

INFORMATION UPDATE

ROPERGREYELL
EMPLOYMENT + LABOUR LAWYERS

Issue no. 52, July 2011

Rioters, Thieves, Vigilantes and other Criminals...

What can you do about your Employees' Off-Duty Conduct?

Like everyone, we at Roper Greyell were disappointed and disheartened by the Stanley Cup riot that took place last month. Although much of the physical damage has now been swept away, Vancouver's business community continues to feel the impact of that night. In the days that followed, B.C. employers faced tough questions about how to deal with employees who may have participated in the riots. Those issues will only get more complicated in the weeks and months to come as more individuals are identified, charged and eventually convicted of criminal acts related to that evening.

In this issue of the Information Update, we discuss some of the rights and responsibilities of employers when dealing with their employees' off-duty conduct and the impact of criminal charges or convictions on the employment relationship.

Can I fire my employee for rioting, looting or stealing?

Within days of the riot, we began receiving calls from clients asking us whether they could fire employees who had allegedly participated in the Stanley Cup riot. The following article summarizes some of the legal principles employers need to keep in mind before they pull the trigger on a rioting employee - or any other employee who has been caught engaging in criminal behaviour. The last thing we want to see is employers losing legal battles to rioters because they have missed some necessary legal principle or process.



B.C. employers should be familiar with the legal principles that govern their ability to regulate and punish employees for their "off-duty conduct" before acting. Although this article is specifically geared to riot-related conduct, these principles apply to any instance where an employer learns of anti-social or criminal conduct by an employee that occurs away from the workplace.

There are three main types of riot-associated misconduct that may attract employer concern:

1. Employees who have been publicly identified as having acted unlawfully during the riots.
2. Employees who have, or will, misconduct themselves in social media (eg – inappropriate blogs, posts, tweets or other public comments connected to their

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employer). Keep in mind that misconduct of this nature might also be done by anti-rioters or vigilantes.

3. Employees who are charged with or convicted of unlawful conduct, and/or who need time off work to go to jail. This is expected to increase in the coming weeks and months.

Before disciplining or firing an employee for off-duty conduct, employers must do two things:

1. Prove the misconduct; and
2. Prove a connection between the misconduct and the employer's business.

Proving the Misconduct

If the employer cannot prove that the misconduct actually occurred, then a for cause termination will not hold up if challenged.

First, it is critical that an employer conduct its own full and fair investigation.

Courts, arbitrators and tribunals require employers to gather all relevant facts before deciding to discipline or fire an employee. Criminal investigations by the police are not a substitute for an employer's own internal investigation. Be sure to get the employee's side of the story before acting. For further advice about conducting a proper and thorough investigation in these circumstances please [contact us](#).

Second, consider the nature of the misconduct, the employee's position and any other relevant circumstances.

As in any case of possible termination for cause, an employer needs to consider all of the relevant circumstances before deciding how to address the "misconduct". How serious was the behaviour in question? Was the employee assaulting police officers, looting local businesses, or simply a bystander photographed in the crowd? Be very careful about online photos, video-clips or what others say about the employee. There have been many cases where first impressions and assumptions have turned out to be incorrect!

Is the employee in the public eye or highly recognizable? Is he or she in a position of trust within your organization? If so, an employer may be entitled to take stronger action.

Finally, consider the employee's employment history and any other relevant circumstances. Is this conduct out of character? Was this an isolated incident in an otherwise spotless work record?

Proving a Connection between the Conduct and your Business

Generally, an employer has no right to interfere in its employees' off-duty time, except where it may have a significant impact on the employer's business. So, in order to discipline or discharge an employee for off-duty conduct, the employer needs to prove

Upcoming Events

We are pleased to announce the 2011 Summer / Fall schedule for RG's **Workplace Law Education Series**. We will be offering in-person seminars, on-line webinars, and half-day workshops on a number of workplace law topics.

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For more information or to register for one of these sessions please contact us at seminars@ropergreyell.com or [visit our website](#).

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Roper Greyell's 2011 [Regional Seminar Series](#) continue in **Campbell River** on October 13 and **Nanaimo** on October 14. You will hear from our firm's leading experts on important topics in labour, employment and workplace human rights issues and have fun while connecting with others in your region. Other planned sessions include seminars in the Okanagan and the Fraser Valley. For further information please [contact us](#). Keep an eye out for upcoming Regional Seminar Series dates in your area.

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a connection between the off-duty conduct and its business.

There are two main connections that may be established in relation to the Stanley Cup riot:

1. The off-duty conduct itself is connected to the person's employment responsibilities. For example, a security guard engaging in violence; or a retail cashier engaged in looting from a retail outlet may meet this requirement.
2. The employer's reputation, products, or business will be damaged if the identity of a person engaged in the riot is connected to that business.

Given the widespread publicity surrounding the riot and the connections being made between rioters and employers, damage to reputation is of particular concern in these circumstances. Indeed, several local companies have been scrambling to minimize the damage to their reputations caused by their professional association with people thought to be involved in the riots.

Employers may also be able to establish a connection that will justify discipline or termination for off-duty conduct where an employee's behaviour renders the employee unable to perform his or her duties satisfactorily or leads to a refusal, reluctance or inability of the other employees to work with that employee.

Keep in mind that the *B.C. Human Rights Code* prohibits discrimination against employees for criminal convictions or charges that are unrelated to their employment. Special care must be taken in these circumstances. For further information, please contact us or see our article on Criminal Convictions and Employment in this issue of the Update.

Finally, recall that even if the above test is not met to justify a *for cause* termination, it is always open to employers to terminate a non-union employee on a *without cause* basis so long as the employee is provided with reasonable notice of termination, or pay in lieu.

Criminal Convictions, Jail Time and Employment



The smoke was still clearing in downtown Vancouver when Facebook groups and other websites emerged that were designed to identify rioters and looters and to organize clean-up crews. Although generally seen as a positive reaction to a terrible event, these sites can become a concern for employers when the content gets out of hand or is not used carefully. Employers must resist falling into the all-too-tempting trap of leaping to conclusions based on unclear photographs and online commentary.

Questions? Suggestions?

If you have questions about this month's *Information Update* or suggestions for topics you would like to see covered in future editions of the *Update*, please contact Jennifer Russell at

jrussell@ropergreyell.com.

Furthermore, certain websites have effectively handed out punishment by publicly shaming individuals before the police and courts have had a chance to figure out what actually happened. This online shaming could have legal implications for employers, especially when company computers are used to publish defamatory, illegal or offensive material. For more information and advice about the use of social media in the workplace, please call us or [click here](#) to view the February edition of the RG Information Update.

Dealing with Criminal Charges

Eventually, the accused rioters will move their way out of the court of public opinion and into the actual courtroom where legal penalties are likely to follow. In the meantime, if an employee has been charged with a serious criminal offence, what are the employer's rights and responsibilities? B.C. courts and arbitrators have been clear that the right to suspend or terminate an employee who has been criminally charged involves a balancing of interests between the employer and the employee.

Fundamental to our Canadian criminal system is the legal presumption of innocence until guilt is proven. This rule holds equally true in the employment realm. An employer's dismissal or disciplinary decision is independent of the criminal process even if the alleged conduct is the same. The issue is not whether an employee is guilty or innocent. Rather, the question to be asked is: Does the presence of this employee create a serious and immediate risk to the legitimate interests of the employer?

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The onus is on the employer to prove that risk. The mere fact that someone has been charged with an offence is not enough. The employer must do its best to independently investigate charges and assess the risk to its operations. If, in doing so, it can reasonably conclude that an employee did something deserving of dismissal, it can terminate the employee. The employer is not necessarily required to await the results at trial.

However, if despite its best efforts an employer cannot reach a conclusion about what happened, it may choose to wait until the trial and consider the evidence presented, and any findings made by the court before it decides if dismissal is appropriate.

It is important to note, however, that the criminal burden of proof "beyond a reasonable doubt" is higher than that required to support a termination. For a termination, an employer need only prove that it was *more likely than not* that the conduct occurred (i.e. "on a balance of probabilities"). Thus, an acquittal does not necessarily mean that an employer cannot terminate the employee.

Regardless, a criminal charge can only be relied upon to support a dismissal as long as there is the required connection between the charge and the workplace. As discussed in the previous article, the employer must show that the nature of the charge is potentially harmful to the employer's reputation, product, employees, and/or customers.

Once the employer has identified a legitimate risk, they must also consider whether that risk can be mitigated by closer supervision or a job transfer. There is also an ongoing onus on employers to consider reinstatement as circumstances evolve.

Criminal Convictions and Jail Time

The mere fact that someone has finally been convicted of an offence as opposed to charged does not alter these basic principles. The starting proposition is that employers have no legitimate interest in how their employees conduct themselves outside of the workplace. Therefore, to justify any discipline for a criminal conviction, employers must show a real connection between the conduct that resulted in conviction and the employee's job. Factors to be considered include:

1. The employer's reputation;
2. The views of other employees;
3. The employee's ability to perform his or her duties; and
4. The ability of the employer to manage its workforce.

Some connections are obvious. For example, if a worker calls his manager at home and threatens to kill him if he doesn't get a promotion, the connection is clear. Other connections are not obvious, particularly when an employer claims that the off-duty conduct could injure the employer's reputation, which is a common concern regarding the Vancouver riots. Equally challenging are cases involving individuals who have temporarily lost their drivers licenses following DUI convictions or roadside suspensions.

In establishing the connection necessary to discipline or terminate an employee due to a criminal conviction, an employer must provide evidence that is more than speculative. Simple uneasiness that some people in the community might not approve of continuing to employ a given employee is insufficient.

Similarly, employers must consider a request for a leave of absence for an employee to serve a jail term just as it would consider another request for personal time off. The employer must balance its interests with the employee's request and determine whether the leave is feasible.

It should also be noted that B.C. human rights legislation makes it unlawful to discriminate against employees for criminal convictions or charges that are **unrelated** to the individual's employment. A recent case from the B.C. Human Rights Tribunal confirms that despite the wording of the *Human Rights Code*, the *Code* will apply to discrimination claims based on criminal convictions and criminal charges and most likely even administrative offences: *Junkin v. B.C. (Ministry of the AG)*, 2011 BCHRT 35.

Given the strict new drinking-driving laws implemented last September, which provide for various immediate roadside administrative penalties, an obligation to accommodate employees dealing with such administrative penalties could prove a significant burden for B.C. employers.

Employers must consider their duty to continue to employ and/or accommodate employees who have unrelated criminal convictions, who are subject to jail terms, or who have lost their drivers license to the point of undue hardship. Failure to do so could constitute a violation of the B.C. *Human Rights Code*.

Family Status Discrimination

By Alissa Macpherson

Discrimination on the basis of family status has been garnering greater attention before adjudicative bodies as of late. However, much of the focus has been on the requirement to accommodate family obligations. We discussed these evolving obligations in our December 2010 newsletter.

Just in time for the summer hiring season, the B.C. Human Rights Tribunal has reminded us that family status discrimination also arises in the context of preferential hiring.

Labourers at the Victoria Shipyard are assigned to work on the basis of a dispatch system. Labourers are assigned work on the basis of their layoff date. However, the collective agreement allows the employer to request up to 50% of the labourers by name, irrespective of their layoff date.



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Donald Dixon believes that workers who are friends of or related to supervisory staff at the Shipyard receive more work and better opportunities than workers who do not have those connections. He says that the Shipyard is using the name-request provision to give friends and family work. Mr. Dixon filed a human rights complaint alleging that this preferential treatment discriminates against him on the basis of his family status, i.e., that he is not related to the Shipyard's management.

The Shipyard filed a preliminary application to dismiss Mr. Dixon's complaint, arguing that the allegation did not allege a contravention of the *Human Rights Code*. In *Dixon v. Goddard*, 2011 BCHRT 46, the Tribunal confirmed that differential treatment on the basis of friendship alone is not a breach of the *Code* because friendship is not a protected ground under the *Code*. The Tribunal dismissed the portion of Mr. Dixon's claims alleging preferential treatment on the basis of friendship. However, the Tribunal ruled that Mr. Dixon's allegations of preferential treatment on the basis of family status could amount to a breach of the *Code*, and referred that portion of his complaint to hearing.

Family status includes both the *absolute* status of being a family member (i.e., a father, mother, sister, brother etc.) and the relative status of being a part of a *particular* family (i.e., a "Smith" or a "Cook"). Adverse treatment because of one's absolute or relative family status is discrimination.

In *Dixon*, the Tribunal reminded employers that the opposite is also true. If Mr. Dixon suffered discrimination because he was not a part of a *particular* family, then this may also be a breach of the *Code*.

The Tribunal cited *Thomson v. Eurocan Pulp and Paper Company*, 2002 BCHRT 32, in its decision. In that case, the Tribunal scrutinized Eurocan's policy of reserving a percentage of its summer jobs for its employees' children. The Tribunal concluded that the policy was discriminatory on the basis of family status and ordered Eurocan to cease giving its employees' children preference for summer jobs.

The message for employers? You can give your daughter's friends preference in the summer intern contest, but if you do the same for your son, or your colleague's children, then you may have stepped afoul of human rights legislation.



[Alissa](#) is an associate at RG. She successfully represents employers in all areas of labour and employment law, including human rights and privacy. Alissa also represents both employers and employees in wrongful dismissal actions. She enjoys being active with family and friends and is relieved that no one ever questioned that brief stint in undergrad when she worked for her father.

What's New at RG

RG announces a new Managing Partner



We are pleased to announce that the RG partners have appointed [Michael Wagner](#) as the firm's new managing partner.

[Michael Wagner](#) succeeds Roper Greyell's founding and highly respected Managing Partner Duncan MacPhail in this role. During Duncan's tenure, Roper Greyell rose to become one of Canada's leading workplace law firms. Duncan helped establish a unique law firm culture built on core values of excellence, respect, and innovation. Duncan will continue his busy practice and assume other leadership roles within the firm. Michael and the rest of Roper Greyell's legal team look forward to continuing Roper Greyell's growth and service to its valued clients.

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This year marks a milestone for Team Finn having raised over \$1 million for the BC Cancer Foundation in the past three years. Congratulations to all who have participated and donated to this cause.

For more information please visit www.teamfinn.com or www.conquercancer.ca. Thanks to everyone who supported Team Finn and our RG Riders!

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RG Spotlight - Danielle Scorda and Harkamal Rai



Danielle Scorda

Danielle is currently attending law school at UBC. She also obtained her BA at UBC where she specialized in Political Science and Economics. Danielle is an active volunteer who donates her skills working as a copy editor for a local non-profit charity. She is also currently training to be a canine handler for the St. John's Ambulance Dog Therapy Program with her dog, Parker.

What got you interested in the world of employment and labour law?

I was drawn to employment and labour law because of the complex and interesting issues involved in an area of law that focuses heavily on human relationships. I also like the idea of building ongoing relationships with clients and the ability to be pro-active and partake in a practice area committed to dispensing strategic advice.

Most interesting experience at RG so far?

Attending labour and employment matters in arbitration, Supreme Court, and Small Claims Court all within a few weeks has been a highlight for me. Overall, the great variety of work I've been a part of in such a short amount of time has made me realize the incredible breadth of work available even in such a specialized practice area. Oh, and I also enjoyed our firm retreat in Whistler—seeing how genuinely passionate and down-to-earth the RG team is.

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What do you like to do outside of work?

I do a lot of yoga and also love to run, hike, walk, and just generally enjoy Vancouver and BC with my two Goldendoodles. I also spend a lot of time with my family and friends, which usually includes enjoying good food and wine.

What is your favourite place to take a break from work and grab a coffee or lunch?

Café Artigiano is my favourite place around the office for a caffeine fix.

What was your last great adventure?

It's hard to choose between my university exchange in Brisbane, Australia (where I also had the chance to visit the Whitsunday Islands, Airlie Beach, Surfers' Paradise, Byron Bay, Melbourne, and Hong Kong!) and the summer I spent volunteering at an orphanage, learning Spanish, and experiencing true Mexican culture in Cuernavaca and Mexico City, Mexico.

Favourite book?

I'm actually an avid magazine reader: anything from fashion to the economy to travel to home decorating magazines litter my home, but I also love classic novels. My all time favourite: To Kill a Mocking Bird.

Is there anything else you would like others to know about you?

No... that was almost more detailed than my resume!



Harkamal Rai

Harkamal is currently attending law school at the University of Victoria. She completed both her Masters in Asia-Pacific Policy and her Bachelors Degree in International Relations at UBC. Over the last couple of years, she has honed her legal skills by volunteering with three different student-run legal clinics across Canada where she has gained an appreciation of the importance of assisting those who would otherwise not be able to afford legal advice and the impact she can have on her community as a law student and eventually as a lawyer.

What got you interested in the world of employment and labour law?

My background in human rights and policy studies combined with my legal education saw this area to be a great fit. The area of employment and labour law also provides a great foundation to be exposed to various areas of the law including human rights and litigation work.

Most interesting experience at RG so far?

I have been learning something new everyday since I started at RG!

One of the most interesting experiences so far was when I got the chance to attend an arbitration hearing with a partner at our firm. It was interesting to see the dynamics in the room and the various parties who were present on both sides. It really highlighted the profound impact that our work has on both the individuals and organizations involved.

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What do you like to do outside of work?

I enjoy learning about different cultures in different parts of the world (and travelling to them when I get the chance!). I also enjoy working out, baking, and spending time with family and friends.

What is your favourite place to take a break from work and grab a coffee?

Since I started working downtown, I've been going to Café Artigiano more and more. They have amazing coffee and it's a great place to take a break!

What was your last great adventure?

A couple of years ago, I did a summer internship in Geneva with an international human rights organization. It was great because I got the chance to travel on the weekends to other countries and take in everything that Europe has to offer. Living in Geneva and becoming a "local" for the summer was also pretty spectacular.

Favourite movie?

It's really hard to choose just one, but A Beautiful Mind and The Shawshank Redemption are a couple of all time favourites. I have to admit, I'm also a huge Bollywood fan! In fact, I'm usually the go-to person for anything Bollywood related.

Is there anything else you would like others to know about you?

That's it for now!

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Roper Greyell LLP or any member of the Firm on the points of law discussed. Interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this bulletin.



800 Park Place, 666 Burrard Street | Vancouver B.C. V6C 3P3
info@ropergreyell.com | 604.806.0922 | www.ropergreyell.com