# THE ASSISTANT

*BC Association of Legal Assistants* *Issue I - 1998, Volume 5*

## 1997 SALARY SURVEY

By Ann Halkett, Editor

I would like to thank everyone who completed a salary survey. Altogether 30 people responded which was down from the 50 who responded last year. I will begin by saying that results were quite varied and the majority of people who responded (20) worked in litigation. For this reason I have split the salary tables into "litigation" and "other".

I did not report the numbers of legal assistants or lawyers per firm because these figures did not make a difference in terms of what legal assistants were paid. As for salaries, in general there did not seem to a consistent wage paid for years of experience. As for education, almost everyone who responded had a legal assistant certificate or diploma and a few also had degrees. Again having a certificate or diploma did not make a difference in wages earned. Therefore rather than taking averages in terms of salaries paid I listed the highest and lowest wage as the average would not have been truly representative. I also did not report the average bonus paid as these ranged from nothing, to several hundred dollars, to a percentage. Finally, keep in mind that some questions were left blank.

**1997 Salary Survey Results**

| | |
|---|---|
| Ave. Hourly Rate: | $74.13 |
| Ave. No. of Permitted Sick Days: | 10 |
| Ave. Annual Min. Billing Req.: | 1,311 hrs |
| 1997 Ave. Salary Increase: | 6.15% |

No. of people who received the following benefits out of 30 survey responses:

| | |
|---|---|
| 16 | Basic Medical |
| 10 | Vision |
| 25 | Extended Medical |
| 18 | Life Insurance |
| 8 | Maternity Leave |
| 23 | Dental |
| 4 | Free Legal Representation |
| | |
| 24 | Business Cards |
| 25 | CLE Courses |
| 6 | Parking Allowance |
| 2 | Job Sharing |
| 2 | Firm/Company Retreat |
| 1 | Firm Credit Card |
| 8 | Flex Time |
| 5 | Travel/Mileage |
| 6 | Paid Personal Days Off |

Continued on page 3.

**INSIDE THIS ISSUE:**

## FROM THE EDITOR'S DESK

By Ann Halkett

This whole issue is devoted to employment law.

## MEMBERSHIP UPDATE

Membership renewal fees are due by March 15, 1998. Fees are $65.00 for Voting and Associate members and $15.00 for Students.

## UPCOMING EVENTS

By Connie Iverson, Programs Director

The first topic in the 1998 LECTURE SERIES was Litigation Technology for the Future and was held on January 27, 1998. The speakers were Clifford F. Shnier, a U. of T. law graduate and member of the Law Society of Upper Canada, and Tom Groom who is a Master of Science and Industrial Engineering graduate from Arizona State University. Both provided an overview of law office litigation computer technology.

As for future events we are in the process of organizing a lecture on Small Claims Court Rules and procedures to be held in March of 1998. We hope to have a Provincial Court judge together with a representative from court services as our featured speakers.

Finally, do not forget to mark your calendars as BCALA's Annual General Meeting will be held on April 8, 1998 in the boardroom of IKON Office Solutions located on the 8th floor of 555 Seymour Street. Registration will begin at 5:15 p.m. Look for the upcoming mail-out.

As always, suggestions on topics of interest to you and other legal assistants are welcome. Fax your suggestions to me at 294-9595.


***THE ASSISTANT***

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**Advertising**
Rate includes four yearly issues:

| | | | |
|---|---|---|---|
| Full page | $200 | Quarter page | $ 75 |
| Half page | $100 | Business card | $ 50 |

Contact Ann Halkett for details.

**History and Purpose**
The BC Association of Legal Assistants (BCALA) is a voluntary non-profit association formed in 1979 to promote the professional development and continuing education of legal assistants in B.C. If interested in becoming a member contact Jasbir Bains.

**Submissions**
Articles for *The Assistant* are gladly accepted. If possible please provide submissions in both hard copy and disk form (formatted for Word Perfect 5.1). The deadline for submissions for the next issue is April 24, 1998. The editor reserves the right to edit articles for brevity and grammar.

**Disclaimer**
All opinions or views expressed in *The Assistant* are those of the writers and not necessarily endorsed by BCALA or its directors.

**Subscription**
Annual subscription for non-members is $24.00. Make cheque payable to BC Association of Legal Assistants and mail to the editor's attention at the above address.

**Reprints**
Articles may only be reprinted with permission. Contact Editor for details.

| | |
|---|---|
| 0 | Child Care/Daycare |
| 10 | Maternity Leave |
| 3 | Meal Allowance |
| 16 | Professional Dues |

Other:
-employer paid school fees

*How people found their current jobs:*

| | |
|---|---|
| 10 | Placement Agency |
| 5 | Networking |
| 7 | Newspaper/Want Ad |
| 2 | School Placement Office |

Other:
-worked in office prior to completion of legal assistant diploma
-employer personally requested individual
-employer referral
-cold call on employer

*Office Space:*

| | |
|---|---|
| 17 | Private |
| 7 | Partitioned |
| 6 | Shared |

*Secretarial Assistance:*

| | |
|---|---|
| 0 | Personal Secretary |
| 10 | Shared |
| 5 | Word Processing Pool |
| 7 | Other - do own typing |

*Survey Comments:*

-Would like to see more definitive separation between secretaries and legal assistants in both duties and salary.
-I enjoy my work very much and also feel proud to be part of BCALA. However, the ongoing and major concern that I and my fellow peers have is that there is no job title protection - any Tom, Dick or Harry calls themself (sic) a "legal assistant", without having dedicated the time and effort to education themself (sic) at an accredited college. There must be some form of protection or else we will spend the rest of our worklife explaining our job title and duties and certification to the public which is frustrating and demeaning.
-Unfortunately for me I work in a small office where I am the legal assistant/secretary/administrator and everything else. Are there other legal assistants like me? It would be interesting to have a "pow wow" and share ideas with others from small offices or single practitioners.
-I'm rather disappointed with my firm in that I am expected to work overtime, take on a great deal more responsibility and the fact I have much more training than a legal secretary, however I am paid nearly the same as a secretary with the same number of work experience years. (I was a legal secretary for 4.5 years before becoming a legal assistant.) They seem to have a hard time with separating the two groups.
-I have just been assigned the responsibility to submit a wage/salary proposal to our partners and office administrator, for salary and bonus caps in our firm. We are experiencing extreme turnover in our legal assistants due to a lack of fair remuneration as compared to the rest of the market. We hold extreme autonomy in our files which comes along with a lot of responsibility which we feel goes unlooked (sic), unpaid and unappreciated. Our benefits are also lacking, specifically we pay our own MSP.
-Although I don't have a minimum amount of billable hours specified, my boss does look at my billable hours and gives raises accordingly. He also doesn't expect me to work overtime, but makes comments that those who are there 10 hour days will be paid accordingly when it comes to raises - we don't get paid for overtime but were told we could, but that we wouldn't get as much of a raise (double edged sword).

Salary Tables appear on pages 4 and 5.

**WHY SHOULD YOU JOIN BCALA?**

-quarterly newsletter
-annual salary survey of working members
-job notices sent only to members
-lecture series on topics of interest (members attend for free)
-continuing education and professional development
-occupational title protection process underway
-networking

## Area of Practice - Litigation

**Numbers of Years of Experience**

| | 1 | 2 | 3 | 4 | 5 | 7 | 9 | 10 | 13 | 19 | 20 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Educat.** | Cert. & Dip | Cert. | Cert. & Dip | Cert. & Dip | Cert., Dip. & BA | Cert. | Law Degree | Cert. & BA | Dip. | Dip & BA | Dip. |
| **Lowest Hourly Rate** | $55 | $50 | $65 | $75 | $50 | $55 | $95 | $75 | $65 | $85 | $60 |
| **Highest Hourly Rate** | $80 | $95 | $80 | $110 | * | $75 | * | * | $80 | * | * |
| **Min. Annual Billing in Hours** | 1,200 - 1,500 | 1,200 | 1,500 | 1,200 - 1,300 | * | 1,200 | * | * | 1,200 | 1,500 | * |
| **Weekly Hours** | 40-50 | 35-45 | 40-60 | 35-50 | 32-35 | 30-35 | 35 | 45 | 40 | 40 | 37.5 |
| **Lowest Salary** | 21,000 | 42,600 | 32,800 | 36,600 | 39,600 | 40,800 | 50,000 | 42,000 | 42,000 | 52,000 | 38,200 |
| **Highest Salary** | 37,200 | 43,596 | 38,400 | 47,400 | 45,000 | 44,400 | * | * | * | 54,000 | * |
| **Vacat. (weeks)** | 2-4 | 4 | 3 | 3-4 | 3-6 | 3-5 | 3 | 3 | 4 | 3-4 | 4 |

* Indicates that no responses were given.

**Area of Practice and Number of Years of Experience**

| Area of Practice & # of Yrs of Experience | Secured Lending 1 Year | Estates 1 Year | Corporate 1 Year | Intellectual Property 1 Year | Real Estate 2 Years | Real Estate 10 Years |
|---|---|---|---|---|---|---|
| **Education** | Cert. & BA | Cert. | Cert. | Dip. & BA | Cert. | Cert. |
| **Highest Hourly Rate** | $110 | $65 | $90 | $60 | $40 | $75 |
| **Lowest Hourly Rate** | * | * | * | * | * | * |
| **Min. Annual Billing in Hours** | * | * | * | * | * | * |

| | | | | | | |
|---|---|---|---|---|---|---|
| **Weekly Hours** | 42 | 40 | 35 | 45 | 45 | 42 |
| **Lowest Salary** | 46,000 | 36,000 | 50,400 | 30,000 | 24,000 | 47,700 |
| **Highest Salary** | * | * | * | 32,400 | * | * |
| **Vacation (weeks)** | 4 | 4 | 4 | 3 | 4 | 5 |

*** Indicates that no responses were given.**

***JOB ANNOUNCEMENTS***

For a nominal fee of $100 BCALA will mail job notices to all its members- many of whom are specialized legal assistants with a number of years of experience. If you're tired of trying to find help through the want ads we have qualified people who want to see you.

# PRESIDENT'S COLUMN

By Jasbir Bains

BCALA needs volunteers now! Current directors are doing double or triple duty. People often ask us why we are not doing this or that. Sometimes members will even remark that the directors do not respond quickly to requests for information. Well the answer is simple - we do not have the time or the personnel to do everything. All the directors are engaged in full-time work and most have families. We cannot and will not give up our lives when members cannot be bothered to assist directors or even attend one general meeting a year. Some of the present directors will not be standing for re-election at the AGM on April 8, 1998 so I urge anyone interested to come forward and volunteer. If volunteers do not step forward we will have to pay people outside the Association and that will mean an increase in membership fees, or alternatively, that BCALA will fold.

You might have noticed that we are beginning to hold our meetings at the offices of IKON Office Solutions. IKON is now our official printer and has kindly put its boardroom at our disposal.

Finally, I would like to say a few words about BCALA's Occupational Title Protection application. By now all members are aware that the Ministry of Finance and Corporate Relations rejected BCALA's application. Interested parties (e.g. Ministry of Attorney General, the Canadian Bar Association, the Law Society of B.C. and Legal Services Society) raised concerns regarding BCALA's "weak membership requirements for admission". We have not given up on Occupational Title Protection and will begin to address these concerns. In that regard we asked The Law Society to assist us with the educational aspect and it has advised that it is willing to help. We are currently waiting for the Law Society to set up a meeting.

# SUPREME COURT OF CANADA ISSUES RULING ON CONSTRUCTIVE DISMISSAL

*Reprinted with permission from Schiller, Couttes, Weiler & Gibson "Labour and Employment Report" newsletter- Vol. 8, # 1.*

In a recent decision, the Supreme Court of Canada analyzed the law of constructive dismissal for the first time.

David Farber was the regional manager of Royal Trust's Western Quebec operations. As a result of a restructuring, the regional manager positions were eliminated, and Farber was offered a manager's position at one of the branches. The employer refused to guarantee the base salary, and Farber estimated that his income would be cut in half. He rejected the employer's offer and sued, claiming constructive dismissal.

Overturning the lower court decisions, the Supreme Court of Canada found that Farber had indeed been constructively dismissed, and that his claim should be allowed.

Although the case was decided under the civil laws of Quebec, the Court confirmed the (very similar) principles that have applied in the common law provinces regarding constructive dismissal. Where an employer decides unilaterally to make significant changes to the essential terms of an employee's contract of employment, and where the employee does not agree to such changes, the employee is entitled to walk out the door and sue for wrongful dismissal. Fundamental changes of this nature amount to a repudiation by the employer of its obligations under the employment contract, and a constructive dismissal of the employee.

The Court noted that an employer is free to make alterations to the employee's position or duties, so long as such changes are contemplated by the express or implied terms of the contract (e.g., changes to duties which do not alter the nature of the employee's managerial authority). In determining whether an employer's actions have substantially altered the essential terms of the employment contract, a court must look at whether - at the time the change was made - a reasonable person in the same situation as the employee would have felt the essential terms of the employment contract had been fundamentally altered.

For a constructive dismissal to occur, the employer need not have intended to force the employee to leave his or her employment. Nor must it be found that the employer acted in bad faith (although the presence of bad faith may impact on the damages awarded to the employee).

The Court held that the trial judge had erred in considering evidence of post-dismissal sales figures, which showed that Farber would have earned a healthy income had he accepted the employer's offer. The Court held that such evidence was irrelevant and inadmissable. Since an employee must decide whether or not unilateral changes constitute a constructive dismissal at the time they are made, the Court must examine the circumstances in existence at that point in time. Evidence of subsequent events is irrelevant, unless such events could reasonably have been foreseen at the time of the change.

The Farber case is significant, because it is the Supreme Court of Canada's first ruling on constructive dismissal. It may be important in other wrongful dismissal actions, given some of the comments of the Court with respect to employment in general. The Court cited with apparent approval the remarks of an academic commentator, who said "...it is often an essential consideration for employees in their employment that they be able to do the job for which they were hired, given both the satisfaction they legitimately wish to derive from it and their concern to maintain and develop their qualifications and skills in their field of work".

Some commentators have suggested that the Supreme Court's decision may make it somewhat easier for employees to win difficult constructive dismissal cases.

Farber v. Royal Trust Company (March 27, 1997), (S.C.C.) (unreported).

**GOT SOMETHING TO SAY?**

Send submissions for The Assistant to:
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Deadline: April 24, 1998

# SUPREME COURT OF CANADA DECIDES ON DISMISSAL OF EMPLOYEES ON DISABILITY

By Vanessa L.D. Wilkinson
*Reprinted with permission from Singleton, Urquhart, Scott's "Letter of the Law" newsletter - Vol. 9, # 3.*

The Supreme Court of Canada has now changed the law on compensation due to employees who are terminated while on disability-treating them in the same way as those who are terminated while in the workplace. The Supreme Court reversed the British Columbia Court of Appeal decision in the employee dismissal case of Sylvester v. The Queen in Right of the Province of British Columbia.

In a trilogy of cases (Sylvester v. The Queen in Right of the Province of British Columbia, Dardina v. The Royal Trust Corporation of Canada (B.C.C.A.) and Bohun v. Similco Mines (B.C.C.A.)), the B.C. Court held that an employee who is dismissed while on disability leave is entitled to both disability benefits and severance pay. The reasoning was that the employee contracted for two separate contracts: the entitlement to disability benefits and the entitlement to notice or pay in lieu of notice. Therefore, if an employee was denied her rights through the breach of either of these contracts, she would have been entitled to an award of damages which would compensate her for both disability benefits until she recovered from her illness and severance pay or notice of termination to compensate her for the loss of reasonable opportunity to search for new employment.

The Supreme Court of Canada in Sylvester v. The Queen in the Right of British Columbia has now changed the law on this point- in a case where the employer had set up the short-term and long-term disability plans-by holding that disability benefits should not be considered as distinct from the employment contract but as an integral component of it. Moreover, the Supreme Court has held that where disability benefits were intended to be a substitute for the employee's regular salary, the benefits received during the notice period must be deducted from the damages awarded in lieu of notice. While the disability benefits are intended to be a substitute for regular salary when the employee was unable to work, damages for wrongful dismissal are calculated on the basis of the salary the employee would have received during the required notice period on the assumption the employee would have been working during that time. The Supreme Court held that in the Sylvester case, the parties did not intend that the employee should receive both severance pay and disability payments.

Employees who are terminated while on disability are no longer entitled to "double compensation" at least when the employer has set up the disability plan. Moreover, in the Sylvester case the employer paid all the premiums for the employee's disability benefits. Although the Court did not consider the situation where the employee pays the premiums, the Court's reasoning should apply to such a situation if the benefit plan is intended to provide income replacement while the employee is disabled.

Therefore it now appears that the law treats the termination of employees on disability leave in the same way as those who are in the workplace. An employer who terminates an employee on disability leave, because her position has become redundant because of reorganization or downsizing, for example, may deduct from her pay during the reasonable notice period any disability payments received during the notice period under the employer's disability plan.

**ATTENTION SPECIALIZED LEGAL ASSISTANTS**

Are you a specialized legal assistant? If so we would love to hear from you. We are looking for individuals to be part of a lecture series. If interested please telephone Connie Iverson at 294-9594.

# LABOUR RELATIONS CODE UPDATE

*Reprinted with permission from Schiller Coultes Weiler & Gibson "Labour and Employment Report" newsletter - Vol. 8,# 1.*

**Company Rules**

In Ventur Steel (1990) Ltd., B.C.L.R.B. No. B57/97, the Labour Relations Board expressly adopted the well-known *KVP* tests regarding the enforceability of Company rules or policies:

1. The rule must not be inconsistent with the collective agreement;

2. It must not be unreasonable;

3. It must be clear and unequivocal;

4. It must be brought to the attention of the employee affected before the Company can act on it;

5. The employee concerned must have been notified that a breach of such rule could result in discharge if the rule is used as a foundation for discharge; and

6. The rule must have been consistently enforced by the Company from the time it was introduced.

**Discharge for Non-Culpable Absenteeism**

Arbitrators should use a three-fold test in cases involving discharge for non-culpable absenteeism. The first question is whether there has been excessive absenteeism in the past. The second question requires a determination of whether the employee is incapable of regular attendance in the foreseeable future. The third part of the test requires a consideration of the applicable human rights legislation. Where an employer has a general rule (such as one which requires regular attendance at the workplace) and the application of this rule adversely affects an employee (e.g. results in the employee losing his or her job because of absenteeism), then if that absenteeism is due to a disability under the Human Rights Code, there arises an obligation on the employer to make reasonable efforts to accommodate the employee. The cases under the Human Rights Code indicate that "physical disability" generally means a physiological state that is involuntary, has some degree of permanence and impairs the person's ability, in some measure, to carry out the normal functions of life. The essential elements of a disability are that the symptoms are chronic, impair a person's ability to perform a job on a consistent and long term basis, and that the problem is an involuntary one. An employer's duty to accommodate does not depend upon a request for accommodation being made. In order to satisfy its duty, the employer must address what it is able to do to accommodate the individual's disability without undue hardship to itself. If the employer can accommodate without undue hardship that is the end of the matter. If the employer is able to accommodate but this requires a change to the terms and conditions of employment, a duty then shifts to the individual suffering from the adverse effects of the discrimination to accept this reasonable accommodation. An employee who is offered a reasonable accommodation has an obligation to cooperate with the employer's suggestions for resolution: Westmin Resources Limited, B.C.L.R.B. No. B64/97.

**Collective Bargaining**

An employer is not prohibited from communicating with its employees on bargaining issues. For example, if the union misstates the employer's position, misrepresents, fabricates or simply refuses to take the employer's position to the employees, an employer may have certain rights in order to communicate its position to its employees. An employer may also communicate its offer, without editorializing or commenting on it. But the communication must be strictly factual and strictly accurate. It is an unfair labour practice for an employer to communicate its offer to employees on

Continued on page 13.

the eve of a strike vote meeting, with editorial comment regarding such matters as the disruptive nature of collective bargaining. The union should be given an opportunity to assess the employer's offer, comment on it and make recommendations to its members. Here, the employer's letter was an attempt to pre-empt the union's ability to effectively conduct its negotiating mandate by reporting back and making recommendations or comments to its members with regard to how collective bargaining had gone. The letter interfered with the administration of the union contrary to Section 6(1), and was contrary to the union's exclusive bargaining agency under Section 27(1) of the Code: Ventur Steel (1990) Ltd., B.C.L.R.B. No. B57/97.

**Plant Closure**

There is no doubt that people who invest in businesses are generally concerned with minimizing costs and maximizing profits. There is also no doubt that costs created by collective bargaining are of significant concern to both employers and investors. Labour legislation was designed to counteract the arbitrary exercise of economic power by employers. While nothing in the Code or the cases prohibits an employer or investor from going out of business for *bona fide* economic reasons, closing or curtailing business activities either temporarily or permanently to avoid collective bargaining obligations may amount to an unfair labour practice. It may also constitute an illegal lockout. It all turns on the employer's motivation and how it is driven: Checkmate Cabs Ltd., B.C.L.R.B. No. B58/97.

LRB Chair Keith Oleksiuk: allowing an employer to close its operations as a response to union organizing would significantly undermine the unfair labour practice provisions of the Code and is fundamentally inconsistent with the purposes of the Code. Here, the employer committed an unfair labour practice by closing its distribution centre shortly after certification. Remedy: employer ordered to pay employees' wages and benefits for the duration of the freeze, and for a further nine months until the point in time the Board was satisfied the employer would have closed its distribution centre and gone to direct shipments in any event. Also, parties invited to engage in collective bargaining regarding continued operation of the distribution centre, failing which the union can bring economic pressure to bear with a strike: Superstar Athletic Footwear Ltd., B.C.L.R.B. No. B135/97.

**Definition of "Collective Agreement"**

A collective agreement within the meaning of the Code only comes into effect when all issues have been resolved by the parties and all agreements have been reduced to writing. There must be a consensus between the parties on all terms of the bargain. As such, an interim agreement does not constitute a collective agreement, even if some of its terms have been put into operation, if further negotiations are contemplated, or if the parties intended an arbitrator's award to result in the collective agreement coming into existence rather than merely filling in the missing terms of an already existing collective agreement: Kootenay Industrial Contractors Ltd., B.C.L.R.B. No. B67/97.

**Section 54 - Adjustment Plans**

Section 54 applies to a sale of a business. This does not interfere with an employer's right to sell its business. Nor does it prevent a vendor from maintaining secrecy to the point where an unconditional contract of sale is concluded with the purchaser. The vendor and purchaser need only ensure that the effective and/or closing date is sufficiently far into the future to permit giving 60 days' notice to the union as required by Section 54 of the Code. Put another way, this 60 day notice period must be taken into account in negotiating agreements of purchase and sale of a business or part of a business. It is the impact of the decision to sell, not the decision to sell itself, which must be discussed with the union pursuant to Section 54. Employees have the right to choose whether they will remain with the vendor (which could result in layoff or termination according to the existing collective agreement) or continue their employment with the purchaser. Should employees elect to remain with the vendor, there may be no jobs left for them to perform

and they may be subject to layoff. As a result, they may have to fall back on their collective agreement rights. These rights may or may not be adequate in the circumstances. Section 54 is intended to allow the parties to explore other alternatives which may more adequately address the employees' predicament and, if necessary, provide a vehicle for supplementing collective agreement rights. Remedy: employer ordered to meet with union to discuss adjustment plan, with 60 day period running from date of decision: Canada Safeway Limited, B.C.L.R.B. No. B75/97.

Section 54 imposes no obligation upon an employer to agree to an adjustment plan or any particular item that may be included in the parties' proposed plan. The obligation is to discuss in good faith, not to agree. The Board will not order severance pay as a remedy for a Section 54 breach. Nor does the Board have jurisdiction to order severance pay under Sections 42 or 44.1 of the Employment Standards Act: D&W Warehousing Ltd., B.C.L.R.B. No. B114/97.

### Certification

There is nothing wrong with a union applying for certification based upon cards that are more than 90 days old, so long as the employees have kept their memberships current through the payment of dues: Gammy Ventures Ltd., B.C.L.R.B. No. B79/97.

### Voting Eligibility

Where an individual's employment status remains in dispute, he/she is entitled to vote. This principle applies where the employee has a dismissal grievance that is awaiting arbitration, or where the union has filed an unfair labour practice complaint challenging the employee's discharge: Roberts Bros. Farming Ltd., B.C.L.R.B. No. B121/97.

### Common Employer Declarations

A common employer declaration is a discretionary remedy and will not be granted if it appears unreasonable or unfair to do so because of delay, acquiescence, or lack of reasonable diligence on the part of the applicant union. Here, the union's explanation that it only acts upon complaints from its members and that the core crew of the unionized employer was relatively content with the arrangement over the years, was not sufficient. The union acquiesced in the existence of the non-union company for a significant period of time. A labour relations purpose is lacking where such acquiescence exists. It suggests that from the union's perspective its rights have not been defeated. Acquiescence must be distinguished from a case where a union ought to have known earlier, but was unaware of the facts. Application dismissed, but the union is not barred from bringing a fresh application should the facts change (e.g., should the employer cease providing work to the union company): G&B Bricklayers Ltd., B.C.L.R.B. No. B136/97.

# RECENT WRONGFUL DISMISSAL AWARDS

*Reprinted with permission from Schiller Couttes Weiler & Gibson "Labour and Employment Report" newsletter - Vol. 8, # 1.*

| Case | Position | Salary | Age | Length of Service | Notice Entitlement |
|---|---|---|---|---|---|
| Robinson v. Island Mack Truck Sales Ltd. (Jul 26/96) (BCSC) | Service Manager | --- | 31 | 16 Mos | 6 Mos |
| Athey v. Steve Marshall Motors Ltd. (Sept. 13/96) (BCSC) | Manager, Auto Body Shop | --- | 47 | 5 Mos | 5 Mos |
| Shearer v. Healey Enterprises Ltd. (Oct 11/96) (BCSC) | "Mid-Level" Office/Sales Employee | $41,400 | 62 | 19 Yrs | 7 Mos |
| McGilvery v. Ace Explosives ETI Ltd. (Sept 27/96) (BCSC) | Truck Driver | $33,600 | 51 | 27 Mos | 2 Mos |
| Byers v. Prince George (City) Downtown Parking Commission (Nov 6/96) (BCSC) | Parkade Attendant | --- | 55 | 15 Yrs | 4 Mos |
| Taylor v. CBHN Information Systems Ltd. (Nov 27/96) (BCSC) | Salesman | $40,820+ Comm/Car | 52 | 22 Yrs | 20 Mos |
| Garrett v. Alouette Laser Products Ltd. (Nov 15/96) (BCSC) | Job involving "minimal skill" | --- | --- | 2 3/4 Yrs | 1 Mos |
| Petersen v. Labatt Breweries of B.C. (Nov 28/96) (BCSC) | Chief Engineer | --- | 61 | 30 Yrs | 21 Mos |
| Ralph v. B.C. Native Housing Corp. (Dec 16/96) (BCSC) | Office Administrator | --- | --- | 6 Yrs | 6 Mos |

**TEACHERS WANTED!**

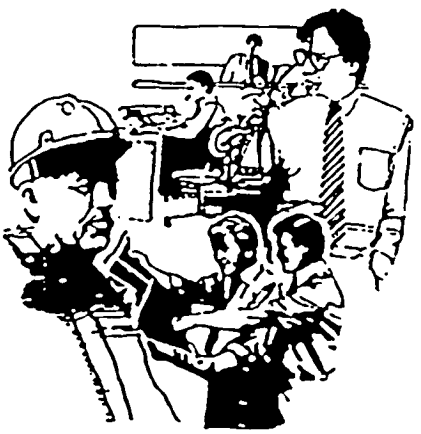
The Vancouver Community College Legal Assistant program is looking for people to add their names to its teaching list. If interested contact Program Advisor Katherine Wellman at 222-0707.

**JOIN BCALA**

Continue your education and professional development.

CAN YOUR CLIENT

# RETURN TO WORK?



***PHYSICAL CAPACITY EVALUATIONS***

Assessment of Physical Capacities, **PCE**

- Determines the client's ongoing physical limitations
- Assesses current level of physical function/work potential
- Provides recommendations for treatment and return-to-work

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# COST OF FUTURE CARE

*"How Much Is Enough?"*

Considers . . .

- Loss of independence
- Permanent disability
- Expenses related to equipment, services and supplies
- Future consideration
- Rehabilitation planning
- Wage loss

# WHEN ARE ADJUSTERS' FILES PRIVILEGED?

By Pierre Cantin

*Reprinted with permission from Singleton, Urquhart, Scott's "Letter of the Law" newsletter - Vol. 9, # 3.*

Because insurance adjusters' files usually contain valuable investigatory information, the extent to which they are privileged in a court case is often disputed.

Plaintiffs take the position that information acquired by an insurer before a writ has been issued is not privileged because it was not gathered for the purpose of litigation.

Insurance companies, on the other hand, view their information as having been gathered for potential litigation and, therefore, as being privileged.

Such disputes occur mainly in the context of motor vehicle accidents, where ICBC adjusters usually start amassing relevant information a long time before a writ is issued. But they are not limited to such cases.

On the issue of the extent of privilege, a good starting point is the seminal case of Hamalainen, which held that the following two-part test must be met for a document to be privileged:

-At the time of the document's production, litigation was a reasonable prospect; and
-The *dominant* purpose for the document's production was to obtain legal advice or to conduct, or aid in the conduct of, litigation.

The Court of Appeal stated that the first part of the test would be met if a reasonable person, possessed of all pertinent information, would conclude it *unlikely* that the claim would be resolved without litigation. This would usually not be particularly difficult to establish. However, with respect to the second test, the Court insisted that only documents created for the *dominant* purpose of preparing for anticipated litigation would be privileged.

Because of this, courts are generally reluctant to grant privilege to documents created before a writ has been issued. In numerous cases, courts have reasoned that there is bound to be a preliminary period in the information-gathering process of an adjuster when the dominant purpose for the creation of documents will not be to prepare for litigation but, for example, to determine whether there is liability or to set the amount of compensation for the insured. Courts have reasoned that it is only later that the focus of an adjuster's inquiry changes to the dominant purpose of litigation. Often, courts have viewed that such change did not occur until the issuance of the writ.

Although the majority of the cases dealt with motor vehicle accidents, a view started to emerge that Hamalainen was to be interpreted as saying that, in every case involving documents prepared by an insurance adjuster, such documents will be privileged only once it can be said that the focus of the inquiry of the adjuster changed from non-litigation to litigation.

Implicit in that view was that an insurance adjuster's file could not be privileged from the moment it was opened.

This view was challenged in Catherwood in the context of two reports created by an adjuster under a third-party liability policy more than a year and a half before a writ had been issued (but within one and three months after the plaintiff had informed the defendant that legal proceedings would be commenced). The general principle argued by the defendant was that when a potential plaintiff is threatening litigation against a defendant with liability insurance, the only reason for investigation by an adjuster, from the very beginning, is litigation. For this reason, the whole of the adjuster's file should be privileged, which in Catherwood included both reports. Although the Court did not rule on the general principle stated by the defendant, it upheld the privilege on the facts, stating it was clear the defendant was going to be sued when the reports were

Continued on page 19.

written and that all actions thereafter were for the purpose of the upcoming litigation.

A recent decision of the British Columbia Supreme Court also challenged the view that an adjuster's file could not be privileged from the moment it was opened. The basic facts were straightforward: after a meeting between an accountant and a client-during which the plaintiff client suggested she would be holding the defendant accountant and his firm responsible for alleged negligent professional advice - the accountant, who had an Errors and Omissions policy, contacted his insurer. The writ was issued a year later. The issue facing the Court was how much of the insurer's file was privileged. The Court held that once coverage issues had been resolved, which occurred a week after the defendant had contacted the insurer, all documents created by the adjuster were privileged.

Strictly speaking, this case, like Catherwood, is limited to its own set of facts. It does, however, support the argument that as soon as coverage issues have been determined, all documents produced by an adjuster under a third-party liability policy (which includes E&O policies) are privileged as having been produced for the dominant purpose of litigation-unless liability is immediately admitted by the insurer.

Until the Court of Appeal rules on the general principle advanced by counsel in Catherwood, adjusters should be aware that in cases involving third-party liability policies there are certain steps they can take to ensure that the majority of their file will be privileged:

-Coverage-issue determinations should be completed by the insurer before any further investigation is done into the details of the action or anticipated action.

-Any notes taken or documents produced by the insurer should be clearly segregated between coverage-issue determinations and anticipated litigation purposes. If the court orders the disclosure of documents produced before coverage was determined, this will ensure that the amount of information given to the plaintiff will be minor and harmless.

-Once coverage is established, counsel should be appointed to the file and all correspondence should be copied to him or her; this will go a long way in establishing that all documents created by the adjuster from that time forward were for the dominant purpose of litigation.

# ACCURATE *Realtime* REPORTING

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**PLEASE READ THIS NOTICE. IT MAY CHANGE A MOST IMPORTANT ASPECT OF YOUR LITIGATION**

# TO: ALL LITIGATORS

I am one of the "Group of Seven" who realtime-reported the 11-month ***Gustafsen Lake*** trial for Judge Josephson. For the past few months, besides regular reporting, I have been transcribing audiotapes of Supreme Court trials. You will be interested to know audiotapes are not turned on in time, speaker misidentification occurs routinely when counsel's voices are indistinct, given that channel 2 and 3 mikes are both at the lectern, spellings and exhibit lists are non-existent, and of course inaudibles are an inevitable result of such a backward step in technology.

**COURT REPORTER'S FEE LESS THAN OR EQUAL TO TYPING COMPANY'S!**

All of the above-noted potentially serious problems can be completely eliminated very simply: Take me to Court! In my survey of Vancouver lawyers, I have found that most prefer the attendance of a reporter to that of an audiotaped transcription, the hesitation being cost. However, with my low overhead and clean writing style (therefore faster turnaround), I can afford to match a transcription company's rates, and you're still ahead as far as speed, accuracy, and all the add-on services I provide. See for yourself:

| | |
|---|---|
| **(A) Typing Company's Transcript Fee:**<br>*(3- to 4-week turnaround)*<br>85 pages @ $5.00 pp (Or + 1)<br>Total Per Day: **$425.00** | **(B) * Reporter C. Kottmeier's Court Fee:**<br>***(2-week turnaround or better)***<br>NO ATTENDANCE FEE WHEN FULL DAY ORDERED!<br>85 pages @ $5.00 pp (Or + 1)<br>Total Per Day: **$425.00** |

**(C) * Reporter C. Kottmeier's Court Fees Split by Parties *(2-week turnaround or better)***

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|---|---|
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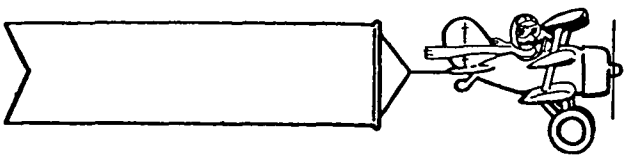
*** (Uncertified transcript at day's end, e-mailed daily, expedited, realtime, etc., are also available at very competitive rates.)**

In closing, as a businessperson, I'd appreciate the opportunity to work with you. However, if your loyalties lie with someone else, as Secretary of our court reporters' association (BCSRA), I welcome your comments, observations, or opinions on your audiotape/transcript experiences. I'm sure you'll agree litigants deserve the best product for their money!

Yours sincerely,

Kottmeier

**Catherine Kottmeier,**
Official & Realtime Reporter



# PRACTICE UPDATE

Questions & Answers
By Joanne Power, Manager Registrar Program

*Ed. Note: BCALA is pleased that the Registrar of the Supreme Court of British Columbia has given permission to reprint "Questions & Answers" as selected by Ann Halkett from the December 1997 "Registrars' Newsletter".*

*The "Questions & Answer" portion of the "Registrars' Newsletter" is now posted on the Internet. The address is: http: www.courts.gov.bc.ca*

**Bankruptcy & Insolvency Act**
**s.73(2)**

**Q: Are funds held in court required to be paid directly to a Trustee in bankruptcy?**

A. In Bankruptcy of Dore, Master Chamberlist held that upon receipt of a copy of the assignment of the receiving order certified by the Trustee as a true copy, any funds paid by or in the name of the bankrupt are to be paid to the Trustee without an order of the court. In order to avoid any misunderstandings, the cashier may decide to informally notify the other party of the Trustee's request. If the other party raises an objection, the cashier may refer the matter to the court for determination.

**Bankruptcy and Insolvency Act s.168(1)(e) and Part II, Bankruptcy Tariff, s.2(a) & 4(f)**

**Q: When a creditor files an opposition to the discharge of a bankrupt is a fee payable by the Trustee to file the s.170 report, etc.?**

A. If the court file has already been opened by the creditor pursuant to s.4(f) of Part II of the Bankruptcy Tariff, then the Trustee need pay no further fee. (If the creditor is the Provincial Loan Administration Branch of the Ministry of Finance and Corporate Relations, then no fee is payable.)

If, however, the Trustee has been notified of the opposition by a creditor pursuant to s.168.1(1)(e) and the creditor has not filed any material with the court, then it is incumbent upon the Trustee to file the necessary documents. To do so, the $50 registry fee must be paid

**Company Act s.204**

**Q: If a document has been served on a company by double registered mail and no receipt of service is provided, how is the time calculated?**

A There is no provision in either the Rules or the Company Act to provide that documents sent by mail have been deemed to have been received. In Forbes v. G.L. Construction Ltd., the court found that without a signed pink card providing receipt, service had not been effected. As a result, a time calculation is meaningless.

**Divorce Act s.2(1)**

**Q: Is there still a difference in the age of a child under the Family Relations Act and the Divorce Act?**

A No, the definition for "child of the marriage" in the Divorce Act now refers to the age of majority. "Age of majority" is defined, as determined by "the laws of the province where the child ordinarily resides"

**Evidence Act s.63**

**Q: As Registrars, considering probate applications or applications for default judgments, can we rely on affidavits sworn outside British Columbia by a commissioner appointed outside British Columbia?**

A No. Section 63 of the Evidence Act lists individuals who may take affidavits outside British Columbia which are "valid and effectual". Commissioners appointed outside British Columbia are not included in this list unless they fall within s.63(1), for example, the High Court Commissioner of England

**Family Relations Act ss. 121 & 122**

**Q: Does a written agreement filed in the court have to signify on the document "In Provincial Court of B.C." or "In the Supreme Court of B.C."?**

A No, a written agreement can be filed in either court It is not a form set out in the Rules.

**Motor Vehicle Act s.94**

**Q: What process is followed in filing a Judicial Review petition relating to a 90 day roadside suspension under the Motor Vehicle Act?**

A: The Judicial Review petition should be filed in Supreme Court, in either the civil or the criminal registry. There are currently no fees to commence this proceeding

Name Act s.5

**Q: Can a husband change his name after divorce pursuant to Section 5 of the Name Act?**

A: Yes Section 5(1) states:

> "...the Supreme Court may, at any time, on the application of a former spouse, order that **his** or **her** name be changed to the name **he** or **she** desires".

**Residential Tenancy Act ss. 50(6) & 51 and Rules 11 and 42(12)**

**Q: Must a document in a proceeding relating to a residential tenancy be personally served?**

A: No. Subsection 85(6) of the Residential Tenancy Act provides that such documents may be served in accordance with s.88 of the Act, which provides for alternate service if the party is absent from his/her premises or is evading service

A Writ of Possession, on the other hand, must be personally served

**Rule 11(6.3)**

**Q: How is time calculated for delivery by mail?**

A Service is effective on the same day of the week in a calendar week following mailing, as the day on which the document was mailed

**Rule 12**

**Q: Can a writ be served substitutionally without an order?**

A: Yes. Rule 12 was amended effective 1 July 1997 Any document, except those listed in Rule 12(1), can be served substitutionally without order, provided the person being served has a residential address or acknowledges receipt.

**Rule 12(4)**

**Q: What is required in an affidavit of service if service has been effected pursuant to Rule 12(4), which permits substituted service at a residence without an order?**

A The affidavit should set out.

1. that an unsuccessful attempt to serve the person at the place of residence was made;
2. that the document was left (during or after the unsuccessful attempt) in a sealed envelope addressed to the person to be served at the place of residence of that person, with someone who appeared to be an adult member of the same household;
3. that the document was subsequently mailed to the person to be served at that place of residence; and
4. that the deponent believes that the address at which the document was left and to which the document was mailed is the residential address of the person on whom service was to be effected

**Rules 17, 25 and 57**

**Q: Are there guidelines as to disbursements allowed on a bill of costs presented with a default judgment such as B.C. On-Line, agent's fees and search fees?**

A: Rule 57(4) compels the Registrar to allow expenses and disbursements that were "necessarily or properly incurred in the conduct of the proceeding". Current allowable rates for fax and photocopy charges are set out in "Practice Before The Registrar". Generally, B C. On-Line is not allowable.

The party submitting the bill can prove its necessity and reasonableness [Holzapfel v Matheusiuk (1987) 14 B.C.L.R. (2d) 135], by including an affidavit proving the disbursements and attaching the invoices This is particularly true for unusual disbursements

**Rules 18A and 60B**

**Q: Can a respondent who has filed an answer in a divorce proceeding set the matter on the chambers list, pursuant to Rule 18A, to ask for a divorce?**

A: If the respondent has filed an answer or counter-petition, the parties are eligible to apply for Judgment under Rule 18A(1)(c). In Vancouver, Rule 65 also applies.

**Rules 18A and 60B(44) & (45)**

**Q: Counsel have been filing 18A motions on undefended divorce applications. Is this correct?**

A: No. Rule 18A(1)(c) states that Rule 18A applies only to contested proceedings. See also the Practice Direction of the Chief Justice dated 8 February 1993.

However, a number of the registries have developed a process of putting the matter on the Chambers list and drawing the Judge's attention to the fact that the matter is

not contested This procedure should not be used where a desk order application for divorce would be appropriate.

**Rules 44(13) and 60B(55)**

Q: **Can an application by consent to vary child support to conform to the Federal Child Support Guidelines be done by desk order?**

A Yes. Rule 60B(55) requires an application by notice of motion as an interlocutory application Rule 44(13) provides for orders by consent in those circumstances

The registry will require that·

The order contains the wording required by s.13 of the Child Support Guidelines;

-The child support fact sheet is completed in the form required by Practice Direction #10;

-The amount of gross income set out in the order matches the amount of gross income set out in the affidavit material,

-The amount of maintenance ordered meets or exceeds the Guideline amount stipulated for a payor having the specified gross income. If not, the application will be rejected unless one of the statements contained in the practice direction concerning split or shared custody, special expenses, or undue hardship has been completed, and

-If income information for the payor is not provided, check to see whether a demand has been made pursuant to Rule 60A or s.21 of the Guidelines. If not, the application will be rejected. If demand has been made, this will be noted for judge's application.

**LEGAL COURSES ANYONE?**

Is there a legal course you would like to take, but no one is teaching it? If so, contact Katherine Wellman, Program Advisor for Vancouver Community College's Legal Assistant Program at 222-0707.

# HOW CAN THE OMBUDSPERSON HELP YOU?

By Gail H. Forsythe, Lawyer

**Hypothetical Case**:

You work with a lawyer who makes jokes that you find offensive. You are a new employee and uncertain who you trust within the firm. You do not respond to the jokes. You are afraid this situation is going to become intolerable. You do not want to leave the firm. What should you do?

**Answer:**

Call the Discrimination Ombudsperson, Gail H. Forsythe, 687-2344, for free and confidential assistance. Ms. Forsythe is the Discrimination Ombudsperson for the Law Society of British Columbia. She is a lawyer and mediator who is independent from the Law Society. She assists staff, articled students and lawyers to address workplace difficulties. She has assisted more than 150 people to effectively deal with racial or sexual harassment; personal harassment; unwanted joking; and employer refusals to accommodate employees due to pregnancy or medical needs.

A call to Ms. Forsythe can help you to identify how to address your needs. For example, by:

(a) assisting you to identify what is important to you and others who may be affected by the behaviour(s);

(b) providing suggestions to assist with communication and problem-solving skill development; and

Continued on page 25.

(c) acting as a neutral mediator to achieve a resolution that works for all concerned.

Ms. Forsythe's services are available as an alternative to the highly adversarial and often costly or time consuming formal processes that are available to address human rights concerns.

If you would like to speak with a knowledgable, objective and trustworthy person about a workplace difficulty that you, or someone you know, is experiencing, please call 687-2344. It is not necessary for you to provide your name, or the names of other individuals involved, for your initial call to Ms. Forsythe.

The Law Society encourages law firms to book Ms. Forsythe to deliver customized in-firm educational seminars. She is also available to assist legal employers with policy design and complaint resolution. If your firm has not scheduled its seminar, encourage your office administrator or managing partner to do so today.



# "THE IMPACT OF STEREOTYPES - A MAN IN A 'WOMAN'S' WORLD"

By Gail H. Forsythe, Lawyer
*Reprinted with permission.*

Attitudes about workplace roles are changing. As a result, previously closed doors are opening. For example, females and people from traditionally under represented groups are now graduating from traditionally male dominated law schools in relatively equal, or increasing, proportions to males. Once in the workforce, female lawyers are finding employment opportunities in traditionally "male" dominated areas of law. Changing attitudes are creating financial rewards and new career paths for groups that faced "closed" doors in the past.

Can the same be said for males who seek employment in traditionally "female" dominated areas of law? Clearly not. In my travels to legal secretarial schools to educate legal secretaries about workplace discrimination, I rarely observe a male in the class. Why is that? Is there truly a "pink collar ghetto" that no "right" thinking male would join? If so, why are those same working conditions acceptable for women?

Why are so few men legal secretaries? Historically, some of the most renown secretaries were men. Are stereotypes about males who enter traditionally female occupations creating barriers to achieve equal opportunity? I am authorized to share this complainant's experience to shed some light on these questions:

*I am a 25 year old Canadian male. My lifelong dream is to work in a law firm. My dream is turning into a nightmare. I have several years of office experience and all of the professional and personal skills to succeed in a law office. I never thought that there would be barriers to prevent me from obtaining employment as a legal secretary, but I have found one...I am male.*

*I bought a new black double-breasted suite and a black leather brief case with the hope of making a positive impression with my appearance and to display my readiness for a work practicum. The experience was a success and the staff wonderful. With a positive review from my practicum; and good grades from my secretarial course, I was ready for long term employment.*

*Over a two and half month period, I submitted over 150 resumes to various law firms and agencies of all sizes and specialties. Over 100 of these applications were to employers who were actively advertising. The only responses that I received were letters of rejection, except for two female lawyers who offered to circulate my resume even though they were not hiring due to budget cut backs.*

*I became frustrated. I did more creative things to post my resume. I have still not received a single response. All of my classmates, except for the other male student and one female student, have found employment during this same period of time.*

*I called my instructor to inform her about my unsuccessful employment search. She advised me that law firm representatives had made it clear to her that they were looking for female secretaries. The first thought that entered my mind was, "how am I supposed to change that?" I was very angered and hurt.*

*It is difficult for me to understand how the people who have made their livings representing client rights and freedoms, are the same people who destroy the rights and freedoms of men trying to explore a field of employment that was never available to them before because of traditional roles in our society. After all of the historic events that have taken place, and the breaking down of the wall of gender discrimination, the most surprising aspect of this discrimination is that it has not been the women that I have had problems with...it is the men!*

*For example, while a receptionist at a large Vancouver insurance firm, I had my first experience with discriminatory conduct. A male laughed at me, asked if the woman receptionist was off today, and implied that I was gay. After work, I went to my martial arts school and, upset, almost beat the kicking bag off its chain.*

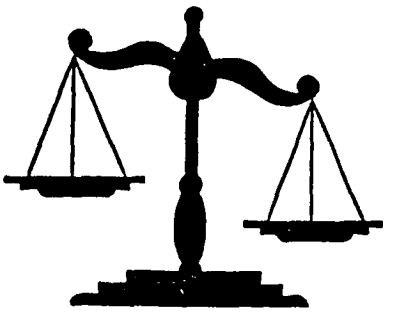
*Lawyers tell me that the ability to adapt to changing environments is a very important quality for success in a law firm. This quality is vital for administrators and lawyers because of our ever changing society. It is very saddening to see that a lot of firms and agencies do not feel that men, as legal secretaries, reflect our changing environment. I do understand that it can be difficult to keep pace with constant change. However, change cannot be ignored.*

*The impact of discrimination is emotionally devastating. After spending large amounts of money on education and training, and working extremely hard to achieve high grades, and then, to be rejected continuously simply because I am male, has caused me a great deal of confusion, a sense of loss, and a feeling of helplessness.*

*Finally, I want every lawyer and personnel administrator to understand one simple fact. This is the 1990's. Men are making career choices that involve secretarial positions more than ever. Those positions give them a chance to gain valuable experience. The traditional roles of the 1960's and earlier have long since expired. When you reject an applicant's resume because that applicant is male, you may be missing out on the best legal secretary that you could ever hire.*

In light of this man's experience, consider examining the hiring practices within your firm. Are attitudes within your firm welcoming and accepting of the diversity of today's applicant? Or, are your hiring options limited to a smaller, and possibly less talented, applicant pool because attitudes within your firm are based on stereotypes that belong in the past? Any firm wanting to give this applicant a chance, should contact me at 687-2344.

# LAW PRIMER



**Case Digests**

*Ed. Note: The following Case Notes are reprinted from the Civil Law Digest with the permission of the Continuing Legal Education Society. For subscription information telephone: 893-2162 or toll free (800) 663-0438. To order full text judgments telephone (604) 535-1197 or toll free (800) 927-3371.*

**EMPLOYMENT - Duties and liability of employee - Insurance salesperson using memory, aided by telephone book, to reconstruct list of her former clients - Court finding employee entitled to contact those persons upon joining new employer.**

The defendant I. was employed by the plaintiff insurance agency as a salesperson. She left the plaintiff's employ in 1994 and went to work for the defendant insurance agency. When she did so she used her memory, assisted by telephone and business directories, to reconstruct a list of parties who had been her clients during her employment with the plaintiff. She contacted each of those clients, advising them of her new location, and was successful in obtaining business from a number of them. The plaintiff sued for damages, alleging that I. had stolen customer lists and breached her fiduciary duty. At trial the plaintiff acknowledged it had no proof that I. took actual documents. Held, action dismissed. I. had had some minor supervisory duties while employed by the plaintiff, but for the purposes of the action she was a mere employee. Although, as such, she owed a duty not to take client lists and confidential information, insofar as those items were recorded in documents, and not to make unfair use of the information she acquired while employed by the plaintiff, she was entitled to recall the people she had dealt with, aided by a telephone book, and to ask them if they wished to do business with her in her new location.

Barton Insurance Brokers Ltd. v. Irwin, S.C., Humphries J., Doc. Prince George 29544, September 26, 1997, 14 pp. [CLE No. 98-10462] // David W. Buchanan, Q.C., for plaintiff; Marie Louise Ahrens and R. Stewart, for defendants.

Principal case authorities: Alberts v. Mountjoy (1977), 16 O.R. (2d) 682 (Ont. H.C.) - distinguished; Monarch Messenger Services Ltd. v. Houlding (1984), 5 C.C.E.L. 219 (Alta. Q.B.) - distinguished.

**EMPLOYMENT - Wrongful dismissal - Damages - Mitigation - Employer providing terminated employee with option of converting his group life insurance to private insurance - Employee dying uninsured, having failed to effect timely conversion - Court finding failure to mitigate.**

The plaintiff, age 46 at the time of his dismissal, had been employed by the defendant for over four years when his work started to suffer. Unbeknownst to the defendant, the plaintiff was suffering from the effects of AIDS. The defendant terminated the plaintiff's employment in early 1995 and advised him to seek legal counsel to assist with the negotiation of a severance package. Pursuant to the defendant's terms of employment, an employee's basic group life insurance terminated on the last day of the month during which his or her employment ended. However, the employee had the option of converting to private life insurance, without medical evidence of insurability, within 31 days following termination of the basic insurance. In addition, the plaintiff received information in his letter of termination advising that his basic life insurance would be discontinued on a specific date and that he had the option to convert the coverage. The plaintiff took no steps to do so. He died in early April 1995 after a rapid deterioration in his mental and physical health. His action for wrongful dismissal, commenced in March 1995, was continued by his estate. The defendant admitted that it did not have just cause for the dismissal. The remaining issue was its liability, if any, for the loss of the plaintiff's

insurance benefits. Held, for defendant on insurance issue; judgment for plaintiff for $6,644, representing salary to date of death. The plaintiff would have had until March 31 to convert to private insurance. However, he took no steps to do so, or to deal with his severance package, despite having been able to meet with a lawyer concerning his will, to meet with the defendant's compensation clerk and to commence the action. The evidence of medical experts and of the lawyer established that until mid-March the plaintiff had the necessary mental ability to perform the simple task of converting the insurance. Therefore it was not reasonable to conclude that, as the estate contended, the plaintiff was prevented by dementia from effecting the conversion. In the circumstances it could not be said that the plaintiff fulfilled his duty to mitigate his damages in any respect whatsoever. The consequences of his inaction during the time he had the requisite mental capacity should not rebound on the defendant.

E.E. v. E.R., S.C., Humphries J., Doc. Vancouver C951648, September 2, 1997, 34 pp. [CLE No. 98-10293] // Gary C. Baldwin, for plaintiff; Bruce M. Greyell and G. Scorer, for defendant.

Expert evidence: Dr. Kitchen, geriatric psychiatry - considered; Dr. Pattullo, infectious diseases - considered.

**EMPLOYMENT - Wrongful dismissal - Probationary employees - Employer having implied right to dismiss probationary employee without notice, provided employer having made good faith assessment of employee's suitability.**

In March 1993 the plaintiff, then in her 50s, began full-time employment with the defendant as a corporate secretary. She was dismissed two months later. She sued for damages for wrongful dismissal. The trial judge found that the plaintiff was a probationary employee at the relevant time. In reaching that conclusion he accepted the defendant's evidence that the parties had initially agreed to a probation period of six months, later reduced to three months. He did not accept the plaintiff's assertion that the probationary period had expired at the time of her dismissal. The judge dismissed the action and the plaintiff appealed. Held, appeal dismissed. The trial judge was not plainly wrong in finding that the plaintiff was a probationary employee at the time of her dismissal. Whereas the standard for dismissal of a regular employee is just cause, for a probationary employee the standard is suitability. Here, the defendant dismissed the plaintiff because its officers concluded that the plaintiff was not a suitable candidate for long-term employment. On the authorities, the trial judge concluded correctly that an employer, during a probationary period, has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of the employee's suitability.

Jadot v. Concert Industries Ltd., C.A., Rowles, Newbury & Braidwood JJ.A., Doc. Vancouver CA020017, October 23, 1997 (oral), 16 pp. [CLE No. 98-10772] // Glenn A. Urquhart, Q.C. and V. Wilkinson, for appellant; Kathleen E. Geiger and David Moonje, for respondent.

**LABOUR LAW - Commissioners - Statute deeming Industrial Inquiry Commissioner's recommendations to constitute parties' collective agreement - Appeal court upholding commissioner's subsequent "clarification" award as being within his statutory power.**

In early 1996 the petitioner health employers' association faced the looming expiration of its collective agreements with eight health care unions, including the respondent nurses' union. In April 1996, R., who had acted as a mediator for a number of months in seeking to bring about a resolution between the parties, was appointed as an Industrial Inquiry Commission under s.79 of the Labour Relations Code. His powers in that capacity were supplemented by the Education and Health Collective Bargaining Assistance Act which came into force shortly after his appointment. In May 1996 R. delivered a report

containing various recommendations which, pursuant to the Act, were deemed to constitute the collective agreement between the parties. One of his recommendations was that the respondent's members be granted bumping rights for the first time, specifically that they "be permitted to bump to the most junior comparable job". The stated purpose of the recommendation was to rectify an unfairness as between the respondent and the other health care unions whose members already enjoyed bumping rights. The petitioner invoked s.1(4) of the Act to request "clarification" of that recommendation and others. In response, R. issued a clarification award stating, inter alia, that the respondent's members were "permitted to bump into any comparable job occupied by an employee with less seniority, for which the member is qualified and capable, regardless of the existence of vacancies". The petitioner brought a successful application for judicial review of that award. The chambers judge concluded that R. had stepped outside his jurisdiction by reconsidering his own decision under the cloak of "clarification". The respondent appealed. Held, appeal allowed. The Education and Health Collective Bargaining Assistance Act was passed at a time when the labour relations problems in the health field were reaching a critical stage. It was clearly designed to create a mechanism to allow the ordinary workings of the collective bargaining regime to be overridden in order to achieve an early resolution of issues which the parties had not settled between themselves. However cherished, important and sacred the right to free collective bargaining may be, it remains open to a sovereign legislature to limit that right when it finds it necessary to do so in the protection of the public wellbeing. That was what the legislature did here. Section 2 of the Labour Relations Code sets out the purposes of the Code, the first of which is to "encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees". The Act is clearly inconsistent with that purpose, but the legislature provided that if there is conflict or inconsistency between it and the Code, the Act applies. There is, therefore, no basis for reading the Act so as to "minimally interfere" with the rights of collective bargaining. That the power to provide "clarifications" is not limited to providing "explanations" is made clear by the language of s.1(4) which deems the collective agreement to be amended to include clarifications. That necessarily implies a power to change the language of the recommendation in order to make clear what the Commission intended by its recommendations. That was what R. was asked to do and that was what he did. Section 1(4) of the Act confers a power to reconsider to the extent necessary to provide clarification. That may result, as it did here, in the scope of the recommendation being increased from what it appeared to be under the original wording. Provided that the broadening of scope is done for the purpose of making clear what the Commissioner's intention was, he acts within his jurisdiction. Here, R.'s clarification award was reasonable.

Health Employers Association of British Columbia v. British Columbia Nurses' Union, C.A., Esson, Goldie & Donald JJ.A., Doc. Vancouver CA022631, November 7, 1997, 17 pp. [CLE No. 98-10819] // Appeal from judgment of J.T. Edwards J., [1997] Civ. L.D. 72. // Catherine A. Wedge and C. Buchanan, for appellant; Eric J. Harris, Q.C. and K. Arnold, for respondent; Deborah K. Lovett, for Attorney General.