

# EMPLOYEE TERMINATIONS

Comprehensive legal information, advice and strategic know-how  
you require to manage dismissals

September 24 - 25, 2012 | Casino Nova Scotia | Halifax



PROGRAM CO-CHAIRS  
**Dale Darling**  
*Health Association Nova Scotia*  
**Andrea D. Gillis**  
*Halifax Regional Municipality*

Minimize risk and avoid unnecessary and unintended liabilities by learning how to handle:

CONSTRUCTIVE & WRONGFUL DISMISSAL • SOCIAL MEDIA • JUST CAUSE • INVESTIGATIONS  
DOWNSIZING • PROGRESSIVE DISCIPLINE • STD & LTD • SEVERANCE • DAMAGES • MULTIPLE CLAIMS

Benefit from answers to critical questions:

- Which way is the pendulum swinging - towards Employers or Employees?
- Is it possible to find just cause?
- Undue hardship - when is enough, enough?
- Post-*Wronko*, *Teamsters* and *Sobeys* - how far does the duty to mitigate extend?
- How costly is it when an investigation is deemed "bad"?
- When is discipline vulnerable to challenge?
- When is it safe to terminate an employee on leave?
- Who has the power to award damages - and on what grounds?
- What will an employee hear from his/her lawyer?
- What constitutes a fair, enforceable employment contract for non-unionized employees?

## FIRST CONTRACT ARBITRATION

Raymond F. Larkin, Q.C.  
*Pink Larkin*

Douglas Ruck, Q.C.  
*Chair, Nova Scotia Labour Board*

Peter McLellan, Q.C.  
*Stewart McKelvey*

Dear Colleague:

Today's employers and employees have high expectations of their advisors. As a result, the in-house human resources professional, the Union representative and the outside expert must deliver advice that is timely, accurate and practical. Termination strategies must be cost effective and minimize exposure to liability. For private sector employers, the strategy must protect their proprietary interests. In a union environment, the rules of engagement for terminating employees provide different challenges.

Employees can readily access employment/labour law information through the Internet and other sources and they are more inclined to challenge employers, even when they leave voluntarily. The objective of this conference is to prepare you by presenting, in one place, and over two information-packed days, a complete guide to structuring, carrying out and defending dismissal claims.

Each termination must be planned as if it might be going to trial. This requires that we, as advisors, remain current on the newest trends in employment litigation and labour arbitration; accordingly **Insight Information** has assembled a faculty of experts recognized for their work on recent cases.

In addition to a comprehensive roster of issues focused on managing the discipline and termination process, we are delighted to have a panel of experts - **Douglas Ruck**, Chair of the Nova Scotia Labour Board, **Raymond Larkin**, Pink Larkin and **Peter McLellan**, Stewart McKelvey - shed light on the process of *First Contract Arbitration*.

We believe this conference presents excellent value and encourage you to invest a few minutes to review the agenda and the faculty of experts below. **If you can only attend one conference this year, we strongly urge you to consider this one!**

We look forward to seeing you in September.



**Andrea D. Gillis**  
Manager, Labour Relations  
Halifax Regional Municipality



**Dale Darling**  
Legal Counsel, Labour Relations  
Health Association Nova Scotia

## ACCREDITATION

This program has been approved by the **Law Society of New Brunswick** for 11.5 hours.

This program also has CLE approval in jurisdictions outside of Atlantic Canada.

## EXPERT FACULTY

**E. Thomas Christie, Q.C.**  
*Christie Law Office (Fredericton)*

**David Conway**  
*Newfoundland & Labrador Nurses' Union (St. John's)*

**Anna M. Cook**  
*Cox & Palmer (St. John's)*

**Dale Darling**  
*Health Association Nova Scotia*

**Eric Durnford, Q.C.**  
*Ritch Durnford*

**George P.L. Filliter**  
*Arbitrator/Mediator (Fredericton)*

**Gail Lynn Gatchalian**  
*Pink Larkin*

**Andrea D. Gillis**  
*Halifax Regional Municipality*

**Lewis Gottheil**  
*CAW Canada (Toronto)*

**Raymond F. Larkin, Q.C.**  
*Pink Larkin*

**Peter McLellan, Q.C.**  
*Stewart McKelvey*

**Murray L. Murphy**  
*Stewart McKelvey (Charlottetown)*

**Ian Pickard**  
*McInnes Cooper*

**Rebekah L. Powell**  
*Cox & Palmer*

**Brad Proctor**  
*McInnes Cooper*

**Mildred Royer**  
*Royer Thompson Associates*

**Douglas Ruck, Q.C.**  
*Nova Scotia Labour Board*

**Scott Sterns**  
*Merrick Jamieson Sterns Washington & Mahody*

**Lisa Teryl**  
*Nova Scotia Human Rights Commission*

**Donna VanBuskirk**  
*Purolator Inc.*

**Kelly VanBuskirk**  
*Lawson Creamer (Saint John)*

## WHO SHOULD ATTEND

This program has been designed for HR and Labour Relations Professionals and Union Representatives from all industries

- Vice Presidents, Directors & Managers of:
  - Human Resources
  - Labour Relations
  - Employee Relations
  - Benefits, Compensation and Payroll
- Union Presidents, Business Agents, Stewards and Committee Members
- In-house Counsel
- Chief Operating Officers
- Employment and Labour Lawyers
- Administrative Law Practitioners
- HR and Labour Relations Consultants
- Benefits and Pension Consultants

8:00 **Registration and Continental Breakfast**

8:30 **Welcoming Remarks from Insight Information**

8:35

**Co-Chairs' Opening Remarks**

**Dale Darling**

*Legal Counsel, Labour Relations  
Health Association Nova Scotia*

**Andrea D. Gillis**

*Manager of Labour Relations  
Halifax Regional Municipality*

8:45

**Beginning With the End In Mind:  
Crafting Employment Contracts That Stand Up In Court**

**Eric Durnford, Q.C.**

*Partner  
Ritch Durnford*

- The pros and cons of using employment contracts
- Steps to improve the chances that the employment contract will be found to be enforceable: consideration, duress and other "pitfalls" to avoid when entering into an employment agreement
- Non-compete and non-solicitation clauses - what is enforceable? When does over-reaching void the intent of the contract? In a global economy, what is reasonable from a geographic perspective? *Chem Trend Limited Partnership v. Tom Mason*
- Bonus clauses and share option agreements - using appropriate language to avoid unnecessary liability at the point of dismissal
- Termination clauses - how to draft fair, enforceable clauses to limit liability
- Obligations when offering new employment contracts to existing employees

9:30

**Different Faces of Constructive and Wrongful Dismissal:  
How Courts and Arbitrators are Viewing Each**

**E. Thomas Christie, Q.C.**

*Christie Law Office (Fredericton)*

- What happens when existing employees refuse to sign mid-term contracts yet continue to work?
- Constructive dismissal vs. workplace change - what weight is given to change in location, duties and/or reporting functions?
- Duty to mitigate - lessons learned from *Wronko*
- Continuing to work after being constructively dismissed - acceptance or mitigation?
- Ramifications of *Wronko, Evans v. Teamsters* and other significant constructive dismissal cases
- Resignation or dismissal: When does "I quit" not mean "I resign"? Lessons from *Chan* and other cases
- *MacWilliams v. AMEC Americas, 2011 NBQB 272; Potter v. New Brunswick Legal Aid Commission*; and other noteworthy Atlantic Canada cases

10:30 **Networking Coffee Break**

10:45

**A Tweet Too Far: Terminations Due to Perceived Improper Use of Social Media**

**Anna M. Cook**

*Partner  
Cox & Palmer (St. John's)*

- Social Media: Is it the new, lawless Wild West or are rules evolving?
- Whose medium is it anyway?
- When do employees' comments outside office hours on their private Social Media accounts impact their obligations to their employers?
- When are comments on employees' Social Media accounts so serious as to amount to cause for dismissal? *Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518, 2010 CanLII 62482 (BC LRB)*
- The developing case law, both civilly and through arbitration
- Post-termination obligations of departing employees to refrain from using Social Media to exact revenge, including issues such as defamation, privacy or company confidential/proprietary information

11:30

**Undue Hardship: When is Enough, Enough?**

**George P.L. Filliter**

*Arbitrator/Mediator (Fredericton)*

**David Conway**

*Staff Lawyer  
Newfoundland & Labrador Nurses' Union (St. John's)*

**Brad Proctor**

*Partner  
McInnes Cooper*

- **SUBSTANCE ABUSE • ABSENTEEISM • POOR PERFORMANCE**
- **UNDISCLOSED DISABILITIES & ILLNESSES**

Burning questions for employers and union representatives are:

- "Must an employee disclose a disability in order to trigger an accommodation?"
- "At what point will undue hardship be reached?"
- "Based on the unproductive results from our efforts to date, is it now safe to dismiss the employee?"

Whether your employees are continuously absent or no longer able to safely and properly fulfill their work requirements due to substance abuse or undisclosed disabilities and illnesses, the onus is on the employer to prove that accommodation efforts have reached the breaking point and the termination is without discrimination. In this session, the panel will shed light on this difficult issue by examining how employers have encountered unintended liability and costly litigation - and share tips for avoiding discrimination and human rights violations.

12:30 **Networking Luncheon**

1:30

**Downsizing Smartly: Effective Termination Strategies**

**Rebekah L. Powell**

*Partner  
Cox & Palmer*

- Planning analysis: Pros/cons of which method works best - all at once vs. over a period of time
- Countering the fallout - communication strategies
- How to structure the offering - voluntary vs. involuntary, formula vs. no formula, options
- Pitfalls to avoid
- Class actions
- Survivors: How to maintain morale after downsizing

2:15

## Is It Possible to Find Just Cause? Hallmarks of a Good Investigation

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**Ian Pickard**

Partner  
McInnes Cooper

- **ON & OFF-DUTY EMPLOYEE MISCONDUCT • VIOLENCE**
- **HARASSMENT AND BULLYING**

- What evidence do you need to prove just cause?
- What works in court and what doesn't?
- How to decide whether to use an internal or external investigator
- Interviewing witnesses and protecting privilege
- Solicitor-client privilege vs. union access to investigation report
- Dealing with the "he said" and "she said" scenario and assessing credibility
- Weighing the evidence
- Reaching a conclusion and writing the report
- How a "bad" (prejudiced?) investigation can become very costly

### 3:00 Networking Refreshment Break

3:15

## Leaves, Leaves, Leaves... The Rules for Terminating Employees on Leave

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**Lisa Teryl**

Legal Counsel  
Nova Scotia Human Rights Commission

- Job abandonment vs. frustration of contract - when is it safe to terminate an employee on leave?
- What information do you need?
- What if the employee will not supply medical information?
- What happens when an employee advises of a leave just as you are planning the termination?
- Can you terminate an employee while on maternity or parental leave?
- Can you downsize employees on STD and LTD?
- Do we have to wait to terminate until the leave concludes?
- Benefit obligations to employees on leave

4:00

## Getting Off the Exit Track: Performance, Progressive Discipline and Last Chance Agreements

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**Gail Lynn Gatchalian**

Partner  
Pink Larkin

**"Good people deserve the push it takes to change behaviour that - left unchecked - will threaten their success."**  
(George Roane, Montana HR Consulting)

*Absenteeism, unacceptable work performance and safety violations all call for corrective action. Yet when the only structured approach to correction involves putting people on the exit track, predictable problems will occur - such as minor irritants going uncorrected and unfairness complaints emerging, to the point that the coinage of discipline is debased.*

- What can be done to turn employees' behaviour around so they can get off the exit track and become productive?
- How can these strategies be employed for optimum results?

*If discipline is unavoidable and the only corrective action alternative:*

- What are the steps in the process that need to be followed?
- When is discipline vulnerable to challenge?
- When should a union disclose a disability to save a person's job?
- When it is appropriate to consider a last chance agreement?
- How should it be drafted?
- Immediate discharge - when progressive discipline may not apply

### 4:45 Conference Adjourns for the Day

**SEPTEMBER 25, 2012**

### 8:00 Continental Breakfast

8:30

## First Contract Arbitration

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Moderator / Commentator:

**Douglas Ruck, Q.C.**

Chair

Nova Scotia Labour Board

**Raymond F. Larkin, Q.C.**

Partner

Pink Larkin

**Peter McLellan, Q.C.**

Partner

Stewart McKelvey

*Our panel of experts will shed light on what will change now that first contract arbitration is law in Nova Scotia and provide insights into the process to be followed for new bargaining units to get to a timely first agreement.*

- Does the new legislation affect how the parties approach collective bargaining?
- How will the Labour Board processes be modified/adapted?
- Will parties choose the Labour Board or an Arbitrator?
- Relevance of decisions of other jurisdictions across Canada
- Are the mandatory one-year collective agreements beneficial to a long-term relationship between the parties?

9:30

## Severance Obligations: How to Creatively Reduce Costs Without Taking a Hardball Approach

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**Kelly VanBuskirk**

Partner

Lawson Creamer (Saint John)

- How are severance entitlements calculated?
- Do senior employees get more severance? The impact of the *Di Tomaso v. Crown Metal Packaging Canada* and *Systad v. Ray-Mont Logistics Inc.* decisions on severance entitlements of less senior employees
- Manners of providing termination entitlements
- Dealing with benefits, overtime, commissions, bonuses and vacation pay entitlements
- Ways to pay out the severance to mitigate the costs (all at once, over a period of time)
- Working notice - how effective is it? How can it be used to reduce severance costs?
- Ensuring enforceability of Releases
- Duty of confidentiality

## 10:20 Networking Coffee Break

10:40

### Damages: Who Can Claim Them, In What Forum, What Do You Get?

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#### Dale Darling

Legal Counsel, Labour Relations  
Health Association Nova Scotia

#### Lewis Gottheil

Director, Legal Department  
CAW Canada (Toronto)

- What types of damages are available in wrongful dismissal?
- The power to award aggravated and punitive damages – what has changed since *Honda v. Keays*?
- Mental distress damages – when they are available and how they should be calculated
- *Arbitrators' powers to award damages:*
  - Can arbitrators award damages for future economic loss? If so, how should they be calculated?
  - Calculation of damages in lieu of reinstatement
  - The power to award damages in lieu of reinstatement at the behest of the Trade Union
  - What is the impact of Arbitrator Shime's award in *PSAC 0004 v. Greater Toronto Airport Authority* – and how might it affect decisions in the rest of Canada?
- *Damages awarded by Human Rights Tribunals:*
  - The grounds upon which they are awarded
  - Calculation of damages amount
- *Does the ESA have power to award damages?*
- Costs

11:40

### Panacea or Powerful Tool for Rooting Out Problems? How to Get Honest Info from Exit Interviews

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#### Mildred Royer

President  
Royer Thompson Associates

*Losing good employees is very costly for an organization. Knowing why the "wrong" employees are choosing to terminate their employment with you is crucial - but how do you get honest answers from departing employees? Does your organization use the information to pinpoint areas where your organization can improve - or do you merely offer them as a formality? Is there a best time to conduct an exit interview? This session will shed new light on:*

- Benefits of face-to-face vs. telephone vs. online exit interviews
- When to conduct exit interviews to obtain the most valuable information – upon departure or several months later?
- Is six months later waiting too long?
- How to conduct anonymous online surveys
- Results from anonymous interviews – do they differ?
- Answers that require follow up
- What happens if you don't take action when you see a trend?
- Additional benefits from post-exit interviews – the grass is not always greener!

## 12:15 Networking Luncheon

1:15

### The Termination Conversation: A Coaching Guide For Managers

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#### Andrea D. Gillis

Manager of Labour Relations  
Halifax Regional Municipality

#### Donna VanBuskirk

Human Resources Manager - Atlantic Canada  
Purolator Inc.

- Tips for *When, Where*, and how to answer *Why*
- Liability that can come from termination conversations that don't go as scripted
- What tools do managers need?
- Importance of rehearsal
- Why is it important for the manager to do the termination as opposed to an HR rep?
- Allowing goodbyes vs. guarding and escorting employees out
- Communicating the decision to your workforce

2:20

### Networking Refreshment Break

2:30

### When Employees Bite Back... How Dismissals and Resignations Become Dangerous and Costly

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#### Murray L. Murphy

Partner  
Stewart McKelvey (Charlottetown)

- Wrongful hiring (false representation of hiring opportunities, variable compensation and long-term incentive prospects)
- Unresolved complaints (human rights, workplace harassment, workplace violence)
- Disgruntled resignations – today's angry quit becomes tomorrow's constructive dismissal
- Unexpected claims (overtime, vacation, pay increases)
- References – duty of care and negligence
- Enforcing restrictive covenants and fiduciary obligations – measures available

3:15

### Claims in Multiple Forums: What Your Employee Will Hear from His/Her Lawyer

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#### Scott Sterns

Partner  
Merrick Jamieson Sterns Washington & Mahody

- Why terminated employees want to sue their employers
- When to fight, when to settle – what criteria are used to establish this analysis?
- Will the cost outweigh the benefits?
- Potential forums – court or arbitration, HR Tribunal, Labour Board?
- Mitigation 1: What sort of employment will a dismissed employee be obligated to accept?
- Mitigation 2: Do employees have to return to the employer that dismissed them?
- What constitutes a credible job search?
- False assumptions and mistakes dismissed employees make

4:00

### Conference Ends

# EMPLOYEE TERMINATIONS

Comprehensive legal information, advice and strategic know-how you require to manage dismissals

September 24 - 25, 2012 | Casino Nova Scotia | Halifax

Conference Code: HRC12809    Priority Code:    12809PDF

**Yes!** Please register the following delegate(s) (photocopy for additional delegates)

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City: \_\_\_\_\_ Province: \_\_\_\_\_ Postal Code: \_\_\_\_\_

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Registration Fee: (Includes meals, documentation and *in*CONFERENCE™, fully searchable online access to this conference's papers\*)

Please check your choice:

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Suite 300, Toronto, Ontario M5H 3S6

**HOTEL RESERVATIONS:**

The Casino Nova Scotia is conveniently located at 1983 Upper Water Street, Halifax, Nova Scotia. For overnight accommodation, please call the Halifax Marriott Waterfront Hotel located at 1919 Upper Water Street. Tel. 902-421-1700.

**CANCELLATION AND REFUND POLICY:**  
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