



LABOUR & EMPLOYMENT LAW SEMINAR

June 16, 2016

VANCOUVER

1600 Cathedral Place
925 Georgia Street
Vancouver, BC V6C 3L2
Phone: 604.685.3456
Fax: 604.669.1620

CALGARY

3700 Bow Valley Square 2
205 – 5th Avenue S.W.
Calgary, AB T2P 2V7
Phone: 403.269.6900
Fax: 403.269.9494

YELLOWKNIFE

P.O. Box 818
200, 4915 – 48th Street
Yellowknife, NT X1A 2N6
Phone 867.669.5500
Toll Free: 1.888.465.7608
Fax: 867.920.2206

#1 Regional Law Firm in Canada
- *Chambers Canada* (2015)

www.lawsonlundell.com



Labour & Employment Law Seminar

June 16, 2016

The Pan Pacific Hotel
Vancouver, B.C.

Dear valued clients and friends,

Welcome to our annual seminar examining emerging legal topics and issues that are relevant to HR professionals and in-house counsel.

We look forward to discussing with you developing trends in labour and employment law. Hosting this complimentary half-day session, which keeps you up-to-date and provides practical information that you can use in your organization, is one way for us to thank you for trusting us with your labour and employment matters. We value your business and are pleased to have this opportunity to share our expertise.

We have designed our programming based on your requests and feedback, as well as on recent developments in the law. The main topics for discussion at this year's seminar include exploring emerging trends in employment law; reviewing key labour relations decisions of the last twelve months; discussing the latest issues in human rights and privacy including a step by step guide to accommodating disabilities, an in-depth review on family status discrimination and an update on privacy breach reporting requirements. The seminar format allows you to customize the content by attending two out of the three topics, and facilitates interactive discussions among small groups.

The Labour and Employment Law Group at Lawson Lundell LLP thanks you for joining us. We are confident that you will find the material covered in the various sessions both informative and useful. We look forward to seeing you at the reception following the seminar, which will take place in the Pan Pacific's Oceanview Suites foyer, just outside the seminar session rooms.

Yours very truly,

A handwritten signature in black ink, appearing to read "M. Patricia Gallivan".

M. Patricia Gallivan, Q.C.

LAWSON LUNDELL LLP
Labour & Employment Law Group



Agenda

1:00 p.m. - 1:30 p.m.	Registration
1:30 p.m. - 2:45 p.m.	Attend first session
2:45 p.m. - 3:15 p.m.	Break
3:15 p.m. - 4:30 p.m.	Attend second session
4:30 p.m. - 6:00 p.m.	Reception

The following sessions will be offered:

- 1. What's New in Employment Law:** Learn about new issues and recent decisions in employment law from the last year. Our annual review of reasonable notice and damage awards in wrongful dismissal claims will be discussed as well as developments in just cause, mitigation, and factors affecting reasonable notice.
- 2. Human Rights and Privacy Update:** Come and learn about the latest developments in human rights and privacy law. We will review the process for accommodating employees with disabilities, engage in an in-depth analysis of latest cases and developments in human rights law. In addition, we will provide an update on the legal obligations in the event of a privacy breach in light of the recent legislative developments. We will also review the current privacy breach reporting requirements in Alberta and the Northern Territories.
- 3. Workplace Investigations and Labour Law Update:** An update for unionized employers on what has happened over the past year in the labour relations field. We will cover new developments in federal and provincial labour law. Additionally, we will discuss workplace investigation law and proper investigation techniques in a unionized environment.

The information contained in this booklet provides a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact any member of the Labour & Employment Law Group. © Lawson Lundell LLP, 2016. All rights reserved.



Labour and Employment Law Group

VANCOUVER

Katy E. Allen	604.631.9198	kallen@lawsonlundell.com
Deborah L. Cushing	604.631.9282	dcushing@lawsonlundell.com
Patricia Gallivan, Q.C.	604.631.6718	pgallivan@lawsonlundell.com
Ritu Mahil	604.631.9156	rmahil@lawsonlundell.com
Robert A. Sider	604.631.6722	rsider@lawsonlundell.com
Nicole K. Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com

YELLOWKNIFE

Sandra P. MacKenzie	867.669.5503	smackenzie@lawsonlundell.com
Glen Rutland	867.669.5535	grutland@lawsonlundell.com



Labour and Employment Law Group

Profiles

M. Patricia Gallivan, QC

Patricia is the Chair of our Labour and Employment Law Group and has extensive experience in all facets of labour relations, employment and human rights law.

Patricia spent two years as Legal Assistant to the Chair of the British Columbia Labour Relations Board before entering private practice. Patricia acts as counsel and provides strategic and tactical advice to the firm's corporate and institutional clients emphasizing preventative aspects of labour and employment law.

In addition to the day to day strategic advice to management in all areas of labour and employment, Patricia's practice includes collective bargaining, as well as appearing as counsel on behalf of employers at labour arbitrations, provincial and federal Labour Relations Boards, Human Rights Tribunals, and all levels of court.

Patricia was appointed Queen's Counsel in 2000.

Recognition and Ranking

- *Legal 500 Canada*: recommended in the 2016 editorial for Labour and Employment
- *Chambers Canada 2016*: recognized in the Employment & Labour (British Columbia) and Employment & Labour (Nationwide - Canada) categories
- *Who's Who Legal Canada 2016*: recognized for Labour, Employment & Benefits law
- *Chambers Global*: recognized in the Employment & Labour (Canada) category
- *Best Lawyers in Canada*: recognized for Labour and Employment law
- *Canadian Legal Lexpert Directory*: repeatedly recommended as a Leading Practitioner in Employment (employer), Labour relations (management) and Workplace Human Rights (employer)
- *Expert Guide to the World's Leading Women in Business Law*: recognized as a leading lawyer in the area of Labour and Employment
- *Expert Guides*: recognized as a leading lawyer in the area of Labour and Employment
- 2009 Lexpert Zenith Award: recognized as a leading woman lawyer for her outstanding contribution to the practice and business of law

Professional Activities

- Canadian Association of Counsel to Employers (CACE) (member 2005 - present): Director 2010-2011 Secretary Treasurer 2011-2012 Vice-President 2012-2013 President 2013-2014 Director / Past-President 2014-2015 Chair of Privacy Committee 2015-2016



M. Patricia Gallivan, QC

Partner

Vancouver

P: 604.631.6718

F: 604.694.2904

E: pgallivan@lawsonlundell.com

Marianna Sichova

Legal Assistant

604.408.5443

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution
- Privacy & Data Management

M. Patricia Gallivan, QC (Cont.)

- Canadian Bar Association (BC Branch) (Labour Law, Employment Law, Human Rights Law, Freedom of Information & Privacy Law Subsections), Member
- Lexpert Zenith Award Advisory Board (2010 - 2016)
- Management Rights Journal, Federated Press, Contributing Editor and Editor-in-Chief (2001-2007)

Community Activities

- South Coast British Columbia Transportation Authority Police Board, Member and Chair of the Human Resources Committee (2011 - Present)
- West Vancouver Police Board, Member and Chair of the Human Resources Committee (2002-2008)
- Vancouver Neurological Centre, Director (1980-1982)

Bar Admissions

- British Columbia (1977)
- Northwest Territories (2008)

Education

- Loyola College (B.A., 1972)
- Dalhousie University (LL.B., 1976)

Experience

- Acting as chief spokesperson for first and subsequent collective agreement negotiations in both the federal and provincial sector in such diverse industries as: transportation, forestry, manufacturing, mining, film and retail
- Representing employers on significant Labour Relations Board decisions including decisions with respect to the appropriateness of the bargaining unit and management exclusions
- Representing employers in labour relations matters in both the Provincial and Federal sector including certifications, unfair labour practice complaints, decertification's, strikes, lockouts and picketing
- Acting for clients faced with labour disruption including strike contingency planning; strike replacement challenges and injunctions
- Providing strategic and tactical employment advice to management with respect to the negotiation of employment contracts and the development and implementation of workplace policies on such diverse matters such as technology usage, drug and alcohol, privacy and confidentiality
- Providing advice to employers on employee terminations and representing employers in wrongful dismissal actions
- Providing advice to employers on human rights matters including the duty to accommodate investigating human rights and workplace harassment complaints
- Providing labour and employment advice on corporate transactions, reorganizations, downsizings and closures
- Acting as counsel in matters before all levels of court, federal and provincial human rights tribunals, labour relations boards, privacy commissioners, and arbitrators



Speaking Engagements

- Lawson Lundell LLP Annual Labour and Employment Law Seminar, Organizer and Speaker
- Accommodation of Employees with Disabilities, (2015), B.C. Chiefs of Police, Speaker
- Cross Canada Employment Law Check Up, (September 20-22, 2012), 9th Annual Canadian Association of Counsel to Employers Conference, Chair
- Labour Arbitration Conference, (2008), Lancaster House, Advisory Committee
- Bargaining in the Broader Public Sector, Labour Arbitration Conference, (December 11, 2006), Lancaster House, Co-Chair
- Drug & Alcohol Testing, Changing Rules, Changing Attitudes, (June 2006), Workplace Privacy Conference, Lancaster House, Speaker
- Canadian Labour Law Update, (September 9, 2005), 2nd Annual Canadian Association of Counsel to Employers Conference, Speaker
- Human Rights Conference, (2005), Lancaster House, Co-Chair
- Bargaining in the Public Sector, "Labour Arbitration Conference", (November 2004), Lancaster House, Co-Chair
- Meeting the Challenges of an Aging Workforce, Labour Arbitration Conference, (2003), Lancaster House, Speaker
- Privacy Conference, Lancaster House, (2003), Co-Chair
- Remedies - What Redress is Available? Labour Arbitration Conference, (May 9, 2003), Lancaster House, Speaker

News / Publications

- Cross Canada Guide to Human Rights Law in Employment, *Canadian Association of Counsel to Employers*, (2014), Contributing Editor/Author
- Cross Canada Guide to Human Rights Law in Employment, *Canadian Association of Counsel to Employers*, (2013), Contributing Editor/Author
- Lawson Lundell Recognized in Chambers Global 2013, (March 22, 2013)
- Labour & Employment Bulletin, (October 9, 2012), Co-Author
- Lawson Lundell Recognized in Chambers Global 2012, (March 19, 2012)
- Labour & Employment Law Bulletin, (November 8, 2011), Co-Author
- Labour & Employment Bulletin: Federal Elections – Employee Voting Time Entitlement and Company Computers and the Employee's Expectation of Privacy, (April 29, 2011)
- Labour & Employment Bulletin: Minimum Wage Increase and Changes to Temporary Foreign Worker Regulations, (March 18, 2011)
- Labour & Employment Law Bulletin: Court of Appeal finds Attendance Management Program Discriminatory, (October 20, 2010)
- "What if you Suspect the Disability Claim to be False? A Guide to Fair and Proper Investigations", *Insight Information Co., Duty to Accommodate*, (2005), Co-author
- Duty to Accommodate, "What if you Suspect the Disability Claim to be False? A Guide to Fair and Proper Investigations", *Insight Information Co.*, (2005), Co-author and Speaker



M. Patricia Gallivan, QC (Cont.)

- Employer Investigations: Legal and Practical Issues, *Labour Arbitration, Continuing Legal Education*, (June 2004), Co-author and Speaker
- Western Region Labour Relations, "The Critical Elements of an Effective Investigation of Employee Misconduct", *Insight Information Co.*, (February 2004), Co-author
- Overview of Amendments to the B.C. Employment Standards Act and Regulations, (November 26, 2002)
- "Beyond Wallace: The Ongoing Impact of the Supreme Court of Canada's Decision on Dismissals from Employment", *5:1 Management Rights Journal J. 238*, (2002), Co-author
- "The Employer's Duty of Good Faith: New Developments Since Wallace", *Western Canada's Advanced Forum on Employment Law, Canadian Institute*, (November 2001), Co-author
- *Employee Terminations*, "The Termination of Disabled Employees: Termination and Accommodation Issues", *Insight Information Co.*, (October 2001), Co-author and Speaker
- *What Not to Ask, A Human Rights Guide to Pre-Employment Inquiries*, (2000), Co-author and speaker
- *Collective Agreement Language*, Collective Bargaining, Continuing Legal Education Society of British Columbia, (1991), Co-author and Speaker
- *Practice and Procedure Under the Human Rights Act (Federal)*, Employment Law and Practice, Continuing Legal Education Society of British Columbia, (1989), Co-author and Speaker
- *Human Rights (British Columbia)*, Employment Law and Practice, Continuing Legal Education Society of British Columbia, (1989), Co-author and Speaker
- Numerous unpublished papers presented at client seminars and to such groups as the Human Resources Management Association of British Columbia. Topics include wrongful dismissal, preparing and presenting a case for arbitration, *collective agreement negotiations, interpretation of health and welfare language, culpable and non-culpable discharge and other general issues in labour relations.*

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Robert A. Sider

Rob's practice focuses on management-side labour and employment law. He advises on labour and employment aspects of commercial transactions and day-to-day labour and employment issues. His work includes labour and employment litigation, arbitrations, human rights, employment standards (including director and officer liability issues), collective bargaining and workers compensation.

Recognition and Ranking

- *Chambers Global 2016*: recognized in the Employment & Labour (Canada) category
- *Legal 500 Canada*: recommended in the 2016 editorial for Labour and employment
- *Chambers Canada 2016*: recognized in the Employment & Labour (British Columbia) and Employment & Labour (Nationwide - Canada) category
- *2016 Best Lawyers in Canada*: recognized for Labour and Employment law
- *Benchmark Canada: The Guide to Canada's Leading Litigation Firms and Attorneys*: recognized as a Future Star for Labour and Employment in British Columbia
- *Canadian Legal Expert Directory 2015*: consistently recommended as a Leading Practitioner for Employment law (employer)
- *Martindale-Hubbell International Law Directory*: BV Peer Review rated

Professional Activities

- Canadian Bar Association, Member
- Canadian Bar Association, BC Branch, Employment Law Subsection, Member and past Chair (2004-05)
- Canadian Bar Association, BC Branch, Labour Law Subsection, Member
- Human Resource Management Association, Member
- Canadian Association of Counsel to Employers (CACE), Member

Community Activities

- Youth Basketball Coach
- Men's League Director, Tennis BC
- President, New Westminster Tennis Club

Bar Admissions

- British Columbia (1991)
- Alberta (1999)
- Yukon (2010)



Robert A. Sider
Partner

Vancouver
P: 604.631.6722
F: 604.669.1620
E: rsider@lawsonlundell.com

Maria Cruz
Legal Assistant
604.408.5339

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution

Robert A. Sider (Cont.)

Education

- Dickinson College; Victoria College, University of Toronto (B.A., 1987)
- University of Toronto (LL.B., 1990)

Experience

- Providing advice on significant downsizings, plant closures, and reorganizations
- Negotiations of employment contracts, stock option plans, and change of control agreements with senior executives
- Providing advice to Boards on compensation and director liability issues
- Conducting investigations of harassment and defending employers in respect of harassment claims
- Acting as chief spokesperson for the employer on both first collective agreements and renewals
- Successfully negotiating collective agreements for a wide variety of employers in both British Columbia and Alberta, including employers in the forestry, construction, transportation, service, financial and food industries
- Providing advice on share and asset deals in the forestry, mining, manufacturing, financial and service industries

Speaking Engagements

- Employment Law Update, (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Latest in Duty to Accommodate", Legal Symposium, BC Human Rights Management Association, (May 29, 2014), Speaker
- "Cross Canada Human Rights Update", 10th Annual Canadian Association of Counsel to Employers (CACE) Conference, (October 3 - 5, 2013), Banff, AB
- "The Rundown on Employment Law", Lawson Lundell Labour & Employment Law Seminar, (June 6, 2013), Speaker
- "Creating a Psychologically Safe Workplace: Reducing stress and addressing mental illness", Human Rights and Accommodation Conference, Lancaster House, (April 17-18, 2013), Vancouver, BC, Speaker
- "Employment Law Update", Lawson Lundell Labour & Employment Law Seminar (May 31, 2012), Speaker
- "Tackling Tough Duty to Accommodate Issues", BC Human Resources Association Conference, Vancouver, BC, (April 26-27, 2012), Speaker
- "Employment", Business Basics 2012, Continuing Legal Education Society of British Columbia, (February 16, 2012), Course Presenter
- "Managing the Sick Employee", (June 14, 2011), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Background Checks in the Age of Facebook", (April 14-15, 2011), BC Human Resources Association Conference, Speaker
- "Written Employment Agreements - Getting It Right", (February 10, 2011), Legal Symposium, BC Human Resources Association, Speaker



Robert A. Sider (Cont.)

- "Written Employment Agreements - Getting It Right", (January 27, 2011), Legal Symposium, BC Human Resources Association, Speaker
- "Employment Law", Business Basics 2010, The Practice of Law, (September 23, 2010), Continuing Legal Education Society of British Columbia, Course Presenter
- "Benefits, Pension and Tax Issues Arising from Employment Related Settlements", (September 20, 2010), Canadian Bar Association, BC Branch, Employment Subsection, Speaker
- "Hiring", (June 2, 2010), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Downsizing in a Downturn: Points to Consider when Reducing your Workforce", (May 20, 2009), Practical Tips for Tough Economic Times Seminar, Speaker
- "Layoff, Bumping and Recall: Canvassing Options in Tough Economic Times", (March 5, 2009), Lancaster House, Speaker
- "Labour Relations Update", (October 30, 2008), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Employment Law Update", (June 21, 2007), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Pre-Employment Screening and the Hiring Process", (June 21, 2006), Lawson Lundell Labour & Employment Law Seminar, Speaker

News / Publications

- Rob Sider quoted in Publications across the Country, (February 2015)
- Supreme Court of Canada Releases Right to Strike Decision: Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, (February 2, 2015)
- Landmark Case on the Freedom of Association from the Supreme Court of Canada: Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, (January 19, 2015)
- L&E Bulletin: SCC Decision on Statutory Freeze Provisions in Labour Legislation, (June 27, 2014)
- Canadian Association of Counsel to Employers, Contributor to the Handbook, (June 9, 2014)
- Labour & Employment Law Bulletin: Who is an "employee" under the British Columbia Human Rights Code?, (May 22, 2014)
- Rob Sider quoted in The Financial Post article, "Lawyers wrestle with the legal issues raised by mining layoffs", (July 31, 2013), Interview
- Lawson Lundell Recognized in Chambers Global 2013, (March 22, 2013)
- Labour & Employment Bulletin, (October 9, 2012), Co-Author
- Lawson Lundell Recognized in Chambers Global 2012, (March 19, 2012)
- Labour & Employment Law Bulletin, (November 8, 2011), Co-Author
- Rob Sider quoted in The Financial Post, (September 21, 2011), Interview
- Labour & Employment Bulletin: Federal Elections – Employee Voting Time Entitlement and Company Computers and the Employee's Expectation of Privacy, (April 29, 2011)
- Rob Sider quoted in The Globe and Mail, (April 26, 2011), Interview
- Labour & Employment Bulletin: Minimum Wage Increase and Changes to Temporary Foreign Worker Regulations, (March 18, 2011)



Robert A. Sider (Cont.)

- Rob Sider's article, "Stress Leave: Legitimate or Escape Tactic" published by BCBusiness Magazine, (March 3, 2011), Author
- Rob Sider interviewed by Canadian Business, (January 19, 2011), Interview
- Labour & Employment Law Bulletin: Court of Appeal finds Attendance Management Program Discriminatory, (October 20, 2010)
- Practical Tips for Tough Economic Times, (May 20, 2009)
- "Management's Duty to Accommodate Disability-Related Absenteeism", *CACE*, (2007), Author
- "Strategic Responses to Major Business Changes", *Insight*, (2006), Author
- "Advising British Columbia Businesses", *Continuing Legal Education, Labour and Employment chapter*, (2006), Author
- "Beyond Wallace: The Ongoing Impact of the Supreme Court of Canada's Decision on Dismissals", *Management Rights Journal*, (2002), Co-author
- "*The Employer's Duty of Good Faith: New Developments Since Wallace*", *Western Canada's Advanced Forum on Employment Law, Canadian Institute*, (November 2001), Co-author
- "Issues of Confidentiality and Competition in the IT Sector", *Canadian IT Law Association*, (2001), Co-author
- "Employment Contracts for Foreign Nationals", *Insight*, (2001), Co-author
- "What Not to Ask: A Human Rights Guide to Pre-Employment Inquiries", *Infonex Conferences*, (2000), Co-author
- "The Right to Refuse Unsafe Work", Co-author
- "*Difficult Issues in Wrongful Dismissal Cases*", *Pacific Business and Law Institute*, (1996), Co-author

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Deborah Cushing

Deborah practises labour and employment law, advising clients on a range of matters including wrongful dismissal, employment standards, business immigration, labour relations, and human rights issues.

Deborah attended law school following a career in human resources. She worked in labour relations in the public sector followed by experience as an employee relations manager in the financial industry.

Deborah works with clients in a wide range of sectors including mining, retail, hospitality, health care, government and non-profit.

Professional Activities

- Canadian Bar Association, Member
- BC Human Resources Management Association, Member
- Canadian Pension and Benefits Institute, Member

Community Activities

- Board of Directors of Simon Fraser University Childcare Society (2013 - present)

Bar Admissions

- British Columbia (2007)
- Northwest Territories (2014)

Education

- University of Victoria (LL.B)
- University of British Columbia (Bachelor of Commerce)

Experience

- Provides advice on employment matters, such as wrongful dismissal, employment standards, salary and benefits administration, and human rights
- Provides advice on labour relations matters, such as collective agreement interpretation, progressive discipline and grievance resolution, and appears at arbitrations and labour relations board hearings
- Conducts harassment investigations and makes recommendations for resolution of harassment complaints
- Maintains a business immigration practice assisting employers with bringing foreign workers into Canada and assists workers with applications to become permanent residents

Speaking Engagements

- Latest Developments in Labour Relations (Unionized Employers), (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar



Deborah Cushing

Partner

Vancouver

P: 604.631.9282

F: 604.669.1620

E: dcushing@lawsonlundell.com

Robinn Habkirk

Legal Assistant

604.631.9256

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution
- Privacy & Data Management

Deborah Cushing (Cont.)

- "Human Rights and Privacy Update", Lawson Lundell Labour & Employment Law Seminar, (June 6, 2013), Speaker
- "Labour Relations Update for Unionized Employers", Lawson Lundell Labour & Employment Law Seminar (May 31, 2012), Speaker

News / Publications

- Deborah Cushing quoted in the Benefits Canada article, "How to bridge the parental leave divide.", *Benefits Canada*, (March 18, 2016), Interview
- Deborah Cushing quoted in the FindLaw Canada article, "Do Fitbits come with workplace privacy concerns?", (August 24, 2015), Interview
- Suspension held to constitute constructive dismissal: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, (March 10, 2015)
- Labour and Employment Law Bulletin: Changes to Temporary Foreign Worker Program Announced, (June 2014)
- Supreme Court of Canada Declares Alberta Privacy Legislation Invalid, (November 15, 2013), Author
- Deborah Cushing quoted in The Vancouver Sun article, "WorkSafeBC to help implement new anti-bullying, harassment policies in B.C. workplaces", (October 30, 2013), Interview
- What you need to know about changes to Canada's Temporary Foreign Worker program, (October 29, 2013), Author
- Deborah Cushing quoted in The Vancouver Sun article, "Employers face deadline to meet WorkSafeBC anti-bullying rules", (October 29, 2013), Interview
- Labour & Employment Law Bulletin: Changes to the Temporary Foreign Worker Program, (August 2, 2013), Author
- Labour & Employment Bulletin, (October 9, 2012), Co-Author
- Employees who Resign Retain Rights to Sue for Wrongful Dismissal, (February 13, 2012), Author
- Labour & Employment Law Bulletin, (November 8, 2011), Co-Author
- "Negligent Infliction of Mental Suffering in the Employment Context", (July 2010)
- "Labour and Employment Law Bulletin: British Columbia Bans Use of Electronic Devices While Driving", (December 2009)
- "Labour and Employment Law Update: A Cautionary Tale about Temporary Layoffs", (October 2009)
- "Changes to the Labour Market Opinion (LMO) Program", (2009)
- Art in Dispute at the Beaverbrook Art Gallery, *International Journal of Cultural Property*, Vol. 15 No. 3, (2008)



Nicole K. Skuggedal

Nicole practises in all areas of labour and employment law, including advising clients on wrongful dismissal, labour relations, human rights and privacy issues.

Nicole has represented clients in matters involving labour arbitrations, labour relations boards, employment standards tribunals, human rights tribunals, privacy commissioners, and has appeared before the British Columbia Supreme Court, Court of Appeal and Supreme Court of Canada. Nicole frequently negotiates collective agreements and provides strategic and tactical advice to clients on drafting employment contracts and the labour and employment aspects of commercial transactions.

Recognition and Ranking

- In 2004, Nicole placed first in the Jessup International Law Moot and represented Canada at the international rounds of the Jessup Moot.

Professional Activities

- Canadian Bar Association, Member
- BC Human Resources Management Association, Member

Community Activities

- Western Canada Society to Access Justice, *pro bono* clinic volunteer

Bar Admissions

- British Columbia (2006)
- Northwest Territories (2008)
- Yukon (2010)

Education

- University of Victoria (B.Comm. (with Distinction) 1999)
- University of Toronto (J.D. 2005)

Experience

- Representing employers in both the provincial and federal sector in a diverse range of industries including: financial services, mining, transportation, construction, retail, First Nations organizations
- Acting as chief spokesperson for first and subsequent collective agreements for clients in both the federal and provincial sector
- Providing strategic labour relations advice to employers on matters such as collective agreement interpretation, discipline, grievance resolution, strikes and lockouts, including appearing at arbitrations and labour relations board hearings



Nicole K. Skuggedal

Partner

Vancouver

P: 604.631.6795

F: 604.694.2912

E: nskuggedal@lawsonlundell.com

Robinn Habkirk

Legal Assistant

604.631.9256

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution
- Privacy & Data Management

Nicole K. Skuggedal (Cont.)

- Acting as counsel on labour board appeals, wrongful dismissal and general civil litigation trials including appearing before the British Columbia Supreme Court, Court of Appeal and Supreme Court of Canada
- Providing employment advice including wrongful dismissal, employment standards and drafting employment contracts
- Providing advice on human rights matters including the duty to accommodate, the permissible scope of drug and alcohol testing, responding to human rights complaints and developing harassment policies
- Providing labour and employment advice to clients on corporate transactions, reorganizations, downsizing and closures; and
- Representing employers in responding to privacy complaints and requests for information pursuant to provincial and federal privacy legislation

Speaking Engagements

- Employment Law Update, (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Human Rights & Privacy Update", Lawson Lundell Labour & Employment Law Seminar, (June 11, 2014), Speaker
- "Employment Law Update", Lawson Lundell Labour & Employment Law Seminar (May 31, 2012), Speaker
- "Managing the Sick Employee", (June 14, 2011), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Accommodating Disabilities", (February 17, 2011), Burnaby Roundtable, BC Human Resources Management Association, Speaker
- "Dismissing", (June 2, 2010), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Managing the Sick Employee", (October 30, 2008), Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Duty to Accommodate", Lawson Lundell Labour & Employment Law Seminar, (June 21, 2007), Speaker
- "Drug and Alcohol Testing", Lawson Lundell Labour & Employment Law Seminar, (June 21, 2006), Speaker

News / Publications

- Access Granted: How Organizations Can Improve Response to Access Requests, (November 4, 2015), Author
- Federal Private Sector Privacy Legislation Amendments, (July 9, 2015), Co-author
- Off-duty tracking offside, says legal experts, *Canadian HR Reporter*, (June 15, 2015), Interview
- Suspension held to constitute constructive dismissal: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, (March 10, 2015)
- Canada Labour Code Does Not Prohibit Without Cause Terminations, (February 5, 2015), Nicole Skuggedal



Nicole K. Skuggedal (Cont.)

- IKEA slapped with labour violation in B.C. strike dispute, *Canadian Labour Reporter*, (August 11, 2014), Interview
- Labour & Employment Law Bulletin: Privacy Commissioner's Report on Police Information Checks Released, (April 2014)
- Nicole Skuggedal quoted in BC Business, (March 4, 2014)
- "The Importance of Responding to Privacy Complaints", (January 17, 2014), Author
- Nicole Skuggedal quoted in Business in Vancouver article "Do You Know Where Your Mobile Workers Are?", (January 13, 2014)
- Labour & Employment Law Bulletin: Viewing Employee's Personal Email Violates Privacy Legislation, (December 20, 2013), Author
- Labour & Employment Law Bulletin: Pension benefits will not be deducted from damages for wrongful dismissal, (December 17, 2013), Author
- CBC Radio: On the Island. Discussing employee GPS tracking, (November 27, 2013), Interview
- Labour & Employment Bulletin, (October 9, 2012), Co-Author
- "How to craft computer policies on personal emails and surfing", (December 8, 2011), Author
- Labour & Employment Law Bulletin, (November 8, 2011), Co-Author
- Nicole Skuggedal quoted in The National Post, (July 19, 2011), Interview
- Nicole Skuggedal quoted in The Vancouver Sun, (June 22, 2011), Interview
- Labour & Employment Bulletin: Federal Elections – Employee Voting Time Entitlement and Company Computers and the Employee's Expectation of Privacy, (April 29, 2011)
- Labour & Employment Bulletin: Minimum Wage Increase and Changes to Temporary Foreign Worker Regulations, (March 18, 2011)
- Labour & Employment Law Bulletin: Court of Appeal finds Attendance Management Program Discriminatory, (October 20, 2010)
- Supreme Court of Canada Clarifies the Duty to Accommodate, (July 18, 2008)
- Supreme Court of Canada Issues Landmark Employment Law Decision in Keays v. Honda Canada Inc., (June 27, 2008)
- "What if you Suspect the Disability Claim to be False? A Guide to Fair and Proper Investigations", *Insight Information Co., Duty to Accommodate*, (2005), Co-author



Ritu Mahil

Ritu is a member of our Labour and Employment Law Group. She is a former Vice Chair of the BC Labour Relations Board. As an experienced adjudicator, Ritu offers our clients a unique perspective on labour and employment law matters.

Ritu is also an experienced negotiator, mediator and skilled litigator with a proven track record appearing at arbitration hearings, the BC Labour Relations Board, and in Court proceedings including BC Court of Appeal.

Ritu advises on all aspects of labour and employment matters including harassment investigations, collective bargaining negotiations and mediation, and essential service disputes.

Ritu's experience as a Vice Chair at the BC Labour Relations Board has given her a working knowledge of the intricacies of labour and employment issues in the following industries:

- Construction
- Forestry
- Gaming
- Healthcare
- Hospitality
- Mining
- Retail & Food Services
- Transportation

In addition to serving as Vice Chair of the BC Labour Relations Board, Ritu previously served as in-house counsel to a union, was a lawyer in private practice, and an instructor at the Capilano College Labour Studies program. Ritu has spoken at a number of labour law conferences and workshops.

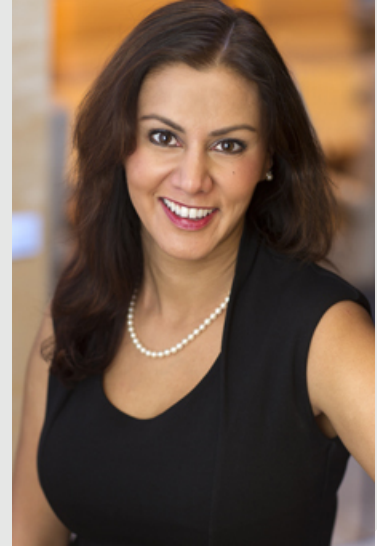
Ritu regularly provides commentary to media on a range of labour and employment issues. She has been interviewed on legal topics by several local and national outlets, including *CBC* (BC and national news), *CKNW*, *CTV National News*, *Canadian Press*, *Vancouver Sun* and *Toronto Star*.

Professional Activities

- Canadian Bar Association, Member
- Canadian Association of Counsel to Employers

Community Activities

- Board of Directors of West Coast Legal Education and Action Fund (2002 - 2008, President 2006 - 2008)



Ritu Mahil

Associate

Vancouver

P: 604.631.9156

F: 604.669.1620

E: rmahil@lawsonlundell.com

Marianna Sichova

Legal Assistant

604.408.5446

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution

Ritu Mahil (Cont.)

Bar Admissions

- British Columbia (2002)
- Nunavut (2015)

Education

- University of Victoria (M.P.A., 2001)
- University of Victoria (LL.B., 2000)
- University of Victoria (B.A., 1996)

Speaking Engagements

- Managing Employee Disability and Privacy, (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar
- "State of the Union: A Labour Arbitration Update", 52nd Annual BC Human Resources Management Association Conference, (April 15, 2014), Vancouver, BC
- "Hot Topics in Labour Relations Law", Canadian Electricity Association Labour Relations Symposium, (March 24, 2014), Toronto, ON, Speaker
- "A Promise is a Promise, or is it? Estoppel in day-to-day labour relations", Labour Arbitration Conference, Lancaster House, (November 20, 2013), Speaker
- "Labour Law Update for BC", 10th Annual Canadian Association of Counsel to Employers (CACE) Conference, (October 3 - 5, 2013), Banff, AB
- "Latest Developments in Labour Relations (Unionized Employers)", Lawson Lundell Labour & Employment Law Seminar, (June 6, 2013), Speaker
- "The Role of the Parties in Accommodation: Employer Responsibilities, Union Role and Employee Responsibilities", 8th Annual Western Canada Labour Relations Conference, Insight Information, (February 21, 2013), Vancouver, BC, Speaker

News / Publications

- Recent Developments in Ontario in Employment and Human Rights Law, (April 14, 2016), Author
- Ritu Mahil quoted in the Benefits Canada article, "Human rights ruling on miscarriage puts employers on notice.", *Benefits Canada*, (April 8, 2016), Interview
- Opinion: Workplaces need clear harassment policies and procedures for addressing problems, *The Vancouver Sun*, (December 15, 2015), Author
- Supreme Court of Canada Releases Right to Strike Decision: Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, (February 2, 2015)
- Ritu Mahil was interviewed by CBC National on the possibility of employees being fired for racist comments made outside of the workplace, (January 21, 2015), Interview
- Landmark Case on the Freedom of Association from the Supreme Court of Canada: Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, (January 19, 2015)
- Discussion of sexual harassment in the workplace and what employers can do to ensure proper policies are in place to address allegations, *CTV: National News*, (November 6, 2014)
- BCTF president calls for binding arbitration in teacher strike; minister cool to proposal, *Canadian Press*, (September 17, 2014), Interview



Ritu Mahil (Cont.)

- Teachers ask for binding arbitration; Government wants more details before agreeing, but deal would open schools next week, *Vancouver Sun*, (September 6, 2014)
- Parties struggle for support in strike, *Victoria Times Colonist*, (September 5, 2014), Interview
- Discussion of labour relations and the teacher's strike, *CBC: The Early Edition*, (September 3, 2014)
- Union's Right to Employees' Home Contact Information from Employer Trumps Privacy Concerns, (February 11, 2014), Co-author
- "Constructive Dismissal: Should I Stay or Should I Go?", *Canadian Employment Law Today*, (January 22, 2014), Author
- Ritu Mahil quoted in the article "A Coming of Age for Family Status", *Canadian Lawyer*, (December 2013), Interview
- Ritu Mahil quoted in The Vancouver Sun article, "Battle over workplace drug tests just heating up following court ruling", (July 3, 2013), Interview
- Women's Day Brings Legal Rights in Workplace Closer to Home, (March 8, 2013), Author

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Katy E. Allen

Katy practises in the area of labour and employment law advising clients in relation to wrongful dismissal cases, labour arbitrations, employment agreements, collective agreements, group terminations, restrictive covenants and post-employment competition litigation, employment standards, human rights, and privacy law. Katy has a particular interest in human rights law in the context of employment. She has assisted clients with matters being litigated at all levels of court and has appeared before the B.C. Employment Standards Branch, Human Rights Tribunal, Labour Relations Board, Provincial Small Claims Court, Supreme Court, and Court of Appeal.

Katy clerked for the British Columbia Supreme Court.

Recognition and Ranking

- Bull, Housser & Tupper Prize in Technology Law
- Harold Scanlon Foley Memorial Scholarship
- Panvini Scholarship in Law
- McCarthy Tetrault Prize in Property
- Bull, Housser & Tupper Prize in Torts
- Borden Ladner Gervais Fellowship

Professional Activities

- Canadian Bar Association, Member
- Law Society of British Columbia, Member

Community Activities

- Western Canada Society to Access Justice, *pro bono* clinic volunteer
- CBA Mentor

Bar Admissions

- British Columbia (2014)

Education

- University of British Columbia (J.D.)
- University of British Columbia (B.Sc.)

Speaking Engagements

- Latest Developments in Labour Relations (Unionized Employers), (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar

News / Publications

- Manitoba Employment Standards Legislation to Include Leave, (April 12, 2016), Co-author



Katy E. Allen

Associate

Vancouver

P: 604.631.9198

F: 604.669.1620

E: kallen@lawsonlundell.com

Maria Cruz

Legal Assistant

604.408.5339

Practices

- Labour, Employment and Human Rights
- Litigation & Dispute Resolution

Katy E. Allen (Cont.)

- Federal Government Passes Union Spending Bill, Bill C-377, (July 3, 2015)
- Suspension held to Constitute Constructive Dismissal: Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10, (March 10, 2015)
- Supreme Court of Canada Releases Right to Strike Decision: Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, (February 2, 2015)
- Landmark Case on the Freedom of Association from the Supreme Court of Canada: Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, (January 19, 2015)

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Sandra P. MacKenzie

Sandra is a litigation lawyer, practicing in the areas of insurance litigation, employment, regulatory, and aboriginal law. Sandra acts as an advocate for clients in the energy, mining, and resource sectors and acts as counsel for regulatory bodies in the North. She also represents a variety of individuals, corporations, municipalities, and governments, and is committed to providing creative, timely, and cost-effective solutions to her clients.

Prior to joining Lawson Lundell in 2011, Sandra clerked at the Supreme Court of the Northwest Territories. She then practised with a boutique litigation firm in Toronto, Ontario, working primarily in the areas of insurance, personal injury, and employment law.

Professional Activities

- Stanton Territorial Hospital Foundation Board of Directors, Board Member (2013 - Present)
- Administrative Law Section of the Northwest Territories Branch of the Canadian Bar Association, Chair (2015 - Present)
- Canadian Bar Association, Northwest Territories Branch, President (2013-2014)
- Advocates' Society, Member

Bar Admissions

- Ontario (2008)
- Northwest Territories (2011)
- Nunavut (2012)

Education

- University of Windsor (LL.B., 2007)
- Wilfrid Laurier University (B.A. Hons., 2004)

Languages

- French

Experience

Sandra's experience includes:

Representing northern governments, corporations, municipalities, and aboriginal organizations with various commercial, employment and general litigation matters:

- Has acted as co-counsel for a municipality in the Supreme Court of the Northwest Territories in relation to a mining surface rights dispute;
- Has successfully conducted wrongful dismissal trials and other employment related litigation;



Sandra P. MacKenzie

Associate

Yellowknife

P: 867.669.5503

F: 867.920.2206

E: smackenzie@lawsonlundell.com

Jean Mahlangu

Legal Assistant

867.669.5515

Practices

- Aboriginal Law
- Commercial Litigation
- Insurance Litigation
- Labour, Employment and Human Rights
- Regulatory Compliance

Sandra P. MacKenzie (Cont.)

- Acted for both debtors and creditors in collection proceedings in court;
- Acted for corporations defending regulatory charges under various pieces of legislation in the Northwest Territories and Nunavut;
- Acted as co-counsel in an Inquiry under the Integrity Act in Nunavut;
- Act as counsel in child protection cases in Nunavut; participate in court and trials regularly in the Nunavut Court of Justice;
- Appeared at various administrative boards and tribunals including Labour Standards Board and the Labour Standards Appeal Board; Motor Vehicles Act Appeal Board; Human Rights Adjudication Panel, Employment Standards Board; and
- Three years of practise in the area of insurance defence; including personal injury, product liability; occupiers' liability, professional errors and omissions; and environmental contamination cases.

Providing general labour and employment advice to a wide variety of clients:

- Conducting workplace investigations for various governmental bodies;
- Acting for northern clients in negotiating collective agreements;
- Drafting, reviewing, and interpreting employment agreements and collective agreements;
- Assisting municipalities, hamlets, and aboriginal organizations with the drafting and interpretation of employment bylaws;
- Providing advice on the discipline and termination of employees;
- Providing advice on the duty to accommodate and other obligations under the Human Rights Act; and
- Acting for corporations and individuals in the cases brought under the Human Rights Act in both the Northwest Territories and Nunavut; have successfully argued dismissal motions and appeals to the Human Rights Adjudication Panel.

Assisting clients in resolving disputes through Alternative Dispute Resolution:

- Participating in mediations for the resolution of civil disputes, child protection matters, or administrative disputes;
- Regularly encourage clients to consider alternative dispute resolution as an alternative to courtroom litigation;
- Has successfully participated in Judicial led mediations in the Territorial Court of the Northwest Territories;
- Has participated in various types of mediation and arbitration for commercial and employment disputes; and
- Has received advanced training in Alternative Dispute Resolution in 2013.

Speaking Engagements

- Managing Employee Disability and Privacy, (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar



Sandra P. MacKenzie (Cont.)

- Canadian Defence Lawyers 2012 Annual General Meeting; “The Conjuror Unmasked - Magic of a Spellbinding Defence: Toronto: 7 June 2012”, Young Lawyers’ Panel Discussion “Conquering the Generational Divide”
- “Human Rights and Privacy Law Update”, Lawson Lundell Labour & Employment Law Seminar (May 31, 2012), Speaker
- “Build Your Brand, Build Your Practice”, (February 2011), Ontario Bar Association Institute, Chair
- “Insurance Law: Everything You Need to Know”, (October 2010), Ontario Bar Association, Speaker
- “Top Ten Mistakes Made by Young Lawyers in the Courtroom and How to Avoid Them”, (February 2010), Ontario Bar Association, Chair
- “Tort Settlements: Success at Mediation”, (January 2009), OBA Young Lawyers, Speaker

News / Publications

- Sandra Mackenzie mentioned in the Yellowknifer, (December 4, 2015), Interview
- Labour & Employment Bulletin, (October 9, 2012), Co-Author

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Glen Rutland

Glen practices in the areas of employment, regulatory, administrative and aboriginal law. Glen represents individuals, corporations, municipalities and governments in a variety of sectors in the Northwest Territories and Nunavut, including construction, mining, and resource development.

Prior to joining Lawson Lundell, Glen worked as a Staff Lawyer at Legal Aid, and as Legal Counsel for the Northwest Territories Department of Justice. In these roles, he has appeared in the Territorial and Supreme Courts of the Northwest Territories, on matters dealing with administrative law, human rights, labour relations, and judicial reviews of administrative decisions. Glen also clerked with the Saskatchewan Court of Appeal and articulated with the Government of the Northwest Territories and Lawson Lundell.

Glen has over a decade of experience with the Government of the Northwest Territories, and during that time, has served as a Policy Advisor and as Director of Policy and Planning with the Department of Justice. In these roles, Glen has worked on numerous legislative initiatives and has been intimately involved with the development of legislation within the government from the ground up. His experience in this area includes issue identification for legislation, research and development of government policy, drafting and review of legislative proposals, instruction for legislative drafters and review of draft bills for consistency with policy objectives.

Glen also conducts workplace investigations for employers when allegations of harassment or discrimination are made.

Professional Activities

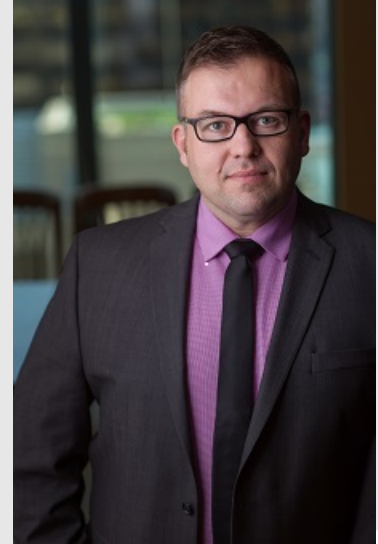
- Law Society of the Northwest Territories, Secretary
- Law Society of Nunavut, Member
- Canadian Bar Association, Member
- Canadian Bar Association, Northwest Territories branch, President (2012-2013)

Community Activities

- Yellowknife Racquet Club, Member
- St. John Ambulance NWT/NU Chapter, Vice-Chair

Bar Admissions

- Nunavut (2013)
- Northwest Territories (2010)
- Saskatchewan (2009)



Glen Rutland

Associate

Yellowknife

P: 867.669.5535

F: 867.920.2206

E: grutland@lawsonlundell.com

Jean Mahlangu

Legal Assistant

867.669.5515

Practices

- Administrative, Constitutional and Public Law
- Litigation & Dispute Resolution
- Labour, Employment and Human Rights

Glen Rutland (Cont.)

Education

- University of Saskatchewan (LL.B., with great distinction, 2009)
- Humber College of Applied Arts and Technology (Cert. in Public Relations, 1996)
- University of Waterloo (B.A., Pol. Sc., 1995)

Personal Interests

Avid kayaker and outdoor enthusiast.

News / Publications

- “Fertile or Fruitful: The Charter and the Decision to Withhold or Withdraw Life-Sustaining Treatment”, 17 Health L. J. 81 (2009)
- “Book Note on Likosky, Law, Infrastructure and Human Rights”, 71 Sask. L. Rev. 429

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What's New in Employment Law

Rob Sider

Direct: 604.631.6722
rsider@lawsonlundell.com

Deborah Cushing

Direct: 604.631.9282
dcushing@lawsonlundell.com

Employment Law

Robert A. Sider and
Deborah Cushing



Employment Law Outline

Dismissal for cause

- ▶ General principles
- ▶ Contextual approach
- ▶ Recent cases

Duty to mitigate

- ▶ General principles
- ▶ Recent cases

Recent wrongful dismissal decisions



Dismissal for Cause

General

- ▶ The first issue an employer must address when considering the dismissal of an employee is whether the employer can dismiss the employee for just cause
- ▶ Important because an employee who is dismissed for just cause may be dismissed without notice or severance pay
- ▶ “Manufacturing” just cause may lead to extra damages



Dismissal for Cause

General

- ▶ Just cause has been described as follows:
“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee”

R. v. Arthurs, [1967] 2 O.R. 49 at 55 (C.A.), reversed on other grounds (1968), 70 D.L.R. (2d) 693 (S.C.C.)



Dismissal for Cause

General

- ▶ The degree of misconduct required for summary dismissal is commensurate with the employee's status, such that more severe misconduct is generally required for the dismissal of long-term employees in senior positions (especially where the conduct is out of character)

Dismissal for Cause

General

- ▶ It is only in exceptional circumstances that an employer may summarily dismiss an employee for a single mistake or one instance of misconduct
- ▶ A single act may be sufficient to justify summary dismissal if it demonstrates that the employee is breaching one of the essential conditions of his or her employment

Dismissal for Cause Contextual

- ▶ Misconduct must always be viewed contextually
- ▶ The severity of misconduct must be viewed against:
 - the importance of the misconduct to the employment relationship
 - the context of the employment in which the misconduct occurred
 - the employment climate and atmosphere
 - the employer's general attitude towards misconduct of a similar nature
 - the employer's treatment of other employees who have engaged in similar misconduct

McKinley v. BC Tel, 2001 SCC 38



Dismissal for Cause Performance Issues

- ▶ Where poor performance is alleged as a reason for dismissal, it generally constitutes just cause only if the employer can show that:
 - the employer advised the employee of the deficiencies in his or her performance
 - the employer advised the employee how to overcome those deficiencies
 - the employer gave the employee a reasonable amount of time to improve his or her performance
 - the employer warned the employee that his or her job was in jeopardy should he or she fail to improve his or her performance in the allotted time

Manning v. Surrey Memorial Hospital Society (1975), 54 D.L.R. (3d) 312 (B.C.S.C.)



Dismissal for Cause Breach of Policy

- ▶ An employee's breach of company policy will only constitute just cause if the employer can establish that:
 - the policy had been distributed to its employees
 - the policy is known to its employees
 - the policy is known to the employee affected
 - the policy is unambiguous
 - the policy is consistently enforced by the employer
 - the employees have been warned that they may be dismissed if they breach the policy
 - the policy is reasonable
 - the breach of the policy is sufficiently serious to justify dismissal

Roney v. Knowlton Realty Ltd. (1995), 11 C.C.E.L. (2d) 205 (B.C.S.C.)



Dismissal for Cause

- ▶ From a practical perspective, employers should remember that proving just cause in court is difficult, particularly given the requirement to view cause contextually
- ▶ Also, it is important for an employer to remember that it either has just cause to dismiss an employee or it does not; there is no in-between



Recent Cases

“Manufacturing” Cause

Karmel v. Calgary Jewish Academy, 2015 ABQB 731

- ▶ Facts
 - Mr. Karmel was the principal of a private school. Part way through his 5-year fixed term contract, Mr. Karmel’s employment was terminated for cause. Employer alleged that Mr. Karmel was willfully disobedient
- ▶ Decision
 - The court found that Mr. Karmel was not guilty of willful disobedience; rather, the school had pursued a strategy of “papering a path to Mr. Karmel’s termination” in order to avoid its obligation to pay out the remainder of the contract. This strategy appeared to be motivated by the Chairman’s personal animosity towards Mr. Karmel
 - The court also found that Mr. Karmel was dismissed without cause and awarded damages equivalent to the remainder of his salary under the fixed term contract

Recent Cases

“Manufacturing” Cause

Karmel v. Calgary Jewish Academy, cont'd

- The court found that the “insidious” actions of the Employer, which persisted in the months prior to Mr. Karmel’s termination of employment, had caused harm to Mr. Karmel’s reputation and mental health. This ultimately led to a finding that the Employer had breached its duty to act in good faith for a period of “about 18 months”. Mr. Karmel was entitled to \$200,000 in damages

Recent Cases

Smoking Dope Not Always Cause

True Colors Painting Ltd. v. 0846747 BC Ltd., 2015 BCSC 278

► Facts

- The Plaintiff's principal, Mr. Fisher, agreed to sell his business to the Defendant
- Within a couple of months, issues emerged. The Defendant advised Mr. Fisher to enforce a strict rule against marijuana use by employees
- This direction was given with the knowledge that Mr. Fisher was authorized to use marijuana in respect of his own medical condition. Mr. Fisher shared that he would fail any random drug testing. Thereafter, the Defendant wrote to Mr. Fisher and advised that his admission of drug use was regarded as a resignation, which the Defendant had accepted



Recent Cases

Smoking Dope Not Always Cause

True Colors Painting Ltd. v. 0846747 BC Ltd., cont'd

► Decision

- The court held that Mr. Fisher did not resign and his admitted marijuana use did not constitute just cause
- The Defendant knew of his use of medical marijuana when it agreed to his employment
- In addition to liabilities under the asset purchase agreement, the Defendant was ordered to compensate Mr. Fisher for the unexpired portion of the first year of the employment contract (i.e. 10.5 months' salary)



Recent Cases

Napping At Work Not Necessarily Cause

Zhang v. Crystal Claire Cosmetics Inc., 2015 CanLII 32245 (ON LRB)

- ▶ Facts
 - Crystal Claire terminated Mr. Zhang's employment after he was caught napping. It was not the first time he had been found sleeping on the job.
 - Employees confirmed they had seen him sleeping at work. However, Mr. Zhang was never formally disciplined prior to the incident that led to the termination
 - Crystal Claire did, at one point, relocate him in order to better "monitor" him, but he was never informed of the reason he was relocated
- ▶ Decision
 - The OLRB clearly expressed its view that Mr. Zhang's conduct was inappropriate. The OLRB was not convinced that Mr. Zhang's sleeping was not accidental. But, despite many prior instances of sleeping, Mr. Zhang had never been provided with any formal verbal warning or written warning that his employment would be at risk if he engaged in further sleeping on the job. As a result, Mr. Zhang was entitled to statutory severance



Recent Cases

Trumped up Cause Allegations

Gordon v. Altus, 2015 ONSC 5663

- ▶ Facts
 - Altus alleged that Gordon was fired for cause for profanity, engaging in a conflict of interest to harm Altus, and employing a colleague who had been charged with fraud
- ▶ Decision
 - The court found no cause
 - No record of Gordon swearing or being reprimanded for it
 - The alleged conflict of interest was properly addressed by Gordon
 - The former employee was charged with fraud in relation to activities that had nothing to do with Altus
 - If Gordon had in fact behaved improperly, "Altus should have exercised a progressive discipline approach"
 - Allegations were examples of "puffing up complaints to justify its peremptory dismissal"
 - Judge awarded him \$100,000 in punitive damages



Recent Cases

Breach of Code of Conduct Not Cause

Lau v. Royal Bank of Canada, 2015 BCSC 1639

- ▶ Facts
 - Employee was account manager with 5 years service, 30 years of age
 - Dismissed for cause for falsifying bank records and lying about joint session with client
 - RBC relied on breach of its code of conduct as reason for dismissal
 - RBC notified regulators of dismissal for cause as employee was licensed mutual funds agent
- ▶ Decision
 - Court found that RBC did not prove that employee lied about joint meeting
 - With respect to bank records, other employees had not been dismissed for similar infractions



Recent Cases

Breach of Code of Conduct Not Cause

Lau v. Royal Bank of Canada, cont'd

- Employee had clean employment record
- Dismissal for cause not warranted
- Reasonable notice period of 8 months awarded
- RBC investigation was flawed
- As a result of dismissal, unable to obtain employment at another financial institution
- Aggravated damages of \$30,000 awarded



Recent Cases

Performance Not Cause

Brake v. PJ-M2R Restaurant Inc., 2016 ONSC 1795

- ▶ Facts
 - Employee was a 20 year employee of PJ-M2R, a McDonald's franchise
 - Managed restaurant in Kanata, ON from 2004 – 2011 with positive performance evaluations
 - After first negative evaluation, transferred to restaurant located in a Walmart
 - Three months later, put on performance improvement plan ("PIP")
 - After three months on PIP, employee refused a demotion and dismissed for cause
- ▶ Decision
 - Court found employee was set up to fail and measurement of performance was arbitrary and unfair
 - Not given any clear and reasonable opportunity to address alleged performance issues



Recent Cases

Performance Not Cause

Brake v. PJ-M2R Restaurant Inc., cont'd

- Entitled to more support and assistance given length of employment and performance history
- Employee was 62 years old with 20 years of service, little formal education
- Knowledge and skills developed through employment most applicable to McDonald's
- Available employment inferior to managerial role with McDonald's
- Reasonable notice of 20 months was awarded



Recent Cases

Removal of Company Property Not Cause

Dhatt v. Kal Tire Ltd., 2015 BCSC 1177

- ▶ Facts
 - Employee was automotive mechanic, 53 years old
 - Dismissed for cause for removing items without permission and lack of honesty when questioned
 - Company handbook stated that unauthorized removal of company property was subject to dismissal
- ▶ Decision
 - Court found that employee thought battery charger and pole were garbage and had no intention to steal
 - Team handbook was not reviewed with the employee



Recent Cases

Removal of Company Property Not Cause

Dhatt v. Kal Tire Ltd., cont'd

- Dismissal for first incident of misconduct was not justified
- Court sets reasonable notice at 21 months, giving recognition for 17 years service with Sears
- Court also awarded \$55,000 for loss of LTD benefits
- Court found manner of dismissal was in bad faith and awarded \$25,000 for aggravated damages



Recent Cases

Insubordination as Cause

Cotter v. Point Grey Golf and Country Club, 2016 BCSC 10

?

Duty to Mitigate

- ▶ An employee terminated without cause is entitled to reasonable notice or pay in lieu of reasonable notice
- ▶ Where reasonable notice is not given and the employee suffers damages, the employee cannot recover the portion of damages that could have been mitigated

Duty to Mitigate

- ▶ In any action for wrongful dismissal, an employee has a clear duty to mitigate his or her damages
- ▶ The duty is not owed to the employer, rather it is a duty an employee owes to conduct himself or herself as a reasonable person
- ▶ In most cases, means that the employee must take reasonable steps to find alternative employment upon dismissal



Duty to Mitigate Onus of Proof

- ▶ In an action for wrongful dismissal, onus is on the plaintiff to prove damages
- ▶ Where an employer seeks to reduce damages on the ground that the employee failed to mitigate his or her losses, then the onus is on the employer to prove on a balance of probabilities that the employee failed to mitigate by not acting reasonably

Coutts v. Brian Jessel Autosports Inc., 2005 BCCA 224



Duty to Mitigate

Offer of Re-employment

- ▶ Duty to mitigate includes return to employment provided return is to a reasonable working situation
- ▶ Employee is not obliged to mitigate by working in atmosphere of hostility, embarrassment or humiliation
Farquhar v. Butter Brothers Supplies Ltd. (1988), 23 B.C.L.R. (2d) 89 (C.A.)
- ▶ Duty to accept re-employment arises infrequently
Cox v. Robertson, 1999 BCCA 640
- ▶ Central issue is whether a reasonable person would accept such an opportunity
Evans v. Teamsters Local Union 31, 2008 SCC 20



Duty to Mitigate

Recent Cases

Frederickson v. Newtech Dental Laboratory Inc., 2015 BCCA 357

- ▶ Facts
 - Dental technician for 8½ years
 - Laid off due to lack of work
 - Employer makes offer to re-employ and employee refuses offer
- ▶ Decision
 - Trial judge finds acceptance of offer would have been reasonable
 - Court of Appeal overturns
 - Offer did not address lost wages for one month or approximately 8% of annual income
 - Mutuality of trust between employer and employee was eroded
 - Employee not required to accept re-employment to mitigate



Duty to Mitigate Recent Cases

Nikkel v. College of Pharmacists of British Columbia, 2015 BCSC 1720

- ▶ Facts
 - Employee was 57 years old at the time of dismissal and over 15 years of service
 - Although qualified pharmacist, had held specialist inspector role not available elsewhere
- ▶ Decision
 - Court awarded reasonable notice of 16 months
 - Employee had held part-time position due to back injury
 - Reasonable that would continue to seek part-time employment
 - Reasonable that employee would not seek pharmacist role with prolonged standing

Duty to Mitigate Recent Cases

Nikkel v. College of Pharmacists of British Columbia, cont'd

- Employee not required to consider positions that would require 90 minute commute to and from work
- Reasonable that employee would take time to upgrade knowledge given length of time in specialist role
- Employee satisfied duty to mitigate

Duty to Mitigate Recent Cases

Cousins v. Quilliq Energy Corp., 2016 NUCJI

- ▶ Facts
 - Employer was territorial Crown hydro corporation
 - Employee had worked way up from trades helper to regional maintenance supervisor over 16 years of service
 - Employee suspended 30 days and demoted to plant superintendent
- ▶ Decision
 - Constructive dismissal found
 - Reasonable notice of 18 months awarded
 - Court found failure to meet duty to mitigate
 - Employee declined two similar job offers in part because would require time away from home
 - Reality in Nunavut that professionals required to spend time away from home
 - Employee failed to seriously consider job offers
 - Notice award reduced to 11 months for failure to mitigate



Recent Wrongful Dismissal Cases Effect of Compensation Plan

Munoz v. Sierra Systems Group Inc., 2016 BCCA 140

- ▶ Facts
 - Employee was 43 years old
 - 2½ years as IT consultant
 - Salary plan with three options:
 - Base Plus 2 – 95% salary and percentage of billed hours
 - Base Plus 1 - 65% salary and percentage of billed hours
 - Hourly – 100% based on billed hours
 - Employee elects hourly plan
 - Loss of only client results in no hours billed and no pay from June 2013
 - In October 2013 Sierra gives employee working notice but no pay
 - Issues at trial include effect of “bench period” of no wages, length of notice period and mitigation



Recent Wrongful Dismissal Cases Effect of Compensation Plan

Munoz v. Sierra Systems Group Inc., cont'd

- ▶ Decision
 - Court of Appeal finds trial judge in error that employee retroactively terminated in June 2013
 - Reasonable notice period reduced from ten months to eight months
 - Trial judge's finding on scarcity of employment was not supported by the evidence
 - On mitigation, court agrees with employer that not necessary to prove that other work was available to prove failure to mitigate
 - Trial judge finding that decision to focus on own business was reasonable and not overturned
 - Trial judge erred in assessment of damages
 - Employee chose hourly plan with increased income and risk
 - Income to be based on four months on bench in 12-month period
 - Damage award reduced accordingly



Recent Wrongful Dismissal Cases Short Service Employee

Bahrami v. AGS Flexitallic Inc., 2015 ABQB 536

- ▶ Facts
 - Employee was 44 years old, VP of Finance with nine months of service at date of dismissal
 - Parties disagree about level of position
 - Divergence in case law on weight to be given character of employment
- ▶ Decision
 - Without evidence, court reluctant to presume that clerical and managerial employees suffer different levels of unemployment following dismissal
 - Reasonable notice award of six months



Recent Wrongful Dismissal Cases Short Service Employee

Cabott v. Urban Systems Ltd., 2016 YKCA 4

- ▶ Facts
 - Employee was planner with 14 months service, 53 years old
- ▶ Decision
 - Trial judge awarded notice of six months
 - Court of Appeal finds that age was not a reason to extend notice period
“Some occupations by their nature are more likely to be occupied by individuals who, as a consequence of wisdom, experience and reputation acquired over the years are older”
 - Trial judge erred by considering employee’s intention to return to Vancouver
 - Starting place for short service employee is 2-3 months notice
 - Given specialized nature of employment, notice set at four months

Recent Wrongful Dismissal Cases Short Service Employee

Degagne v. City of Williams Lake, 2015 BCSC 816

- ▶ Facts
 - Degagne accepted offer of employment to be CAO
 - Offer included probationary period of six months and notice of one month for termination during probationary period and subsequently six months during first year of employment
 - City decides to rescind offer prior to start of employment and provides one month of notice
- ▶ Decision
 - Court finds that employment had not commenced and probationary period did not apply
 - Determined that reasonable notice at common law would be six months

Recent Wrongful Dismissal Cases Bridging to Retirement

Arnone v. Best Theratronics Ltd., 2015 ONCA 63

- ▶ Facts
 - Employee was supervisor/manager with 31 years of service, 53 years old
- ▶ Decision
 - Trial judge sets notice at 16.5 months to bridge employee to retirement
 - Appeal court finds that notice should be determined on *Bardal* factors not on basis of bridge to retirement
 - Agrees that character of employment is factor of declining importance
 - Reasonable notice of 22 months substituted
 - Retirement allowance was a contractual entitlement on termination without cause
 - Employee awarded retirement allowance of 30 weeks' pay



Recent Wrongful Dismissal Cases Fixed Term Contract

Howard v. Benson Group Inc., 2015 ONCA 256

- ▶ Facts
 - Employee dismissed after 23 months under a five-year fixed term contract
- ▶ Decision
 - Trial judge awarded common law damages for wrongful dismissal subject to mitigation
 - Court of Appeal found in absence of enforceable contractual provision setting fixed term of notice, fixed term contract obligates employer to pay the employee to the end of the term and not subject to mitigation
 - Contrast with position of BC Court of Appeal that, whether a contract of employment is for a fixed term or an indefinite period, usual rules of mitigation apply and earnings from other sources after termination will be taken into account unless the contract provides otherwise

Neilson v. Vancouver Hockey Club Ltd., 1988 CanLII 3051 (BC CA)





Presented by
Robert Sider and Deborah Cushing



Vancouver

Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary

Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife

P.O. Box 818
200, 4915 - 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500
(F) 867.920.2206
Toll Free: 888.465.7608



BC WRONGFUL DISMISSAL AWARDS

May 2015 to May 2016

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Munoz v. Sierra Systems Group Inc.</i> , 2015 BCSC 269; appeal allowed in part 2016 BCCA 140	Bilingual Information Technology Consultant	\$119,386	2.58	43	8	<ul style="list-style-type: none"> • On appeal, the court reduced the reasonable notice period from 10 to 8 months and revised the calculation of damages. The Court found that the trial judge erred in assessing damages at full wages when the employee had elected an hourly compensation plan and not a guaranteed monthly salary structure. The damages were ordered to be reduced accordingly.
<i>Steinebach v. Clean Energy Compression Corp.</i> , 2015 BCSC 460, 2016 BCCA 112	Vice President Business Development Canada	\$251,847	19.5	49	New trial ordered	<ul style="list-style-type: none"> • The employee changed professions three months after termination. • The trial judge found that the employee failed to adequately mitigate because the employee's search criteria were too narrow, he should have made greater efforts to find a new position in his previous field, and he placed a greater emphasis on his personal preferences than career objectives. • The trial judge reduced the reasonable notice period by 3 months to 13 months. • On appeal, the Court found that the trial judge erred when arbitrarily reducing the notice period for failure to mitigate without identifying when employee would likely have secured acceptable employment or the duration of the period in which he failed to mitigate damages. • A new trial was ordered.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Waterman v. Mining Association of British Columbia</i> , 2016 BCSC 921	Vice President	\$127,332	35 Months	45	10	<ul style="list-style-type: none"> The employee was terminated due to “significant economic challenges in the industry”. The judge found that the employee’s unique and long background in the mining industry, the nature of responsibilities she fulfilled in her position, and combined with the economic downturn in the mining industry, outweighed the relatively short length of employment.
<i>Lau v. Royal Bank of Canada</i> , 2015 BCSC 1639	Account Manager	\$41,500	5	30	9 \$30,000 in aggravated damages	<ul style="list-style-type: none"> The employee was terminated due to allegedly breaching the integrity provisions in RBC’s code of conduct by falsifying bank records and failing to tell the truth when questioned regarding an alleged joint session with a client. The court found that there was no just cause for dismissal as the employee’s record was unblemished and the misconduct was deemed to have been a miscommunication at best. Aggravated damages awarded as employer knew reasons for termination would become public and failed to ensure publication was accurate and true.
<i>Cotter v. Point Grey Golf and Country Club</i> , 2016 BCSC 10	Controller		16.5	53	0	<ul style="list-style-type: none"> The employee was dismissed for continued disregard of directions not to discuss a property tax issue and repeated failure to participate in the audit process as directed. The court found that the employee was properly terminated for cause. He was willfully disobedient and disregarded repeated warnings given to him. His actions were insubordinate and incompatible with his duties as an employee.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Hall v. Quicksilver Resources Canada Inc.</i> , 2015 BCCA 291	Facilities Manager	\$125,000	9 months for current owner 24 years for previous owner	42	3	<ul style="list-style-type: none"> The employee was employed at a pulp mill for 24 years. The mill was sold to the defendant for use as an LNG plant. The employee opted for severance payment of \$125,345. After dismissal, the employee proceeded to work for the defendant for 9 months until he was dismissed without cause. He received one week's pay in lieu of notice. The plaintiff sued for wrongful dismissal alleging that he was entitled to notice commensurate to his length of service with the former owners. The summary judge found that the first severance package was a retention bonus and not severance therefore awarding 18 months' pay in lieu of notice. Upon appeal the court found that although the agreement with the former company did not specifically refer to severance, it was implied to be such. Reasonable notice period was 3 months.
<i>Dhatt v. Kal Tire Ltd.</i> , 2015 BCSC 1177	Automotive Mechanic	\$57,054	23 Includes 17 years with predecessor company	53	21 \$25,000 in aggravated damages	<ul style="list-style-type: none"> The employee was dismissed from his employment for cause for theft from the workplace. The court found that just cause did not exist as the employee did not act dishonestly when he removed the items. The employee genuinely believed that he had permission to remove the items and had no intention to steal them. The court found that termination was not a proportionate response for an employee's first incident of misconduct. An appropriate notice period was determined to be 21 months based on total service plus aggravated damages of \$25,000.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Kong v. Vancouver Chinese Baptist Church</i> , 2015 BCSC 1328	Senior Pastor	\$54,520	2		12 \$30,000 aggravated damages	<ul style="list-style-type: none"> The employee was dismissed after being found unsuitable for role of Senior Pastor. The employee was given 6 months' pay in lieu of notice by the defendant. The court found that the role of Senior Pastor was of special character and employee had expectation that his employment would be long-term. 12 month notice period was awarded. \$30,000 in aggravated damages was awarded due to the "unduly insensitive" manner of dismissal including circulating unproven allegations attacking the pastor's social and spiritual worth.
<i>Damani v. Stuart Olson Construction Ltd.</i> , 2015 BCSC 2322	Project Assistant	\$51,000	1		2 weeks	<ul style="list-style-type: none"> The employee was dismissed after raising concerns regarding increased workload and payment of overtime. Two weeks' notice was provided under an employment agreement. The court found that the notice provision of the agreement was enforceable. There was no basis for claim of aggravated and punitive damages. Action was dismissed.
<i>O'Dea v. Ricoh Canada Inc.</i> , 2016 BCSC 235	Sales Person	\$48,000	7	57	9	<ul style="list-style-type: none"> The employee was dismissed without cause and provided with 7 weeks of pay. The court found that 9 months would be the appropriate period of notice for experienced sales person in office equipment field with this age and service. The plaintiff demonstrated an adequate level of job searching as there were a relatively low number of available positions in his field and at his level.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>McLeod v. Lifelabs BC LP.</i> , 2015 BCSC 1857	Process Improvement Manager	\$108,357	25.5	50	18	<ul style="list-style-type: none"> The employee was dismissed without cause due to financial reasons. The court found that given limited scope of responsibilities including budget, 18 months of notice was reasonable. Employee was entitled to prorated bonus for the 18-month notice period.
<i>Saliken v Alpine Aerotech Limited Partnership</i> , 2016 BCSC 832	Helicopter Mechanic	\$68,000	15 months	54	6	<ul style="list-style-type: none"> The employee was summarily dismissed for allegedly having a negative interaction with a potential client and signed a release. The court found that there was no just cause for the decision to fire the plaintiff based on one event. Limited disciplinary response would have been appropriate. Release was not binding. Reasonable notice period of 6 months was awarded.
<i>Nikkel v. College of Pharmacists of British Columbia</i> , 2015 BCSC 1720	Pharmacist/ Inspector (part-time)	\$77,256	15.5	57	16	<ul style="list-style-type: none"> Plaintiff was dismissed without cause. The court considered that role of inspector was highly specialized. The employee was in a part-time role due to a back injury and availability of similar part-time roles was relevant. Employee was not required to commute long distances to obtain other employment. Employee met duty to mitigate
<i>Davidson v. Extreme Excavating Ltd.</i> , 2015 BCPC 211	Accounting Clerk	\$22/hr	4		3	<ul style="list-style-type: none"> Plaintiff was dismissed without cause due to downsizing of the defendant's company. 2 months' notice was given to the plaintiff if willing to sign release. Plaintiff refused to sign release. The Court found that appropriate notice was 3 months.
<i>Pakozdi v. B & B Heavy Civil Construction Ltd.</i> , 2016 BCSC 992	Bid estimator	\$130,000	13 months	55	8	<ul style="list-style-type: none"> Court finds that employee was vulnerable at time of dismissal due to medical condition. Notice period increased by 3 months to 8 months.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Liboiron v. IBM Canada Ltd.</i> , 2015 BCSC 1523	Technical Services Professional	\$67,327	32	57	20	<ul style="list-style-type: none"> Employee dismissed without cause due to company downsizing. Failure to use career counselling services did not show failure to mitigate when services were tied to severance offer or when services had to be accessed within 4 weeks of date of termination. Lack of reference letter for long service employee could have negative effect on employee's ability to find new employment. Employee met duty to mitigate.
<i>Luchuk v. Starbucks Coffee Canada Inc.</i> , 2016 BCSC 830	Senior Regional Manager	\$112,854	18	48	17	<ul style="list-style-type: none"> Employee dismissed without cause due to company reorganization. Court found that position was specialized with both national and international scope. Notice award reduced by one month on contingency that employee might find employment during 18 month notice period.
<i>TeBaerts v. Penta Builders Group Inc.</i> , 2015 BCSC 2008	Project Consultant and Account Manager	\$86,000	11	32	12	<ul style="list-style-type: none"> Employee dismissed for cause for deleting files, failure to be honest in her explanations and seeking alternative employment for key person in company. Employee's actions were not seriously incompatible with duty of loyalty and good faith to employer. Dismissal was disproportionate to the conduct. Court awarded a reasonable notice period of 12 months.



Human Rights and Privacy Update

Nicole Skuggedal

Direct: 604.631.6795
nskuggedal@lawsonlundell.com

Sandra MacKenzie

Direct: 867.669.5503
smackenzie@lawsonlundell.com

HUMAN RIGHTS AND PRIVACY UPDATE

Sandra Mackenzie
Nicole Skuggedal



Human Rights Update Outline

1. Duty to Accommodate
 - ▶ Disability
 - ▶ Family Status
2. Human Rights Case Law Update
3. Privacy Breach Reporting

Human Rights Update

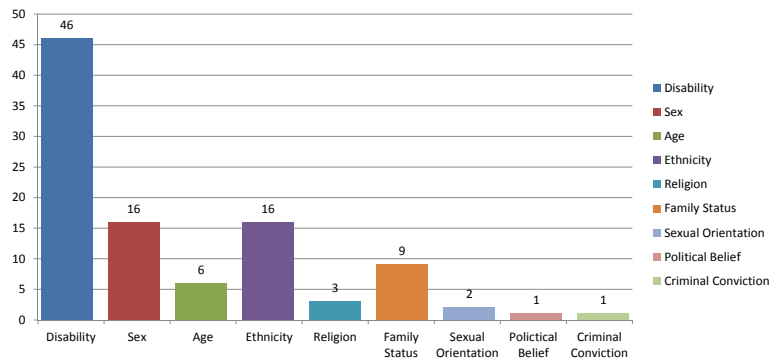
BC Human Rights Tribunal - 2014 - 2015

- ▶ 7% increase in cases compared to 2013-2014
- ▶ 201 applications to dismiss – 52% were dismissed and 10% were partially dismissed
- ▶ 65% of complaints in the employment context

BC Human Rights Tribunal 2014-2015 Annual Report

Human Rights Update

Grounds of Discrimination



Of the disability complaints – 27% physical disability and 18% mental disability

What is a Disability?

- ▶ The onus is on the employee to establish that they have a disability

What is a Disability?

- ▶ “Disability” has been broadly defined
- ▶ BC Human Rights Tribunal:
 - The concept of physical disability, for human rights purposes, generally indicates a physiological state that is:
 - involuntary, has some degree of permanence, and
 - impairs the person’s ability, in some measure, to carry out the normal functions of life

Boyce v. New Westminster (City) (1994), 24 C.H.R.R. D/441 (B.C.C.H.R.)

What is a Disability?

- ▶ Includes actual and perceived disabilities
 - Perception can be evidenced by the employer's conduct and/or workplace policies
- ▶ Loss or limitation of the opportunity "to take part in the life of the community on an equal level with others"
- ▶ May exist without proof of physical limitation or presence of an ailment
- ▶ Does NOT include normal ailments (common cold, flu)

Quebec v. Montreal (City) (Mercier), [2000] 1 S.C.R. 665

What is a Disability?

Davis v. Sandringham Care Centre, 2015 BCHRT 148

- ▶ Facts:
 - Employee confided in colleague that she had post traumatic stress disorder and colleague informed the supervisor
 - Supervisor engaged in intrusive and repetitive questioning and employee felt compelled to disclose details of her mental health history. After disclosure, supervisor sent employee to emergency and placed her on medical leave
 - Employee was not allowed to return to work until she provided medical evidence of her fitness to work from a psychiatrist
- ▶ Decision:
 - Employer discriminated against the employee based both on her mental disability and the employer's perception of her mental disability
 - Not reasonable to require medical evidence in these circumstances
- ▶ Damages: \$35,000 injury to dignity, wage loss and cost to attend hearing

Recognized as “Disabilities”

- ▶ Depression (*Canada (Attorney General) v. Hughes*, 2014 FC 278)
- ▶ Environmental sensitivity (*Andruski v. Coquitlam School District and another*, 2015 BCHRT 74)
- ▶ Chronic fatigue (*Metsala v. Falconbridge Ltd.*, [2001] OHRBID No. 3)
- ▶ Miscarriage (*Mou v. MHPM Project Leaders*, 2016 HRTO 327)
- ▶ Short term concussion (*Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133)
- ▶ Hemorrhoids (*Carriere v. Boonstra Trucking Ltd.*, 2013 AHRC 10)

Not Recognized as “Disabilities”

- ▶ Normal ailments NOT typically considered disability:
 - Flu symptoms (*Quimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19)
 - Head lice (*C.M. v. York Region District School Board*, 2010 HRTO 1494)
 - Twisted ankle (*Kalam v. Brick Warehouse*, 2011 HRTO 1037)

Not Recognized as “Disabilities”

Rooplall v. Trillium Health Centre, 2016 HRTO 476

- ▶ Facts
 - Complainant alleged that she suffered from the intellectual disability of “being smarter than most people” which affected her job because people did not want to admit to mistakes at work
- ▶ Decision
 - Ontario Human Rights Tribunal confirmed that “being smarter than most people” is not a prohibited ground of discrimination and that the Tribunal does not have jurisdiction over cases of general unfairness

What is Discrimination?

- ▶ If an employee suffers from a disability and as a result suffers adverse workplace consequences, discrimination will be established
- ▶ Example: If an employee cannot meet workplace fitness standard(s) due to his disability, then an adverse consequence will be established
- ▶ The onus then shifts to the employer to establish that the fitness standard is a *bona fide* occupational requirement (“BFOR”)

Duty to Accommodate

Bona Fide Occupational Requirement

- ▶ Test for *Bona Fide Occupational Requirement*: (*Meiorin* Test)
 - Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?
 - Did the employer adopt the particular policy or standard in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate, work-related purpose?
 - The standard or test is reasonably necessary to accomplish the legitimate work-related purpose or goal. To show that the standard is reasonably necessary it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.

British Columbia Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union, [1999] 3 S.C.R. 3 ("*Meiorin*")

Duty to Accommodate

- ▶ Onus of proof on employer to show it has exhausted all reasonable possibilities of accommodation
- ▶ Employer is required to accommodate up to the point of undue hardship
- ▶ Employer is required to go well beyond organizational inconvenience and increased cost

Duty to Accommodate

- ▶ Employer must offer concrete evidence of accommodation attempts including job modifications and financial impact statements
- ▶ Duty to accommodate continues for the duration of the employment relationship
- ▶ **Accommodation process requires an individual assessment**

Duty to Accommodate

Employers are NOT REQUIRED to

- ▶ Accommodate employee in the same position if the employee is unable to perform the “essential duties” of the position
- ▶ Create a supernumerary position on an open-ended, long term basis where the employer bears the full cost of the program
 - Employer may be expected to accommodate through short-term graduated return to work

Canada Safeway Ltd. v. United Food and Commercial Workers,
Local 401 (Szauner Grievance), [2010] A.G.A.A. No. 63 (Jolliffe)

Duty to Accommodate

Employers are NOT REQUIRED to

- ▶ Reassign duties between employees in a manner that would create unacceptable safety risks
- ▶ Maintain the rate of pay for employees accommodated in another position with a lower rate of pay, provided:
 - The position is different and not merely the same position with accommodation
 - Reasonable efforts have been made to accommodate the previous position or to find a different suitable position with equivalent wages

Nearing v. Toronto (City), 2010 HRTO 1351

Undue Hardship

- ▶ Undue hardship - non-exhaustive list of considerations:
 - Financial cost
 - Health and safety of the employee, co-workers and the public
 - Undue interference with the operation of the employer's business, including
 - substantial interference with the employer's ability to get the work done
 - significant disruption to the Collective Agreement
 - significant interference with the rights of other employees
 - Other considerations:
 - Size of employer's operation
 - Interchangeability of the workforce and facilities

Undue Hardship Financial Cost

Dunkley v. UBC and another, 2015 BCHRT 100

- ▶ Facts:
 - Metis woman who has been deaf since birth accepted to residency program in dermatology through UBC
 - UBC refused to have a full time interpreter available to Dr. Dunkley on the basis that it would cost too much and ultimately removed Dr. Dunkley from the residency program
- ▶ Decision:
 - The employer's conduct was discriminatory and it was not an undue hardship to provide a full time interpreter.
 - The cost estimates provided by UBC were inflated because they were based on the "worst case scenario" and failed to explore all options
 - Damages: lost wages, expenses and \$35,000 compensation for injury to dignity

Duty of Employer

- ▶ Employer has the primary obligation to provide a reasonable accommodation
- ▶ Employer is expected to:
 - Initiate and lead the accommodation process
 - Consult with the employee and/or the union representative as appropriate
 - Identify potential accommodations
 - Oversee the implementation of any accommodation
 - Inquire if it suspects that an employee has a disability

Duty of Employer Duty to Inquire

- ▶ Employer must inquire about an employee's health when:
 - The employee suggests he or she has a disability
 - The employee's behaviour suggests he or she has a disability
 - The employee expresses a desire to be accommodated

Duty of Employer Duty to Inquire

Lethbridge Industries Ltd. v Alberta (Human Rights Commission), 2014 ABQB 496

- ▶ Facts:
 - Employee with 15 years service was frequently absent from work due to migraines, hernia and depression issues
 - The employee was terminated for excessive absenteeism and offered a severance package
 - The Tribunal held that the employer failed to accommodate because it took no steps to determine whether there was a capacity for the employee's attendance to improve since the employer did not request updated medical information
 - Tribunal awarded 30 months for wage loss with no deduction for the LTD benefits and \$10,000 on account of injury to dignity
- ▶ Decision:
 - Alberta Court upheld the Tribunal's finding that the employer failed to accommodate to the point of undue hardship but reduced the wage loss award to 20 months and deducted the LTD benefits the employee received from the severance awarded

Duty of Employee

- ▶ Employee must:
 - Communicate existence of a disability (but not a diagnosis)
 - Provide medical information as it relates to accommodation and limitations
 - Facilitate the employer's attempt at accommodation
 - cannot expect a “perfect solution”

Duty of Employee

- ▶ If the employee does not cooperate:
 - Failure to provide information does not amount to insubordination and is NOT cause for discipline
 - Employer does not need to return the employee to the workplace or pay benefits until information is provided
 - Can result in the discrimination claim being dismissed

Duty of Employee

Rajigadu v. University of British Columbia (No. 3), 2014 BCHRT 157

- ▶ Facts:
 - UBC Electrician has asthma and other respiratory difficulties and alleged that he was harassed by co-workers
 - UBC proposed an accommodation in a location that met medical restrictions and was away from co-workers who allegedly harassed the employee
 - Employee did not like the location and proposed other locations that UBC refused
- ▶ Decision:
 - Tribunal dismissed the complaint on the basis that UBC had proposed reasonable accommodations and an employee cannot expect perfect accommodation or their preferred accommodation

Duty of Employee

French v. Selkin Logging, 2015 BCHRT 101

- ▶ Facts:
 - Employee was terminated from his safety sensitive job as a log gripper for smoking marijuana on his breaks
 - Employee alleged that he smoked marijuana to deal with side effects of cancer but provided no evidence to support this
- ▶ Decision:
 - *Prima facie* case of discrimination established since the employee was smoking marijuana due to his cancer
 - BUT the complaint was dismissed because the employee had not provided the employer with medical authorization to smoke marijuana
 - Employee was obligated to provide the necessary medical authorization to obtain and use marijuana for medical purposes

Duty of the Union

- ▶ Union's duty to accommodate arises in 2 ways:
 - Collective Agreement contributes to discrimination
 - Union's role in the accommodation process. The union must:
 - Cooperate with the employer in facilitating accommodation
 - Support accommodation measures irrespective of Collective Agreement matters, unless to do so would create an undue hardship (interference with Collective Agreement rights would have to be very significant to constitute undue hardship)

Family Status Leading BC Case

Health Sciences Association of BC v. Campbell River and North Island Transition Society, 2004 BCCA 260

- ▶ BC Court of Appeal held that a case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a **serious interference with a substantial parental or other family duty or obligation of the employee**

Family Status Leading Case Outside BC

Canada (Attorney General) v. Johnstone, 2014 FCA 110 (“*Johnstone*”)

► Facts:

- Complainant and her husband worked rotating shifts for Canada Border Services Agency (“CBSA”)
- After having a child the Complainant requested a fixed schedule
- CBSA offered part time employment but that adversely impacted seniority and opportunity for promotion

Family Status Leading Case Outside BC

Johnstone con’t

► Decision:

- Federal Court of Appeal formulated the following four part test to determine whether an employee has proven a *prima facie* case of discrimination based on family status:
 - Child is under his or her care of supervision
 - The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice
 - The Employee has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
 - The imputed workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

Family Status

Leading Case Outside BC

Johnstone continued

- ▶ Decision:
 - The Federal Court of Appeal in concluding that family status includes childcare obligations immediately cautioned that the precise nature of childcare activities contemplated by the prohibited ground must be carefully considered and should have immutable or constructively immutable characteristics “that form an integral part of the legal relationship between a parent and a child”
 - The childcare obligations comprising family status are those which “a parent cannot neglect without engaging his or her legal liability”
 - The Court expressly noted that it would trivialize human rights to extend protection to personal choices such as participation of children in dance classes and sporting events

Family Status

Childcare

Kenworthy v. Brewers’ Distributor (No. 2), 2016 BCHRT 54

- ▶ Facts:
 - Employer, employee and union entered into multiple accommodation agreements to accommodate the employee’s childcare schedule. The Agreements provided that the employee was responsible for making personal arrangements to meet her employment obligations
 - Employer refused to renew accommodation agreement because the employee was not fulfilling her obligations
 - Employee filed a human rights complaint alleging discrimination on the basis of family status and sexual harassment
- ▶ Decision:
 - Complaint dismissed on the basis that there was no prospect of success
 - Complainant argued that the *Campbell River* test no longer applies. Tribunal held that the *Campbell River* test is not exhaustive but that there was no need to revisit in this case.

Family Status Childcare

SMS Equipment Inc. v. Communications, Energy and Paperworkers Union, Local 707, 2015 ABQB 162

- ▶ Facts:
 - The grievor, a single mother of two children, worked night and day shifts as a welder on a rotating basis. She asked to be placed on straight day shifts because she had no extended family members who could assist her with childcare, and as a result the night shifts required her to incur significant childcare costs
 - Employer denied the request
- ▶ Decision:
 - The arbitrator held that the employee should be accommodated with straight day shifts
 - Arbitrator's decision upheld by Alberta Court of Queen's Bench

Family Status Childcare

Partridge v. Botony Dental Corporation, 2015 ONSC 343

- ▶ Facts:
 - Office manager given a dental hygienist position on return from maternity leave. The dental hygienist position paid less, guaranteed fewer hours, and conflicted with the employee's daycare arrangements
 - The employee was unhappy and was terminated for cause soon after her return
- ▶ Decision
 - Employer did not have just cause
 - Applied *Johnstone* test and found prima facie discrimination on the basis of family status
 - Employer unable to establish that the employee's schedule was a BFOR that could not be accommodated without undue hardship
 - Damages - 12 months pay in lieu of notice and \$20,000 damages for family status discrimination

Family Status

Miraka v. A.C.D. Wholesale Meats Ltd, 2016 HRTO 41

- ▶ Facts:
 - Employee took a day off to care for his children. On the following shift, he called in 3 hours after his shift started to advise he would be off for another 2 days to care for his children
 - Employee was terminated on the basis that the job “was not suitable for him”
- ▶ Decision:
 - Tribunal held that the employer discriminated both based on family status and disability
 - Applied the *Johnstone* test which request to the requirement to make reasonable efforts to find childcare, the Tribunal stated that it was:
 - “not convinced that the requirement to demonstrate reasonable efforts to make childcare arrangements applies in cases like this, where it is only an infrequent, sporadic or unexpected need to miss work to care for one’s children”
 - Damages - \$10,000 injury to dignity which the Tribunal held was at the lower end of the range because there were also non-discriminatory reasons for the termination i.e. failing to call in. No wage loss because hernia prevented employee from working and employer could not accommodate in another position

Family Status Childcare

Clark v. Bow Valley College, 2014 AHRC 4

- ▶ Facts:
 - Employee scheduled to return from maternity leave in January 2012. In November 2011 employee requested an extended leave until her childcare started in February 2012
 - On December 23, 2011 employer communicated that it could not accommodate a delayed return and ultimately terminated the employee on January 13, 2012 for job abandonment
- ▶ Decision:
 - Applied the *Johnstone* test and held that the employee had made sufficient efforts to find childcare
 - It would not have been an undue hardship to implement a shared instructor arrangement since it did this both before and after the employee’s dismissal
 - Damages \$10,000 injury to dignity plus 4 months wage loss

Family Status Childcare

Wing v. Niagara Falls Hydro Holding Corporation, 2014 HRTO 1472

- ▶ Facts:
 - A board member argued that changing the time of board meetings from 3pm to 4pm interfered with her obligation to pick up her 6 year old and constituted discrimination on the basis of family status
- ▶ Decision:
 - Applying the Johnstone test, a case of discrimination was not made out
 - It was the board member's personal choice and not legal obligation to enroll her child in a school in another community and to not enroll her child in after school care
 - No evidence was led that she even considered alternative solutions

Family Status Leave vs. Pay

Durham College of Applied Arts and Technology v. Ontario Public Service Employees Union, Local 353, 2015 CanLII 23804 (ON LA)

- ▶ Facts:
 - Grievor requested paid personal leave to take care of sick children.
 - Employer granted the time off without pay
 - Collective agreement provided for paid leave in cases of "extenuating personal circumstances"
- ▶ Decision:
 - The arbitrator applied the test from *Johnstone* and held that the fourth factor, workplace rule interferes with family obligation in a way that is more than trivial or insubstantial, was not met because the employee received the time off, just not the pay
 - Having a small child get sick was not an "extenuating personal circumstance" to qualify for paid leave. Arbitrator discussed how small children getting sick is quite ordinary

Family Status

Unilaterally Reducing Hours

Bray v. Canadian College of Massage and Hydrotherapy (No. 2), 2015 CanLII 3452

- ▶ Facts:
 - On return from maternity leave employee's hours were reduced by one third
 - When the employee requested an explanation the employer stated:
 - “Let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment.”
 - After the employee commenced legal proceedings, the employer alleged that the change in hours was disciplinary based on an unsubstantiated complaint that was never investigated or communicated to the employee.
- ▶ Decision:
 - Reduction in hours was a constructive dismissal and the employer discriminated based on family status
 - Damages: \$17,7000 in lieu of notice; \$20,000 discrimination and \$5,000 punitive damages but reduced to \$25,000 since that is the small claims court maximum

Family Status

Breastfeeding

Flatt v. Canada (Attorney General), 2015 FCA 250

- ▶ Facts:
 - The Grievor requested to telework from home full time for a year following the end of her year-long maternity leave so that she could breastfeed her child. There was an available daycare spot close to the place of her work that would enable her to maintain the breastfeeding schedule. The grievor chose not to enroll her child because she “would be working to just cover the cost of daycare”
- ▶ Federal Court of Appeal upheld the arbitrator's decision that:
 - Discrimination on the basis of breastfeeding is a discrimination on the basis of family status rather than of sex or gender
 - Breastfeeding is a function of a balancing of various personal choices and circumstances that flow from a relationship between parent and child. It is not an “immutable” characteristic of gender
 - To assert a protected status to the choice of a mother to breastfeed denigrates a woman's choice to fulfill the desire to nourish her child in another way, like by bottle feeding

Family Status Breastfeeding

Flatt - Continued

- ▶ Decision:
 - The test for establishing a *prima facie* case of discrimination on the basis of breastfeeding is the *Johnstone* test
 - Applying the *Johnstone* test, the Board found a *prima facie* case has not been made
 - The child is under her care of supervision
 - Although nourishing a child is a parent's legal responsibility, to fulfill it through breastfeeding is a personal choice
 - Available daycare spot close to place of work is a reasonable alternative, despite the costs

Family Status Elder Care

Ontario Public Service Employees Union (Bharti) v. The Crown in Right of Ontario, 2015 CanLII 19330

- ▶ Facts:
 - The grievor was required to report to work in Peterborough when he lived in Ottawa with his wife, two children and his parents. He alleges that this requirement constitutes a failure by the Employer to accommodate the eldercare obligations he has towards his parents.
- ▶ Decision:
 - Grievance dismissed. *Johnstone* test applied in the context of elder care as follows:
 - Parents under the adult child's care or supervision. To meet this factor, parents must be:
 - under the adult child's care - can be established by financial dependency
 - unable to withdraw themselves from the adult child's charge by reason on detention, age, illness, mental disorder or other cause
 - unable to provide themselves with the necessities of life

Family Status Elder Care

Bharti – Decision Continued

- Legal responsibility to care for parent
 - This factor will be met if adult child responsible for provision of food, medication etc.
- Reasonable efforts to look for alternate care
 - Not met in this case because grievor's wife could care for his parents
 - Interference with caring for parents must be more than trivial or insubstantial
 - Not met in this case because the conflict was due to the grievor's personal preference to live in Ottawa despite his job being in Peterborough. The grievor could have moved his family to Peterborough if the commute was impacting caring for his parents

Family Status Elder Care

Canada (Attorney General) v. Hicks, 2015 FC 599

- ▶ Facts:
 - Employee was relocated for work from Sydney, Nova Scotia to Ottawa, Ontario. His wife did not move with him due to her mother's ailing health. Employee made an expense claim for temporary dual residence assistance, which was denied
- ▶ Decision:
 - CHRT held that the failure to provide dual residency benefits to an employee whose spouse was unable to move due to an ailing parent was discrimination on the basis of family status
 - CHRT awarded \$15,000 in pain and suffering and \$20,000 for willful and reckless conduct
 - Federal Court upheld Canadian Human Rights Tribunal ("CHRT") decision

Family Status Rates of Pay

Nelson v. Bodwell High School, 2015 BCHRT 183

- ▶ Facts:
 - Single, childless high school teacher alleged he was discriminated against on the basis of family status because he was not eligible for bonuses provided to employees with children to assist with child rearing and educational costs
 - Employee was dismissed after raising concerns
- ▶ Decision:
 - Application to dismiss was denied
 - Tribunal stated that “it is arguable, at least, that paying people with children more than people without children is *prima facie* discriminatory”

Family Status

- ▶ Potential types of accommodation:
 - Modified hours
 - Reduction in hours
 - Working from home
 - Guaranteed shifts as opposed to rotating shifts
 - Agreement that the employee does not have to travel for work
 - Modified work duties
 - Modified rules
 - allow employee time off to attend child's doctor's appointment
 - Allow employees to use sick days when their dependents are sick so that they do not have to use vacation
 - Other positions
- ▶ Ensure the employee is told the accommodation will be continually evaluated – i.e. that it is not necessarily permanent

Case Study

Fact Scenario:

- ▶ Background
 - Employee worked as a bookkeeper for the City of Yellowknife. She had a child with autism spectrum disorder and requested the summer off to be with her child. The City had granted summers off in the past
 - The City refused to give the employee the summer off but offered to accommodate her with evening and weekend work
- ▶ Question
 - Did the duty to accommodate require the City to give the employee the summer off?

A.B. v. Yellowknife (City), 2016 CanLII 19718 (NT HRAP)

Case Study

Fact Scenario:

- ▶ Background
 - The employee in question is required to travel for work. The employee asks for a blanket exemption from any travel during his wife's high-risk pregnancy. He claimed she needs his assistance with the childcare responsibilities of their special-needs son during her pregnancy.
- ▶ Question
 - Does the employer have to accommodate?

Alliance Employees Union, Unit 15 v. Customs and Immigration Union (Loranger Grievance) (2011), 205 L.A.C. (4th) 343

Human Rights Update

Political Belief

Police Officer can Advocate for Drug Legalization

Bratzer v. Victoria Police Department (No. 3), 2016 BCHRT 50

- ▶ Facts
 - Bratzer filed a complaint after he was barred from participating in the advocacy group Law Enforcement Against Prohibition, which advocates for the legalization of illicit drugs
- ▶ Decision
 - The BCHRT specifically examined eight incidents. In each case, the Tribunal held that the actions of the Police Department amounted to unreasonable interference with Bratzer's ability to express his political beliefs

Human Rights Update

Damage Award Reduced

University of British Columbia v. Kelly, 2015 BCSC 1731

- ▶ Facts
 - Appeal of a decision of the BCHRT to award a medical resident with ADHD and a non-verbal learning disability damages in the amount of \$385,000 in lost wages, \$75,000 for injury for dignity and \$14,000 for expenses he incurred after he was dismissed from the program for performance below expectations
- ▶ Decision
 - The BC Supreme Court upheld the decision on its merits as well as damages for wage loss and expenses. The BCSC overturned the award of \$75,000 for injury to dignity and sent the case back to the Tribunal
 - UBC has appealed to the BC Court of Appeal

Human Rights Update

Jurisdiction

Northern Regional Health Authority v. Manitoba Human Rights Commission and Horrocks, 2016 MBQB 89

- This was an application for judicial review by the employer to set aside the human rights adjudicator's decision that the employer had discriminated against the employee (unionized) for failure to accommodate her addiction to alcohol
- The parties entered into a "Last Chance Agreement" after a series of incidents where the employee was intoxicated at work. After receiving reports that the employee was drinking in the community, which the employee denied, she was terminated for just cause. Employee made a complaint to the human rights tribunal
- The Court set aside the adjudicator's decision on the grounds that the approach incorrectly focused on the legal characterization of the dispute. The Court indicated that the legislative intent was that any dispute involving the termination of a unionized employee, including any human rights violations would be within the exclusive jurisdiction of an arbitrator
- The Manitoba Human Rights Commission has indicated it will appeal

Human Rights Update

Discrimination of Foreign Workers

O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675

- Two sisters alleged that they were subjected to a sexually poisoned work environment, discrimination in respect of employment because of sex, unwanted sexual solicitations and advances and reprisals
- In light of the objective and seriousness of the conduct as well as the particular vulnerability of migrant workers, O.P.T was awarded \$150,000 as compensation for injury to dignity, feelings, and self-respect

United Steelworkers v. Tim Hortons and others (No.2), 2015 BCHRT 168

- Complaint was made by the union on behalf of a group of workers employed through the temporary foreign worker program
- Application by franchisor was dismissed on the basis that the *Human Rights Code* can apply outside of strict employee-employer relationships

Human Rights Update

Age Discrimination

Foster v. Nova Scotia (Human Rights Commission), 2015 NSCA 66

- ▶ Facts
 - The Appellant was a member of a defined contribution pension plan for employees of the Cape Breton Regional Municipality. He was forced to retire at 65 due to a mandatory retirement provision in the DCP. He filed a complaint on the basis of age discrimination
- ▶ Decision
 - The Court upheld the decision of the Human Rights Commission, which dismissed the complaint. The Court found the decision was reasonable
 - The Court found that the DCP was a bona fide pension plan. The employer imposed the mandatory retirement provision in good faith and for a valid work place policy reason, which was a concern for the equal treatment of its employees

Human Rights Update

McNair v. International House, 2015 BCHRT 123

- ▶ Facts
 - Mr. McNair was a 64 year old teacher at a private school. He was terminated for an alleged shortage of work and the termination letter stated that if work picked up, he could return
- ▶ Decision
 - The Tribunal engaged in a detailed discussion of age stereotyping and applied principles established for racial discrimination to age stereotyping (*Redek v. Henderson Development (Canada)*, 2005 BCHRT 302)
 - The nexus between Mr. McNair's termination and his age was established, on the basis that when business began to increase, he was not offered any work and a younger teacher was hired by the respondent, despite the terms in the termination letter. He was the only employee dismissed.
 - Mr. McNair was awarded \$6000 for injury to dignity and damages for lost wages of \$11, 214

Privacy Breach Reporting Private Sector

Alberta – *Alberta Personal Information Protection Act* (“PIPA”) – s. 34.1

- ▶ Organizations are required to notify the Alberta Privacy Commissioner if:
 - There is an incident involving the loss or unauthorized access to or disclosure of personal information of individuals who reside in Alberta; and
 - A reasonable person would consider that there exists a **real risk of significant harm** to an individual as a result of the incident
- ▶ Notification must occur “without unreasonable delay”
- ▶ No criteria for what constitutes a “real risk of significant harm”
- ▶ No requirement to notify the individual but notification of the individual is typically recommended by the Alberta Privacy Commissioner

Privacy Breach Reporting Private Sector

Alberta – *Alberta Personal Information Protection Act* (“PIPA”) – s. 34.1

- ▶ Real risk of significant harm
 - Identity theft or fraud
 - Physical harm
 - Risk of hurt, humiliation, damage to reputation
 - Loss of business or employment opportunity

Privacy Breach Reporting Private Sector

- ▶ Notification to the Privacy Commissioner must include: (Alberta PIPA, Regulation section 19)
 - a description of the circumstances of the loss or unauthorized access or disclosure
 - the date on which or time period during which the loss or unauthorized access or disclosure occurred
 - a description of the personal information involved in the loss or unauthorized access or disclosure
 - an assessment of the risk of harm to individuals as a result of the loss or unauthorized access or disclosure

Privacy Breach Reporting Private Sector

- ▶ Notification to the Privacy Commissioner must include: (Alberta PIPA, Regulation section 19), con't
 - an estimate of the number of individuals to whom there is a real risk of significant harm as a result of the loss or unauthorized access or disclosure
 - a description of any steps the organization has taken to reduce the risk of harm to individuals
 - a description of any steps the organization has taken to notify individuals of the loss or unauthorized access or disclosure
 - the name of and contact information for a person who can answer, on behalf of the organization, the Commissioner's questions about the loss or unauthorized access or disclosure

Privacy Breach Reporting Private Sector

Factors to consider when deciding whether to notify affected individuals:

- ▶ Is there a risk of:
 - Identify theft/fraud
 - Physical harm
 - Loss of business or employment opportunities
 - Risk of hurt, humiliation or damage to reputation
- ▶ Would notification jeopardize an investigation
 - If police are involved consult with the police prior to issuing notification
- ▶ Is there a contractual requirement of notification
- ▶ If in doubt, contact the Privacy Commissioner

Privacy Breach Reporting Private Sector

Federal – *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) – s. 10.1 (not yet in force)

- ▶ Organizations will be required to report to the Privacy Commissioner if:
 - There is a breach of security safeguards involving personal information under the organizations control
 - is reasonable to believe that the breach creates a **real risk of significant harm** to an individual
- ▶ Requirement to notify the individual
- ▶ Notification must be given “as soon as feasible” after the breach is discovered

Privacy Breach Reporting Private Sector

Federal –

- ▶ Factors that are relevant to determining whether there is a “real risk of significant harm” – 10.1(8)
 - the sensitivity of the personal information involved in the breach
 - the probability that the personal information has been, is being or will be misused
 - any other prescribed factor
- ▶ Consultation process underway to draft regulations to identify other prescribed factors and what is required in notification

Privacy Breach Reporting Private Sector

British Columbia – *Personal Information Protection Act* (“BC PIPA”)

- ▶ Currently no mandatory privacy breach notification
- ▶ Mandatory privacy breach reporting recommended in both:
 - 2015 Report to the Special Committee to Review PIPA
 - 2016 Report to the Special Committee to Review BC Freedom of Information and Protection of Privacy Act (“BC FOIPPA”) (BC FOIPPA applies to public bodies)
- ▶ Guidelines issued by the BC Privacy Commissioner recommend notification to both the Privacy Commissioner and affected individuals where there is a real risk of significant harm

Presented by:
Nicole Skuggedal
and Sandra MacKenzie



Vancouver

Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary

Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife

P.O. Box 818
200, 4915 - 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500
(F) 867.920.2206
Toll Free: 888.465.7608

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Workplace
Investigations and
Labour Law Update

Ritu Mahil

Direct: 604.631.9156
rmahil@lawsonlundell.com

Katy Allen

Direct: 604.631.9198
kallen@lawsonlundell.com

Workplace Investigations & Labour Law Update

Ritu N. Mahil &
Katy E. Allen



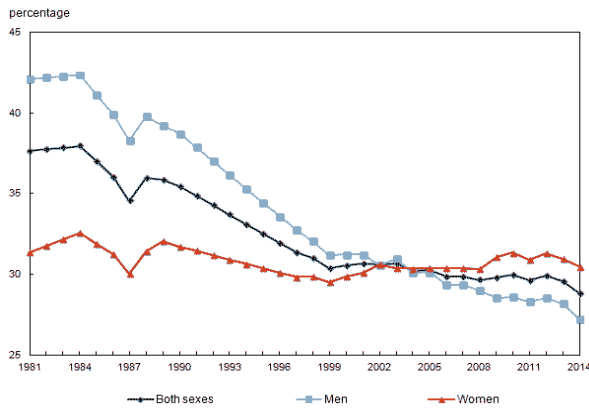
Overview

- ▶ Labour statistics
- ▶ Update on case law:
 - BC Labour Board decisions
 - Arbitration decisions
 - BC
 - Federal
 - Alberta
- ▶ Workplace Investigations



Unionized Landscape – Canada

Unionization rates of employed individuals aged 17 to 64, 1981 to 2014



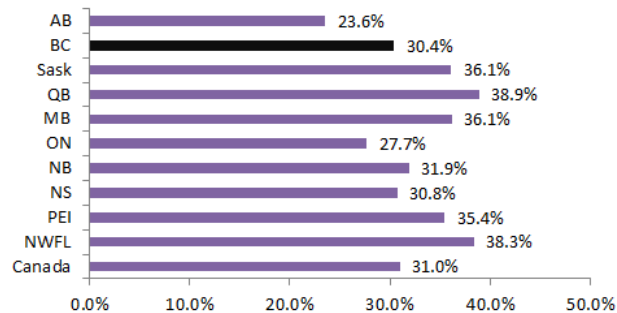
► 31% of employees in Canada are unionized

Source: Statistics Canada



Unionized Landscape – Canada

Union Density by Province (2015)



► Quebec has the highest unionization rate (38.9%)

► Alberta has the lowest (23.6%)

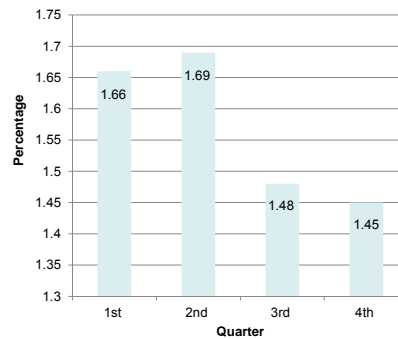
Source: Statistics Canada



Collective Agreement Trends – BC

- ▶ In 2015, 139 collective agreements were concluded
 - 64, 585 employees were impacted
 - 46,111 in public sector
 - 18,747 in private sector
- ▶ 1.61% average wage increase occurred in 2015
 - 1.71% in private sector
 - 1.31% in public sector

Average Quarterly Wage Increases
- 2015



Source: Business Council of British Columbia



Notable Negotiations and Settlements – BC (as of May 2016)

Settlements

- ▶ UBC and Faculty Association of the University of British Columbia
 - 3,320 employees (professors and librarians)
 - Duration of agreement: 24 months; 2.0% annual adjustment

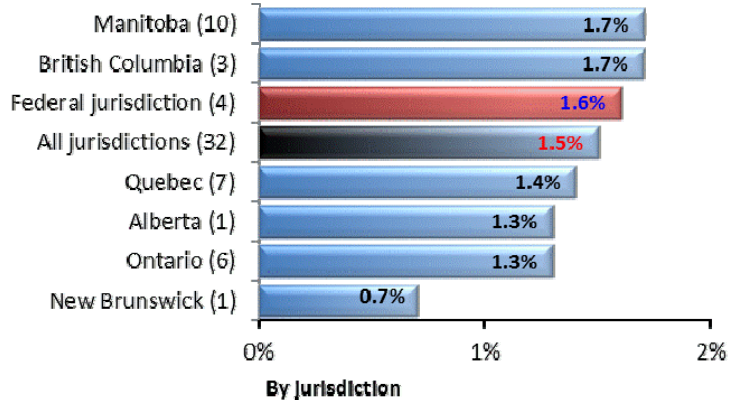
Key Negotiations

- ▶ Public sector
 - City of Vancouver and CUPE/IAFF (2,580 employees)
 - Vancouver Police Board and BC Federation of Police Officers (1,450 employees)
- ▶ Private sector
 - Construction Labour Relations Association of BC (carpenters) and United Brotherhood of Carpenters and Joiners America (5,500 employees)
 - Coast Mountain Bus Company and Unifor (4,700 employees)

Source: Government of Canada Labour Program



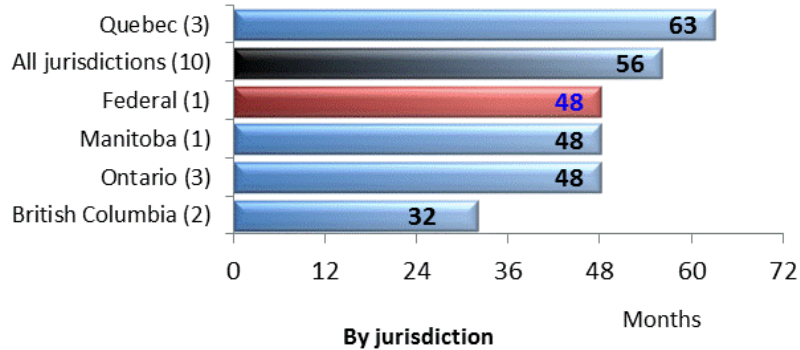
2016 Q1 Wage Settlements – Across Canada



Source: Government of Canada Labour Program



Duration of Collective Agreements reached in March 2016



Source: Government of Canada Labour Program



BC Labour Relations Board – *HEABC v. BC Nurses' Union*

Health Employers Association of British Columbia v. British Columbia Nurses' Union, 2016 CanLII 22163 (BC LRB)

- ▶ Union applied to be certified representative of seven different units composed of psychologists and psychometrists

- ▶ The Board dismissed the application because:
 - Application contrary to Board's policy on partial raids in health care sector
 - Partial raids of bargaining units and development of "classification-specific" units lead to fragmentation and proliferation of bargaining units
 - Increases the potential for industrial instability
 - Applicant Union did not establish compelling reasons to justify fragmenting the bargaining unit and departing from Board policy – employee choice alone is not sufficient reason



BC Labour Relations Board – *Wolverine Coal v. United Steel*

Wolverine Coal Partnership v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 1-42, 2015 CanLII 60287 (BC LRB)

- ▶ The Employer laid off approximately 300 employees without notice and did not provide definite time for recall

- ▶ The Board found that the Employer breached s. 54(1) of the BC Labour Relations Code
 - S. 54(1): employer must provide notice if the employer "introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies..."
 - Lay-offs triggered s. 54(1) because employees left with uncertainty with respect to "security of employment"



BC Labour Relations Board – *Floralia v. United Food*

Certain Employees of Floralia Plant Growers Limited v. United Food and Commercial Workers International Union, Local 1518, 2016 CanLII 10573 (BC LRB)

- ▶ A group of employees applied to decertify the Union
- ▶ Day before the decertification vote, 12 Seasonal Agricultural Workers Program workers arrived from Mexico, got to their lodgings at 10:30 PM, required to vote in decertification vote at 9:30 AM the following morning
- ▶ Board found the Employer's actions constituted an unfair labour practice and violated s. 6(1) of the BC Labour Relations Code
 - Right of employee choice is fundamental to the Code, requires that employees have the opportunity to make inquiries and assess views presented to them
 - Employer's actions denied employees this opportunity and therefore breached s. 6(1)



BC Labour Relations Board – *Fenchurch v. HEABC*

Fenchurch General Insurance Company v. Health Employers Association of British Columbia ("HEABC"), 2015 CanLII 34193 (BC LRB)

- ▶ Employee qualified for long-term disability benefits ("LTD")
- ▶ Fenchurch, the underwriting insurance company, wanted to appeal the decision that the employee qualified for LTD benefits to the Labour Relations Board
- ▶ The Board determined that Fenchurch did not have standing under s. 99 of the BC Labour Relations Code to appeal decision to the Labour Relations Board
 - Fenchurch is not a "party" – not "bound by a collective agreement" and not a person "involved in a dispute" "party involved in a dispute"
 - Fenchurch is not "a party affected by the decision"
 - Board will not exercise discretion to allow Fenchurch to initiate s. 99 application because neither Union nor Employer dispute the decision



BC Labour Relations Board – *Applicant v. BC PSEA*

*Applicant v. British Columbia Public School Employers Association
(The Board of School Trustees of School District No. 36 (Surrey)), 2016
CanLII 9420 (BC LRB)*

- ▶ Grievor discharged from her position as a teacher for failing to follow proper protocol upon student's disclosure of inappropriate sexual touching
- ▶ Applied for reconsideration on basis of new evidence – letter from the mother of student
- ▶ The Board denied leave for reconsideration of the discharge
 - Requirements of new evidence basis for reconsideration were not met
 - Does not meet timeliness requirement – evidence was available at the time of the hearing (mother was called as witness)
 - Does not meet probative value requirement – evidence contains hearsay and double hearsay, statement was not sworn



BC Arbitration Decisions – *Meridian Marine v. Marine Workers Union*

*Meridian Marine Industries Corporation v. Marine Workers Union Local
1, 2016 CanLII 31119 (BC LA)*

- ▶ Grievor fired from position as welder for assisting competitor welding company obtain Lloyd's Register certification
- ▶ Arbitrator upheld discharge
 - Employer has right to ensure employees act in trustworthy way
 - Grievor was not a credible witness – not truthful during arbitration proceedings, changed answer he gave on direct during cross-examination
 - Dismissal was not excessive in light of circumstances
 - Seriousness of Grievor's actions
 - Actions planned in advance
 - Only admitted what he had done once confronted
 - Grievor did not appear to understand nature and consequences of actions
 - Employer's confidence in Grievor's ability to be trusted eroded



BC Arbitration Decisions – *Sobeys v. United Food and Commercial Workers*

Sobeys West Inc. (Safeway) v. United Food and Commercial Workers, Loc. 1518, 2015 CanLII 68542 (BC LA)

- ▶ Grievor was terminated for claiming pay for time not worked
- ▶ Arbitrator determined that discharge was excessive, ordered reinstatement of Grievor with two month suspension without pay
 - Employer established prima facie case of fraud
 - Grievor proved absence of fraudulent intent
 - Difficult systems transition from Safeway to Sobeys and significant stresses in personal life meant that Grievor was “in a blur or fog” that led to Grievor misreporting the time she had worked
 - Arbitrator noted that this was exceptional case



Federal Arbitration Decisions – *Telus v. Telecommunications Workers' Union*

Telus Communications Inc. v. Telecommunications Workers' Union, 2015 BCSC 1570

- ▶ Union filed a grievance when Employer did not involve the Union in the accommodation process when employees sought accommodation for medical disabilities
- ▶ Arbitrator allowed grievance – Union entitled to notice, information, and consultation in all accommodation requests
- ▶ The Court held that arbitrator’s decision was unreasonable
 - Union and Employer did not agree in the collective agreement that Union was entitled to notice, information and consultation during accommodation process
 - Union involvement in accommodation only required in three circumstances: (1) if the Union participated in creating discriminatory rule or policy, (2) if Union agreement is necessary to facilitate accommodation and no alternative is available, and (3) if the employee requests Union involvement



Alberta Arbitration Decisions – *Suncor Energy v. Unifor Local 707A*

Suncor Energy Inc v. Unifor Local 707A, 2016 ABQB 269

- ▶ Employer implemented random drug testing policy at oil sands operation
- ▶ Arbitration panel found policy was an unreasonable exercise of management rights
- ▶ Court overturned arbitration panel's decision on the basis that it was unreasonable and remitted the matter for re-hearing
 - Arbitration panel erred by applying an elevated standard of a "serious" or "significant" drug or alcohol problem
 - Arbitration panel erred by only considering evidence related to members of the bargaining unit rather than evidence of the general workplace as a whole



Alberta Arbitration Decisions – *Calgary v. CUPE*

Calgary (City) v. Canadian Union of Public Employees (Cupe 37), 2015 CanLII 61756 (AB GAA)

- ▶ The Grievor, a heavy equipment operator, received a declaration to use medical marijuana for chronic pain; continued to work for two years
- ▶ Employer gave Grievor two options: stay in non-safety sensitive accommodated position or undergo substance dependency treatment
- ▶ Arbitration Board upheld the grievance
 - Removal of Grievor from position as heavy equipment operator was direct result of his use of medication to treat a disability
 - No evidence that Grievor's use of medical marijuana had an impact on his ability to perform duties in safe manner, no evidence he had exhibited signs of impairment while on duty
 - Employer failed to act honestly, reasonably, and in good faith by relying on flawed investigation and evidence to find a dependency issue
 - Arbitration board imposed conditions on Grievor's including that he be subject to random testing, work performance monitoring, and reduce monthly marijuana intake



Alberta Arbitration Decisions – *Tracker v. Unifor Local 4050*

Tracker Logistics Inc v. Unifor Local 4050, 2016 CanLII 680 (AB GAA)

- ▶ Employer's smoke-free workplace policy extended site smoking ban to employees' private vehicles if vehicles parked on company property

- ▶ Arbitrator upheld policy as reasonable exercise of management rights
 - Main driver of policy was corporation-wide concern for employee wellness
 - Convincing evidence that workplace policies which provide disincentives for smoking help reduce employee smoking, absenteeism, and other costs of employment
 - Substantial connection between Employer's policy and Employer's legitimate interests (including economic interest in reducing number of employees who smoke)



Workplace Investigations

When do they arise?

- ▶ WCB Incidents
 - Complying with statutory obligations

- ▶ Bullying/Harassment Complaints
 - WCB, Human Rights, Discipline

- ▶ Employee Misconduct
 - Discipline, Building a case for just cause

We will be focusing on the last point.



Workplace Investigations

The 'gold standard' of Procedural Fairness:

1. Right to notice of allegations and notice of process/hearing
2. Right to oral or in-person hearing before the decision maker
3. Right to disclosure of information decision maker is using
4. Right to present evidence (including witnesses and testimony) and cross-examination (as well as right to fair evidence)
5. Right to counsel



Workplace Investigations

The 'gold standard' of Procedural Fairness (cont'd):

6. Right to have decision based on the record at hearing along with right to formal reason
7. Speedy hearing
8. Person who decides the case must hear it
9. Personal impartiality and bias
10. Institutional (structural) impartiality and bias



Workplace Investigations

In Labour/Employment situations, level of procedural fairness depends on type of decision being made:

- ▶ For instance, a case of internal Union discipline where expulsion essentially deprives member of livelihood, procedure will be close to the “gold standard”
- ▶ In a minor workplace discipline incident (for instance, warning letter for lateness), procedure will not resemble “gold standard”

Workplace Investigations

Investigation Steps:

1. Receive complaint or observe misconduct
2. Decide who should be in charge of investigation (unbiased)
3. Review any relevant Policies (for instance, Drug and Alcohol Policy, Absenteeism Policy or Call-In Procedure, Bullying and Harassment Policy)
4. Conduct Interviews:
 - Shop Steward present
 - More than one person from Employer present
 - Take careful notes
 - Inform participants of confidentiality
 - Put allegations to employee and provide an opportunity to respond

Workplace Investigations

Investigation Steps, Conduct Interviews (cont'd):

- ▶ Ask open-ended questions
 - Incorrect: "Billy harassed you, right?"
 - Correct: "How would you describe your interactions with Billy in the workplace?"
- ▶ Ask Who, What, When, Where, Why, and How
 - Get specifics "What words did he use?", "What time did this occur?"
 - Ask if there is any other evidence or any other witnesses
- ▶ Consider what evidence you are allowed to use
 - Video/audio evidence
- ▶ Consider the evidence
 - If necessary, go back and conduct further interviews



Workplace Investigations

Investigation Steps (cont'd):

- ▶ Make Decision
 - Write down reasons
- ▶ Determine consequences
 - General: amend/create policies, training
 - Specific discipline for employee – depends on discipline policies and terms of your Collective Agreement: warning, suspension, discharge
- ▶ Communicate outcome to effected parties
 - Discipline/discharge meeting with employee and shop steward
 - Let Complainant (if any) know that the matter has been investigated, general outcome of investigation, and that appropriate corrective measures have been taken
- ▶ Finalize Investigation notes and keep file confidential



Workplace Investigations

Video and Audio recordings:

1. Can you rely on video/audio evidence of misconduct for discipline?
2. Can you videotape or audio record investigation interviews?



Workplace Investigations

Can you rely on video/audio evidence of misconduct for discipline? This depends on:

- ▶ terms of Collective Agreement and Policies
- ▶ whether the recording is central to the issue at hand
- ▶ the reasons for the surveillance, i.e. the basis for the suspicions or mistrust
- ▶ expectations of privacy including the location of the surveillance
- ▶ the degree of surreptitiousness
- ▶ the degree of intrusiveness and the seriousness of the loss of privacy
- ▶ to whom the surveillance was directed (eg., all employees or only individuals about whom there is some suspicion)
- ▶ how the evidence was recorded



Workplace Investigations

Can you rely on video/audio evidence of misconduct for discipline? This depends on (cont'd):

- ▶ when the evidence was recorded, the accuracy and reliability of the taped evidence
- ▶ the efforts made to solve the problem in alternate ways, the availability of other information
- ▶ the existence of previous threats
- ▶ the nature of the previous relationships between the parties involved on the tape
- ▶ whether the admission of the evidence would bring the arbitration process into disrepute or whether that would be the case if the evidence was not admitted

Domtar and CEP, Local 789 ([2000] B.C.C.A.A. No. 285 (McPhillips))



Workplace Investigations

Can you videotape or audio record investigation interviews?

- ▶ Privacy law
- ▶ Criminal law
- ▶ Human Rights law



Workplace Investigations

Scenario



Presented by
Ritu N. Mahil and Katy E. Allen



Vancouver

Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary

Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife

P.O. Box 818
200, 4915 - 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500
(F) 867.920.2206
Toll Free: 888.465.7608

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July 3, 2015

Federal Government Passes Union Spending Bill, Bill C-377

[Katy Allen](#)

The federal government has enacted a new tax law that requires unions to disclose financial information (Bill C-377, *An Act to Amend the Income Tax Act*, passed on June 30, 2015). The bill had been slowly progressing for four years. It was the first private member's bill to proceed to the Senate this session, and its passing was the final legislative act of the 41st Parliament.

An Act to Amend the Income Tax Act brings into effect provisions that require unions to disclose, among other things:

- details of officers or executives who earn over \$100,000;
- financial statements including details of spending, borrowing and accounts receivable;
- details on all contracts over \$5,000, including those with third party vendors; and
- money spent on lobbying, political activities and other non-labour relations activities.

The law will apply to fiscal periods starting on January 1, 2016. This disclosed financial information must be made available to the public by the Minister of Revenue. The enactment carries a fine of \$1,000 for each day that a union contravenes the section, up to a maximum of \$25,000.

Impact

The stated purpose behind the bill is to increase transparency regarding union finances, as unions receive special tax treatment under the *Income Tax Act*. The public, including union members and management personnel, will be able to view unions' financial information.

Whether this bill will remain in effect is uncertain. Both supporters and opponents expect that the law will be challenged in court. Most provinces oppose the bill on the grounds that it is unconstitutional because it allegedly infringes on the provincial regulation of labour. The federal privacy commissioner has taken the position that the bill is overbroad and infringes on privacy rights. Finally, the leader of the Liberal Party of Canada, Justin Trudeau, has announced that he will repeal the bill if his party forms a government in the next election.



Katy Allen

604.631.9198

kallen@lawsonlundell.com

Key Contacts

• **Patricia Gallivan, Q.C.**

(T) 604.631.6718

(E) pgallivan@lawsonlundell.com

• **Rob Sider**

(T) 604.631.6722

(E) rsider@lawsonlundell.com

Team Members

Name	Phone	Email
Katy Allen	604.631.9198	kallen@lawsonlundell.com
Deborah Cushing	604.631.9282	dcushing@lawsonlundell.com
Clara Ferguson	604.631.9175	cferguson@lawsonlundell.com
Patricia Gallivan, QC	604.631.6718	pgallivan@lawsonlundell.com
Sandra MacKenzie	867.669.5503	smackenzie@lawsonlundell.com
Ritu Mahil	604.631.9156	rmahil@lawsonlundell.com
Glen Rutland	867.669.5535	grutland@lawsonlundell.com
Robert Sider	604.631.6722	rsider@lawsonlundell.com
Nicole Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com

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Vancouver

Suite 1600, Cathedral Place
925 West Georgia Street
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(T) 604.685.3456
(F) 604.669.1620



Calgary

Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494



Yellowknife

P.O. Box 818
Suite 200, 4915 – 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500 Toll Free: 888.465.7608
(F) 867.920.2206



April 12, 2016

Manitoba Employment Standards Legislation to Include Leave for Victims of Domestic Abuse

[Katy Allen](#) and Alexandra Hughes

On March 15, 2016, Manitoba gave royal assent to [legislation](#) that will provide employees who are victims of domestic violence with both paid and unpaid leave from work. Titled *The Employment Standards Code Amendment Act (Leave for Victims of Domestic Violence, Leave for Serious Injury or Illness and Extension of Compassionate Care Leave)* (the “Act”), the law is the first of its kind in Canada.

The Act

The purpose of the Act is to assist victims of domestic violence in getting medical attention for themselves or their child, accessing victim services or professional counseling, moving temporarily or permanently, and obtaining legal or law enforcement assistance. The paid and unpaid leave provided for in the Act may only be used by employees for these purposes.

Under the Act, victims are able to take up to five days paid leave. Additionally, they may also take an unpaid leave of up to 10 days intermittently or in a continuous period, as well as up to 17 weeks in one continuous period. The 10 days could be used as needed throughout the year for medical or legal appointments, while the 17 weeks could be used to move into a new home or to recover from a violent incident or relationship.

To be eligible for this leave, the employee must have been employed for at least 90 days and must be a victim of domestic abuse as defined in the Manitoba *Domestic Violence and Stalking Act*, which includes experiencing threatened or actual bodily harm, sexual assault, confinement, and psychological or emotional abuse.

Employers are entitled to “reasonable verification” of the necessity of the leave. While there is no guidance in the legislation as to what might constitute reasonable verification, proof of Court proceedings or medical notes for the employee or their children will likely suffice. Employers must maintain confidentiality in respect of all matters relating to an employee’s leave.

Impact

Ontario has prepared similar [legislation](#), which passed second reading in the Legislative Assembly of Ontario on March 10, 2016 and was referred to Standing Committee on Justice Policy for further study. If passed, employees would have access to 10 days of annual paid leave and an unspecified period of unpaid leave if they or their child experience domestic or sexual violence. Further, the legislation also requires employers to reasonably accommodate employees who have been threatened with domestic abuse or who have experienced such abuse with modified hours of work or an alternate workplace.

Employers in Manitoba may face issues with the collection of evidence for domestic abuse leave. Employees who require the leave are unlikely to want to share such personal information. Additionally, this sort of personal



Katy Allen

604.631.9198

kallen@lawsonlundell.com

information is of the most sensitive nature, as it combines medical evidence with personal/relationship information. We hope that the government may provide further guidelines as to the scope of evidence employers may collect from employees.

Although the Manitoba and Ontario laws only affect employers and employees in those provinces, it appears there is a general social trend towards supporting legislative pressure on employers to allow leave for victims of domestic abuse. As such, it is possible that other provinces may soon follow suit.

Key Contacts

• **Patricia Gallivan, Q.C.**

(T) 604.631.6718

(E) pgallivan@lawsonlundell.com

• **Rob Sider**

(T) 604.631.6722

(E) rsider@lawsonlundell.com

Team Members

Name	Phone	Email
Katy Allen	604.631.9198	kallen@lawsonlundell.com
Deborah Cushing	604.631.9282	dcushing@lawsonlundell.com
Patricia Gallivan, QC	604.631.6718	pgallivan@lawsonlundell.com
Sandra MacKenzie	867.669.5503	smackenzie@lawsonlundell.com
Ritu Mahil	604.631.9156	rmahil@lawsonlundell.com
Glen Rutland	867.669.5535	grutland@lawsonlundell.com
Robert Sider	604.631.6722	rsider@lawsonlundell.com
Nicole Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com

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Vancouver

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Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary

Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife

P.O. Box 818
Suite 200, 4915 – 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500 Toll Free: 888.465.7608
(F) 867.920.2206



April 14, 2016

Recent Developments in Ontario in Employment and Human Rights Law

[Ritu Mahil](#)

There were two interesting developments in Ontario this month in employment and human rights law.

1. Changes to the Occupational Health and Safety Act

[Bill 132](#) received Royal Assent. Important to our employer clients in Ontario are the amendments to the [Occupational Health and Safety Act](#) (OHSA). Bill 132 now expands the definition of “workplace harassment” in the OHSA to include:

- Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; or
- Workplace sexual harassment

Bill 132 clarifies that reasonable action taken by an employer in managing or directing the workplace and workers is not workplace harassment.

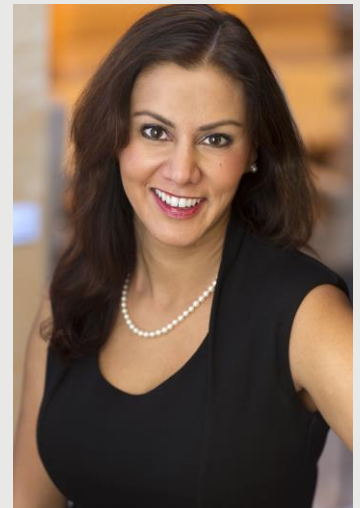
Bill 132 also specifically defines “workplace sexual harassment” as:

- Engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, general identify or gender expressed, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or
- Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Bill 132 requires employers to develop written programs, which must be reviewed annually, to respond to issues of harassment and sexual harassment in the workplace. Further, employers must provide training to their employees on their workplace harassment policy and program.

The changes to the OHSA will come into force on September 8, 2016.

The amendments to Ontario’s OHSA are similar to the Occupational Health and Safety policies in British Columbia which came into effect in 2013. These policies are pursuant to sections 115, 116, and 117 of the *BC Workers Compensation Act*, dealing with workplace bullying and harassment. The policies define bullying and harassment, and explain the duties of employers, workers, and supervisors to prevent and address workplace bullying and harassment.



Ritu Mahil

604.631.9156

rmahil@lawsonlundell.com

2. Miscarriage is a Disability under Human Rights Law

In another Ontario development, the Ontario Human Rights Tribunal has found that a miscarriage may be a disability. The Tribunal, in *Wenyng (Winnie) Mou – and MHPM Project Leaders*, 2016 HRTO 327, acknowledged that a miscarriage may already be covered in the *Human Rights Code* under the ground of sex. However, it found that a miscarriage is itself an ailment which may result in a disability requiring accommodation. The decision is an interim one and it is not clear whether the employee requested accommodation from her employer. The employer had sought to terminate the employment relationship due to performance concerns. The decision indicates that a disability need not be permanent for an employee to seek accommodation in the workplace. Women suffering a miscarriage may seek time from work to recover emotionally and physically. It further confirms the employer’s duty to make inquiries to determine if there was a relationship between the disability and the performance concerns.

Key Contacts

• **Patricia Gallivan, Q.C.**

(T) 604.631.6718

(E) pgallivan@lawsonlundell.com

• **Rob Sider**

(T) 604.631.6722

(E) rsider@lawsonlundell.com

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Deborah Cushing	604.631.9282	dcushing@lawsonlundell.com
Patricia Gallivan, QC	604.631.6718	pgallivan@lawsonlundell.com
Sandra MacKenzie	867.669.5503	smackenzie@lawsonlundell.com
Ritu Mahil	604.631.9156	rmahil@lawsonlundell.com
Glen Rutland	867.669.5535	grutland@lawsonlundell.com
Robert Sider	604.631.6722	rsider@lawsonlundell.com
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(F) 867.920.2206