



## Welcome to our 2009 Employment Law Year in Review Seminar

Presented by  
McLennan Ross LLP  
**Labour & Employment Practice Group**  
February 2010

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## Employment Law Cases

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 Employment Law Cases

*Shafron v. KRG Insurance Brokers (Western) Inc.*,  
Supreme Court of Canada (2009)

### Facts

- Plaintiff subject to restrictive covenant that for 3 years after leaving employment he would not be employed in the business of insurance brokerage within the "Metropolitan City of Vancouver"
- Employee began working as an insurance salesman for another agency in Richmond and was sued by former employer
- Supreme Court of Canada refused to enforce or re-write the restriction because "Metropolitan City of Vancouver" was ambiguous

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McLennan Ross LLP Employment Law Cases

*Shafron v. KRG Insurance Brokers (Western) Inc.*,  
Supreme Court of Canada (2009)

**Principles**

- Restrictive covenants are generally restraints of trade and contrary to public policy
- The onus is on the party seeking to enforce the restrictive covenant to show that it is reasonable (in activity, time, and geographic scope)
- An ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable

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McLennan Ross LLP Employment Law Cases

*Shafron v. KRG Insurance Brokers (Western) Inc.*,  
Supreme Court of Canada (2009)

**Principles** (cont'd)

- It is not appropriate for a court to "read down" a defective restrictive covenant
- Parties should not be uncertain about their restrictions
- Employers should be discouraged from drafting overly broad restrictive covenants with the prospect that the court will simply read them down
- Restrictive covenants in employment contracts are scrutinized more rigorously than restrictive covenants in a sale of a business

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McLennan Ross LLP Employment Law Cases

*Shafron v. KRG Insurance Brokers (Western) Inc.*,  
Supreme Court of Canada (2009)

**Implications**

- Employers must exercise great care in drafting restrictive covenants to ensure that the restrictions are not only very clear but also reasonable in terms of time, duration, and geography
- You cannot count on a court to amend or shape a covenant to fit what it thinks is reasonable

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McLennan Ross LLP Employment Law Cases

*Piresferreira v. Ayotte and Bell Mobility*, Ontario Superior Court of Justice (2008)

**Facts**

- Plaintiff assaulted by supervisor during argument
- Supervisor received minor disciplinary reproach
- Supervisor placed employee on Performance Improvement Plan (PIP)
- PIP required meetings with supervisor
- Employee went on sick leave and never returned to work

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McLennan Ross LLP Employment Law Cases

*Piresferreira v. Ayotte and Bell Mobility*, Ontario Superior Court of Justice (2008)

**Facts** (cont'd)

- Company and supervisor liable for negligent infliction of emotional distress, mental suffering, and psycho-traumatic disability
- Reasonably foreseeable that combination of yelling/swearing, assault, and threats of PIP would cause psychological injury
- \$50,000 in general damages, less contingencies
- \$500,000 for past and future wage loss, less contingencies

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McLennan Ross LLP Employment Law Cases

*Piresferreira v. Ayotte and Bell Mobility*, Ontario Superior Court of Justice (2008)

**Principles**

- Damages increased due to failures throughout process
- Employer unaware supervisor used verbal abuse as motivational tool
- Employer failed to conduct appropriate investigation
- Employer downplayed severity of incident
- Complainant placed on PIP immediately following incident despite supervisor's conduct

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**Employment Law Cases**

*Piresferreira v. Ayotte and Bell Mobility*, Ontario Superior Court of Justice (2008)

**Implications**

- Significant Employer liability can arise from abusive supervisors and poor investigations
- Investigations must be thorough and impartial
- Separate investigation from performance management, particularly if occurring at same time
- Assess appropriateness of employee and supervisor working together during investigation

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**Employment Law Cases**

*Soost v. Merrill Lynch Canada Inc.*, Alberta Court of Queen's Bench (2009)

**Facts**

- Plaintiff a financial advisor paid by commission
- Began employment with RBC Securities in 1993
- Recruited by Merrill Lynch in 1998
- Brought \$70 to \$80 Million in business with him, which he built up to \$150 Million
- Employee terminated for cause on May 18, 2001, based on various alleged misconduct
- No time given to inform clients

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**Employment Law Cases**

*Soost v. Merrill Lynch Canada Inc.*, Alberta Court of Queen's Bench (2009)

**Facts** (cont'd)

- Found employment 3 weeks after termination, only brought \$10 million in business with him
- On December 31, 2001, Plaintiff left the business as commission was too low to continue

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 Employment Law Cases

*Soost v. Merrill Lynch Canada Inc.*, Alberta Court of Queen's Bench (2009)

**Principles**

- No just cause
  - Misconduct was not proportionate to employee's stature
  - Clients didn't lose anything
  - Employee should have been warned
  - 3-week delay in acting on alleged cause undermined claim
- Employer was unfair and insensitive claiming cause, but not malicious or outrageous
- Failing to give employee even short notice or opportunity to resign had big impact on his business

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 Employment Law Cases

*Soost v. Merrill Lynch Canada Inc.*, Alberta Court of Queen's Bench (2009)

**Principles** (cont'd)

- Employer knew Plaintiff would suffer significant damage to reputation if terminated without notice
- Significant damages awarded:
  - \$600,000 for reasonable notice (12 months)
  - \$1.6 Million for lost business/goodwill & reputation
  - Nothing for defamation, intentional interference with economic relations, or punitive damages
- Court extended damages for the manner of dismissal (from *Honda* case) beyond mental suffering

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 Employment Law Cases

*Soost v. Merrill Lynch Canada Inc.*, Alberta Court of Queen's Bench (2009)

**Implications**

- "Wallace" damages not necessarily dead
- Significant damages for manner of dismissal continue to be granted
- Courts will be creative to punish "bad" Employers and/or compensate sympathetic employees
- Delay in acting upon conduct considered to be just cause can undermine the court's interpretation of whether it is just cause

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*Renaud v. Graham*, Ontario Supreme Court of Justice (2009)

**Facts**

- Renaud hired Graham as real estate agent
- Agreed to provide Graham with the training needed to become licensed, and salary during training
- If Graham resigned prior to expiry of contract and joined a competitor, he would pay Renaud \$20,000 as estimate of training costs
- Prior to expiry of his contract, Graham resigned and joined competitor
- Renaud successfully sued for \$20,000

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*Renaud v. Graham*, Ontario Supreme Court of Justice (2009)

**Principles**

- \$20,000 was genuine estimate of loss Renaud would suffer if Graham resigned
- Payback provision not unreasonable restraint on Graham's ability to work
- Graham not prohibited from working for competition
- Payback provision simply required Graham to reimburse training costs

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*Renaud v. Graham*, Ontario Supreme Court of Justice (2009)

**Implications**

- Employers can require employees to pay back training, education, or relocation costs if they leave employment prior to Employer receiving benefit of expenditures
- Be careful drafting such agreements
- Should be entered into before the Employer has agreed to pay the costs and must have expiry date

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*Ling v. Unity Builders Inc.*, Alberta Court of Queen's Bench (2008)

**Facts**

- Ling hired as GM for corporation operating as part of a group of related corporations (Unity Builders Group)
- Contract with the corporation provided for 2 months' termination notice
- Appointed GM of two other corporations in the Unity Builders Group, 1.5 years later
- Title changed to President of the 3 corporations

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*Ling v. Unity Builders Inc.*, Alberta Court of Queen's Bench (2008)

**Facts** (cont'd)

- Fired a few months later
- Paid 3 months' salary in lieu of notice
- Sued the Unity Builders Group for wrongful dismissal
- Unity Builders Group was the "real" Employer
- Original contract no longer enforceable

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*Ling v. Unity Builders Inc.*, Alberta Court of Queen's Bench (2008)

**Principles**

- Possible to have joint or common Employers
- Depending on corporate structure, changes in employee's duties / responsibilities may also change Employer
- Employment contract no longer enforceable if "real" Employer has changed

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 Employment Law Cases

*Ling v. Unity Builders Inc.*, Alberta Court of Queen's Bench (2008)

**Implications**

- With modern corporate conglomerates:
  - Take care in choosing corporate Employer for employment contract purposes
  - New employment contract should be entered into or previous one amended when employee's role changes significantly

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 Employment Law Cases

*Lippa v. Can-Cell Industries Inc.*, Alberta Court of Queen's Bench (2009)

**Facts**

- Employee terminated after being absent for 5 months due to a disability
- Employee had been denied disability benefits by insurer, but was still in appeal process
- At time of termination, Employer had no current medical information about the employee's ability to return to work

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 Employment Law Cases

*Lippa v. Can-Cell Industries Inc.*, Alberta Court of Queen's Bench (2009)

**Facts** (cont'd)

- Employer claimed employee had either abandoned position or frustrated employment contract
- Employee was wrongfully dismissed and awarded 9 months of salary plus bonus
- Court refused to deduct settlement obtained by employee from the disability insurer from the reasonable notice award

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 Employment Law Cases

*Lippa v. Can-Cell Industries Inc.*, Alberta Court of Queen's Bench (2009)

**Principles**

- To prove frustration, Employer must have medical info. showing Employee unable to work in foreseeable future at time of decision to terminate
- Wrongfully dismissed employees are entitled to pay in lieu of reasonable notice, even if they are unable to work at the time of termination
- If employee contributes to disability insurance premiums, Employer may not be able to deduct benefits received from pay in lieu of notice which is owing

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 Employment Law Cases

*Lippa v. Can-Cell Industries Inc.*, Alberta Court of Queen's Bench (2009)

**Implications**

- Employers must stay in touch with disabled employees and require updated medical reporting (either to themselves or their insurer)
- Denial of benefits by disability insurer does not automatically mean employee is capable of working
- Failure to return to work does not mean employee abandoned position
- Seek legal advice prior to any termination for frustration

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 Employment Law Cases

*McKee v. Reid's Heritage Homes Ltd.*, Ontario Court of Appeal (2009)

**Facts**

- In-house sales agent terminated after 18 years
- He sued, was found to be an employee, and was awarded 18 months' pay
- Employer appealed
- Ontario Court of Appeal agreed the sales agent was an employee

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*McKee v. Reid's Heritage Homes Ltd.*, Ontario Court of Appeal (2009)

**Principles**

- In reaching its decision, the Court recognized "dependent" contractors as a category between employees and independent contractors
- Exclusivity is the key difference between dependent and independent contractors
- Dependent contractors are entitled to reasonable termination notice
- Important to protect the economically vulnerable

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*McKee v. Reid's Heritage Homes Ltd.*, Ontario Court of Appeal (2009)

**Implications**

- Contractors may be entitled to notice of termination
- Contractor agreements should address termination rights
- Courts look at reality of relationship when deciding between contractor and employee
- Unclear how much termination notice dependent contractors should be entitled to vs. employees

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**Occupational Health & Safety Cases**

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Occupational Health & Safety Cases

*R. v. Bruce Power Inc.*, Ontario Court of Appeal (2009)

**Facts**

- OHS charges laid against Employer and 2 of its supervisors regarding serious injury of a worker
- Immediately after injury, Employer sought advice from external counsel
- Counsel instructed it to conduct internal investigation and provide report detailing investigation, to be used by counsel in providing legal advice
- Employer instructed to claim documents privileged

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Occupational Health & Safety Cases

*R. v. Bruce Power Inc.*, Ontario Court of Appeal (2009)

**Facts** (cont'd)

- "Confidential" draft report circulated to internal investigators, including managers and union official with instructions not to disclose and to return or destroy draft
- Despite clear instructions, union official provided copy to MOL Inspector who attempted to enter report into evidence at trial
- Employer claimed solicitor-client privilege and litigation privilege over report and brought a motion for a stay of the prosecution

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Occupational Health & Safety Cases

*R. v. Bruce Power Inc.*, Ontario Court of Appeal (2009)

**Principles**

- Internal investigations can be shielded from use in subsequent prosecutions if steps taken to create "privilege"
- If Crown improperly obtains privileged internal investigation documents, prosecution might be stayed

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Occupational Health & Safety Cases

*R. v. Bruce Power Inc.*, Ontario Court of Appeal (2009)

**Implications**

- To protect against internal reports being used against Employers:
  - Legal counsel should commission the report
  - When report commissioned, should be clear that report prepared in anticipation of potential litigation
  - Clear that investigation and reports subject to solicitor-client privilege, litigation privilege and confidentiality
  - Any disclosure of report must be limited, through counsel, and does not constitute waiver

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Human Rights & Privacy Cases

**Human Rights & Privacy Cases**

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Human Rights & Privacy Cases

*Faldreau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, B.C. Human Rights Tribunal (2009)

**Facts**

- Single father with sole custody of 10-year-old son employed as a mover
- He would not allow son to be home alone on weekdays after school, and when necessary, made school care arrangements
- When hired, employee knew job required irregular hours, including occasional overtime

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Human Rights & Privacy Cases

*Faldareau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, B.C. Human Rights Tribunal (2009)

**Facts** (cont'd)

- Several months later, employee advised Employer he would finish a moving job that started before 4:00 p.m., but would not start new job at or after 4:00 p.m.
- Wanted to select jobs so he could be home with son
- Not acceptable to Employer; employee terminated
- Employee filed HR complaint for discrimination on basis of family status

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Human Rights & Privacy Cases

*Faldareau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, B.C. Human Rights Tribunal (2009)

**Principles**

- This type of discrimination requires "a serious interference with a substantial parental or other family duty or obligation"
- No human right to refuse overtime
- Employee's situation not outside ordinary parental obligations that juggle employment demands
- Employer not required to accommodate the single father
- HR complaint was dismissed

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Human Rights & Privacy Cases

*Faldareau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, B.C. Human Rights Tribunal (2009)

**Implications**

- An Employer is likely justified in requiring employees to work overtime to meet business obligations
- To trigger accommodation, overtime must cause "substantial interference" with family obligations
- Normal demands of juggling child care alone do not qualify as "substantial" parental obligations

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*Rawleigh v. Canada Safeway*, Alberta Human Rights Tribunal (2009)

**Facts**

- 27 year employee worked as a general clerk
- Sought exemption from night shift work to be at home for wife with a degenerative eye condition
- Employer offered accommodation as cashier which did not require night shift work
- Employee refused and requested status change to restricted part time, which reduced work hours
- Alleged discrimination based on family status

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*Rawleigh v. Canada Safeway*, Alberta Human Rights Tribunal (2009)

**Principles**

- Broad definition of family status: "the status of being related to another person by blood, marriage or adoption"
- Employer's policy requiring night shift work arose out of CA and based on genuine business reasons
- Application to Rawleigh's unique circumstances rendered policy discriminatory
- Employer failed to accommodate to point of undue hardship

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*Rawleigh v. Canada Safeway*, Alberta Human Rights Tribunal (2009)

**Implications**

- Accommodation process critical to outcome if complainant denied preferred solution
- Employer must be able to prove *all* options were considered and have concrete proof they are not viable
- Discrimination for family status broadly interpreted which may open avenues to variety of claims

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Human Rights & Privacy Cases

*Coast Mountain Bus v. CAW – Canada*, B.C. Supreme Court (2009)

**Facts**

- Employer implemented Attendance Management Program (“AMP”)
- AMP identified employee absence which exceeded average attendance rate
- If no attendance improvement, medical evidence as to employee’s fitness to Return to Work (“RTW”) required, including whether accommodation needed

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Human Rights & Privacy Cases

*Coast Mountain Bus v. CAW – Canada*, B.C. Supreme Court (2009)

**Facts** (cont'd)

- Medical information only seen by employer’s Occupational Health group handling RTW
- If medical evidence showed employee fit to RTW without restrictions, employer set attendance expectations for 2-year period
- Employer considered individual circumstances of each employee

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Human Rights & Privacy Cases

*Coast Mountain Bus v. CAW – Canada*, B.C. Supreme Court (2009)

**Principles**

- Employer entitled to implement AMP which set threshold attendance levels
- These cannot be arbitrary
- Program should be flexible and based on accommodation principles
- Employees with disabilities to be treated on *individual* basis

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Coast Mountain Bus v. CAW – Canada, B.C. Supreme Court (2009)

**Implications**

- Good news decision for Employers
- Employer has right to monitor, manage, and require employee attendance
- Employer not required to employ absent employees indefinitely
- If absence due to disability, employer *must* consider and meet its duty to accommodate to point of undue hardship
- AMP should allow parties to discuss accommodation of disability at any stage of AMP

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Government of British Columbia v. BCGSEU, B.C. Court of Appeal (2008)

**Facts**

- Employee of B.C. Liquor Distribution Branch began to steal alcohol from the store he managed
- When confronted, he admitted thefts, confessed to being an alcoholic, and entered rehab at his own cost, which was successful
- Employee terminated for theft and union grieved
- Arbitrator upheld termination, but alcoholism was a mitigating factor in employer's choice of discipline

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Government of British Columbia v. BCGSEU, B.C. Court of Appeal (2008)

**Facts** (cont'd)

- Union appealed decision to LRB & argued termination should be assessed under non-culpable framework
- LRB concluded the disease of alcoholism is a physical or mental disability
  - Employee's dismissal by the employer was therefore *prima facie* discriminatory
  - Employer could have accommodated employee by means other than termination
- Employer appealed

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*Government of British Columbia v. BCGSEU*,  
B.C. Court of Appeal (2008)

**Principles**

- Critical question is whether employer's decision was influenced by the employee's disability
- The essence of discrimination is the arbitrary imposition of a negative impact upon a person/group
- Here, decision to terminate was not arbitrary, but related to the individual's employment misconduct – treated the same as any thief would be
- Irrelevant that conduct may have been influenced by alcohol dependency

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*Government of British Columbia v. BCGSEU*,  
B.C. Court of Appeal (2008)

**Implications**

- Human rights legislation is not designed to prohibit Employers from terminating an employee for a crime related to his/her employment
- An employee's dismissal for theft is not absolved by virtue of physical or mental disability

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*Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*, Ontario Court of Appeal (2009)

**Facts**

- After *Entrop*, Imperial Oil investigated new drug testing technologies to identify current cannabis impairment
- Imperial received expert advice that oral fluid (saliva) drug testing could show current impairment
- Effective July 2003, Imperial resumed random drug testing of safety-sensitive employees, using oral fluid testing technology, at an Ontario facility

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Human Rights & Privacy Cases

*Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*, Ontario Court of Appeal (2009)

**Facts** (cont'd)

- The union said the testing violated its collective agreement, and an Ontario arbitrator agreed
- The Ontario Court of Appeal dismissed Imperial's further appeal which was based on a variety of technical and evidentiary grounds, including issues with the Canadian Model

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Human Rights & Privacy Cases

*Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*, Ontario Court of Appeal (2009)

**Principles**

- Unless reasonable grounds can be shown, or union agreement can be obtained, employers in Ontario will not be able to impose random testing on their workers even if it is using a test that indicates only current impairment

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Human Rights & Privacy Cases

*Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*, Ontario Court of Appeal (2009)

**Implications**

- Alberta and northern employers will have difficulty implementing any kind of random alcohol or drug testing scheme without either union agreement or proof of reasonable grounds for doing so in the particular workforce

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Human Rights & Privacy Cases

*Ottawa (City) v. Ottawa-Carleton Public Employees Union, Local 503*, Ontario Arbitration (Simmons, 2008)

**Facts**

- Municipal Employer operating long-term care facility
- Employer found knapsacks containing stolen goods on its premises and fired knapsack-owner for theft
- Union argued evidence taken from knapsacks was inadmissible because the Employer violated s. 8 of the *Charter* - the right to be secure against unreasonable search and seizure

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Human Rights & Privacy Cases

*Ottawa (City) v. Ottawa-Carleton Public Employees Union, Local 503*, Ontario Arbitration (Simmons, 2008)

**Principles**

- *Charter* does not apply to employment relationship between private parties
- *Charter* does not apply when government Employer exercises its private rights under contractual employment relationship
- Employees have lower reasonable expectation of privacy in public areas
- Expectation of privacy must be balanced against Employer's legitimate management rights

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Human Rights & Privacy Cases

*Ottawa (City) v. Ottawa-Carleton Public Employees Union, Local 503*, Ontario Arbitration (Simmons, 2008)

**Implications**

- Employees entitled to a measure of privacy, but reasonable for Employers to search items left unattended in public areas, particularly if employees:
  - Have been warned not to leave personal belongings in the area
  - Have been provided with secure area to store personal belongings
- Government employees are not entitled to increased privacy rights

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Human Rights & Privacy Cases

*George Byma and Burnswest, Alberta Information and Privacy Commissioner (2009)*

**Facts**

- Former Employer advised prospective Employer that complainant:
  - Capable at first but had not lived up to expectations
  - Made mistakes
  - “Stole” or wasted time
  - Would not hire her again in a million years
- Complainant alleged former and prospective Employers breached privacy legislation

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Human Rights & Privacy Cases

*George Byma and Burnswest, Alberta Information and Privacy Commissioner (2009)*

**Facts (cont'd)**

- Former Employer failed to respond to request for access to personal information
- Privacy Commissioner found reference provided and collected in accordance with privacy legislation
- Former Employer breached legislation by failing to respond to access request
- Privacy Commissioner also commented on evidence needed to prove full search of records was done in response to access request

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Human Rights & Privacy Cases

*George Byma and Burnswest, Alberta Information and Privacy Commissioner (2009)*

**Principles**

- Former Employers do not need consent to provide references to prospective Employers as long as they truthfully discuss employment related information
- Prospective Employers can collect same information without consent to evaluate employee for employment
- Neither former nor prospective Employer needs to provide applicant with notice of reference
- Organizations must respond to access requests or will be found to have breached privacy legislation

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 Human Rights & Privacy Cases

*George Byma and Burnswest, Alberta Information and Privacy Commissioner (2009)*

**Implications**

- Consent not needed for references
- Ensure references are truthful and limited to work-related comments
- Keep notes of references, but ask reference provider whether the reference is “confidential”
- When responding to access requests keeps notes about how and where you searched for records

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**Arbitration Cases**

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 Arbitration Cases

*Stirling Heights v. SEIU, Ontario Arbitration (Levinson, 2009)*

**Facts**

- Employee took lengthy medical leave after making several unusual harassment complaints against Employer
- Employee continued to display unusual behaviour during leave
- Ultimately employee certified fit to return to work
- Employer remained concerned about employee’s mental health

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 Arbitration Cases

*Stirling Heights v. SEIU, Ontario Arbitration (Levinson, 2009)*

**Facts** (cont'd)

- Employer refused to allow employee to return to work and gave her option of providing further medical information or undergoing IME
- Employee refused to cooperate and claimed the Employer had dismissed her

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 Arbitration Cases

*Stirling Heights v. SEIU, Ontario Arbitration (Levinson, 2009)*

**Principles**

- Employer has right and obligation to satisfy itself employee is fit to work
- Since employee had been absent due to illness, she had onus to establish her fitness
- Employee's strange behaviour gave Employer reasonable grounds to request additional medical information
- Having communicated the basis for its concern, Employer had no obligation to prepare list of specific questions for employee's physician

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 Arbitration Cases

*Stirling Heights v. SEIU, Ontario Arbitration (Levinson, 2009)*

**Implications**

- Employers can request proof of fitness for work, but must have reasonable and probable grounds for doing so
- Much easier to establish such grounds when the employee has been absent for a significant period of time

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*Independent Electricity System Operator v. Society of Energy Professionals*, Ontario Arbitration (Albertyn, 2009)

**Facts**

- Employee put on notice of substandard performance in a number of respects
- After additional warnings, employee was advised his job was in jeopardy if he did not improve
- Employee then put on formal 6-month review program
- After 3 months, performance didn't improve
- Employee dismissed & termination upheld after lengthy hearing

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*Independent Electricity System Operator v. Society of Energy Professionals*, Ontario Arbitration (Albertyn, 2009)

**Principles**

- Arbitrator found employee's performance did not meet the requirements reasonably expected of him, justifying the dismissal
- Employer's failure to continue the review program for the full 6 months was not fatal, because the employee had not shown improvement in the first 3 months

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*Independent Electricity System Operator v. Society of Energy Professionals*, Ontario Arbitration (Albertyn, 2009)

**Implications**

- Termination of employees for substandard performance is possible (even union employees), but should be preceded by coaching, written warnings, further training (where appropriate) and a final warning that the employee must improve or will be dismissed
- An Employer who terminates a substandard union employee should expect a grievance and, quite possibly, a lengthy arbitration process

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**Arbitration Cases**

*B.C. (Ministry of Public Safety) v. B.C. Government & Service Employees' Union*, B.C. Arbitration (Steeves, 2009)

**Facts**

- Employee intentionally and repeatedly released unauthorized information via email to more than one media "tip line" regarding health and safety issues in correctional institute
- Employee had lengthy service without any recorded discipline
- Actions worthy of discipline, but did not warrant dismissal and Arbitrator referred issue of punishment back to the parties

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**Arbitration Cases**

*B.C. (Ministry of Public Safety) v. B.C. Government & Service Employees' Union*, B.C. Arbitration (Steeves, 2009)

**Facts** (cont'd)

- Damages in lieu of reinstatement might be appropriate
- Employee's conduct raised question as to whether he should remain in supervisory position. Demotion more appropriate

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**Arbitration Cases**

*B.C. (Ministry of Public Safety) v. B.C. Government & Service Employees' Union*, B.C. Arbitration (Steeves, 2009)

**Principles**

- A higher standard is expected in those industries where confidentiality of information is an important requirement of the work
- Must always consider gravity of offence along with employee's history (i.e. no prior disciplinary record and apology given)
- Discipline must be consistent with other similar cases
- Actions must be "vitriolic, obsessive or extreme" in order to warrant dismissal

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 Arbitration Cases

*B.C. (Ministry of Public Safety) v. B.C. Government & Service Employees' Union*, B.C. Arbitration (Steeves, 2009)

**Implications**

- Duty of loyalty owed by employees is significant but not absolute
- Employers must balance their interests with those of employees and public in regard to the exposure of any “wrongdoing”
- Dismissal cannot be automatic response to “whistle blowing”, otherwise interests of Employers and public not served because employees will fear losing their jobs if “wrongdoing” is exposed

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 Arbitration Cases

*Keating v. Ontario Ministry of Community Safety and Correctional Services*, Ontario Arbitration (O’Neil, 2009)

**Facts**

- Employee, manager of a provincial jail, charged with criminal harassment
- Employee’s charge and position at jail were reported in newspaper
- Employer interviewed employee
- Employee, on advice of his criminal lawyer, refused to answer any questions about events giving rise to criminal charge

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 Arbitration Cases

*Keating v. Ontario Ministry of Community Safety and Correctional Services*, Ontario Arbitration (O’Neil, 2009)

**Facts** (cont)

- Employee’s refusal was based on his *Charter* right against self-incrimination
- Employee believed he could not be compelled to give evidence that would incriminate him
- Employer acted on the evidence it obtained from others during its investigation and terminated employee’s employment
- Arbitrator found employee had to answer Employer’s questions during Employer investigation

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 Arbitration Cases

*Keating v. Ontario Ministry of Community Safety and Correctional Services*, Ontario Arbitration (O'Neil, 2009)

**Principles**

- Employee did not have a right to avoid answering Employer's questions - the questions had nothing to do with the criminal charge against him

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 Arbitration Cases

*Keating v. Ontario Ministry of Community Safety and Correctional Services*, Ontario Arbitration (O'Neil, 2009)

**Implications**

- During Employer disciplinary investigations, employees may not be able to refuse to answer questions – provided that the answers will not be used for other purposes

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 Arbitration Cases

*EV Logistics v. Retail Wholesale Union, Local 580*, B.C. Arbitration (Laing, 2008)

**Facts**

- Employee discharged for creation of blog containing racist and offensive material
- Blog clearly identified employee's Employer by name
- After the Employer's discovery of the blog, the employee removed it and replaced it with an apology
- Employee had history of mental illness
- Termination found to be excessive response

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**Arbitration Cases**

*EV Logistics v. Retail Wholesale Union, Local 580,*  
 B.C. Arbitration (Laing, 2008)

**Principles**

- Mitigating factors such as youth, a clean disciplinary record, & a sincere apology may be enough to offset off-duty conduct with potentially harmful effects for Employer's business interests
- Absence of specific reference to Employer and negative comments about Employer's operations in blog make it more difficult to justify dismissal

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**Arbitration Cases**

*EV Logistics v. Retail Wholesale Union, Local 580,*  
 B.C. Arbitration (Laing, 2008)

**Implications**

- Reprehensible off-duty conduct may not justify termination even where great potential damage to the Employer's business interests exists
- Employees are afforded a certain degree of freedom in off-duty creation of blogs, or posts on social networking sites, such as Facebook or Twitter, so long as statements do not directly attack the Employer

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**Arbitration Cases**

*City of Ottawa v. Ottawa Professional Firefighters Association,*  
 Ontario Divisional Court (2009)

**Facts**

- Employer implemented a policy requiring firefighters to consent to having mandatory criminal records checks every 3 years
- Arbitrator found the Employer could not unilaterally implement such a policy
- On appeal, Court found that there were no circumstances when Employer could require employees to consent to criminal records checks

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**Arbitration Cases**

*City of Ottawa v. Ottawa Professional Firefighters Association,*  
 Ontario Divisional Court (2009)

**Principles**

- Employers may have difficulty implementing policies requiring mandatory criminal records checks for existing employees
- Arbitrator and court did not comment on policy of requiring criminal records checks as condition of employment

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**Arbitration Cases**

*City of Ottawa v. Ottawa Professional Firefighters Association,*  
 Ontario Divisional Court (2009)

**Implications**

- Policies requiring criminal records checks may be under attack by employees and unions
- Unionized employers may want to negotiate these provisions with unions

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**Arbitration Cases**

*Alberta (Health Services) and H.S.A.A. (Re Munro),*  
*Alberta Arbitration (Price, 2009)*

**Facts**

- Employee terminated for innocent absenteeism - MS
- Employee's LTD claim accepted beyond 24 month initial assessment period
- Medical reports indicated Employee would continue to be unable to Return to Work, and Employer relied on these reports in terminating employee
- Employee grieved, and termination overturned at arbitration

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AR Arbitration Cases

*Alberta (Health Services) and H.S.A.A. (Re Munro),  
Alberta Arbitration (Price, 2009)*

**Principles**

- Employer had just cause to terminate employee for non-culpable absenteeism
- But termination null and void due to non-compliance with agreed disciplinary procedures
- Employee dismissed without warning, notice, meeting, or union representation
- Arbitrator: reasonable to interpret "discipline" as including non-culpable dismissals

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AR Arbitration Cases

*Alberta (Health Services) and H.S.A.A. (Re Munro),  
Alberta Arbitration (Price, 2009)*

**Principles** (cont'd)

- Employees facing discipline for culpable conduct entitled to meeting and to union representation
- Absurd not to extend same fundamental rights to employee facing dismissal for non-culpable reasons
- Employee entitled to damages for loss of dignity caused by Employer being unduly insensitive

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AR Arbitration Cases

*Alberta (Health Services) and H.S.A.A. (Re Munro),  
Alberta Arbitration (Price, 2009)*

**Implications**

- This decision appears to confuse culpable and non-culpable terminations
- Terminating for non-culpable absenteeism may be subject to same procedures as for discipline
- Employers may wish to address non-culpable absenteeism in CBA to distinguish from discipline
- Careful consideration and justification always required when terminating for non-culpable absenteeism

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 Arbitration Cases

*City of Calgary and Calgary Fire Fighters Local 255,  
 Alberta Arbitration (Pollock, 2009)*

**Facts**

- As a result of an arbitration award, City required to pay certain employees retroactive pay
- City then determined that it had overpaid some employees and initiated a process to recover those funds
- City did not have the consent of the Association or the individuals to make payroll deductions
- Association grieved, claiming return of all monies collected, damages and arbitration costs

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 Arbitration Cases

*City of Calgary and Calgary Fire Fighters Local 255,  
 Alberta Arbitration (Pollock, 2009)*

**Principles**

- Arbitration panel said City was entitled to collect overpayment but its process was flawed
- It failed to obtain employee consent prior to making payroll deductions as required by *ESC*
- Section 12 of the *Employment Standards Code*, which deals with the process of payroll deductions, set-offs and claims against the earnings of employees, applies to unionized settings and collective agreements

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 Arbitration Cases

*City of Calgary and Calgary Fire Fighters Local 255,  
 Alberta Arbitration (Pollock, 2009)*

**Principles** (cont'd)

- But, as City acted in good faith and had right to recover, no basis for return of the monies or any interest payable to employees
- Majority of panel found because an Association right had been breached, entitled to general damages, which were awarded in the amount of \$5,000

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MR Arbitration Cases

*City of Calgary and Calgary Fire Fighters Local 255, Alberta Arbitration (Pollock, 2009)*

**Implications**

- Employee consent is the safest approach to employee deductions
- The Employment Standards policy of allowing Employers to deduct for overpayments occurring within 6 months might not apply in unionized settings, requiring Employers to grieve to recover overpayments
- Arbitrators continue to award general damages for breaches of a collective agreement

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**Labour Relations Board Decisions**

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MR Labour Relations Board Decisions

*Plourde v. Wal-Mart Canada, Supreme Court of Canada (2009)*

**Facts**

- A Wal-Mart store in Quebec was certified
- Union and Employer unable to negotiate first collective agreement
- Union requested appointment of an arbitrator to arbitrate first collective agreement
- Same day as Union's request was made, Wal-Mart announced the store would close in 3 months

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 Labour Relations Board Decisions

*Plourde v. Wal-Mart Canada*, Supreme Court of Canada (2009)

**Facts** (cont'd)

- Weeks before scheduled closing date, Wal-Mart told employees their employment would be ending immediately
- Employees argued that their termination occurred because they had supported the union and were union activists
- Quebec Labour Commission and courts found that Wal-Mart's reason for closing was genuine
- The Supreme Court agreed

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 Labour Relations Board Decisions

*Plourde v. Wal-Mart Canada*, Supreme Court of Canada (2009)

**Principles**

- Employers may choose to cease operations and terminate employees after becoming unionized
- SCC recognized that labour legislation is a balance between employee rights and Employer rights – not all rights favour unions/employees
- This decision may not have full application outside Quebec, because of specific provision in Quebec labour law

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 Labour Relations Board Decisions

*Plourde v. Wal-Mart Canada*, Supreme Court of Canada (2009)

**Implications**

- Supreme Court acknowledges an Employer's right to make business decisions, even when certified
- Supreme Court also recognizes that Employers have rights in, and are entitled to protection through, labour legislation

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 Labour Relations Board Decisions

*Old Dutch Foods v. UFCW 401*, Alberta Labour Relations Board (2009)

**Facts**

- Employer successfully resisted a union security clause in its CBA for almost 40 years
- During a lockout, the Union filed an ULP complaint challenging Employer's refusal to agree to mandatory deduction of union dues (i.e. the "Rand formula")
- Union argued Alberta Code's failure to require the Rand formula violated freedom of association under the *Charter*

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 Labour Relations Board Decisions

*Old Dutch Foods v. UFCW 401*, Alberta Labour Relations Board (2009)

**Principles**

- Based on *BC Health Services*, the Board confirmed that freedom of association protects the process of collective bargaining
- Board also cited SCC authority for the proposition that the payment of dues constitutes a form of association
- From this, the Board inferred that Rand formula is included within the protection that freedom of association affords

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 Labour Relations Board Decisions

*Old Dutch Foods v. UFCW 401*, Alberta Labour Relations Board (2009)

**Principles (cont'd)**

- Board opined that absence of a mandatory Rand formula in the *Code* financially weakens unions and enfeebles their ability to secure a fair outcome regarding workplace issues
- Based on these considerations, Board declared that the Alberta *Code* violated freedom of association

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 Labour Relations Board Decisions

*Old Dutch Foods v. UFCW 401*, Alberta Labour Relations Board (2009)

**Implications**

- Most Alberta collective agreements already contain the Rand formula or some stronger type of union security clause (e.g. mandatory membership)
- Inclusion of a mandatory Rand formula in the *Code* may make it easier for unions to secure first collective agreements
- More importantly, this case reveals Board's willingness to take an expansive view of the protection that freedom of association affords collective bargaining

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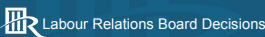
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 Labour Relations Board Decisions

*Armstrong v. Boilermakers Local Lodge No. 146*,  
 Alberta Court of Queen's Bench (2009)

**Facts**

- Armstrong was Boilermakers' Union member
- He accepted management position with a construction management company that did not directly employ unionized employees
- Union told him he had no right to counsel at the Union discipline hearing, but later said they would have allowed it if he had asked
- He didn't attend hearing and was fined \$5,000
- LRB upheld discipline, but Court overturned it

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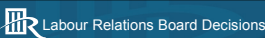
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 Labour Relations Board Decisions

*Armstrong v. Boilermakers Local Lodge No. 146*,  
 Alberta Court of Queen's Bench (2009)

**Principles**

- Union failed to comply with member's right to legal counsel at discipline hearing – irrelevant that member did not request it
- Union cannot discipline a member working non-union unless the Union can supply reasonable alternate employment
- Since the non-union job was not comparable to the jobs available under the Union's CBA, Union not able to provide reasonable alternate employment & unable to discipline

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 Labour Relations Board Decisions

*Armstrong v. Boilermakers Local Lodge No. 146,*  
 Alberta Court of Queen's Bench (2009)

**Implications**

- Case highlights important constraints upon unions punishing their members who work for non-union companies, particularly if in management positions
- Decision is being appealed

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 Labour Relations Board Decisions

*UA Local 488 and IBEW Local 424 v. Firestone Energy Corporation,*  
 Alberta Labour Relations Board (2009)

**Facts**

- Employer and union, CLAC, entered a renewal collective agreement before the "open period" began
- Employees voted to ratify the new agreement, including giving up the open period
- Two competing unions, which didn't have enough employee support to file own certification applications, challenged the renewal
- LRB overturned precedents which allowed open periods to be closed by employee ratification

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 Labour Relations Board Decisions

*UA Local 488 and IBEW Local 424 v. Firestone Energy Corporation,*  
 Alberta Labour Relations Board (2009)

**Principles**

- Board decided it should have greater liberty to change existing precedents
- There was effective ratification of the new collective agreement, but not for the purpose of closing the open period – original open period still existed
- It was an ULP for the Employer to seek, initiate, and negotiate a new collective agreement that would have the effect of removing the open period

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 Labour Relations Board Decisions

*UA Local 488 and IBEW Local 424 v. Firestone Energy Corporation,  
Alberta Labour Relations Board (2009)*

**Implications**

- This case overturns significant longstanding decisions and creates uncertainty about the Board following its precedents, particularly in construction
- Early renewal of collective agreements does not close the open period
- Employers and unions must be careful how they handle early renewals
- This decision is being challenged

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**THANK YOU  
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seminar reception.

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