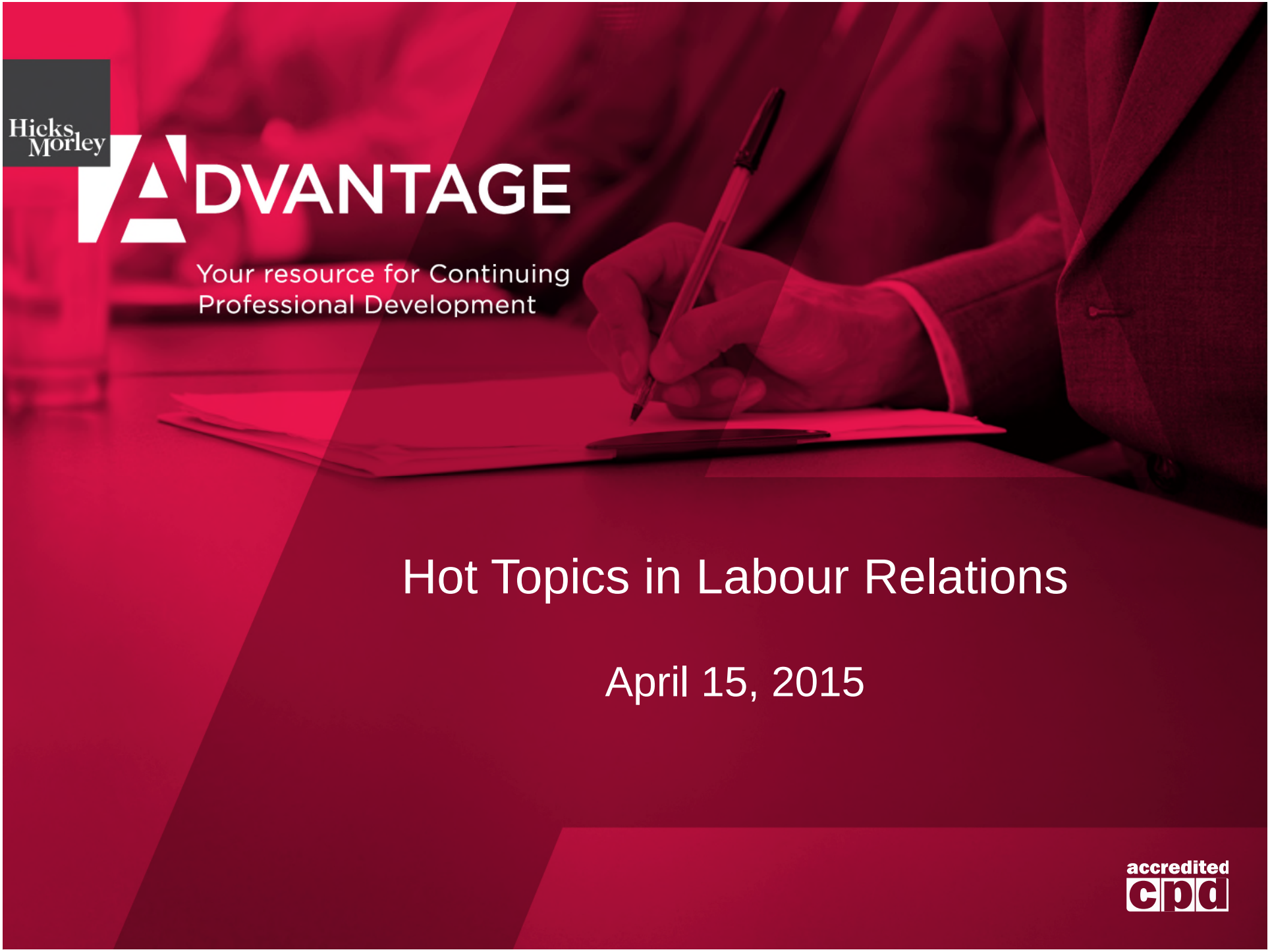

Hot Topics in Labour Relations

April 15, 2015

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Hot Topics in Labour Relations

Henry Y. Dinsdale
Amanda J. Hunter
Paul E. Broad
Julia M. Nanos
John J. Bruce

Hicks Morley

Agenda

- The Supreme Court of Canada: The *Charter of Rights and Freedoms* and "Constitutionalizing" Labour Relations
- Ethical Communications with Expert Witnesses
- Ontario Government "Changing Workplaces" Consultation
- What do Tweeting Toronto Firefighters and the Toronto Maple Leafs' Stanley Cup Efforts Have in Common?
- Quirky Cases and Lessons

The Supreme Court of Canada: The *Charter of Rights and Freedoms* and "Constitutionalizing" Labour Relations

Henry Y. Dinsdale

Hicks Morley

The "New" Labour Trilogy

Will review:

- Context for the decisions
- What they say
- Questions for the future

The Context

- *Canadian Charter of Rights and Freedoms* ("*Charter*")
  - adopted in 1982
- Applies to government actors and actions
- Includes:
  - public and quasi-public actors
    - actions as employers
    - what they legislate as government

The Context

- Section 2(d) of the *Charter*:

Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association.

The Context

- If an action or statute violates one of the *Charter* rights or freedoms, it can still be saved (section 1)
- Must be able to **prove** that the violation is "demonstrably justifiable in a free and democratic society."

The Context

The Original "Labour Trilogy" (1987)

Concluded:

- the roles and rights of unions are fundamentally political;
- collective bargaining is a statutory right of relatively recent origin;
- there is no Constitutional right to strike since no individual had the protected "right" to walk off the job (note: they have the freedom to, but there may be consequences);
- no Constitutional right to collective bargaining;
- no Constitutional right to strike.

The Context

The Evolution of the "Labour Trilogy"

Dunmore (2001)

- challenged the exclusion of agricultural workers from the Ontario *Labour Relations Act, 1995*;
- found that agricultural workers should have the right to join an association to make collective representations to their employer;
- really an equality case jammed into an associational rubric;
- the *Charter* forcing government to act where they haven't (the "chilling" effects of government not acting).

The Context

The Evolution of the "Labour Trilogy"

B.C. Health Services (2007)

- rejection of the "narrow approach" to freedom of association in the Labour Trilogy;
- the government of B.C. over rode terms and conditions of employment negotiated in collective agreements in the health care sector without union consultation.

The Context

The Evolution of the "Labour Trilogy"

B.C. Health Services (2007)

SCC held:

- section 2(d) protects a right "to a process of meaningful collective bargaining";
- no protection of the outcomes, just the process;
- the B.C. statutes overrode the process with no attempt to preserve even the semblance of a collective bargaining process;
- did the B.C. government "substantially interfere" with the collective bargaining process? "Yes."
- was the interference "justified in a free and democratic society"? "No."

The Context

The Evolution of the "Labour Trilogy"

Fraser (2011)

- *Dunmore* Round Two
- Ontario's *Agricultural Employees Protection Act*
- *Act* included:
  - the right to form associations without interference;
  - the right to make proposals to employers; and
  - employers obligated to consider the proposals in good faith.

The Context

The Evolution of the "Labour Trilogy"

Fraser (2011)

SCC holds:

- the *Charter* right is the right to associate to meaningfully seek to achieve collective goals;
- therefore, the right to bargain collectively is a "derivative right," i.e. it is derived from the right to meaningfully associate; and
- in every case the question is whether associational (collective) action to achieve workplace goals has been rendered "impossible."

The Context

The Evolution of the "Labour Trilogy"

Fraser (2011)

SCC holds:

- the *Act* does not violate the *Charter*;
- the *Charter* requires "a process to ensure meaningful association in pursuit of workplace goals";
- must be a right to form a representative association;
- employer must consider representations in good faith; and
- there must be a quasi-jurisdictional mechanism to enforce an employer's good faith consideration.

The Context

The Evolution of the "Labour Trilogy"

Fraser (2011)

What was not protected by *Fraser*:

- any particular labour relations model (*Wagner Act*);
- dispute resolution for collective bargaining;
- no right to strike;
- no right to interest arbitration; and
- no protection of outcomes of this process.

The "New Labour Trilogy"

Three new 2015 cases from the SCC completely change the landscape

1) *Mounted Police Association of Ontario* ("*MPAO*")
2) *Saskatchewan Federation of Labour* ("*SFL*")
3) *Meredith v. Canada* ("*Meredith*")

The "New Labour Trilogy"

1) *MPAO*

- Mounties are statutorily excluded from collective bargaining
- This is unique among Canadian Police Services
- Mounties did have a representative structure called the SRRP
  - elected representatives;
  - funded by management;
  - structured by management;
  - could make representations on working condition but not wages;
  - but participated in a "pay council"; and
  - final decisions were management's.

The "New Labour Trilogy"

1) *MPAO*

- the SCC held that the SRRP process violated the freedom to associate

To find a *Charter* violation:

- it is now no longer necessary to show association is "impossible";
- only need to show "substantial interference" with meaningful collective bargaining;
- now avoid using the term "derivative right."

The "New Labour Trilogy"

1) *MPAO*

- There was substantial impairment in this case
  - did not have freedom over the association's rules & constitution;
  - did not have control over the association's financial administration; and
  - did not have control over the activities the association chose to pursue.

The "New Labour Trilogy"

1) *MPAO*

- Was not saved by section 1
- To be saved by section 1, as part of proving that the restriction on the right was demonstrably justifiable in a free and democratic society, must show:
  - pressing and substantial objectives;
  - rational connection to the objective; and
  - carefully tailored, minimal impairment.

The "New Labour Trilogy"

2) *SFL*

- Saskatchewan essential services legislation in response to 2007 public sector strikes
- Government could:
  - declare services essential as they saw fit;
  - declare certain classifications "essential";
  - determine the number of "essential" employees;
  - determine the identification of "essential" employees;
  - striking by an essential services employee forbidden; and
  - no ultimate dispute resolution mechanism established.
- "Bad facts make bad law."

The "New Labour Trilogy"

2) *SFL*

- The Court explicitly overturns the "Labour Trilogy"
- "The ability to collectively withdraw services is an essential component through which workers pursue their goals," an "indispensable part of the system"
- Without the right to strike "a Constitutionalized right to bargaining collectively is meaningless"
- Making no provision for a right to strike is *per se* a violation of section 2(d)

The "New Labour Trilogy"

2) *SFL*

- Not saved by section 1
- Court applies the "substantial interference" test
- Court didn't like:
  - unilateral authority of public employers to determine essential services employees;
  - lack of adequate review mechanism; and
  - lack of meaningful dispute resolution mechanism.

The "New Labour Trilogy"

2) *SFL*

- Court did find that some statutory amendments did not violate the *Charter*:
  - increasing written support needed for secret ballot certification vote from 25% to 45% collected within 3 months rather than 6 months;
  - by requiring a vote in every case for certification; and
  - decrease the % of written support for a decertification vote from 50% to 45%.

The "New Labour Trilogy"

3) *Meredith*

- RCMP again
- Through the SRRP process, because of the financial crash of 2008, Treasury Board decreased salary increases previously set
- Done through the *Expenditure Restraint Act*
- Found no violation of section 2(d) because the restraints were shared by all public servants and did not preclude wage consultation.

Questions for the Future

- Any legislation that restricts the right to strike is unconstitutional *per se* and must be justified under section 1
- Section 1 can be a tough test to meet
- Expect challenges to any context in which public sector employees are denied the right to strike
- There may be calls for changes to legislation to ensure the right to strike is being exercised properly – greater scrutiny of union decision-making/voting (not the union's right to strike, the individual rights of employees exercised collectively)
- What about exclusions for management?
- What about the constitutional right to strike during the life of a collective agreement?
- What about the right to strike of the minority employees?

Ethical Communications with Expert Witnesses

Amanda J. Hunter

Hicks Morley

Moore v. Getahun, 2015 ONCA 55

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Rules of Civil Procedure

- Rule 4.1.01(1) specifically addresses the duty of an expert witness:

> It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Rules of Civil Procedure

- Rule 53.03(2.1) provides that an expert report must contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

Rules of Civil Procedure

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 1

  An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings. An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 2

  At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and content of the expert's duties, including the requirements of independence and objectivity.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 3

  In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 4

  The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances in the case.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 5

  An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 6

  An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 7

  An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

The Advocates' Society, *Principles Governing Communications with Testifying Experts*

- Principle 8

  At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

Ontario Government "Changing Workplaces" Consultation

Paul E. Broad

Hicks Morley

"Changing Workplaces" Consultation

- Initial commitment – 2014 Budget
- Formal announcement – February 17, 2015
- Review of *Labour Relations Act, 1995* ("*LRA*") and *Employment Standards Act, 2000* in light of:
  - changing economy; and
  - changing workplaces.

Scope of Consultations

- Government identified some topics:
  - Non-standard working relationships, including temporary jobs, part-time work, and self-employment;
  - Service sector;
  - Globalization and trade liberalization;
  - Technological change; and
  - Diversity.
- Only excluded areas:
  - Construction industry provisions of the *LRA*;
  - Minimum wage; and
  - Policy discussions subject to other independent processes.

Two Special Advisers

- C. Michael Mitchell
- The Honourable John C. Murray
- Will lead and coordinate the consultations
- Provide a written report with recommendations to the Ministry

Process

- Regional consultations
- Targeted stakeholder meetings
- Written submissions
- Undertaking research

Employer Participation

- Critical that government hears the voices of employers
  - Economic realities of modern workplace;
  - How changes to employment are impacting businesses; and
  - Impact of government regulation – what currently works and what does not.
- Strong need for evidence-based submissions

What do Tweeting Toronto Firefighters and the Toronto Maple Leafs' Stanley Cup Efforts Have in Common?

Julia M. Nanos

Hicks Morley

Some Things Never Change!

- When it comes to employee discipline for off-duty conduct, the principles of the 1967 *Millhaven Fibres* decision continue to apply

City of Toronto v. Toronto Professional Firefighters' Association (2 cases)

- Discipline for off-duty social media comments considered
  - Arbitrator Newman – termination of employment upheld
  - Arbitrator Misra – 3-day suspension warranted; termination excessive

What are the *Millhaven* criteria?

1. The conduct of the employee harms the Company's reputation or product;
2. The employee's behaviour renders him or her unable to satisfactorily perform his or her duties;
3. The employee's behaviour leads to the refusal, reluctance or inability of other workers to work with the employee;
4. The employee is guilty of a serious breach of the *Criminal Code* or of a human rights policy or code, thus rendering his or her conduct injurious to the reputation of the Company and its employees; and
5. The employee's conduct makes it difficult for the Company to properly manage its works and direct its working forces.

Do All Criteria of the *Millhaven* Test Need to be Established?

- No!
- Discipline may be warranted even if the employer is only able to establish one of the *Millhaven* criteria
- Discipline must be proportional

Other Considerations

- Does the employer have a human rights policy, social media policy, or code of conduct that addresses social media behaviour?
- Have these policies been communicated to employees?
- Do the tweets identify the employer?
- How egregious are the employee's violations?
- Were the violations repeated or a single incident?

Other Considerations

- Did the employee understand the nature of social media?
  - Arbitrators clear that social media users are responsible for understanding the risks associated with their personal social media usage.
- Does the employee's work require a degree of public trust and respect?
  - Employees who work with the public, such as firefighters, EMS workers, police officers and teachers, may be held to a higher standard.

Quirky Cases and Lessons

John J. Bruce

Hicks Morley

Nahrgang v. Unique Personnel Canada, 2009 HRTO 452 (CanLII)

- Shunt driver ran over family of geese with his truck
- Charged under *Criminal Code* for "*willfully causing unnecessary suffering to a Gosling by purposely running a motor vehicle over it*"
- He was removed from GE assignment
- He brought a *Human Rights Code* Application alleging discrimination on the basis of "record of offences"
- Dismissed: a charge ≠ record of offences
- Lesson: Record of offences means a conviction for:
  - a pardoned *Criminal Code* conviction offence
  - a provincial offence conviction

(City) and C.U.P.E., Local 831 (Brand) (Re), 94 C.L.A.S. 67 (R.O. MacDowell)

- City introduced Smart Cars for its Property Standards Officers – by-law infractions
- PSOs objected: Small Car was a funny looking little vehicle that did not project a suitable law enforcement image and the greater visibility impeded ability to do their job. Unfair that PSOs given Smart Cars and other employees had Honda Hybrids. Also suggested that greater visibility was an intrusion into employees' privacy rights
- Grievor alleged he had a psychological disability that made it impossible for him to drive the Smart Car: human rights violation.

(City) and C.U.P.E., Local 831 (Brand) (Re), 94 C.L.A.S. 67 (R.O. MacDowell)

- Doctor's Note: "problem with panic/anxiety in small cars, e.g. Smart Cars"
- Psychologist: "Motor vehicle anxiety"
- Arbitrator Held: The grievor had not been truthful with his doctors and psychologists rendering their opinions of no value
- Grievance dismissed
- Lesson: Many diagnoses are based on self-reporting – therefore, undermining the grievor's credibility undermines the medical evidence

Seneca College and OPSEU, 2014 CanLII 39592 (ON LA) (Jesin, July 23, 2014)

- Discrimination on the basis of creed
- FT teacher at the college, but also taught computer classes at a Jewish high school know as CHAT
- Asked the college to accommodate his morning teaching schedule at CHAT by scheduling his college classes after 1 p.m.
- Grievor had sincerely held belief that he is required by his faith to give back to his community
- Held: Failure to schedule the grievor such that he could teach in the mornings at CHAT was not discrimination

Seneca College and OPSEU, 2014 CanLII 39592 (ON LA) (Jesin, July 23, 2014)

- In essence, would require the College to accommodate the grievor's desire to hold a second job
- Grievance dismissed
- Lesson:
  - not all life choices related to a human rights ground need to be accommodated;
  - needs vs. wants; and
  - where do you draw the line?

MacLean v. The Barking Frog, 2013 HRTO 630

- Allegation of discrimination on the basis of gender
- Cover charge for women less than for men
- Disadvantage: Discourages men from entering bar and makes them feel unwelcome
- HRTO: Quite the contrary. More women = more men.
- Stereotype: There is still a woman vs. man power imbalance. Higher cover charge is not demeaning to men
- Application dismissed
- Lesson: Have to demonstrate a distinction on a prohibited ground that creates a disadvantage by perpetuating a stereotype or disadvantage

Cenanovic v. Bourbon St. Grill, 2014 HRTO 1811

- Allegation of discrimination on the basis of gender
- Ad placed in Kijiji for a female server at the restaurant
- Ad asked the applicants to send resume with picture
- Respondent: "It is my own experiences, sometimes the patrons especially the aged patrons like to talk to female servers. It is my observation and experience that some female servers are more attentive and easy to talk. It is undeniable that in most of the companies or food industries, the servers, the front desk receptionists are female. It is not gender discrimination at all."

Cenanovic v. Bourbon St. Grill, 2014 HRTO 1811

- Held: It constituted adverse treatment to tell applicants they could not apply for a job because of their male gender. Violated his rights.
- Tribunal also found that "a picture is not necessary to discern an applicant's job experience and customer service skills"
- Lesson:
  - do not gender-hire absent a BFOR; and
  - do not ask for applicant's picture unless you are a modelling or acting agency.

***Bombardier Aerospace and Unifor, Local 112 (Grievance of Neil McDougall)*, W.B. Rayner, November 7, 2014**

- Grievor claimed to have a knee injury in order to avoid a transfer to another work area
- You-tube video taken by his daughter showed him at the gym doing repetitive leg presses starting at 635 lbs up to 1000 lbs
- Arbitrator found cause for discipline but termination too severe
- Motive was to avoid a transfer not to defraud the company
- Reinstate without compensation

***Bombardier Aerospace and Unifor, Local 112 (Grievance of Neil McDougall)*, W.B. Rayner, November 7, 2014**

- Lesson: Social media emails, texts, phone records and data dumps continue to be a key part of workplace investigations: you need expertise as to how to appropriately secure this evidence
    - technical knowledge
    - privacy
    - privilege
    - litigation hold
    - spoliation
    - court injunctions

Van den Boogaard v. Vancouver Pile Driving Ltd., 2014 BCCA 168 (CanLII)

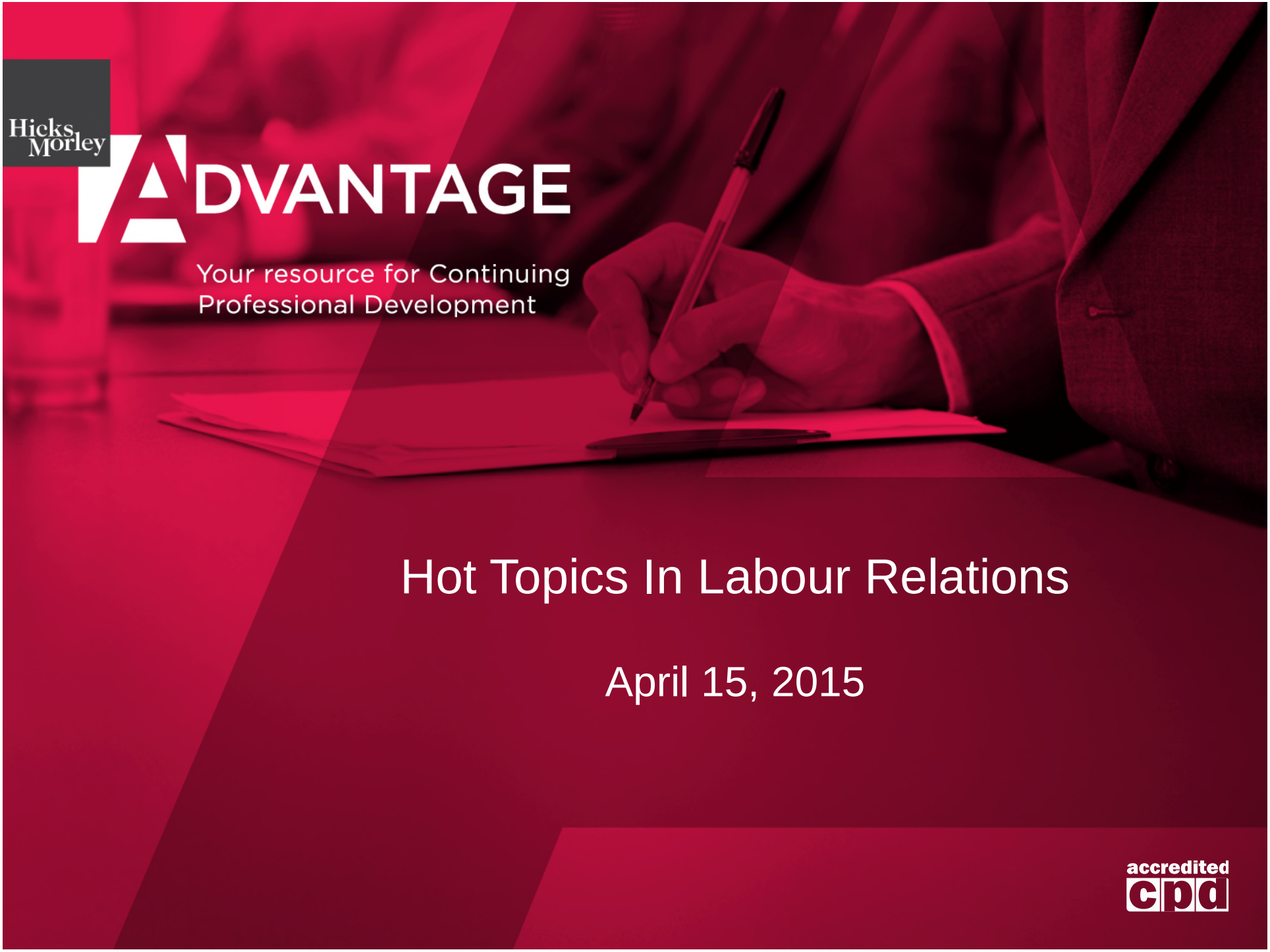
- Wrongful dismissal action
- Terminated without cause
- When he returned the company cell phone, the employer discovered a series of text messages he had sent during working hours to solicit and procure drugs from a union employee he supervised as well as other people
- After-acquired evidence for a "For Cause" termination
- The employee argued that no evidence of misconduct during working hours and that employer had a lax attitude about drinking/drugs
- Appeal dismissed

Van den Boogaard v. Vancouver Pile Driving Ltd., 2014 BCCA 168 (CanLII)

- Lesson:
  - In non-union workplace can rely on after-acquired evidence. But in unionized workplace?
    - Mixed arbitral case law
    - Collective agreement require you to set out reasons for termination?
    - Did you/should you set out the reasons in the termination letter?

R. v. Brewers Retail Inc. (OCJ, February 12, 2013) (unreported)

- Truck wash contractor found inside a truck with a Smirnoff bottle ¾ full with light blue liquid
- He drank some and then took it home and drank the rest over 2 days
- It was windshield washer fluid
- He died of methanol poisoning
- TBS drivers had been decanting washer fluid into liquor bottles and stowing them in trucks
- TBS charged under *OHSA* – WHMIS
- Pleaded guilty – convicted – $175,000 fine
- Lesson:
  - Under *OHSA*, "employer" of both employees and contractors. Control your workplace. Child-proof it?



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