

# Boughton Employment & Labour Line

Fall 2010

## In this issue:

### Family Feud

p1 & continued p4



### Recruiting Foreign IT Workers - Risky Business?

p2



### On the Hook for Hurt Feelings?

p2 & continued p4



### No Damages for Lost Book of Business

p3



## Family Feud

*Gulf Coast Materials Ltd v. Helgesen, 2010 BCSC 1169*

I once represented a client who had been dismissed by a company for alleged cause. The client had previously sold the company and stayed on as a manager. Two things made the case unusual. First, the day before the client was to give evidence, she died of a heart attack. Secondly, the client had sold the company to her children—the kids had fired mom!

I am increasingly consulted about employment matters that affect small and medium-sized family-owned businesses. As with the above case they are often unique. Matrimonial disputes are a good example - what if one spouse is the owner of the company and terminates the other spouse who works for the family business?

“What if one spouse is the owner of the company and terminates the other spouse who works for the family business?”

The B. C. Supreme Court recently addressed the issue of employment matters arising in the unique context of a family owned business. In *Gulf Coast Materials Ltd v. Helgesen*, two very successful brothers operated many businesses—some owned separately, some owned jointly. They had a falling out. Gulf Coast Materials Ltd. (“Gulf Coast”) was jointly owned 50/50 but was managed on daily basis by Mhinder Mayer (“Mhinder”). Bhern Mayer (“Bhern”) was the president. Mhinder hired Helgesen to work for Gulf Coast after Mhinder had laid him off from a company owned by Mhinder’s wife and over the strong objections of Bhern. Bhern told Helgesen in writing that he was not an employee of Gulf Coast, he would not be paid by Gulf Coast and if he continued to show up for work he would be charged with trespassing. Bhern even called the RCMP to come and remove him (they refused to get involved). Helgesen kept showing up for work and although he was never paid by Gulf Coast he received the equivalent of wages in the form of a loan from Mhinder and his wife.

Helgesen filed complaints with the Director of Employment Standards claiming \$18,000 in wages. The Director’s delegate found that Helgesen had been employed by Gulf Coast and awarded him \$93,000. The Court on judicial review upheld the findings of the Director with respect to liability but reduced the award to 6 months wages, citing a limitation under the *Employment Standards Act*.

(Continued page 4...)

# Recruiting Foreign IT Workers - Risky Business?

The entry of foreign workers into Canada is governed by the *Immigration and Refugee Protection Act* ("IRPA") and its associated regulations. Like other immigration legislation, the IRPA is a set of rules with a set of exceptions to the rules.

Usually, a Canadian employer who wants to bring in a foreign worker must first apply to Service Canada's Foreign Worker Recruitment Unit for a Labour Market Opinion ("LMO"). An LMO is a determination by an employment officer at Service Canada on whether the importation of the identified foreign worker will have a neutral or positive effect on the labour market. Without an LMO, the worker will be unable to obtain a work permit.

IRPA Regulation 203 directs the employment officer to look at a number of specific factors. These legislated criteria reflect Service Canada's "Canadians first" policy, which is designed to control the influx of foreign workers. In our experience the difficulty in obtaining a positive LMO corresponds directly with the Canadian unemployment rate. The higher the level of unemployment, the greater the difficulty in obtaining a positive LMO.

Until now, many employers in the Information Technology ("IT") sector have not had to deal with LMOs as there were exceptions from the LMO requirement for 7 key occupations, including senior animations effects editors, embedded systems software designers, MIS software designers, multimedia software developers, software developer services, software products developers, and telecommunications software designers.

Effective October 1, 2010, these exemptions were to be abolished (except for employers wanting to hire foreign workers for positions in Quebec). British Columbia has negotiated an extension of the program until March 31, 2011, but

change is on the horizon. As a result, Canadian-based employers who want to avoid the delays associated with the LMO process need legal alternatives.

Savvy employers will look to the United States and Mexico for IT workers. Under the North American Free Trade Agreement ("NAFTA"), nationals of the United States and Mexico who fall under the generic term "Computer Systems Analyst" may qualify under the NAFTA temporary foreign worker category of "Professional." Professionals under NAFTA may obtain a work permit without an LMO for an initial period of three years.

Another option for Canadian companies that have a parent - subsidiary or parent - affiliate relationship with a foreign company may be to import a foreign worker as a person with specialized knowledge in the category of "Intra-company Transferee". This category exists under NAFTA and is also specifically exempted from the LMO requirement under the immigration regulations.

Therefore, while the change in policy has caused concern within the IT industry, the focus on the recruitment of foreign nationals within the industry will not automatically trigger the loss of jobs if other tools found in the immigration legislation are implemented.



**Bruce Harwood**  
**Associate**

P: 604.647.6747

E: bharwood@boughton.ca

# On the Hook for Hurt Feelings?

*Piresferreira v Ayotte, 2010 ONCA 384*

Should you be liable for accidentally hurting someone's feelings? What if one of your employees accidentally hurts another employee's feelings? The law allows for tort damages when you intentionally cause someone mental suffering, but what if you do it negligently? These issues were raised in a recent Ontario Court of Appeal decision that overturned \$500,955 in damages awarded at trial.

The plaintiff, Ms. Piresferreira, was a 60 year old, 10 year employee of Bell Mobility. Her supervisor, Mr. Ayotte, was a critical, loud and aggressive boss who often swore and pounded his fists on desks. Ms. Piresferreira had been having performance issues when a mix-up occurred and a client meeting wasn't scheduled. Mr. Ayotte learned of this and began to berate Ms. Piresferreira in the hallway. She protested, trying to show him an email on her blackberry to explain it. He refused to look at it. When she continued to show it to him, he pushed her hard enough that she had to step back and balance herself against a cabinet. Mr. Ayotte stormed off to his office with Ms. Piresferreira in pursuit. When she told him he should not have pushed her, he yelled back: "Get the hell out".

The aftermath of this incident was dealt with poorly. On Ms. Piresferreira's first day back at the office after the incident, Mr. Ayotte gave her a Performance Improvement Plan ("PIP"). She read it, then went on sick leave. She complained to the HR manager about the incident, and he asked her to come to a meeting. She replied that she could not because she was on sick leave. The HR manager responded by saying she had refused to attend and provide Mr. Ayotte the opportunity to apologize and so the file was closed. The evidence was that Ms. Piresferreira was psychologically

(Continued page 4...)

# No Damages for Lost Book of Business

*Merrill Lynch Canada Inc. v. Soost, 2010 ABCA 251*

Since decisions of the Supreme Court of Canada in *Wallace* and *Keays*, employers have been aware that they must act in good faith in the manner of dismissal of an employee. Damages are available when the employer's conduct is unfair or unduly insensitive.

In an Alberta case known as *Soost*, a judge attempted to use the principles from *Keays* as a foundation for awarding \$1.6 million dollars in damages to a financial advisor who lost a valuable book of business when he was terminated. Mr. Soost was induced to leave a successful career with one investment house to join Merrill Lynch. He was summarily dismissed, allegedly for cause. Merrill Lynch sent a letter to his clients advising that he had left the firm but not setting out the reason. Soost found alternate employment but only \$10 million dollars of his \$150 million dollar book of business moved with him. He found it impossible to earn a living and eventually left the industry. The trial judge found that none of the allegations of cause were significant enough to warrant summary dismissal and awarded Soost damages in lieu of notice.

Soost argued that he was entitled to additional damages because Merrill Lynch defamed him by advising his clients that he was no longer with Merrill Lynch but without giving any reason, thereby raising the suspicion that he had done something wrong. The Court found that Merrill Lynch's silence was not defamatory.

The trial judge also rejected *Soost's* argument for additional damages because Merrill Lynch meant to deprive him of his book of business and intentionally interfered with his economic relations. The Court found Soost had failed to prove that Merrill Lynch had acted with the necessary deliberation and calculation and with intent to injure.

Having rejected those two claims, the trial judge's next finding was remarkable. He relied on both *Wallace* and *Keays* to support Soost's claim that he should be compensated for the loss of his book of business. The judge found that purporting to dismiss Soost for cause was both "unfair and insensitive" and said that if he did not apply the *Keays* principles "the plaintiff would be woefully under-compensated for his true loss".

He found that both parties knew at the time of hiring if reasonable notice was not given and Soost was summarily dismissed, damages greater than the loss sustained in the notice period would result. Merrill Lynch induced Soost to leave his previous employer because it wanted his large, valuable book of business. Both parties were aware that a financial advisor's reputation is his most important asset and that if *Soost* was summarily discharged without reasons being given then his clients would immediately be suspicious and leave.

The Court of Appeal overturned the award. It started with basic principles. In a contract for an indefinite hire either party has the right to end the contract whenever he or she chooses and for whatever reason he or she likes and ending it is not a breach of the agreement. The terminating party need only give a reasonable length of time as notice. Unless the manner of dismissal warrants *Keays* damages, the only damages that a plaintiff can be awarded are for the failure to give reasonable notice. Terminated employees cannot expect to keep all the benefits they had during their employment.

The Court cited examples of media stars and professional athletes who get lucrative speaking engagements or product endorsements but only while employed. They are not compensated for the loss of those engagements or endorsements after employment is terminated. The Court of Appeal found that the circumstances of *Soost's* termination were not egregious enough to be a separate actionable wrong. The Court commented that the trial judge himself had already dismissed the plaintiff's claims that the manner of termination was firstly, defamatory and, secondly, an unlawful interference with his economic relations (ie: losing the "book of business"). Since *Keays* damages could not be supported, the award was set aside.



**Gregg E. Rafter**  
**Shareholder**

P: 604.647.4108  
E: grafter@boughton.ca

## Don't Miss Out

If you would like to ensure you receive this newsletter on a regular basis, please contact **Dari Gilham**, Legal Assistant to the Employment and Labour Group by phone **604.647.4141** or email at **dgilham@boughton.ca**.

## Family Feud Continued...

The Court made observations that would resonate with many employers faced with the adjudication of employment standards complaints (see paras. 3, 74-76). It described the judicial review analysis as “a descent through a rabbit hole to an alternate reality” that “is of no consequence, provided that the alternate reality is not a patently unreasonable one”. It noted that:

**The dispute between Mr. Helgesen and Gulf Coast also took on monetary and legal significance beyond the scope of the Complaint because of inordinate delay in what is intended to be a fair and efficient remedial administrative process.**

As seen in *Gulf*, family-owned businesses must carefully consider how a fall out between family members might affect the business. The emotional aspects of a dispute within the family must be separated from the business needs of the enterprise. Here the deadlock was resolved by the company's articles. A written employment contract might solve other challenges that arise in a marital breakdown or other dispute among family members.

**“Carefully consider the ramifications of a fall out in a family owned business in respect of employment and other matters.”**

Ultimately, the Court broke the tie in a separate application, finding that Gulf Coast's articles gave Bhern a “second or casting vote” which gave him the final authority in acting on Gulf Coast's behalf.

At Boughton, we encourage our family-run business clients to address business issues including corporate governance, estate planning, succession, tax and yes, even employment issues, well in advance of any potential family fall out. So avoid becoming the next contestant on the Family Feud - where only the lawyers win.

**Mike J. Weiler**  
**Employment & Labour**  
**Group Leader**  
P: 604.647.5521  
E: mweiler@boughton.ca



## On the Hook for Hurt Feelings? Continued...

devastated by the incident and its aftermath, and it was unlikely she would be able to return to work before she reached 65. Not surprisingly, she started a lawsuit.

The trial judge found Ayotte personally liable for the torts of battery, intentional and negligent infliction of mental suffering. Bell was found directly liable for negligent infliction of mental suffering. In allowing the tort of negligent infliction of mental suffering, the trial court was essentially putting a positive legal duty on Ayotte and Bell to take reasonable care of Ms. Piresferreira's mental health. Bell was also held liable for constructive dismissal, and vicariously liable for the torts committed by Ayotte. The Court of Appeal found that the trial judge had gone too far. It held that the tort of negligent infliction of mental suffering is not available against an employer or supervisor for conduct in the course of employment. The court also found there was insufficient evidence to find liability for intentional infliction of mental suffering. The damages upheld were only \$15,000 for battery, liability for 12 months of notice at a salary of \$115,932, and \$45,000 for the manner of dismissal.

Unfortunately, the Ontario courts did not comment on British Columbia decisions on these issues, so whether the same result would flow in British Columbia is yet to be determined.

**Anne Muter**  
**Associate**

P: 604.605.5634

E: amuter@boughton.ca



## Noteworthy News

On **September 22**, Michael Weiler and Elizabeth Reid hosted the Employment and Labour Group's “Wrongful Dismissal” breakfast seminar at Boughton Law Corporation.

On **September 10**, Elizabeth Reid of the Employment and Labour Group participated in a Boughton - sponsored free legal advice-athon to raise funds for the provision of pro bono legal services in BC.

## Upcoming Events

Mike Weiler will be presenting a paper on “Advising First Nations on Human Rights” at a continuing legal education event on **November 5**.

Mike will also be presenting “New Best Practices - Take-aways from 2010” at the Centre for Labour Management on **December 2**.