



LABOUR & EMPLOYMENT LAW SEMINAR

May 31, 2017

Vancouver

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#1 Law Firm in British Columbia,
Alberta and the North

- *Canadian Lawyer* magazine (2010 - 2016)

#1 Regional Law Firm in Canada

- *Chambers Canada* (2015)



Labour & Employment Law Seminar

May 31, 2017

Four Seasons Hotel Vancouver
Vancouver, BC

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 an annual review of the latest developments in employment law; examining emerging and current issues from the human rights perspective and an update for unionized employers on what has happened over the past year in the labour relations field including federal and provincial labour boards and arbitration cases. 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 & 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 at the Four Seasons Hotel Vancouver.

Yours very truly,

A handwritten signature in black ink, appearing to read "M. Patricia Gallivan". The signature is fluid and cursive, with a prominent loop at the end.

M. Patricia Gallivan, QC

LAWSON LUNDELL LLP
Labour & Employment Law Group



Agenda

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

The following sessions will be offered:

1. Employment Law Update: In addition to our annual review of the latest developments in employment law, this session will focus on termination of the employment relationship. We will review when it is appropriate to allege just cause based on recent jurisprudence from across Canada where just cause has been upheld and explore the perils of improperly alleging just cause including the risk of aggravated damages for improper just cause allegations. We will discuss how properly drafted employment contracts can protect employers from lengthy notice periods and ensure employers are properly protected from post termination solicitation and/or competition.

2. Emerging Issues and Human Rights: Three emerging and current issues will be examined from the human rights perspective: legalization of marijuana; gender identity or expression; and bullying and harassment. The federal government intends to legalize the recreational possession and consumption of marijuana sometime in 2018. We will examine how this change may affect your workplace including amending drug and alcohol policies and meeting your duty to accommodate. Gender identity or expression is now a protected ground under human rights legislation in BC and other jurisdictions in Canada. We will consider how gender identity or expression has been interpreted by human rights tribunals and possible implications for the workplace. Finally, employer obligations to investigate and address bullying and harassment complaints in the workplace are significant. We will look at recent decisions and consider steps employers should take to meet their obligations under human rights and occupational health and safety legislation.

3. Case Law Update for Unionized Employers & Social Media Issues in the Unionized Workplace: An update for unionized employers on what has happened over the past year in the labour relations field including federal and provincial labour boards and arbitration cases. Additionally, given the rising importance of employees' online activities, we will review labour arbitration decisions where information acquired from Facebook or other social media postings have been used by employers when imposing discipline or discharge. Finally, we will review the necessary elements for creating an effective social media policy in a unionized environment.



Labour & Employment Law Group

VANCOUVER

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YELLOWKNIFE

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Glen Rutland	867.669.5535	grutland@lawsonlundell.com

M. Patricia Gallivan, QC

Patricia is Senior Counsel in 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.

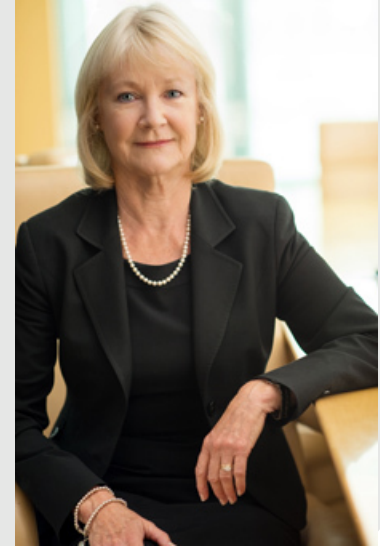
Patricia was appointed Queen's Counsel in 2000.

Recognition and Ranking

- *Chambers Canada*: recognized in the Employment & Labour (British Columbia) and Employment & Labour (Nationwide - Canada) categories
- *Chambers Global*: recognized in the Employment & Labour (Canada) category
- *Canadian Legal Lexpert Directory*: repeatedly recommended as a Leading Practitioner in Employment Law (employer), Labour Relations (management) and Workplace Human Rights (employer)
- *Best Lawyers in Canada*: recognized for Labour and Employment law
- *Legal 500 Canada*: recommended in the editorial for Labour and Employment
- *Who's Who Legal Canada*: recognized for Labour, Employment & Benefits law
- *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
- Canadian Association of Counsel to Employers: Recipient of the 2016 Roy Heenan/Dave Ross Volunteer of the Year Award.
- 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

Senior Counsel

Vancouver

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D'Arcy Oishi

Legal Assistant

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Practices

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

- Canadian Bar Association (BC Branch) (Labour Law, Employment Law, Human Rights Law, Freedom of Information & Privacy Law Subsections), Member
- Inducted as Fellow (2016), US College of Labor and Employment Lawyers
- 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)
- Queen's Counsel, British Columbia (2000)
- 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

- *Canadian Legal Lexpert Directory*: repeatedly recommended as a Leading Practitioner for Employment law (Employer) and Workplace Human Rights law (Employer)
- *Chambers Canada*: recognized in the Employment & Labour (British Columbia) and Employment & Labour (Nationwide - Canada) category
- *Chambers Global*: recognized in the Employment & Labour (Canada) category
- *Best Lawyers in Canada*: recognized for Labour and Employment law
- *Legal 500 Canada*: recommended in the editorial for Labour and employment
- *Benchmark Canada: The Guide to Canada's Leading Litigation Firms and Attorneys*: recognized as a Provincial star for Labour and Employment in British Columbia
- *Martindale-Hubbell International Law Directory*: BV Peer Review rated
- *Who's Who Legal Canada*: recognized for Labour & Employment law

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

- Men's League Director and Coordinator, Tennis BC
- Past President, New Westminster Tennis Club

Bar Admissions

- British Columbia (1991)



Robert A. Sider

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Practices

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

- Alberta (1999)
- Yukon (2010)

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

- "Cause and Effect: Proof and Perils of a Just Cause Allegation", (May 2-3, 2017), HR Conference + Tradeshow 2017, Chartered Professionals in Human Resources of British Columbia and Yukon, Moderator
- "What's New in Employment Law", (June 16, 2016), 2016 Lawson Lundell Labour & Employment Law Seminar, Speaker
- "Environmental Sensitivity and Duty to Accommodate" - OH&S Human Rights Panel, (September 10, 2015), CACE Conference 2015: Halifax, Nova Scotia, Panel Member
- "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
- "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 The Province, (October 3, 2016)
- 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)
- 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



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 Association of Counsel to Employers (CACE), Member
- Canadian Bar Association, Member
- BC Human Resources Management Association, Member

Community Activities

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

Bar Admissions

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

Education

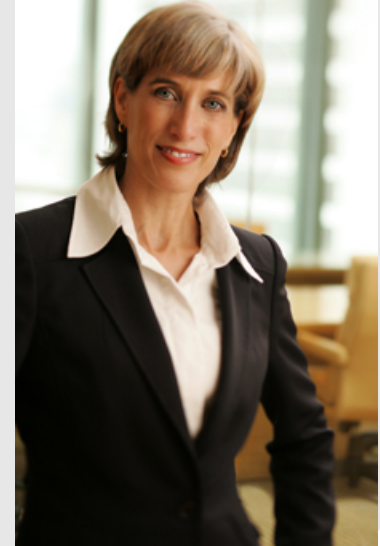
- University of Victoria (LL.B)
- University of British Columbia (Bachelor of Commerce)

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

- "Success with Employment Agreements", (March 2017), Canadian Golf Course Management Conference, Speaker



Deborah Cushing

Partner

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Robinn Habkirk

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Practices

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

- "What's New in Employment Law", (June 16, 2016), 2016 Lawson Lundell Labour & Employment Law Seminar, Speaker
- Latest Developments in Labour Relations (Unionized Employers), (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar
- "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 Vancouver Sun article, "Daphne Bramham: The Americans are coming! The Americans are coming! But will we let them in?", *Vancouver Sun*, (November 11, 2016)
- 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
- Deborah Cushing quoted in The Vancouver Sun article, "Employers face deadline to meet WorkSafeBC anti-bullying rules", (October 29, 2013), Interview
- What you need to know about changes to Canada's Temporary Foreign Worker program, (October 29, 2013), Author
- 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

- Canadian Legal Lexpert Directory 2017: recognized as one of the leading lawyers to watch in the area of Employment law (Employer)
- 2016 *Lexpert Rising Star Award*: recognized as one of Canada's Leading Lawyers under 40
- 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



Nicole K. Skuggedal

Partner

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Robinn Habkirk

Legal Assistant

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Practices

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

- 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
- 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

- "Cause and Effect: Proof and Perils of a Just Cause Allegation", 55th Annual HR Conference & Tradeshow, Vancouver Convention Centre West (May 2, 2017), Speaker
- "Hot Privacy Topics, Coast-To-Coast: Hiring, Health and Hacks", (September 22-24, 2016), 13th Annual Canadian Association of Counsel to Employers (CACE) Conference, Winnipeg, MB, Speaker
- "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

- Video Surveillance and Individual Privacy Rights: BC Privacy Commissioner Issues First Ever Audit and Compliance Report, (December 13, 2016), Author



- CRTC Releases CASL Decision Clarifying the Limits of Implied Consent, (November 3, 2016)
- 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
- 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)



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Practices

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

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

- Vancouver Human Rights and Accommodation Conference 2017, (April 19 - 20, 2017), Lancaster House, Co-Chair
- "The Need for Social Media Policies", (February 3, 2017), Vancouver HR Director's Association Conference, Speaker
- "Workplace Investigations and Labour Law Update", (June 16, 2016), 2016 Lawson Lundell Labour & Employment Law Seminar
- "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
- 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



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.

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

- "Workplace Investigations and Labour Law Update", (June 16, 2016), 2016 Lawson Lundell Labour & Employment Law Seminar
- Latest Developments in Labour Relations (Unionized Employers), (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar

News / Publications

- BC *Human Rights Code* Amended to Include "Gender Identity and Expression", (July 26, 2016), Author
- Manitoba Employment Standards Legislation to Include Leave, (April 12, 2016), Co-author
- 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)



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Practices

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

Katy E. Allen (Cont.)

- 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, practising in the areas of labour and employment, civil litigation, administrative and child protection law. Sandra acts as an advocate for clients in both the Northwest Territories and Nunavut for local and territorial governments, private business and administrative tribunals. She is a problem solver 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

- Chair, Stanton Territorial Hospital Foundation (2013 - Present)
- Chair, Women Lawyers' Forum, Northwest Territories Branch of the Canadian Bar Association, (2015 - Present)
- Past President, Canadian Bar Association, Northwest Territories Branch, President (2013-2014)
- Member of Admissions Committee, Law Society of the Northwest Territories (2011- Present)
- Advocates' Society, Member (2008-Present)

Bar Admissions

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

Education

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

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;
- Acted for both debtors and creditors in collection proceedings in court;



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Practices

- Administrative, Constitutional and Public Law
- Commercial Litigation
- Labour, Employment and Human Rights

Sandra P. MacKenzie (Cont.)

- 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;
- Acted as lead counsel in two Coroner's Inquests 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

- "Update on Labour and Employment law in the North" National Referral Network meeting in Montreal, QC (June 2016)



Sandra P. MacKenzie (Cont.)

- "Human Rights and Privacy Law Update", Lawson Lundell Labour & Employment Law Seminar (June 2016), Speaker
- "Managing Employee Disability and Privacy", (May 28, 2015), 2015 Lawson Lundell Labour & Employment Law Seminar
- "Child and Family Services Act Update", Senior Management Training"Half day training for Director of Family Services in Iqaluit, Nunavut (March 2014)
- 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 quoted in the Yellowknifer, (April 26, 2017), Interview
- Sheila MacPherson and Sandra MacKenzie quoted in Financial Post article, "Chambers Canada 2017: Legal practice in the Arctic requires special expertise", (October 3, 2016)
- Sheila MacPherson and Sandra MacKenzie quoted in the Extra Credit article, "Called to the North", (September 2016), Interview
- Sandra Mackenzie mentioned in the Yellowknifer, (December 4, 2015), Interview
- Labour & Employment Bulletin, (October 9, 2012), Co-Author





Glen Rutland

Glen practices in the areas of employment, litigation and administrative 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.

Recognition and Ranking

- *Chambers Canada 2017*: recognized in the General Business Law: Canadian North and Arctic (Canada) category

Professional Activities

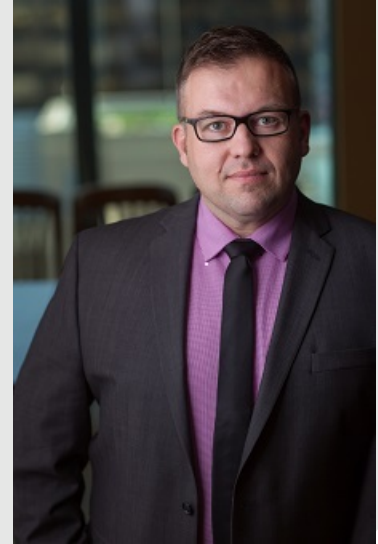
- Law Society of the Northwest Territories, President
- Law Society of Nunavut, Member
- Canadian Bar Association, Member
- Canadian Bar Association, Northwest Territories branch, President (2012-2013)

Community Activities

- Yellowknife Racquet Club, Member
- St. John Ambulance NWT/NU Chapter, Chair
- St. John Ambulance Canada, Member, Priory Executive Committee

Bar Admissions

- Nunavut (2013)



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Practices

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

Glen Rutland (Cont.)

- Northwest Territories (2010)
- Saskatchewan (2010)

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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Sarah J. Smith

Sarah practices labour and employment law. She advises clients on wrongful dismissal, labour relations, labour arbitration, employment standards, employment, contractor and collective agreement, human rights and privacy issues. She has assisted clients with matters at all levels of court and has appeared before the B.C. Provincial Small Claims Court, the B.C. Supreme Court and the Federal Court.

Professional Activities

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

Bar Admissions

- British Columbia (2013)

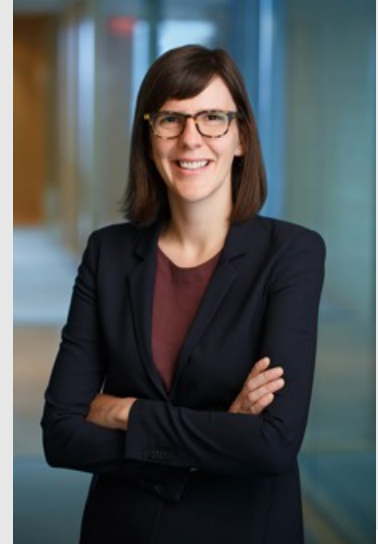
Education

- University of Toronto (J.D., 2012)
- University of Toronto (M.F.E., 2009)
- Queen's University (B.Sc.H., B.A., 2007)

News / Publications

- Honesty is a Defensible Policy: Reference Checks, (May 2017), Author
- Ontario Court of Appeal Judgment a Reminder of the Importance of Carefully Drafted Termination Clauses, (March 2017), Author
- No Common Law Duty Requiring Employers to Reasonably Exercise their Discretionary Contractual Powers in Relation to their Employees, (March 2017), Author

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Employment Law Update 2017



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EMPLOYMENT LAW UPDATE
2017

ROBERT SIDER and NICOLE SKUGGEDAL

BUSINESS LAW

Outline

- Just Cause
 - What constitutes cause?
 - When do improper cause allegations lead to additional damages?
- Statutory Entitlements on Termination
- Common Law Reasonable Notice
- Contractual Protections
 - Termination clauses
 - Restrictive covenants

Termination of Employment

1. Determine if you have just cause
2. Review employment contract
 - Contractual severance
 - Post Termination Restrictive Covenants
3. If no contractual severance or contractual severance provision unenforceable, determine appropriate common law reasonable notice
4. Conduct the termination process in a professional and respectful manner to reduce the risk of additional damages

Just Cause

- If an employer has just cause, no requirement to provide notice or severance pursuant to employment contract or otherwise
- However, under Ontario employment standards legislation, employees are entitled to notice of termination and severance, if applicable, unless the employee is:

“guilty of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”

Just Cause

Contextual Analysis

- The employer must balance the seriousness of the misconduct with other circumstances, including:
 - The nature of the employee's position
 - The employee's length of service
 - The nature of the employer's business
 - The employee's past work record
 - The employee's response to the misconduct
 - The connection between the misconduct and the key duties of the job
 - The employee's personal circumstances
 - Other mitigating circumstances

Just Cause Insubordination

Cotter v. Point Grey Golf and Country Club, 2016 BCSC 10; 2016 BCCA 260 (upheld)

Facts:

- Employee was the Controller of the Point Grey Golf Club
- Point Grey had constructed a pro shop that was not disclosed in a prior tax assessment. Point Grey notified the tax authorities and entered into bypass agreement with tax authority to resolve the issue
- Employee refused to sign management representation letters to auditors as he was concerned the tax issue was a future liability

Just Cause Insubordination

Cotter continued

- Point Grey directed employee to drop the issue multiple times but the employee refused and persisted in attempts to get Point Grey to address issue
- Employee persisted and Point Grey dismissed the Employee for insubordination

Decision:

- Just cause established
- Employee had no legitimate cause to press the issue and disobey unequivocal directions
- Employment relationship irrevocably broken

7

Just Cause Refusal to Accept New Terms of Employment

Nufrio v. Allstate Insurance Company of Canada, 2016 ONSC 2791

Facts

- Employer sought to change the office location and compensation structure for its employees, and provided more than a year's notice of the change
- The employee did not want to accept the changes and tried to negotiate terms with the Employer
- The employer gave the employee a 24 month working notice period with an income guarantee based on prior year's income, and an extended guaranteed income for four additional years
- The employee did not accept the changes and was terminated

Decision

- Just cause established. The Court held that the employer has the right to impose new conditions with reasonable notice, and that the employee has no right to insist on different employment terms
- The employee effectively abandoned the employment by refusing to accept the new terms

8

Just Cause Aggression

Turner v. Atco Frontec Corp, 2016 ABQB 265

Facts:

- Employee provided military dispatch services on a small base in Bosnia
- Employee accused co-worker of theft, took it upon himself to investigate the co-worker and at mediation was obstinate and said “either she goes or I go”
- Employee’s discipline record included a prior warning for getting into a heated altercation with a supervisor. Employee was referred to anger management training but did not attend

Decision:

- Just cause established on the basis that the employer was aggressive and attempted to dictate the terms of employment
- Turner’s conduct was incompatible with a continued employment relationship in the circumstances. The fact that the employee was living in close quarters with other employees was key

9

Just Cause Time Theft

Yorkton Cooperative Association v. Retail, Wholesale Department Store Union, 2016 SKQB 296

Facts:

- Employee was the supervisor of the co-op and was responsible for operating the store independently and ensuring employees followed co-op policies
- An investigation revealed that the employee closed the store early and that the employee did not properly fill out time sheets and instructed subordinates to do the same
- Employee was dishonest in the investigation

Decision:

- Arbitration board substituted the termination for a 4.5 month unpaid suspension
- Saskatchewan Court of Queens Bench overturned the arbitrator’s decision and upheld the termination for cause
- Court held that it was not reasonable to reinstate an employee who the arbitration board found was not trustworthy. A key basis that the court relied upon for establishing just cause was that the employee was guilty of both time theft and lying during the investigation

10

Just Cause Breach of Trust

Fernandes v. Peel Educational & Tutorial Services Limited (Mississauga Private School), 2016 ONCA 468

Facts

- The employee teacher was found to have falsified student grades. His initial submission of grades was sloppy and resulted in his class having grades significantly lower than the school average. When resubmitted, the grades were suspiciously perfect
- Employer investigation concluded he had engaged in academic fraud and the employer terminated for cause
- The trial judge found no just cause because the school released the grades submitted by the employee to the students, indicating the infraction was not so serious that it warranted termination rather than a reprimand

Decision

- The Court of Appeal overturned the lower court and upheld termination for cause. Reasons included:
 - Teachers occupy a special position of trust, and the employee's misconduct went far beyond mere negligence or incompetence
 - The misconduct jeopardized the school's continued operation as an accredited private school, destroyed the employer's trust, and was incompatible with the employee's professional obligations as a teacher

11

Just Cause Breach of Trust

Stock v. Oak Bay Marina Ltd., 2017 BCSC 359

Facts:

- 20-year travel sales agent earned commission and bonus for meeting sales targets based on bookings where the agent had made contact with a guest
- Employees had received a memo 3 years earlier instructing sales agents not to mark guests as contacted where no contact has been made, but the memo did not mention this could be considered grounds for immediate dismissal
- Employee dismissed after the Employer discovered she had been "marking" dozens of guest reservations with her initials despite having had no contact with the guest

Decision:

- The Court found that while the employee's conduct was deceitful, termination was a disproportionate penalty taking into account her age; long employment history; unblemished record; lack of benefit from marking; and lack of clear warning about consequences of marking
- Appropriate sanction would be strong and final warning
- Just cause not established; employee entitled to 13 months' notice

12

Just Cause Poor Performance

Brake v. PJ-M2R Restaurants Inc., 2017 ONCA 402

- Facts
 - 62-year-old McDonalds manager with 25 years' service terminated when she refused to accept a demotion due to poor performance
 - Trial judge found Employee had not been given opportunity to correct performance issues, and that the standards set were not reasonable or attainable
 - By offering demotion or termination, Employer made substantial and fundamental change to employment contract amounting to constructive dismissal without cause
- Decision
 - Court of Appeal upheld decision of trial judge
 - Employee was constructively dismissed; no failure to mitigate by not accepting demotion because no obligation to mitigate by working in an atmosphere of embarrassment or humiliation
 - Employee awarded 20-months' salary, inclusive of common law damages and statutory entitlements

Just Cause Off-Duty Conduct

Merritt v. Tigercat Industries Inc., [2016] O.J. No. 874

Facts

- Employee dismissed after he was criminally charged with sexually assaulting two minors
- The alleged crimes had no relation to the workplace

Decision

- Employer did not justify dismissal based on reputational damage, no justifiable connection to employer or nature of employment
- Employee was one of hundreds of general labourers, not a manager or professional
- Employer did not tender evidence to support its position, and did not conduct an independent investigation

Just Cause Damages

Aggravated Damages

- Compensate dismissed employee for the distress caused by the manner of dismissal, as distinct from the fact of dismissal
- Typically employee needs to prove actual damage

Punitive Damages

- Punish the employer for conduct deserving of rebuke

Just Cause Aggravated Damages

Ram v. The Michael Lacombe Group Inc., 2017 BCSC 212

Facts:

- 24 year Burger King employees dismissed for taking a drink and fries at the end of her shift

Decision:

- Court held that the employee took the food due to a miscommunication and that there was no dishonest intent
- Even if there was dishonest intent, termination was disproportionate in the circumstances
- Employee awarded 12 months' notice plus **\$25,000 aggravated damages**
- Medical evidence not require to demonstrate that false accusations of dishonesty can lead to mental distress

Just Cause Aggravated Damages

Davies v. Canada Shineray Suppliers Group Inc., 2017 BCSC 304

Facts:

- Employee dismissed for alleged incompetence, dishonesty
- Allegations of incompetence included failing to keep proper records and cleanliness of the childcare centre
- At trial the employer produced no records to establish that the employee failed to keep improper records and relied on concerns that had been communicated to the employer by an intermediary but the intermediary did not testify
- Employer sent message to clients which implied that the plaintiff stole school equipment

Decision:

- Just cause not established
- Employer produced no records to establish cause and the allegations on cleanliness were inconsistent with the fact that the daycare passed numerous health inspections
- **Aggravated damages of \$30,000** due, in part, to making unfounded allegations about the employee

Just Cause Aggravated Damages

Doyle v. Zochem Inc., 2017 ONCA 130

Facts

- Supervisory employee with 9 years of service sexually harassed by manager
- In response to sexual harassment complaint, employer conducted a cursory investigation, did not give the Plaintiff an opportunity to respond and then terminated the Plaintiff without cause
- Plaintiff diagnosed with a major depressive disorder as a result of the sexual harassment

Decision

- Trial judge awarded: (i) 10 months common law notice; (ii) \$25,000 for sexual harassment under *Human Rights Code*; and (iii) **\$60,000 aggravated damages**
- Employer appealed
- Court of Appeal awarded full indemnity costs of \$40,000 because pursuit of appeal constituted further oppressive conduct by Employer

Just Cause Aggravated Damages

Bovin et al v. Over the Rainbow Packaging Services Inc., 2017
ONSC 1143

Facts

- Company was having financial trouble, began campaign of harassing senior employees to make them quit
- Employer acted in threatening way, disclosed income to other employees, delivered letters making unfounded complaints, told employee she would no longer be paid for lunch breaks, stared at an employee when she was working, and removed responsibilities to give them to the Employer's daughter
- Employees did not resign but stopped going to work

Decision

- Court found employees were constructively dismissed
- Employer conduct was designed to humiliate employees and was unduly insensitive
- Employees awarded 24 months common law reasonable notice plus **\$15,000 aggravated/moral damages**

Just Cause Aggravated Damages

Cottrill v. Utopia Day Spas and Salons Ltd. , 2017 BCSC 704

Facts

- Employee terminated for poor performance
- New manager discovered performance issues and employee given warning letter
- Employee's performance improved but her attitude continued to be an issue and she was terminated for cause
- Employment contract contained a contractual severance provision limiting notice or pay in lieu to the *Employment Standards Act*

Decision

- No cause – warning letter was ambiguous, employer had already decided to terminate when warning letter issued.
- Contractual severance provision upheld – pay in lieu of notice limited to 8 weeks
- **Aggravated damages of \$15,000** due to the employer dismissing the employee despite improvements in her performance and the courts finding that the employer had decided to dismiss the employee before the end of the trial

Just Cause Aggravated Damages

Strudwick v. Applied Consumer & Clinical Evaluations Inc.,
2016 ONCA 520

Facts

- 56 year old administrative employee with 15 years of service terminated for cause
- Employee had become suddenly deaf; employer began campaign of harassment to force her to resign
- Employee terminated in front of co-workers for insubordination and willful misconduct
- Evidence of diagnosed psychological harm

Decision

- Court **awarded a total of \$246,049** broken down as: (i) 20 months common law reasonable notice; (ii) \$40,000 for breach of *Human Rights Code*; (iii) \$35,294 for intentional infliction of mental suffering; (iv) \$70,000 aggravated damages; (v) \$55,000 punitive damages; and (vi) costs

Just Cause Punitive Damages

Morison v. Ergo-Industrial Seating Systems Inc., 2016 ONSC 6725

Facts

- 58 year old regional manager with 6 years of service terminated. In termination meeting employer alleged cause but offered 5 months. Employer did not pursue cause allegation at trial.

Decision

- Employee awarded 12 months notice
- Employer acted in bad faith. Bad faith was based on: (i) attacking the employee's reputation; (ii) delaying payment of statutory notice because employer knew the employee was in financial difficulty; and (iii) using allegation of cause as part of a negotiation strategy despite no real basis for alleging cause. The finding that the employer had no basis for alleging cause was based on: the employer offered working notice, and that the basis alleged for cause was inconsistent with definition of cause in employee handbook.
- Despite bad faith conduct no aggravated damages because aggravated damages are compensatory and the employee had no evidence of actual damage beyond the usual anguish and stress resulting from termination
- **\$50,000 punitive damages** awarded due to bad faith conduct

**Just Cause
No Aggravated Damages**

Smith v. Pacific Coast Terminals Co., 2016 BCSC 1876

Facts

- 51-year-old Employee was manager with Employer for 16 years, dismissed without cause and offered severance after the Employee failed to ensure permits in place for two projects
- Employer obtained information that the Employee had assisted another employee in employment matters prior to disclosing romantic relationship; divulged confidential information; and stored pornography on his computer
- Employer withdrew offer and alleged cause

Decision

- Employee conduct fell short of cause as the permit issue was an error in judgment and other conduct happened years ago
- The Court awarded 19 months' reasonable notice, but no award of aggravated damages
"The fact the defendant asserted that there was cause and maintained it through trial but was ultimately unsuccessful does not mean in these circumstances that the defendant acted in bad faith"

**Just Cause
No Aggravated Damages**

TeBaerts v. Pental Builders Group Inc., [2015] B.C.J. No. 2388

Facts

- Employee terminated for cause for allegedly deleting files and assisting another senior employee (her father) find another job

Decision

- Cause not established. Employee made an error of judgment and did not intend to be disloyal or dishonest.
- Employer failed to properly investigate allegations or give the employee an opportunity to respond
- Although Employer acted unfairly and dismissal had negative emotional impact, no mental distress markedly beyond normal effect of dismissal
- No aggravated damages awarded

Statutory Notice and/or Severance

British Columbia *Employment Standards Act*

- Section 63

- Employer must provide the following notice of termination:
 - Less than 3 months = no notice
 - 3 months or more but less than 12 months = 1 weeks
 - 1 year or more but less than 3 years = 2 weeks
 - 3 years or more but less than 4 years = 3 weeks
 - 4 years or more but less than 5 years = 4 weeks
 - 5 years or more but less than 6 years = 5 weeks
 - 6 years or more but less than 7 years = 6 weeks
 - 7 years or more but less than 8 years = 7 weeks
 - 8 years or more = 8 weeks
- Can be given as working notice or pay in lieu
- No requirement to mitigate

Statutory Notice and/or Severance

Alberta *Employment Standards Code*

- Section 56

- Employer must provide written notice of termination of at least the following:
 - Less than 3 months = no notice
 - 3 months or more but less than 2 years = 1 week
 - 2 years or more but less than 4 years = 2 weeks
 - 4 years or more but less than 6 years = 4 weeks
 - 6 years or more but less than 8 years = 4 weeks
 - 8 years or more but less than 10 years = 6 weeks
 - 10 years or more = 8 weeks
- Can be given as working notice or pay in lieu
- No requirement to mitigate

Statutory Notice and/or Severance

Ontario Employment Standards Act

- Notice - Section 57

- Employer must provide the following notice of termination:
 - Less than 3 months = no notice
 - 3 months or more but less than 1 year = 1 week
 - 1 year or more but less than 3 years = 2 weeks
 - 3 years or more but less than 4 years = 3 weeks
 - 4 years or more but less than 5 years = 4 weeks
 - 5 years or more but less than 6 years = 5 weeks
 - 6 years or more but less than 7 years = 6 weeks
 - 7 years or more but less than 8 years = 7 weeks
 - 8 years or more = 8 weeks
- Can be given as working notice or pay in lieu
- No requirement to mitigate
- Need to continue benefits during notice period (section 60 Ontario ESA).

Statutory Notice and/or Severance

Ontario Employment Standards Act

- Severance – Sections 64 and 65

- Employer must pay severance pay if:
 - Employee employed with employer more than 5 years, and
 - Employer's annual payroll exceeds \$2.5 million.
- Severance pay is calculated as:
 - employee's regular weekly wage multiplied by:
 - The number of completed years of service; and
 - The number of completed months of employment divided by 12 for a year that is not completed

Statutory Notice and/or Severance

Canada Labour Code – Federally Regulated Employers

- Notice – Section 230
 - Less than 3 months service = no notice
 - 3 months or more service = 2 weeks written notice or pay in lieu
- Severance – Section 235
 - Applies to employees with at least 12 months of continuous service
 - Employee entitled to the greater of
 - 2 days' wages for each year of completed service; and
 - 5 days wages.
- No requirement to mitigate

Statutory Notice and/or Severance

Canada Labour Code – Federally Regulated Employers

- Unjust Dismissal – section 240
 - Provides statutory remedies, including wage loss and reinstatement for unjust dismissal
 - Applies to employees with 12 months of continuous employment
 - Does not apply to:
 - Managers
 - Employees who are dismissed due to lack of work or discontinuance of function
 - Employees covered by a collective agreement

Common Law Reasonable Notice

- Notice can be provided as working notice or payment in lieu of notice
- What constitutes notice?
 - To be effective the notice of termination must be specific, unequivocal and clearly communicated to the employee. The standard is an objective one. The question is, would a reasonable person understand that employment was to end on a specific date? There need not be an offer extended at the same time. Normally, express notice that employment will cease on a specific date is effective notice.

Sutton v. Alaska Air Group, Inc., 2013 BCSC 351, aff'd 2014 BCCA 59

Common Law Reasonable Notice

- Amount of notice is assessed by the courts
- Four factors the courts consider:
 - Nature of position
 - Length of service
 - Employee's age
 - Availability of similar alternate employment
- During notice period employee is entitled to all compensation they would have earned if working
- Employee has a duty to mitigate common law notice but not statutory entitlement (notice, pay in lieu of notice or severance)

Common Law Reasonable Notice – Short Service

Sollows v. Albion Fisheries Ltd., 2017 BCSC 376

- 10 months common law reasonable notice awarded to 60 year old President terminated after approximately 3 years of service

Ly v. British Columbia (Interior Health Authority)., 2017 BCSC 42

- 3 months common law reasonable notice awarded to 38 year old Manager terminated within the probationary period and after approximately 2 months of service

Contractual Termination Provision

- To be enforced, termination provision must be:
 - Clear and unequivocal
 - Meet or exceed the statutory minimum in the applicable employment standards legislation
 - Agreed to by employee in exchange for valuable consideration, ie. offer of employment, promotion. Continued employment is not consideration

Contractual Termination Provision

- Ensure compliance with respective employment standards legislation
 - Alberta
 - *Employment Standards Code* requires the employer to provide “at least” the statutory minimum
 - Termination provisions need to expressly state that the company’s maximum obligation is that set out in the Code and no greater benefit will be provided
 - Ontario
 - Ensure the termination provision includes notice (or pay in lieu), benefits and severance

Kosowan v. Concept Electric Ltd., 2007 ABCA 85

Contractual Termination Provision

Wood v. Fred Deeley Imports Ltd., 2017 ONCA 158

Facts

- Termination Clause:

The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks’ notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph... The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000
- On termination employee was provided with salary and benefits for 13 weeks plus a lump sum payment of 8 weeks
- Under the Ontario ESA employee was entitled to: (i) 8 weeks reasonable notice or pay in lieu; (ii) 8 weeks benefits; and (iii) severance equal to 8 1/3 weeks salary

Decision

- The Court of Appeal held that the termination clause was invalid because it did not reference benefit continuance and did not recognize that notice payments and severance are separate obligations under the *Employment Standards Act* (“ESA”)
- Despite the fact that the employer paid the employee more than she was entitled to under the ESA, the clause was unenforceable and the employee was entitled to 9 months common law reasonable notice

Termination Clause

Covenoho v. Pendylum Inc., 2017 ONCA 284

Facts

- Employee had one year fixed-term agreement with a clause allowing the parties to terminate on two weeks written notice or immediately if the client the employee worked for terminated their contract with the employer
- Employee was terminated in the first three months after refusing criminal background check
- Under Ontario ESA employee can be terminated in the first three months without notice or pay in lieu

Decision

- Court of Appeal held that termination clause must be construed as if the Employee had continued to be employed beyond three months
- Violation of *ESA* after three months rendered the termination clause void
- No early termination clause and employee entitled to the balance of the fixed term contract i.e. one year with no requirement to mitigate

Contractual Termination Provision

- Include a requirement to mitigate
 - If the contract sets a fixed term of notice or payment there is no requirement to mitigate unless the contract contains a mitigation requirement
 - Cannot require mitigation of statutory notice of termination or payment in lieu
- Include a provision that employees are not entitled to notice or pay in lieu in the event of a for cause termination
 - Use caution when including definitions of cause and ensure sufficiently broad
- Require the employee to sign a release to obtain any severance in excess of the statutory minimums
- Consider whether you need non-solicitation and/or non-competition post termination
 - Need to provide consideration i.e. severance in excess of statutory minimum

Bowes v. Gross Power Products Ltd., 2012 ONCA 425

Restrictive Covenants

- Non-Competition
 - Prevents a former employee from competing against a former employer for a specified amount of time and usually within a specific geographic area
- Non-Solicitation
 - Prevents a former employee from soliciting his or her former employer's clients or employees
 - Less restrictive; more likely to be upheld

Restrictive Covenant

- Non-Competition covenants in employment contracts are difficult to enforce
 - More likely enforceable in the sale of a business
- Policy Reasons:
 - Right of the employee to secure alternate employment
 - Public interest in free market and competition
 - Imbalance of power between employer and employee

Restrictive Covenant

Legal Test: *KRG Insurance v. Shafron*, 2009 SCC 6

- Presumption: Non-Competition and Non-Solicitation covenants in employment contracts are prima facie unreasonable and that consideration provided
- Employer bears the burden of demonstrating that the clause is reasonable
- Clause must be reasonable in terms of time, scope and geography

Restrictive Covenant

IRIS The Visual Group Western Canada Inc. v. Park,
2016 BCSC 2059

Facts

- Optometrist entered into an employment contract with a non-competition clause with the following restrictions:
 - Time: 3 years
 - Geographic: 5km from the Employer's place of business
 - Scope: business that competes with the employer defined as:
 - Any entity that dispenses performs [sic] any sort or [sic] prescription or non-prescription optical appliances including eye glasses or sunglasses, vision correcting lenses and contact lenses, or is an optical retail dispensary, optometry clinic, an ophthalmology clinic, or any laser eye surgery centre and/or any location that performs optical refractions and/or complete or partial eye examinations or eye health assessments
- Also a non-solicitation clause that employee would not "solicit, interfere with or endeavour to entice away any customers."

Restrictive Covenant

IRIS, continued

- Employee quit and set up competing business 3.5 km from the Employer's location
- Employee placed add that stated: " Dr. Park looks forward to seeing familiar faces and welcoming new patients."

Decision:

- Non-Competition Clause not enforceable
 - Time and geography were reasonable
 - Scope of business too broad
- Non-Solicitation Clause
 - The add did not violate the non-solicitation provision

Practical Tips - Termination

- Carefully consider the strategic value of alleging cause
 - If cause not alleged at termination, it may be more difficult to uphold cause allegation during litigation
 - Do not allege cause without a reasonable case and do not try to use baseless cause allegations to bolster negotiating position
- Review employment contract
 - If risk that employment contract not enforceable may offer an additional payment in exchange for a release
- Employee's individual circumstances
 - Including medical issues, disabilities and other possible human rights issues, pregnancy, etc.

Thanks for Listening

Presented by



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BC WRONGFUL DISMISSAL AWARDS

May 2016 to May 2017

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Mudrovic v. Engenuity Manufacturing Solutions Ltd.</i> , 2016 BCSC 2573	Project Management Team Leader	\$81,000	7.25 <small>(19 years considered)</small>	48	21	<ul style="list-style-type: none"> The employee was dismissed without cause. The judge considered the employee's combined 19 years of service for the employer and its predecessor in determining the notice period. It was an implied term in the employment contract that the combined service would be recognized.
<i>Bishop v. Rexel Canada Electrical Inc.</i> , 2016 BCSC 2351	Buyer for an Electronics Retailer	\$52,700	27	61	20	<ul style="list-style-type: none"> The employer alleged resignation; the court disagreed. The employee did not fail to mitigate his damages by declining the re-employment offer as there was a breach of trust and animosity between the parties.
<i>Price v. 481530 B.C. Ltd.</i> , 2016 BCSC 1940	Senior Manager	\$77,760	20	47	20 \$50,000 in aggravated damages	<ul style="list-style-type: none"> Constructive dismissal The employee did not fail to mitigate his damages as his illness and treatment limited his opportunities for employment as a manager in a similar business. Employee was entitled to \$50,000 in aggravated damages as the employer made unfounded allegations of dishonesty and was wilfully blind or reckless as to whether pressure would aggravate the employee's medical condition.
<i>Smith v. Pacific Coast Terminals Co.</i> , 2016 BCSC 1876	Manager of Maintenance and Engineering	\$171,190	16.5	48	19	<ul style="list-style-type: none"> The employee was initially terminated without cause. Due to information found on his work computer post-termination, the employer revoked the severance offer and terminated the employee for cause. Wrongful dismissal action allowed. The employee was not entitled to aggravated or punitive damages as the dismissal was considered in a respectful manner and the computer search was done for legitimate reasons.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Cheong v. Grand Pacific Travel & Trade (Canada) Corp.</i> , 2016 BCSC 1321	Director of Sales and Marketing	\$58,080	13	59	14	<ul style="list-style-type: none"> The employee was dismissed without cause. The employer provided two weeks' pay in lieu of notice, relying on a provision in the staff handbook expressly limiting length of notice. The judge found that the provision in the handbook did not have contractual force as neither the handbook nor its termination provisions had been referred to in the employment contract.
<i>Logan v. Numbers Cabaret Ltd.</i> , 2016 BCSC 1473	Cook; Waitress	\$44,800; \$32,136	18; 18	56; 44	14; 14	<ul style="list-style-type: none"> Employment terminated when restaurant closed for renovation and employees were never recalled. The judge placed greater emphasis on the employees' length of service than the menial nature of their roles. The employees failed to discharge their duty to look for alternative employment once they realized there was no prospect the restaurant would reopen. Notice was reduced to 7 months each on account of a failure to mitigate.
<i>Stock v. Oak Bay Marina Ltd.</i> , 2017 BCSC 359	Sales Agent	\$81,792	20	54	13	<ul style="list-style-type: none"> The employee was terminated for improperly marking guest records to benefit her sales activity. The judge found that the misconduct did not justify immediate termination. The judge drew an adverse inference from the employee's failure to disclose details about her new employment and the income earned. She was awarded damages only up to the point where she found new employment.
<i>Glimhagen v. GWR Resources Inc.</i> , 2017 BCSC 761	Chief Financial Officer and Corporate Secretary	\$78,000	12	68	12	<ul style="list-style-type: none"> The employee was fired without notice. The judge found that while the employee had been providing accounting services to the defendant over a period of 23 years, he had only been acting as a dependent contractor and employee for 12 years.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
						<ul style="list-style-type: none"> The employee did not fail to mitigate his damages. It was reasonable for him to have assumed it would be futile to apply to accounting positions that required formal qualifications given that he was self-taught.
<i>Ram v. Michael Lacombe Group Inc.</i> , 2017 BCSC 212	Fast Food Cook	\$21,000	5 (24 years considered)	55	12 \$25,000 in aggravated damages	<ul style="list-style-type: none"> The employee was terminated for taking food and drink at the end of a shift. The employee only worked at the specific franchise for 5 years but the judge took into account the 24 year service at other Burger King locations. A mitigation defence was not made out. Although the employee failed to look for a job, the employer did not establish that she could have found equivalent employment. The Employee was awarded aggravated damages because the employer acted in an unreasonable, unfair and unduly insensitive manner when confronting the employee.
<i>Rock v. Michael's Enterprizes Ltd.</i> , 2016 BCPC 160	Waitress	\$21,213	22	Not provided	12	<ul style="list-style-type: none"> The employee was dismissed when the restaurant where she worked closed for renovations. Although for 3 years she knew that renovations were being discussed, the employer did not give her legally appropriate notice. The judge dismissed the employee's claim. She breached her duty to mitigate by refusing her employer's clear offer of alternative equivalent employment during the renovation period. Had she accepted the position, she would not have suffered any losses.
<i>Schinnerl v. Kwantlen Polytechnic University</i> , 2016 BCSC 2026	University Director	\$99,800	9.5	48	10	<ul style="list-style-type: none"> The employee was terminated as a result of restructuring. Employee obtained a higher-paying job but chose to work only part time. Notice ended when the employee was offered but refused full time work.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Sollows v. Albion Fisheries Ltd.</i> , 2017 BCSC 376	Vice President	\$160,000	2.75	60	10	<ul style="list-style-type: none"> The employee worked for the employer for 19 years. He then worked for a competitor for nine years but returned to the employer after he was offered a position with opportunity for advancement. The summary judge found that the employee's hiatus was of sufficient length that it could not be implied that he would be credited with it in the event of dismissal without cause. Lengthy notice period due to the employee's age and senior management position.
<i>TCF Ventures Corp. v. Cambie Malone's Corp.</i> , 2016 BCSC 1521, 2017 BCCA 129	Chief Financial Officer	\$75,000	3.58		9	
<i>Tsai v. Atlas Anchor Systems (B.C.) Ltd.</i> , 2016 BCPC 406	Professional Engineer	\$70,000	7	30	9	<ul style="list-style-type: none"> The employee was hired as an engineering assistant and entered into an employment contract that contained a termination clause. The employee was terminated without cause. The termination clause was found to be unenforceable since the foundation of the employment contract was eroded when he received his professional engineer designation and his responsibilities substantially changed.
<i>Streng v. Northwestern Utility Construction Ltd.</i> , 2016 BCPC 161	Lineman	\$69,785	3.5	55	4	
<i>Ly v. British Columbia (Interior Health Authority)</i> , 2017 BCSC 42	Manager	\$98,000	0.17	38	3	<ul style="list-style-type: none"> The employee was within the probationary period, but the employer failed to assess his suitability in good faith and therefore the employee was entitled to damages for wrongful dismissal.

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
<i>Gust v. Right-of-Way Operations Group Inc.</i> , 2016 BCSC 1527	“Jack of all trades”	\$99,792	1.08	31	2	
<i>Miller v. Integrated Health Clinic Inc.</i> , 2016 BCPC 440	Medical Laboratory Assistant	\$24,480	1.42	23	1.5	
<i>Technicon Industries Ltd. v. Woon</i> , 2016 BCSC 1543	Construction Estimator	\$60,000	1.08	55	1 Provisional assessment only	<ul style="list-style-type: none"> The judge found that the employee had been dismissed for cause, but stated that one month notice would have been appropriate if there had not been just cause.

Emerging Issues and Human Rights



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Emerging Issues and Human Rights

Deborah Cushing and Sandra MacKenzie

BUSINESS LAW

Outline

- Examine three primary issues
 1. Legalization of recreational use of marijuana in Canada
 2. Gender identity or expression in human rights legislation
 3. Bullying and harassment in the workplace
- For each issue, we will consider
 - Current law and proposed legislation
 - Review of relevant decisions
 - Implications for workplace policies and procedures



Marijuana and the Workplace

- Changing laws and public perceptions regarding use of marijuana
- Employers must balance workplace needs including safety with employee's right to use marijuana



Medical Marijuana

- Regulations to the *Controlled Drugs and Substances Act*
- *Access to Cannabis for Medical Purposes Regulations*
- *Marihuana for Medical Purposes Regulations*
- Must be prescribed by a medical practitioner



Medical Marijuana

- In 2014, Health Canada reported 7,914 registered users of medical marijuana
- In 2016, Health Canada reported 98,460 registered users
- Marijuana is prescribed to treat many conditions and may be taken in a variety of forms
- If employee has a prescription for marijuana, consider if impaired from carrying out any, all or some duties and responsibilities



Recreational Marijuana

- Recreational use of marijuana currently prohibited but federal government has promised legalization
- Task Force issued framework report in November 2016
- In April 2017, two bills tabled to permit the legal growing, possession and recreational consumption of marijuana
- Goal of implementation by July 1, 2018

Recreational Marijuana

- Proposed *Cannabis Act* allows adults (18 years or older) to:
 - Possess up to 30 grams of legal dried cannabis or equivalent in non-dried form
 - Share up to 30 grams of legal cannabis with other adults
 - Purchase dried or fresh cannabis and cannabis oil from a provincially-licensed retailer or online
 - Grow up to 4 cannabis plants to maximum height of 100 cm for personal use
 - Make cannabis products such as edibles at home

Recreational Marijuana

- Provinces and territories would license and oversee the distribution and sale of cannabis
- Provinces and territories may restrict where adults may consume cannabis such as in public or in vehicles
- Criminal sanctions for persons operating outside the legal framework range from tickets to prosecution and imprisonment



Recreational Marijuana

- Penalties for cannabis-impaired driving in related proposed legislation
- Proposed blood test to determine impaired driving under scrutiny
- Task Force found that blood test was not a reliable measurement of impairment



Non-Culpable Use of Marijuana

- Where an employee is a marijuana user, a duty to accommodate under human rights legislation will apply in two instances:
 1. The employee suffers from an addiction; or
 2. The employee has been prescribed marijuana to manage a disability

Medical Marijuana

Brown v. Bechtel Canada and another

- Brown is employed by a contractor on Kitimat aluminium smelter project
- Brown has a prescription for marijuana for chronic back pain
- Brown passes the pre-access drug test and informs the testing service of his prescription
- Brown is later dismissed for use of marijuana at the job site and for failure to disclose
- Tribunal finds that the company had a duty to inquire as to the reason for the prescription
- Application to dismiss denied

Brown v. Bechtel Canada and another, 2016 BCHRT 170

Medical Marijuana

International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP

- Uprichard was employed as a structural assembler on a construction project
- Employer had a zero tolerance policy
- Uprichard passed pre-employment drug test and did not disclose his use of medical marijuana
- Uprichard brought marijuana to the worksite contrary to the policy
- Use of marijuana was discovered after about 5 months of employment without incident
- Uprichard was dismissed for failure to disclose marijuana use, and for possession and use of marijuana at site

Medical Marijuana

- Arbitrator upheld the termination for failure to disclose and possession on the worksite
- On judicial review the Court found just cause for discipline but insufficient analysis of the appropriate penalty
- Case referred back to the arbitrator to determine the penalty taking into consideration that:
 - Uprichard had followed his physician's advice and used the prescription only for the purpose intended;
 - his work record disclosed no problems;
 - he had worked safely on the project; and
 - after discovery the employer had no concerns about safety as it allowed the employee to continue working for 5 days

International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP, 2016 NLTD(G) 192

Medical Marijuana

M obo another v. V Gymnastics Club

- Complainant was a gymnastics coach working with children
- Prescribed marijuana for treatment of gastric conditions, anxiety and depression
- Marijuana use was known to the company
- No concerns were raised with the complainant about her marijuana use and her performance was good
- Company implemented a revised zero tolerance drug and alcohol policy
- Complainant put on indefinite medical leave of absence without pay

Medical Marijuana

- Company takes position that gymnastics coach is a safety sensitive position and her use of marijuana was in breach of policy
- Evidence did not support that the Complainant's work was compromised by marijuana use
- Company failed to show that it had attempted to accommodate the complainant's disabilities other than through complete abstention of her treatment option
- Application to dismiss denied

M obo another v. V Gymnastics Club, 2016 BCHRT 169

Medical Marijuana - Benefits

Skinner v. Board of Trustees of The Canadian Elevator Industry Welfare Trust Fund

- Skinner was prescribed medical marijuana for physical and mental disabilities resulting from an MVA
- Coverage for his prescription cost was denied under the Industry Welfare Trust Plan
- Decision to deny coverage was discriminatory
- Terms of the benefit plan did not exclude medical marijuana coverage and the treatment was medically necessary for Skinner
- No evidence of undue hardship to the respondent
- Adverse effect of depriving coverage comparable to other beneficiaries

Medical Marijuana - Benefits

- Plan ordered to provide coverage
- Result based on terms of the plan but expect to see an increase in requests for coverage for medical marijuana
- Necessary to consider human rights obligations when responding to requests for medical marijuana coverage

Skinner v. Board of Trustees of The Canadian Elevator Industry Welfare Trust Fund, 2017 CanLII 3240 (NS HRC)

Culpable Use of Marijuana

- Where an employee uses or possesses marijuana illegally at work or is impaired at work and is neither addicted nor uses medical marijuana to treat a disability, the employer may discipline the employee
- An isolated act or event of impairment at work does not automatically justify termination
- The circumstances of impairment and the nature of their work in question must be considered prior to discipline

Dziecielski v. Lighting Dimensions Inc., 2012 ONSC 1877

Culpable Use of Marijuana

- An employer may not discipline an employee for consuming marijuana while off duty and off premises if the consumption poses no threat or harm to the company's operations

*Canadian Pacific Railway Company v. Teamsters Canada Rail Conference
Maintenance of Way Employee Division, 2013 CanLII 88312 (CA LA)*

Duty to Accommodate

- If an employee has an addiction, including an addiction to cannabis, the employer is required to accommodate to the point of undue hardship
- Onus is on the employee to provide medical evidence of addiction

United Food and Commercial Workers, Local 373A v. Canada Safeway Ltd., [2006] AGAA No. 23

Employee Duty to Cooperate

- The employer was not required to accommodate absenteeism stemming from substance addiction where the employee concealed the addiction from the employer and refused to seek rehabilitation or treatment

*Telus Communications Inc. v. Telecommunications Workers' Union
(Termination Grievance No. 214.076), [2016] CLAD No. 91*

Medical Marijuana to Manage Disability

- Employer has a duty to accommodate an employee's disability requiring medical marijuana balanced against the employer's duty to ensure a safe workplace
- The duty to accommodate does not require an employee to permit smoking on the employer's premises where reasonable alternatives exist

McDougall v. Nova Scotia (Human Rights Commission), 2016 NSSC 118

Accommodating Substance Dependence

Step 1: Recognize signs

- Changes observed in behaviour may include:
 - Personality changes
 - Appearance of impairment
 - Working in an unsafe manner
 - Absenteeism, tardiness, reduced productivity
- Consider other reasons for behaviour
- Take immediate action if required

Impaired at Work, A guide to accommodating substance dependence, Canadian Human Rights Commission, 2017

Accommodating Substance Dependence

Step 2: Inquire

- Suspicion of drug or alcohol addiction should not be ignored by the employer
- The employer has a duty to inquire about an employee's health when:
 - The employee suggests he or she has a disability;
 - The employee has a prescription for medical marijuana;
 - The employee's conduct gives rise to a suspicion of drug or alcohol abuse; or
 - The employee expresses a desire to be accommodated;
- If a legally compliant drug and alcohol testing policy is in place, the duty to inquire will be triggered by a positive test

Accommodating Substance Dependence

Step 2: Inquire

- More than one conversation may be required
- Employer role is not to diagnose substance dependence or to prescribe treatment
- Identify concerns about performance, attitude, or test results
- Inquire about possible need for accommodation
- Inform employee about available supports such as EFAP

Impaired at Work, A guide to accommodating substance dependence, Canadian Human Rights Commission, 2017

Accommodating Substance Dependence

Step 3: Collect and consider medical information

- Balance employer's right to manage the workplace with employee's privacy rights
- Medical information as to whether employee has a disability, employee's limitations and what accommodations may be required
- Employer should provide information to the physician about the employee's position, work schedule and working conditions

Accommodating Substance Dependence

Step 3: Collect and consider medical information

- Employer not entitled to specific diagnosis or treatment plan
- Employer may ask:
 - Whether the employee has a disability
 - The general nature of the employee's medical condition
 - Any restrictions or limitations related to the disability and the performance of the job, particularly any safety concerns
 - Whether a treatment plan is being followed and how it may affect the employee's behaviour, performance and schedule
 - Recommendations for return to work plan
 - Effects of medications or treatment related to the employee's safe performance of his or her duties

Impaired at Work, A guide to accommodating substance dependence, Canadian Human Rights Commission, 2017

Accommodating Substance Dependence

Step 4: Develop an accommodation plan

Consider available options on an individual basis

Involve employee and union, if applicable

Possible accommodation measures:

Short or long term changes to schedule to allow for treatments and meetings

Re-assignment to an alternative position, particularly if safety-sensitive

Leave of absence to allow for treatment

Access to EFAP

Tolerating at least one relapse

Accommodating Substance Dependence

Step 4: Develop an accommodation plan

- Employer has primary responsibility
- Accommodation plan should be in writing and signed
- Identify specific measures and the conditions employee must satisfy in order to return to work
- Identify contact person for questions
- Identify what changes in behaviour will be considered significant and require updated medical
- Take into consideration other physical or mental disabilities
- Consider a return to work agreement and medical monitoring including drug or alcohol testing

Impaired at Work, A guide to accommodating substance dependence, Canadian Human Rights Commission, 2017

Accommodating Substance Dependence

Step 5: Monitor the accommodation plan

- Follow up with employee and adjust plan as needed
- Consider scheduling follow-up meetings
- Recognize relapse as a characteristic of substance dependence
- Request periodic updates from medical professional
- Maintain confidential records

Impaired at Work, A guide to accommodating substance dependence, Canadian Human Rights Commission, 2017



Drug and Alcohol Policy

- Introducing a drug and alcohol policy
 - Key = reasonableness – balancing employee’s right to privacy and employer’s legitimate business interests in maintaining safety
 - Testing generally upheld for safety sensitive positions in safety sensitive industries
 - Address possession of drugs/alcohol and impairment at work
 - Address over the counter or prescription medications and impairment at work



Drug and Alcohol Testing Policy

- Appropriate mandatory drug and alcohol testing policies
 - Reasonable Cause
 - Post incident where the condition of the employee is seen as a reasonable line of inquiry
 - Return to work following treatment for drug or alcohol dependency

Drug and Alcohol Testing Policy

- Random testing is generally not acceptable
- Unless legislative requirement – ie. Transport Canada
- Consider impact of legalization of marijuana in Canada

Drug and Alcohol Testing Policy

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission

- Injunction application of union seeking to restrain universal random drug and alcohol testing by TTC denied
- TTC to randomly test 20% of workforce up to executive level
- Evidence of substance abuse issues in workplace and in Ontario more generally
- Random testing would increase public safety and any privacy breach compensable by damages
- Policy still subject to grievance arbitration

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017 ONSC 2078



Gender Identity and Expression - Legislative Changes

- In July 2016, British Columbia joined Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, the Northwest Territories and Nunavut to explicitly protect gender identity and/or gender expression under its human rights legislation
- Northwest Territories, Manitoba, and Saskatchewan protect gender identity only



Gender Identity and Expression - Bill C-16

- Proposed amendments to the *Canadian Human Rights Act* and the *Criminal Code*
- Adding gender identity and expression as prohibited grounds
- Passed in the House of Commons, referred for third reading in the Senate March 18, 2017

Genetic Non-Discrimination Act

- Received Royal Assent on May 4, 2017
- Amends Part 3 of *Canada Labour Code* (employment standards) to prohibit requiring an employee to undergo a genetic test or reveal any result from a genetic test. Also prohibits disciplinary action based on a genetic test
- Genetic test analyses the employee's DNA, RNA, or chromosomes for purposes such as the prediction of disease, monitoring or prognosis. Relevant as genetic tests could reveal gender of an employee
- Amends *Canadian Human Rights Act* to add genetic characteristics as a prohibited ground

Definition of Gender Identity and Expression

- Legislation passed to date does not define gender identity or expression
- BC Human Rights Tribunal provides the following descriptions on its website:
 - Gender expression is how a person presents their gender. This can include behaviour and appearance, including dress, hair, make-up, body language and voice. This can also include name and pronoun, such as he, she or they. How a person presents their gender may not necessarily reflect their gender identity
 - Gender identity is a person's sense of themselves as male, female, both, in between or neither. It includes people who identify as transgender. Gender identity may be different or the same as the sex a person is assigned at birth

Definition of Gender Identity and Expression

- Ontario Human Rights Commission Policy on Preventing Discrimination because of Gender Identity and Gender Expression
- Includes definitions of gender identity, gender expression and transgender
 - Trans or transgender is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer

Gender Identity and Expression - Employment

Vanderputten v. Seydaco Packaging Corp.

- Employee was transitioning from male to female and started the process of sex re-assignment
- Employee alleged that she was harassed, subjected to a poisoned work environment, and dismissed in violation of the *Human Rights Code*
- Issue whether various incidents in the workplace ending in termination were related to gender identity
- Employee found to be subject to a poisoned work environment, through harassing comments about her gender and being required to use the men's change room

Gender Identity and Expression - Employment

- Employer failed to properly investigate and respond to employee's allegations that she was being harassed. Tribunal also found that gender identity was a factor in dismissal
- Awarded \$22,000 for injury to dignity, feelings and self-respect, and lost wages for eight months
- Employer ordered to develop a formal human rights policy that includes a mechanism for complaints, and to provide training on the *Human Rights Code* to all managers

Vanderputten v. Seydaco Packaging Corp., 2012 HRTO 1977

Gender Identity and Expression – Services/Facilities

Salsman v. London Sales Arena Corp.

- Four applicants alleged discrimination with respect to facilities on the basis of sex, specifically gender identity, as transgendered persons
- One applicant had booth at a market which was staffed or tended by three applicants who identified as transgender
- Claim discrimination based on reaction by the respondent manager and owner of the market and comments made during a phone call and a community radio interview
- Applicants awarded between \$5,000-\$20,000 each for injury to dignity, feelings, and self-respect
- Respondents and their management staff were also ordered to take "Human Rights 101" from the Ontario Human Rights Commission; download and review the Commission's policy on preventing discrimination because of gender identity/gender expression; and required to post *Human Rights Code* cards in the market

Salsman v. London Sales Arena Corp., 2014 HRTO 775

Gender Identity and Expression – Services/Facilities

Lewis v. Sugar Daddys Nightclub

- Applicant identifies as transgender male
- Applicant in the men’s bathroom when he was forcibly removed from nightclub by security
- Tribunal found that the conduct of the security guards was directly related to the applicant’s gender identity and expression
- \$15,000 awarded to the applicant for injury to dignity, feelings, and self-respect
- Tribunal ordered the Respondent to provide human rights training to its employees, management and staff specifically on the issue of gender identity and expression

Lewis v. Sugar Daddys Nightclub, 2016 HRTO 347

Gender Identity and Expression – Privacy

Order F2016-26, Alberta Office of the Information and Privacy Commissioner

- Complainant was a female transgender student attending public school in Edmonton
- Complaint that the Public Body disclosed her personal information in contravention of the *Freedom of Information and Privacy Act* when teachers displayed or called out her legal name, which is a typically male name
- Adjudicator found that the Public Body disclosed the Complainant’s personal information (her name, sex, and that her gender identity was different than her sex at birth) in breach of the Act
- Public Body failed to make proper security arrangements but a guide created after these breaches to support transgender students and families addressed the concerns raised by the Complainant

Order F2016-26, 2016 Canlii 82100, Alberta Office of the Information and Privacy Commissioner

Gender Identity and Expression – Employment

Browne v. Sudbury Integrated Nickel Operations

- Complaint of a cis-gendered male (born male and identified as male), who challenged the employer's clean shaven policy as discriminating against him on the basis of sex and gender expression
- Equipment operator required to be clean shaven to ensure fit of a respirator mask
- Complainant argued that his beard was part of his gender expression
- "[I]n my view, interpreting "gender expression" broadly to extend protection to the right of men to grow beards would do violence to the important and fundamental purposes sought to be achieved by human rights legislation. There is nothing to indicate that bearded men suffer any particular social, economic, political or historical disadvantage in Canadian or Ontario society, absent any connection between the wearing of a beard and matters of religious observance or perhaps some link to a protected ground in the Code other than sex or gender expression."
- Complaint dismissed as having no reasonable prospect of success

Browne v. Sudbury Integrated Nickel Operations, 2016 HRTO 62

Practical Implications for Employers

- Update any anti-discrimination policies to add reference to gender identity and expression as prohibited grounds
- Review current policies and practices that may touch on gender identity and expression, including dress codes, access to washrooms, and availability of leave for treatment related to gender identity
- Allow employees to indicate and require others to use their preferred name and choice of pronoun
- Educate employees and management about the new grounds and revised policies



Harassment

- In BC, occupational health and safety requirements regarding bullying and harassment were put into effect in November 2013
- The employer is obligated to have a policy, complaint and investigation procedure, and provide training
- Other jurisdictions have implemented bullying and harassment provisions under occupational health and safety legislation
- For employers operating in multiple jurisdictions, important to review policy for compliance in each province or territory



Harassment

- Currently BC, Saskatchewan, Manitoba, Ontario, and NWT have bullying and harassment provisions under OH&S legislation
- Alberta has introduced a bill to implement bullying and harassment provisions
- OH&S obligations are in addition to those under human rights legislation/jurisprudence
- Challenge for employers as protected grounds under human rights legislation may differ from protected grounds named under OH&S legislation

Harassment

- In BC, WorkSafeBC reports over 11,400 bullying and harassment enquiries since November 1, 2013 to December 31, 2016
- On average about seventy enquiries a week
- WorkSafeBC will investigate such complaints to determine if the employer has a policy, has provided training, and has investigated the individual's complaint appropriately
- Determine whether WorkSafeBC requests relate to prevention or claims or both
- Obligation to respond to documents request from WorkSafeBC

Harassment

- An employee may make a wage loss claim if he or she has a diagnosed mental disorder predominately caused by significant work related stress including bullying and harassment

Harassment - Civil Claims

Doyle v. Zochen Inc.

- Doyle supervised an all male group of refinery workers
- The plant maintenance manager sexually harassed Doyle and made frequent inappropriate and belittling comments
- Doyle made a sexual harassment complaint
- Because the company planned to dismiss Doyle, the employer did only a cursory investigation and 5 days later dismissed Doyle without cause
- The trial court found wrongful dismissal and awarded a reasonable notice period of 10 months

Harassment - Civil Claims

- The court awarded an additional \$60,000 in moral damages related to the manner of dismissal
- The court also awarded \$25,000 for damages under human rights because the company had failed to meet its obligation to properly investigate the complaint
- Damages were upheld on appeal as the moral and human rights damages serve different legal purposes

Doyle v. Zochen Inc., 2017 ONCA 130

Dismissal for Bullying & Harassment

Ontario Public Service Employees Union, Local 245 v. Sheridan Institute of Technology and Advanced Learning

- Long service college employee in co-op education department with history of bullying and harassment
- Progressive discipline for disrespectful and aggressive conduct
- After final incident, employment terminated
- Arbitrator held that dismissal was justified

Dismissal for Bullying & Harassment

- Employer is entitled to expect employees will treat one another with respect
- Employee engaged in harassing behaviour contrary to policy, including offensive and derogatory comments, false accusations, and bullying, creating poisoned work environment
- Continued employment would have been contrary to obligations under collective agreement, OH&S legislation and college policy

Ontario Public Service Employees Union, Local 245 v. Sheridan Institute of Technology and Advanced Learning

Workplace Harassment Investigations

Important to have investigation process which may include these steps:

- Receive complaint or observe misconduct
- Decide who should be in charge of investigation
- Review any relevant policies
- Conduct interviews and collect evidence
- Address confidentiality
- Keep notes
- Make determination and decide consequences
- Communicate outcome to effected parties
- Finalize investigation notes and keep records confidential

Thanks for Listening

Presented by Deborah Cushing and
Sandra MacKenzie



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Case Law Update for Unionized Employers & Social Media Issues in the Unionized Workplace



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Case Law Update for Unionized
Employers & Social Media Issues
in the Unionized Workplace

Ritu Mahil & Sarah Smith
March 31, 2017

BUSINESS LAW

Presentation Overview

1. Case Law Update
2. Social Media Policies
3. Collective Bargaining Statistics

1. Case Law Update

BC Labour Relations Board Decisions

ECN Hotel Mgt (Tally-Ho Hotel), BCLRB No. B 159/2016

- Section 54 of the *BC Labour Relations Code* requires employers to give 60 days notice of any change in terms & conditions of employment to significant number of employees
- Employer sent notice of closure of hotel to union and all staff within 60 days. Put hotel up for sale
- Union alleged Employer violated s. 54 because hotel did not sell

BC Labour Relations Board Decisions Continued

ECN Hotel Mgt (Tally-Ho Hotel), Continued

Decision:

- Employer did not violate s. 54 because it provided 60 days notice and engaged in good faith discussions
- Confirmed: at time s. 54 notice is issued, an employer “may have a very clear idea of the direction it plans to go” and “is entitled to conduct its business”
- When notifying union of intention to make change, employers do not have to provide details if they are not available
- The intention to close the hotel was sufficient. Sale did not matter

BC Labour Relations Board Decisions Continued

Working Enterprises Consulting and Benefits Services Ltd . V. United Food and Commercial Workers International Union, Local 1518, BCLRB No. B67/2016

- Union applied to certify a unit of four employees based on electronically signed and dated membership cards
- Board cautioned against using employer’s email system to send/receive electronic union membership cards due to confidentiality obligations under s. 124 of the *BC Labour Relations Code*

BC Arbitration Decisions

Prince George (City) v. PG Firefighters Local 1372 (Williams), [2016] B.C.C.A.A.A. No. 114

- Arbitration for dismissal for dishonesty
- Grievor found in possession of stolen property of over \$ 5,000 (boat & trailer)
- Employer argued termination warranted: grievor was dishonest & expectations higher because of his position

BC Arbitration Decisions Continued

Prince George (City) v. PG Firefighters Local 1372 (Williams), Continued

Decision:

- Grievance allowed. Employee reinstated (with no damages for loss of pay or benefits)
- Isolated incident; not likely to repeat
- While employer could “not be faulted for lack of trust”, there was not a sufficient nexus between the grievor’s misconduct and his duties to warrant termination
- Media attention and embarrassment were considered part of the penalty

BC Arbitration Decisions Continued

Prince George (City) v. PG Firefighters Local 1372 (Williams), Continued

When terminating for conduct away from the workplace, onus is on employer to prove:

1. Conduct of grievor harms the company's reputation or product;
2. Grievor's behaviour renders the employee unable to perform his or her duties satisfactorily;
3. Grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him/her;

BC Arbitration Decisions Continued

Prince George (City) v. PG Firefighters Local 1372 (Williams), Continued

4. Grievor guilty of a serious breach of the Criminal Code and/or conduct injures reputation of the employer; and
5. Grievor's conduct makes it difficult for company to carry out its function or manage its workforce.

Not all criteria have to be met but must show that employee's off-duty conduct was wholly incompatible with continuation of employment relationship

Canada Industrial Relations Board Decisions

FedEx Freight Canada, Corp. v. Teamsters Local Union No. 31, 2017 FCA 78

- In January 2013, Employer opened a service centre where it had previously used third-party agents to deliver freight in BC
- In September 2014, Union certified as bargaining agent for some service centre employees
- At outset of bargaining, Employer informed Union that it decided to close the service centre and return to the third-party model

Canada Industrial Relations Board Decisions Continued

FedEx Freight Canada, Corp. v. Teamsters Local Union No. 31, Continued

Canada Industrial Relations Board found:

- No bad faith bargaining and no violation of the freeze conditions on employment
- Contrary to the *Canada Labour Code*, discrimination based on union participation and interference with union representation

Union and employer both applied for and were denied reconsideration of the original decision and the decision was also upheld on appeal

Canada Industrial Relations Board Decisions Continued

FedEx Freight Canada, Corp. v. Teamsters Local Union No. 31, Continued

Board ordered a remedy that would require the Employer, in the event of a closure of the service centre, to ensure that:

- Every unionized employee would be offered employment by any third party agent on similar terms and conditions; and
- The Union is recognized as the representative of every unionized employee if the employees of any third-party agent are not represented by a different trade union

BC Arbitration Decisions

Sunrise Poultry Ltd. v. United Food and Commercial Workers' Union (Unjust Termination Grievance), [2016] B.C.C.A.A.A. No. 53

- Grievance regarding dismissal of employee for excessive absenteeism
- To establish just cause for excessive absenteeism, employer must show:
 - History of excessive absenteeism;
 - Inability to satisfactorily attend in the future; and
 - If absences leading to dismissal are in part due to a disability under the *Human Rights Code*, dismissal based on a *bona fide* occupational requirement

BC Arbitration Decisions Continued

Sunrise Poultry Ltd. v. United Food and Commercial Workers' Union (Unjust Termination Grievance), Continued

Decision:

- Grievance denied
- Grievor had twice been dismissed and reinstated for absenteeism in past, had been warned and had a deleterious effect on production through absences

BC Arbitration Decisions Continued

Sunrise Poultry Ltd. v. United Food and Commercial Workers' Union (Unjust Termination Grievance), Continued

- Grievor's absences typically were for one day and were prompted by a variety of unrelated ailments. Employer attempted to address absenteeism through notices and previous dismissals
- Grievor's trouble with kidney stones, which caused some of his recent absences, was not a disability for the purposes of the *Code*

Federal Labour Arbitration Decision

Telus Communications Inc. v. Telecommunications Workers' Union, 2017 BCCA 100

- Review of arbitration decision
- Arbitrator's decision quashed which had upheld grievance claiming Union has right to receive notice from employer of all requests made by employees covered by collective agreement for accommodations to address a medical disability

Federal Labour Arbitration Decision


Telus Communications Inc. v. Telecommunications Workers' Union, Continued

Court of Appeal Held:

- Union has obligation to engage in accommodation process when its participation is required to alleviate application of collective agreement; and
- Non-discrimination provision in the collective agreement did not provide basis for Union to participate in all employee requests for accommodation, and Union's submission wrongly anticipated circumstances of discrimination where none may ever exist.



2. Social Media Issues in the Unionized Workplace



Section Overview

- What is a social media policy?
- Why have one?
 - Legal test for off-duty conduct
 - Review recent case law
- Takeaways and tips

What is a Social Media Policy?

- A **social media policy** (also called a social networking policy) is a corporate code of conduct that provides guidelines for employees posting content on the Internet both during and after work hours
- Social Media = Facebook, Twitter, Instagram, Reddit, blogs, etc.

Why Have One?

- To protect your reputation
- To control your online and social media presence
- To ensure productivity in the workplace
- To establish just cause for breach of a social media policy

Legal Test for Off-Duty Conduct

1. Harms the company's reputation or product;
2. Renders the employee unable to perform his or her duties satisfactorily;
3. Leads to the refusal, reluctance, or inability of other employees to work with the employee; or
4. Makes it difficult for the company to properly carry out its function of efficiently managing its works and efficiently directing its workforce.

Social Media Case Law

Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518, BCLRB No. B190/2010

- Threatening and derogatory Facebook posts
- No expectation of privacy
- Damaging to employer
- No social media policy

Social Media Case Law Continued

Alberta v. Alberta Union of Provincial Employees, 2008
CanLII 88488

- Employee had blog posts
- Used less than kind terms to describe co-workers (identified by pseudonyms) and management
- Actions were insubordination

Social Media Case Law Continued

Kim v. International Triathlon Union,
2014 BCSC 2151

- Senior employee
- Compared communications with boss to abuse from her mother and described excessive alcohol consumption at a workplace party
- No social media policy
- Wrongfully dismissed; no warning

Social Media Case Law Continued

Maxam Bulk Services v. International Union of Operating Engineers, Local 115 (Lebrun Grievance),
[2015] B.C.C.A.A.A. No. 72

- Facebook posts and comments about the employer and its largest BC customer
- Remorseful
- No social media policy

Social Media Case Law Continued

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance),
[2016] O.L.A.A. No. 267

Facts:

- Union grieved employer's use of Twitter
- Employer had set up a Twitter account with the handle of @TTChelps
- Tweets received by @TTChelps included innocuous requests for information, compliments, criticisms of the service provided by the TTC and complaints about TTC employees

Social Media Case Law Continued

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance), Continued

Facts:

- Tweets received by @TTC also included language that was vulgar, offensive, abusive, racist, homophobic, sexist, and/or threatening and directed towards union members

Social Media Case Law Continued

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance), Continued

Decision:

- TTC failed to take all reasonable steps and practical measures to protect bargaining unit employees from harassment by members of the community as required by Ontario's *Human Rights Code*, the applicable collective agreement and TTC's Workplace Harassment Policy
- TTC responded inadequately to certain tweets and should request that an offensive tweeter immediately delete his or her offensive tweet and advise him or her that if he or she does not remove the tweet that he or she will be blocked

Social Media Case Law Continued

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance), Continued

Decision:

- TTC should direct individuals with complaints received by @TTChelps to the appropriate phone number and website with the appropriate complaint procedure
- Union denied an Order requiring TTC to shut down @TTChelps
- Parties were given opportunity to confer regarding solution in light of arbitrator's award

Social Media – Key Takeaways

1. Set clear standards for your employees:
 - Confidentiality
 - Acceptable standards of conduct
 - Consequences of breach
2. Opportunity for education
3. Reflect corporate culture



Other Helpful Tips

1. Involve everyone in drafting
2. Make it sufficiently broad and prospective
3. Emphasize caution and good judgment
4. Identify “acceptable uses”
5. Clear and simple policy terms and enforcement
6. Incorporate into training



3. Collective Bargaining Statistics

Wage Settlement Data, First-Year Increases

MONTHS	Number of Contracts			Avg. First-Year Wage Increases, %		
	Public Sector	Private Sector	All Agreements	Public Sector	Private Sector	All Agreements
2016						
Feb/Mar	3	6	9	1.8	1.5	1.6
Apr/May	12	22	34	1.6	2.0	1.8
June/July	6	3	9	1.3	1.6	1.5
Aug/Sept	4	14	18	1.2	1.9	1.8
Oct/Nov	9	18	27	1.7	1.6	1.7
Dec/Jan	10	19	29	1.4	1.8	1.6
2017						
Feb/Mar	5	16	21	2.4	1.2	1.6
Total/Avg Past 12 months	45	89	134	1.6%	1.7%	1.6%

Finance Sector

Parties :

Interior Savings Credit Union (Thompson)

AND

British Columbia Government &
Service Employees' Union

Contract Expiry: February 28, 2015; 64 unionized employees. The parties have ratified a 3-year agreement effective March 1, 2015 to February 28, 2015 that provides general wage increases as follows:

Mar 1, 2015	2.00%
Mar 1, 2016	2.00%
Mar 1, 2017	2.00%

Finance Sector

Parties :

Lake View Credit Union
AND
British Columbia Government &
Service Employees' Union

Contract Expiry: June 30, 2016; N/A unionized employees. The parties have ratified a 3-year agreement effective July 1, 2016 to June 30, 2019 that provides general wage increases as follows:

July 1, 2016	1.50%
July 1, 2017	2.00%
July 1, 2018	2.00%

Finance Sector

Parties :

VantageOne Credit Union
AND
MoveUp (Canadian Office & Professional Employees)

Contract Expiry: Nov 30, 2016; N/A unionized employees. The parties have ratified a 3-year agreement effective Dec 1, 2016 to Nov 30, 2019 that provides general wage increases as follows:

Dec 1, 2016	1.00%
Dec 1, 2017	1.00%
Dec 1, 2018	1.00%

Note: Ratified by 78%

Food & Beverage Sector

Parties :

Aramark Canada (UBC Okanagan Campus)
AND
United Food & Commercial Workers Local 247

Contract Expiry: June 14, 2015; 90 unionized employees. The parties have ratified a 4-year agreement effective June 15, 2015 to June 14, 2019.

Note: Ratified by 88%; wage increase details not yet available

Food & Beverage Sector

Parties :

J & L Beef
AND
United Food & Commercial Workers Local 1518

Contract Expiry: Aug 31, 2014; N/A unionized employees. The parties have ratified a 5-year agreement effective Sep 1, 2014 to Aug 31, 2019 that provides general wage increases as follows:

Sep 1, 2014	2.30%
Sep 1, 2015	2.30 %
Sep 1, 2016	2.30 %
Sep 1, 2017	2.30 %
Sep 1, 2018	2.30 %

Note: 2.3% increases for top level of each classification; 2.0% for each wage scale below the top level

Trades and Services Sector

Parties :

Konica Minolta Business Equipment
AND
Canadian Office & Professional Employees Local 378

Contract Expiry: Mar 31, 2015; 53 unionized employees. The parties have ratified a 3-year agreement effective Apr 1, 2015 to Mar 31, 2018 that provides general wage increases as follows:

Apr 1, 2015	0.00%
Apr 1, 2016	2.00%
Apr 1, 2017	2.00%

Note: Final two-year wage increases contingent upon company profit plan being achieved. If not, Apr 2016 increase will be 1.5% and Apr 2017 increase will be 2.0%.

Trades and Services Sector

Parties :

Teck Coal Limited (Elkview)
AND
United Steelworkers Local 9346

Contract Expiry: Oct 31, 2015; 710 unionized employees. The parties have ratified a 5-year agreement effective Nov 1, 2015 to Oct 31, 2020 that provides general wage increases as follows:

Nov 1, 2015	0.00%
Nov 1, 2016	2.00%
Nov 1, 2017	2.00%
Nov 1, 2018	2.00%
Nov 1, 2019	2.00%

Note: Ratified by 79%; \$7,500 payment per worker in lieu of first-year wage increase

Trades and Services Sector

Parties :

University of Victoria Student Society
AND
International Association of Theatre and
Stage Employees Local 168

Contract Expiry: Apr 30, 2016; N/A unionized employees. The parties have ratified a 3-year agreement effective May 1, 2016 to Apr 30, 2019 that provides general wage increases as follows:

May 1, 2016	1.00%
May 1, 2017	1.00%
May 1, 2018	1.50%

Transportation Sector

Parties :

Coast Mountain Bus Co. Ltd
AND
Canadian Union of Public
Employees Local 4500

Contract Expiry: Dec 31, 2014; 165 unionized employees. The parties have ratified a 2-year agreement effective Jan 1, 2015 to Dec 31, 2018 that provides general wage increases.

Note: Wage details not yet available

Transportation Sector

Parties :

Swissport
AND
International Association of Machinists & Aerospace
Workers, Local Lodge 140

Contract Expiry: Aug 31, 2015; 850 unionized employees. The parties have ratified a 3-year agreement effective Sep 1, 2015 to Aug 31, 2018 that provides general wage increases as follows:

Sep 1, 2015	3.20%
Sep 1, 2016	0.00%
Sep 1, 2017	0.00%

Transportation Sector

Parties :

Translink
AND
MoveUp Local 378

Contract Expiry: Mar 31, 2016; N/A unionized employees. The parties have ratified a 3-year agreement effective Apr 1, 2016 to Mar 31, 2019 that provides general wage increases.

Communications Sector	
Parties :	
Telecommunication Workers Union	
AND	
MoveUp Local 378	
Contract Expiry: June 30, 2016; N/A unionized employees. The parties have ratified a 5-year agreement effective July 1, 2016 to June 30, 2021 that provides general wage increases as follows:	
Jul 1, 2016	0.50%
Jul 1, 2017	0.75%
Jul 1, 2018	1.00%
Jul 1, 2019	1.50%
Jul 1, 2020	2.00%
Note: Agreement Extended by way of MCA	

Public Sector (Municipal)	
Parties :	
Burnaby, City of (inside, outside, foremen, library)	
AND	
Canadian Union of Public Employees Local 23	
Contract Expiry: Dec 31, 2015; 1010 unionized employees. The parties have ratified a 4-year agreement effective Jan 1, 2016 to Dec 31, 2019 that provides general wage increases as follows:	
Jan 1, 2016	1.50%
Jan 1, 2017	1.50%
Jan 1, 2018	2.00%
Jan 1, 2019	2.00%

Public Sector (Municipal)	
Parties :	
Kamloops, City of	
AND	
International Association of Firefighters Local 913	
Contract Expiry: Dec 31, 2014; 120 unionized employees. The parties have ratified a 5-year agreement effective Jan 1, 2015 to Dec 31, 2019 that provides general wage increases as follows:	
Jan 1, 2015	2.50%
Jan 1, 2016	2.50%
Jan 1, 2017	2.50%
Jan 1, 2018	2.50%
Jan 1, 2019	2.50%

Public Sector (Municipal)	
Parties :	
Nelson, City of (inside & outside)	
AND	
Canadian Union of Public Employees Local 339	
Contract Expiry: Dec 31, 2015; 80 unionized employees. The parties have ratified a 4.5-year agreement effective Jan 1, 2016 to June 30, 2020 that provides general wage increases as follows:	
Jul 1, 2016	2.00%
Jul 1, 2017	2.00%
Jul 1, 2018	2.00%
Jul 1, 2019	2.00%
Note: Separate terms reported for Nelson & District Youth Centre employees. Term of agreements is 4.5 years – to June 30, 2020	

Public Sector (Municipal)

Parties :

Vancouver, City of
AND
International Association of Firefighters 18

Contract Expiry: Dec 31, 2015; 770 unionized employees. The parties have ratified a 4-year agreement effective Jan 1, 2016 to Dec 31, 2019 that provides general wage increases as follows:

Jan 1, 2016	2.50%
Jan 1, 2017	2.50%
Jan 1, 2018	2.50%
Jan 1, 2019	2.50%

Note: Previous agreement extended by way of MOA.

Public Services Sector

Parties :

New Westminster Police Board
AND
New Westminster Police Officers' Association

Contract Expiry: Dec 31, 2015; 110 unionized employees. The parties have ratified a 3-year agreement effective Jan 1, 2016 to Dec 31, 2018 that provides general wage increases as follows:

Jan 1, 2016	3.50%
Jan 1, 2017	2.50%
Jan 1, 2018	2.50%

Thanks for Listening

Presented by Ritu Mahil & Sarah Smith



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Labour & Employment Law Bulletins



July 14, 2016

Supreme Court of Canada Rules that Federal Employees are Protected from Arbitrary Dismissal

The Canada Labour Code (the “Code”), which applies to federally regulated employers, provides that non-union employees in non-management positions with 12 months or more service can bring complaints alleging that the termination of their employment was “unjust.” An adjudicator deciding an unjust dismissal complaint under the Code can award a wide range of remedies if they find the termination was unjust, including reinstatement of the employee.

In our [previous release](#), we summarized the Federal Court of Appeal’s decision in [Wilson v. Atomic Energy of Canada Ltd.](#), 2015 FCA 17. The Court of Appeal held that not all without cause terminations are presumptively unjust which was a considerable shift from the established jurisprudence that federally regulated non-unionized employees’ in non-management positions could only be dismissed for just cause similar to the protection afforded to unionized employees.

Today, the Supreme Court of Canada overturned the Court of Appeal’s decision and [ruled](#) that the intention of the unjust dismissal provisions of the Code is to provide non-unionized federal employees in non-management positions with dismissal rights analogous to unionized employees. Because of today’s decision, it is now clear that federally regulated employees in non-management positions with more than 12 months’ service may not be terminated without just cause unless the employee is laid off because of lack of work or the discontinuance of a function.

This means that federal employers may not be able to rely on contractual severance clauses to dismiss employees with more than 12 months of service without cause (unless the dismissal is due to a lack of work or the discontinuance of a function), as employees cannot waive their rights under the Code in a contract. Providing common law notice or pay in lieu of notice of such a dismissal will also not suffice.

Practically speaking, the Supreme Court of Canada decision is a return to the state of the law prior to the brief employer-friendly reprise that the Court of Appeal decision provided. The established jurisprudence is that in the case of an unjust dismissal, adjudicators will typically award payment in lieu of notice slightly in excess of an employee’s common law notice entitlement and would rarely award reinstatement. However, in light of the SCC decision there is a risk that we may see more reinstatements. We will keep you apprised of further developments with respect to how the Supreme Court of Canada decision is applied by adjudicators.

For more information, please contact one of the members of our [Labour and Employment Group](#) seen below.

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January 9, 2017

BC Employers Subject to New Requirements Regarding Joint Health and Safety Committees and Worker Health and Safety Representatives

[Michelle S. Jones](#)

WorkSafeBC has approved the addition of the following three new sections to the Occupational Health and Safety Regulation (OHSR) relating to Joint Committees and Worker Representatives:

1. **Section 3.26 - Evaluation of Joint Committees** - Employers must undertake an annual evaluation of each of their Joint Committee(s) to examine its effectiveness and identify possible improvement. The evaluation must be conducted by either the co-chairs, the employer, or a person retained by the employer, but in all cases input from the co-chairs is required. The evaluation must include at minimum consideration of the topics identified in section 3.26(3). The results of the evaluation must be discussed by the Joint Committee and any comments or feedback must be incorporated into the final evaluation report.
2. **Section 3.27 - Minimum Training Requirements** - Employers must provide new Joint Committee members must receive at least 8 hours of instruction and training, while new worker health and safety representatives must receive at least 4 hours. All training and instruction must take place as soon as practicable but not more than 6 months after being selected and must at minimum include the topics listed in section 3.27. Time spent undertaking this training and instruction must be paid by the employer and is in addition to the 8 hour entitlement of education leave provided for in section 135 of the Act. The requirements apply to individuals selected to be on the Joint Committee on or after April 3, 2017, but there are exceptions for people who were previously on the Joint Committee or who have already received the training.
3. **Section 3.28 - Participation in Incident Investigations** - WorkSafeBC has clarified the role of employer and worker representatives in the employer's fulfillment of its preliminary and full incident investigations. More specifically, section 3.28 provides that the "participation" of employer and worker representatives includes, but is not limited to:

- assisting the persons carrying out the investigation with gathering information relating to the investigation;
- assisting the persons carrying out the investigation with analyzing the information gathered; and
- assisting the persons carrying out the investigation with identifying any corrective actions necessary to prevent reoccurrence of similar incidents.

Client are encouraged to review their internal policies and practices around Joint Committees and Worker Representatives and revise as necessary to ensure they will be compliant with the new requirements which come into force on April 3, 2017. Employers failing to comply with the requirements could face non-compliance orders and in some cases, financial penalties.

Lawson Lundell LLP has an active Occupational Health and Safety department available to assist you and your business with a more in depth review of the requirements and its implications for your operations. For more information, please contact [Michelle S. Jones](mailto:mjones@lawsonlundell.com) at 604.631.9224 or mjones@lawsonlundell.com or a member of our [Public Utility and Regulatory](#) group.

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March 2017

No Common Law Duty Requiring Employers to Reasonably Exercise their Discretionary Contractual Powers in Relation to their Employees

[Sarah J. Smith](#)

In a recent decision, [Styles v. Alberta Investment Management Corporation](#), 2017 ABCA 1, the Alberta Court of Appeal reversed a 2015 judgement of the Alberta Court of Queen's Bench that had recognized a common law duty requiring employers to reasonably exercise their discretionary contractual powers in relation to their employees. The Court of Appeal found that such a duty is not one that should be imposed upon employers.

Important takeaways from the decision include that:

- at common law, an employer has the right to determine the composition of its workforce and does not need to give an explanation for its decision to terminate on a without cause basis; and
- where the terms of a bonus or incentive scheme clearly exclude an employee from being entitled to compensation under the scheme, an employer has no obligation to provide the employee with such compensation.

Facts

David Styles was employed with the Alberta Investment Management Corporation ("AIMCo"). His written employment agreement provided for a base salary and other compensation programs. The program giving rise to the case was the "Long Term Incentive Plan" (the "Plan"). Under the Plan, Mr. Styles was eligible for "grants" each year. The vesting period for a grant under the Plan was four years such that no grant was payable for at least four years. In order to receive a particular grant, Mr. Styles had to be "actively employed" by AIMCo on the vesting date of the grant. Being "actively employed" excluded any period of reasonable notice of termination.

Mr. Styles worked for AIMCo for three years and was approved for a grant each year. His employment was terminated without cause and he received three months' base salary in accordance with the terms of his employment agreement. He did not receive any payment in respect of his grants because he was not actively employed by AIMCo on any vesting dates. Mr. Styles subsequently sued AIMCo claiming entitlement to the total value of his earned grants.

Lower Court

Justice Yungwirth of the Alberta Court of Queen's Bench determined that Mr. Styles' grants were payable after finding "a common law duty of reasonable exercise of discretionary powers." Among other things, she found that, in some situations, where the termination of an employee deprives him or her of the right to receive earned performance bonuses, grants or awards, then

the exercise of the discretion to terminate without cause becomes arbitrary or capricious.

Court of Appeal

The Alberta Court of Appeal allowed the appeal. Writing for the majority, Justice Slatter held that, based on a plain reading of the Plan's provisions, Mr. Styles was not entitled to any grants. He found that there was no exercise of discretion involved in Mr. Styles not receiving any grants. There was no right to receive them under the terms of the Plan unless Mr. Styles was actively employed on a vesting date. He also observed that an employer does not need to justify or explain the termination of an employee without cause. Accordingly, it is inaccurate to describe an employer's decision to terminate without cause as a discretionary decision and it was an error for the lower court to review such a decision for reasonableness. Ultimately, Justice Slatter held that neither of the reasons given for awarding Mr. Styles the grants could be sustained.

Justice Slatter went on to discuss and reject Justice Yungwirth's finding of "a common law duty of reasonable exercise of discretionary powers." He noted that the Supreme Court of Canada in [*Bhasin v. Hrynew*](#), 2014 SCC 71 ("*Bhasin*") recognized a general requirement of honesty in the performance of contracts as a general organizing principle of the law of contract. It did not invite the court to examine the terms of a contract. Accordingly, unless a contract is unconscionable or contrary to public policy, it is to be enforced consistently with its terms. Justice Slatter also observed that *Bhasin* does not make it dishonest, in bad faith, or arbitrary for one party to require that another party perform a contract in accordance with its terms. Accordingly, AIMCo was not dishonest in refusing to pay grants that were not payable under the terms of the Plan. He concluded at paragraph 65:

It must have been obvious to the respondent that unless his employment with the appellant lasted for at least four years he would never receive any bonus under this Plan. Specifically, if he was terminated without cause within four years, any expectation of a bonus would be lost. Those are the terms of employment to which the respondent agreed. If he wished to earn some bonuses under the Plan in the eventuality that he was terminated without cause within four years, it was incumbent for him to negotiate such a provision.

The court also rejected the remainder of Mr. Style's arguments and the appeal was allowed.

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March 2017

Ontario Court of Appeal Judgment a Reminder of the Importance of Carefully Drafted Termination Clauses

[Sarah J. Smith](#)

In a recent decision, [Wood v. Fred Deeley Imports Ltd.](#), 2017 ONCA 158, the Ontario Court of Appeal reversed a 2016 judgment of the Ontario Superior Court of Justice that had found a termination clause in an employee's employment agreement enforceable. The consequence for the employer was that, instead of 13 weeks' working notice and a lump sum equivalent to eight weeks' pay, the employee was entitled to nine months' reasonable notice.

Important takeaway from the decision:

- a carefully drafted termination clause that provides an employee with at least his or her minimum entitlements under the applicable employment standards legislation is important where the employer wants to avoid the risk of having to pay the employee reasonable notice of termination at common law upon termination of the employee's employment.

Facts

Julia Wood, at 48 years old, had been employed with Fred Deeley Imports Ltd. ("Deeley") as a sales and event planner for eight years and four months, earning approximately \$100,000 annually when her employment was terminated. She had signed an employment agreement on her first day of employment with Deeley that contained the following termination clause:

[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph... The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.

Deeley paid Ms. Wood her salary and benefits for her 13 weeks of working notice and additional compensation, including a lump sum equivalent to eight weeks' pay. Nonetheless, Ms. Wood started an action seeking 12 months' notice of termination on the basis that either her whole employment agreement or its termination clause was unenforceable. A motion judge dismissed Ms. Wood's motion for summary judgment.

Court of Appeal

The Court of Appeal held that the termination clause was invalid and unenforceable because it violated the Ontario *Employment Standards Act, 2000* (the “ESA”). Under the ESA, Ms. Wood was entitled to at least eight weeks’ notice of termination where Deeley was required to continue contributing to Ms. Wood’s benefit plans during the eight-week period. Further, because Deeley had a payroll of at least \$2.5 million and Ms. Wood was employed for over five years, Deeley was required to pay Ms. Wood severance pay equal to eight and one-third weeks’ salary. Under the ESA, Deeley could not contract out of meeting these minimum requirements and any clause that did so would be void.

The Court found that although Ms. Wood had been compensated an amount on termination that exceeded the amount that she was entitled to under the ESA (21 weeks’ salary versus 18 weeks’ salary), and despite the fact that Deeley had made contributions to Ms. Wood’s benefit plans during her 13 week notice period, the termination clause was invalid because it excluded the benefit contributions during the notice period required by the ESA.

The language of the provision was clear that “the Company shall not be obliged to make any payments to you other than those provided for in this paragraph,” and “the payments and notice provided for in this paragraph are inclusive of your entitlement to notice, pay in lieu of notice and severance pay pursuant to the ESA.” Ultimately, the clause contracted out of the ESA requirement to maintain benefit payments and was therefore invalid.

Although not necessary to decide the appeal, the Court also found that the clause would be unenforceable because, under the ESA, notice periods and severance pay are separate obligations. The termination clause combined these obligations such that Deeley could fulfill its obligations under the termination clause in one of three ways, where only one of those ways would give Ms. Wood the severance pay to which she was entitled under the ESA.

The Court reversed the decision of the motion judge and held that Ms. Wood was entitled to reasonable notice of nine months or pay instead of reasonable notice.

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May 16, 2017

Honesty is a Defensible Policy: Reference Checks

[Sarah J. Smith](#)

The Ontario Superior Court recently confirmed in *Papp v. Stokes et al.*, 2017 ONSC 2357 that an employer will not be held liable for defamation when it provides a truthful reference about a former employee. It is, however, important to note that:

- an employer should be careful to ensure that the information provided is accurate and must not act with malice in providing a reference, which includes acting with a reckless disregard for the truth; and
- while not addressed in this particular decision, employers in some Canadian jurisdictions, including private-sector organizations in British Columbia, must ensure that they have consent before disclosing any personal information about a former employee under privacy legislation.

Facts

Mr. Papp was employed by Stokes Economic Consulting Inc. (“Stokes Consulting”) from 2011 until 2013 when his employment was terminated without cause. Shortly after he was dismissed, Mr. Papp emailed Dr. Ernest Stokes, the president and secretary/treasurer of Stokes Consulting, to ask if he would provide a reference. He provided Dr. Stokes with a list of the type of work that he had done at Stokes Consulting and asked Dr. Stokes to let him know if he had any comments. Dr. Stokes replied “[t]hat is okay” by email.

In the summer of 2014, the Government of Yukon advised Mr. Papp that he was their first-ranked candidate for a position for which he had applied. The only remaining step was a reference check. Mr. Papp sent an email to Dr. Stokes in which he told Dr. Stokes that he was the first-ranked candidate for a position and that Dr. Stokes would be contacted as a reference. Dr. Stokes did not reply to that email.

When Dr. Stokes was ultimately contacted by the Government of Yukon, he stated, among other things, that Stokes Consulting was not pleased with the quality of Mr. Papp’s work and that Mr. Papp did not get along well with others. He also stated that Stokes Consulting would not rehire Mr. Papp. On the same day, the Government of Yukon contacted Mr. Papp to advise him that he would not be offered a position.

Mr. Papp brought an action seeking, among other things, damages for defamation.

Judgment

Justice Miller concluded that there was no issue that the words spoken by Dr. Stokes were defamatory. A plaintiff is only required to prove three things in order to establish defamation: (a) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (b) the words referred to the plaintiff; and (c) the words were published, meaning that they were communicated to at least one person other than the plaintiff. After these elements are established on a balance of probabilities, damages are presumed. The issue ultimately became whether Dr. Stokes and Stokes Consulting could advance a defence in order to escape liability.

Defences to defamation include both justification and qualified privilege. The defence of justification places an onus on the defendant to establish, on a balance of probabilities, that the statements in question were true in substance and in fact. The defence of qualified privilege attaches to a reference, among other things, unless the defendant acted with malice.

Justice Miller found that, on a balance of probabilities, the evidence established that Dr. Stokes' statements to the Government of Yukon were substantially true. He also held that, in any event, the defence of qualified privilege also applied. The words of Dr. Stokes were "published" in the context of a reference check and Justice Miller was not satisfied, on a balance of probabilities, that Dr. Stokes acted with malice. Altogether, Dr. Stokes had a complete defence to defamation.

Mr. Papp was ultimately awarded damages for four months' reasonable notice less amounts already paid to him by Stokes Consulting.

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