WHAT'S NEW

ISSUE 10 – December 2011

In an effort to keep the Labour Relations Community informed on an ongoing basis of happenings at the Labour Relations Board, the Board produces a monthly newsletter - "What's New." The following is Issue 10 for December 2011.

NEWS AROUND THE BOARD

Board Open House - The Board held its annual Stakeholders Open House on December 15, 2011. Reportedly, a good time was had by all! Thank you to all those who attended and, in particular, to those who donated to the CBC Turkey Drive for the Food Bank. A total of $200 was raised for this worthwhile event.

A New Ministry and Minister! – As some of you may be aware, the new Ministry of Human Services was created after the recent leadership race. The new Minister of Human Services is the Honourable Dave Hancock, Q.C. The new ministry is a very large entity and by some estimates encompasses approximately 25% of all government employees, with the Board making up a small but important part of that total.

RECENT CASES

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association **2011 SCC 61**

On December 14, 2011, the Supreme Court of Canada released a majority decision reinforcing its previous jurisprudence stating expert administrative tribunals such as labour boards are entitled to deference when interpreting and applying the tribunal's home statute. The decision involved the appropriate standard of review to be applied to a decision of the Alberta Privacy Commissioner to extend the deadline for completing an inquiry beyond the 90 days set out in the statute after the 90 days had already expired.

The majority of the Court held the reasonableness standard applied – the Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually apply where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of questions to which the correctness standard applies. These categories include: constitutional questions; questions involving jurisdictional lines between competing specialized tribunals; questions of central importance to the legal system as a whole; and true questions of jurisdiction or *vires.*

Significantly, on the issue of true questions of jurisdiction of *vires* the Court questioned whether the time has come to consider whether this exception should continue to apply. Although the Court did not do away with this exception to the application of the reasonableness standard, it severely limited its application. Unless the situation is

exceptional, the interpretation by a tribunal of its home statutes or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to the deferential reasonableness standard. A party arguing otherwise must demonstrate why the reasonableness standard should not apply. As stated by the Court, "[e]xperience has shown that the category of true questions of jurisdiction is narrow indeed."

Finally, the decision also addresses what a reviewing court should do when an issue raised on judicial review was not argued before the tribunal with the result that the tribunal's reasons do not address the issue.

***Newfoundland and Labrador Nurses' Union v. Her Majesty the Queen in Right of Newfoundland and Labrador et al.* 2011 SCC 62**

On December 15, 2011 the Supreme Court of Canada issued a significant decision clarifying the requirement that administrative tribunals provide reasons and the sufficiency of those reasons. The decision made the following findings:

- the adequacy of reasons is not a stand-alone basis for quashing a decision;
- a reviewing court should not undertake two discrete analyses – one for the reasons and a separate one for the result – rather - reasons must be read together with the outcome and serve the purpose of showing whether the results fall within a range of possible outcomes;
- reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred and are not required to make an explicit finding on each constituent element, however subordinate, leading to a final conclusion;
- reasons that allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes meet the *Dunsmuir* criteria;
- reviewing judges should pay "respectful attention" to the decision-maker's reasons and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful;
- the Court's decision in *Baker* does not stand for the proposition that reasons are always required;
- nor does *Baker* mean alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness subject to the correctness standard – rather – any challenge must be made within the reasonableness analysis.