Welcome to our

2018 Annual Labour & Employment Seminar

May 29, 2018

Pan Pacific Vancouver
(Oceanview Suites)

LAWSON LUNDELL LLP

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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; human rights update: focus on sexual harrassment and labour law update: focus on marijuana and drugs in the unionized workplace. 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 Pan Pacific.

Yours very truly,

Robert A. Sider, Partner
Lawson Lundell LLP
Labour & Employment Law Group

AGENDA

1:00 - 1:30 PM | Registration

1:30 - 2:45 PM | First Seminar Session

2:45 - 3:15 PM | Afternoon Break

3:15 - 4:30 PM | Second Seminar Session

4:30 - 6:00 PM | Post-seminar Reception

SEMINAR TOPICS

(1) Employment Law Update

In addition to our annual review of the latest developments in employment law, this session will address recent and upcoming changes to employment standards legislation and review the perils and pitfalls of making unilateral changes to an employee's duties or conditions of employment, including an employer's right to make changes and issues of notice, constructive dismissal, and anticipatory breach.

(2) Human Rights Update: Focus on Sexual Harassment

Sexual harassment was at the forefront of many news articles this year. Women came forward in record numbers with stories of sexual harassment in the workplace. Our session will provide you with an overview of the recent human rights cases on discrimination and harassment. We will explore the best practices to protect your employees from workplace discrimination, bullying and harassment and provide you with practical advice on how to respond to complaints and conduct investigations. With our tips in place, you will be able to better protect your organization from becoming a part of the next #metoo headline.

(3) Labour Law Update: Focus on Marijuana and Drugs in the Unionized Workplace

With legalization of recreational marijuana fast approaching, many employers are uncertain how this will impact their unionized workplace, and what steps they may take to prepare. This session will provide an overview of the law regarding employee drug use in the unionized context, and will address specific topics such as: addictions management in the unionized workplace; drug testing; addressing employee impairment; and specific issues regarding employee use of marijuana.

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Patricia is Senior Counsel in our Labour, Employment and Human Rights Group and has extensive experience in all facets of labour relations, employment and human rights law. 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.

Robert A. Sider
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Rob is the head of the Labour, Employment and Human Rights Group at Lawson Lundell. His 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.

Deborah L. Cushing
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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.

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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.

Ritu Mahil
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Ritu is a member of our Labour, Employment and Human Rights 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 and essential service disputes. Ritu also handles collective bargaining negotiations and mediation.

Sandra P. MacKenzie
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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.

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

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Katy Allen is an associate in the Labour, Employment and Human Rights Group in Vancouver. She advises and represents clients regarding a broad range of issues relating to labour, employment, employment standards, human rights, and privacy law. She also assists clients with drafting and interpreting employment agreements (ranging from agreements for hourly employees to executive compensation plans) and providing input on a wide variety of employment and labour related issues in business transactions.

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Jim is an associate in the firm's Labour, Employment and Human Rights group. Jim advises and represents clients on a variety of labour and employment issues, including grievance arbitrations and mediations, human rights complaints and accommodation, post-employment competition litigation, employment contracts, and collective bargaining. Jim started with Lawson Lundell as a summer student in 2015, and joined the firm as an associate following the completion of his articles in 2017.

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Session #1:
Employment Law Update

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Employment Law Update 2018

Rob Sider , Deborah Cushing, Glen Rutland and Jason Harman

BUSINESS LAW

Presentation Roadmap

Employment Law 2018 Update:

- Update on New and Amended Legislation
  - Minimum Wage – Cross Canada
  - British Columbia
    - *Employment Standards Amendment Act* 2018
  - Alberta
    - The *Fair and Family-Friendly Workplaces Act*
  - Ontario
    - *An Act to Amend the Employment Standards Act*, 2000
- The Law of Constructive Dismissal
  - The Basics
  - Constructive Dismissal in Context
  - Avoiding Constructive Dismissal by Giving Working Notice (The Wronko Trilogy)
  - Anticipatory Breach
- Recent Interesting Cases out of British Columbia

Legislative Changes: Minimum Wage Update

	2017	2018	2019	2020	2021
British Columbia	$11.35	$12.65	$13.85	$14.60	$15.20
Alberta	$13.60	$15.00			
Saskatchewan	$10.96	(CPI)	(CPI)	(CPI)	(CPI)
Manitoba	$11.15	$11.35			
Ontario	$11.60	$14.00	$15.00		
Quebec	$11.25	$12.00			
New Brunswick	$11.00	$11.25	(CPI)	(CPI)	(CPI)
Nova Scotia	$10.35	$11.00	(CPI)	(CPI)	(CPI)
Prince Edward Island	$11.25	$11.55			
Newfoundland & Labrador	$11.00	$11.15	(CPI)	(CPI)	(CPI)

Legislative Changes: British Columbia

Bill 6: *Employment Standards Amendment Act, 2018* (in force May 17, 2018)

- Pregnancy leave: 13 weeks prior to expected due date, up from 11 weeks
- Parental leave: 18 months up from 12 months
- Compassionate care leave: 27 weeks up from 8
- Two additional parental leaves:
  - Child death leave (104 weeks)
  - Crime-related child disappearance leave (52 weeks)

Legislative Changes: Alberta

The Fair and Family-Friendly Workplaces Act

- Eligibility for all current (excluding reservists leave) and new leaves: 90 days rather than 1 year
- Compassionate care leave: 27 weeks up from 8 weeks
- Parental leave: 18 months up from 12 months
- Rest periods: 30 minute breaks for every 5 hours of work now must take place **within** the 5 hour period and cannot be following
- Overtime agreements will allow time to be banked for 6 months rather than 3 months
- Overtime banking will be calculated at 1.5x for all overtime hours worked, rather than hour-for-hour
- Permits that formerly allowed employers to pay employees with disabilities less than the minimum wage are no longer available

Legislative Changes: Alberta

- New (Unpaid) Leaves:
  - Personal and Family Responsibility Leave (5 days)
  - Long-Term Illness and Injury Leave (16 weeks)
  - Bereavement Leave (3 days)
  - Domestic Violence Leave (10 days)
  - Citizenship Ceremony Leave (½ day)
  - Critical Illness of an Adult Family Member (16 weeks)
  - Critical Illness of a Child (36 weeks)
  - Death or Disappearance of a child (104 weeks and 52 weeks)

Legislative Changes: Ontario

Bill 148, *An Act to amend the Employment Standards Act, 2000*

- Independent contractor/employee distinction: Reverse onus and criminalization
- OHSA change: no mandatory high heels (except entertainment industry)
- Extensions to the unpaid parental and critical illness leaves of absence
- Increased vacation for employees with more than five years of service, and new and extended leaves of absence
- Equal pay for equal work provisions: Casual, part-time, temporary and seasonal employees; temporary help agency employees

The Law of Constructive Dismissal

- Scenarios – which one constitutes dismissal?
  1. The employer changes a defined benefits pension plan to a defined contribution plan?
  2. The employer changes an employee's place of work from Vancouver, B.C. to Nanaimo, B.C.?
  3. An employee receives unjustified criticism and a suspension as well as vague and unfounded accusations of poor performance?
  4. A senior employee is instructed to report to an incoming junior employee?

Constructive Dismissal: Farber v. Royal Trust Company

Farber v. Royal Trust Company, [1997] 1 S.C.R. 846

Facts:

- As part of a restructuring effort, the Royal Trust Co. eliminated its regional manager positions
- The Company offered Mr. Farber to return to his previous post as a branch manager
- Mr. Farber estimated he would earn approximately 50% of his regional manager salary
- Mr. Farber attempted to negotiate for a better deal but the Company refused
- Mr. Farber quit and sued for constructive dismissal

Constructive Dismissal: Farber v. Royal Trust Company

Farber v. Royal Trust Company, [1997] 1 S.C.R. 846

Decision:

- A reasonable person would view the Company to be altering the essential terms of employment
- The branch manager position was a significant demotion to Mr. Farber in terms of income, status, and prestige
- Mr. Farber was entitled to one year's wages in lieu of notice
- Damages assessed at $150,000

The Farber Test for Constructive Dismissal

- Farber tells us that **where:**
  - an employer unilaterally…
  - …makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms

  then
  - …the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed
  - The employee can then claim damages from the employer In lieu of reasonable notice

The Constructive Dismissal Analysis

Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10

- Step One:
  - Determine whether a breach has occurred
  - Has the employer unilaterally changed the contract?
  - Is the change detrimental to the employee?
  - If term of contract gives the employer the authority to make the change or if the employee consents or acquiesces, change is not a unilateral act and does not constitute a breach

The Constructive Dismissal Analysis

Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10

- Step Two:
  - Reasonable person test
  - At time of breach would reasonable person in this situation feel that the essential terms of the employment contacts were being substantially changed?
  - Can be single unilateral act or series of acts that together show employer no longer intends to be bound by the contract
  - Minor breach does not amount to constructive dismissal

Constructive Dismissal in Context

- Examples of constructive dismissal:
  - A significant demotion
    - *Brake v. PJ-M2R Restaurant Inc.,* 2016 ONSC 1795, aff'd 2017 ONCA 402
  - Removal of employee's management functions and assigned to report to a former subordinate
    - *Cox v. Royal Trust Corp. of Canada,* 1989 CarswellOnt 756, [1989] O.J. No. 675
  - Loss of opportunity for advancement
    - *Chandran v. National Bank of Canada,* 2012 ONCA 205
  - A unilateral promotion (with altered duties)
    - *Hanni v. Western Road Rail Systems (1991) Inc.,* 2002 BCSC 402
  - Unilateral transfer from one location to another
    - *Allen v. CP Express & Transport Ltd.,* 1989 CarswellBC 677, [1989] B.C.W.L.D. 2744
  - Destruction of trust and breach of privacy
    - *Colwell v. Cornerstone Properties Inc.,* 2008 CanLII 66139 (ON SC)
  - Improperly disciplining and suspending an employee
    - *Biccum v. Fanny's Fabrics (Sask.) Ltd.,* 1996 CarswellSask 620, 149 Sask. R. 243

Constructive Dismissal & Working Notice

- Constructive dismissal can be defeated where an employer provides working notice of unilateral changes
- From Farber:
  - A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee…

Constructive Dismissal: The *Wronko* Trilogy

- The ability to provide employees with working notice of unilateral changes was seemingly challenged in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327

Facts:

- Employer notified employee that his severance package was to be reduced from 2-years of salary to 30 weeks in 2 years' time
- Employee rejected proposed change and continued working
- Matter appeared to have been dropped by both sides
- Employer notified employee 2 years later that the proposed change had been implemented and if the employee did not accept it then "we do not have a job for you"
- The Employee sued for wrongful dismissal

Constructive Dismissal: The *Wronko* Trilogy

Wronko v. Western Inventory Service Ltd., 2008 ONCA 327

Decision:

- Employer's seeking to implement a unilateral change to a contract present an employee with 3 options:
  - The employee may accept the change and continue in employment
  - The employee may reject the change and sue for damages if the employer has implemented the change
  - Employee may reject the change in which case the employer may respond by terminating the employee with proper notice and offering re-employment on the new terms only
- The Employer, Western Investory Service, had not clearly communicated that it intended to rely on the **third option** to Wronko
- The Employer was found to have constructively dismissed Wronko

Constructive Dismissal: The *Wronko* Trilogy

The *Wronko* Employer's Dilemma:

- Can you give working notice of unilateral and substantial changes as described in *Farber*?

or

- Must an Employer literally "terminate" the employee and then offer "re-employment on the new terms" in order to avoid an outcome such as in *Wronko?*

Constructive Dismissal: The *Wronko* Trilogy

Kafka v. Allstate Insurance Company of Canada, 2012 ONSC 1035

Facts:

- Employees of Allstate attempted to file a class action lawsuit against their employer
- The employees accused Allstate of fundamentally changing its employment relationships when it switched its business model
- Allstate had provided its employees with two-years of notice and declared this period to be "working notice"

Argument:

- The Employees cited *Wronko* and argued that an employer cannot effect unilateral and fundamental changes to the employment contract with any amount of notice
- They argued that *Wronko* means Allstate was required to fire the employees and then offer to rehire them on the different terms

Constructive Dismissal: The *Wronko* Trilogy

Kafka, continued

Decision:

- The Court rejected that interpretation of *Wronko*
- *Wronko* was really about the particular lack of a true ultimatum between the employer and employee
- What must be conveyed to an employee is that refusal to accept new terms *will* result in termination
- In *Kafka,* the Court held that Allstate provided clear notice of the proposed changes and a definite point in the future when they would be implemented

Constructive Dismissal: The Wronko Trilogy

Kafka, continued

- The Court distinguished *Wronko*
  - In *Wronko,* there was ambiguity
    - This was not a case, like *Wronko,* where the employer issued an ultimatum following a period of time in which it had permitted an employee to continue employment after he had refused to accept proposed terms. In *Wronko,* the two year period between 2002 and 2004 was one of some ambiguity
  - In Kafka, on the other hand
    - There was a clear transitional period and it was understood as such. Some employees accepted the new positions offered, some negotiated further changes, and some resigned. In the meantime, Allstate provided compensation during the 24 month period of notice that maintained or exceeded employees' prior levels of compensation

Constructive Dismissal: The *Wronko* Trilogy

Nufrio v. Allstate Insurance Company of Canada, 2017 ONCA 948

Facts:

- *Nufrio* arises from the same factual situation as *Kafka*
- Mr. Nufrio was given the 2-years of working notice in respect of Allstate's change in its business model
- After approximately 1 year of working notice, Allstate accelerated the proposed changes, requiring Mr. Nufrio to accede to some of the changes to his employment contract immediately
- The immediate changes included a shift in his place of work to the opposite side of the city of Toronto
- When Mr. Nufrio refused, he was terminated for cause

Constructive Dismissal: The *Wronko* Trilogy

Nufrio, continued

Decision:

- An employer cannot implement fundamental and unilateral changes during the working notice period
- An employee in such situation has a right to insist on the terms of the employment contract as it exists at that time
- Nufrio was constructively dismissed and awarded damages for the lost portion of his working notice period

Constructive Dismissal: Takeaways from *Wronko*

Takeaways from the *Wronko* Trilogy

- Employers can unilaterally change contracts of employment
- Where employers intend to make such changes they should
  - Establish a future date where the changes will take effect that adequately provides a period of reasonable notice to all affected employees
  - Make no fundamental changes in the interim period
  - Ensure clear messaging to all employees that the proposed changes are non-negotiable and will take effect at the prescribed time

Constructive Dismissal: Working Notice

- If done properly, a la *Kafka,* working notice gives employers great flexibility
  - It allows employers to make unilateral and substantial changes to employee contracts, including changes to:
    - Roles and tasks
    - Work schedule
    - Benefits and pension
    - Work location

Constructive Dismissal: Working Notice

- However, working notice is not a panacea
  - Unilateral and substantial changes to employment contracts are not always palatable by virtue of a long lead time
  - Some employees refuse to accede to the changes and may quit and sue for anticipatory breach of contract
  - It does not assist the employer that needs to implement changes on short-notice, as in *Farquhar.*

Constructive Dismissal: Mitigation

Farquhar v. Butler Brothers Supplies Ltd., 1988 CanLII 185 (B.C.C.A.)

Facts

- Mr. Farquhar was employed as an office manager
- Due to financial difficulties, Butler Brothers notified Mr. Farquhar that it intended to unilaterally reduce his salary by 30% effective Jan 1, 1985.
- Mr. Farquhar quit as a result of the proposed changes
- The remaining employees accepted the cutbacks, and when the company's viability was restored, their former salaries were reinstated.
- Mr. Farquhar sued for wrongful dismissal

Trial Decision:

- Mr. Farquhar was found to have been wrongfully terminated
- The trial judge awarded Mr. Farquhar:
  - Nine months of damages in lieu of notice
  - Declared that Mr. Farquhar's refusal to continue working at Butler Brothers did not count as a refusal to mitigate his losses
- Butler Brothers appealed

Constructive Dismissal: Mitigation

Farquhar, continued

On appeal:

- The reduction in salary of 30% was held to be an anticipatory breach of the employment contract, significant enough to repudiate the whole contract
- The Court established some criteria as to when employees should continue to work, such as where:
  - There is a situation of mutual understanding and respect
  - Where a reasonable employee would accept the offer
- An employee need **not** continue to work where:
  - There is an atmosphere of hostility, embarrassment, or humiliation
  - The employment relationship is so frayed as to preclude working in harmony
  - Either the employee or employer is likely to put the others' interests in jeopardy

Constructive Dismissal: Mitigation

Farquhar, continued

On appeal:

- The Court concluded that the changes foisted upon Mr. Farquhar, including reduction to salary, perks and benefits, represented a 47% reduction overall in his remuneration
- In the circumstances, the Court upheld the trial judge's ruling that Mr. Farquhar did not need to continue his employment with Butler Brothers to mitigate his losses
- The appeal was dismissed

Anticipatory Breach

Giza v. Sechelt School Bus Service Ltd., 2012 BCCA 18

Facts:

- Mr. Giza was a professional forester who in his mid-50s began driving a school bus part-time
- Following a change in ownership of bus company, Mr. Giza was terminated as a result of a disagreement
- The termination letter offered Mr. Giza 5 weeks of working notice during which time his pay and benefits would be maintained
- Upon learning of his termination, Mr. Giza quit and sued for wrongful dismissal

Anticipatory Breach

Giza, continued

Trial Decision:

- The offer of 5 weeks notice was inadequate and as a result the employer, Sechelt School Bus Services, unilaterally breached the employment contract
- However, the breach was not so substantial as to rise to the level of a fundamental breach of contract
- Sechelt was therefore found to have breached the contract but not to have repudiated it
- However, Mr. Giza's act of quitting repudiated the contract
- The trial judge held that Mr. Giza's greater breach by way of repudiating the contract disentitled him to claiming damages for the employer's breach of offering inadequate notice

Anticipatory Breach

Giza, continued

Appeal Decision:

- Mr. Giza was held to be contractually entitled to 6 months of reasonable notice
- Sechelt's offer of 5 weeks was a breach of contract that entitled Mr. Giza to a damages claim that survives his repudiation of the contract
- Applying *Farquhar,* the Court held that the relationship between the parties was not so damaged that Mr. Giza could not have continued to work the final 5 weeks offered to him by Sechelt
- However, as Mr. Giza had refused to accept the reasonable offer of continued employment – even though for an inadequate period of time – and had not found alternative employment during those 5 weeks, his total damage award would be reduced by 5 weeks
- The Court awarded Mr. Giza damages of 6 months, less the 5 weeks of notice offered by Sechelt

Recent Interesting Cases out of British Columbia

- *Trust & Confidentiality*
  - *Manak v. Workers' Compensation Board of British Columbia*, 2018 BCSC 182
  - *Klonteig v West Kelowna (District),* 2018 BCSC 124
- *Damages for Wrongful Dismissal*
  - *Buchanan v. Introjunction Ltd.,* 2017 BCSC 1002
  - *Lau v. Royal Bank of Canada*, 2017 BCCA 253
  - *Bailey v. Service Corporation International (Canada) ULC,* 2018 BCSC 235

Recent Interesting Cases out of British Columbia

Manak v. Workers' Compensation Board of British Columbia, 2018 BCSC 182

Facts:

- Ms. Manak was terminated from her manager position at WorkSafeBC after 36 years of service
- The Court found that the breaches were serious and the trust relationship had been broken by the pattern of inappropriate disclosures, concluding WCB had grounds for dismissal
- The Court also held that the employer's offer of termination with cause *or* that the employee voluntarily retire and receive four months salary as severance was not unconscionable
- The Court did however caution that employers should take steps to ensure employees can obtain independent legal advice and to beware presenting a "take it or leave it" offer where the employer is seen to enjoy an overwhelming position of bargaining power

Recent Interesting Cases out of British Columbia

Klonteig v West Kelowna (District), 2018 BCSC 124

Facts:

- West Kelowna terminated the City's Assistant Fire Chief, Kerry Klonteig's employment for cause after Mr. Klonteig received a 90-day administrative driving prohibition for failing a roadside breathalyzer
- The City alleged that though Mr. Klonteig was off-duty at the time, he was driving a City vehicle and his conduct was incompatible with his position as a public safety officer
- The Court found, however, that the incident was not public knowledge, the vehicle was unmarked, and Mr. Klonteig was not in his official capacity at the time
- Mr. Klonteig was awarded damages on the basis of his employment contract of five-months

Recent Interesting Cases out of British Columbia

Buchanan v. Introjunction Ltd., 2017 BCSC 1002

Facts:

- The plaintiff applied for work with the defendant employer while he was employed elsewhere
- The plaintiff quit his position in anticipation of starting with the new employer
- Just prior to his start date with the defendant, the employer "retracted" its executed employment contract and terminated the employee
- The employer argued that as the contract contained a probationary period, it had no obligation to pay damages in lieu of notice for termination
- The Court rejected the probation argument on two grounds:
  1. The clause only applied once employment commenced and therefore had no application in the pre-employment period; and,
  2. Dismissal of probationary employees cannot be done at whim but requires a good faith assessment of the plaintiff's suitability for the job for which he was hired
- The Court also held that the employer's "retraction" constituted an anticipatory breach of contract that was accepted by the plaintiff
- Repudiation and acceptance brought the contract to an end which precludes the employer from relying on terms of the contract to limit its damages
- While the plaintiff only requested 4 weeks of notice, the Court awarded 6 weeks

Recent Interesting Cases out of British Columbia

Lau v. Royal Bank of Canada, 2017 BCCA 253

Facts:

- At trial, Marco Lau was found to have been wrongfully terminated by RBC on the grounds that his misconduct did not rise to the level for termination for cause
- The trial judge awarded Mr. Lau aggravated damages of $30,000, citing her finding that RBC terminated Mr. Lau on the basis of a false allegation which she found, without recourse to medical evidence, led to mental distress
- On appeal, RBC challenged the award on the basis that there was no evidence of employee losses; Mr. Lau countered that "intangible effects" are compensable
- The Court of Appeal determined that while evidence of mental distress does not require expert testimony, there must be some basis in evidence
- Moreover, the normal distress and hurt feelings that arise from the fact of dismissal are not eligible for damages
- Award of aggravated damages was set aside

Recent Interesting Cases out of British Columbia

Bailey v Service Corporation International (Canada) ULC, 2018 BCSC 235

Facts:

- Don Bailey was dismissed for cause from his position at S.C.I. after he failed to return to work from sick leave following an initial rejection of his disability benefits and WCB claim
- The trial judge found that an employer may not rely upon the rejection of third-party medical benefits to deny a medical leave; therefore, Mr. Bailey did not fail to return to work and his dismissal was unjust
- The Court found that Mr. Bailey's damages were determined by his employment contract that stated the notice period was "as required" by the *Act,* i.e. the minimum legal notice
- The Court also awarded Mr. Bailey aggravated damages, citing *Lau,* on the basis that the employer had breached a duty of good faith and fair dealing
  - The award was issued without a scintilla of medical evidence
- Finally, the Court awarded punitive damages for conduct it found to be malicious, vindictive, callous, and dishonest

Wrongful Dismissal Notice Chart

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
Smith v. Pacific Coast Terminals Co., 2016 BCSC 1876; aff'd 2017 BCCA 197	Manager of Maintenance and Engineering	$171,190	16.5	48	19	• 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.
Glimhagen v. GWR Resources Inc., 2017 BCSC 761	Chief Financial Officer and Corporate Secretary	$78,000	12	68	12	• 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. • 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.

Wrongful Dismissal Notice Chart

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
Lau v. Royal Bank of Canada, 2015 BCSC 1639; var'd 2017 BCCA 253	Account Manager at Bank	$41,500	5	30	9 + $30,000 (aggr.) [aggr. award set aside on appeal]	• The trial judge found Mr. Lau was wrongfully dismissed and awarded him 9 months of notice as well as $30,000 in aggravated damages for mental distress arising from his termination. • On appeal, the court set aside the aggravated damages award holding that the ordinary psychological impact of termination is not compensable because the contract of employment is by its terms subject to cancellation on reasonable notice.
Buchanan v. Introjunction Ltd., 2017 BCSC 1002	Senior Software Engineer	$125,000	0	27	1.5	• The court found the Employer had unilaterally retracted the employment offer prior to the start date. • The court observed that though the minimal length of service militated against the award, the fact that the plaintiff was promised a high salary and was induced to leave secure employment to take the job, justified the final award.

Wrongful Dismissal Notice Chart

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
Sletmoen v. Nafco Manufacturing Co., 2017 BCSC 1726	Machine Operator	$70,000	18.33	52	16 (10 working notice + 6)	• In February of 2015, the Employer notified all employees that their positions would terminate on December 31, 2015 - giving each employee approximately 10 months of notice • At trial, the judge found the plaintiff was entitled to 16 months noticed and the award consisted of the difference.
Cottrill v. Utopia Day Spas and Salons Ltd., 2017 BCSC 1925	Skincare Therapist	$30,000	11	32	2 (emp. con.) + $15,000 (aggr.)	• Employee found to be contractually entitled to 8 weeks' severance pay based on her initial employment contract, dismissing the 2014 contract for want of consideration. • $15,000 in aggravated damages were awarded for bad faith as the court felt that the company did not properly permit the employee to improve her job performance.
Jover v. Creditloans Canada Financing Inc., 2017 BCSC 2341	Executive	$80,000	4		3 (emp. con.)	• Employee found to be contractually to 90 days of notice for termination without cause; employer did not breach the employment contract and therefore the claim was dismissed.

Wrongful Dismissal Notice Chart

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
Pakozdi v. B & B Heavy Civil Construction Ltd., 2016 BCSC 992; var'd 2018 BCCA 23	Bid Estimator and Construction Professional	$130,000	1	55	8 [reduced to 5 on appeal]	• At trial, the employee was awarded 5 months reasonable notice plus an additional 3 due to his "vulnerability" as a result of his deteriorating health; on appeal, the additional 3 months was struck out on the basis that "worsened medical condition" is not a basis to expand the range of damages so significantly, especially where the plaintiff found new, sustained employment relatively quickly.
Klonteig v. West Kelowna (District), 2018 BCSC 124	Assistant Fire Chief	$102,000	5	48	5 (emp. con.)	• Plaintiff was dismissed for cause for after receiving a 90-day driving prohibition for failing a roadside breathalyzer while off-duty; • Trial judge found employer did not have cause to dismiss exemplary employee based on single incident while off-duty; plaintiff awarded severance as per his employment contract; judge declined to apply aggravated or punitive damages.

Wrongful Dismissal Notice Chart

Case	Position	Income per Annum	Years of Service	Age	Total Notice (months)	Comments
Bailey v. Service Corp. International (Canada) ULC, 2018 BCSC 235	Salesperson	$150,000	17	60	2 (emp. con). + $25,000 (aggr.) + $110,000 (pun.)	• Trial judge awarded a total of $158,293 in damages; • Reasonable notice was found to have been limited by the language "as required" by the Act in the contract • Aggravated and punitive damages found based on the malicious and callous conduct of the employer.
Tymko v. 4-D Warner Enterprises Ltd., 2018 BCSC 372	Switchman and Trackmobile Operator		3	52	2	• The employer was found to not have properly linked a safety incident to Mr. Tymko and therefore wrongful dismissal was established. • For the purpose of calculating notice, an interruption in Mr. Tymko's employment with the company was disregarded as at the time of his lay-off there was a reasonable likelihood of his return to work.

Questions?

Thanks for Listening

Presented by Rob Sider, Deborah Cushing, and Glen Rutland

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Session #2:
Human Rights Update:
Focus on Sexual Harassment - #metoo

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Human Rights Update: Focus on Sexual Harassment - #metoo

By Nicole Skuggedal and Katy Allen

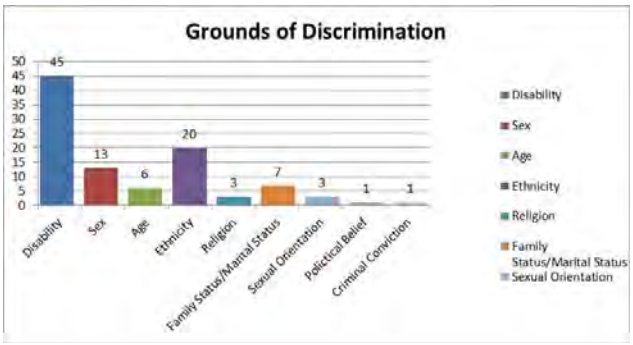
BUSINESS LAW

Outline

- Human Rights Caselaw Update
- What is Sexual Harassment?
  - Recent case law that exhibits the broad spectrum of sexual harassment claims
- Preventing Sexual Harassment
  - Policies
  - Training
- Investigations
  - Importance of Investigations
  - Practical Tips for Conducting Investigations
  - After the Investigation

BC Human Right Tribunal Update

- 2016-2017 Grounds of Discrimination



Of the disability complaints – 25% physical disability and 20% mental disability

Source: www.bchrt.gov.bc.ca/sharedocs/annual-reports/2016-2017/2016-2017-charts.pdf

Caselaw Update
Expanded Application of the Code

British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62

Facts:

- During the course of a large-scale construction project, a site foreman, allegedly made racist and homophobic statements about an engineer working for another company on the project
- Section 13(1)(b) of the Code states:

  13 (1) A person must not

  (a) refuse to employ or refuse to continue to employ a person, or

  (b) discriminate against a person regarding employment or any term or condition of employment

Decision:

- "Regarding employment" is not limited to discrimination by workplace superiors
- Factors to consider to determine whether discrimination connected to the workplace:
  - Was the respondent integral to the complainant's workplace?
  - Did the impugned conduct occur in the complainant's workplace?
  - Was the complainant's work performance or work environment negatively affected?

Caselaw Update
Family Status

Suen v. Envirocon Environment Services (No. 2), 2017 BCHRT 226

Facts:

- Employee with a four month old child was assigned to a project in Manitoba for 2.5 months with no paid travel home during the assignment
- Employee quit and filed human rights complaint alleging discrimination on the basis of family status
- Employer applied to dismiss the complaint on the basis that the complaint had no reasonable prospect of success

Decision:

- Complaint allowed to proceed
- Requiring the employee to be absent from his spouse and four month old infant for an extended period may constitute "serious interference with a substantial parental or other family duty or obligation" and complaint should not be dismissed at a preliminary stage

Caselaw Update
Hiring

Jahromi v. Link2 Manufacturing and another, 2017 BCHRT 151

Facts:

- Complainant alleged that during an interview he was asked "where are you from", "where are your parents from" and asked to pronounce his name
- Complainant was not hired and filed a human rights complaint alleging discrimination

Decision:

- Complaint dismissed on a preliminary basis as having no prospect of success
- No prohibition in *Code* on asking interview questions related to a prohibited ground
- Merely asking a question is not discriminatory but it may be discriminatory depending on context
- To establish discrimination in hiring an employee needs to establish the following:
  - That they have one or more characteristic protected from discrimination under the *Code;*
  - They had the qualifications for the position; and
  - Employer hired someone no better qualified by lacking in the distinguishing characteristic

Caselaw Update
Hiring

Rambo Landry v. Vegerville Autobody (1993) Ltd., 2017 AHRC 19

Facts:

- Complainant was a married gay man and member of the Dene First Nation
- In the job interview company owner made comments including that straight people were bullied into accepting gay people, and "natives" were the minority in the town. The owner also asked the complainant if he believed in god and if he would stay in town long given that his husband was in the RCMP
- Complainant was not hired and the interview experience triggered severe PTSD and depression

Decision:

- Not hiring the complainant constituted discrimination on the basis of race, religious beliefs, marital status and sexual orientation
- Damages: general damages $20,000; lost wages $36,000

Caselaw Update
Hiring

Nolting v. 847012 Alberta Ltd., 2017 AHRC 12

Facts:

- Complainant applied for a job as a labourer with a construction company
- Company called the complainant, asked if she was a woman and in response advised that they were "not looking to hire a woman" due to additional hotel room costs for out of town projects

Decision:

- Company did not meet its duty to accommodate
- Duty to accommodate has a procedural and substantive element
  - Procedural – employer must gather all relevant information and meaningfully consider all options for accommodation
  - Substantive – need sufficient evidence to show undue hardship
- Blanket refusal to have woman was "reckless in 2012"
- Damages: injury to dignity $8,500

Caselaw Update
Hiring

My v. Nova Scotia Health Authority, 2017 CanLII 17201

Facts:

- Applicant was offered a job as a nurse working rotating shifts with the Nova Scotia Health Authority. Job offer was conditional on a satisfactory medical
- The medical provided that the applicant could not change shifts more than every six weeks and could not work nights
- Health Authority rescinded the offer of employment

Decision:

- It would not have been an undue hardship for the Health Authority to accommodate the applicant with no night shifts limiting shift changes to every six weeks
  - Negative morale argument was speculative
  - Cost argument given little weight given that the Health Authority was one of the largest employers in Nova Scotia
- The duty to accommodate did not require the employer to look for positions beyond the position the employee applied for
- Damages: general damages $15,000, lost wages up to the date of new employment

Sexual Harassment – Definition

- In *Janzen v. Platy Enterprises Ltd*., 1989 CanLII 97, the Supreme Court of Canada broadly defined sexual harassment in the workplace as:
  - (…) unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.
  - When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it.
- Analysis is objective, not subjective (no requirement that the harasser intended to sexually harass)
- Impact on victim is relevant

Sexual Harassment - Definition

- Examples of sexual harassment:

• offensive, degrading or derogatory remarks • sexually charged jokes • sexually suggestive text messages • touching or brushing up against another person • unwelcomed invitations or propositions	• undermining or refusing to follow a person's authority due to their gender • distributing obscene pictures or cartoons • making general insults based on gender • asking for sexual favors in return for continued employment or employment opportunities

Sexual Harassment - Forum

Lewis v. WestJet Airlines Ltd., 2017 BCSC 2327

Facts:

- A former flight attendant of WestJet, Mandalena Lewis, commenced this proposed class action lawsuit on behalf of a class of "present and former female Flight Attendants employed by WestJet who were entitled to the benefit of the Anti-Harassment Promise"
- A preliminary application by WestJet to have the claim struck on the basis that the claim should be brought before the Canadian Human Rights Tribunal and the various provincial Workers' Compensation Boards, and because parts of the claim do not disclose a reasonable cause of action

Decision:

- The Court agreed that insofar that the claim is for damages for personal injury to an employee, it should be brought under the *Workers Compensation Act*. Insofar as it is a claim for damages for discrimination, it should be brought under the *Human Rights Act*
- The Court decided that the remainder of the claim, a claim for breach of the anti-harassment promise, was on its face a valid contractual claim that did disclose a reasonable cause of action

Sexual Harassment - Forum

Araniva v. RSY Contracting and Another., 2018 BCHRT 6

Facts:

- An employee filed three separate actions due to sexual harassment:
  - a discriminatory action complaint with WorkSafeBC;
  - a constructive dismissal action in the BC Supreme Court; and,
  - a human rights complaint with the Human Rights Tribunal
  - Employee applied to defer

Decision:

- Applied to the facts, the Tribunal found that
  - The similarity between the proceedings favoured deferral
  - The similarity in the available remedies favoured deferral
  - The BC Supreme Court action was still in the early stages, favouring proceeding in the Tribunal
  - The parties and the public interest in timely resolution of human rights complaints favoured proceeding in the Tribunal
  - The Tribunal dismissed the application to defer

Sexual Harassment Cases

A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

Facts:

- Serious sexual assaults spanning over decades

Decision:

- $200,000 in injury to dignity damages awarded to complainant.
- The Tribunal held that when judging testimony, assessments of credibility and reliability did not have to be all or nothing

G.M. v. X Tattoo Parlour, 2018 HRTO 201

Facts:

- Serious sexual harassment in the workplace - sexual assault, sexual touching and sexual interference of 15 year old employee by owner

Decision:

- $75,000 in injury to dignity damages

Sexual Harassment Cases

E.T. v. Dress Code Express Inc., 2017 HRTO 595

Facts:

- Allegations by 14 year old complainant included sexualized comments and touching by her Employer
- The Employee also alleged that the Employer made racist remarks about her Black boyfriend and other Black persons that entered the store

Analysis:

- Sexual harassment made out, and harassment/discrimination on the basis of race
- Corporate employer and individual respondent jointly and severally liable for $15,000 for injury to dignity

Sexual Harassment Cases

Granes v. 2389193 Ontario Inc., 2016 HRTO 821

Facts:

- A new co-owner Mr. Dutta of the employer, a restaurant, sexually harassed and assaulted the employee, a waitress, over the course of an evening
- The employee made complaints to the employer which did not take her allegations seriously
- The employee resigned and filed a police report and Human Rights complaint

Decision:

- Mr. Dutta was not a credible witness.
- The employer did not do an investigation and essentially asked the employee to forget what had happened.
- Injury to dignity awarded at $25,000

Sexual Harassment Cases

De Almeida v. Coast Spas Manufacturing and another, 2016 BCHRT 37

Facts:

- Allegations of harassment included a variety of conduct some of which, if true, would constitute sexual harassment

Decision:

- General allegations of harassment are not covered by the *Code,* including the Employee's allegation that
  - She was forbidden to socialize with the staff
  - She was forbidden to smoke with other staff
  - Her job assessment was "inaccurate"
- Harassment between the sexes is not *necessarily* sexual harassment
- However, harassment need not be *sexualized* to amount to sexual harassment either
- Those allegations that are "primarily about power imbalance/abuse of power" were allowed to proceed to a decision on the merits

Sexual Harassment Cases

Kerceli v. Massiv Automated Systems, 2016 HRTO 1324

Facts:

- The Employee who identified as white, straight, male, alleged
  - discrimination and harassment on the basis of race and sexual orientation
  - he was called "names like he was gay and said his face looked like a girl"
  - co-workers refused to share equipment and tools with him
  - that after he complained to Management he was terminated from his position

Analysis:

- Even where an Employee identifies as a "straight, white male", he can bring a discrimination complaint on the basis of sexual orientation.
- Injury to dignity damages were awarded at $25,000

Sexual Harassment Cases

Galuego v. Spectrum Health Care, 2016 HRTO 1367

Facts:

- The complainant was a male employee of the employer, which provided services such as assisting vulnerable clients with dressing and undressing and bathing and washing

Decision:

- It was not discriminatory for the Employer to refuse to assign the male Employee female clients on the basis of his sex and gender while the Employer assigned female employees both female and male clients
- Evidence showed that male employees were provided more hours and made more money
- Equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality
- Case dismissed

Sexual Harassment Cases

Employees v. Albert Schultz and Soulpepper Theatre – Ontario Civil Case

Facts:

- Four female former employees of Soulpepper Theatre have filed sexual harassment suits claiming unwanted sexual touching, groping and harassment over a period spanning 13 years in Ontario court
- The Employees allege that because the company's workplace harassment policy required employees to report complaints in writing to the executive director (Ms. Lester, Mr. Schultz's wife) they could not expect to do so "without the perception of bias and fear of reprisal"

Decision:

- The case is still in preliminary stages in Ontario Superior Court
- Cases such as this show that it is not only important for employers to have a written harassment policy, but to also ensure such policies have up-to-date best practices for reporting and investigating claims of sexual harassment
- A common sense review of these policies should be undertaken to ensure that vulnerable workers have an appropriate reporting route without fear of reprisal

Bullying and Harassment under OHS

Province	Legal Obligations				
	Mandatory Policy	Mandatory Report to Regulator/Agency	Mandatory Investigation	Training Requirement	Policy Reassessment Date
British Columbia	Y	N	Y	Y	Annually
Alberta	Y	N	Y	Y	N/A
Saskatchewan	Y	N	Y	N	N/A
Manitoba	Y	N	Y	N	Annually
Ontario	Y	N	Y	Y	As often as necessary
Federal	Y	N	Y	Y	At least every 3 years
Yukon	N	N/A	N/A	N/A	N/A
Northwest Territories	Y	N	Y	Y	At least every 3 years
Nunavut	Y	N	Y	Y	At least every 3 years

Policies

- Bullying and Harassment Policy
- Violence Prevention Policy
- Conflict of Interest Policy
- Social Events Policy / Drug and Alcohol Policy
- Respectful Workplace Policy (including electronic communications and social media)
- Policy on ownership of accounts, emails, devices

Training

- Ensure:
  - Senior management and Board receive training
  - Senior management and/or Board attend employee training to communicate importance of preventing harassment in the workplace
  - Mandatory attendance
- Keep record of employees who attend
- Encourage dialogue
- Explain how to bring complaint forward and encourage employee to come forward

Importance of Investigations

Ontario Public Service Employees Union v. Toronto Community Housing Corporation, 2016 CanLII 21169 (L.A.)

Facts:

- Employee brought a bullying and harassment complaint in response to rumours in the workplace that she was having an affair with a management employee
- Management refused to investigate because it felt that the issue was resolved by sending an email to all staff advising that there was zero tolerance for gossip and rumours in the workplace

Decision:

- General damages of $10,500 for the employer failing to investigate

Importance of Investigations

Colistro v. Tbaytel, 2017 ONSC 2731

Facts:

- Employer re-hired an employee, Mr. B, who had previously been dismissed following an investigation into allegations of sexual harassment
- Prior to re-hiring, the employer asked the plaintiff about Mr. B and she advised that he had sexually harassed her
- Despite prior sexual harassment allegation, no substantive investigation undertaken and Mr. B was hired
- Plaintiff went on medical leave and diagnosed with major depressive disorder and PTSD as a result of the re-hiring of Mr. B

Decision:

- Constructive dismissal due to negative work environment
- Aggravated damages of $100,000

Importance of Investigations

Damages for Failure to Conduct Investigations:

- $25,000 – *MK v. Massiv Automated Systems,* 2016 HRTO 1324
- $10,000-$35,000 to three Muslim employees harassment by their manager – *Big Inc. v. Islam,* 2015 ONSC 2921
- $25,000 – *Lalwani v. ClaimsPro Inc.,* 2016 AHRC 2
- $18,000 – *HF v. Black Swan Pub and Grill,* 2016 HRTO 1109

Investigations
Who Should Conduct the Investigation

- Investigation should be conducted by someone who:
  - is neutral and unbiased
  - is not directly involved in the incident
  - is skilled in the investigation process
  - has credibility with the employees
  - knows and understands the collective agreement
  - is able to be a witness in the proceedings
- Consider having a second person present to take notes and act as a witness to the interview

Investigations
Steps Prior to the Interviews

- Develop the terms of reference
  - Scope of investigation
  - Define the investigator's role
    - To find facts?
    - To mediate?
    - To determine misconduct?
    - To make recommendations?
  - Address privacy concerns
  - Is a preliminary report necessary?

Investigations
Steps Prior to the Interviews

Implementing Interim Measures

- Changes in reporting relationships, work locations
- Leaves
- Safety protocols
- Securing evidence

Investigations
Steps Prior to the Interviews

- Review bullying and harassment policy
- Consult collective agreement
- Review other applicable policies
- Consult with the Union, if appropriate
- Address requests for representation
- Offer support via Employee Assistance Program, if necessary

Investigations
Steps Prior to the Interviews

- Consider venue if separation of participants is important
- Prepare a preliminary list of the employees to be interviewed
- Determine the timing and the order of the interviews
- Develop a list of questions

Investigations
Conducting the Interview

- Remember that the purpose of the interview is to elicit all relevant information: who, what, where, when, why and how
- Ask open-ended and follow up questions
- Allow the employee(s) full opportunity to speak. Listen carefully and observe body language
- Take detailed notes
- Ask for clarification where required
- Caucus if necessary
- Find out, if there were others involved in the incident, who should be interviewed
- Ensure that the employee is given the opportunity to respond to any and all issues raised in the investigation

Investigations
After the Investigation is Complete

- Record the interview and ask the witness to confirm or sign your record of the interview (or have the witness prepare their own statements)
- In preparing a record of the interview keep to the employee's words insofar as possible - do not editorialize or summarize
- Determine whether further investigation is necessary, and if so what investigation
- Identify any conflicts in the evidence and make preliminary assessments of credibility

Investigations
Assessing Credibility

- Factors to Consider
  - Firmness of memory, accuracy and evasiveness
  - Did employee give their story in a clear and convincing manner?
  - Consistency of statements:
    - Is the story consistent with other persons' stories, or with other evidence obtained during the investigation including any relevant documents
    - Is it consistent with prior statements given by this witness
  - What was the witness's opportunity to observe the incident, i.e., were they in a better or worse position than other witnesses?

Investigations
Assessing Credibility

- Factors to Consider – Continued
  - Whether the witness is a non-party or otherwise disinterested in the outcome, that is, does the person have a bias or self-interest that might influence his/her version of the events?
  - Whether the evidence is consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions
  - Does the story make sense?
  - Is it probable that things happened that way?

Investigation
Conclusions and Implementation

- Reaching Conclusions
  - Has there been a breach of the policy?
  - Restorative measures, training, communications to staff
  - Does the evidence establish that misconduct has occurred warranting discipline?
  - What discipline should be imposed?

Investigation
Conclusions and Implementation

- Communicating investigation results
- Privacy considerations
- Ensure consistent discipline
- Ensure outcomes are monitored

Thanks for Listening

Presented by Nicole Skuggedal and Katy Allen

LAWSON LUNDELL LLP

Session #3:
Labour Law Update:
Focus on Marijuana and Drugs in the Unionized Workplace

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Labour Update: Marijuana in the Unionized Workplace

Ritu Mahil & Jim Boyle

05/29/2018

BUSINESS LAW

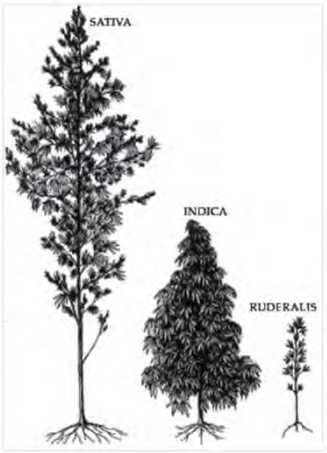
Presentation Outline

Labour Law 2018 Update:

1. Overview of marijuana legal status
   - *Medical marijuana*
   - *Federal legalization*
   - *Provincial regulation*
2. Addressing use of marijuana and drugs where no duty to accommodate
   - *Discipline*
   - *Off-duty use*
   - *Drug testing*
3. Duty to accommodate
   - *Addiction*
   - *Medical use to treat disability*
4. Labour law update

Cannabis Overview

- Two psychoactive varieties of cannabis:
  - *Cannabis indica* – painkiller, sedative – "cloudy" high
  - *Cannabis sativa* – nausea, appetite, anxiety, depression – "active" high
  - Hybrid varieties – varying quantities of THC and other compounds



Medicinal Uses of Marijuana

- Antiemetic (nausea)
- Sedative
- Appetite stimulant
- Pain management
- Anxiety
- Depression

Side Effects of Marijuana

- Impairs:
  - Coordination
  - Reaction time
  - Concentration
- Munchies
- High doses may cause anxiety, paranoia and hallucination
- Effects increased when combined with alcohol or other drugs
- Duration:
  - Smoke – effects almost immediate, last between 2 to 4 hours
  - Ingested – effects within 30 minutes, last between 4 to 8 hours (or longer)

Cannabis Use in Canada

"Canada has one of the highest rates of cannabis use in the world. More than 40% of Canadians have used cannabis in their lifetime and about 10% have used it in the past year. No other illegal drug is used by more than 1% of Canadians every year."

Centre for Addiction and Mental Health (2014). *Cannabis Policy Framework*. Retrieved from <https://www.camh.ca/-/media/files/pdfs---public-policy-submissions/camhcannabispolicyframework-pdf.pdf>

Legal Status: Medical Use

- Regulated by *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230
  - The following persons may possess fresh or dried marijuana or cannabis oil:
    - A person who has obtained the substance for their own medical purposes or for those of another individual for whom they are responsible:
      - from a licensed producer,
      - from a health care practitioner in the course of treatment for a medical condition, or
      - from a hospital.

Benefits Coverage

Canadian Elevator Industry Welfare Trust Fund v. Skinner, 2018 NSCA 31

- An employee diagnosed with chronic pain was prescribed medical marijuana by his physician.
- When the employee requested reimbursement from his union-administered health plan, he was rejected as the plan did not provide coverage for medical marijuana.
- The Nova Scotia Human Rights Board found that the failure to provide coverage was discriminatory on the basis of disability.
- The Court of Appeal reversed the Board's decision:

> Whether to provide a particular benefit, in this case a particular drug, could be based on many factors. Disability would be common to all applicants, because it is a prerequisite to any beneficial entitlement. That alone cannot make it a factor in the decision. As the Employers Roundtable argues, the Board's recognition that Welfare Plans need not cover the "sun, the moon and the stars" is an implicit admission that non-coverage decisions—and their effects—do not necessarily make disability a factor in those non-coverage decisions.

Legal Status: Recreational Use

- Currently illegal for recreational use
  - Schedule II of the *Controlled Drugs and Substances Act*
- Bill C-45 – *Cannabis Act*
  - Currently under review by Senate Committee
  - Senate vote expected in June 2018
  - Legalization for recreational use expected by August 2018

Provincial and Territorial Regulation

BRITISH COLUMBIA
Age of legal consumption: 19+
Where to buy: Both government and privately-run storefronts and online sales
Grow your own?: Up to four plants, out of public sight
Where to smoke?: Prohibited in cars, in areas frequented by children, and wherever tobacco is restricted.

ALBERTA
Age of legal consumption: 18+
Where to buy: Privately-run retail stores and government-operated online sales
Grow your own?: Up to four plants, subject to restrictions from landlords
Where to smoke?: Prohibited in cars, in areas frequented by children, and wherever tobacco is restricted.

NORTHWEST TERRITORIES
Age of legal consumption: 19+
Where to buy: Privately-run liquor stores and government-operated online sales
Grow your own?: Up to four plants
Where to smoke?: On private property and in private residences. Smoking will also be allowed on trails, highways, streets, roads and in parks when they are not in use for public events.

YUKON
Age of legal consumption: 19+
Where to buy: Government-operated storefronts and online sales.
Grow your own?: Up to four plants, out of public sight
Where to smoke?: Only on private property and in private residences

Legalization in BC - *Cannabis Control and Licensing Act*

You may not smoke it on a boat [s.65]
You may not to a child promote [s. 71]

You may not smoke it on a train [s. 66]
You may have more if you're in pain [s. 52]

You may not smoke it at a rink [s. 63]
You may not buy it if you drink [s. 49]

You may possess up to 30 grams [s. 52]
You may not smoke it on a tram [s. 66]

You may not smoke it at the beach [s. 63]
You may not smoke it where they teach [s. 61]

You may not smoke it in a car [s. 81]
You may not smoke it at a bar [s. 64]

You may not smoke it in a pool [s. 63]
You may not smoke it near a school [s. 61]

You may not have more than four vines [s. 56]
If you are bad you'll get a fine [s. 110]

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Legal Issues for Employers

- No different than any other drug that causes impairment
- Recreational marijuana users who possess or use marijuana at work, or report to work while impaired, may be subject to discipline for breach of employer policy
- Reasonable accommodation required where:
  - Employee is addicted to marijuana; or
  - Employee uses medical marijuana to treat disability

Implementing Drug and Alcohol Policy

- Unless restricted by collective agreement, employers may unilaterally institute and enforce a drug and alcohol policy, provided that:
  - The policy is consistent with the collective agreement
  - The policy is reasonable
  - The policy is clear and unequivocal
  - The employer has brought the policy to the attention of employees before enforcing
  - The employer consistently enforces the policy from the time it is introduced

Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson)

Managing Employee Recreational Use of Marijuana

Terra Nova Employers' Organization v. Communications, Energy and Paperworkers Union (UNIFOR, Local 2121), 2018 NLCA 7

- Employee dismissed for violating company drug policy by possessing marijuana while performing company business
- The Newfoundland Supreme Court found that as the employee was not aware that there was a small amount of marijuana in the pocket of his clothes, he did not possess the required "mental element" to be guilty of violating the policy
- On appeal, the Court reversed the ruling. It held that there is no need to prove an intentional disregard of the employer's policies.
- The employee had the onus to prove that he had taken reasonable care to ensure he did not breach the policy. Mere ignorance is not a defence.

Use at Workplace

Re Bombardier Transportation and Unifor, Local 1075 (CT), 2018 CarswellOnt 3701 (Ont. Arb.)

- Employee dismissed for smoking marijuana at the workplace in contravention of the drugs and alcohol policy prohibiting consumption "anywhere on the company premises."
- It was acknowledged that the Employer ran a "safety-sensitive" operation and the employee tested positive for THC. However, it was also conceded that a positive result does not necessarily indicate either present impairment or recent consumption.
- The employer was required to show through other means that the employee had violated the policy.
  - Evidence of eye-witnesses challenged
- The employer was unable to discharge its burden and so the arbitrator ruled in favour of the employee.

Discipline for Reporting to Work Under the Influence

Re Tolko Industries Ltd. and USW, Local 1-425 (Lipke), 2017 CarswellBC 3151 (B.C. Arb.)

- Arbitrator upheld the employer's right to discipline its employee for marijuana use, although she overturned the employee's termination.
- The employer prohibited employees from reporting for duty under the effects of alcohol or drugs. The policy had exceptions for prescription medications.
- The arbitrator upheld the policy but deemed dismissal an excessive disciplinary response.

Discharge for Use at Work

University of Windsor v. Canadian Union of Public Employees, Local 1001, 2017 CanLII 9594 (ON LA)

- Employees dismissed for smoking marijuana at workplace
- Neither employee was forthcoming during investigation or at hearing
- Arbitrator recognized that the absence of candour by grievor when confronted with drug use is aggravating factor as it undermines trust relationship – even more so where position is either highly safety sensitive or unsupervised
- Combination of unsupervised nature of work and continued lying that "warrants what would otherwise appear to be an overly harsh penalty for a first offence by employees with significant records of service"
- Arbitrator upheld just cause for dismissal

Off-Duty Use

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

- Arbitrator found no basis for any discipline where employee had smoked marijuana while off duty

> The Company seeks to punish an employee for activity which occurred while he was off duty, off Company premises which, in and of itself, posed no threat or harm to the Company's operations or its legitimate business interests. In these circumstances the Arbitrator cannot responsibly conclude that the employer had just cause for the assessment of any discipline against the griever, merely by reason of his having registered a positive result to a urine analysis drug test, or by his admission that he did consume marijuana in a social setting while off duty.

Off-Duty Use

Suncor Energy Inc. v. Communications, Energy & Paperworkers Union (Local 707), 2008 CanLII 88097 (AB GAA)

- Grievor dismissed after post-incident drug test revealed cannabis metabolites, violating Last Chance Agreement after similar incident seven months prior
- Arbitrator found the drug policy was reasonable and discipline justified, but termination was excessive
- Not every violation of policy is breach of trust, and grievor consumed marijuana off worksite in personal life
- No more risk to attend work impaired than employees who consume alcohol on days off

Off-duty Use and Continued Impairment

Re Hotz Environmental and TC, Local 879 (B. (G.)), 2016 CarswellOnt 1824 (Ont. Arb.)

- The Arbitrator was tasked with assessing the line between off-duty consumption of drugs and working "under the influence"
- The Arbitrator applied a B.C. case dealing with alcohol to the facts: *Teck Cominco Metals Ltd. v. U.S.W.A., Local 480*
  - Arbitrator Hope ruled the employer's suspicions of alcohol abuse in an employee's off-hours, based on the smell of alcohol, were speculative and insufficient to sanction intrusion on the "high degree of respect for the off-duty privacy of employees"
- The Arbitrator ruled that while random testing is unreasonable, where there is "reasonable cause" an employer will be entitled to require testing.

  While there may be arbitral recognition that there are limits to an employer's interest in an employee's off-duty drug use, those limits give way when an employee reports to work for a safety sensitive position showing indicia of impairment or signs that s/he may be under the influence of drugs or alcohol.

Off-duty Use and Continued Impairment

IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.

A decision of Arbitrator John Roil, Q.C. that has yet to be formally reported.

- The employer, Valard Construction LP, refused to hire an employee into a safety-sensitive position who openly used medical cannabis to treat osteoarthritis and Crohn's Disease.
- The union grieved the action on the basis that the refusal to hire a qualified person on the basis of a disability is discriminatory
- Arbitrator Roil held that given there is no accurate means for employers to test for cannabis impairment, it was an undue hardship for the employer to manage the risk of having an employee that could be impaired without the means of properly detecting it.

When is Drug Testing Appropriate?

- Pre-employment
  - Safety sensitive position
- Reasonable grounds
  - Indicators lead to reasonable conclusion of inability to work safely because of substance abuse
- Post-incident
  - Employee involved in significant incident causing actual damage or near-miss
- Return to work
  - Employee has agreed to RTW post-treatment
- Random?

Reasonable Grounds

- Odour of alcoholic beverage or marijuana on breath, body, or clothes
- Slurred or agitated speech
- Red eyes, pupils larger or smaller than normal
- Unsteadiness in walking or standing, marked decrease in coordination
- Disorientation and/or drowsiness
- Uncharacteristic or unusual behaviour

Reasonable Grounds

Re Airport Terminal Services Canadian Co. and Unifor, Local 2002 (Sehgal), 2018 CarswellNat 991, 135 C.L.A.S. 28

- Employer policies that can result in discipline, even in a safety sensitive or dangerous environment, must involve a "balancing of interests" between employee and employer.
- The "balance of interests" approach requires justifying whether the alleged grounds outweigh the employee's privacy interests.
- Proportionality must be a guiding force even after a workplace accident. Factors may include the *significance* of a workplace incident or an employee's past history:

  Mandating post-incident drug and alcohol testing after any and all accidents or incidents, without an analysis or balancing of the individual's privacy interests, is overly broad and unreasonable.

Random Testing

- Random drug testing generally prohibited in Canada
- Ontario Court of Appeal rejected random drug testing for employees on basis that it did not measure current impairment

Entrop et al. v. Imperial Oil Limited et al., [2000] O.J. No. 2689

- Employer must establish "general problem in the workplace"

Irving Pulp & Paper, Ltd v. Communications, Energy and Paperworkers Union of Canada, Local 30., 2013 SCC 34

- No means of testing current marijuana impairment – though police throughout Canada are piloting oral fluid testing

Random Testing

Teck Coal Ltd. (Fording River and Elkview Operations) v. United Steelworkers, Locals 7884 And 9346, 2018 CanLII 2386 (BC LA)

- Grievances challenged Employer's use of random drug and alcohol testing of its employees
- The Employer argued that the policy was necessary on the basis of incidents at its work sites.
- Applying *KVP,* Arbitrator upheld the grievances, finding the Employer's other efforts to reduce drug use had removed the objective basis for random testing policy:

> Such testing and its accompanying policies seriously intrude upon employee privacy rights and there is not a corresponding "general" problem in those workplaces with employees being under the influence of, or impaired by, drugs or alcohol sufficient enough to justify those serious intrusions into their rights.

Random Testing

Suncor Energy Inc. v. *Unifor, Local 707A*, 2017 ABCA 313

- Suncor implemented random drug testing for safety sensitive workers in 2012 – Union grieved policy on basis of privacy infringement
- Court of Appeal found that an employer could justify its policy by relying on evidence of substance abuse in the workplace generally rather than just within the bargaining unit
- Nature of workforce in this case was one where workforce strongly integrated between union and non-union employees and contractors
- Ultimate decision on policy remitted to new arbitration panel

Random Testing

Unifor, Local 707A v. Suncor Energy Inc., 2018 ABCA 75

- Court of Appeal upheld injunction preventing implementation of random drug testing policy until proceedings on the merits finally decided
- Irreparable harm was found due to the impact that random testing would have on the privacy and dignity of the workers
- Other drug and alcohol policies and practices would still continue on the site, which was a factor indicating the balance of convenience favoured the Union. Another factor was the impact on employees who have no drug or alcohol issues and who have not been involved in workplace incidents

Return to Work

Spectra Energy Transmission - West v. Communications, Energy and Paperworkers Union of Canada, Local 686-b, 2012 CanLII 105337

- Grievor returned to work, physician recommended engagement with addictions specialist for cannabis abuse
- Grievor had never been intoxicated at work
- Employer instituted monthly random testing over two years as part of return to work
- Physician noted in assessment that ongoing consumption of marijuana was inconsistent with safety sensitive duties – Union brought no evidence to counter this point
- Arbitrator upheld six random tests over two year period confined solely to detecting cannabis

Accommodation

- Must accommodate employees when:
  - Employee has addiction
  - Employee uses marijuana or drugs to treat disability

Employee Onus to Demonstrate Disability

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

- Employee dismissed after smoking marijuana during paid break in contravention of drug policy
- Employee later claimed to be addicted, but provided no diagnostic medical or addictions expert evidence – relied on own statements
- Arbitrator found employee had not established addiction, therefore no duty to accommodate

Employee Duty to Disclose

Stewart v. Elk Valley Coal Corp., 2017 SCC 30

- Employer implemented policy requiring employees to disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. If they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated
- Employee used cocaine on his days off
- After accident, tested positive for drugs and later said he thought he was addicted to cocaine
- Employer terminated employment
- Tribunal and courts found that there was no discrimination as employee was terminated for violating policy, not for having addiction
- Employee may have been in denial about addiction, but knew he should not take drugs before working and had capacity to disclose drug use to employer

Employee Duty to Disclose

French v. Selkin Logging Ltd., 2015 BCHRT 101

- Logging employee hit moose after smoking; claimed he was following doctor's orders and smoking "medical type" marijuana that does not impair – up to 8 joints per day
- Tribunal found doctors had not prescribed marijuana and he had no legal authorization
- *Prima facie* discrimination established, but employee had a duty to:
  - Obtain legal authorization; and
  - Disclose potential source of impairment pursuant to *Workers Compensation Act* Regulation 4.20
- Employee failure to engage in accommodation process meant employer fulfilled duty to accommodate

Disclosure of Medical Authorization

IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Assn. Inc., 2016 NLTD(G) 192.

- A judicial review of an arbitration decision, the trial judge quashed the award upholding the employee's termination for failure to disclose consumption of prescribed (medical) marijuana.
- The trial judge found that termination was unreasonable for the mere breach of the drug policy. The trial judge still found discipline warranted, however, even though the employee had a medical prescription to consume marijuana.
- The basis for this finding was the employee's failure to disclose his consumption habits (and prescription) and evidence that the employee took deliberate steps to conceal his medical marijuana use.

Hybrid Cases

Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115, 2006 BCCA 58

- Hybrid case – culpable and non-culpable elements
- Addicted employee has duty to facilitate accommodation through rehabilitation – but must first be aware of addiction
- If aware of addiction and failure to seek rehabilitation, then can be dealt with as culpable misconduct
- Ten-month disciplinary suspension without pay or benefits appropriate in this case

Employer Duty to Inquire

Brown v. Bechtel Canada and another, 2016 BCHRT 170

- Complainant terminated after being found with marijuana in work camp
- Complainant produced Health Canada authorization but did not indicate marijuana was to treat back pain
- Employer applied to dismiss discrimination claim, citing no reasonable prospect of success because complainant did not disclose disability
- Tribunal denied application; knowledge of Health Canada authorization may be sufficient to establish that the Employer ought to have known that the medical reasons for the authorization could be a disability

Employee Duty to Cooperate

Telus Communications Inc. v. Telecommunications Workers' Union (Termination Grievance No. 214.076), [2016] C.L.A.D. No. 91

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

Requirement to Produce Medical Information

United Steel Workers, Local 7656 v. Mosaic Potash Colonsay ULC, 2016 CanLII 18320 (SK LA)

- Welder prescribed marijuana, employer alleges marijuana use in breach of its drug policy and suspended grievor
- Employer would reinstate grievor when he swapped to another treatment, arguing employer is required to accommodate disability, not particular medication
- Prior to arbitration, employer sought disclosure of medical information including application for medical marijuana authorization
  - includes diagnoses and treatment options
- Arbitrator held grievor should produce records pertaining to treatment because availability of alternate treatments and whether grievor is fit for safety-sensitive work are issues relevant to arbitration

Discrimination

Wilson v. Transparent Glazing Systems (No. 4), 2008 BCHRT 50

- Complainant, a medical marijuana user for chronic pain, was dismissed by Employer after series of culminating incidents due to incompetence and disrespect towards coworkers
- Termination letter noted that the "final straw" was a memo sent by the superintendent, which included the line "I understand that he's taking a form of medication that seems to impair his ability to properly perform his duties."
- On basis of this line, Tribunal found that disability was a factor in his termination
- Employer provided no justification as its position was there was no discriminatory conduct
- Tribunal found that Employer had discriminated on basis of disability; but Complainant would have been dismissed anyway, so remedy limited to $500 for injury to dignity

No Duty to Accommodate Smoking

McDougall v. Human Rights Commission, 2016 NSSC 118

- Complainant ejected from bar after rolling joint in bathroom, owner thought he was going to light up
- Complained on basis that he was discriminated against on basis of disability because of his medical marijuana
- Human Rights Commission investigator found complaint unsubstantiated, Commission dismissed
- Court found no procedural or substantive error
- Complainant ejected because of mistaken but reasonable belief that he was going to smoke in bathroom – irrelevant if medical marijuana or tobacco

Alberta *Fair and Friendly Workplaces Act*

Amendments to Alberta *Labour Relations Code* (most amendments in force June 7, 2017)

- Expanded powers for Labour Relations Board and arbitrators
- Secondary picketing permitted
- "Hybrid" union certification process (effective September 1, 2017
  - No representation vote if Board is satisfied union has support of 65% of employees in bargaining unit
  - Representation vote required where application for certification supported by 40% to 65% of employees in bargaining unit
  - Period for organizing campaign increased from 90 days to 6 months

BC Labour Law Update

- No legislative changes, but provincial government is currently undertaking a review of the *Labour Relations Code*
- Public engagement closed April 24, 2018
- Panel to provide report in August 2018
- Union submissions:
  - Restore 'card-check' certification
  - Provisions to reduce contracting and outsourcing
  - Repeal picketing restrictions

BC 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
Apr/May	5	16	21	1.4	1.5	1.5
June/July	4	15	19	2.0	1.4	1.5
Aug/Sept	10	16	26	1.5	1.7	1.5
Oct/Nov	10	9	19	1.5	1.8	1.6
Dec/Jan	7	13	20	1.4	1.5	1.5
Total / Avg past 12 months	**41**	**85**	**126**	**1.7%**	**1.5%**	**1.5%**

Business Council of British Columbia Collective Bargaining Bulletin Volume 49, Issue 6, Dec 2017/Jan 2018

Questions?

Thanks for Listening

Presented by Ritu Mahil and Jim Boyle

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Class Action for Workplace Sexual Harassment Allowed to Proceed

By Nicole K. Skuggedal and Katy E. Allen

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A former flight attendant of WestJet, Mandalena Lewis, has commenced a class action lawsuit on behalf of a proposed class of WestJet employees, alleging that the company breached its promise to provide a harassment-free workplace.

Ms. Lewis alleges that she suffered sexual assault at the hands of a pilot who had previously engaged in similar behaviour with another flight attendant and, despite WestJet's knowledge of the previous assault, WestJet did not discipline or dismiss the pilot. The claim alleges that Lewis suffered physical, emotional, and psychological harm from WestJet's systemic breach of its promise to employees to provide a harassment-free workplace. The claim further sets out that WestJet benefited from the breach by saving the costs of implementing a proper anti-harassment procedure, and making increased profits from promoting its reputation as an airline that does not tolerate harassment.

WestJet brought an application to the British Columbia Supreme Court to strike the claim, partially on the basis that such claims must be brought to a human rights and/or workers compensation tribunal and that the claim had no reasonable prospect of success. The Court decided that the claim did disclose a reasonable cause of action and was not bound to fail, as the claim for breach of the anti-harassment promise was on its face a valid contractual claim.

This is a novel case as employers rarely face civil class actions for harassment, given the prevalence of administrative tribunals designed to deal with discrimination or occupational health and safety issues. We will be monitoring this claim carefully as it makes its way towards trial and will continue to provide updates.

SCC Dismisses Leave to Appeal the ABCA's Decision that Litigation Privilege Cannot Cloak an Employer's Internal Investigation Process

By Michelle. S. Jones

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The Supreme Court of Canada has dismissed leave to appeal in *Suncor Energy Inc. v. Her Majesty the Queen in the Right of Alberta*. The case involved the application of litigation privilege to an internal incident investigation conducted following a workplace fatality.

In April 2014, Suncor Energy Inc. (**Suncor**) experienced a worker fatality at one of its worksites near Fort McMurray. Suncor immediately commenced an employer's incident investigation as required under section 18(3)(a) of the *OHS Act*. Based on initial information received as part of the employer's investigation, Suncor determined that litigation was a real and distinct possibility and as such, it commenced an internal investigation into the incident with direction to endorse all documents within this internal investigation as privileged.

Occupational Health and Safety Officers from the Ministry of Labour demanded that Suncor produce copies of materials (notes, records, photos, videos, documents, statements, interviews, etc.) collected as part of its incident investigation process. Suncor produced its employer incident investigation, but refused to produce the requested materials on the basis of litigation privilege. The Ministry of Labour sought an order compelling Suncor to disclose the materials.

The Court of Queen's Bench of Alberta held that the dominant purpose of Suncor's internal investigation was in contemplation of litigation and consequently ordered Suncor to meet with a referee who would assess the claims of privilege and provide recommendations to the Court about which documents were in fact privileged.

The Alberta Court of Appeal disagreed. It found that the Chambers Judge's application of legal privilege was overbroad. Whereas the Chambers Judge had applied the dominant purpose test to the internal investigation as a whole, the Court of Appeal held that it had to be applied to each document or set of documents. Absent a consideration of the specific documents, the focus of the inquiry was overbroad in that it focused on *whether the document was created as part of the internal investigation* as opposed to *whether the creation of the document itself was primarily for the purpose of litigation*. Thus, materials collected as part of the internal investigation, but not created for the dominant purpose of litigation, were not properly subject to litigation privilege. As leave to appeal has been denied, the Court of Appeal's decision stands.

The case is particularly significant for internal legal counsel overseeing investigations into workplace incidents. Counsel must not assume that everything created or collected as part of an internal investigation in anticipation of litigation will be protected by privilege. The application of the dominant purpose test is narrower. Instead of focusing on whether the document was collected or created as part of the internal investigation, they must instead ascertain whether the creation of the document itself was for the dominant purpose of litigation. If not, then litigation privilege will not apply.

Recovery of Overpayment to Employees in British Columbia

By Jim Boyle

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In the fast-paced world of payroll, mistakes occasionally happen leading to overpayment of employees. It is tempting to correct such overpayment by simply deducting the overpaid amount from the employee's next paycheque. British Columbia employers may be surprised to learn that, except in certain circumstances, this method of recovery is impermissible.

Section 21(1) of the BC *Employment Standards Act* says:

> Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose. (emphasis added)

This broadly worded clause seems, on its face, to prohibit deductions for any purpose, apart from those authorized by statute, such as for tax, Employment Insurance, or Canada Pension Plan. Fortunately, courts have taken a sympathetic view of section 21.

In *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343, the Court of Appeal affirmed a grievance arbitrator's interpretation of section 21 as prohibiting the unilateral recovery by the employer in all but certain excepted circumstances. The Court of Appeal wrote:

> The employer is still able to recover overpayments from employees where that employee agrees to the deduc tions, or where a statute or collective agreement expressly authorizes the employer's unilateral action. Where no such agreement or statutory authorization exists, the employer has the option of recovering overpayments in other ways such as pursuing a grievance, or bringing a claim against the employee (at para 67).

In the non-union workplace, where an employee has been overpaid, the employer should seek consent in writing from the employee to deduct the amount of overpayment from the employee's next paycheque. Where there is a good working relationship and the mistake is caught quickly, an employee may willingly consent to this reasonable balancing of accounts.

If the employee does not consent to the deduction, as may be the case where there is an accidental overpayment coincident with an employee's final paycheque on termination of employment, section 21 holds that the employer's only remedy would be to bring a claim against the employee.

Given the relatively small amounts that may be in issue in the event of overpayment, a full-scale court action would likely be an inefficient way to recover the overpayment. Circumstances of overpayment are suitable instead for the relatively informal and streamlined Civil Resolution Tribunal process, which is appropriate where the disputed overpayment amounts to less than $5,000. The Civil Resolution Tribunal process is based online and proceeds by written submission, offering a cost-effective method for employers to recover overpayment from intransigent employees which helps to overcome the restrictions imposed by section 21.

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