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## LABOUR AND EMPLOYMENT COMMUNIQUÉ

### COURT OF APPEAL REFUSES TO ENFORCE UNION IMPOSED FINES AGAINST MEMBERS FOR CROSSING PICKET LINE

Erik Marshall  
Toronto  
Tel. 416.595.2656  
emarshall@millerthomson.com

#### **Background Facts**

Jeffrey Birch and April Luberti were employees of the Canada Revenue Agency and members of the Union of Taxation Employees, a component of the Public Service Alliance of Canada (referred to collectively as the "Union"). In the fall of 2004, Mr. Birch and Ms. Luberti crossed a picket line to attend work for three days during a legal strike which lasted a total of seven days. The union brought disciplinary proceedings against Mr. Birch and Ms. Luberti for violating its constitution by working during a legal strike.

As a consequence, Mr. Birch and Ms. Luberti had their union memberships suspended for three years and were each fined \$476.75. The three-year suspensions were designed to match each day Mr. Birch and Ms. Luberti crossed the picket line, and the \$476.75 fine was equivalent to the total of each of their gross salaries earned during the three days they crossed the picket line.

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mwain@millerthomson.com

Mr. Birch and Ms. Luberti refused to pay their fines so the union sought to enforce payment of the fines in Small Claims Court. An agreement was then made to proceed by way of an application brought by Mr. Birch and Ms. Luberti in the Ontario Superior Court of Justice on an agreed statement of facts as a test case.

#### **Ontario Superior Court of Justice**

At the Ontario Superior Court of Justice, the Union argued that since Mr. Birch and Ms. Luberti failed to appeal their fines to the Public Service Labour Relations Board, which had jurisdiction to hear complaints under the *Public Service Labour Relations Act* (the "PSLRA"), they lost their right to defend against the actions in Small Claims Court. However, the application judge held that once the Union had sued Mr. Birch and Ms. Luberti in Small Claims Court, they were entitled to raise any defence open to them.

The applications judge also held that the penalty imposed by the Union and its enforcement by the court was not authorized by statute. The Union had argued that since the unfair labour practice sections of the PSLRA prohibited unions from imposing penalties on their members in certain circumstances, yet failed to include the imposition of fines for crossing a picket line during a legal strike in that section, it was entitled to impose fines for such conduct. The applications judge ruled that in these circumstances, an express statutory grant of authority similar to section 36 of the *Saskatchewan Trade Union Act* would be required for a union to be able to levy fines and enforce their collection in the courts.

Perhaps most importantly, the applications judge held, as the Supreme Court of Canada did in *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, that at common law, the courts will not enforce a penalty clause in a contract that does not provide a genuine pre-estimate of damages. Applying this

analysis the applications judge determined that the penalty clause in the Union's constitution was unenforceable in this case.

The applications judge also went on to consider whether the equitable doctrine of unconscionability favoured the enforcement of the penalties imposed. The reason for this was that the Ontario Court of Appeal's decision in *Peachtree II Associates – Dallas L.P. v. 857486 Ontario Ltd.* which suggested that wherever possible, the courts should favour analysis on the basis of the equitable doctrine of unconscionability as opposed to strict adherence to the common law rule pertaining to penalty clauses.

The application judge adopted the test for unconscionability expressed in *Ekstein v. Jones*, which requires the party asserting unconscionability to demonstrate:

- 1) That the terms are very unfair or that the consideration is grossly inadequate; and
- 2) That there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.

Concerning the first part of the test, the applications judge noted that the imposition of a hefty fine (which exceeded Mr. Birch's and Ms. Luberti's take home pay for the three days worked), at a time when members may already be suffering financially as a result of strike action supported the conclusion that the fine provisions were very unfair. As for the Union's arguments to the contrary, the applications judge rejected the Union's submissions that: (i) damages ought to be calculated on the basis of one cent per union member since Mr. Birch's and Ms. Luberti's actions caused a decrease in the benefits that the Union was able to negotiate; (ii) the fines were fair because they represented the value of the work to the employer; and (iii) the fines were fair because they prevented free-loading by individual members of the union during the collective bargaining process. On the third point, the applications judge noted that the Union had other means available to it to accomplish this end such as the waging of an information campaign and/or the disbursement of strike pay on a basis that would encourage support for the strike.

As for the second element of the test for unconscionability, the applications judge followed the statement of the Supreme Court of Canada in *Berry v. Pulley*, wherein it held that a contract between a union and its membership is essentially a contract of adhesion since practically speaking the membership has no bargaining power with the union (since the terms of the contract between the parties are already fixed and set out in the union constitution at the time employees join the union). As a consequence, the applications judge held that the penalty provision in the Union's constitution authorizing the fines was unconscionable and therefore unenforceable.

### ***Ontario Court of Appeal***

The Ontario Court of Appeal agreed with the reasons of the applications judge and dismissed the Union's appeal. However, the Court of Appeal did clarify that it did not consider it necessary to decide whether the applications judge was correct in holding that express legislative authority was required to give unions authority to impose fines since nothing could permit the enforcement of fines that the court found to be unconscionable.

### ***Conclusion***

In *Birch v. Union of Taxation Employees, Local 70030*, the Ontario Court of Appeal confirmed that Ontario courts will not enforce unconscionable penalty clauses in union constitutions which levy fines against union members for crossing picket lines during legal strikes. Elsewhere in the country, it is interesting to note that the Alberta Court of Queen's Bench recently upheld a decision of the Alberta Provincial Court declining jurisdiction to enforce fines levied by unions against their members for crossing picket lines during legal strikes because the fines constituted neither debt nor damages. As it stands, Saskatchewan is the only jurisdiction in Canada that legislatively authorizes trade unions to levy fines (up to members' net pay) against members who cross picket lines during legal strikes.

## **Important Update - Minimum Wage Increase**

Effective March 31, 2009, the minimum wage in Ontario increased from \$8.75 per hour to \$9.50 per hour.

### **Around Miller Thomson**

Stuart Rudner will be chairing Osgoode Professional Development's annual employment law conference (the "conference") titled "Proactively Managing Legal Risk in Challenging Times" April 27-29, 2009. Stuart will also be speaking at a pre-conference workshop on the *Employment Standards Act, 2000* on April 27, 2009, and moderating a Judges Panel on the Bench's view of employment terminations on April 28, 2009.

Adrienne Campbell will be speaking at the conference on the scope of an employee's duty to mitigate on April 28, 2009.

Erik Marshall will be speaking with Stuart at the pre-conference workshop on the *Employment Standards Act, 2000* on April 27, 2009.

Jane Roffey will be speaking at the Ministry of Labour's Collective Bargaining Conference on the role of conciliators and mediators in collective bargaining on May 5-6, 2009.

Laura Cassiani recently wrote an article titled "The Global Workplace 101: Issues facing multinational employers" that appeared in the Spring 2009 edition of *Canadian Corporate Counsel Association* magazine.

### **ABOUT THE AUTHOR:**

Erik Marshall is a member of our Labour and Employment Group in Toronto. He provides legal services and advice to a wide range of clients in the private and public sectors.

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### **MILLER THOMSON'S OFFICES:**

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