



Going for Gold:  
10 Top Medal Winning Developments  
in Employment and Labour Law  
2009-2010

J. Geoffrey Howard  
Michael Schalk  
Jennifer Vermiere

**gowlings**  
Lawyers • Patent and Trademark Agents

## EMPLOYERS' GOLD MEDAL



**gowlings**  
Lawyers • Patent and Trademark Agents

## Departing Employees Liable for \$11M for "Wrongful Resignation", etc.

*GasTOPS v. Forsyth* (Ontario Superior Court)  
(under appeal)

```

    graph TD
      A[Three managers, but not executives, learn of a lucrative opportunity with GE] --> B[Frustrated with their employer and recent management changes]
      B --> C[Resign with two weeks' notice and incorporate their own company]
      C --> D[16 members of their team resigned in rapid succession to join new company]
      D --> E[Create very product that GE was attempting to source from employer]
      E --> F[Sell to GE and other clients]
  
```

**gowlings**  
Lawyers • Patent and Trademark Agents

## "Wrongful Resignation" cont.

- Trial Judge found:
  - Employees failed to provide "reasonable notice" of resignation
  - Should have given 10 months' notice
  - Employees bound by fiduciary duty not to divert corporate opportunities, solicit clients or employees
  - Solicited other employees or, at the very least, hired those employees to detriment of GasTOPS
  - Unfairly represented themselves as "spin off" of GasTOPS

**gowlings**  
Lawyers • Patent and Trademark Agents

## "Wrongful Resignation" cont.

- Damage Award = Over \$11 million in total, including
  - All profits over a period of nine years on sales to specific clients previously identified by GasTOPS
  - Profits lost due to employees' absence during 10-month resignation notice period

**gowlings**  
Lawyers • Patent and Trademark Agents

## EMPLOYERS' SILVER MEDAL



**gowlings**  
Lawyers • Patent and Trademark Agents

### Yes Virginia, There is Just Cause – Even on Summary Trial

*Poliquin v. Devon Canada* (Alberta C.A.)

- Poliquin had 26 years of service
- Senior supervising employee
- He solicited and accepted free landscaping services to personal residence from suppliers to his employer
- Employer *Code of Conduct* strictly prohibited soliciting or receipt of gifts for favours beyond “nominal value”
- Value of landscaping services unclear, but substantial
- **Held:** this alone is just cause



### Yes Virginia, There is Just Cause... *cont.*

Also:

- Poliquin regularly received and distributed to others pornography and at least one racist e-mail
- Previously warned in writing not to access Internet porn
- Poliquin mainly receives and views e-mail with pornography, but never requests that senders stop



### Yes Virginia, There is Just Cause... *cont.*

**HELD:**

- ABCA recognizes importance to companies of protecting computer resources and reputation
  - Employer can consider risk of harassment and discrimination complaints
  - And elevated risk of computer viruses from such e-mails
- Termination justified on these grounds as well



### EMPLOYERS' BRONZE MEDAL



### Wal-Mart Anti-Union Closure Allowed

*Plourde v. Wal-Mart Canada* (Supreme Court of Canada)

- Retail giant Wal-Mart a prime target for unionization
- But currently operates non-union everywhere
- First North America location to be unionized was Jonquière, Quebec
- Union and Wal-Mart unable to agree on Collective Agreement
- Ministry of Labour referred matter to “first collective agreement arbitration”



### Wal-Mart Closure Allowed *cont.*

- Prior to arbitration, Wal-Mart closed Jonquière location
- All 190 employees were terminated
- Plourde was active union organizer
- Quebec Labour Code protects against reprisal for union activity
- Quebec Labour Code contains “reverse onus” provision: if union activist disciplined, deemed due to union activity unless employer can show not even one factor in decision to terminate
- Reinstatement with back pay is normal remedy
- The Union sought an order that Wal-Mart reopen and reinstate employees



## Wal-Mart Closure Allowed *cont.*

### HELD:

- Closure of location in and of itself a valid reason for Plourde's termination
- No reinstatement remedy available
- Plourde could seek damages under different provisions of Quebec *Labour Code*
- Plourde not entitled to utilize reverse onus provision
- Affirms labour relations remains a battle from which employer can withdraw by closing



## EMPLOYEES' GOLD MEDAL



## Major Wallace Award to Sanction Employer "Insensitivity"

*Soost v. Merrill Lynch Canada Ltd.* (Alta. C.A.)

- Soost was a high producing financial advisor
- Soost was recruited by Merrill Lynch from RBC Dominion Security
- Serious issues arose with Soost's failure to comply with:
  - Industry standards
  - Corporate standardsrelating to ethics etc.
- Merrill Lynch argued cause



## Major Wallace Award to Sanction Employer "Insensitivity" *cont.*

- Soost's "sins" included:
  - Failure to disclose private placement on annual disclosure forms
  - Failure to obtain authorization for private placement
  - Promoting speculative stock contrary to instructions
- Merrill Lynch took compliance seriously after February 2001, but uneven enforcement prior
- Court finds "genuine concerns", but not just cause



## Major Wallace Award to Sanction Employer "Insensitivity" *cont.*



### The Award:

- \$600,000 for 12 months' severance
- \$1.6 million for additional lost opportunity to earn income from his "book of business"
- Not required to repay \$406,000 employee loan
- Total win: **Over \$2.6 million**



## Major Wallace Award to Sanction Employer "Insensitivity" *cont.*

### LESSONS

- *Keays v. Honda* requires proof of psychological injury to receive *Wallace* damages
- *Soost* held that additional proveable financial losses beyond reasonable notice can be recovered as *Wallace* damages



## EMPLOYEES' SILVER MEDAL



**gowlings**  
Law - Real Estate - Insurance

## Human Rights Awards Escalate

- Tribunal awards for "injury to dignity" damages are jumping across Canada
- Until approximately 5 years ago, awards were either limited by statute or precedent to \$5-10K
- Now \$40,000 – \$50,000 damages for serious cases of sexual assault or toxic work environment are common
- Even in ordinary cases Tribunal will award as much as \$35,000

e.g. *Senyk* award: employee absent 2 years on disability found to have been terminated prematurely without seeking medical information and awarded \$35,000

**gowlings**  
Law - Real Estate - Insurance

## Human Rights Awards Escalate *cont.*

### LEGAL COSTS

- Traditionally, no legal costs awarded to or against complainants or employers, although *Human Rights Codes* not clear
- Now awards can be made to sanction frivolous or bad faith claims in B.C. and Ontario's direct access systems. This helps cover legal fees in some cases
- In *Senyk* case, B.C. Tribunal awarded legal costs, finding under a direct access system, she needed a lawyer for her complete claim
- *Senyk* has not been judicially reviewed and has been rejected in one later HRT case, so too early to tell if it will change the law

**gowlings**  
Law - Real Estate - Insurance

## EMPLOYEES' BRONZE MEDAL



**gowlings**  
Law - Real Estate - Insurance

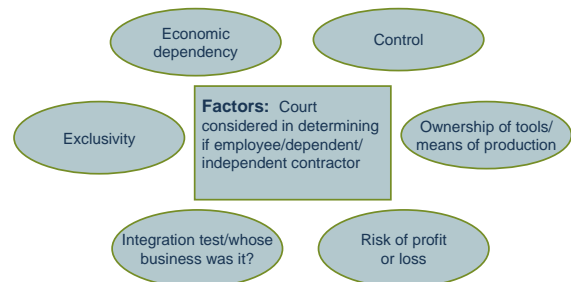
## Ontario Court of Appeal Defines "Dependent Contractor" Rights

*McKee v. Reid's Heritage Homes Ltd.* (Ontario C.A.)

- Bribet sold new homes developed by builder Reid's, its sole client
- Bribet paid as an independent contractor on a percentage commission basis
- Relationship started in 1987 and ended 18 years later
- Bribet paid 4-5 "sub-agents" servicing the Reid contract

**gowlings**  
Law - Real Estate - Insurance

## Ontario Court of Appeal Defines "Dependent Contractor" Rights *cont.*



**gowlings**  
Law - Real Estate - Insurance

### Ontario Court of Appeal Defines “Dependent Contractor” Rights *cont.*

- Trial Judge held Bribet’s principal was effectively an employee
- Awarded 18 months’ compensation in lieu of notice
- Court of Appeal considered employee status finding but stated award also “defensible” under concept of “dependent contractor”
- Case is consistent with B.C. decisions



### Ontario Court of Appeal Defines “Dependent Contractor” Rights *cont.*

#### LESSONS:

- Establish written agreements with all dependent/independent contractors that clearly defines relationship
- Include a termination clause
- Absent such an agreement, “dependent contractors” will be entitled to “reasonable notice” of termination similar to that owed employees



### Crime and Punishment in the Great White North

*Fullowka v. Pinkerton’s* (Supreme Court of Canada)

- Bitter protracted Giant Mine strike
- Numerous acts of vandalism, including life-threatening arson
- September 1992, nine replacement workers murdered by a bomb planted by militant striker



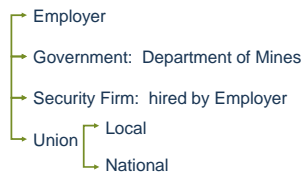
### Crime and Punishment ... *cont.*

- Royal Oak Mines, the employer:
  - Scaled back security contrary to Pinkerton’s advice
  - Was warned regarding issues of vandalism and personal safety
  - Settled out of court for an undisclosed amount
- NWT Mine Safety Division
  - Was aware of potential risk to workers’ safety and life
  - Did not close mine, allowing replacement workers to operate
- Union Local and the National Union
  - Were they vicariously liable for union members’ actions arising out of strike?



### Crime and Punishment ... *cont.*

Issue: are others liable to compensate the families of the victims?



- Murderer had no resources to compensate bereaved families



### Crime and Punishment ... *cont.*

#### HELD:

- Pinkerton’s not responsible
  - Protected from liability to families by contractual limitations regarding scope of and responsibility for services
  - Could not be expected to act when not paid to do so
- National Union not liable
  - No national union vicarious liability for actions of union member
  - National and Local Union chapters are separate legal entities



## Crime and Punishment ... cont.

- NWT government not responsible
  - Given wrong legal advice about powers from government lawyers
  - SCC determined legal advice was wrong, but NWT government followed it in good faith
  - Contrary to public policy to hold officials liable for not ignoring legal advice
  - One might ask: Why should bad legal advice be a defence?



## Coming Soon: Two New Employer Obligations in Ontario:

### Employment Accessibility Standards (Ontario)

- Government passes the *Ontarians with Disabilities Act*
- Act allows for detailed "Standards" to accommodate and include disabled in workforce and in economy generally
- Ontario Government consulting on details of employment Standard under Act
- Implementation of Standards for most employers staggered over 5 years
- Larger employers have shorter timeframes, starting 1 year from passing of Standard
- Requires employers to create their own internal Standard (policy)



## Employment Accessibility Standards (Ontario) cont.

First Year – all employers must create policy committing to:

- ✓ Removing barriers to employment
- ✓ Creating inclusive systems and procedures e.g. recruiting ads must state disabled welcome
- ✓ Supporting persons with disabilities through the "lifecycle of employment"
- ✓ Accommodation
- ✓ Privacy
- ✓ Training of employees



## Employment Accessibility Standards (Ontario) cont.

### First Year Obligations

- Create customized emergency and safety protocols that meet needs of employees with disabilities
- Government has committed to creating templates and training materials to assist employers
- Reflects frustration with reactive complaints-based systems



## Ontario Employers Must Assess Risk of Violence

Bill 168 becomes law in Ontario on June 15, 2010 and employers must be compliant

- Bill 168 focuses on preventing workplace violence or threats of violence
- Employers with over five employees must conduct a risk assessment and develop policies and protocols



## Ontario Employers Must Assess Risk of Violence cont.

- Develop appropriate workplace policy and protocols
- Create program to respond to issues of workplace violence
  - Training
  - Security procedures re: incident investigation and methods of obtaining immediate assistance
- Employers must disclose information about risks so employees can protect themselves
  - This trumps privacy concerns



## The Last Word - Vacation Pay ESA Compliance

Many employers do not realize:

- Vacation pay is due on most incentives under ESA
  - Except totally discretionary amounts
  - Pay vacation pay separately on incentives
- “Use it or lose it” vacation policies
  - Must be clearly communicated
  - ESA minimum vacation cannot be cancelled
  - In some provinces, accrued vacation pay likely cannot be “cancelled”, although time off

**Lesson:** Review your vacation pay policies



## For further information:

J. Geoffrey Howard  
Gowling Lafleur Henderson LLP  
Barristers & Solicitors  
Suite 2300 – 550 Burrard Street  
Vancouver, British Columbia V6C 2B5  
Direct Tel: (604) 891-2279  
Email: [geoffrey.howard@gowlings.com](mailto:geoffrey.howard@gowlings.com)



604314



Montréal • Ottawa • Toronto • Hamilton • Waterloo Region • Calgary • Vancouver • Moscow • London