Another busy month in labour and employment law. This *Fitzgibbon Workplace Law Legal Alert* has 11 articles reviewing some developments over the past 30 days. You'll find other updates in the Journal on the website.

The law of reasonable notice of termination at common law continues to develop as does the law of damages (particularly, incentive compensation) both *pro-rata* to the date of termination and through the common law notice period.

I also wanted to discuss the oft-misunderstood, but critically important, issue of production of documents in litigation. Specifically, what is the scope of documentary disclosure, and whether email between HR and operations (or within the company) must be disclosed. The article is *Production of Communication Between HR and Management - The Hard Truth*. Also, employers must be careful how they defend a case, as this impacts what must be produced in the litigation - see *Cautionary Disclosure Case for Employers*.

The other article of note deals with the weight to be given to findings in a criminal proceeding in a civil case. I've had to deal with this a few times in my career, and a recent case helpfully discusses the principles that need to be considered. This article is *Weight to be Given to Findings in a Criminal Case in a Civil Proceeding.*

I hope you find something in these pages that is helpful to you in your work.

Mike

In this Edition

Reasonable Notice, Benefits and Bonuses at Common Law

An important case dealing with entitlement to benefits and bonus in a wrongful dismissal case was decided by the Ontario Court of Appeal on April 13, 2018. The case is Singer v. Nordstrong Equipment Limited, 2018 ONCA 364. Singer commenced employment with Nordstrong (through its predecessor) in October 2005. In 2012, he was named the President and General Manager of Nordstrong East (a division of the defendant) operating in the province of Ontario.

His employment was terminated, without just cause, on December 12, 2016, after 11 years and 4 months of employment at which time he was 51 years old.

Singer brought a motion for summary judgment to determine the issues of reasonable notice, loss of bonus for the 2016 year that he had worked, loss of bonus during the reasonable notice period, and loss of benefits during the reasonable notice period.

The motion judge awarded the appellant 17 months' salary in lieu of reasonable notice, as well as an amount for his bonus for 2016. The motion judge denied the appellant's claim for his bonus during the 17 month notice period in 2017 and part of 2018, as well as any amount for the loss of his benefits package during the notice period.

Singer appealed the denial of bonus and benefits through the period of reasonable notice, while Nordstrong appealed the period of reasonable notice, arguing that it should have been between 12 and 15 months.

Reasonable Notice Period

The motion's judge, of course, cited Bardal v. Globe & Mail Ltd. (1960), 1960 CanLII 294 (ON SC) and the factors to consider in determining the notional period of reasonable notice at common law. Specifically, the criteria include the plaintiff's age, length of service, character of employment and the availability of similar employment with regard to his experience, training and qualification.

The motion's judge commented:

> It is trite to state that the assessment of reasonable notice is an art and not a science. Both parties have provided case law which set out a range of reasonable notice periods. As held by Justice Perell in Fisher v. Hirtz 2016 ONSC 4768 (CanLII), "the character of employment factor tends to justify longer notice periods for senior management employees or highly skilled and specialized employees and a shorter period for lower ranked for unspecialized employees…generally speaking, a longer notice period will be justified for older, long term employees, who may be at a competitive disadvantage in securing new employment because of their age."

Although, as is often the case, the court seems to take "judicial notice" of this "reality" without any supporting evidence, the Court of Appeal in Singer wrote:

> Furthermore, in his analysis, the motion judge cited a passage from Fisher v. Hirtz, 2016 ONSC 4768 (CanLII), where Perell J. explained that a longer notice period is generally justified for older, long term employees who are often at a competitive disadvantage in securing new employment. The motion judge's reliance on this passage demonstrates that he considered the other *Bardal* factors – age, length of service, and availability of similar employment – in determining the appellant's reasonable notice period.

The Court of Appeal dismissed the employers' appeal with respect to reasonable notice, and upheld the motion's judgment on this point (i.e., the period of common law reasonable notice was 17 months).

Claim for benefits during the notice period

The motion judge denied the appellant's claim for the loss of his benefit package on the basis that the appellant did not prove that he suffered a loss. He had not replaced benefits and, therefore, no damages were awarded.

The Court of Appeal found that this was an error. They held that the law in Ontario was settled by the Court of Appeal in Davidson v. Allelix Inc. (1991), 1991 CanLII 7091 (ON CA), 7 O.R. (3d) 581 (C.A.), where the court stated:

> Allelix cross-appealed against the award of damages for loss of benefits proposed by the trial judge relying on a line of British Columbia decisions. They held that the loss of benefits from termination of employment is limited to losses or expenses actually incurred, the sum of $6,052.97 referred to above for which Dr. Davidson was entitled to be compensated under the benefit coverage: see *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 1987 CanLII 154 (BC CA), 16 C.C.E.L. 223, 39 D.L.R. (4th) 460 (B.C. C.A.), *Wilks v.*

> *Moore Dry Kiln Co. of Canada* (1981), 1981 CanLII 597 (BC SC), 32 B.C.L.R. 149 (S.C.), and *McKilligan v. Pacific Vocational Institute* (1981), 1981 CanLII 442 (BC CA), 28 B.C.L.R. 324 (C.A.).
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> Counsel for Allelix candidly acknowledged that there was conflicting jurisprudence on this point. In my opinion the British Columbia decisions do not apply in Ontario where the law is settled that a wrongfully dismissed employee may claim, in addition to lost salary, the pecuniary value of lost benefits flowing from such dismissal. This principle was referred to with approval by this court in *Peck v. Levesque Plywood Ltd.* (1979), 1979 CanLII 2055 (ON CA), 27 O.R. (2d) 108, 105 D.L.R. (3d) 520, where Dubin J.A. said at pp. 113-14 O.R., pp. 525-26 D.L.R.:
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> In a successful action for wrongful dismissal, an employee is entitled to damages for the breach of his contract of employment.
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> In Batt, Law of Master and Servant, 5th ed. (1967), at p. 263 the following proposition is enunciated:
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> > . . . in *Savage v. British India SS. Co.,* (1930), 46 T.L.R. 294, Wright, J., appears to have given the plaintiff twelve months' salary as damages because the plaintiff was entitled to twelve months' notice. But clearly the servant's damages ought not to be so limited; the master has committed a breach of contract and so all damages naturally flowing therefrom ought to be recoverable.
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> In the case of *Lawson v. Dominion Securities Corp.*, June 30, 1977 and September 30, 1977, unreported, this Court held:
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> > The recovery of lost income is not limited to salary. In this case the appellant conceded that pension plan benefits should also be included. . . . other income items should be admitted including contractual profit-sharing, a share purchase option, and many fringe benefits such as a company car, club membership, pension, disability and medical plans . . . *McGregor on Damages* (13th ed.), para. 885 at 595.

Applying the reasoning in Davidson, the Court found that Singer proved on the motion that the cost to replace his benefits for one year was $6,676, and is therefore entitled to damages of $9,458, the replacement cost of his benefits over the 17 month notice period.

Claim for bonus during the notice period

The motion's judge denied Singer's claim for bonus during the 17 month period of reasonable notice. The judge stated:

> The purpose of the defendant's incentive plan is to maximize efforts to generate profits. As in Fulmer v. Nordstrong Equipment Limited 2017 ONSC 5529 (CanLII)], I do not find it to be within Singer's reasonable expectation to be able to earn a bonus for the 2017 and 2018 fiscal years while he searched for alternative comparable employment.

The Court of Appeal overturned this aspect of the decision because the motion's judge failed to apply the Court of Appeal's decision in Pacquette v. TeraGo Networks Inc., 2016 ONCA 618 (CanLII) for determining whether an employee is entitled to be compensated for the loss of his bonus as part of his damages for wrongful dismissal:

1. Was the bonus an integral part of his compensation package, triggering a common law entitlement to damages in lieu of bonus?; and

2. If so, is there any language in the bonus plan that would restrict his common law entitlement to damages in lieu of a bonus over the notice period?

The Court of Appeal found that:

> …. where a bonus is considered an integral part of a compensation package and there is nothing in the bonus plan that negates entitlement to a bonus during a period of reasonable notice, damages for wrongful dismissal include compensation for loss of the bonus: Paquette, at paras. 17-18; and Lin v. Ontario Teachers' Pension Plan, 2016 ONCA 619 (CanLII), 402 D.L.R. (4th) 325, at paras. 84-86.

The Court of Appeal awarded Singer $166,945 representing his bonus through the 17 month notice period. The amount was arrived at by taking the average monthly value of Singer's bonuses from the two years preceding the termination of his employment.

The Moral of the Story

The decision is another example of a situation where the Court affirmed that damages are based on total compensation except in the clearest of circumstances. In terms of reasonable notice, the Court seem to accept, without any evidence, that older and longer service employees are "often at a competitive disadvantage in securing new employment" and are entitled to lengthier periods of reasonable notice. In this case, the Court awarded a 17 month period of reasonable notice for an employee with a little over 11 years of service.

Terminating the Long Service, Older Worker

The factors considered by a Court in determining the period of common law reasonable notice are those laid down in Bardal v. Globe & Mail Ltd. (1960), 1960 CanLII 294 (ON SC) and endorsed by the Supreme Court of Canada in Honda Canada Inc. v. Keays, [2008] 2 SCR 362. In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in Bardal:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

Although no Bardal factor is to be given undue weight, it does seem pretty clear that some are more important than others (length of service and age), while others seem less significant (character of employment).

The Court in Rabin v. The Brick Warehouse LP, 2018 ONSC 449 (CanLII) considered the appropriate period of reasonable notice for a terminated employee who was:

- 70 years old at the time of termination;
- 30 years of service
- National Director (a senior position)
- $316,000 per year (which included his salary, bonus, and pension contribution)

The motion's judge opined that:

> The purpose of reasonable notice of termination is to enable an employee to secure alternative employment. In assessing the reasonable notice period it will necessarily be longer if the dismissed employee will face a challenge finding similar employment.

Based on that, and, it would seem, no evidence that it would take the plaintiff "will face a challenge finding similar employment" the Court agreed with the plaintiff that the period of reasonable notice was 24 months, subject to his obligation to mitigate his damages.

The Court then considered the damages to which the plaintiff was entitled during the period of reasonable notice.

Bonus

The plaintiff relied on the general damages principle in Paquette v. TeraGo Networks Inc., 2016 ONCA 618 (CanLII) to the effect that "damages award should place the employee in the same financial position he or she would have been in had such notice been given".

The Court discussed Rabin's entitlement to a bonus through the period of reasonable notice and, in doing so, had to consider the language in the bonus plan and the employer's argument that the plan limited Rabin's entitlement to the bonus. The plan provided:

> If you terminate or are terminated (regardless of whether it is deemed just cause or wrongful dismissal), no bonus incentive plan will be paid out for that year and subsequent years.

Although Rabin said he never accepted this language, the Court observed that he continued to work and acquiesced to the language and accepted these changes in his bonus plans. The judge denied his entitlement to the bonus stating:

> Based on the test in Paquette, set out above, I find that the wording of Mr. Rabin's bonus plan, quoted above, is clear and specifically limits his right to receive compensation for lost salary and bonus during the period of reasonable notice. Accordingly, I conclude that Mr. Rabin is not entitled to compensation for any lost opportunity for bonus payments during the notice period.

In terms of a pro rated bonus for 2017, the Court similarly denied the plaintiff's claim. This time on the basis of Chandran v. National Bank of Canada, 2011 ONSC 777 (CanLII) where it was held that the plaintiff was not entitled to a pro-rated bonus because the bonus policy did not provide for a pro-rated bonus payment for part of a year of work.

Benefits

The plaintiff also claimed compensation for the loss of benefits during the 24 month notice period. The motion's judge denied this claim because:

> [the plaintiff] has argued that he is entitled to damages for loss of benefits during the notice period, but has not provided the Court with any evidence on the value of these benefits and consequently what a proper assessment of his damages would be.

As noted above in the discussion of Singer v. Nordstrong Equipment Limited, 2018 ONCA 364, benefits are compensable in damages where the plaintiff is able to show the replacement costs of the lost benefits. Recall that in Singer, the plaintiff was able to prove that the cost to replace his benefits for one year was $6,676 and the court awarded damages through the period of reasonable notice on that basis.

Conclusion

This case demonstrates that, even where a bonus is an integral part of an employees' compensation it is possible to displace the presumption that he or she is entitled to recover all losses during the period of reasonable. To do so, the terms of the bonus plan must be accepted, perhaps by silence (as in Rabin) and clearly and unambiguously displace the presumption. Any doubt will likely be decided in the plaintiff's favour. Further, benefits are recoverable through the period of reasonable notice if damages are proven.

Request for a List of Employees by an Organizing Trade Union

I discussed section 6.1 of the Labour Relations Act, 1995 in the April 2018 Legal Alert and noted that "if you are a non-union employer you need to be aware of the changed rules of union organizing that have come into force with the passage of Bill 148, Fair Workplaces, Better Jobs Act, 2017." I further mentioned that when an employer receives an Application for List of Employees there are really only a couple of things that the employer can dispute in its response.

The Ontario Labour Relations Board ("OLRB") in a decision released on April 10, 2018 called United Food and Commercial Workers International Union, Local 175 v Sofina Foods Inc., 2018 CanLII 31972 (ON LRB) considered these areas. The case also considered the union's request for contact information regarding yet-to-be hired employees.

In this case, the Union made an Application for a List of Employees under section 6.1 of the LRA in respect of the following bargaining unit:

> all Employees of Sofina Foods Inc. in the City of Mitchell, save and except office and clerical, Sales, Supervisors and persons above the rank of Supervisor.

It estimated that there were 110 employees in this bargaining unit.

The employer responded and gave notice under section 6.1(4) of the LRA. Specifically, it disagreed with the union's proposed bargaining unit description, and argued that it could not be appropriate for collective bargaining because the union's bargaining unit description did not expressly exclude Quality Assurance Staff and Assistant Supervisors. The employer also said that there were 122 employees in the union's proposed bargaining unit and, further, that it was in the process of hiring and the number would likely increase to 139 employees.

There is a three (3) step approach to these applications:

1. The OLRB must determine whether the union's proposed bargaining unit could be appropriate for collective bargaining;
2. If the OLRB determines that the union's proposed bargaining unit could be appropriate for collective bargaining then it must then determine "an estimated number of individuals" in the unit described in the application.
3. Finally, after the OLRB has determined the estimated number of individuals in the bargaining unit, the OLRB must determine the percentage of individuals in the bargaining unit who appear to be members of the union at the time the application was filed.

With respect to step #1, the OLRB commented in *Sofina*:

> For a responding party to persuade the Board to dismiss a list application because the applicant's proposed bargaining unit could not be appropriate, the unit applied for would have to be one that could never be granted by the Board. [Emphasis added]

This is a high threshold. In the *Sofina* case, the OLRB held that the union's proposed bargaining unit could be appropriate for collective bargaining.

The OLRB then considered the material filed including the disagreement regarding the numbers of employees in the union's proposed bargaining unit and held that, even if the employer's estimate were correct and that there were 122 employees in the bargaining unit, the union had submitted enough membership cards with the application to establish that it had the support of 20% or more of the employees in the bargaining unit. It therefore ordered the employer to provide the union with the following information:

(a) The name of each employee; and
(b) The telephone number and personal email address of each employee, if the employee has provided that information to the employer.

The OLRB then turned to the union's argument that it was entitled to be provided with the above information for employees hired after the application date that fell into the proposed bargaining unit. The OLRB refused this request stating that the operative date under section 6.1 of the LRA is the "application filing date" and that it would not be appropriate to order the employer to provide this information with respect to employees hired after the application filing date.

An important, and even more recent case is Service Employees International Union Local 1 Canada v ParaMed Home Health Oakville Branch, 2018 CanLII 34122 (ON LRB) decided by the Chair of the OLRB Bernie Fishbein. In this case, the OLRB accepted the employer's estimate of the number of employees in the union's proposed bargaining unit (which had been agreed to by the employer) and dismissed the application as the union had failed to show that it had the support of 20% or more of the employees in that bargaining unit.

The OLRB commented that the employers' estimate "is information that the responding party (arguably uniquely) would clearly have in its possession" and is supported by a sworn statement in the form of a Statutory Declaration. If you'd like to know more about this case, please go to the article that I wrote at the Fitzgibbon Workplace Law blog entitled Request for List of Employees - Application Dismissed.

Conclusion

I stand by my statement last month that if you are a non-unionized employer, section 6.1 of the LRA dramatically changes the rules of union organizing by setting a low threshold for unions to satisfy in order to get all the information they need to give their organizing efforts momentum. It is difficult to get off the section 6.1 track once the application is filed as the OLRB has applied, as the legislation requires, the could be appropriate for collective bargaining test, and then engages in a mathematical exercises without consideration of status issues rained by the employer about who should be included or excluded from the bargaining unit which issues are left for a later date.

Justice Delayed is Justice Denied? Or the Harsh Consequences of Missing a Filing Deadline

And while we're on the subject of an application under section 6.1 of the Labour Relations Act, 1995, let me bring the case of Unifor v Hearn Industrial Services Inc., 2018 CanLII 31962 (ON LRB) to your attention for a different reason.

Unifor filed an Application for a List of Employees under section 6.1 of the LRA. It delivered the Application to the employer on March 13, 2018 by sending it to the employers' fax number as permitted under the Board's *Rules of Procedure*. It filed the Application with the OLRB. The employer has two (2) days, excluding weekends, holidays or days on which the OLRB is closed to deliver and file its response in the form provided by the OLRB.

In this case, the employer was required to deliver its response on March 15, 2018. It did not do so. The following day, the OLRB issued a decision ordering the employer to provide the mandatory information under section 6.1 of the LRA. The employer immediately sought reconsideration of the decision.

Specifically, the employer said that, although the Application was delivered to it on March 13, 2018 in accordance with the OLRB's Rules of Procedure, the employer argued that it did not have"actual notice" of the application until after the two-day statutory deadline for filing its response. The reason for this is because the union sent the fax to a private fax number

which was only accessible by executives. The executives were either travelling or on vacation and did not see the fax until the evening of March 15, 2018.

The president of the company (who was the contact noted in the Application) attended at the office on March 16, 2018 and called the union representative indicating that the company would be filing a response. The president did not notify the OLRB who, a short time later, issued its decision ordering the employer to produce the list of employees to the union.

It seems that the employer subsequently filed its response and estimate of the number of employees in the bargaining unit.

The OLRB considered the employer's request to relieve it from the requirement to file a response within 2 days of delivery of the application and to reconsider its decision. The union opposed this request.

The OLRB noted that:

> ….. the Board has long held that a party is responsible for the lack of diligence in the way it conducts its business, and it cannot rely on its own inadvertence or negligence to obtain an extension of time to file a response if important correspondence did not come to its attention.
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> Furthermore, while the Board may grant relief from deadlines, the Board has also emphasized the importance of parties' compliance with statutory deadlines. As the Board said in *Di Blasio Homes*, [2016] OLRB Rep. January/February 66, at paragraph 32:
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> > It does no one any good if those statutory deadlines are regularly missed or excused. The very application for certification, the notice and the response, on their face, and the Rules stress the importance of complying with these timelines and non-compliance with them should not be lightly or easily condoned. Neither the avoidance of unnecessary litigation nor expedition will be achieved if there is no clarity, consistency and finality on how the Rules are applied.
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> In *Mosiac Sales Solutions*, the Board said:
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> > 19. When considering whether to accept a late-filed response, the Board examines all of the circumstances surrounding the delay, including the reasons for the delay, the prejudice to the parties and any other relevant factor: *Carman Construction Inc.*, [2008] OLRB Rep. January/ February 1; *Weathertech Restoration Services Inc.*, [2008] OLRB Rep. November/December 832.

The OLRB noted that in Mosaic Sales Solutions, it accepted a late filed response in circumstances where the employer did not see the faxed Application because the employer did not check its fax machine as a result of a complete seasonal shutdown of its business. That case was distinguishable from the Hearn case where, the OLRB suggested, where a business is open but the proprietor does not check the business' mailbox or fax machine. The Vice-Chair observed:

> As a consequence of the Employer's choices, important communications did not come to its attention before the deadline for filing a response. After it became aware of the faxed copy of the application (at 5:00 p.m. on March 15), the Employer did not take prompt steps to communicate with the Board, or to file its response. For these things, the Employer bears full responsibility. In these circumstances, the Board is not persuaded that it is appropriate to extend the time for filing a response.

The OLRB dismissed the employer's reconsideration request.

Conclusion

This seems like a harsh result in the circumstances, but does highlight that having access to the fax machine (really, aren't these going the way of the dinosaur?) is paramount and "confidential" businesses faxes need to be monitored and steps taken to ensure that important faxes are not sitting. In this case, the fax number was listed on the company website under the "contact us" section, so, arguably, there is an assumption that someone will have access to the fax machine. Be that as it may, this case, and others, support the proposition that missing a deadline for filing a response can have significant consequences.

Can a Union Intimidate and Coerce Employees During an Organizing Drive?

I get this question from time to time. Employers, who are constrained during an organizing drive sometimes feel that union's can do and say anything they want without consequence. While it is true that employers, who have the power and control the work and the workplace, are subject to greater oversight and scrutiny, unions are also limited by what they can do and say in the effort to have employees sign membership cards, for example.

The OLRB had recent occasion to consider this issue in Fer-Pal Construction Ltd. v Labourers' International Union of North America, 2017 CanLII 87202 (ON LRB). Here, a union filed an application for certification. The employer filed an unfair labour practice against the union under section 96 of the Labour Relations Act, 1995 alleging that the union had violated sections 5, 73(2), 76 and 77. In an earlier decision, the OLRB dismissed the ULP so far as sections 5, 73(2) and 77 were concerned.

The only remain allegation was under section 76 of the LRA which prohibits intimidation or coercion. Specifically, the section reads:

> 76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

But what is "intimidation or coercion" for purposes of section 76? The OLRB in *Chinook Chemicals Company* [1989] OLRB Rep Oct 1021 discussed this as follows:

> 24. The terms "intimidation" and "coercion" are not defined in the Act, and the Board has not attempted an exhaustive definition of them in any of its decisions. In the *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, the Board observed that:
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> > Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly, deprives an individual of his free choice in the exercise of his rights under the Act. While that might include acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose.
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> A threat that his or her employment or employment opportunities will be reduced or eliminated unless he or she exercises rights in a particular way has generally been regarded as creating the sort of pressure which removes an employee's ability to choose.

According to Vice-Chair McKee in *Fer-Pal Construction Ltd.*:

> Further, as noted in the Union's submissions, the caselaw recognizes that some pressure may be applied by those selling union memberships as much as by those selling motor vehicles. The question is whether the pressure is "undue or improper" such that they were threatened, intimidated or coerced into supporting the application or such that the vote result is an unreliable indicator of employee's true wishes (Dunbury Homes (Holly) Ltd. [1998] OLRB Rep May/June 420 and generally the caselaw cited by the Union at paragraph 7 of its submissions.

The OLRB went through the particulars supplied by the employer in support of its allegation that the union had intimidated or coerced employees to sign membership cards, and concluded that most of them could not amount to intimidation or coercion (even if proven). There were a few allegations that "could possibly constitute intimidation or coercion" and those would be heard by a panel of the OLRB.

Anyone involved in an organizing drive, and labour relations in a unionized workplace knows that this isn't, to quote some cases, a "tea party". That said, there are rules that regulate what can and can't be done. Unions are given more latitude to sell their wares, than are employers. So, in that sense, it is a bit of a double standard, but one that is countenanced by the law and the position of the employer relative to the employees.

Production of Communication Between HR and Management - The Hard Truth

The case of Guthrie v. St. Joseph Print Group Inc., 2018 ONSC 1411 (CanLII) is a must read for any HR practitioner. It is a stark reminder of the dangers of e-mail (and any written communication) and the need to take great care in what you write.

This was a constructive dismissal case. The plaintiff brought a motion for production of five (5) documents over which the employer claimed privilege. According to the Master hearing the motion:

> In the course of examinations for discovery of the defendant's representative, the plaintiff became aware of the existence of 5 undisclosed emails between the defendant's senior management and its local and regional human resources department (HR). The defendant claims privilege over those emails and refuses to produce them which gives rise to this motion.

The *Rules of Civil Procedure* require that each party to the litigation disclose every relevant document regardless of whether it is privileged or not. The parties are required to identify documents that are privileged and will not be produced. Rule 30.10 of the Rules of Civil Procedure provides the court with the authority to order the production of documents that are relevant to a material issue in an action and without which it would be unfair to require the moving party to proceed to trial.

The defendant acknowledged that the email were relevant, but claimed that they ought not to be produced because they were subject to litigation privilege, which arises when documents are authored or prepared for the dominant purpose of litigation, or were privileged under what we call the *Wigmore* test.

The leading case comes to us from the Supreme Court of Canada in Blank v. Canada (Minister of Justice), 2006 SCC 39 (CanLII) where the Court said that litigation privilege attaches to documents that are created for the dominant purpose of litigation.

The Master in the Guthrie case concluded that the documents did not meet the test for litigation privilege:

> In order for litigation privilege to apply to a communication or document, it must have arisen when litigation was reasonably anticipated and its dominant purpose must be litigation (*Blank v. Canada*). As this is a constructive dismissal matter, it is difficult to definitively ascertain when litigation might reasonably have been anticipated, but the timing of the emails almost a year prior to the plaintiff's departure is not sufficiently proximate to conclude that litigation was reasonably anticipated. In addition, I find that the predominant purpose of the emails was the performance management of the plaintiff and not litigation. I therefore reject the argument that litigation privilege applies.

With respect to the *Wigmore* test, the Master summarized the elements as follows:

> [t]he common law privilege under the *Wigmore* test arises when a communication meets all 4 of the following criteria (see Slavutych v. Baker, 1975 CanLII 5 (SCC), [1976] 1 S.C.R. 254, at para. 260):
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> 1. the information or communications must originate in a confidence that they will not be disclosed;
> 2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
> 3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
> 4. the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The employer argued that "the relationship between management and human resources is one that meets the *Wigmore* test". The Master disagreed and distinguished the cases relied on by the employer, which all came out of unionized workplaces. Interestingly, the Master commented that "in a non-unionized environment, as a general rule, an HR department serves employees as well as management." He went on:

> Extending the *Wigmore* privilege to cover the relationship between a HR department and management in circumstances such as these could have wide-ranging implications for employment law and must be based on persuasive and compelling evidence. Such evidence is simply not before me. While I accept that the

> parties to the impugned emails might have thought that their communication was confidential, that is not enough. The third and fourth branch of the *Wigmore* test must be satisfied.

The Master held that the documents should be produced and opined that:

> Disclosure is a cornerstone of civil litigation and a fundamental right absent a clear claim of privilege. The relevance of the impugned emails is conceded. The plaintiff is entitled to their production. If management seeks confidentiality in dealing with an employee, it should consult with counsel and not its HR department.

Not only were the documents ordered produced, but the court awarded the plaintiff $5,000.00 inclusive of disbursements and HST.

Conclusion

This is yet another case where communication between the HR department and management were ordered produced. I have seen this issue "sink" cases because of an unfortunate word or turn of phrase. Even a "good" case can be irreparably damaged by an email which changes the optics of the context. When you're writing an email or taking notes, you should assume that these will have to be produced in litigation and that will make you choose your words carefully, pick up the phone or walk down the hall for a chat.

Sale of a Business under the Labour Relations Act, 1995 and the Distressed Company

Practicing long enough, you see economic and business cycles. Good times and bad times. During the tough times, some companies find themselves in distress and are required to restructure their affairs under, for example, the Companies' Creditors Arrangement Act or the Bankruptcy and Insolvency Act. But what is the status of the receiver for purposes of the Labour Relations Act, 1995 ("LRA") or any union?

The issue was recently considered by the Ontario Labour Relations Board in United Food and Commercial Workers International Union, Local 175 v Rose of Sharon (Ontario) Community cob as Rose of Sharon Korean Long-Term Care Home, 2018 CanLII 32988 (ON LRB).

The applicant union holds bargaining rights for certain employees of Rose of Sharon, a nursing home. Pursuant to an Order dated September 27, 2011 (the "Appointment Order") the Deloitte Restructuring Inc./Deloitte and Touche Inc. ("Receiver") was appointed as receiver and manager of all of the assets, undertaking and property of Rose of Sharon pursuant to the Courts of Justice Act (Ontario) and the Bankruptcy and Insolvency Act. As is common, the Appointment Order provides for a stay that prevents proceedings from being commenced or continued as against the Receiver or Rose of Sharon. The Receiver assumed control and responsibility for Rose of Sharon, including the employees represented by the Union.

On October 3, 2011, the Union issued Rose of Sharon notice to bargain the collective agreement under the LRA. On October 3, 2011, the Union filed a request for the appointment of a conciliation officer with the Minister of Labour to assist with the negotiation and conclusion of a collective agreement. On October 12, 2011, the Minister of Labour appointed a conciliation officer to confer with the parties and to endeavor to effect a collective agreement. On November 8, 2011, the Union issued notice to bargain directly to the Receiver.

A court order dated December 23, 2011, which was served on the union and not appealed, approved the actions and activities of the Receiver, including its taking possession of the property, and entering into of management agreements with Assured Care Consulting Inc. ("ACC"), with respect to the management of the long-term care facility owned by Rose of Sharon. The Receiver was acting solely in its capacity as the court-appointed receiver and manager of the Property.

According to the OLRB:

> To date, Rose of Sharon has been operated by the Receiver through its agent ACC, including the management and direction of members of the Union's bargaining unit, but has refused to meet with the Union to bargain a collective agreement or consult in any way with the Union with respect to the terms and conditions of employment applicable to the employees that the Union is statutorily entitled to represent. The Receiver has effectively refused to recognize the Union as the bargaining agent of the employees it assumed control over.

Pursuant to a Consent Order dated February 21, 2017, the stay imposed by the Appointment Order was lifted which permitted the union to initiate "an application for a related and/or successor employer against the Receiver, which it did and that is the subject of this case.

The issue was whether the Receiver was a successor employer within the meaning of section 69 of the LRA which provides, in part:

> 69. (1) In this section,
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> "business" includes a part or parts thereof;
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> "sells" includes leases, transfers and any other manner of disposition , and "sold" and "sale" have corresponding meanings.
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> (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board declares otherwise, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

A fundamental purpose of section 69 is to preserve the bargaining rights of the trade union. The OLRB in *Aircraft Metal Specialists Ltd*., [1970] OLRB Rep. Sept. 703

> Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours, and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves the continuum of the business.

Simply put, and as a generalization, corporate transactions and other arrangements will not destroy hard-fought for bargaining rights.

The Receiver argued that section 14.06(1.2) of the BIA prevented the OLRB from declaring that it was a successor employer within the meaning of the LRA. Section 14.06(1.2) of the BIA provides:

> (1.2) Despite anything in federal or provincial law, if a trustee, in that position , carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,
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> (a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
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> (b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

The OLRB did not accept this argument. It considered that a bankruptcy judge "had no jurisdiction to make a declaration immunizing the receiver from successor employer liability" absent explicit language in the BIA and, therefore, the OLRB had to consider whether section 14.06(1.2) of the BIA provided such explicit language. The OLRB concluded that it did not.

Bargaining rights are a vested right of a trade union and not a "liability...that is in respect of employees of the debtor" and are not "is not an obligation which flows from the predecessor employer". According to the OLRB:

> If it had been the intention of Parliament in enacting subsection 14.06 (1.2) to preclude a finding that a trustee was a successor employer, those words "including one as a successor employer" and "liability of a successor employer other than the trustee" would have no meaning. This wording recognizes that a trustee may be

> declared a successor employer but section 14.06(1.2) then proceeds to immunize the trustee from certain liabilities for actions of the debtor concerning its employees which predate the trustee's appointment.
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> * * *
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> The Board therefore concludes that the intent of the wording "in respect of a liability, including one as a successor" found in subsection 14.06(1.2) is to clearly immunize the trustee (or in our case, the Receiver) from certain liabilities in respect of the debtor's employees which would otherwise flow from a finding that the trustee is a successor employer. However, it does not preclude a finding that the Receiver is a successor employer pursuant to section 69(3) of the Act.
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> However, it is equally clear that such immunization from liability applies only to the trustee as a successor and not to an employer who may ultimately purchase the business from the trustee.

The OLRB clarified that the union was not making any claim against the Receiver beyond recognition of bargaining rights and the negotiation of a collective agreement and that those things "not necessarily inconsistent with the purposes of the BIA." Accordingly, the OLRB found that the Receiver was a successor employer pursuant to subsection 69 (3) of the LRA. If the union chose to launch future proceedings against the Receiver, the OLRB would determine, at that time, whether the immunization from liability of the Receiver found in section 14.06 (1.2) of the BIA applied in those circumstances.

Weight to be Given to Findings in a Criminal Case in a Civil Proceeding

The Superior Court of Ontario recently considered the weight that should be accorded to findings in a criminal case involving a former employee. The case is Atlas Copco Canada Inc. v. Hillier, 2018 ONSC 1588 (CanLII). One of the defendants ("D") to the lawsuit was "convicted of defrauding the plaintiff and his former employer by a jury on June 29, 2016" and was "sentenced to five years in prison on October 25, 2016".

The plaintiff (former employer) sought to obtain summary judgment against D relying upon that jury verdict as well as a number of findings of fact made by the sentencing judge based upon the trial evidence. The main issue before the court was "the extent to which those findings of fact are able to be relied upon by the plaintiff in making its claim and whether P may re-litigate some or all of them." The judge found that it would be an abuse of process to allow D could to re-litigate findings in the criminal proceeding and the "plaintiff is entitled to the judgment on its claim to the extent it can be supported by facts that the sentencing judge validly determined in that proceeding."

In this case D was General Manager of the Construction and Mining Canada ("CMT") division of the plaintiff from 2002 until 2005. His employment was suspended and then terminated in 2007. It was alleged that D and other former employees of D had engaged in a "fraudulent scheme" that included the misappropriation of funds from CMT and other business units of the plaintiff through a variety of means including (i) false advances and bonuses; (ii) approvals of illegitimate expense reimbursements; and (iii) inflated and/or false invoices. There was alleged conspiracy.

D was alleged to have breached his fiduciary duties to the plaintiff which breaches caused damage to the plaintiff former employer. In total, the plaintiff claimed $20,000,000 in damages. D was arrested and charged with a number of offences, but only the fraud charge was pursued to trial in April 2016, the other charges (theft and conspiracy) were withdrawn. After a 10 week jury trial, a verdict of guilty was found by the jury.

D was sentenced to five years in jail. In addition, a restitution order in favour of the plaintiff was made in respect of (i) $77,930; and (ii) certain annuities purchased at a cost of $1,440,000 (whose value had since increased).

The Decision on Sentencing and the findings were central to the issue before the motion judge who pointed out that when a jury returns a verdict, it does not provide reasons. Instead, the sentencing judge "must do his or her best to determine the facts necessary for sentencing from the jury's verdict" and they have wide latitude in doing so.

The court discussed the important principle of abuse of process and the strong "public interest in favour of the finality of judicial determinations and avoiding the re-litigation of issues and the attendant risk of inconsistent decisions". The court commented:

> While it is clear that the findings of Poupore J. are admissible in the context of this motion for summary judgment, the weight to be attached to those findings will depend on such factors as the issues to be decided, the identity of the parties, and the nature of the proceedings: *Deposit Insurance Corp. of Ontario v. Malette*, 2014 ONSC 2845 (CanLII) at para. 21; British Columbia (Attorney General) v. Malik, [2011] 1 SCR 657, 2011 SCC 18 (CanLII) at para. 42

There was a large overlap of issues between the civil and criminal proceedings, D was a party to both proceedings and "vitally interested" in the outcome. Accordingly, the judge found that "the similarity of issues, the identity of the parties and the criminal nature of the prior proceeding all suggest that the findings of Poupore J. are not only admissible but entitled to very considerable weight in this civil proceeding." This does not mean that these findings are beyond question and must be looked at cautiously.

On the motion for summary judgment, the judge found:

> The word "never" is very seldom found in the context of anything as discretionary as the doctrine of abuse of process. I need only find – and I do – that the plaintiff has failed in its burden on this motion for summary judgment to place before me sufficient evidence to persuade me that the interests of justice require a trial of these issues. … Having determined to exercise my jurisdiction to weigh the evidence, I find the weight of the prior determinations made in these circumstances to be very high and the defendant has failed to adduce sufficient affirmative evidence to persuade me to find otherwise. [Emphasis added]

The motion's judge found that the civil fraud and conspiracy claims could not be made out. However, the breach of fiduciary duty claim was successful. To make out such a claim, the plaintiff had to prove that D was a fiduciary and that he committed an act that betrays the beneficiary's trust, whether or not the fiduciary gains a benefit

The sentencing judge made specific findings that D was a fiduciary and that he had engaged in conduct that breached his fiduciary duties. What damages flow from this?

The forensic evidence filed and accepted as proved by the Sentencing Judge that the loss suffered by the plaintiff was $22,336,335.38. The motions judge gave credit for certain annuities seized by the plaintiff and the $77,930 restitution order made in the criminal proceeding, and awarded damages to the plaintiff of $20,000,000.

Cautionary Disclosure Case for Employers

An employee is terminated and sues. She claims damages for wrongful dismissal and, among other things, damages with respect of *pro-rated* bonus to the date of termination as well as damages representing the loss of bonus during the period of common law reasonable notice. The employer defends on the basis of, among other things, that the metrics, including company profitability, have not been achieved. Examinations for discovery occur and the plaintiff's lawyer asks the President of the company to provide sales and financial records for the company for the past 3 years. The defendant's lawyer refuses. The plaintiff brings a motion to compel the production of the sales and financial records.

A Master of the Superior Court of Justice considered the issue of production of sales and financial records in Gray v. Promark Electronics Inc., 2018 ONSC 2298 (CanLII) in a wrongful dismissal case. The plaintiff alleged that he had been constructively dismissed when the employer unilaterally reduced his commission plan. The defendant argued that Promark had an unfettered discretion to vary the plaintiff's commission structure from time to time and that the company did so on four (4) occasions when the commission plan was "misaligned with [Promark's] business realities" which was based on the company's profitability. The defence also mentioned the diversification of the sales portfolio.

Master Wiebe ordered the production of the sales and financial records saying:

> [The plaintiff] is entitled to explore in detail the veracity of this pleaded Promark position to establish the circumstances in which previous negotiations of compensation change took place, all with a view to establishing that Promark in fact had no discretion to change. Furthermore, and most importantly, given [the plaintiff's] fallback pleading in his Reply as described above, the requested documentation is also important to show that, if Promark had discretion, any "business realities" that may have formed the basis of its exercise of discretion to change the compensation in the past did not form the basis of its exercise of discretion in 2015, thereby lending credence to [the plaintiff's] fallback position that Promark was in breach of contract in 2015 in any event, even if it had discretion. Therefore, I find as a general proposition that the requested documentation is relevant.
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> However, the production must be reasonable and proportional. I do not believe that the financial books and records for the entire time of [the plaintiff's] employment are relevant. Only those financial books and records leading up to and including the changes in [the plaintiff's] compensation package are important to the case.

The case is a not-so-subtle reminder that where you plead something, you'd better be ready to back it up with documents. Where the employer puts its financial affairs in issue, production will include business records. The pleadings (statement of claim, statement of defence and reply) frame the issues and therefore the scope of production. Care must be taken not to unwittingly open the door to broad and expansive production which may well shift the leverage to the plaintiff because the employer simply doesn't want to risk making public things that are otherwise private such as financial documents of a privately held company.

Remembrance Day is a Public Holiday Throughout Canada But Not in Ontario (for now)

On March 1, 2018, Parliament enacted Bill C-311, An Act to amend the Holidays Act (Remembrance Day) which declared, simply, that:

> November 11, being the day in the year 1918 on which the Great War was triumphantly concluded by an armistice, is a legal holiday and shall be kept and observed as such throughout Canada under the name of "Remembrance Day".

In Ontario, Remembrance Day is not a recognized as a statutory holiday under the Employment Standards Act, 2000. Because of the division of powers under the Constitution Act, 1867, Bill C-311 doesn't apply to provincially regulated employers since the provinces set the public holidays for most employees.

Notwithstanding this there's no question that Bill C-311 will likely push the Ontario government to pass legislation to amend the Employment Standards Act, 2000 by adding Remembrance Day to the list of public holidays. We have seen this a number of times where the federal government amended the Employment Insurance Act to increase benefits to individuals taking pregnancy and parental leave and the Wynne government, through its Bill 148 reforms, amended the pregnancy and parental leave provisions in the Employment Standards Act, 2000.

There Are Limits to the Duty to Accommodate

The Human Rights Tribunal of Ontario dismissed an application under the *Human Rights Code* in Danso v. Maximum Seafood, 2018 HRTO 486 (CanLII). The case involved an allegation that the employer had breached its duty to accommodate the applicant to the point of undue hardship under the Code.

The applicant alleges that after several weeks of doing regular duties his condition worsened. The applicant provided a medical report to the employer and in response the he was sent home. On October 14, 2015 the employer advised the applicant that it could not provide him with accommodation.

The Tribunal stated the issue as follows:

> The human rights issues arising from the pleadings appear to be whether or not the respondent provided the applicant with reasonable accommodations and whether in light of the applicant's restrictions at the time the respondent was able to provide accommodation to the point of undue hardship.

Although the employee tried his position as a truck driver it became clear that he was struggling and that the work may well have aggravated his condition.

The Tribunal noted that:

> It was common ground that the only way that the applicant could perform his work was if the respondent hired a helper to assist him with loading and unloading the truck. It was not controversial that an essential duty of his position was loading and unloading the truck.
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> ***
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> The ultimate question is whether or not the respondent was required to hire another worker to assist the applicant in the performance of the essential duties of his work. The applicant provided me with no authority for this position and in my view the duty to accommodate does not require an employer to hire a helper for a worker who is unable to perform the essential duties of their work.

The Tribunal went on to discuss the limit on the duty to accommodate and the case of Pourasadi v. Bentley Leathers Inc., 2017 HRTO 1418 (CanLII):

> As the Tribunal has held in many cases, the duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. See Brown v. Children's Aid Society of Toronto, 2012 HRTO 1025 (CanLII) at para. 99; Briffa v. Costco Wholesale Canada Ltd., 2012 HRTO 1970 (CanLII) at para. 60; Yeats v. Commissionaires Great Lakes, 2010 HRTO 906 (CanLII) at paras. 58-59; and Perron v. Revera Long Term Care Inc., 2014 HRTO 766 (CanLII) at para. 16. [Emphasis added]

In the circumstances, the Tribunal held that the employer was not required to hire a helper for an employee who was unable to perform the essential duties of his position. Having explored other options, it concluded that given the nature of the work, that it could not accommodate the employee short of undue hardship and he was sent home.
The case is an excellent reminder of the limits of the duty to accommodate and a practical application of the Supreme Court of Canada's decision in Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 SCR 561.

Articles of Interest

- According to a CTV News article Sexual harassment in the workplace an 'epidemic': human resources survey. The survey referred to in the article is Doing Our Duty Preventing Sexual Harassment In The Workplace.

- The CIRHR Library, University of Toronto, has some excellent "current awareness" publications including the PWR: work&labour news&research blog. In Ontario, employers are permitted to ask job applicants whether they have been convicted of a criminal offence for which a pardon has not been granted. Thanks to the PWR: work&labour news&research blog, I learned about a movement in the U.S. to prohibit employers from asking about "criminal histories on job applications and other forms of initial job screening". The movement is called "Ban the Box" and has been adopted in 25 States and the District of Columbia.

  I am biased as I teach in the undergraduate program at the Centre, but I read the CIRHR Library blog daily, and I would commend it to you.

- Benefits Canada has an article on how Canadian HR functions unprepared for growth of AI, automation: survey. At the same time, the Chief Human Resources Office of Best Buy Canada wrote an article in the The Globe and Mail How machines are putting the human back in human resources

- Nominations open for 5th annual Canadian HR Awards. There are 24 categories this year, including 6 new categories, including, Canadian HR Team of the Year (Retail and Hospitality), The Leadership Agency Award for Woman of Distinction, Labour & Employment Boutique Law Firm of the Year and Best Employment & Labour Lawyer.

- In the category of shameless self-promotion (something I am usually allergic to), please bookmark or follow in your news reader, the Journal on the Fitzgibbon Workplace Law website. I do a lot of writing (academic and non-academic) and I post fairly regularly there. For example Another Termination Clause Bites the Dust and Just Cause, Proving your Case and Marijuana.

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