

## employment litigation bulletin

July 2008

### The Unusual Suspect – Ontario Court of Appeal Bars Claims of Negligent Investigation against Employers

In the recent decision of **Correia v. Canac Kitchens** the Ontario Court of Appeal found that employers cannot be held liable for negligent investigation leading to the dismissal of an employee. In that case, an employer suspected that its employees were stealing and dealing drugs in its plant. The employer hired a private investigator who placed an undercover agent in the plant. In coordination with police, the agent identified a suspect and collected evidence of the alleged offences. When the investigation was complete the employer dismissed several employees who were charged by the police, including the plaintiff.

The only problem: the plaintiff was the wrong man.

As a result of investigative errors, instead of firing the correct suspect, the employer dismissed the plaintiff, who had a similar name. Once the error was uncovered, the plaintiff sued his employer, the private investigator and the police for negligent investigation.

#### The tort of negligent investigation

In 2007, the Supreme Court of Canada held in **Hill v. Hamilton-Wentworth Regional Police Services Board** that a police force which is negligent in the way it conducts investigations may be liable for injuries consequently inflicted on a suspect. In his claim, the plaintiff sought to expand liability for negligent investigation from police to encompass employers and private investigators.

In a significant victory for employers, the Court of Appeal held that employers cannot be liable for negligent investigation. There were two grounds for the decision. First, the Court held that to recognize a duty of care on employers in these circumstances could have a “chilling effect” on reports of criminality by honest citizens to the police.

Second was the finding by the Supreme Court of Canada in **Wallace v. United Grain Growers Ltd.** that there is no separate action in tort for breach of a good faith obligation in the dismissal of an employee. The Court of Appeal held that making employers separately liable for negligent investigations which lead to the dismissal of an employee would violate this rule.

Although the Supreme Court reconsidered **Wallace** in the **Keays v. Honda Canada Inc.** decision, which was released three days after **Correia**, it does not appear that the reasoning in **Keays** changes the basis for the Court of Appeal's decision.

### **What does this mean for your business?**

The Court of Appeal has drawn a bright line, explicitly refusing to hold employers liable for negligent

investigations that lead to terminations. While this decision is good news for employers, it should be noted that an employer who conducts a negligent investigation of an employee may still be liable for wrongful dismissal and other torts, such as infliction of mental distress. In order to mitigate the likelihood of such claims, an employer should ensure that it diligently pursues any claims that the information used to support the dismissal is inaccurate.

**Written by Brett Harrison and Rob Barrass**

---

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

---

© Copyright 2008 McMillan LLP

## employment litigation

### ABOUT McMILLAN LLP

McMillan, a leading Canadian business law firm, is committed to advancing our clients' interests through exemplary client service combined with thoughtful and pragmatic advice. The firm is a values-driven organization that takes a dynamic and sophisticated approach to providing practical and creative solutions to its clients. Our client first, team based approach draws effectively upon our diverse expertise. The firm has a national, cross-border and international practice and has grown to be one of the

top 20 largest firms in Canada. The firm is agile and flexible, and committed to always striving for excellence.

The members of the Employment Litigation Group advise and represent corporate clients on all disputes with former employees. Such disputes include claims for wrongful dismissal, breach of fiduciary duty, breach of confidentiality agreement and breach of restrictive covenants. We are experienced in dealing with these matters before the Ontario Courts, the Canada Labour Board and by arbitration/mediation.

For further information, please contact one of the members of our Employment Litigation Group:

David Elenbaas	416.865.7232	david.elenbaas@mcmillan.ca
Brett Harrison	416.865.7932	brett.harrison@mcmillan.ca
Darryl Hiscocks	416.865.7038	darryl.hiscocks@mcmillan.ca
Paul G. Macdonald	416.865.7167	paul.macdonald@mcmillan.ca
Dave McKechnie	416.865.7051	dave.mckechnie@mcmillan.ca
Leonard Ricchetti	416.865.7159	leonard.ricchetti@mcmillan.ca
Lyndsay Wasser	416.865.7083	lyndsay.wasser@mcmillan.ca

[www.mcmillan.ca](http://www.mcmillan.ca)



McMillan LLP

Toronto | t 416.865.7000 | f 416.865.7048

Montreal | t 514.987.5000 | f 514.987.1213

[www.mcmillan.ca](http://www.mcmillan.ca) | Barristers & Solicitors