

# RICKETTS, HARRIS LLP

---

## Barristers & Solicitors

M. J. White  
R.D. Preston  
A. DiNardo  
R.W. Davies, Q.C. (Ret.)

T.C. Warne, Q.C.  
J. D. Gibson  
J. L. Andree

Suite 816, 181 University Ave.,  
Toronto, Ontario  
M5H 2X7

Counsel: Harvey S. Dorsey, M.G. Cochrane, Jay Josefo

Tel: (416) 364-6211  
Fax: (416) 364-1697

## **RICKETTS, HARRIS LLP** **EMPLOYMENT LAW NOTES & NEWS**

### ***THE “MILE HIGH CLUB”, AND OTHER EMPLOYMENT LAW TIDBITS***

No doubt many of you read about the escapades of two American business executives, married strangers who met when they boarded an airplane for a flight to London. Shortly after take-off, they soon became very fast friends. Consumption of alcohol in the first class section of the airplane, along with the dimming of the lights for the movie, led to a regrettable lowering of inhibitions and amorous behaviour displayed publicly before their fellow passengers.

As was reported in the media, these two high flyers were, upon arrival at Heath Row Airport, charged with public indecency. Both of these individuals were also fired from their executive level positions at their respective companies.

The question I raise is, whether under Ontario Law these two individuals could have been fired for “just cause”. The answer is, frustratingly enough, *not likely*. While revelation of character can be just cause for dismissal, whether executives in similar circumstances could be fired under Ontario Law is very much dependant upon the individual facts and circumstances surrounding their history of employment.

For example, if one or both of these individuals had been long serving employees with clean records, who had never before engaged in conduct exhibiting a lack of judgment, it is unlikely that an Ontario Court would find just cause to terminate the employee. The employee would likely argue that he or she was involved in a momentary lack of judgment, the circumstances of which never before occurred and never would occur again. Considering that a fairly recent decision of our Court found there was no cause in the dismissal of a long serving employee who had assaulted his supervisor after they both got drunk one workday afternoon, it is in my view unlikely that the lewd (and tacky) behaviour exhibited by these high flyers would justify their dismissal, considering particularly the consensual nature of the conduct and that this was a “victimless” crime (ignoring the feelings of the other passengers on the plane).

If, on the other hand, an employment contract contained clauses which specifically govern the conduct of the employee, and if it could be argued that this conduct was so reprehensible as to breach the employment contract or be a serious lack of judgment, then cause might exist. Traditionally, if the tenure of employment was short and if there had been other problems in the past, this would assist the employers' case. Moreover, if the employee was in a position of trust and confidence, (such as a clergyman), and the behaviour upon which the employer was relying was so antithetical to the job requirements, then again it is possible that cause could exist.

It almost goes without saying that employees must use their caution and good judgment in all public situations. Not only their own integrity, but the integrity of their organisation could be at risk otherwise. Using caution in all public situations goes beyond such flagrant behaviour that is involved in the case of the amorous flyers. Using caution when speaking on a cell phone about sensitive business matters, as well as ensuring no one is peeking over your shoulder at sensitive business documents at a restaurant, should also be common practice. The subject of using electronic mail was covered in a previous newsletter. Suffice it to say that electronic mail for sensitive topics should be used with great care. Others may well be reading it along with you.



***FROM THE "WACKY WEST COAST" OF BRITISH COLUMBIA, SMOKING NOW A DISABILITY UNDER HUMAN RIGHTS LAW !***

***RE: COMINCO LTD. (FEBRUARY 29, 2000, UNREPORTED DECISION OF ARBITRATOR LAWSON)***

In a recent arbitral decision it was held that being addicted to cigarettes is a disability under British Columbia's Human Rights Code. A company policy that banned smoking in certain operations, for legitimate health and safety reasons, was grieved by a union, the United Steel Workers. The union argued that the total ban imposed by the company on tobacco related products was "an unreasonable intrusion into the personal freedom of employees".

Despite this argument, the arbitrator concluded that the employer had a legitimate interest in reducing smoking and that the ban did not cause undue interference with personal liberties.

The arbitrator did, however, conclude that the policy had a discriminatory impact on those employees who were very heavy smokers and thus heavily addicted to tobacco. Despite finding that the employer had legitimate reasons to adopt the policy, including the health of its employees as well as cost savings regarding employee benefits, and that the policy was adopted in good faith, the arbitrator felt that the policy as it was – a blanket ban on smoking on company property – did not "accommodate" those employees who were addicted to tobacco.

The parties themselves were to attempt to work out some accommodation of those addicted employees, failing which the arbitrator would rule on that remaining issue.

The surprising aspect of this decision is the arbitrator's finding that being a smoker, and thus being addicted to nicotine, is a *disability* worthy of protection under the Human Rights Code of British Columbia. The decision does not discuss the issue of the ability of some smokers to quit, or the

notion of “will power” which allows one to overcome what, in this case, was purely a voluntary act when the individual employees’ commenced to smoke.

Thus, the number of categories of what constitutes a “disability” appear to be ever on the increase, with no consideration of individual responsibility as opposed to the foisting of what were once personal obligations of the employee onto someone else, who must bear the cost. In this case, that “someone else” is the employer. The expansion of what constitutes a “disability” will no doubt be imported to other jurisdictions. Stay tuned!

.. ..

### ***DAWN OF THE LIVING DEAD – THE ONTARIO COURT OF APPEAL RESURRECTS ISSUE ESTOPPEL (IN EMPLOYMENT SITUATIONS)***

Some years ago it was determined that an employee dismissed for cause, and determined by the Unemployment Insurance (now, Employment Insurance) Board of Referees to be not entitled to UIC benefits because of dismissal for “misconduct”, could not subsequently sue for wrongful dismissal in Civil Court. This was because a finding that there existed “misconduct” – the standard required under the Employment Insurance Act to deny EI benefits – also included or subsumed a finding of “just cause” for the dismissal. The employee was held not to be able to re-litigate this matter in a different forum, but that he or she was stuck with the initial decision given by the Board of Referees. This same principal applied to Employment Standards hearings.

Subsequent decisions of the Ontario Court, however, watered down the above principal. While in the early and middle 1990’s I recommended the employers attend at all Board of Referee hearings and assert misconduct at that hearing if just cause was to be alleged for the dismissal of the employee, by the end of the decade I no longer proffered this advice. The decision of Madam Justice Molloy in *Minnott O’Shanter Developments* concluded that an issue estoppel ordinarily no longer arises when an employee is denied his Employment Insurance benefits for “misconduct”. *Minnott* concluded that the finding of “misconduct” by a Board of Referees for Employment Insurance benefits purposes is not conclusive that there exists “just cause” for the purposes of a subsequent wrongful dismissal action.

The Ontario Court of Appeal, however, has recently overturned that principal in *Schweneke v. Ontario*. The doctrine of issue estoppel is therefore reinstated, subject to the over-arching discretion of the Court to prevent unfairness or an injustice in the particular case. A rehearing of issues previously decided by another tribunal will thus not generally be allowed, so long as no injustice would result.

The requirements for issue estoppel are:

- the same question has previously been decided,
- the previous decision was a final one or that appeal rights from it have expired,
- the parties to the previous and new proceedings are the same.

If there are findings of fact made by a tribunal in a previous decision, and these findings are adverse to the employee or employer, then those findings will ordinarily not be permitted to be re-litigated in a subsequent court proceeding.

For example, consider the scenario of an employer terminating an employee for just cause. That employee then claims Employment Insurance benefits. If he or she successfully convinces the Board of Referees that there was no “misconduct”, and obtains benefits, it will be difficult if not impossible for the employer to subsequently argue at any wrongful dismissal trial that there was just cause for the dismissal. Similarly, consider an employee found to have committed misconduct and is denied Employment Insurance benefits. That finding of fact of the Board of Referees, if not appealed, results in a factual finding that there was misconduct, arguably equivalent to just cause. This factual finding will be against him or her in any attempted wrongful dismissal action. Such an action will thus likely fail.

Once again, we should not ignore what were once considered purely “administrative” proceedings. Employers and employees should take such matters before lower Tribunals seriously; and strategically consider what, if any, action should be taken when considering whether to appear before any decision making tribunal.

.. ..

### ***Employment Law Developments—Your Risk-Management Check-List***\*

This is an update on recent, interesting developments in employment law. We discuss three Ontario Court decisions and what they mean, in practical terms, for you and your organization.

With the rise in mobility for skilled employees, restrictive covenants such as non-competition and non-solicitation agreements have grown in popularity and in importance. In *Towers, Perrin, Forster & Crosby Inc. v. Cantin* (1999), 46 O.R. (3d) 180 (“Towers”), the enforceability of such covenants is analyzed and considered.

In *Haldane v. Shelbar Enterprises Ltd.*, 46 O.R. (3d) 206 (C.A.) (“Haldane”), the Ontario Court of Appeal may have opened the door to allowing employers to discipline employees through the use of suspensions without pay. This type of discipline is used in unionized environments, but has not, until now, been approved by the courts in the absence of a collective agreement.

The high-water mark of employer liability for negligent acts of employees may have been reached, in the unreported Ontario Superior Court decision of *John Flynn v. Eaton Yale* (“Eaton Yale”). In this case it was held that an employer was responsible for the harm caused by an employee off the work premises, but who got drunk at work. The facts of the case are very interesting, and should cause all employers to pay attention to previously disregarded harmful activities of employees.

---

\* by Jay Josefo and Gerrard McGeachy



**TOWERS—Enforcing “Non-competes” and other restrictions:**

The first case, Towers, is a reported motion for an interlocutory injunction. The plaintiff brought the motion because its former principal, an actuary and insurance consultant, left the plaintiff TP to become a manager of a competing company, KPMG. While at Towers, Perrin, Forster & Crosby ("TP"), the defendant Cantin had contact with fifty four clients. Eleven of those clients followed her to KPMG.

When Cantin became a principal of TP, she became a shareholder and thereby subject to restrictive covenants contained in the corporation's by-laws. The covenant precluded her from encouraging any employee to leave TP and prevented her from competing with TP. These covenants ran for a two year period, commencing on the date that she ceased being a shareholder. TP brought this motion for an injunction to enforce the restrictive covenant, alleging that Cantin had breached the covenant and that KPMG intentionally interfered with the plaintiff's economic interest. The defendants resisted only the injunction with respect to the covenant against competition.

The Judge had to decide whether the restrictive covenant was enforceable, and if so how best to enforce it.

It was held that the restrictive covenant was enforceable. The plaintiffs were entitled to an injunction until trial restraining both Cantin and KPMG from competing with TP and from soliciting the employees of TP. There was, however, a significant limit placed on the injunction. At the time of the hearing, Cantin had already secured the work of eleven corporations. It was ordered that none of these companies should be prejudiced by the injunction, and the Judge indicated an intention to make a supplementary order if counsel for the parties could not identify and implement a temporary solution dealing with the specified clients.

After considering the seminal case, *Nordenfelt v. Maxim Nordenfelt Guns Ammunition Co.*, and the Supreme Court of Canada decision in *Elsley v. J.G. Collins Insurance Agencies Ltd.*, Madam Justice Kitley held that:

*Prima facie*, the restrictive covenant against competition is in restraint of trade and, according to *Nordenfelt*, *supra*, is against public policy and is therefore void unless it can be sustained based on reasonableness in the interests of the parties and in the interests of the public.

This view of the law formed the basis for Madam Justice Kitley's principled approach to dealing with the restrictive covenant. She considered the threshold question of whether TP had a proprietary interest which entitled it to protection, and found that in fact such an interest did exist. She therefore

turned to the question of whether the covenant against competition was reasonable between the parties.

The Judge held that where an imbalance of bargaining power exists, it may lead to oppression and a denial of the right of the employee to exploit the knowledge and skills he or she obtains during employment. However, Cantin had willingly become a principal with all of the benefits and obligations which that entailed. This led to the significant finding that there was no imbalance of bargaining power.

The scope of a restrictive covenant is the main tool by which courts analyze its reasonableness. In *Towers*, the covenant was two years in duration. This was held to be a reasonable period of time, largely because of the nature of the business under consideration. As a company that does actuarial work, it would likely take the full two years for TP to re-develop its relationship with clients after Cantin's departure. The Judge noted that although restrictions of two years have been found to be unenforceable, duration is not the only factor. Restrictions of two years have been upheld in the past, and restrictions for three years and even five years have been enforced.

With respect to the duration of the covenant, the Judge held that the most important consideration was that this interlocutory order would likely be finally determined in about one year. The parties had prepared at length, and would likely go to trial in under one year. Regardless of the duration of the covenant, an interlocutory order itself may be reasonable if the final order is likely to be obtained within a reasonable time.

The scope of a covenant is also defined by the description of the protected clients. In order to make a restriction enforceable, it should be as limited as possible while still protecting the important interests of the restricting party. In this case, counsel for Cantin argued that a failure to define the scope of the restriction to a geographical area was fatal to the agreement. However, the Judge held that the definition of "client" adequately circumscribed the geographical limitation. All of Cantin's clients carried on business in North America and Europe. Therefore, she was free to seek any new business outside of those areas.

After finding that the restriction was reasonable between the parties, the Judge turned to the question of the public interest. Significantly, the Judge found that there should be a shift in the evidentiary burden at this point. Once the plaintiffs had satisfied the court that the agreement is reasonable between the parties, the onus shifted to the defendant to prove that the agreement was contrary to the public interest. The Judge held, without further analysis, that there was nothing to suggest that the "clients", and by implication, the public, would suffer through the enforcement of the restrictive covenant.

It was argued that even if the restrictive covenant was reasonable and enforceable, it should not be upheld because its breach does not cause "irreparable harm". The Judge held that, at this

interlocutory stage, the plaintiffs suffer an undefined but potentially significant damage to its reputation and revenue. The Judge was:

... mindful of the point made in *Bank of Montreal v. James Main*, where ... the court held that where there has been a clear breach, "courts are inclined to grant injunctions enforcing negative covenants until trial ..."

The Judge held that there had been a clear and in fact an admitted breach, making any further assessment of the harm unnecessary. The Judge went on to find that Cantin would not be restricted from earning a livelihood, and that she had been told repeatedly in writing following her departure that TP intended to vigorously pursue compliance with the covenants.

In the case where a person has very limited and specific skills, in a very limited market for their services, a restrictive covenant is unlikely to be upheld. However, in the case where there are clear indications that the person will be able to earn a livelihood notwithstanding the restrictive covenant, it is more likely to be enforced. By putting Cantin on clear notice of its intention to pursue enforcement of the restrictive covenant, the plaintiff was able to avoid any arguments that Cantin had been significantly prejudiced without notice. For example, if the plaintiff had not put her on notice of its intention to enforce the agreement, and Cantin had then somehow relied upon her belief that the covenant was unreasonable, the Judge would likely have found it more difficult to enforce the covenant against her.

The remedy portion of the Judgment is quite brief, but it is significant as an example of a pragmatic approach taken by the Judge to craft an injunction which preserved the rights of the plaintiff while maintaining reasonableness. The evidence before the Judge was that Cantin had already secured the work of eleven corporations. The corporations had not been given notice of the application for the injunction, nor were they represented at the hearing. The Judge held that none of the eleven companies should be prejudiced by the injunction, and advised the parties that he would make a supplementary order if a resolution to the issue of the eleven clients could not be achieved through counsel.

### ***What does this decision mean for employers?***

- even very senior employees, officer, directors and shareholders, may be able to successfully claim an imbalance of bargaining power, on the right facts.
- a company which seeks to have someone agree to a restrictive covenant should be very careful to ensure that at the time of the formation of the agreement, there are as few indicia of imbalance as possible.
- a company policy that people must become a partner after a certain period of time, failing which their employment will be terminated, may make a restrictive covenant unenforceable.

- a senior person who enters into a restrictive covenant under duress may be treated much the same as a junior employee.
- clearly specifying the ways in which competition may occur will make an agreement more enforceable.
- companies using restrictive covenants should realistically determine crucial areas which require protection and only seek to restrict those areas - otherwise, there is a greater likelihood that the entire agreement will be found invalid by a court.



### **HALDANE-Discipline for non-unionized employees:**

The second case, Haldane, involved a plaintiff, H, who was a generally hardworking and valued employee of the defendant, but she engaged in insubordinate conduct in the workplace. She was advised by the president of the defendant, Shelbar, that she would be required to provide a written apology to the staff and that she would be suspended for three days without pay. H advised that she could not afford to lose three days of pay and suggested it would be fair to deduct three days of pay from her vacation pay.

Shelbar did not accept this proposal and H's employment came to an end. H sued for wrongful dismissal. H was successful at trial, after it was held that her insubordination was not grounds for dismissal, and that the proposed discipline was excessive in all of the circumstances.

The Judge had to decide whether the employer had a right to suspend the employee without pay as an exercise of discipline.

The Judge ruled that the employer did not have the right to suspend the employee without pay, in the circumstances of the case, although such a term may be expressed in an employment contract, or may be implied in the appropriate circumstances.

The Court of Appeal noted that at the trial level, H had not taken issue with Shelbar's claimed right to suspend without pay. Rather, H only took issue with the reasonableness of the particular discipline. The court refused to decide the case on the basis that the employer had no right to suspend H, because the issue was not raised at trial. However, the Court of Appeal went beyond what was required of them to decide this case, and made what may be significant pronouncements on the law of employment in a non-unionized setting.

The court adopted the observation of O'Leary, J. of the Divisional Court that "the employer's right to suspend without pay, as an exercise of reasonable discipline may flow from an implied term of the

employment contract. Terms may be implied into a contract based on custom and usage or based upon the presumed intention of the parties."

The Court of Appeal held that terms may be implied into a contract in three ways:

- i) to accord with the presumed intention of the parties;
- ii) to accord with existing custom and usage; and
- iii) a term may be implied into a contract as a matter of law.

The court noted that employment contracts create a special relationship and there is often a power imbalance which renders these contracts particularly susceptible to implied terms as a matter of law. The court further noted that progressive discipline powers are contained in virtually all collective agreements, and that the implication of such a term into employment contracts would add flexibility to the employer/employee relationship. While reserving its determination of this issue to a case where it is fully argued and necessary for the decision, the court is of the opinion that "a case could be made for implying a term providing for reasonable discipline into employment contracts."

***Practical Conclusions—Employers’ options are increased...***

It is arguable that this decision permits employers to include suspension without pay clauses in employment contracts. Courts will, however, be loathe to uphold them unless they are clearly spelled out, with readily identifiable triggering mechanisms. Specific types of employee conduct should be included, where possible.

In an intolerable situation, an employer may wish to seek the advice of a lawyer on the risks and potential benefits of suspending an employee in the absence of a written contract expressly providing for such discipline. There is no absolutely correct answer, but a thorough analysis of legal and business considerations would likely enable a lawyer to provide an employer with a risk assessment before suspending an employee. Currently a grey area, there will be litigation on this developing issue in the near future.

.. ..

***Eaton Yale—Employee negligence can cost the employer!***

It is the law that employers can be held liable for harmful actions of their employees. Employer liability for negligence can even include acts of employees while outside the workplace. The duty of an employer to oversee conduct of employees was recently considered by Mr. Justice Donnelly in John v. Flynn and Eaton Yale.

It is a ruling which makes it clear that appropriate employer policies and procedures, and the effective application of these, are essential to employer risk management.

In Eaton Yale, an employee drove away from the workplace while legally drunk. Within 45 minutes of leaving work, he was involved in a collision, severely injuring a pedestrian. A lawsuit was brought against both the driver and the employer, Eaton Yale Limited. The jury awarded the plaintiff \$1,050,242 in damages, and found the employer 30% liable. Thus, the employer owed this pedestrian a duty of care. Once this duty was breached, the employer's portion of the damages was over \$300,000, not including legal fees, interest and lost management time.

The Judge found that the employer knew or ought to have known that employees gathered at the company parking lot during work breaks and drank alcoholic beverages. The employer had not made reasonable efforts to stop the behaviour, although it was foreseeable that an employee would drive away from work impaired.

The Judge also decided that the employer knew or ought to have known that employees gathered at the workplace and drank alcoholic beverages from time to time. The employer had not made reasonable efforts to stop the behaviour, although it was foreseeable that an employee would drive away from work impaired.

In Eaton Yale, Mr. Justice Donnelly found it to be a fact that when Flynn left the workplace, he drove home and "stayed long enough to take a pickled sausage and a beer from the refrigerator. He returned to the highway immediately, driving with an open bottle of beer between his legs." It was argued on behalf of Eaton Yale Limited that by arriving home, he had broken the chain of causation, but it was held that "Flynn's safe arrival at home was a fortuitous event, totally unrelated to any discharge of duty by Eaton Yale."

The law of civil liability for negligence is a fluid body of rules and principles. It is driven by the specific facts of the case before the court. Historically, it arose out of the idea that in a civil society people must conduct themselves reasonably. As society has become increasingly complex, so have the types of duties that arise out of our relationships with one another.

The case of *Donoghue v. Stevenson* established the modern framework for claims based upon negligence. The decision stands for the proposition that the categories of negligence are never closed. It was there that Lord Atkin made the following pronouncement:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

The Supreme Court of Canada decision, *Jordan House Ltd. v. Menow and Honsberger* held that a hotel owner owed a duty of care to a drunken patron who was killed by a car after being removed from the hotel tavern. The duty arose, in part, out of the relationship between the hotel and the patron, coupled with the knowledge of the risk to the intoxicated person after leaving the establishment.

The decision in Eaton Yale may represent somewhat of a high water mark for liability of an employer in Canada, but it is an extension of well-established negligence principles. It serves as a reminder that the categories of negligence are not closed, and that we must be on guard for potential legal risk in all activities.

***The significance of the Eaton Yale decision to your risk management policy:***

- when an employer knows or ought to know that an employee is a risk to others outside or inside the workplace, there is a legal duty to attempt to prevent any harm to anyone.
- it is impossible to say in advance just how far the duty extends. Each case is determined on its facts, and it is possible to be negligent by failing to take reasonable measures to make oneself aware of potential risk.
- in Eaton Yale, it was found that the employer knew or ought to have known of the alcohol consumption. The court concluded the employer squandered the opportunity to take preventative action.
- employers may have a duty to implement reasonable policies and reporting measures to attempt to find out about unsafe activity.
- employers should begin by implementing policies, educating staff and creating effective reporting measures.
- identification of impairment is also a difficult issue. Some types of impairment are not readily apparent. Eaton Yale deals with alcohol use, which can clearly be generalized to illegal drug use, but the principle is likely to have much wider application. A strong argument can be made that any other foreseeable employee impairment also gives rise to employer liability. Such impairment could arise from use or abuse of medication, or arguably even employee fatigue.
- collection and reporting of information means that privacy rights of employees may be in conflict with a risk management plan that is not carefully administered.
- failure to act upon a written policy may be treated as *"lip service"*, and may be evidence that the employer has breached a duty. When action is taken, it must be effective and consistent. Eaton Yale was found to have knowledge of the employee's alcoholism, having arranged for him to spend three months at a treatment institute. Mr. Justice Donnelly's findings regarding Eaton Yale's practices represent a clear warning to employers who fail to follow their own policies:

...[u]pon his release from Brentwood, Flynn's continued employment depended upon compliance with Eaton Yale's aptly named 'Last Chance Agreement'. Flynn breached each of the three alcohol related conditions in that agreement, thereby providing grounds for suspension or dismissal. Eaton Yale ignored the breaches.

Eaton Yale had a claimed policy of zero tolerance for alcohol in the workplace. It had a policy of intervention to supervise known alcoholics. It gave mouth honour to those policies by sporadic postings on notice boards.(paras. 3-4)

The concept of negligence is here to stay as a basis for civil liability. In order to guard against failing to satisfy their duty, employers should ensure that reasonable risk management systems are in place. It is important to pay attention to warning signs and all incidents of employee impairment at work. Most importantly, an employer should take decisive action as soon as it discovers impairment associated with the workplace, to ensure that the behaviour and risk does not continue.