



Employment & Labour Brief

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Each stage of the employment cycle can present key challenges to employers in an ever-evolving marketplace. In this issue of *Employment and Labour Brief*, we explore some of these situations that may provide guidance to employers when faced with similar decisions.

David McInnes, with assistance from Cindy Cheuk, reviews recent decisions on pre-employment drug testing and terminations with a history of illness or disability, and the need for employers to exercise caution.

Michael Weiler reviews a precedent-setting Supreme Court of B.C. decision where the Court rewrote a restrictive covenant in an employee contract and the implications this may present for employers.

In two short pieces on employee terminations, David Dahlgren weighs in on the various financial severance options available and Louis Zivot outlines court rulings where termination notice has been given but there is a possibility of future employment elsewhere.

Finally, Gary Fraser looks at recent situations where the use of customer information by former employees has been permitted.

Considerations for Employee Terminations Involving a History of Illness or Disability



David McInnes



Cindy Cheuk

As any experienced employment lawyer can attest, one of the most difficult issues facing employers is the ending of the employment relationship for performance or other operational reasons where there has also been a history of illness or disability. Two recent decisions serve to remind employers that it is necessary to tread extremely carefully when considering the termination of employees who may be suffering from an illness or disability.

In *Toivanen v. Electronic Arts (Canada) Inc.*, the British Columbia Human Rights Tribunal (the “Tribunal”) ordered compensation of nearly \$150,000 to an employee who had been terminated immediately after providing a medical note from her family doctor advising that she should take stress leave.

At the time the employee presented her medical note and asked for stress leave, the employer, for performance reasons, had already made the decision to terminate her employment and was in fact set to deliver notice of termination. The Tribunal found that the employee’s work performance and work relationships with co-workers had deteriorated over the final months of her employment following generally positive evaluations during her career. However, the Tribunal found that many of the difficulties which the employee was experiencing were, at least partly, the result of the employer having imposed an overwhelming workload on the employee.

Immediately prior to the hearing before the Tribunal, the employer conceded that it had in fact violated the B.C. *Human Rights Code* in failing to make any attempt to investigate the employee’s medical condition which led to her requesting stress leave, and in failing to make any attempt to accommodate her medical circumstances. Instead of taking such steps, the employer simply proceeded with its plan to terminate the employee. The Tribunal noted that the effect of doing so on the employee was devastating.

When Ms. Toivanen was terminated, she felt like she had been thrown away. She thought that EA was a company that prided itself on looking after employees. Instead of investing any time and energy in bringing her back, healthy, to her work place, it fired her. This is not a case where Ms. Toivanen found herself “worked to death” by EA, but it is about the fact that EA did nothing to investigate why she needed a leave of absence and did nothing

to accommodate her. It was a situation where she required time off, requested it of EA, and it fired her at a most vulnerable time.... To this day she is unable to work; however, her goal is to believe that she will one day return to work.¹

The failure to take the necessary steps to investigate the employee's request for stress leave or to accommodate her medical condition proved very expensive to the employer in this case. The Tribunal ordered compensation of nearly \$150,000 to the employee, including \$20,000 for injury to dignity, feelings and self respect, approximately \$20,000 to compensate for lost severance pay, and U.S. \$69,000 to compensate for the lost value of stock options.

The clear lesson for employers from the Tribunal's reasons is that where it is apparent that an employee is or may be suffering from an illness or disability at the time an employer is intending to terminate for performance or other occupational reasons, it is critical that the employer fully investigate the medical circumstances and consider possible accommodation before proceeding with termination.

Also of significance for employers is a recent decision of the Ontario Court of Appeal in *Keays v. Honda Canada Inc.*² After working for Honda Canada for approximately eleven years, Mr. Keays, following extensive absences from work, was diagnosed with chronic fatigue syndrome. For a period of time, the employer accommodated Mr. Keays by permitting him to work on a part-time basis. Subsequently, Honda Canada directed the employee to be examined by a company physician. After meeting with the company physician, the employee refused to attend on him for further examinations without receiving clarification from Honda Canada as to the purpose of meeting with the company physician and the parameters of his medical assessment. Honda Canada refused to provide any such clarification and terminated Mr. Keays for disobeying its direction to attend upon the company physician for further examination.

At trial, the court found that the direction to the employee to attend upon the company physician was not made in good faith but rather was part of a plan to intimidate the employee and to eventually terminate him for the purpose of avoiding its obligation to accommodate his chronic fatigue syndrome disability.

Where it is apparent that an employee is or may be suffering from an illness or disability at the time an employer is intending to terminate for performance or other occupational reasons, it is critical to fully investigate the medical circumstances and consider possible accommodation before proceeding.

The trial judge found that Honda Canada's course of conduct constituted discrimination and harassment, which contravened his rights under the Ontario *Human Rights Code* and awarded an unprecedented \$500,000 in punitive damages. In addition to awarding a reasonable notice period of 15 months, the court also increased the notice period by nine months to 24 months because of the bad faith displayed by Honda Canada in the manner in which it terminated the employee. In extending the notice period, the court relied on *Wallace v. United Grain Growers*.

The Ontario Court of Appeal (the "Court of Appeal") upheld the decision of the trial judge but reduced the punitive damage award from \$500,000 to \$100,000. Notably, the Court of Appeal was unanimous in dismissing the appeal but divided on the issue of reducing the award. Although the majority elected to reduce the punitive damages against Honda Canada, Goudge J.A. held that the original award was appropriate given the deliberate nature of the mistreatment, the vulnerability of the employee and the degree of resulting harm. While clearly a significant reduction, the \$100,000 award remains the highest award for punitive damages in the employment context in Canada. Previous awards have consistently been well below the \$100,000 mark. If followed, the punitive damages awarded in *Keays* could prove crippling to small businesses involved in similar litigation. The potential effect could be

greater still if future decisions fall in line with the reasoning set out in Goudge J.A.'s partially dissenting view.

Accordingly, employers should take away a very clear message from the Ontario Court of Appeal in *Keays* that, in addition to facing extended notice periods based on *Wallace*, where an employer's course of conduct also contravenes the applicable human rights legislation, a significant punitive damage award may be a consequence.

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1 *Toivanen v. Electronic Arts (Canada) Inc.*, [2006] B.C.H.R.T.D. No. 396

2 *Keays v. Honda Canada Inc.* (c.o.b. Honda of Canada MFG), [2006] O.J. No. 3891

Court Rewrites Restrictive Covenants in Employment Contract



Michael J. Weiler

Restrictive covenants are often found in employment contracts and purchase and sale agreements. In the case of employment contracts, these covenants typically purport to limit the right of an employee to compete with his or her former employer, for a specified period and in a specified geographic area, after termination of employment. Similarly, in a purchase and sale agreement, the restrictive covenant will purport to prevent the vendor from competing with the purchaser for a period of time after the sale of the business.

Until recently, courts were inclined to simply strike down such covenants in their entirety where they were found to be unreasonable with respect to geographic or temporal limitations, or if the scope of the agreement in terms of work or activity was found to be too broad. Only in the clearest and most exceptional circumstances would courts apply the doctrine of “severability” to sever the unenforceable parts of an agreement and save what remains.

There has been a noticeable judicial trend recently to move away from this narrow approach. This trend has culminated in *Jones v. Prostar Painting and Restoration Ltd.*, a 2006 decision of the British Columbia Supreme Court, where the Court rewrote a restrictive covenant in an employment contract by substituting a two-year restriction for the five-year restriction agreed to by the parties in the contract.¹

The genesis for this more relaxed approach can be found in *Transport North American Express Inc. v. New Solutions Financial Corp.*, a 2004 decision of the Supreme Court of Canada (SCC).² In this decision, the SCC developed and endorsed the doctrine of “notional severance,” whereby the courts are permitted, as one of the spectrum of remedies available when determining the enforceability of an agreement, to alter the language of the agreement. In *Transport North American Express Inc.*, *supra*, the Court considered a credit agreement pursuant to which the respondent had advanced the sum of \$500,000. The agreement contained an interest component that contravened Section 347 of the *Criminal Code*, which prohibits annual interest rates beyond 60%. In this case, the loan was to be repaid in full in two years with an effective rate of 90.9%. The SCC “read down” the agree-

ment, by reducing the interest rate to the legal limit of 60%. Although the case involved a contract in violation of the *Criminal Code*, the SCC made it clear that “notional severance” must apply to any contract that was contrary to law.³

In *Jones, supra*, Madam Justice Morrison showed just how far the courts are prepared to go in applying the “notional severance” doctrine to commercial contracts. In this case, Madam Justice Morrison rewrote a restrictive covenant in an employment contract by substituting a two-year restriction in the non-competition clause for the five-year restriction agreed to by the parties. The decision contains little analysis as to why a two-year restriction was reasonable, especially since the employee appears to have been a salesman and not part of senior management. The Court appears to have been convinced that since

the painting business was competitive, as asserted by the defendant, and the defendant had the legitimate right to protect its “customer list” (despite evidence to the contrary) that the restrictive covenants were legitimate in that they protected the defendant’s proprietary interests. The Court simply asserted that “on the basis of fairness” it was reasonable to restrict the non-competition clause to a time period of two years rather than five years.

The Court noted that it was particularly appropriate to read down the restrictive covenant in this case because of a clause in the employment contract which read as follows:

... it being the intent of this provision that if the foregoing covenant is found to be unreasonable to any extent by a court of competent jurisdiction adjudicating upon the validity of the covenant, whether as to the scope of the restriction, the area of the restriction or the duration of the restriction, then such restriction shall be reduced to that which is in fact declared reasonable by such court, or a subsequent court of competition jurisdiction, requested to make such a declaration.

Commenting on the development of the notional severance doctrine, the B.C. Court of Appeal recently noted “so the law has travelled some distance from the all or nothing proposition advanced by the appellants.” But one must ask – how far is too far? It would appear that the *Jones* case provides an example of where the courts might have gone too far. In fact, the

The SCC developed and endorsed the doctrine as one of the remedies available when determining the enforceability of an agreement, to alter the language of the agreement.

case reflects the concerns expressed by Bastarache J. in his dissenting opinion in *Transport North American Express Inc.*:

... under notional severance, courts will be permitted to literally add new words to the parties' agreement. By doing so, courts will be substituting their intentions for those of the parties. Notional severance would extend the judicial will in what I consider to be an unfortunate way.

The *Prostar* decision is problematic for a number of reasons and might well be of questionable authority.

The restrictive covenant appears to have included both a non-competition clause and a non-solicitation clause. The decision does not analyze the legality of each provision as a separate clause. That distinction is however crucial to the proper interpretation of the legality and enforceability of such clauses. The B.C. Court of Appeal has recently made it clear that a non-competition clause will rarely be enforced where a non-solicitation clause will suffice to protect the otherwise legitimate proprietary interests of the employer. In such cases, the non-competition covenant will be unnecessary, unreasonable and therefore unenforceable. It is only when a non-solicitation covenant cannot adequately protect the employer's established legitimate proprietary interest that a non-competition covenant will be enforceable: see *Valley First Financial Services Ltd v. Trach* [2004] B.C.J. 1127; *Globex Foreign Exchange Corp, supra*; *Yellow Pages Group Co. v. Anderson* (2006) BCSC 518 (Groberman J. oral decision).

It appears that the *Jones* decision will not likely be appealed and it therefore remains good law in British Columbia at this time. However, for the reasons noted, the

decision must be treated with caution. In our view, courts will continue to be very reluctant to uphold non-competition provisions in employment contracts, especially where the contract contains non-solicitation clauses that suffice to protect those interests. Further, we believe courts will remain very reluctant to enforce non-competition clauses in any employment contracts, especially for non-management employees. Therefore, we continue to recommend that such clauses be drafted carefully and narrowly, seeking only to protect the employer's interests as may be necessary in the particular circumstances. Further, employees should be given the time and option of seeking legal advice before they sign such agreements.

At the same time, the *Prostar* decision does suggest that employers or purchasers might well consider including the type of clause relied upon in *Jones* in their employment or purchase and sale agreements respectively, in order to maximize the potential for saving a restrictive covenant that is otherwise found to be unenforceable.

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- 1 *Jones v. Prostar Painting and Restoration Ltd*, [2006] BCSC 1034
- 2 *Transport North American Express Inc. v. New Solutions Financial Corp.* [2004] SCC 7
- 3 Note: this was not the conclusion of the Alberta Court of Appeal in *Globex Foreign Exchange Corp v. Kelcher* [2005] A.J. No. 1654. In that case the Alta CA found that the non-competition clause was not reasonable as the non-solicitation clause was *prima facie* sufficient to protect Globex's proprietary interest in its clients and goodwill. The court further held that the doctrine of notional severance should not be applied, as it should be restricted to cases of statutory illegality. This conclusion was based in large part on the rationale for close scrutiny of such clauses. see paragraphs 59-62.

Lump Sum Payment vs. Salary Continuance: Payment Options for Employee Termination



David Dahlgren

Most employers are aware that an employee may be terminated without just cause so long as he or she is provided with reasonable working notice or pay in lieu of notice. An employer who elects to provide a terminated employee with pay in lieu of reasonable notice has two main payment options: (1) provide a lump sum severance payment; or (2) impose a salary continuance arrangement. Under both options, the terminated employee is generally required to immediately leave his or her place of employment.

A lump sum payment is significantly different from a salary continuance arrangement, in that the latter is a uni-

laterally imposed arrangement whereby the terminated employee receives his or her wages for the duration of the notice period as per the regular weekly or monthly pay schedule. These arrangements typically contain mitigation provisions which mandate that payment of severance ceases or is reduced once the terminated employee finds new employment.

A lump sum payment may initially appear attractive, because it usually enables an employer to immediately end its relationship with a terminated employee. However, an employer should always consider imposing a salary continuance arrangement as payment in lieu of reasonable notice, since it has a significant advantage over a lump sum payment.

At common law, a terminated employee generally has an immediate duty to mitigate his or her damages by taking reasonable steps to seek comparable, alternative employment. An employer's liability to provide pay in lieu of reasonable notice to a terminated employee will be reduced, or even eliminated, if the terminated employee finds alternative employment before the end of the reasonable notice period. Unlike a lump sum severance payment, a salary continuance arrangement enables the employer to take advantage of this contingency by relying upon and enforcing the mitigation requirement.

The law is clear that an employer is permitted to unilaterally impose a salary continuance arrangement as a mechanism to provide a terminated employee with pay in lieu of reasonable notice. In the decision of *Tull v. Norske Skog Canada Ltd.*, [2004] B.C.J. No. 1691 (B.C.S.C.), the

Honourable Mr. Justice Pitfield concluded that the Court has the discretion to endorse or uphold a salary continuance arrangement as a means of providing damages to a terminated employee. The courts will generally uphold a unilaterally imposed salary continuance arrangement where it is reasonable and fair (e.g. where the notice period provided to the employee is adequate in light of his or her length of service and level of responsibility, and where the mitigation provisions are not unduly harsh or arbitrary).

It is therefore crucial that an employer carefully consider a number of issues before it structures and imposes a salary continuance arrangement on a terminated employee.

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Pre-employment Drug Testing



**N. David
McInnes**

In recent years, employers have become increasingly aware of the importance of fostering and maintaining a safe, drug-free workplace. Especially in safety-sensitive jobs or industries, when employees report to work under the influence of drugs, the result can be catastrophic both in financial and human terms.

Some employers have responded to this risk by establishing pre-employment drug testing policies. Implemented at the hiring stage, such policies aim to identify and screen out applicants whose past history of drug use may point to an unacceptable risk of reporting to work under the influence of drugs.

A recent Alberta Court of Queen's Bench decision, *Alberta Human Rights and Citizenship Commission v. Kellogg, Brown and Root*, raises important issues for employers who may be considering establishing a pre-employment drug testing policy. As the Court in *Kellogg* makes clear, pre-employment drug testing is not prohibited in law; however, any policy which provides for the automatic rejection of any applicant who tests positive for drugs is almost certainly going to be found to contravene human rights legislation.

In *Kellogg*, the employer established a policy which required non-union employees to take and pass a pre-employment drug test as part of the interview and screening process. Under the policy, any prospective employee who failed the drug test would not be considered further for employment. In

Kellogg, the employer learned that one job applicant, Mr. Chiasson, had tested positive for marijuana. Although Mr. Chiasson had already begun working for the employer by that time, he was immediately terminated.

Mr. Chiasson took his case to the Alberta Human Rights and Citizenship Commission, alleging that he was discriminated against contrary to the *Human Rights, Citizenship and Multiculturalism Act* on the basis of a real or perceived disability. However, the Commission dismissed his complaint. The Commission accepted Mr. Chiasson's evidence that he was strictly a recreational user. On that basis, the Commission concluded that he was not disabled because he was not addicted to marijuana and that, in any event, the employer had not perceived that he suffered from any disability. Accordingly, the Commission found no violation of the Act, since the employee had not established a case of discrimination on the basis of a disability, real or perceived.

On appeal, the Alberta Court of Queen's Bench overturned the Commission's decision. With respect to the issue of discrimination on the basis of a real or perceived disability, the Court stressed the broad meaning of 'perceived disability' and the importance of discriminatory effect rather than intent. The Court concluded that "the effect of the KBR Policy on pre-employment drug testing [was] to exclude addicted individuals on the basis of actual disability and non-addicted and non-impaired employees from employment based on a perceived disability," thus "the KBR Policy con-

stitute[d] *prima facie* discrimination based on disability.” The employer was automatically rejecting those applicants with positive test results based on its perception that those applicants would be more likely to work while impaired, regardless of whether they suffered from clinical addiction. By so doing, the employer was discriminating against applicants on the basis of both real and perceived disabilities.

Having found sufficient evidence of discrimination, the burden shifted to the employer to prove a non-discriminatory purpose to its policy. Applying the three-part test from *British Columbia (Public Service Employee Relations Commission) v. British Columbia G.S.E.U. (Meiorin)*, [1999] 3 S.C.R. 3, the Court concluded that the employer failed to prove that its drug testing policy was rationally connected to job performance and further, failed to prove that the policy was reasonably necessary and that accommodation would have been impossible without undue hardship. Specifically, the Court determined that the link between a positive pre-employment drug test and subsequent workplace impairment was “tenuous” given that a positive test does not show future impairment, or even likely future impairment on the job. The Court also concluded that the employer could have

accommodated employees without undue hardship by implementing measures such as grace periods, re-takes or drug counselling the employer. Since it would have been possible for the employer to accommodate, the policy was held not to be reasonably necessary. Accordingly, the employer’s drug testing policy was held to be discriminatory and therefore unlawful, having failed both the first and third part of the *Meiorin* test.

The message employers can learn from *Kellogg* is to not rely solely on positive pre-employment drug test results to automatically reject job applicants from further consideration without running afoul of human rights legislation. Instead, any drug testing policy must include a process whereby the individual circumstances of job applicants who fail the test will be investigated, and depending on those circumstances, possibly hired and then accommodated by the employer. As a practical matter, employers should implement any potential pre-employment drug testing policy as only one facet of a larger process of assessing drug abuse.

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Specific and Unequivocal Notice of Termination



Louis J. Zivot

A contract of employment that does not specify how much notice or severance is to be given upon termination can be terminated at common law by the provision of reasonable notice. What constitutes reasonable notice is fact dependent, but a number of factors such as age, length of employment, the type of employment and position held are all taken into account by judges in determining what is “reasonable.” An employee may be given working notice, provided the notice of termination is specific and unequivocal and clearly communicated. For example, advising an employee that his or her job will end in two weeks but holding out the prospect of employment in another position is, without more, equivocal and will therefore not be found to be sufficient notice at law. Employers must be careful in drafting termination letters to ensure that they meet the appropriate standard.

Recently, in *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)* [2005] BCCA 349, the British Columbia Court of Appeal upheld the trial ruling that the company’s notice to its 150-plus employees was effective. The employees were

advised that the plant would be shut down on September 30, 2002 “unless you are advised otherwise.” The letter further indicated the possibility of being offered employment with a related company in Oregon. An employee argued that this notice was not unequivocal. The Court of Appeal disagreed. The Court held that neither the possibility of employment with a related company nor the possibility of earlier termination affected the clear advice that the plant would close September 30. There was objectively no holding out of a promise of continued employment with the employer, despite the possibility of future employment.

These cases are fact specific, but what is clear is that it is certainly possible to discuss alternative employment and yet retain the specificity of the notice of termination. It must, however, be made clear to the employee that, despite the possibility of future employment, the employment relationship will end on the specified date. In this case the future was certain as the plant was actually closing.

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Use of Customer Information by Ex-employees



Gary Fraser

The law appears to be well settled in British Columbia that non-fiduciary employees are free to compete with their former employer, and to make use of knowledge and experience acquired while so employed, so long as they do not disclose or make use of the former employer's confidential information, including customer lists removed from the former employer's premises. See, for example, *Valley First Financial Services Ltd. v. Trach*, a 2004 decision of the British Columbia Court of Appeal.

These decisions further indicate that a non-fiduciary employee may contact previous customers if he or she relies upon memory regarding the names and particulars of the previous customer.

While there are at least two cases which hold that the prohibition against an employee removing customer lists is not absolute (see, for example, *TOS Insurance Services Ltd. v. Panahi*), *Axiom Services Ltd. v. Weigert et al.*, a recent decision of the British Columbia Supreme Court, further limits this prohibition.

Weigert was a hairstylist who worked for the plaintiff Axiom with her co-defendant Pelletreau. Pelletreau began working for Axiom in 1995 and was one of its most popular stylists. During the period of her employment with Axiom, she had talked openly about her desire to work for herself and in 2001, she acted on this plan and opened her own salon. While Pelletreau did not acquire a printout of her clients prior to the time she left Axiom's employment, she did take with her an address book in which she had recorded telephone and address information for her regular clients. She used this address book to contact these clients when she began working at her new salon.

While the Court accepted the general proposition that non-fiduciary employees are prohibited from taking customer lists and information belonging to their former employer, it did not accede to the plaintiff's contention that, by keeping her own personal records, Pelletreau was essentially committing a theft of information. The Court held that, while in

many employment situations, an employee would be clearly breaching his or her duty of loyalty to his or her employer by keeping track of customer information, the question of whether the conduct is improper is to be determined by looking at the *purpose* for recording the information.

The Court also held that unless Pelletreau's purpose for keeping the information was to benefit herself at the expense of Axiom, no breach of duty would be found. The Court noted that Pelletreau had not been directly asked whether or not her purpose in recording customer information was to take customers away from Axiom in the event that she left the salon. The Court found that there were other purposes (both personal and business) for keeping these records and declined to ascribe improper motives for compiling the data.

The Court did state, however, that if Axiom had a clear policy against employees keeping contact information for clients, it might have been persuaded to draw an adverse inference against Pelletreau.

This decision is interesting on a number of fronts. It clearly departs from other authorities which hold that departing non-fiduciary employees can only rely upon their memories when contacting customers they dealt with during their prior employment.

Weigert seems to say that an employee can use personally compiled records of customer information so long as the purpose for compiling those records is not for personal benefit. While it is our view that an employee who keeps records of customers must be doing so in furtherance of his or her employment duties, and that such records should be deemed to be the property of the employer, *Weigert* suggests that the prudent thing for an employer to do is ensure that policies are in place prohibiting employees from keeping personal records of customer information for any reason. In addition, the employer's policies, and employment agreements, should contain an express provision requiring all employees to return all copies of customer information upon termination of employment.

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News and Announcements

Events

B.C. Council of Administrative Tribunals 11th Annual Conference

Richmond, BC, October 23–24, 2006

Executive Airport Plaza

Presented by the B.C. Council of Administrative Tribunals.

The theme of the 2006 conference was Diversity and Integrity. Keynote speakers included the Honourable Wally Oppal, Attorney General of British Columbia, and the Honourable Robert (Bob) Rae. Topics included: tension between merit and diversity, working with interpreters, adjudication in the era of self-represented parties, and the Mary McKenzie case. There will also be an administrative law update.

October 24, 1:15 pm–3:00 pm

Lang Michener Panelist: **Michael Weiler**

“Independence Panel: Mary McKenzie Case/Bill 27/Merit Based Reappointment Process”

Announcements

Welcoming Team Members



We are pleased to welcome **Michael J. Weiler** as Associate Counsel. Having come from a Vancouver firm he co-founded, Mr. Weiler brings more than 25 years' experience to Lang Michener's Employment and Labour Group. Mr. Weiler has represented both employers and employees in matters of labour relations, wrongful dismissal, human rights complaints, and occupational health and safety matters. As a speaker and author, Mr. Weiler has made more than 60 presentations to industry and professional groups throughout the past decades.

Employment&LabourBrief

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