



# Employment & Labour Brief

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In light of recent scandals and alleged corruption in government and business, there has been a growing need to encourage whistleblowers in employee ranks. Karl Gustafson, Q.C., reviews some of the legal implications in this area and the importance for employers to develop, implement and maintain effective whistleblower policies.

As a global fast food franchise, McDonald's places a high priority on cleanliness and hygiene in its restaurants. Michael Weiler discusses a recent B.C. Human Rights Tribunal decision concerning McDonald's policies regarding hand-washing and disposable glove use when the company attempted to accommodate a disabled employee.

In "Canucks Win, Canucks Win!!!...at Least at the LRB," Michael Weiler examines the Labour Relations Board's ruling on the BC-NHLPA's attempt to certify the Vancouver Canucks' players in a collective bargaining agreement, apart from an agreement negotiated between the NHL and the league-wide NHLPA.

In the new year, B.C. will join a host of other provinces in eliminating mandatory retirement. David McInnes considers the potential implications for employers as the employment landscape is reshaped.

## Whistleblower Protection



Karl E. Gustafson, Q.C.

With scandals involving law breaking and corruption in government and business headlining the news in recent years, there has been a growing awareness of the need to protect, and indeed to encourage, "whistleblowers." There are various definitions of "whistleblowing" but, in essence, it is the act of an employee who, with a *bona fide* belief that there is a public interest overriding the interests of the employer, reports or discloses illegal, fraudulent or corrupt activity.

In considering some media reports, one could easily form the view that "whistleblowers" are exposed and vulnerable to retaliation from their employers. However, it would be a very serious mistake for any employer to retaliate against an employee who reports a violation of federal or provincial laws.

Amendments to the *Criminal Code* (Canada), in effect since September 15, 2004, provide broad protection for whistleblowers by making it a *criminal offence* to retaliate against any employee who reports unlawful conduct on the part of the employer or by directors, officers or other employees of the employer. Section 425.1(1) of the *Criminal Code* states:

No employer or person acting on behalf of an employer...shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so, (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, in respect of an offence that the employee believes is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer...

Section 425.1(2) provides that any person who contravenes section (1) is guilty of an indictable offence and liable to imprisonment for a term of up to five years.

It is important to note that the provisions of the *Criminal Code* are very broad. Given the pervasive nature of government regulation of business, it is difficult to imagine any area of inappropriate conduct that would fall outside the scope of section 425.1(2). For example, it protects an employee who reports a breach or potential breach of any federal or provincial legislation or regulation related to the environment, human

rights, competition, employment standards, workplace safety or protection of privacy. Similarly, any interaction between an employer and an employee that can be interpreted as having an adverse effect on the employee would be caught by that section.

In these circumstances, and given the potential consequences of any sort of retaliation against a whistleblower, employers need to take exceptional care to avoid even the perception of any adverse treatment of an employee who is or might become a whistleblower. The unfortunate reality is that a substandard or otherwise troublesome employee could create a certain amount of job security for themselves by becoming a whistleblower.

Accordingly, employers would be well advised to create and implement their own internal protections for whistleblowers. To state the obvious, all employers ought to be highly motivated to identify and prevent or correct any potential or actual violation of federal or provincial laws. However, a secondary benefit of adopting and following such a policy will be to lessen the risk that a whistleblower protected by the provisions of the *Criminal Code* will be able to argue that any negative treatment by his or her employer is necessarily done with the intent to compel the employee from reporting unlawful conduct or retaliating. A comprehensive whistleblower policy, one that is active-

ly implemented and is not merely window-dressing, will be a relevant consideration to answer an allegation that the employer's motivation in its subsequent treatment of an employee was motivated by a desire to retaliate.

Effective whistleblower policies must have the following characteristics:

- ensure anonymity;
- provide for effective and independent investigation of complaints;
- protect against retaliation of any sort by the employer;
- protect against negative treatment by other employees; and
- demonstrate that the employer is serious in adhering to the policy and is actually encouraging the reporting of unlawful or inappropriate conduct.

In addition, employers should also follow the conventional wisdom of clearly documenting employee reviews, reasons for disciplinary action and all other dealings with employees. However, when dealing with a whistleblower, even greater care and vigilance is required.

**Karl E. Gustafson, Q.C.** is a partner and Chair of the Technology and Intellectual Property Group in Vancouver. Contact him directly at [kgustafson@lmls.com](mailto:kgustafson@lmls.com) or 604-691-7427.

## McDonald's "Wrapped" Over Hand-Washing Policy



Michael J. Weiler

It should come as no surprise to learn that McDonald's Restaurants place a high priority on maintaining a clean restaurant. As a restaurant operator, McDonald's is required under the *Health Act* (British Columbia) and the *Food Premises Regulations* (British Columbia) to ensure that their premises maintain proper personal hygiene requirements. McDonald's maintains a very strict hand-washing policy that requires all managers and crew members to frequently wash their hands, using proper hand-washing procedures. The company had a timed hand-washing system installed which was an integral part of the daily restaurant operations and encouraged managers and crew members to wash their hands at least once per hour in order to meet health department regulations that require monitoring and documentation of hand-washing. It also had provisions for disposable gloves. The wearing of disposable gloves *did not* eliminate the need for frequent hand-washing. In a

recent case, McDonald's ran afoul of the *Human Rights Code* (British Columbia) when it applied this policy to one of its employees. The case has serious implications for employers who try to accommodate disabled employees.

### The Facts

Beena Datt started working at McDonald's in December 1981. She remained employed by McDonald's for 23 years and expected to work there until her retirement. Her evidence was that she loved working at McDonald's, enjoyed the convenience of working shifts, loved the customers and felt that the other employees were like her family. She enjoyed a very attractive benefits package, known as "the Big Mac Plan." By all accounts she was an excellent employee.

Unfortunately, early in 2002, Ms. Datt developed a very painful skin condition which progressively worsened. She went on short-term disability, attempted to return in April 2002, but after two weeks her skin condition returned and

she went off work again. A second attempt to return to work in January 2003 was similarly unsuccessful. She began collecting LTD benefits through Great West Life (“GWL”). In July 2003, the Complainant attempted a third return to work which was similarly unsuccessful.

GWL, *not* McDonald’s directly, dealt with the Complainant and her doctors. The assessments and treatments varied throughout the next 16 months but it appeared that the rehabilitation counsellors and the doctors held the view that Ms. Datt could only return to an administrative capacity or in a position that did not require frequent hand-washing and food preparation or the wearing of plastic gloves.

The Complainant was advised by GWL’s rehabilitation consultant that there were no administrative positions available and that she would not be able to return to work at McDonald’s. The Complainant insisted that she could perform some duties and met with an HR consultant at McDonald’s head office in November 2004. It was at this meeting she was advised that her employment was being terminated and that the decision had been finalized. This was the first time anyone at McDonald’s had met with the Complainant to discuss her situation.

## The Decision

Ms. Datt filed a complaint with the B.C. Human Rights Tribunal (“Tribunal”). On August 3, 2007, the Tribunal issued a decision finding in favour of Ms. Datt. The decision is important in a number of respects, not the least of which is the significant and record-setting financial award for damages for injury to dignity and self-respect.

Not surprisingly, the Human Rights Tribunal found that the hand-washing policy was rationally connected to the safety requirements and regulations and was adopted in good faith. Accordingly, the first two requirements of the *Meiorin* test<sup>1</sup> were satisfied. The issue, therefore, focused on whether McDonald’s demonstrated that it was impossible to accommodate the Complainant’s hand-washing disability without suffering undue hardship.

The Tribunal ruled that although GWL could work with McDonald’s regarding Ms. Datt’s return to work, it did not, nor could it assume the primary responsibility for accommodating Ms. Datt. The primary responsibility for the duty to accommodate lies with McDonald’s. One of the concerns of

the Tribunal was that GWL would not have a clear understanding of McDonald’s financial circumstances, the impact of workplace changes on other employees and the safety issues that may be relevant to the duty to accommodate a disabled employee. And, as will become apparent, the failure of McDonald’s to deal directly with the Complainant in her particular circumstances, injured her dignity, feelings and self-respect.

The Tribunal did not accept the blanket requirement that hand-washing had to be performed on an hourly basis but only “as often as necessary to prevent the contamination of food.”

The Tribunal found that McDonald’s had failed to conduct a thorough and careful assessment to determine whether there were any duties that Ms. Datt could perform, including wearing non-plastic gloves to do certain duties.

Further, the Tribunal rejected the argument that the medical evidence established that the Complainant could not return to work (despite some fairly broad statements to that effect in the medical reports). There were other positions within the restaurant, where such a requirement may not be necessary such as the drive-thru windows, and hostess and swing manager duties. It was up to McDonald’s to obtain clear and specific medical evidence through further discussions with the Complainant and her doctors in order to reach that decision. McDonald’s failed to question the doctors as to the meaning of statements in assessments that the Complainant could not do “frequent hand-washing.”

The Tribunal accepted that the goal of preventing the contamination of food is why McDonald’s established its hand-washing policy and that goal could not be understated as it accords with common sense in the handling and preparation of food. However, it found that there certainly were duties that Ms. Datt *could* have performed that *might not* have required her to handle food. The point of the decision, however, was that McDonald’s had not assessed Ms. Datt’s condition in the context of the actual duties required of each position.

Further, the Tribunal noted that there was no evidence to address whether the goal could have been achieved with less frequently timed hand-washing – “there was no evidence of the actual risk to the public if Ms. Datt, the only employee who had some form of hand-washing restriction, was provided with modified duties or a modified way of working.”

Medical evidence consisted of documents created by GWL which were entered by consent. No medical doctors or

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experts were called to testify. Ms. Datt saw a number of doctors, including her family doctor, Dr. Tan, and skin specialists, Dr. Kitson, Dr. Zhou and Dr. Morton. Dr. Kitson first examined Ms. Datt on September 23, 2002.

At various times Dr. Kitson seems to have supported McDonald's claim that Ms. Datt could not be accommodated. For example, it was noted by Dr. Kitson (or others where indicated):

- On her return to work she could not use her hands [April 28, 2002].
- There needed to be modification of Ms. Datt's job requiring less hand-washing [April 24, 2003].
- Ms. Datt could not use her hands [April 28, 2003].
- She was told to stop wearing gloves because they made her condition worse [May 2003].
- Ms. Datt's third attempt at a return to work failed and she returned to Dr. Kitson and started to resume her treatments [August 1, 2003].
- Ms. Datt could not do "wet work or frequent hand-washing" [September 15, 2003].
- Ms. Datt could not do restaurant work [September 15, 2003].
- The handling of cash may be relevant to Ms. Datt's problem [Dr. Morton's letter to Dr. Kitson in 2003].
- Ms. Datt confirmed that she was unable to wear gloves all the time at work and as a result her condition returned and she had to stop working [November 7, 2003].
- Ms. Datt could not work in the restaurant business [November 14, 2003].
- In completing another report under the heading "Future Treatment Goals" Dr. Kitson wrote "new job" [December 8, 2003].
- Although Ms. Datt wanted to return to work, her hands were not completely healed and it was Dr. Kitson's impression that they would break out again if Ms. Datt returned to her old job [July 5, 2004].
- Dr. Kitson prepared a report indicating that there were jobs in cash, food preparation or cleaning. In answering the

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questions set out in the report, Dr. Kitson stated that Ms. Datt could not perform any job requiring "frequent hand-washing *ever*" and that she could not "currently" return to a restaurant position with McDonald's [July 14, 2004].

- Dr. Kitson e-mailed GWL that Ms. Datt could not return to any job involving soap and water exposure or the constant wearing of rubber or other waterproof gloves and that in Dr. Kitson's stated view this eliminated restaurant work. He noted that Ms. Datt was willing to return to work but in his view there was no doubt that her hands would "disintegrate within a week" [2004].
- Dr. Kitson stated in a report to GWL that restaurant work, of any kind, would not work for Ms. Datt although she could work for McDonald's in an administrative position or in a position that did not require "frequent hand-washing, food preparation or the wearing of plastic gloves" [August 25, 2004].

The Tribunal, however, did not accept this evidence as satisfying McDonald's duty to accommodate Ms. Datt. The Tribunal challenged the medical evidence by finding that at no time did the Complainant's doctors say that she could never wash her hands, that there was a risk to the public or that her skin condition might lead to contamination of food. In the Tribunal's view, the issue was not whether Ms. Datt could wash her hands; the issue was how often. While accepting

McDonald's legitimate interest in not wanting to risk contamination of food, if that was a possibility, the Tribunal found that the issue was not canvassed with her doctor and McDonald's did not properly assess the risk and application of its policy in the context of an individual assessment of Ms. Datt.

In respect of the obligation of an employer to create a job, the Tribunal noted that the issue was not whether McDonald's had an obligation to create a job but whether McDonald's *had considered*, given the jobs available, whether it could have modified or differently organized them for Ms. Datt.

In concluding its decision the Tribunal stated:

McDonald's did not argue that it did not have the financial or other resources to accommodate Ms. Datt. Given the size of McDonald's, and the resources available to it, I am at a loss to understand why McDonald's did not take more

steps to try and accommodate Ms. Datt, a 23-year employee. Ms. Datt was not entitled to a “perfect” solution but she was entitled to a fulsome consideration of her restrictions and how those restrictions intersected with the hand-washing policies and the jobs that were available. Without having done so, neither Ms. Datt nor McDonald’s was in a position to know what the outcome of a return to work, with accommodations, might have been. [para.249]

This case is unique in that the Tribunal *did not* find that McDonald’s *could have* accommodated Ms. Datt. Further, it did not consider whether the onus was on Ms. Datt, in light of the medical evidence, to call sufficient evidence from *her* doctors to clarify what they meant by the comments noted above, having regard to the actual workings of the restaurant. Rather, it was McDonald’s who was found to have failed to properly examine these issues with Ms. Datt’s doctors. Therefore, the violation of the Code lay in the fact that McDonald’s had not taken sufficient steps to ensure that Ms. Datt could not be accommodated. Interestingly, the Tribunal stated:

It may be that, at the end of the day, Ms. Datt could not have been accommodated at McDonald’s because she simply could not meet its hand-washing policies doing any job or combination of jobs, but based on the evidence before me, I find that McDonald’s failed to take all the necessary steps to make this final determination. [para. 250]

Accordingly McDonald’s was found to have failed to accommodate Ms. Datt to the point of undue hardship contrary to s. 13 of the Code.

## Remedy

McDonald’s was ordered:

- to cease and desist discriminatory conduct or any similar conduct.
- to compensate Ms. Datt for lost wages from the date that she was terminated to the date of the decision. Accordingly, she was compensated slightly less than two years’ wages less mitigation income.
- to pay the difference between what Ms. Datt would have paid in taxes on her earned income from McDonald’s, if she had remained employed, and the amount she will now have to pay as a result of a lump sum payment.

No award was made for future wage loss although it is clear that there was a potential for such a damage claim. Ms. Datt was employed at the time of the hearing at The Bay and hoped to obtain full-time employment within two or three years. The Tribunal noted there was no “expert evidence” which would have provided it with the basis for calculating future wage loss, and accordingly, any calculation would be too speculative.

Ms. Datt was awarded:

- \$1800 for loss under the profit sharing plan;
- \$200 in compensation for expenses incurred to seek re-employment.
- damages for medical expenses;
- \$225 for wages she lost as a result of attending the hearing; and
- interest.

*The violation of the Code lay in the fact that McDonald’s had not taken sufficient steps to ensure that Ms. Datt could not be accommodated.*

From an employer’s point of view, perhaps one of the most disturbing aspects of the remedy decision was the damages awarded for injury to dignity, feelings and self-respect. Not so long ago, the highest award in this area was \$10,000. However, recent cases have seen that amount increase. Relying on the comments of the Supreme Court of Canada regarding the vulnerability of employees and the importance upon which society

attaches to employment, the Tribunal awarded Ms. Datt the sum of \$25,000 to compensate her injury to dignity and self-respect. This remains the highest amount awarded by the Tribunal to date. However, if recent court decisions for punitive damages in wrongful dismissal cases are any indication, we can expect that these awards will continue to increase substantially.

## Impact of the Decision

The decision is noteworthy for a number of reasons. First, the Tribunal has raised the ceiling for damage awards for injury to dignity and self-respect to \$25,000, which is a 25% increase over the most recent decision. Here, arguably, McDonald’s had taken sufficient steps to satisfy the duty to accommodate and relied in good faith on the medical opinions, including those noted above. Was there no onus on Ms. Datt to show that accommodation could have been made in the particular facts of her case, notwithstanding the medical

evidence? Further, the Tribunal specifically *did not* conclude that Ms. Datt could have been accommodated in these circumstances. Given the importance of the hand-washing policy to an organization like McDonald's, including their statutory obligations, it is remarkable that the Tribunal would use this occasion to substantially increase the award by "injury to dignity."

Secondly, it appears that the Tribunal was particularly affected by the fact that McDonald's is a significant employer. For example, it placed particular weight on Ms. Datt being terminated in a rather cold and callous way by someone she didn't know and who had not investigated what job opportunities were available. As the Tribunal stated:

Ms. Datt expected better from her employer, an employer known for its charitable works. McDonald's should have "stepped up to the plate" and done everything it could to accommodate Ms. Datt before it terminated her employment. Ms. Datt was upset that it failed to do so. [para. 291]

One has to wonder if the same considerations would have applied if this had been a "Ma and Pa" restaurant operation with limited financial resources.

The McDonald's case arguably represents a significant precedent that complainants will use to claim larger and larger awards from employers in this very murky area of the duty to accommodate. This decision may indicate the problems that employers face in trying, in good faith, to accommodate their employees in their particular circumstances. Nevertheless, since the decision will not be judicially reviewed, it will remain good authority.

Employers should consider the following points in attempting to accommodate an employee who suffers from a disability:

- Do not rely on a third-party carrier's conclusions after receiving, analysing and considering the medical information; consider it yourself.
- Ensure that someone who is familiar with the operation, the employee's workplace and the company's policies has some dealings with the medical experts, including rehabilitation counsellors, etc.
- If it appears that the employee can be accommodated by modifying the job duties short of undue hardship, then the employee should be given a trial period in that position to see if it alleviates the problem.
- If it appears that the employee cannot be accommodated, ensure that there is evidence to prove this conclusion. This means responding to suggestions put forward by the employee or their medical advisors.
- Consider the *Wallace* principles regarding unjust dismissals. If a decision has been made to terminate an employee due to a disability, then the employer should be particularly sensitive to the employee in communicating that information to avoid an increased damage award.

<sup>1</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, where the S.C.C. set a three-step test "for determining whether a *prima facie* discriminatory standard could be justified as a *bona fide* occupational requirement."

**Michael J. Weiler** is an associate counsel in the Employment & Labour Group in Vancouver. Contact him directly at [mweiler@lmls.com](mailto:mweiler@lmls.com) or 604-691-6837.

## Canucks Win, Canucks Win!!!...at Least at the LRB



**Michael J. Weiler**

The Labour Relations Board ("LRB") has overturned a decision that would have allowed the players' union to certify the Vancouver Canucks. The decision recognizes the importance of structuring bargaining units that reflect the parties' particular circumstances and the practical realities.

The NHL is a professional hockey league with teams located across Canada and the United States. The NHL Players' Association ("NHLPA") was formed in 1967 to represent the players in the NHL. The NHLPA was voluntarily recognized, and successive collective bargaining agreements ("CBA") have governed the relationship between the NHL and the NHLPA since 1975.

The Canucks withdrew their objection that the LRB did not have jurisdiction to hear the application and conceded that provincial law, including the *Labour Relations Code* (British Columbia) ("Code"), governed that application. However, the Canucks argued that a bargaining unit consisting of players of a single NHL team would not be an appropriate unit for collective bargaining, allowing the certification application would have negative ramifications on the league-wide collective bargaining structure that the Canucks' players had been a part of for decades. The Canucks argued that their players had voluntarily chosen to be part of a league-wide collective bargaining relationship, and that it was untimely and improper to withdraw from that bargaining structure during the course of a labour dispute.

The original panel concluded that the BC-NHLPA was a trade union, that Orca Bay was the employer, that the agreement between the NHL and the NHLPA was not a collective agreement within the meaning of the Code, and therefore could not stand as a bar to the certification application.

The original panel further held that the unit applied for met the test of appropriateness set out in *Island Medical Laboratories Ltd.* decision.

In its appeal decision, the LRB overturned the original panel. It had serious reservations about the appropriateness of the bargaining unit, given the unique nature of the league structure with its corresponding labour relations between the NHL and the NHLPA. The appeal panel was reluctant to interfere with the established bargaining structure by creating another regime which would, by definition, fragment and compete with the existing regime. There was no need to be concerned about access to collective bargaining or industrial stability, given the collective representation and bargaining through the NHLPA, although that was not under the *Labour Relations Code* structure.

In assessing the application, the Labour Relations Board noted:

As we noted earlier, appropriateness is uniquely a policy determination and exercise of judgment under the Code, but one which is also highly contextual. Appreciating the context includes considering the conduct of the parties.<sup>1</sup>

The LRB considered the implications on the bargaining relationship between the NHL and the NHLPA in granting certification to the union for the Canuck' players and held that, considering those implications, it was inappropriate to grant the application. It found that certifying a bargaining unit consisting of the Canucks' players was inappropriate within the context of Section 22(1) of the Code, particularly given the timing and the context of the application. As a result, it was not consistent with the Code principles and the application was dismissed. Accordingly, the LRB held that the bargaining unit applied for was inappropriate and the application for reconsideration was granted. The original decision and the certification flowing from it were therefore cancelled.

1. *Orca Bay Hockey Limited Partnership et al. v. B.C. NHLPA.*

**Michael J. Weiler** is an associate counsel in the Employment & Labour Group in Vancouver. Contact him directly at [mweiler@lmls.com](mailto:mweiler@lmls.com) or 604-691-6837.

## Mandatory Retirement Ends in B.C. on January 1, 2008



**N. David  
McInnes**

Most employers will now be aware that effective January 1, 2008, mandatory retirement will end in British Columbia. In making this change, B.C. will fall into step with most other Canadian provinces, including Ontario, which ended mandatory retirement on January 1, 2006.

The elimination of mandatory retirement in British Columbia will be achieved through a change in the definition of "age" under the *Human Rights Code* (British Columbia) ("Code"). Although "age" is presently a prohibited ground of discrimination under the Code, legal protection is provided only to employees between 19 and 65 years of age. The amendments to the *Human Rights Code* will extend protection to employees who are age 65 years or older.

Presently, employers in British Columbia are at liberty to require mandatory retirement at age 65, either through negotiated provisions in a union collective agreement, or as a result of imposed corporate policies, or negotiated terms within individual contracts of employment. As a result of the amendment to the *Human Rights Code*, employers in British Colum-

bia will no longer be able to rely on any such corporate policies, collective agreement provisions, or individual contract terms which may require retirement at age 65.

Although employees will gain the right to remain employed beyond the age of 65 years should they choose to do so, it is important for employers to understand that they will still be able to rely upon age-based distinctions which may be contained in *bona fide* retirement, superannuation or pension plans, or *bona fide* group or employee insurance plans.

For example, many if not most long-term disability plans do not provide coverage or benefits beyond 65 years of age. Similarly, many pension plans provide that employee contributions must cease and benefits must commence at a specified age. Thus, although the change in the law will give employees the right to work beyond 65 years of age, there will be no requirement that the benefits which are provided to older workers will necessarily be the same as those which are provided to employees who are younger than 65.

One question that some employers are asking is whether the change in the *Human Rights Code* will provide for any exceptions which could permit employers to institute a blan-

ket mandatory retirement at a particular age, depending on the nature of the business. Although it is possible in certain safety-sensitive industries, in the vast majority of circumstances employers will be obliged to make individual assessments about the mental and physical capacities of employees in determining whether or not they are able to continue to work in a safe and productive manner.

For many employers, the change in the law may not be a matter of concern, especially in a buoyant economy where there are more jobs than there are available employees. Many employers recognize that older workers have the experience and skills which make them a valuable addition to the workforce. However, in other cases, employers may also be concerned about how the change in the law may affect the ability to address such circumstances where the performance levels or capabilities, or sometimes enthusiasm for the job, has begun to diminish.

Previously, employers who establish mandatory retirement policies had the luxury of not being required to make

individual assessments about the capabilities of employees, a luxury which no longer exists. Accordingly, employers will need to pay more attention to performance management over the entire course of an employee's career, in order to gauge and monitor changing levels in performance or capacity. Employers may also want to consider developing attractive voluntary retirement packages which will hopefully avoid the necessity of dealing with employees who may have simply decided to remain working for too long. Doing so may assist in continuing the employment relationship only for that period of time during which it is in fact in the best interests of both the employer and the employee to do so.

It remains to be seen exactly how the change in the law will reshape the employment landscape in British Columbia. We will be sure to keep our clients informed of developments as they occur in 2008 and beyond.

**N. David McInnes** is a partner and Chair of the Employment & Labour Group in Vancouver. Contact him directly at [dmcinnes@lmls.com](mailto:dmcinnes@lmls.com) or 604-691-7441.

## Announcement



**Lai-King Hum**  
Employment  
& Labour  
Toronto, ON



**Aaron Rousseau**  
Employment  
& Labour  
Toronto, ON

We are pleased to announce that **Lai-King Hum** and **Aaron Rousseau** have joined the firm as associates with the Employment & Labour Law Group in Toronto.

## Employment&LabourBrief

Editor: N. David McInnes  
604-691-7441  
[dmcinnes@lmls.com](mailto:dmcinnes@lmls.com)

RETURN UNDELIVERABLE CANADIAN ADDRESSES TO:

1500 Royal Centre  
1055 West Georgia Street  
P.O. Box 11117  
Vancouver, BC V6E 4N7  
Tel.: 604-689-9111 Fax.: 604-685-7084  
e-mail: [info@lmls.com](mailto:info@lmls.com)

### Lang Michener LLP

Lawyers – Patent & Trade Mark Agents

**Vancouver**  
1500 Royal Centre  
1055 West Georgia Street  
P.O. Box 11117  
Vancouver, BC V6E 4N7  
Tel.: 604-689-9111 Fax.: 604-685-7084

**Toronto**  
Brookfield Place  
181 Bay Street, Suite 2500  
P.O. Box 747  
Toronto, ON M5J 2T7  
Tel.: 416-360-8600 Fax.: 416-365-1719

**Ottawa**  
Suite 300  
50 O'Connor Street  
Ottawa, ON K1P 6L2  
Tel.: 613-232-7171 Fax.: 613-231-3191

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