

# EMPLOYMENT LAW UPDATE – THE OIL PATCH & BEYOND

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# Agenda

- **Drug & Alcohol Testing Update**
- **Use of Consultants**
- **Employees Using Their Own Devices**

# “HOW MANY FINGERS AM I HOLDING UP?”: DEALING WITH IMPAIRED EMPLOYEES

# Types of Testing

1. **Pre-employment Testing**
2. **Random Testing**
3. **Reasonable Suspicion**
4. **Post Accident/Near Miss**
5. **Return to Duty and Follow-up Testing**
6. **Other Types of Testing**
  - “Sweep” Testing
  - Customer-required “pre-access” testing



# Why is this a work issue?

- Absenteeism/illness/productivity
- Illegal activities (e.g. selling drugs) - Risk to employer's reputation/vicarious liability
- After-effects (e.g. hangover, “cold turkey”) and job performance
- Preoccupation with next fix/drink – reduced attention/concentration
- Health and safety – impaired performance
- Cost



# Why is this a legal issue?

## Privacy/human rights

VS.

## health and safety



# The Right to Privacy Limits Drug and Alcohol Testing

- In the U.S., most drug and alcohol cases rest on state common law prohibitions against unreasonably intruding into employees' private affairs
- Some state Constitutions also confer privacy rights
- Canada generally has legislation requiring information collected be “reasonable”



# Human Rights Issues

- Addict = disability
  - Must not discriminate
  - Must accommodate (up to point of undue hardship)

BUT:

- Non-addicts:

*Recreational use of drugs or alcohol is not protected under the AHR Act. A "recreational user" is a person who uses drugs or alcohol, but is not dependent on or addicted to drugs or alcohol. A recreational user does not have a dependency and therefore does not have a disability.*

(albertahumanrights.ab.ca)

- Non-employees (McCormick)

# Limit the Intrusiveness of Testing



## Select the appropriate test:

1. Urine Testing
  - Most commonly used and widely accepted
  - Generally detects drug usage within last 2-4 days
2. Oral Fluid Testing – less intrusive, less reliable
3. Hair Testing – even less intrusive, long look back, may miss recent use
4. For Alcohol Testing:
  1. Saliva/Breath – DOT accepts saliva for initial test only, breath for initial test and confirmation test as well.
  2. Blood – some jurisdictions may require blood testing; others restrict it. More invasive than breath testing.



# Bottom Line on Drug Testing

- Implement an appropriate drug and alcohol testing policy
- Use consent forms
- Adhere strictly to the policy
- Limit intrusiveness of testing
- Work with qualified independent agencies to conduct the testing
- Keep all results confidential and separate from personnel files
- Be careful when terminating an employee for refusing testing
- Recognize drug testing does not show current impairment
- “Balance is everything!”



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

- Facts
- Supreme Court of Canada
- Only dealing with random alcohol testing
- Heard on December 7, 2012
- Decision

# DARRPP

- Drug and Alcohol Risk Reduction Project
- What did it propose?
  - Introduce random testing of safety sensitive positions
  - See if accident rates fall
- What safeguards were in place?
  - Organisations must have a mechanism in place for assessment by a third party, of individuals who test positive for alcohol or drug use, to determine whether any individual suffers an addiction
  - Organisations must offer rehabilitation and accommodation for at least those who are diagnosed with an addiction
  - Organisations must have controls in place that ensure protection of privacy and personal information of workers who are tested

# Suncor and DARRPP

- **June 2012** - Suncor told its workers it would introduce a random drug and alcohol testing policy for all employees in "safety-sensitive" roles on October 15, 2012.
- **Rationale** - three of the seven deaths at its facilities since 2000 involved workers under the influence of alcohol or drugs. Between May 28, 2010, and June 30, 2012, there were "over 100 reported security incidents involving alcohol or drugs" at its operations.
- "Our view is that even one fatality is too many."
- **Union** - the policy would violate the privacy and dignity of employees, as well as the terms of their collective agreement.
- **July 19, 2012** - the Union filed a grievance objecting to Suncor's Program. Suncor said they were going to implement the policy before the grievance hearing.
- **October 12, 2012** - Alberta Court of Queen's Bench granted an injunction prohibiting Suncor from conducting the Program pending the grievance being heard.
- **October 22, 2012** – Alberta Court of Appeal (one judge) – injunction upheld.
- **November 28, 2012** - Alberta Court of Appeal (three judges) - split decision – injunction upheld.
- Arbitration hearings heard in January 2013.

# Suncor Court of Appeal Decision

Suncor was not entitled to unilaterally implement such an intrusive policy at the expense of employees' privacy rights, particularly since an arbitration hearing was still pending.

The Court of Appeal noted:

- only 6% of employees tested positive over 3.5 year period
- Suncor experienced only seven fatalities at its oilsands site over a 12-year period, with just three of those killed having been shown to have been under the influence of drugs or alcohol at the time of death.
- Suncor was unable to demonstrate that the proposed policy would have any “immediate effect on prevention of job site accidents” or that “it would do so more effectively than the currently operating policy”
- no rush to implement policy before arbitration hearing
- A safety-sensitive position is only the start of the analysis. There needs to be something more e.g. evidence of abuse in the workplace

# Suncor Arbitration Hearing

Had Suncor had exceeded its management rights in unilaterally implementing a policy to randomly test employees for drugs (by urinalysis) and alcohol (by breath tests)?

## Board Decision:

- 14 positive alcohol tests over period of 9 years in a workforce of Suncor's size not sufficient to establish that there was persistent problem of a drinking or drug culture in the workplace which would justify the significant intrusion into the employees' privacy.
- urinalysis test for drugs was unable to provide evidence on the present impairment of an employee.

## Board Decision:

- The policy was “an unreasonable exercise of [Suncor’s] management rights” because the policy “...is not targeted as narrowly as possible, does not use the least intrusive or most accurate testing measures available and does not contain provisions for communicating with employees around false positive results.”
- Suncor has indicated that it will appeal the decision

# Managing the Risk

## Privacy

- Limit those who deal with the information
- Limit the requests to safety sensitive positions

## Human Rights (Canada)

- If there is a positive test then find out if they are an addict
- If they are an addict:
  - Do not discriminate
  - Accommodate up to the point of undue hardship

## Human Rights (U.S.)

- If there is a positive test then look at the individual state's laws
- Determine if there was self-identification before the test:
  - Do not discriminate
  - Accommodate, if required, up to the point of undue hardship

# What does the future hold?

- Are we looking at this from the right angle?
  - What about sleep deprivation?
  - Will we move towards “impairment” testing?
- Different types of testing (retinal reaction?)



# “WHO DO YOU WORK FOR ANYWAY?”: USE OF CONSULTANTS

# Why is this important?

## Canada

- Tax laws
- Employment standards
  - Termination pay
  - Overtime
  - Leaves of absence
- Human rights laws

## U.S. and Canada – Misclassification has substantial potential adverse ramifications under:

- Tax Laws
- Wage & Hour Laws
- Title VII, ADEA, ADA, etc., i.e., Discrimination Laws
- The NLRA (Labor Law)
- Workers' Compensation Laws
- Unemployment Compensation Laws
- Employee Benefits Laws

# So, why do we do it?

- “To save money”
- “It’s easier”
- “We’ve always done so.”
- “The entire industry does it this way.”
- “Our business model requires it to remain competitive.”
- “That is what these workers want.”

Reality check: These reasons are irrelevant to the legal reasons that support a valid consultancy (independent contractor) classification in the U.S.

# How do I tell the difference?

## Canada

- Who's looking? CRA? Employment standards? Human rights?
- SAGAZ
- WEIBE DOOR
- McCORMICK

## U.S. – Every set of laws has its own fact intensive test

- Category Test (behavioral control, financial control, the parties' relationship)
- Economic Realities Test
- Common Law “Right of Control” Test
- The “Common Sense” (Joe the Plumber) Test
- Look for “carve outs” in each law, e.g., the “direct seller” carve out in some laws

# What if I get it wrong? What's the risk?

## Canada

- Tax
- Human rights
- Employment rights (especially reasonable notice and overtime)
- Beware the dependent contractor!

## U.S.

- Back taxes and penalties
- Back wages and statutory double damages, costs and attorneys' fees
- Liability for discrimination claims (back and front wages, compensatory damages, punitive damages, costs and attorneys' fees)
- Liability for injuries
- Criminal sanctions under some statutes

# EMPLOYEES LEFT TO THEIR OWN DEVICES: LUXURY OR LIABILITY?

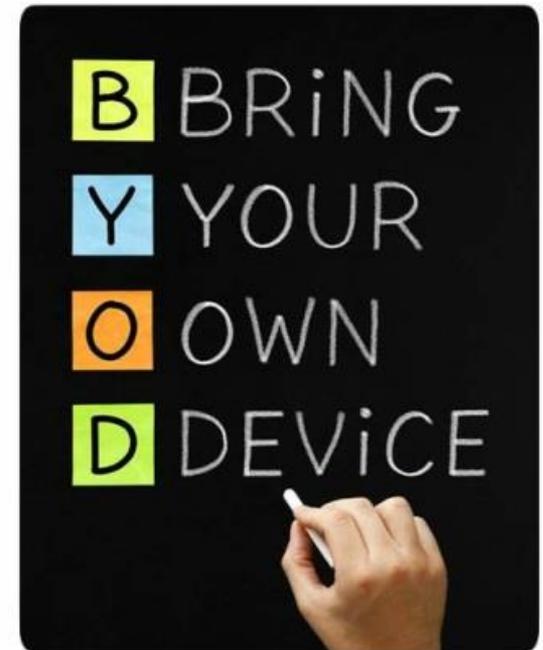
# What Devices?

- Smartphones
- Tablets/iPads
- Laptops/Personal PCs
- USB
- External hard drives
- Cloud-based storage (e.g., Drop Box)



# Is BYOD a B-A-D Idea?

- 1) “Bring Your Own Device.”
- 2) Employees utilize these devices to perform work for you - whether company provided or employee’s personal device.
- 3) Why allow it? You may not have a choice!
  - Technology is a part of us, not apart from us



# Is BYOD a B-A-D Idea? Stat Facts

- 1) **80%** of employees continue working when they leave the office
- 2) **46%** of employees admit regularly transferring work-related documents between work and personal computers when working from home, leaving the security of the corporate network
- 3) **80%** of employees use their private smartphone for business; **67%** use their tablet

(McKinsey Survey 2014)

- 1) **25%** of business users admitted to having security issues with their private devices in 2013, but only **27%** of them felt obliged to inform their employer
- 2) **50%** of those surveyed said they spend more than one hour each day using private devices for work purposes
- 3) By 2017, **50%** of employers predicted to require employees to supply their own devices for work purposes (Gartner Inc., 2013)

(Gartner Inc., 2013)



# Risks & Challenges – Overview

- **Upgrades: Too fast**
- **Lost Data**
- **Rights affecting access and monitoring**
  - Privacy
  - NLRA Rights
- **Who owns data stored on personal devices?**
  - Corporate information and trade secrets
  - Personal information of employees or customers
- **Duty to monitor employee conduct?**
- **Compliance risks:**
  - HIPAA
  - Encryption (MA & NV)
  - Client demands
  - e-Discovery
- **Data breaches**
- **Wage & Hour violations**

# Benefits/Risks



## 1) Benefits

- Avoid security & support problems with “ad hoc” BYOD
- Reduced hardware & software costs
- More sophisticated devices
- Reduced maintenance costs
- More flexible & efficient workforce
- Eliminate need for two devices
- Employee familiarity with device
- Improved/faster decision-making
- Greater employee morale/satisfaction

## 2) Risks

- IT teams must support a proliferation of mobile vendors/operating systems
- Impacts security - more difficult to control user, device, application, data and network
- Less bargaining power on cellular plans
- Less customer confidence if data not controlled
- HR issues such as acceptable use, privacy, misconduct, termination
- Compliance – encryption, HIPAA
- Legal issues such as ownership, e-discovery, trade secrets, privacy
- Blurring of work and personal data

# Who is Affected by a BYOD Program?

- 1) Legal
- 2) Human Resources
- 3) Finance
- 4) Communication/Employee Relations
- 5) Information Technology

# Some HR Issues

- Misconduct
- Remote/Telecommuting Policies
- Privacy Policies/GPS
- Safety Policies
- Confidential Information/Trade Secrets
- Investigations



# Some Legal Issues

## U.S.

- LEGAL hold issues
- FLSA - wage/hour
- EEOC - discrimination, harassment, retaliation
- OSHA – safety
- NLRA – unions
- Trade secrets/confidential information
- Privacy

## Canada

- Legal hold
- Overtime
- Human rights
- OSH
- Labour
- Trade secrets/confidential information
- Privacy



# Data Breaches

## U.S. Fines, Penalties, Settlements:

- State Attorneys General
  - Varies By State
    - Penalties and Damages.
    - Length of notification delay: Florida imposes fines when notification is not provided within the statute's mandated time frame (45 days). Calculate the fine as \$1,000 per day for the first 30 days, and \$50,000 for each 30 day period thereafter with a maximum fine of \$500,000.
    - Protects enacting states residents so national compliance very costly.
  - Health and Human Services
    - Penalties and settlements in the *millions* of dollars

## U.S. Private Cause of Action

- 14 states have some form of private action

## Canadian Fines, Penalties, Settlements

# Risks & Challenges

## *Trade Secrets*

- **Employee uses phone or tablet to receive and store information**
- **Employee uses phone or tablet to transmit or forward information**
- **Employee or visitor uses phone to capture information (including photographs or video)**

# Policy is a Must

- Prevent data loss
- Need to monitor v. privacy concerns
- Protect trade secrets
- Technical controls
- Limit wage & hour violations
- Consider technical controls
- Enforce anti-harassment and anti-retaliation policies

# Key Elements of BYOD Policies

- **Eligibility**
- **Authorized Use v. Unauthorized Use?**
- **Reimbursement**
- **Security**
- **Monitoring**
- **Support**
- **Discipline**
- **Policy Violations:**
  - Clear on consequences (progressive discipline)
    - “Up to and including termination”
  - May need to notify business partners
- **Guidelines on device configuration**
- **Safety (e.g. vehicle use)**
- **Plan for breach**
- **Develop process for litigation preservation, data deletion, device and security updates**
- **Training**

# Policy Considerations

- How will the device be updated?
- Which corporate applications?
- Acceptable use policies?
  - Device enrollment? Remote device management? Cloud storage? Wipe device if termination?
- How to enforce the policies?
  - Network controls? Device controls? Data controls? Applications controls?
- How to implement?
  - Ease of implementation? Cost? Security? Usability?



# Evaluating Policies

## *Monitoring*

- **Develop a specific, written policy:**
  - Establish information systems are the property of the employer – BE SPECIFIC
  - Consider additional steps – desktop statement, posting in common area, written consent/acknowledgement . . .
- **Reserve the right to monitor**
- **Prohibit inappropriate use**
- **Include penalties for policy violations**
- **Train/educate employees and others – temps, I/Cs, etc.**
- **Keep the monitoring work-related**
- **Permit reasonable personal use**

# Take Aways

- **Craft policies to reduce all privacy expectations**
- **Craft policies that protect patient and customer privacy and confidentiality**
- **Communicate that personal texting, emailing, etc. should not interfere with job duties**
- **Bar off the clock emails for non-exempts**
- **Review technical controls**
- **Encourage responsible use of devices and the Internet when discussing the company or its employees**
- **Actually monitor on a consistent basis**
- **Be aware of changing laws and audit policies routinely**

**Questions?**

# INVESTIGATIONS

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# Overview

## Legal Obligations

- Occupational Health & Safety Act and Code
  - › Strict Liability and Due Diligence Defences
- Human Rights Act
- Employment Standards Code

## Policies

- Safety
- Respectful Workplace
- Business Code of Conduct and Ethics

# Overview

## Investigation Process

- Informal and Formal Complaint Processes
- Role of Investigator
- Role of Legal Counsel
- Reports
- Decision Making Process

## Outcomes

- Discipline
- Court and Tribunal Proceedings

# Legal Obligations - OHS

## **Occupational Health and Safety Act, RSA 2000, c.O-2**

- Comprehensive legislative scheme for health and safety in the workplace
- General duties and requirements; offences and penalties; authority of OHS officers, directors

## **Occupational Health and Safety Code 2009**

- Technical details and requirements for health and safety in the workplace

# Legal Obligations - OHS

## OHS Act s. 2(1):

Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

(a) the health and safety of

- workers engaged in the work of that employer, and
- those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and

(b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code

**“Reasonably Practicable”**

# Legal Obligations - OHS

## Strict Liability Offence and Due Diligence Defence

- Strict liability offence means that the Crown must only prove that the prohibited act occurred to obtain a conviction
- A corporation charged under the OHSA will not be held liable if it can show that it took all reasonable care in the circumstances (i.e. exercised due diligence)
- Crown's burden of proof for OHS violation = beyond a reasonable doubt
- Defendant's burden of proof for due diligence defence = balance of probabilities

# Legal Obligations - OHS

- Crown must prove, beyond a reasonable doubt, that a violation of the OHS legislation occurred
- Crown does not need to show that the offence was intentionally or deliberately caused, or was caused by negligence
- Once a violation is established, the burden shifts to the defendant corporation to establish a due diligence defence

# Legal Obligations - OHS

## ***R. v. Lonkar 2009 ABQB 345***

- *There is no duty imposed on an employer by health and safety laws to anticipate every possible failure*
- *Did the employer do everything reasonably practicable to address foreseeable risks in terms of training, materials, testing, direction and supervision? Part of that assessment requires careful consideration of foreseeability*

# Legal Obligations - OHS

**To succeed with a due diligence defence, the defendant corporation must establish that it engaged in appropriate safety procedures:**

- Enforcement of a comprehensive policy of workplace safety, including employee orientation
- Employee training
- Hazard assessment
- Developed written safety policies , which are available or accessible to employees
- Prepared and enforced safe work procedures
- Conducted daily safety meetings (documented)

# Legal Obligations - OHS

## Appropriate safety procedures:

- Generally engaged in all safety-conscious activities that are standard within the industry affecting the particular employer and its workers;
- Hired competent workers, who can work without supervision;
- Monitored workers after they received training to verify that performance was acceptable;
- Had a progressive disciplinary policy to ensure continued compliance with safety policies;
- Conducted regular inspection program by trained individuals (independent safety audit firms)

# Legal Obligations - OHS

## OHS Act: sections 18 & 19

- Serious injuries and accidents

## Individual OHS complaints

- Unsafe working conditions, tools and equipment, procedures

# Legal Obligations – Human Rights

## Human Rights Act, RSA 2000, c A-25.5

### Section 7(1):

No employer shall

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

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person

# Legal Obligations – Human Rights

- **Positive obligation to maintain discrimination-free workplace**
- **Individual complaints to the Alberta Human Rights Commission**

# Legal Obligations – Employment Standards

## Employment Standards Code, RSA 2000, c E-9

- Establishes minimum standards relating to minor employees, holidays and holiday pay, hours of work and days of rest, maternity and parental leave, compassionate care leave, minimum wage, overtime, payment of earnings, termination of employment and termination pay and vacation and vacation pay
- Individuals can file a complaint with Employment Standards with respect to entitlement to earnings and termination of employment (in limited circumstances)

# Policies

## 1. Safety

- Required for OHS compliance
- Workplace violence is considered a hazard and requires a hazard assessment to be conducted and a procedure to be developed when an incident occurs in the workplace

## 2. Respectful Workplace

- Recommended for Human Rights Compliance
- Use the same complaint and investigation procedure developed for workplace violence

# Policies

## 3. Business Code of Conduct and Ethics

- Set of rules addressing the way in which a company behaves towards, and conducts business with, its internal and external stakeholders, including: employees, investors, creditors, customers, and regulators
- Common policies include: corporate governance, insider trading, bribery, discrimination, corporate social responsibility, whistleblower and fiduciary responsibilities
- Compliments the Respectful Workplace Policy

# Investigation Process

- 1. Informal and Formal Complaint Processes**
- 2. Choice of Investigator**
- 3. Role of Investigator**
- 4. Role of Legal Counsel**
- 5. Reports**
- 6. Decision Making Process**
- 7. Role of the Decision Maker**

# Outcomes

## Discipline

- Warnings and suspensions
- Termination without cause
- Termination for just cause

## Court and Tribunal Proceedings

- Wrongful Dismissal Litigation
- OHS Prosecution
- Human Rights Complaint
- Employment Standards Complaint

**Questions?**

# EMPLOYMENT LAW IN A CHALLENGING ECONOMY

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# Agenda

- **Constructive Dismissal**
- **Remuneration Changes**
- **Layoffs and Restructuring/Redeployment**

# Constructive Dismissal

- ***Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10***
  - Two step test for constructive dismissal:
    - The court must first identify an express or implied contract term that has been breached
    - The court must determine whether that breach was sufficiently serious to constitute constructive dismissal
- **Would a reasonable person in same situation feel essential terms of contract being substantially changed?**
- **Highly fact- driven exercise**

# Constructive Dismissal

- **Can you make changes?**
- **Examining the written employment agreement**
  - Express wording allowing change?
  - Termination/notice provisions
- **No written agreement?**
  - Past practice

# Remuneration Changes

## Successful employee constructive dismissal claims:

- Pay decrease resulting from 25% reduction in sales territory: *Bergmann v. CPT Canada Power Technology Ltd.* 1997 CanLII 14843 (AB QB)
- Change in commission structure: *Brunswick News Inc. v. Sears*, 2012 CanLII 42254 (NB CA)
- Non-payment of bonuses: *Piron v. Dominion Masonry Ltd.* 2013 BCCA 184

# Remuneration Changes

## More successful constructive dismissal claims:

- Changed hours of work: *Dorion v Stewart, Weirhard Data Inc.* (1996), 23 CCEL (2d) 333
- From full time to “as needed basis”: *Therrien v. True North Properties Ltd.*, 2007 ABQB 312

# Remuneration Changes

## Unsuccessful employee claims for constructive dismissal:

- Reasonable change to bonus target: *Haglund v. Clean Harbors Canada, Inc.* 2007 BCSC 1719
- Same office, salary, benefits and responsibility level but more work: *Johnston v. Co-Van International Trucks Inc.* (1993), 48 CCEL 147 (BCSC)

# Remuneration Changes

## **More likely to give rise to constructive dismissal:**

- Wage rollbacks
- Changes to commission/incentive plans
- Elimination of non-discretionary or contractual bonuses

## **Less likely to give rise to constructive dismissal:**

- Elimination of non-discretionary bonuses
- Vehicle allowances or parking
- Payment of professional fees

# Remuneration Changes

## Responding to changes in remuneration:

- If the employee does not protest, he/she acquiesced to the change
- If employee rejects the change, can sue for damages
- Duty to mitigate damages
  - Damages are difference between old and new remuneration

# Layoffs

- **Governed by the *Employment Standards Code***
- **Maximum 59 days**
- **On 60<sup>th</sup> day, the employee's employment terminates and termination pay required, unless:**
  - Wages or benefits continue to be paid;
  - There is a collective agreement

# Layoffs

- **Specific notice required**
- **Requirements set out in *Vrana v. Procor*, 2004 ABCA 126**
  - Be in writing;
  - State that it is a temporary layoff notice and effective date; and
  - Include sections 62, 63, and 64 of the Code
- **If notice requirements not met, constructive dismissal?**

# Layoffs

- **During 59 day period, employer can recall the employee with one week notice**
- **Employee can be terminated while on temporary layoff but termination pay required**

# Layoffs and Restructuring

- **Repeated layoffs?**
  - No specific prohibition
- **At common law, absent a contractual, a temporary layoff can result in constructive dismissal**
- ***Turner v. Uniglobe Custom Travel Ltd.***
  - Layoff can be grounds for constructive dismissal?
  - Revolving door scenario
  - Code does not affect common law rights

# Layoffs and Restructuring

## ***Trites v Renin Corp, 2013 ONSC 2715***

- “no room remaining at law for a common law claim for a finding of constructive dismissal in circumstances where a temporary layoff has been rolled out in accordance with the terms of the [*Employment Standards Act, 2000*].”

# Layoffs and Restructuring

## Mass layoffs

- Alberta
  - If laying off more than 50 employees at one location within a four-week period
  - Provide Minister 4 weeks' notice
- British Columbia
  - If laying off more than 50 within 2 month period
  - Provide Minister with notice
  - May have to give termination pay

# Restructuring

## Changes to essential terms may ground claim for constructive dismissal:

- Demotion, loss of seniority, or loss of status, profile and prestige
- A change in hours or the number of shifts worked
- A change in job responsibilities
- A decrease in the supervisory powers of the employee
- An increase in the amount of supervision above the employee

# Re-deployment of Employees

## ***Smith v. Viking Helicopter Ltd. (1989), 31 OAC 368***

- Ontario Court of Appeal - no "vested right" to a job in a particular place

## ***Marshall v Newman, Oliver & McCarten Insurance Brokers Ltd. [2004] O.J. No. 172 (CA)***

- Essential term of employment offer was location

## ***Brown v. Pronghorn Controls Ltd., 2011 ABCA 328***

- Transfer from Red Deer to Sedgwick (2 hours) was not constructive dismissal

# Re-deployment of Employees

## Canadian courts are likely to look at a number of factors including the following:

- Is there an employment contract in place? If so, does it permit the employer to relocate the employee?
- Has the employee moved for work purposes while working for this employer? Has the employee moved for professional purposes in the past, with other employers?
- Is the proposed position equivalent in compensation, benefits and opportunity?
- Will the employer be paying for all moving costs?
- Is there a reasonable business purpose to the proposed transfer (i.e. as opposed to some type of vindictive relocation proposal).
- Is the employer offering an alternative?

# Avoiding Constructive Dismissal

## Avoiding constructive dismissal

- Terms of employment contract are key
  - Are essential terms of the employment contract being altered?
- Retain ability to change work location, reduce compensation and benefits, assign to lower position, change reporting structure and discretionary bonuses
- Building flexibility in contract
  - “at the discretion of the employer”
  - “can be unilaterally changed from time to time”

# Avoiding Constructive Dismissal

- **Use of a mobility and/or temporary layoff clause**
- **Avoid any guarantee of a position at a specific location or specific number of hours of work**
- **Provide an employee with proper notice**

# Avoiding Constructive Dismissal

- **Provide proper notice and communicate early with employees**
- **Don't take away wages already earned**
- **Put the onus on employees to respond**

# Constructive Dismissal and Mitigation

- **Obligation on employees to mitigate their damages**
- **Mitigation is not a defence but may reduce the quantity of damages**
- **No obligation to accept if position is demeaning**
- ***Dahlgren v. 1093777 Alberta Ltd. (Wainwright Harbour Hotel)*, 2011 ABPC 107**

# Termination of Employment

**1. Look to Legislation – *Employment Standards Code*, RSA 2000, c E-9.**

**2. Look to Contract**

- Is the contractual notice period valid? If not:

**3. Look to Common Law**

# Termination of Employment

## Contractual notice period:

- Is the contract valid?
  - Lack of consideration
- Is the clause valid?
  - Non compliance with Employment Standards Code

# Termination of Employment

## If common law, Bardal factors

- Character of employment
- Length of service
- Age of Employee
- Availability of similar employment

# Termination of Employment

## Reasonable notice periods

- *Minott v. O'Shanter Development Company Ltd.*, [1999] O.J. No. 5 (Ont. C.A.)
  - Rule of thumb approach is not warranted

Name	Position	Salary	Age	Service	Notice
Beggs v. Westport Foods Ltd., 2010 BCSC 833	Meat and Deli Dept. Clerk	\$19,981.87	52	7 years	11 months
Haddock v. Thrifty Foods (2003) Ltd., 2011 BCSC 922	Manager of Grocery Store (supervised 3-4 employees)	\$19.95 per hour	39	6 years	12 months
Rachert v. Teligence (Canada) Ltd., 2011 BCPC 8	Senior manager of promotions and brand public relations	\$93,600	46	9 years	9 months
Whiting v. Boys and Girls Club Services of Greater Victoria, 2011 BCSC 681	Supervisory position (oversaw 20 frontline programs)	\$52,000	57	13 years	18 months
Elgert v. Home Hardware Stores Ltd., 2011 ABCA 112	Supervisor at Home Hardware Stores Ltd.	\$60,000	48	17 years	24 months
Lavallee v. Siksika Nation, 2011 ABQB 49	Medical doctor	\$92,449.23	60	10 years	12 months
Link v. Venture Steel Inc., [2008] O.J. No. 4849	Vice-President, Sales	>\$500,000	37	7 years	12 months

# Termination of Employment

## Mitigation by employee

- Reduction in damages

## Prevailing economic conditions may affect notice period

- *Heinz v. Cana Construction Co. (1987), 1987 CanLII 3203 (AB QB)*

## Only if they are proven?

- *Novak v. Fintech Services Ltd., 2001 ABQB 1077*
- *Russell v. Winnifred Stewart Assn. (1993), 49 CCEL 177 (ABQB)*

# Termination of Employment

## Damages:

- Reasonable notice
- Wallace damages
- Aggravated/punitive damages
- Lost benefits
- Earned entitlements, i.e. bonuses
- Pension?

# Termination of Employment

## Mass terminations

- S. 137 of the ESC
- 50 or more employees at a single location within 4 week period requires notice to the Minister
- Specific notice requirements

**Questions?**

# TOP 10 CASES IN LABOUR & EMPLOYMENT 2014/2015

Duncan J. Marsden  
Partner  
[DMarsden@blg.com](mailto:DMarsden@blg.com)

Christine Dowling  
Associate  
[Cdowling@blg.com](mailto:Cdowling@blg.com)



# 10. *Peters & Co Limited v Ward* (2015 ABCA 6)

- **Protecting yourself from your former employees**
- **Mr. Ward tendered his resignation with Peters & Co**
  - Key and senior employee
  - Company was worried he had moved to a competitor and might have taken company property and began an investigation
- **Investigation revealed that Mr. Ward had taken significant amounts of property and confidential information**

# *Peters & Co*

**Peters & Co commenced an action and sought an Anton Pillar Order to recover their property**

**Master in Chambers granted the order, upheld on appeal**

- Test for an Anton Pillar Order
- Court ordered search and seizure

# *Peters & Co*

## **Reminder to put everything into writing**

- Confidential information
- Return of company property
- Non-solicitation and non-compete clauses
- Policies and procedure for termination and resignations

# 9. *Rhebergen v Creston Veterinary Clinic* (2014 BCCA 97)

- **Enforceability of restrictive covenants**
- **Employment contract**
  - Non-traditional restrictive covenant
    - Must pay Creston a set amount if she set up a practice within 25 miles of the clinic within three years
    - Estimate amount to be invested to train a new employee based on experience with a former associate

# *Rhebergen*

## **After termination Rhebergen sought a declaration that the covenant was unenforceable**

- Rhebergen was seeking to set up a mobile veterinary practice

## **Trial decision**

- Clause was considered an unreasonable restraint of trade
  - Ambiguity in the language
  - Amount was considered a penalty
  - Temporal limit was also considered

# *Rhebergen*

## **Appeal decision**

- No prohibition but still a restraint of trade
  - ‘functional’ versus ‘formalist’ approach
- Not a penalty
  - Reasonable compensation for costs incurred by Creston
  - Mentoring, training and equipment costs + impact on the goodwill and volume of business
- Court was divided on ambiguity
- Clause upheld

## **8. *Jacobson v Atlas Copco Canada Inc.* (2015 ONSC 4)**

- **When solicitor-client privilege will apply**
- **Wrongful dismissal case**
  - Jacobson was dismissed for allegedly engaging in a physical altercation with another employee
- **Sought production of an email between HR and the employer's lawyer**
  - Discussion outlined a potential course of action for dealing with the employee
  - Employer claimed document was privileged

# ***Jacobson continued***

## **Test for solicitor-client privilege**

- (1) communication between solicitor and client
- (2) intended to be confidential between the parties; and
- (3) regarding the seeking or giving of legal advice?

## **Onus is on the employer**

- (1) and (2) were established but the employer failed to produce evidence of the email writer's intention
- Circumstances and contents of the email were insufficient to establish the third requirement

# *Jacobson*

## Implications?

- Doesn't mean that privilege won't exist where communications are between non-lawyers and lawyers
- Purpose of a communication is important – make this apparent

## **7. *SMS Equipment Inc. v Communications, Energy and Paperworks Union, Local 707* (2015 ABQB 162)**

- **Can an employer be required to accommodate childcare responsibilities?**
- **Grievor was a single mother with two children**
- **Worked rotating night and day shifts as a welder**
  - **Required to pay for childcare during night shifts, as well as days (or forfeit sleep altogether)**
- **Asked to be placed on straight day shifts – SMS refused**

## Union filed a grievance

- The refusal to accommodate was discriminatory on the basis of family status

## Arbitrator's decision

- “Family status” under the *Alberta Human Rights Act* includes child care obligations
- Employers rule requiring day and night shifts imposed a burden due to grievor's unique family status
- No evidence of undue hardship
  - Grievor had found another employee willing to work straight night shifts

## Appeal

- Upheld arbitrator's decision on a reasonableness standard of review
- Confirmed the test for establishing a prima facie case of discrimination
  - Complainant has a characteristic which is protected
  - Complainant has experienced an adverse impact
  - Must show that the protected characteristic was a factor in the adverse impact

# SMS

## Consider whether requests from employees may be related to legitimate family status needs

- Scheduling modifications and flexible work arrangements may need to be considered

## **6. *Pourasadi v Bentley Leathers* (2015 HRTO 138)**

- **Limitations on the duty to accommodate**
- **Applicant was a retail store manager**
  - Suffered a wrist injury on the job
  - Could not perform certain tasks when working alone
- **Employer referred her to a work transition program with the WSIB and ended her employment**

# *Pourasadi*

## **HRTO examined the duty to accommodate**

- “...the goal of accommodation is to ensure that an employee who is able to work can do so.”
- “The employer does not have a duty to change working conditions in a fundamental way, but does have a duty... to arrange the employee’s workplace or duties to enable the employee to do his or her work.”

# *Pourasadi*

## **Two potential accommodations**

- Schedule another employee to assist during shifts
- If she worked alone she should be able to turn away customers and defer housekeeping tasks

## **HRTO held that accommodation now being sought was outside of the employers duty**

- Essential duty of store manager was to assist customers
- Not sufficient to perform it 'most of the time'

## **Employers should identify what 'essential duties' are for a given position**

- Requires supporting evidence

# 5. *True Colors Painting Ltd. v 0846747 BC Ltd. et al* (2015 BCSC 278)

- **Duties of an employer in the context of an asset purchase agreement**
- **Fisher owned True Colors**
  - Roadway line painting
  - Diagnosed with Hepatitis C and used medical marijuana to manage symptoms
  - Began looking for a partner to relieve him of work
- **Approached 084 and its principal, Ross**
  - Fisher disclosed his health issues, including marijuana use
  - 084 interested in asset purchase

# *True Colors*

## **Asset purchase agreement**

- Also contained employment arrangement with Fisher – manager and labourer
  - Salary, profit sharing, consultancy fee
- Termination clause
  - “In the event that [Fisher] quits or resigns from his employment... or his employment is terminated by the Purchaser for cause, the Purchaser’s obligations... shall expire.”

# *True Colors*

## Issues with 'drug use'

- Chiliwack incident
- Implementation of random drug testing
  - Fisher reminded him that this would put him in a precarious position due to his medical license
  - Ross treated Fisher's 'admission' of use of drugs as a resignation

# True Colors

## Trial

- 084 commenced an action for return of company property
- Fisher commenced an action to determine issues of breach of contract, tort of deceit, fraudulent misrepresentation and wrongful dismissal
  - Judge found that Ross had fabricated issues with marijuana use in an effort to force Fisher to resign
  - Ross also sought return of company property despite the fact that he had not paid for them at the time (and proceeded to sell)
- Damages awarded to True Colors and Fisher (\$328,481.77)
- Punitives also awarded for Ross and/or 084's conduct (\$20,000.00)

## **4. *Keenan v Canac Kitchens Ltd* (2015 ONSC 1055)**

- **Entitlements for dependent contractors**
- **Keenans both worked for Canac for 25+ years as foreman supervising Canac's installers**
- **In 1987 Canac approached the Keenans – no longer employees, instead independent contractors**
  - Same duties
  - Paid directly (no deductions)
  - Responsible for paying installers
  - Liable for damage while in transit
  - Written agreement that full time and attention devoted to Canac

# *Keenan*

## Upon termination Keenans sought common law notice entitlements

### Trial

- Independent versus dependent contractors
  - Whether the agent is limited exclusively to the service of the principal
  - Whether the agent is subject to the control of the principal
  - Whether the agent has an investment or interest in his/her tools
  - Whether or not the agent has undertaken any risks in the business sense and/or any expectation of profit
  - Whether the activity of the agent is part of the business organization of the principal

# Keenan

- **Found in favor of the Keenans and awarded 26 months' notice**
- **Written agreement may not be sufficient to prove 'independent contractor'**
  - Actual circumstances of the working relationship will determine this
- **State of the law in Alberta?**
  - Dependent contractors are entitled to reasonable notice, although typically on a lesser scale than traditional employees (see: *Weber v Coco Homes Inc.*, 2013 ABQB 180)

### ***3. City of Calgary v Canadian Union of Public Employees, Local 38 (2013 CanLII 88297)***

- **Duties of an employer in workplace investigations**
- **A clerk in the City's Roads division was sexually assaulted on a number of occasions by a senior foreman**
  - Employee reported assaults
  - Manager arranged for an extension to be installed at her desk and then left on a week vacation and left the foreman in charge

# *City of Calgary*

## **The assaults continued**

- Employee installed a spy camera and captured images of her being assaulted
- Brought these to the manager (who described them as inconclusive) but discussed the need for an investigation

## **Foreman was suspended with pay and an investigation was commenced but never completed**

- Keyboard sabotage, forced to change offices

# *City of Calgary*

## **A month later they called her back to discuss the foreman's return to work as her supervisor**

- Warned not to make disrespectful comments and asked to meet with a psychiatrist
- Also required a 'fitness to return to work' after she took vacation

## **Employee eventually took an indefinite sick leave and commenced a human rights complaint and filed a grievance**

- Employer had treated her “as a problem to be managed, as opposed to a victim to be supported.”

## **The City's response was more than inadequate**

- “...a total failure on the part of those responsible to meet the obligations under the Collective Agreement, human rights legislation, occupational health and safety legislation and the City's Respectful Workplace Policy”
  - Failure to immediately investigate
  - Failure to adequately assess the evidence (namely, the still photos) before concluding it was 'inconclusive'
  - Failure to take steps to ensure there were no reprisals
  - Failure to complete the investigation
  - Treatment of the employee upon the foreman's return to work

# *City of Calgary*

**A large damage award was required to recognize the severity of the results and the City's lack of response**

- Awarded over \$800,000 in general and special damages for loss of income and future income

## **2. *Saskatchewan Federation of Labour v Saskatchewan* (2015 SCC 4)**

- **Is the right to strike constitutionally protected?**
- **In 2008 the Government of Saskatchewan enacted the Public Services Essential Services Act**
  - (1) broadened the category of public services defined as ‘essential’;
  - (2) provided employers with unilateral authority to determine which employees provide essential services; and
  - (3) prohibited those employees from striking

# *Saskatchewan*

- **Constitutional challenge on the basis that it infringed s. 2(d) freedom of association**
- **Majority overturned the Alberta Reference decision and adopted the dissenting judgment**
  - For collective bargaining to be effective, employees must have the right to collectively withdraw services

# Saskatchewan

## Majority reasons pointed to Canada's history of strikes and Canada's obligations under international law

- The right to collectively withdraw services is an “irreducible minimum” of the freedom to associate
- The right to strike also promotes equality in the bargaining process
- Not saved by s.1 of the *Charter*
- ‘Essential services’ should be interpreted in a limited manner

# *Saskatchewan*

## **Dissent reasons**

- A statutory right to strike represents a complex balance between the interests of employees, employers and the public
- Constitutionalizing this disrupts this balance and undermines the legislative process
- Strikes by public service employees are unique

# **1. *Potter v New Brunswick Legal Aid* (2015 SCC 10)**

**Addresses the grey area between administrative suspension and constructive dismissal**

- Confirms the test for constructive dismissal
- Reiterates the need for transparency in the employment relationship

**Potter was appointed as Executive Director of New Brunswick Legal Aid**

- Relationship deteriorated and parties considered a buyout
- Potter also required an extended leave of absence for medical reasons

# *Potter*

**Board of directors advised the Chair to contact the Minister of Justice and recommended terminating Potter for cause**

- Did not inform Potter of this, instead placed him on administrative suspension

**Potter commenced an action claiming that he had been constructively dismissed**

# Potter

## Trial decision

- Denied Potter's claim
- Judge held that an employee could not rely on information which was unknown to him at the time of the claim
  - Constructive dismissal was to be determined on an objective basis and applied to the subjective knowledge of the employee at the time of the alleged dismissal

# Potter

## Appeal decision

- Upheld trial decision
- Constructive dismissal required a “fundamental or substantial change to an employment contract”
  - Indefinite nature of the suspension weighed against other factors: continuation of pay and benefits, not required to return company property
- Questioned Trial Judge’s determination of whether the employee could rely on facts unknown at the time
  - Potential errors were “wholly harmless”
  - Employer had acted within the scope of the contract

# Potter

## SCC decision – overturned the courts below

- Majority
  - Appeal Court had erred in applying the test for constructive dismissal
    - (1) Objective test: does the employer’s conduct demonstrate an intention to no longer be bound by the contract?
    - (2) Would a reasonable person, in the same situation as the employee feel that the essential terms of the employment were being substantially changed?
  - Employer’s actions had repudiated the contract
    - “Administrative suspension cannot be justified in the absence of a basic level of communication.”

## SCC decision continued

- Minority decision reached the same conclusion but applied a slightly different test
  - Constructive dismissal is available in two instances:
    - (1) where the employer repudiated the contract by unilaterally changing the terms; or
    - (2) the employer engages in conduct which evinces an ‘intent not to be bound.’

## Takeaways & Implications

- “Basic level of communication” is required
  - Will depend on context
- Withholding information can be justified in limited circumstances
- Reiterates that employees are vulnerable and the need for accountability and communication

# Questions?