The Year in Review in Labour & Employment Law

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INTRODUCTION

As former American House of Representative Speaker Tip O’Neil famously said, “All politics is local” (allowances for his grammar). In my experience, with few exceptions, so too “all labour and employment law is local”.

However, as usual, the Supreme Court of Canada has rendered a number of important decisions, and this year provided the end point of a new trilogy in its much-debated decision, *Ontario (Attorney General) v Fraser, 2011 SCC 20*, which was rendered on April 29, 2011. Deference and preference, of course must be given to the Court.

Following my “all labour and employment law is local” theme, I will:

(i) provide comment on key decisions of the Supreme Court of Canada and Federal Court of Appeal;

(ii) provide a “geographic” review of the leading cases/events in each of the Provinces and Territories and the Federal jurisdiction;

(iii) focus on two particular, arbitrarily-chosen topics – (1) the older worker and (2) employees and their computers; and

(iv) close with the Wacky Decision of the Year (the “WDY”).

* A number of the cases selected for discussion in this paper were based upon material presented by my colleagues at the annual conference for the Canadian Association of Counsel to Employers in September, 2011. Some commentary that appears in this paper is based upon these materials.
The Supreme Court of Canada

1. Constitutional Jurisdiction

In two decisions released on the same day, *NIL/TU, O Child & Family Services Society v BSGEU, 2010 SCC 45* and *Native Child & Family Services of Toronto v CEP, 2010 SCC 46*, the Court ruled in both cases that certification applications by unions representing employees of Aboriginal child welfare agencies fall under the jurisdiction of provincial Labour Relations Boards rather than the CIRB.

The full bench of the Supreme Court was unanimous in holding that both organizations were provincially-regulated bodies, subject to provincial labour regimes. Although Justices MacLachlin, Fish and Binnie differed in their approach to analyzing the constitutional question, they arrived at the same result as the majority, whose decision was written by Madam Justice Abella.

Justice Abella began her decision by reaffirming that labour relations fell presumptively within provincial jurisdiction, unless a particular entity was a “federal work, undertaking or business.” To decide this, a two-step test must be applied. Firstly, the entity’s “normal or habitual activities” must be considered, to determine if these activities are inherently provincial or federal in character. Justice Abella quoted from Justice Beetz in *Four B Manufacturing Ltd v UGW, [1980] 1 SCR 1031*, to emphasize that it is the activities of the organization, and not how these activities are carried out, that is the main concern:

... Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. (quoted in *NIL/TU* at para 15)

According to the majority, it is only if the first part of this “functional analysis” test is inconclusive, that a court should consider whether provincial regulation of the entity’s labour relations would impair the core of the federal head of power at issue. This is where the minority differed, taking the view that the “core” test should form part of the analysis at the outset.
With respect to the case at bar, the sole function of the organizations in question was to provide family and child services. This was an inherently provincial service, and as such the labour relations of these organizations came within provincial jurisdiction. As per Justice Beetz’ quote in *Four B Manufacturing*, the fact that the organizations received federal funding, and serviced Indian families, did not change the nature of the tasks performed. Therefore the Supreme Court dismissed both appeals, and confirmed that it is the “what”, and not the “how”, that is the relevant consideration when faced with constitutional questions such as the one at bar.

In her concurring judgment, the Chief Justice observed that

> [60] ... to deem any Aboriginal aspect sufficient to trigger federal jurisdiction would threaten to swallow the presumption that labour relations fall under provincial jurisdiction. The proper approach is simply to ask, as the cases consistently have, whether the Indian operation at issue, viewed functionally in terms of its normal and habitual activities, falls within the core of s. 91(24) of the Constitution Act, 1867.

**Take Away Point (“TAP”)**

1. In determining constitutional jurisdiction of labour relations, one need primarily ask whether an entity’s normal or habitual activities are provincial or federal in character. Only if this functional analysis does not answer the question should a court consider whether provincial regulation of the entity’s labour relations would impair the core of the federal head of power at issue.

2. **Which Forum, Please?**

The seemingly never-ending search for the correct forum arose again in *Syndicat de la fonction publique du Québec v Quebec (Attorney General), 2010 SCC 28*. An employee with two years of uninterrupted service with the same employer may file a complaint of dismissal without cause and demand reinstatement. In this case, the employees were unionized, but did not have job security, one being casual, the other a probationer, and under their collective agreement were barred from grievance and arbitration. In a 5:4 judgment, Justice LeBel found that
the arbitrator had jurisdiction to hear these complaints, not because of the theory of implied incorporation of the tenure provision (section 124) of the Labour Standards Act, but on the basis of the “public order status of the Act”, which rendered null and void the bar to grievance for the employees in question.

It may be that the case is limited to the wording of its statute, since the Act expressly states that the labour standards contained within it “are of public order” and rendered null any provision in an agreement that contravened it. Furthermore, the other jurisdictions with tenure provisions – Nova Scotia and the Federal jurisdiction – do not apply to unionized employees. It remains to be seen whether conflicts between collective agreements and labour standards legislation in other jurisdictions will be resolved on this “public order” rationale.

**TAP**

1. A labour arbitrator has jurisdiction to apply employment standards dismissal legislation because labour standards is a matter of “public order”.

3. **Workers’ Compensation**

In a case originating from British Columbia, *British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52*, the Supreme Court dealt with the difficult issue of chronic pain. The complainants contended that the WCB Board Policy, which set a fixed award for chronic pain, was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under the B.C. Human Rights Code. In a 5:4 split, the Court dismissed the complaints.

The litigation history was that, after unsuccessfully appealing a negative Board ruling to the Board’s Review Division, the complainants did not seek judicial review, but filed new complaints with the Human Rights Tribunal, raising the same arguments as they had before the Review Division. The B.C. Court of Appeal ruled that the Human Rights Code conferred jurisdiction on the Human Rights Tribunal, even when the same issue had previously been dealt with by another Tribunal.

The majority of the Supreme Court found that s. 27(1)(f) of the Code embraced the underlying principles of the doctrines of issue estoppel, collateral attack and abuse of process, which ensure finality and fairness.
of the litigation process and protect the integrity of the administration of justice. Therefore, the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of fairness of finality in decision-making and avoidance of re-litigation of issues already decided by a decision-maker with the authority to resolve them. The Tribunal should have considered whether there was concurrent jurisdiction, whether the previously-decided legal issue by the Review Division was the same issue before it, and whether the parties had the opportunity to know the case to be met and have the chance to meet it. The Tribunal’s discretion in s. 27(1)(f) was intended to be limited. The Court found that the Tribunal’s strict adherence to the application of issue estoppel was an overly formalistic interpretation of the s. 27(1)(f), particularly of the phrase “appropriately dealt with”, which had the effect of obstructing rather than implementing the goal of avoiding unnecessary re-litigation. The majority noted that:

[38] What I do not see s. 27(1)(f) as representing, is a statutory invitation either to “judicially review” another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

The Court found that the complainants were in effect attempting to re-litigate the matter in a different forum in search of a more favourable result, which represented a “collateral appeal” to the Tribunal. This, the Court noted, was the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent. The Court held that the Tribunal’s analysis in effect centered on whether it was comfortable with the process and merits of the Review Officer’s decision. The Court found that the Tribunal based its decision on irrelevant factors and ignored its true mandate under s. 27(1)(f) and thus its decision was patently unreasonable.
TAP

1. There should be “territorial respect” among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching.

4. **Ontario (Attorney General) v Fraser, 2011 SCC 20**

This case will likely be widely described as the completion of a trilogy of cases of the Supreme Court of Canada on the constitutional right to a freedom of association [section 2(d) of the *Charter*].

The first case, *Dunmore v Ontario (Attorney General), 2001 SCC 94*, involved a challenge to the provision of the Ontario *Labour Relations Act* excluding agricultural workers from its protections. The Court ruled this exclusion violated the workers’ right to organize, which was protected by the freedom of association guarantee in section 2(d).

The second case, the 2007 *Health Services and Support - Subsector Bargaining Assn v British Columbia, 2007 SCC 27 [B.C. Health Services]* decision involved legislation which restricted various subjects of collective bargaining. Such action was also found to violate section 2(d) of the *Charter*. The Court also, and significantly, concluded there was a constitutional obligation on employers to bargain in good faith on important workplace issues. The Court has used unequivocal language in characterizing this obligation. In *B.C. Health Services*, the Court affirmed “the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining”. Likewise in *Fraser*, the Court commented that “workers have a constitutional right to make collective representations and have their collective representations considered in good faith”. This finding was controversial in that, in essence, it found that the right to freedom of association could impose obligations on others to bargain with those who had chosen to associate. As the majority said in *Fraser*:

[54] *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter*
jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d). No particular bargaining model is required.

Following Dunmore, the Ontario Government enacted the Agricultural Employees’ Protection Act [AEPA], which established:

- a right to form an association;
- the right to make representations to employers;
- the obligation of employers to listen; and
- the obligation of employers to acknowledge receipt of the representations.

Finally, came Fraser, when the AEPA was claimed to violate section 2(d) of the Charter. It was thought that the Supreme Court might expand upon its ruling in B.C. Health Services. Instead, the Court overruled the Ontario Court of Appeal and found:

There is:

- no entitlement to a Wagner Act type of labour relations regime (where majority gets representation by a union, which has exclusive right to bargain for all employees in a bargaining unit, and where there is a statutory mechanism for resolving bargaining impasses);

- no right to affirmative state action (one needs evidence that government action made it impossible to have meaningful association and there was no such evidence in Fraser), i.e., prematurity;

- the Court read in to the AEPA an obligation of employers to consider in good faith proposals made by their employees.

However, Fraser did not extend the scope of the constitutional right to collective bargaining raised in B.C. Health Services; rather, it found the limited scope of the AEPA to be constitutional. For example, it stopped
short of requiring anything more than a good faith consideration of representations made by an employer’s employees (i.e. – there is no obligation under that statute akin to actual negotiations requiring good faith efforts to reach an actual agreement). In other words, the freedom to associate can only go so far – to quote the Court, “[w]hat is protected is associational activities, not a particular process or result”.

From all of this comes the ultimate question -- whether the content of the constitutional duty to bargain in good faith will be filled by further Charter decisions, or by legislators.

TAP

1. The Fraser case looks like the third decision of a trilogy but expect there to be a fourth.

The Federal Court of Appeal

In Canada (Attorney General) v Mowat, 2009 FCA 309, the Federal Court of Appeal was asked for the first time to determine if the Tribunal had jurisdiction under the Canadian Human Rights Act to award legal costs to a successful complainant. The Tribunal had, in 2006, awarded the complainant, Mowat, $47,000 in legal costs after she was successful in her complaint (albeit on only one of many alleged grounds). The Tribunal had reasoned that legal costs were encompassed by s. 53(2)(c) of the Act, wherein the Tribunal could order compensation “for any expenses incurred by the victim as a result of the discriminatory practice.” The Federal Court, on judicial review, held that the Tribunal’s decision was reasonable, and supported by Federal Court and Tribunal jurisprudence.

The Federal Court of Appeal applied a correctness standard of review to the Tribunal’s decision, on the basis that the interpretation of s. 53(2)(c) of the Act was a question of general law of central importance to the legal system as a whole, and one that was outside of the specialized area of the Tribunal’s expertise. In doing so, the full bench of the Appeal Court, led by Justice Layden-Stevenson, held that Parliament had not intended that the Tribunal have the power to award legal costs to a successful complainant. There was no evidence of practical necessity for the exercise of the power to award costs to enable the Tribunal to attain the objects prescribed to it by Parliament.
This case has been appealed to the Supreme Court of Canada. Until such time as it renders a decision, it is very clear from the Federal Court of Appeal that the Tribunal does not have the power to award costs to successful complainants.

**TAP**

1. The Federal Human Rights Tribunal has no authority to award legal costs.

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**CROSS COUNTRY NOTE-UP**

**Federal Jurisdiction**

**Labour Law**

Apart from the constitutional jurisdictional issues involving child and family services providers to Aboriginal organizations, reviewed in the Supreme Court of Canada, section, *supra*, the most significant decision federally was the decision of the Canada Industrial Relations Board to certify a bargaining unit of captains and chief engineers on *Captains & Chiefs Assn v Algoma Central Marine, 2010 CIRB 531*. The Board noted that, “unlike some provincial labour relations boards, the CLRBB and subsequently the CIRB have interpreted the managerial exclusion narrowly”. The Board “...begins with the presumption that individuals who wish to exercise the right to organize and bargain collectively are entitled to such rights. The burden of proving that these individuals exercise management functions or are employed in a confidential capacity...rests on the party arguing for such exclusion”.

Even though the captains were the only management representatives of the company on the vessel, and exercised numerous functions which would ordinarily easily be found to be management functions, the Board analogized their positions to that of airline pilots and locomotive engineers having command and control of extremely valuable equipment. There was obviously a conflict between the interests of employees’ freedom to associate and the employer’s interest in having an effective management, with the former winning out.
Employment Law

The four-year legal saga of two 60-year old Air Canada pilots reached another significant point with the July 8, 2011 decision of the Canadian Human Rights Tribunal dismissing the complaints. Judicial review is pending.

The Tribunal dismissed the complaint, which alleged that the airline’s mandatory retirement policy constituted prohibited age-based discrimination under the Canadian Human Rights Act. According to Captain Steven Duke, an expert witness called by Air Canada, compliance with an International Civil Aviation Organization (ICAO) rule instituted in November 2006 – that a pilot over 60 cannot fly on international routes unless another pilot on the flight is under 60 – would cause undue hardship because of extra staffing requirements, scheduling problems and additional costs. As a result, the Tribunal ruled that requiring Air Canada pilots to retire at age 60 was a *bona fide* occupational requirement.

The Tribunal found that “[i]t is clear from Duke’s evidence that for decades Air Canada has engaged in a legitimate and meaningful bargaining process with the pilots’ union that has resulted in an enduring collective agreement which enshrines seniority and provides for mandatory retirement at age 60 with a reasonable pension. In the result, Air Canada has been able to effectively balance the introduction of new pilots to replace a predictable number of retiring pilots. Assessing this situation both subjectively and objectively, I conclude on a balance of probabilities that the work standard does not have a discriminatory foundation.”

The Tribunal held that “[g]iven the restrictions of the ICAO over/under rule, I am satisfied that the accommodation of the needs in the period after November 2006, by abolishing mandatory retirement, would result in negative consequences to Air Canada: significantly increased operational costs, inefficiency in the scheduling of pilots, and, to a lesser extent, negative ramifications for the pilots’ pension plan, and the collective bargaining agreement, particularly in maintaining an effective rule of seniority. I conclude on a balance of probabilities that Air Canada would suffer undue hardship in accommodating [Vilven’s and Kelly’s] needs.”
TAPs

1. “Management functions” takes a severe hit.

2. Air Canada’s over 60 year-old pilots must retire (maybe).

British Columbia

Labour Law

Just before last year’s Conference, the B.C. Court of Appeal decided *Coast Mountain Bus Company v CAW, 2010 BCCA 447*. The employer implemented an attendance-management program consisting of the usual multi-step process to control absenteeism. The program was found discriminatory for two reasons. First, employees with disabilities would advance to termination vulnerability more quickly as a result of recurring absences caused by their disabilities. Second, employees were held to a uniform standard based upon average absence rates which were calculated without regard for the fact that disability may cause elevated absence levels. The employer failed to establish that accommodating employees with disabilities would necessarily result in undue hardship; the attendance-management program was therefore found to be discriminatory. In essence, individual employees with disabilities must be considered on a case-by-case basis, with case-specific standards and analysis of the costs and other possible hardships associated with such accommodation.

Employment Law

*Waterman v IBM Canada Limited, 2011 BCCA 337*, raised the issue of the deductibility of pension benefits from an award of damages for wrongful dismissal.

Before the British Columbia Court of Appeal, IBM argued that the Supreme Court of Canada’s reasoning in *Sylvester v British Columbia, [1997] 2 SCR 315* (which ruled that disability benefits were to be deducted from wrongful dismissal damages) should apply equally to pension benefits. The Court of Appeal disagreed, saying that:

[8] In each case, the result will turn on an analysis of the nature of the benefit and the terms of the employment contract applied to the particular facts of the case.
The Court continued:

[29] ... as stated by the court in *Sylvester SCC*, the question of deductibility will depend on an interpretation of the contractual arrangement between the employer and the employee, taking into account the nature of the benefits in issue.

...

[33] In *Sylvester SCC*, the court attempted to ascertain the intention of the parties by reference to the terms of the contract and the nature of the benefits in issue. It found that the disability benefits in issue were intended to be a substitute for the employee’s regular salary during the period that the employee was disabled. Further, payment of the benefits was premised on the employee being unable to work. The court in *Sylvester SCC* concluded from these facts, and the fact that the employer had fully funded the disability plan, that the parties must be taken to have intended that the disability payments paid during the notice period would be deductible from damages; that is, the parties could not have intended that the employer pay both salary and disability benefits during the period of reasonable notice. Disability payments were a proxy for salary. As with other forms of salary replacement, for example, salary earned with another employer during the period of reasonable notice, such payments were deductible from damages, at least where the disability plan was fully funded by the employer. (The court did not decide that disability payments were not deductible where the employee contributed to the disability plan, but declined to decide that issue one way or the other.)

...

[36] ... I have reviewed the authorities to which counsel have referred which discuss the nature of pension benefits, on the one hand, and disability benefits, on the other. Those authorities indicate that, historically, and with particular reference to the issue of double recovery in tort, pension benefits and disability benefits have been
regarded as being different in kind, and requiring different treatment in terms of deductibility from damages.

...

[44] The Parry decision [(1970) AC 1 (HL)] was not the subject of comment in Sylvester SCC and, at least to the extent of its characterization of pension benefits, it continues to be regarded as “good law” in Canada. It emphasizes the concept of a pension as a benefit earned by the employee, which is not a form of salary replacement, but enures to the benefit of the employee whether or not the employee made monetary contributions to the plan.

...

[58] I am satisfied, however, that Mr. Waterman never would have intended that his fully earned pension benefits could be utilized to reduce the amount of damages IBM would be required to pay him during the notice period if he were wrongfully dismissed. This would have been viewed by him as adding insult to injury. How could IBM force him into retirement, on the one hand, and then effectively claw back the very pension payments they had triggered in so doing, on the other?

...

[61] All of these provisions [of the Pension Plan] support the view, reflected in Parry, Chandler and other decisions that the pension benefits available to IBM employees are earned by and belong to the employee. The suggestion that the parties would have intended to treat Mr. Waterman’s pension benefits as a trade-off or offset against salary owing during the notice period is, in my view, incompatible with these provisions. Although pension benefits provide an income stream when paid, they are not a substitute for salary. In that respect, they are not like the disability payments in Sylvester SCC which the court found were intended to replace salary at a time when the employee was incapable of working.
Here, there is no inherent inconsistency between an employee receiving both salary and pension; there are many instances of that in the workforce, including those who receive statutory pension benefits, private pension benefits from former employment, and even payments from IBM where the employee has earned a pension, retires, and is later hired back. These are benefits IBM employees enjoy in addition to salary.

... 

[64] I would add that I do not take the position that Mr. Waterman is entitled to his pension benefits because it would be “wrong” for IBM to receive a set-off of these benefits against salary. In other words, my decision is not predicated in any way on the concept of punishing a wrongdoer. I do not think that notions of “right” and “wrong” are useful in dealing with what is essentially a contract analysis. I note as a practical matter, however, that if pension benefits could be deducted from salary in circumstances such as these, the result could be viewed as an invitation to employers facing economic hardship to terminate senior employees with many years of service who have vested pension rights and entitlement to a significant pension, rather than more junior employees without vested rights, since laying off the former would result in a significant offset of pension against salary in estimating damages for wrongful dismissal. A policy argument could be mounted for arguing that the employment contract should be interpreted in such a way to avoid such a result, but no such policy argument was advanced in this case.

**TAPs from British Columbia**

1. A successful attendance-management program has to give special treatment to employees with disabilities.

2. If an employer wants to avoid paying dismissal damages to an employee receiving a pension, it needs to provide for that in the employment contract.
Alberta

Labour Law

International Assn of Fire Fighters, Local 225 (Calgary Fire Fighters Assn) v Calgary (City), 2011 ABCA 121, involved a union application for leave of the Court to reconsider its landmark decision on the application of estoppel in the collective bargaining context, Smoky River Coal Ltd v United Steelworkers of America, Local 7621, (1985) 18 DLR (4th) 742. In that earlier decision, the Court had held that the doctrine of promissory estoppel could not be used to create positive obligations, but was limited to providing a defence against the enforcement of otherwise enforceable rights.

The Court of Appeal noted that the decision in Smoky River Coal had been cited and applied in many arbitral and court decisions since 1985 and had not been either expressly overruled or shown in any decision of the Supreme Court of Canada to have any fundamental flaw. The fact that other appeal courts had treated the issue differently did not support the argument that the decision should be reconsidered. The union’s application for reconsideration was dismissed.

Employment Law

In Globex Foreign Exchange Corporation v Kelcher, 2011 ABCA 240, the Alberta Court of Appeal dismissed Globex’s appeal and allowed the respondents’ cross-appeal from a judgment that granted an injunction enforcing a non-solicitation covenant, but refused to enforce the non-competition covenants. The respondent employees had entered into employment contracts containing restrictive covenants. One of them was wrongfully dismissed by Globex. The other two voluntary left their employment when Globex asked them to accept more onerous restrictions. All three went to work for a competing employer. Globex was partially successful in its motion for an interlocutory injunction. The Court of Appeal upheld the trial judge’s finding that the non-competition covenants were overly broad and thus unenforceable. However, the Court disagreed with the trial judge’s conclusion that one of the non-solicitation clauses was reasonable and thus enforceable; the clause was overly broad in that it prohibited former employees from “solicit customers in any manner whatsoever, in any business or activity for any client of Globex”. While the Court agreed that Globex had an interest in protecting its customers in the foreign currency exchange business, there was no reason for preventing ex-employees from contacting customers.
with respect to other businesses. Regarding the employee who was wrongfully dismissed, the Court agreed that wrongful dismissal generally relieves ex-employees from compliance with covenants that restrict their future employability. Accordingly, the Court found that the other employees were not bound by the restrictive covenants because they were too broad or were ambiguous.

**TAPs from Alberta**

1. For those who want to continue to defend against claims of promissory estoppel by using the “shield, no sword” approach, Alberta continues to be your best legal ally.

2. There is an issue about the enforceability of an agreed restrictive covenant where an employee is wrongfully dismissed.

**Saskatchewan**

**Labour Law**

*CUPE, Local 3967 v Regina Qu'Appelle Health Region, 2010 CarswellSask 155* (February 9, 2010) is a case in progress. The union challenged the government’s 2008 essential services legislation, claiming a *Charter* breach with heavy reliance on the *BC Health Services* decision. The Labour Board concluded that the definition of “essential services” is not so broad as to be inconsistent with a minimal and proportional limit, nor did it amount to a substantial interference with CUPE’s freedom of association or its right to strike. The ability of the Board, upon application by a union, to modify the number of positions declared “essential” by an employer was considered a sufficient safeguard. Finally, the Board concluded that even if there was a substantial interference with CUPE’s right to bargain, the interference would be justified under section 1 of the *Charter*. Judicial review is underway.

**Employment Law**

In *Duguay v Mudjatik Thyssen Mining Joint Venture, 2010 SKPC 183*, the plaintiff employee was offered a job over the telephone in October of 2007. It was not until the plaintiff started the job on November 19, 2007 that he was given the employer’s policy manual and asked to read and sign an acknowledgement of the policy manual’s terms and conditions. The policy manual stated that employees terminated
without cause would receive notice or pay in lieu in accordance with “relevant labour legislation”; summaries of the legislation were included, but not the legislation itself.

The Court found that the plaintiff was entitled to more than the statutory minimum in the Labour Standards Act. If the employer wanted to rely on the statutory minimums in the Act the, according to the court, “it ought to have been more clearly spelled out”. If an employee’s right to common law notice is to be removed, it must be done on the clearest of terms.

The Court went on to note that the policy manual provisions on termination did not have contractual force because the plaintiff was already an employee when the policy manual was signed. Since continued employment is not adequate consideration for the imposition of important additional terms and conditions, the defendant could not rely on the termination provision.

This case therefore reinforces the need to follow the Ontario Court of Appeal’s decision in Wronko v Western Inventory Service Ltd, 2008 ONCA 327. If an employer wishes to change the termination provisions in an employment contract, it must give the employee clear notice that the contract (as it was) is terminated and that re-employment will be offered on new terms after the expiry of the notice period provided under the former contract.

**TAPs from Saskatchewan**

1. *BC Health Services* should not deter governments from legislating essential services limitation.

2. Employers should be careful if they want to rely upon a general employee handbook or manual to define the terms of termination.

**Manitoba**

**Labour Law**

The decision of the Manitoba Court of Appeal in Manitoba Association of Health Care Professionals v Nor-Man Regional Health Authority Inc., 2010 MBCA 55, was heard by the Supreme Court of Canada earlier this month. It may be a major precedent. It started out simply enough – an arbitrator had to interpret a collective agreement over the issue of
calculation of years of service for the purpose of vacation entitlement. He concluded that the employer’s long-standing practice of excluding all casual service was inconsistent with the proper interpretation of the article in question, but concluded that, as the practice had existed for over five collective agreements and was regularly communicated to employees and the union, the employer was entitled to assume the union had accepted its practice. Hence, an estoppel was found. However, the Court of Appeal overturned the arbitrator, adopting the traditional legal analysis of the estoppel principles and concluding that, while one could reasonably impute knowledge of the practice to the union, one could not impute its intent to affect legal relations. This finding runs contrary to numerous labour arbitrators’ decisions that have found that silence, in these circumstances, would give rise to an estoppel.

Employment Law

In Carson International Inc. v Biggar et al., 2010 MBQB 198, Alan Biggar was a 22-year employee of Can Am RV (“Can Am”) when he resigned from his position in December 2005. By February 2006, he had started operating Big Country RV (“Big Country”), competing in some aspects of the recreational vehicle market with Can Am and others. Can Am claimed that Mr. Biggar breached fiduciary or other common-law duties owed to it, before and after starting Big Country, and as such Big Country was liable to account for, or disgorge, its profits to Can Am.

Mr. Biggar was not in a management position at Can Am but he was a long-serving employee. No one reported to him; he had no authority to direct or manage any employees including other salespeople; he could not hire or fire anyone; he could not bind the company in any respect even to order vehicles he had sold or to place advertisements; he had no access to company financial statements; and he was not involved in planning except on an occasional ad hoc basis. He was not a shareholder or director. Mr. Carson ran the company on a full-time, hands-on basis and below him was a director of operations. As such, the Court held that Mr. Biggar’s position was not one where he ran a small company on behalf of an owner, which owner would then be severely disadvantaged if Mr. Biggar left his employment.

The key issue in this case was whether or not Mr. Biggar was fiduciary and if so, what duties were owed to his former employer. After examining the conflicting tests for determining a fiduciary relationship (the “key employee” or “vulnerability” tests) the Court determined that Mr. Biggar was not a fiduciary by either test, as his responsibilities had been
diminishing over the period of time prior to his resignation and did not include decision-making or access to financial statements. The Court held:

[74] I am satisfied this situation is truly one of Mr. Biggar’s personal skill and ability as opposed to a fiduciary ex-employee’s unfair exploitation of his former employer.

Another noteworthy aspect of this case is that Mr. Biggar kept and modified Can Am business documents for his own use as Big Country. According to the Court, for the most part these documents were “relatively benign forms such as quote sheets, etc.” More critical, however, was a contract and brochure. The Court stated:

[86] … I accept that Mr. Biggar took and used these documents in this business. Essentially he copied these documents with minor modifications. This was Can Am’s property with which Mr. Biggar was intimately familiar throughout his 22 years of employment with Can Am. The legal issue, however, as pled, boils down to whether or not these documents were confidential or secret proprietary documents.

Relying on the test set out in GasTOPS Ltd v Forsyth, [2009] OJ No 3969 (Sup Ct J), the Court concluded:

[90] Here, the RVMP contract and brochure, their contents and the concept contained therein, were not in the strict sense secret or confidential. They had been in use by all Go Camping franchisees, by Mr. Carson as such a franchisee since at least 1983 and more so since 1988 by Can Am. It would be fair to say, over that time, hundreds of these documents would have been distributed to customers or prospective customers. These documents and the concept contained therein were in the general domain of the recreational vehicle industry.

**TAPs from Manitoba**

1. Estoppel remains a limited vehicle.

2. Fiduciary employees are few and far between.
Ontario

Labour Law

One of the most far-reaching occupational health and safety decisions rendered in Canada is that of the Ontario Divisional Court in Blue Mountain Resorts Limited v Ontario, 2011 ONSC 3057. In this case, the Court found that an employer or a constructor is now obligated to report any death or critical injury that occurs at its workplace, even if the victim is not an employee and no workers are present when the fatality or critical injury occurs. Here, a patron drowned in an unsupervised swimming pool. The section of the OHSA in question required an employer or constructor to report a death or critical injury of any “person” at a “workplace”. Critically, the Court concluded that a “workplace” is any area where workers work or are present – even for a brief period of time – during the normal course of business operations. As such, the employer was obligated to report the death of a non-worker in the pool area even though no workers were present at the time of the incident. The Court noted that an employer’s reporting obligations under Section 51(1) of the Act were driven by the result (i.e., injury or death) rather than the nature of the underlying incident itself. The Court acknowledged that this was a potentially far-reaching result, but it found that its interpretation was consistent with the goals of the OHSA, as any danger to a non-worker might also present a danger to an employee.

Employment Law

The recent Superior Court decision Brito v Canac Kitchens, 2011 ONSC 1011, illustrates the significant risk faced by an employer when a former employee becomes disabled during the notice period at a time when long-term disability benefits (“LTD”) have been discontinued. This case involved the dismissal, without cause, of a 55 year-old employee with 24 years of service. The employer paid the employee his statutory minimum notice and severance and maintained his LTD benefits for the statutorily-mandated minimum of eight weeks. The employee successfully secured alternative employment shortly after his termination but his new position did not include LTD coverage.

Unfortunately, the employee became ill with cancer approximately 16 months after the termination of his employment and was totally disabled. He claimed he had been wrongfully dismissed and sued his employer seeking, among other relief, compensation for the loss of his LTD benefits. Justice Echlin applied the Bardal factors and determined the
appropriate common law notice period for the employee was 22 months. As the Plaintiff became disabled during the reasonable notice period, entitlement to compensation for loss of LTD coverage became a central issue in this case.

The employer argued it was not liable to compensate the plaintiff for loss of LTD benefit coverage during the entire notice period because the employee failed to mitigate his potential damages by purchasing replacement insurance. Justice Echlin rejected this argument, reasoning the employer led insufficient evidence to establish comparable coverage would have been available to the employee. The employer also argued its insurance policy contained a requirement that the employee be “actively at work” to maintain coverage and therefore the employee was not entitled to coverage beyond the statutory notice period because he was only a “notional employee” during the remainder of the common law notice period. Justice Echlin also rejected this argument as being inconsistent with the well-established principle that an employee is to be treated the same regardless of whether he receives working notice or payment in lieu. In other words, an employee is entitled to be made ‘whole’ during the notice period.

Based on the above reasoning, Justice Echlin held the employee was entitled to be placed in the same position he would have been if the employer offered him 22 months of working notice. As a result, the employee was entitled to LTD benefit coverage for the entire 22-month period following his termination. Justice Echlin noted the employer consciously chose to pay only the statutory minimum and “gambled” that the employee would get another job and remain healthy. The employer lost this “gamble” when the employee became disabled 16 months after termination. The employer was therefore responsible for compensating the plaintiff for lost LTD benefits as a result of its “lost gamble”.

**TAPs from Ontario**

1. The *Ontario Health and Safety Act* needs to be amended.

2. One of Justice Randall Echlin’s last decisions reminds us of the “make whole” nature of wrongful dismissal law.
Labour Law

As we all know, since 1977, the Quebec Labour Code contains some of the most restrictive anti-strikebreaker provisions in North America, which prohibit the use of replacement workers at the employer’s establishment. The law was found to have not caught up to the new technological age in SCFP local 2808 c Journal de Quebec, division de Corp Sun Media, 2008 QCCRT 0534. The Labour Board found against the employer in a lockout where it used journalists and photographers from other companies, including a communications consulting firm, an online magazine and a news agency, all away from the paper’s regular workplace. However, the Superior Court reversed, ruling that if work is not performed in the establishment where the lockout was declared, it is not covered by the anti-strikebreaker provisions. That decision has been appealed.

Employment Law

In Houle c St-Basile-le Grand (Ville), 2010 QCCRT 0390, Quebec’s Labour Relations Board (Commission de relations de travail, hereinafter the “Board”) dismissed a complaint lodged by the plaintiff in accordance with section 72 of the Cities and Towns Act, claiming he was dismissed without cause.

This case is useful to mention because the Board ruled that although there were some deficiencies in the communication of the workplace policies on internet usage, an employee occupying a managerial position is expected to have the initiative to keep himself informed on the employer’s policies. At the same time, it is interesting to note that the amount of emails sent and received by the plaintiff was considered and played an important role in the Board’s decision against him.

At the time of his dismissal, the plaintiff had 23 years of service and was the Manager of Leisure Services for the City. The employer’s decision to dismiss was based on the following elements:

- abusive personal use of the computer hardware made available to him for work purposes;
- stolen time;
- violation of the City’s image and integrity;
• attempt to mask his activities; and
• conflict of interests resulting from some of these activities.

The triggering event that brought the employer’s attention to the plaintiff’s computer usage was his refusal to provide his password to his immediate supervisor when the latter needed to access the emails of several clients during the plaintiff’s vacation.

The City proceeded to examine the plaintiff’s computer contents which revealed that he had made repeated personal use of material put at his disposal by the employer. From a total 16,270 emails sent or received by the plaintiff in a 20-month period, there were 214 emails regarding the organization of squash parties and golf rounds, 190 emails and files on hockey pools, and 189 emails related to various financial and commercial activities, despite the City’s policies in place prohibiting these specific activities.

Following the discovery of these emails, the employer refused to discuss the situation with the plaintiff, considering that no explanation would have been acceptable under the circumstances and that there was definite breach of trust.

The employee attempted to argue that he became aware of these policies only after he got fired. He also argued that at no time had he thought that his computer usage was in any way prejudicial to his work performance.

The Board determined that despite deficiencies in the communication of the employer’s policies, the plaintiff should have found a way to inform himself. More importantly, due to his managerial position as a supervisor of about sixty employees, he had the responsibility to at least consult the employees’ newsletters and to click on the provided hyperlink in order to reach the City’s various policies. The Board concluded that the employee had not made the necessary effort to keep himself updated on the employer’s policies, as was required by his managerial position.

The Board relied on the fact that even if the employee’s activities covered a period of around two years, some of which were prior to the implementation of the policies, a reasonable person – and even more so an employee occupying a managerial position – must understand that excessive personal use of a working tool of the employer cannot be considered normal. Common sense would stop one from acting as such, even in the absence of any policies on the subject. The fact that the
plaintiff had previously received other administrative and disciplinary measures for similar acts was also taken into consideration by the Board.

As for the stolen time as a ground for dismissal, the Board determined that the amount of time spent on the described activities greatly exceeded the normal time an employee can take, occasionally, to deal with some personal business, by email or by phone. Instead of being exceptional, the plaintiff’s personal activities were systematic.

With respect to the argument of the violation of the image and integrity of the City, the Board concluded that by using his official signature as a manager for the City in all his personal emails, the plaintiff had violated the image and integrity of the employer. All employers have the right to expect their identity would be used only in the course of the official duties related to the employment functions.

Finally, with regard to the dismissal of the plaintiff, by the employer, without any prior discussion with him, the Board said that though it would have been wiser and more respectful to meet with the plaintiff and confront him on the situation, the lack in the procedure was not fatal.

Moreover, the duty of loyalty superseded here the principle of progressive discipline, as there is an expectation on the employer’s part that an employee occupying a managerial position would modify his conduct without the need of implementing intermediate measures. Due to the broad autonomy given to the plaintiff within the scope of his official activities and to the direct contact between the citizens and the regulatory bodies of the City, the employer had to be able to trust the person in this type of position. The employer and citizens also had the right to expect transparent and professional services from the employee. Therefore, the Board concluded that the plaintiff’s dismissal was justified.

**TAPs from Quebec**

1. Expect the *Quebec Labour Code’s* anti-strikebreaker provisions to be amended to offset the decision in *Journal de Quebec*.

2. Management employees are expected to know their employer’s policies. Systematic use of an employer’s computer for personal activities can cost you your job.
New Brunswick

Labour Law

In *Irving Pulp & Paper Ltd v CEP, Local 30, 2011 NBCA 58*, the New Brunswick Court of Appeal considered whether an employer’s policy of random alcohol testing was reasonable. The Court, applying a standard of review of correctness, held that the arbitration board erred when it struck down the policy.

The Court found that the proper question to be decided was: “Must an employer’s decision to adopt a policy of mandatory random alcohol testing for employees holding safety-sensitive positions be supported by sufficient evidence of alcohol-related incidents in the workplace?”

The arbitration board majority had found that random alcohol testing can be justified in two situations: (1) where the workplace is “ultra dangerous”; or (2) where the employer can adduce sufficient evidence of pre-existing alcohol problems in a workplace that is not “ultra dangerous”.

The Court did not accept that such a distinction should be drawn between “dangerous” and “ultra dangerous” and found that the proper test was whether a workplace was “inherently dangerous”. In this case it was enough that the workplace in question – a kraft paper mill where toxic chemicals were routinely used in the manufacturing process – was characterized as a “dangerous work environment.” Therefore it was not necessary to go on to consider whether the employer had provided sufficient evidence of pre-existing alcohol problems in the workplace.

In assessing whether a policy of random alcohol testing is reasonable in a given workplace, the Court endorsed a “balancing of interests” approach: the employer’s right to adopt policies that promote a safe workplace must be balanced against the privacy and dignity interests of the employees.

In this particular workplace, the Court concluded that the policy was reasonable given the inherently dangerous nature of the workplace and because the employer’s policy applied only to employees in “safety sensitive” positions.
Employment Law

In *Doucet v Spielo Manufacturing Inc, 2011 NBCA 44*, the New Brunswick Court of Appeal found that section 30(2) of the *Employment Standards Act* overrides the common law by requiring employers to provide employees with written reasons for dismissal where cause is alleged. In situations of after-acquired cause, the impact of the provision is that it limits an employer’s ability to rely on after-acquired cause if the employer knew or ought to have known about the conduct in question prior to dismissal, and the employer failed to provide written reasons for dismissal. An employer cannot take note of an employee’s conduct and plan to rely on it at a later day if a complaint of wrongful dismissal surfaces.

Doucet had been employed by Spielo for ten years. Upon being terminated, he received severance pay in the amount of twelve months wages.

At trial, Spielo was successful in its counterclaim against Doucet for the return of the severance package he had received, based on allegations that he had done work for his own company on Spielo time and had used Spielo employees to serve his company. The trial judge accepted that Spielo had after-acquired cause to dismiss Doucet based on the fact that Doucet contributed to the management of another company while being employed by Spielo.

The Court of Appeal explained that an employer’s defence of after-acquired cause for dismissal can only be invoked in circumstances where, following the employee’s dismissal, the employer discovers employee misconduct that occurred prior to the dismissal and that the misconduct would have justified summary dismissal had the employer known of it earlier. If the employer was aware of the misconduct prior to the dismissal and the notice of dismissal failed to specify that the misconduct was the reason for the dismissal, section 30(2) of the *Employment Standards Act* precludes the employer from subsequently raising the matter. There was evidence to suggest that Spielo was aware or ought to have been aware, prior to Doucet’s termination, that he was working for his company on Spielo’s time. Doucet’s involvement in the other company was not a secret in the business community nor a secret from those who worked at Spielo.

The Court of Appeal held that the trial judge should have reflected on the difference between cause based on discrete acts of misconduct which
had been hidden from the employer and acts which relate to matters of job performance which would have been evident to anyone who took the time to observe what was happening in the workplace. In other words, an employer cannot be willfully blind to an employee’s misconduct and then later claim after-acquired cause. Because this distinction was not taken into consideration, this aspect of the counterclaim was sent back for a new trial before a different judge.

**TAPs from New Brunswick**

1. We need the Supreme Court of Canada to give us a definitive ruling on the never-ending debate on random alcohol testing.

2. In dismissing employees, be wary of employment standards statutes overriding common law principles.

**Nova Scotia**

**Labour Law**

A major overhaul has resulted in the creation of a “super board” – called the “Labour Board” – which administers labour relations, labour standards and occupational health and safety matters.

Case wise, the limits of an arbitrator’s authority were tested in *Canadian Union of Public Employees, Local 108 v. Halifax (Regional Municipality)*, 2011 NSCA 41. The employee had been dismissed for repeated absenteeism. While disability accommodation had not been raised by the union in the grievance or at the hearing, the arbitrator, of his own motion, suggested that an issue may exist and adjourned the hearing so the grievor could get a psychological assessment. When the hearing resumed, the grievor advised he had not been assessed, nor did he intend to be. The arbitrator found there was just cause for the dismissal, but provided a “condition subsequent” that the union would be allowed to reopen the hearing, lead evidence of the grievor’s mental disability, which would then trigger the duty to accommodate. The Court of Appeal quashed, saying in part that the collective agreement does not allow

> [45] ... an arbitrator, on his own initiative, to inject an issue that the parties have decided to exclude from the submission to arbitration. In this respect I reiterate the
principles from Brown and Beatty quoted earlier (para 37). Neither do I accept that the article allows an arbitrator to transform what the parties expected to be the final award into a message with ongoing trial advice to one of the parties. Nor should the arbitrator supplant or compete with the Union as the grievor’s strategic counsellor. In my view, no reasonable interpretation of “arrangement which [the arbitrator] deems just and equitable” in Article 16.04 authorizes such a substantial departure, in these respects, from fundamental principles.

Employment Law

As Carrigan v Berkshire Securities Inc, 2010 NSSC 373 demonstrates, offering a reasonable compensation package to employees that have had the terms of their employment unilaterally changed can be very worthwhile. Courts have little sympathy for employees who received a reasonable compensation package and yet choose to sue for constructive dismissal in an attempt to get even more money from the employer.

In this case, the employee, Carrigan, worked as a financial advisor. In 1998, he was promoted to regional director.

In the summer of 2001, Berkshire eliminated its regional director structure and as a result, Carrigan was demoted to the position of branch manager and his compensation was reduced. He was paid $100,000 as compensation in lieu of notice of the unilateral changes to his employment. Carrigan did not accept these changes. Carrigan brought an action for constructive dismissal.

The Court held that the elimination of his duties as regional director constituted constructive dismissal. However, the reduction in his income as a result of the constructive dismissal was not more than $5,000 per month, and the notice to which he was entitled was less than 20 months. Therefore, the compensation already provided to him exceeded the amount to which he was entitled based upon reasonable notice of termination. Accordingly, despite the fact that he had been constructively dismissed, no damages were awarded.
TAPs from Nova Scotia

1. Arbitrators have no authority to change the essence of cases submitted to them.

2. When dealing with a constructive dismissal situation, employers can avoid wrongful dismissal damages by providing reasonable compensation for changes to an employee’s position.

Prince Edward Island

Labour Law

In an interest arbitration – *PEI (Department of Health and Wellness) and PEIUPSE, 2010 CLB 35106* – occurring in the context of a renewal collective agreement for a health care bargaining unit, the parties disagreed as to the implementation dates of a 6% general economic increase to be awarded to all employees in the unit over a three-year term. Recognizing the parties were far apart in their expectations, Arbitrator Kuttner summed up the task of the board as being to determine the “zone of acceptability”, saying:

[11] Where, as was the case here, and is often the case, the formal briefs and evidence led in support exhibit a deep divide between the parties as to the shape which the award should take, the task of the interest arbitration board becomes that much more onerous. If the system of interest arbitration is to maintain the confidence of the parties, the award outcomes must be credible. To be sure, there may be disappointment, but so long as the outcomes lie within a 'zone of acceptability' which the parties can tolerate, that confidence in the process is assured. Identifying that zone is critical and the weak link in the formal interest arbitration process is that the interest arbitrator may mis-step and issue an award which in part or in total lies beyond the margin of error which the zone of acceptability can withstand. The result: loss of confidence in the system of binding interest arbitration.

To resolve the dispute, Arbitrator Kuttner made a proposal that fell within the zone of acceptability for resolution of the dispute between the
parties and a unanimous award was implemented: 2% in April and October 2009, 1% in October 2010, 1% in October 2011.

**Employment Law**

In *Nilsson et al. v The University of Prince Edward Island, 2010 CarswellPEI 51*, the PEI Human Rights Tribunal allowed the complaints of two professors and one employee arising from the University’s age 65 mandatory retirement policy. The University argued that its policy of mandatory retirement was justifiable under the provincial *Human Rights Act*, whose section 11 permitted discrimination on the basis of age for the “operation of any genuine retirement or pension plan or any genuine group or employee insurance plan”. The Tribunal found that s. 11 is meant to protect the actuarial aspects of genuine pension and retirement plans, but does not address the validity of mandatory retirement at the age of 65. The Tribunal concluded that mandatory retirement did not affect the operation of the University’s pension plan and, accordingly, the University could not rely on s. 11 of the *Act* to justify its policy. The Tribunal also concluded that the University’s policy was neither a “genuine occupational requirement” nor a “genuine qualification”, and thus the University could not rely on those defences. The Tribunal ordered reinstatement, lost income plus pre-judgment interest, $8,000.00 in general damages for each complainant for their loss of professional reputation and the length of the complaints process, and $1,000.00 for costs, plus post-judgment interest. The Tribunal further ordered the University to reinstate the complainant’s pension plans or purchase annuities if pension reinstatement was not possible.

An application for judicial review is currently pending. Whether the reviewing court will choose to intervene will depend on its interpretation of PEI’s human rights legislation. The Tribunal’s decision to go beyond the question of whether the University’s pension plan was *bona fides* appears to be in direct conflict with the direction of a majority of the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc, 2008 SCC 45 [Potash]*, where Justice Abella commented:

> [33] Section 3(6)(a), notably, states that the age discrimination provisions do not apply to the terms or conditions of any “*bona fide* pension plan”. The placement of the words “*bona fide*”, it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions,
like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan’s legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components. [emphasis mine]

The Tribunal in *Nilsson* side-stepped the Supreme Court’s dicta by concluding that the language of the New Brunswick provision, which was the subject of the Supreme Court’s decision in *Potash*, was totally unique in Canada. If the Tribunal’s conclusion is accepted, the Supreme Court’s guidance in *Potash* will be limited to New Brunswick.

**TAP**

1. When making a case in an interest arbitration, aim for the zone of acceptability.

2. Mandatory retirement may be on its way out.

**Newfoundland & Labrador**

Perhaps the most significant news from the “Rock” was the settlement of the lengthy lockout at the Voisey’s Bay nickel mine in Labrador. So significant was the 18-month dispute that the Government ordered a special Industrial Inquiry Commission, which rendered its final report in May 2011 with several recommendations, one of which was *against* banning replacement workers.

**Labour Law**

A case scheduled to be heard by the Supreme Court of Canada on October 14, 2011 may resolve issues with respect to the “reasonableness” of an arbitrator’s decision after *Dunsmuir*. In *NLNU v Newfoundland & Labrador (Treasury Board)*, 2010 NLCA 13, the Newfoundland and Labrador Court of Appeal concluded that the reasonableness requirement of “justification, transparency and
intelligibility in the decision-making process” could be satisfied by a process that, although “skeletal” and “minimal”, showed simply that the arbitrator knew what the issue was and achieved a result that was within a range of acceptable outcomes. The Supreme Court has been asked to determine whether the reasonableness analysis from Dunsmuir takes the place of the procedural fairness analysis to focus only on the result of an administrative decision, even in the absence of supportive reasoning.

This decision was released one day after Burke v NLAPPE, 2010 NLCA 12, which also applied the reasonableness test from Dunsmuir, but with a very different result. In Burke, the Court considered whether the reasonableness standard of review had been properly applied in a judicial review. The grievor alleged that his union acted in a “superficial and careless” manner in developing a last-chance agreement between himself and his employer. He claimed that he was not given the opportunity to meet with the employer to develop a resolution, no precedents of last-chance agreements were supplied to the arbitrator, and his specific complaints were not addressed in any responses from the union. The employee’s grievance was dismissed by the arbitrator, and the finding was subsequently affirmed and allegations against the legitimacy of the arbitration were dismissed by the Labour Relations Board. The union applied for judicial review of the decision by the Board, where it was found at the Trial Division that the Board properly considered the law and the finding was reasonable. The union appealed to the Court of Appeal, where the parties agreed that the trial judge appropriately reviewed the arbitration decision for reasonableness; however the parties disagreed as to whether the trial judge applied the Dunsmuir standard correctly. The appeal focussed on the fact that the Board (as well as the other parties) had for the most part ignored the specific allegations made by the employee: “It was as if all of Mr. Burke’s points were being ignored by all other participants – a voice crying in the wilderness, so to speak” (para 61). The Court concluded that a “decision that is unresponsive to the case presented cannot be said to meet the standard of ‘justification, transparency and intelligibility’ within the Dunsmuir test of reasonableness” (para 67). Therefore, the matter was sent back to be properly considered by the Labour Relations Board.

In Burke, it was found that in reviewing a decision for reasonableness, it is not only the outcome that must be reasonable, but also the process of analysis. The reasoning in Burke would support a position that a finding by an arbitrator that contained only a minimally acceptable analysis would be inadequate, and that supporting reasons should be scrutinized for reasonableness as much as the result.
Employment Law

In *Leonard v Newfoundland and Labrador (Human Rights Commission)*, 2011 NLTD 48, the complainant, Leonard, filed a claim with the Newfoundland and Labrador Human Rights Commission that his employer, Noble Drilling (Canada) Ltd. (“Noble”), had discriminated against him on the basis of disability when it fired him after he failed a drug test. Leonard travelled by helicopter to the Hibernia drilling platform where he worked. After a partially smoked marijuana cigarette was found in the helicopter, Leonard was advised that all persons who travelled on the flight would have to submit to a drug test. Leonard failed the drug test and was suspended pending further testing. Although Leonard’s subsequent tests came back negative, he was fired for violating Noble’s drug and alcohol policy. Leonard argued that Noble’s drug policy created the perception that because he had tested positive for drugs once, he may do so again and thus be impaired and unable to perform his job safely and effectively. This, he urged, was discriminatory. Further, he submitted that he was treated unfairly in that he was terminated after failing a single drug test.

At the hearing, Noble testified that it had fired Leonard, not because he had a drug addiction, but because he violated the company’s drug and alcohol policy. The Board found that Leonard did not have a drug addiction and thus did not have a disability as defined by the Human Rights Code. Leonard appealed this decision on a number of grounds. The crux of the appeal was whether a determination regarding the existence of an actual or perceived disability should have been addressed before or after there was a decision as to whether Noble’s drug policies were in fact *prima facie* discriminatory.

The Court reiterated that the appropriate test to be applied to determine if there has been discrimination is the two-stage test set out by the Supreme Court of Canada in *Meiorin*. First, the complainant must establish a *prima facie* case of discrimination, and second, the onus shifts to the employer to justify the discrimination as a *bona fide* occupational requirement or that accommodation would result in undue hardship.

Accordingly, Leonard bore the onus of establishing that the employer either perceived that he had a substance abuse problem or would develop one in the future. The Board was correct in making the determination as to whether an actual or perceived disability existed.
before proceeding to an analysis of whether Noble’s policy was discriminatory. The Court explained that the analysis as to whether a company’s drug policy can be justified as a *bona fide* occupational qualification is completed at the second stage of the test. As there was no finding of an actual or perceived disability, it was not necessary to proceed to the second stage of the test.

**TAPs from Newfoundland and Labrador**

1. The Supreme Court will soon put meat on the bones of the phrase “justification, transparency and intelligibility in the decision-making process”.

2. More interesting case law on discrimination and drug use.

**Nunavut**

**Labour Law**

*Nunavut v Nunavut Employees Union, 2011 NUCJ 24*, involved a judicial review of an arbitration award that found the employer breached the collective agreement and awarded the grievor general and special damages. The grievor had resigned because the employer failed to take any steps to address his harassment complaints based on sex and race. The employer challenged the arbitrator’s jurisdiction to hear the case given that the grievor had resigned. There were two arbitration hearings. In the first award, the arbitrator concluded that he had jurisdiction to decide the issue. In the second award, the arbitrator dealt solely with the quantum of damages. The respondent argued that the application for judicial review of the first award was not filed in time. The Court of Justice found that the second award was intertwined with the first so that it would have been a waste of judicial resources to have a judicial review after the first award. The Court reviewed the decisions for correctness and concluded that the arbitrator did not err by not applying the principles of constructive dismissal when awarding the grievor loss of wages; the arbitrator correctly applied basic contract law to grant a remedy pursuant to his general powers as an arbitrator under the collective agreement. Accordingly, the Court dismissed the application.
TAP from Nunavut

1. Arbitrators have jurisdiction over situations where constructive dismissal is alleged.

Northwest Territories

Labour Law

In *del Valle v Northwest Territories, 2011 NW TCA 3*, the union applied for judicial review of an arbitration award that dismissed its grievance. Subsequently, the union advised the Court that it was not going to proceed with the matter, and that the employee was going to proceed as an unrepresented litigant. The employer successfully applied to have the judicial review dismissed on the basis that the employee lacked standing. The employee appealed. The Court of Appeal dismissed the appeal noting that individual union members give up individual contractual rights in exchange for collective rights provided by the collective agreement. Thus the employee could not personally seek judicial review of an arbitration conducted under a collective agreement, since the employee was not a party to the agreement, unless it was in the interests of justice. The chambers judge did not err in finding that it was not in the interest of justice to permit the employee to represent the union in judicial review.

TAP from the NWT

1. Individual unionized employees have very limited ability to challenge arbitration decisions.

Yukon

In *Yukon Teachers’ Assn v Yukon, 2011 YKCA 4*, a teacher was terminated during his probationary period. The union successfully applied to the Supreme Court of Yukon for an injunction suspending the employee’s dismissal pending the outcome of an appeal hearing and adjudication of employee’s dismissal grievance. The employer appealed the injunction, but before the appeal could be heard, the Deputy Minister of Education decided the case and ordered that the employee be reinstated. Nevertheless, the employer wanted to continue with the
appeal on the ground that the Supreme Court had acted beyond its jurisdiction in granting the stay. The union brought an application to dismiss the appeal for mootness. The Yukon Court of Appeal dismissed the employer’s appeal and granted the union’s application. The Court found that the appeal was moot but went on to consider whether it should exercise its discretion to hear the appeal. Under the first prong of the test for mootness (whether there is a continuing adversarial context), the Court found that the parties were prepared to argue the case fully. With respect to the second prong (judicial economy), the Court rejected the employer’s argument that the issue was likely to recur. Instead, the Court held that the application before it was likely to be exceptional, noting that it was not obvious that a decision in the case would resolve future disputes. The Court also found that the employer’s arguments with respect to the third prong (whether the court is straying into the legislative sphere by hearing a moot case) failed. In sum, the Court concluded that considerations of judicial efficiency did not justify expending scarce judicial resources on the appeal.

**TAP from the Yukon**

1. Another useful case on mootness.
The Older Worker and Discrimination

Mandatory retirement on the basis of age is a form of discrimination that is prohibited by human rights legislation in all Canadian provinces subject to few exceptions:

1. if it is based upon a *bona fide* qualification;
2. if it is based upon a *bona fide* occupational requirement (“BFOR”); and
3. if not doing so would prevent, on account of age, the operation of a *bona fide* pension plan or *bona fide* group or employee insurance plan.

Valid reasons for imposing mandatory retirement may possibly include: preserving the integrity of the pension plan, fostering prospects for younger employees, and facilitating planning for staffing requirements. If a pension plan contains a mandatory retirement age and the plan meets the test for *bona fides* (which is not too onerous), an employer can continue to impose mandatory retirement on its employees.

The phrase “*bona fide* pension plan” was recently interpreted by the Supreme Court of Canada in *Potash*. In that case, an employee filed a human rights complaint when he was required to retire at age 65. The New Brunswick *Human Rights Act* contained an exception to age discrimination for *bona fide* pension plans. The Court found that mandatory retirement at age 65, which was required by the pension plan in question, was valid. The Court held that *bona fide* in this situation must have a different meaning than that given to *bona fide* occupational retirement because the BFOR exception was set out as a separate provision in the Act. The Court held that *bona fide* with respect to pension plans requires the plan to be legitimate, be adopted in good faith and not be adopted for the purpose of defeating protected rights. The Court noted that registration of the pension plan under the *Pension Benefits Act* was an indication of the *bona fide* of a pension plan. However, the Supreme Court did not consider the constitutional validity of such an exception pursuant to the equality provisions of the *Charter*, as the issue was not before it, but left the door open for future *Charter* challenges.
The pension plan must clearly provide for a mandatory retirement age. If the pension plan allows for the employee to work past the normal retirement age (which is usually 65) – even when this does not normally occur – then the pension plan does not require mandatory retirement. When the pension plan does not allow for mandatory retirement, an employer cannot force the employee to retire based on having a *bona fide* plan. For example, in *Theriault v Conseil Scolaire Acadien Provincial, 2008 NSHRC 3*, a Nova Scotia Board of Inquiry found that s. 6(g) of the Nova Scotia *Human Rights Act*, which permits age discrimination on the basis of a *bona fide* retirement or pension plan, cannot prevent a claim of age discrimination when the pension plan does not require the retirement of an employee at a set age.

In *William Talbot v Cape Breton Regional Municipality and CUPE, Local 759 and the Human Rights Commission, 2009 NSHRC 1*, the employee filed an age discrimination complaint with the Nova Scotia Human Rights Commission challenging the employer’s mandatory retirement policy. The *Act* prohibits age discrimination in employment but permits mandatory retirement as part of the operation of a *bona fide* pension, group or employee insurance plan. The Employer had a defined pension benefit plan which contained a mandatory retirement provision and which was registered under both the provincial *Pension Benefits Act* and the federal *Income Tax Act*. The Human Rights Commission acknowledged that the test set out by the Supreme Court of Canada in *Potash, supra*, applied to the term “*bona fide*” in the *Act*. The Board concluded that the pension plan was “a legitimate and genuine one” and dismissed the employee’s complaint of age discrimination.

Recently, in *Ontario Nurses Association (ONA) and Municipality of Chatham-Kent, 2010 CLB 33134*, Arbitrator Etherington questioned the constitutionality of the provisions in Ontario’s *Human Rights Code* (the “*Code*”) and the *Employment Standards Act* (the “*Act*”) that allow employers to cut off or reduce benefits to employees once they reach age 65. The *Code* was amended in 2006 to eliminate mandatory retirement at age 65, therefore prohibiting discrimination against employees aged 65 or older with some exceptions. Subsections 25(2.1-2.3) of the *Code* provide that the right to equal treatment without discrimination on the basis of age is not infringed by benefit, pension, superannuation or group insurance plans or funds that comply with the *Act* and the regulations thereunder. Section 44(1) of the *Act* prohibits employers from providing benefit plans that discriminate against employees on the basis of age. Nonetheless, the Regulation on benefit plans (O. Reg. 286/01) permits age-based discrimination over age 65 because age is defined as “any age
18 years or more and less than 65 years.” As well, sections 7 and 8 of the *Regulation* permit age-based distinctions with respect to life insurance plans, short and long term disability plans.

Once the *Code* was amended, the Municipality of Chatham-Kent and the ONA negotiated a collective agreement which reduced or eliminated the provision of certain benefits to employees aged 65 and older. For example, employees aged 65 and older received reduced benefits (60 days sick leave compared to 119 days received by nurses under 65; maximum of 60 unused sick days as opposed to an unlimited number of sick days for nurses under 65; $5000 life insurance while nurses under 65 were insured for twice their annual salary) and nurses aged 65 or older were denied LTD and AD&D coverage that was provided to nurses under the age of 65. The ONA challenged the constitutionality of these provisions in the collective agreement and of the enabling legislation on the basis that they were under-inclusive by failing to protect workers aged 65 and over from age-based discrimination.

Arbitrator Etherington denied the grievance, concluding that the relevant provisions in the collective agreement and in the legislation violated the equality rights under section 15 of the *Charter*, but were reasonable limits that were demonstrably justified under section 1 of the *Charter*. In determining whether the impugned legislation violated section 15 of the *Charter*, the Arbitrator applied the two-part test outlined by the Supreme Court of Canada in *Andrews v Law Society of BC*, [1989] 1 SCR 143, and later confirmed by the Court in *R v Kapp*, 2008 SCC 41. The two parts of this test are: i) whether the law creates a distinction based on an enumerated or analogous ground, and ii) does the distinction create a disadvantage by perpetuating prejudice or stereotyping. He answered both questions in the affirmative, noting that the impugned legislative and collective agreement provisions created a distinction based on the enumerated ground of age and created a disadvantage by perpetuating the stereotype that older workers are less valuable members of society.

In conducting the section 1 analysis, he held that providing benefit plans with age-based distinctions was rationally connected to the government objective of providing choice to workers to work past age 65 while ensuring that existing benefit plans are not threatened or undermined in any way. He also concluded that choosing age 65 as the cut-off age for LTD benefits minimally impaired the *Charter* right since employers, employees and insurers were left with the flexibility to adapt to the negative impacts that may arise from the elimination of mandatory retirement, being mainly, the increased cost and viability of employer-
sponsored pension and benefit plans. He commented:

[127] What all of these arguments suggest is that there may be a range of acceptable alternatives available to government to select, but that they must inevitably engage in some line drawing and decide on which is the preferable limitation from a social policy perspective given the need to balance the interests of the individual with the collective interests at stake. Given the expert evidence put before me concerning the cost curve of providing employment benefits and group insurance plans, showing that the cost becomes higher as workers enter their late 40’s and 50’s, and increases on a steeper curve when employees enter their 60’s, it would appear that any age between the ages of 60 and 71 could be said to provide a reasonable choice for the challenged limit on protection from age discrimination. But the fact that there must be an age limit of some kind for certain types of benefits such as LTD was accepted by all experts. And I believe that all experts acknowledged that there can be significant difficulties in administering LTD plans and sick leave policies for senior workers in terms of distinguishing between legitimate claims from workers who have no plans to retire, whether healthy or ill, and those who might choose to remain on LTD or sick leave despite the fact they may have planned to retire sooner if they had remained healthy. However, given the potential range of choices for an age limit for protection from discrimination in the provision of benefit and insurance plans, there are several factors that make the age of 65 a limit which provides reasonably minimal impairment of the equality rights of workers. (emphasis added)

[128] First, many social programs, such as government pensions, and private pension plans, use age 65 as the "normal retirement" age, thus providing for full or unreduced pension benefits at that age. Under current law, the normal retirement age for pensions cannot be greater than age 65. In addition some other government social benefit plans, such as medical drug coverage plans, also use age 65. The fact that other social benefit and support plans use age 65 as the age of entitlement makes the age of 65 a reasonable limit for the impugned legislation for several reasons. First, to the extent employees may lose coverage under employer sponsored benefit plans
some of those losses can be compensated for by government programs should they choose to continue to work. Second, to the extent the loss of employer benefits proves to be an incentive to some employees to choose to retire, those employees will be better situated to retire and take advantage of government pensions and benefit plans. Third, the vast majority of workers do choose to retire by the age of 65. Because traditionally only a small percentage of workers have chosen to work past age 64, the limit of age 65 minimizes the number of workers who will be detrimentally affected by the legislative limitation on protection under the Human Rights Code. Finally, given that prior to the amendments which took effect in December of 2006 the Code and ESA allowed mandatory retirement and only prohibited age discrimination in employment up to age 65, the choice of age 65 as the cut-off for protection against discrimination in benefit plans and pensions will best serve the government objective of minimizing the disruption to the web of interconnected rules that govern workplace relationships, a goal that was recognized as very important by the Supreme Court in McKinney.

Under the proportionality test, he found that the deleterious effects of the legislation do not outweigh its salutary objective and effects noting the importance of other social policy objectives such as allowing employers and employees to freely negotiate their own terms of employment.

This decision is good news for employers as it confirms that age distinctions in the provision of benefits remains valid despite the elimination of mandatory retirement. It should be noted that, although this is an arbitration case, which is only binding upon the parties involved, it has not been overturned by a higher court and thus remains a good authority for allowing age-based distinctions in benefit plans.

Under workers’ compensation legislation in most provinces, benefits also cease at age 65. Courts and tribunals in several jurisdictions are currently grappling with whether placing age limits on entitlement to such benefits is discriminatory. For example, in Québec (Commission de la santé & de la sécurité du travail) c Québec, 2011 QCCS 610, the Superior Court of Quebec overruled the Quebec Workers’ Compensation Tribunal’s finding that reducing income replacement benefits for injured workers after age 65 breached both the Quebec Charter of Human Rights and the Canadian Charter. The Superior Court held, similar to the New Brunswick Court of Appeal’s reasoning in Laronde v WHSCC
Attorney General of New Brunswick et al., 2007 NBCA 10, that there was no proof of a general disadvantage for those aged 64/65 or older because, once these workers reached 65, they have other avenues of income that are not available for younger workers, such as Old Age Security and Quebec and Canada pension plans. The worker’s motion for an appeal in the Quebec case has been granted, but a decision has not been rendered. The Nova Scotia Workers’ Compensation Appeals Tribunal is currently holding in abeyance a worker’s appeal involving the same issue until the Quebec Court of Appeal’s decision is released.

It remains to be seen how the Quebec Court of Appeal will address this issue in light of the recent Supreme Court of Canada decision in Withler v Canada, 2011 SCC 12, which confirmed that reducing pension entitlement on the basis of age is not discriminatory.

In Withler, the appellants’ surviving spouses challenged the reduction of their federal supplementary death benefits based on their husbands’ age. The Court held that a contextual assessment revealed that, although the age-based benefit reduction constituted a distinction based on an enumerated ground, it did not violate section 15 of the Charter because overall it was effective in meeting the actual needs of the claimants and in achieving important goals such as ensuring that retiree benefits are meaningful. The Court noted that pension benefits schemes must balance different claimants’ interests and that the supplementary death benefits are “not intended to be a long-term stream of income for older surviving spouses” which is attained through other benefits such as pension benefits and health and dental benefits under other provincial plans.

Similarly, in Gill v Canada, 2009 FCA 56, the Federal Court of Appeal upheld the validity of section 12.1 of the Public Service Superannuation Regulations which prohibits employees from making contributions to the pension plan after reaching age 71. The Court found that the differential treatment resulting from section 12.1 does not constitute age discrimination and, in particular, does not cause or perpetuate any adverse effect on persons over the age of 71 on the basis of any negative stereotyping of older workers.

In Black & McDonald Ltd v IBEW, Local 353, 2010 CLB 24841, the Ontario Labour Relations Board found that a provision of a collective agreement which gave preferential treatment to employees age 50 and over violated the Human Rights Code. In that case, the collective agreement required that every fifth journeyman retained shall be 50
years or older. The Board concluded that the evidence did not demonstrate that the age of journeymen had any material impact on their employment with contractors. The Board refused to take administrative notice that electricians 50 years and older constitute a disadvantaged group. This is an example of a case where aging employees who receive preferential treatment was found to violate human rights legislation. On the flip side a loss of benefits has been found not to violate human rights legislation in most cases.

Accordingly, as noted above, employers can continue to provide benefits under their existing benefit plans which already have age-based distinctions, or even eliminate the provision of benefits all together, if providing the benefits past age 65 proves to be impossible or very costly.

❖ Pension Plans v Collective Agreements

In School District No 59 (Peace River South) and BCGEU (Re), 2009 CLB 25477, Arbitrator Hall dismissed the union’s grievance challenging the discontinuance of health benefits at age 65 after the elimination of mandatory retirement. The collective agreement provided benefits to “all employees”, but the terms of the new insurance plan stipulated that coverage would terminate once the employee reached age 65 or retired. The Arbitrator found that the parties expressly provided for benefits in the collective agreement by way of insurance plans which they had negotiated. The parties had agreed the terms of those plans would not change. The Arbitrator noted that the abolishment of mandatory retirement did not override the contractual agreement between the parties. As a result, benefits for those over 65 could be terminated.

On the other hand, in London (City) and London Civic Employees’, Local 107 (Re), 2010 CLB 22395, Arbitrator Etherington allowed the grievance of the union which challenged the validity of the employer’s decision to terminate certain benefits for employees over 65. The union argued terminating these benefits contravened the benefits and non-discrimination articles of the collective agreement. The Arbitrator ruled that the language used in the collective agreement took precedence over that used in the benefit plan. The impugned provision of the collective agreement referred to “employees” or all “permanent employees” without any limitation as to age. The Arbitrator concluded that, although this group of employees did not include employees over age 65 or older prior to elimination of mandatory retirement, the amendments to the legislation in December 2006 rendered the impugned provisions in the collective agreement of no force or effect so that all groups of employees
contemplated by the benefit provision in Article 14 were covered, including those over the age of 65:

[37] ... To the extent that the amendments in Bill 211 appear to allow for continuation of benefit plans that discriminate on the basis of age, the finding of an intention to differentiate on such grounds should require clear and unambiguous language to indicate such an intention. In short, the amendments to the Human Rights Code may enable employers and unions to make distinctions that disadvantage senior workers in their entitlement to benefits, but it does not mandate it or require us to read such a limitation into existing general contract language concerning benefits simply on the basis that workers who are 65 or older were not allowed to work past age 64 prior to December 12, 2006.

The implication of these decisions is that unionized employers have to ensure that they purchase insurance plans that are consistent with and do not contravene the language used in their collective agreements.

In sum, despite the elimination of mandatory retirement, the provision of benefits such as life insurance, medical benefits, and long term disability remains with the discretion of the employer. However, if an employer chooses to continue providing such benefits for employees 65 and older, this will likely increase the cost of providing those benefits for the employer. As long as the employer can provide a legitimate basis for the establishment of differing rules for benefit plans based on age, exceptions should be allowed. The inability of employers to obtain insurance coverage for benefits past a certain age or the increased amount of premiums would likely meet this requirement. The employer could also show that increased usage of certain benefits after a particular age would result in the overall benefit plan no longer being viable.

In order for an employer to rely upon the exception of a bona fide pension or group or employee insurance plan, the employer must show that the plan is legitimate, and was adopted in good faith, and was not adopted for the purpose of defeating protected rights. Registration of a pension plan under pension legislation is a good indication that the plan is bona fide.

**TAP**

1. The balancing of interests continues to govern the disposition of issues facing older employees.
EMPLOYEES AND COMPUTERS

The recent Ontario Court of Appeal decision in *R v Cole, 2011 ONCA 218*, considered whether an employer has unfettered access to its employees’ workplace computers and their contents. The Court determined that, in some circumstances, an employee does have a reasonable expectation of privacy which limits the employer’s ability to access information and provide it to third parties. While *R v Cole* is a criminal case, it will be applied more broadly and should be considered in the employment law context.

Cole was a high school computer science teacher who had access to the school’s server and all computers. A computer technician found sexually explicit images of a grade 10 student on the accused’s laptop in a hidden folder which the technician accessed through the server while performing regular maintenance.

There was a Policy and Procedures Manual which covered computer use that included the following:

- There is to be no inappropriate content on the school computer, including sexually explicit material;
- All data and messages are considered to be property of the school board; and
- The administrative team can “legally open private email if that action seems necessary for the ongoing ‘health’ of the system or if inappropriate use is suspected”.

Cole claimed that seizure of his computer by police without a warrant violated his protection under section 8 of the *Charter* (freedom from unreasonable search and seizure).

The Court of Appeal found that the accused did have a reasonable expectation of privacy with respect to the information he had stored on his computer based on the following considerations:

- The accused made use of the laptop for personal matters and protected it with a password, which showed a subjective expectation of privacy;
- There was no clear privacy policy related to the teacher’s laptop specifically;
• The policy did not provide for regular monitoring and no regular monitoring actually took place;

• While the accused was aware that the administration could access the contents of his laptop, there was no evidence that this was actually done prior to this event. The Court noted that the fact that access could be made did not “negate a reasonable expectation of privacy” and compared the situation to the existence of a master key in the case of an apartment or bus locker;

• The folder containing the information was not in “public view” but was a hidden folder, it was not abandoned, and it was not in the hands of third parties; and

• Access by the technician for the purpose of maintaining the system was not objectively unreasonable, but access by a state actor to determine the nature of the information was intrusive. The Court compared this situation to hotel cleaning staff where there was no reasonable expectation of privacy for items in plain view but a privacy expectation does exist for items in drawers, closets, suitcases, etc. Therefore, the expectation of privacy was modified to some extent for the purposes of maintaining the system.

The Court found that the principal viewing the photographs, directing the technician to copy the photographs onto a disc, and requiring the accused to hand over the laptop was an unreasonable search and seizure that violated section 8 of the Charter. However, his actions were authorized and justified by the Education Act and his overriding obligation to ensure the health and safety of the students. A similar finding was made with respect to the school board.

With respect to the seizure of the computer equipment and data by the police without a warrant, the Court noted that the accused’s privacy interest continued even though the material had been legally seized by the principal and the school board. The fact that it was turned over by parties who had lawful possession did not make the seizure legal. Therefore, the seizure of the laptop and the disc with the temporary internet files without a warrant violated the Charter. There were no exigent circumstances that could justify the search without a warrant.

However, with respect to the screen shots and images of the student saved by the technician when he initially discovered the material, the Court found that the accused had no personal privacy interest in the data because they were taken from the school’s network using the
school’s computer and the student herself had a privacy interest in the photographs. Further, the photos were in plain view and found by the technician while performing permissible activities. The Court compared the transfer of this information to the police that was stored on a disc to the handing over of photographs in an envelope which the accused had no privacy interest in or the handing over of drugs found in a student’s pocket by a vice-principal after a search (which was the issue in *R v M (MR)*, [1998] 3 SCR 393). Therefore, there was no unreasonable search and seizure with respect to the photos of the student and no warrant was required.

Arbitrators have for years been called upon to decide grievances involving employees who have been disciplined or terminated as a result of their off-duty conduct. The new social media wave that has arisen over the last decade will likely increase the number of these cases. This will, in part, be a result of the permanence of and easy access to comments made by employees to their friends and the general public on social media sites such as Facebook and Twitter.

The law in this area is fairly well established. An employee’s behaviour outside the workplace is of no concern to an employer unless it affects the legitimate business interests of the company. Undoubtedly, employees have been commenting negatively about employers to friends and family ever since there were employers. However, until recently these comments were largely oral and the audience was narrow, with the result that evidence of any wrong doing was difficult to find and establish. Public postings made on internet social media sites can undoubtedly affect employer interests and they are in a form that has more permanence and broader distribution. Proof of comments made by off-duty employees that was not easily available prior to the establishment of social media sites is now available on public or widely distributed sites.

In *Sidhu & Sons Nursery v United Food and Commercial Workers International Union, Local 1518, BCLRB No B26/2010*, the BC Labour Relations Board considered a complaint involving two employees who were terminated due to comments made about their employer on their Facebook pages. The case involved an employer that was in the process of being organized by a union. Under the *BC Labour Relations Code*, the employer was prohibited from disciplining employees in these circumstances except for “proper cause”.

The two employees had Facebook accounts and had 100 and 377 Facebook friends respectively. These friends included coworkers at their
workplace. The first employee wrote a string of derogatory, threatening and malicious comments about his employer on his page. The second employee only posted a few comments on his page but his postings were extremely derogatory toward his employer and his supervisors. One of the comments he posted was,

West coast detail and accessory is a fuckin joke...don’t spend your money there as they are fuckin crooks and are out to hose you... there [sic] a bunch of greedy cocksucin low life scumbags... wanna know how I really feel?????

The employer argued that it had proper cause to terminate the employees based on the test established in White Spot Limited. The employer relied on a recent case from Alberta in which an employee was terminated based on comments she made on an internet blog. The arbitrator in that case concluded that:

While the Grievor has a right to create personal blogs and is entitled to her opinions about people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the grievor, in expressing contempt for her managers, ridiculing her coworkers, and denigrating administrative processes engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.

The union argued that the employer did not have proper cause for the employees’ termination because the employer was guilty of anti-union animus. One of the employees had been instrumental in organizing the workplace. The Board dismissed the union’s assertion that the employer was motivated by anti-union animus. The evidence did not establish that the employees’ union activities were a factor in the decision to terminate. Ultimately, the Board concluded that the first employee “expressed contempt for and ridiculed the manager and supervisors in such a manner that there was proper cause [for his termination].” Interestingly, the Board wasn’t certain that the second employee’s comments alone (such as the one cited above) would have been grounds to terminate the employee for proper cause. However, in addition to posting his comments, he was dishonest. He denied that he was the one who posted the comments. The Vice Chair commented that had the employee been forthright and apologized, her decision might have been different.
Ultimately, it was his dishonesty in combination with his Facebook postings that resulted in his employer having proper cause to terminate his employment.

The Board also addressed the issue of privacy. The Board adopted comments from *Leduc v Roman, 308 DLR (4th) 353*, in which the Ontario Superior Court of Justice held that “there is no serious expectation of privacy when publishing comments on Facebook.” As a result, privacy concerns were not a factor in this decision.

In *Brisindi c STM, 2010 QCCLP 4158*, the employee unsuccessfully filed an application challenging the decision of the Quebec’s Health and Safety Board, which maintained its initial decision to the effect that he did not suffer from an employment injury.

The plaintiff was a public transit bus driver who claimed to have injured himself while performing the daily “check-up prior to departing” of the bus. For almost a month, the employee was on sick leave followed by a progressive return to work. However, he still claimed to be suffering. He was given ergotherapy and physiotherapy treatments. In one of the ergotherapy reports produced at hearing, it was indicated that the employee “had not retry to swim crawl or to bike outside”.

Meanwhile, documents produced by the employer’s lawyer which originated from Facebook showed that the plaintiff had participated in 4 biathlons and triathlons during the month of the so-called recovery. During the triathlons, he was generally swimming for 750 metres, biking for 20 kilometres and running for 5 kilometers more.

Despite a final diagnosis confirming the initial diagnosis given by the employer’s doctor, the Board decided, particularly based on the Facebook evidence, that the various contradictions and the unlikeliness of the events played against the plaintiff’s credibility. The decision is being judicially reviewed.

**TAPs**

1. Make sure your workplace computer use policy is clear and unequivocal on what constitutes abuse and the consequences that will flow therefrom.

2. Privacy and computers usually do not mix.
**THE WACKY DECISION OF THE YEAR (the “WDY”)**

The winner this year is *Andrews v Canada, 2011 PSLRB 100*.

Andrews was employed as a Senior Analyst/Policy Advisor in the Department of Citizenship and Immigration with 27 years seniority when he was terminated on November 3, 2009.

The employer’s basis for termination was that

[1] ... He used government property and equipment for inappropriate and non-work-related activities, including viewing pornographic material, and that he misused government property and equipment through the excessive use of its Internet services and electronic network systems for non-work-related purposes.

Evidence of a random investigation yielded the following:

[13] ... August 20, 2009, was chosen because it was the day on which the matter came to the attention of IT Security. On that day, the grievor engaged in almost continuous Internet surfing between 08:00 and 13:00. This included about two hours on Flick'r, looking at about 43 pornographic images. Ms. Leblanc testified that, overall, 70% of the Internet browsing on that day was not related to work. A similar pattern occurred on August 18, August 10 and August 7, 2009. However, Ms. Leblanc acknowledged that while the grievor did access some inappropriate sites, the bulk of his Internet browsing was on news and sport sites.

The grievor’s basic defence was that for many months prior to his dismissal he was underworked and these activities were used to fill in the time. The adjudicator commented:

[37] The grievor acknowledged that, although he was required to use the Internet for work-related research, he also used it for non-work-related purposes. He said that he was interested in the news and that he frequently browsed news and sports sites. He also accessed the schedules of the soccer team that he coached and found it convenient to do his banking online. He said that he
saw other employees at work accessing news sites or doing their banking online and that he felt that, as his work was complete, it would be acceptable. He also said that he frequently left the computer on an Internet site.

...

[38] The grievor testified that he did not realize that his Internet use was heavy. He said that in the past he had been told by the director at that time, Bruce Scofield, that his internet usage was high and that he should tone it down. ... He stated that he believed that accessing the Internet sites did not impact his ability to do his assigned work.

...

[41] The grievor testified that the investigation came as a shock. He said that he had no issue with the investigation. He believed that the investigators were sensitive and fair. He tried to be honest and forthright and to answer all questions truthfully. He could not explain his behaviour. He stated that at some point he allowed his personal life to spill over into his work life but that there was no real explanation. He said that it was just a “very stupid act” and that he was very embarrassed.

...

[76] I do not think that the grievor’s excessive use of the employer’s Internet services for non-work-related purposes can or should be characterized as time theft, as that phrase seems to be used in the case law. I agree with the grievor that time theft as it is generally understood involves an overtly fraudulent act, such as altering a time card, having employees punch in for each other or failing to record or falsely recording attendance on an attendance management system.

...
[78] I believe that what sets the time theft cases apart from the facts of this case is that in the time theft cases the intent to commit the act can be inferred from the act itself. For example, there can be no mistaking the intent to steal time when an employee has another employee punch his or her time card. But in an environment in which personal use of the employer’s Internet services is permissible on an employee’s own time and in which employees do not punch time cards or actively record their working hours, it becomes much more difficult to infer the requisite intent for a charge of time theft. I simply do not see excessive use of the employer’s Internet services for non-work-related purposes as the beginning of a continuum that ends with time theft. I believe that fraudulent intent is a fundamental element in the offence of time theft, but it is not in an allegation of misusing the employer’s Internet services.

...

[81] The grievor offered as an explanation for his behaviour the fact that he did not have enough work to do. He also argued that his behaviour did not prejudice anyone.

The employer in its submissions argued that the grievor had engaged in time theft and inappropriate viewing of pornography while at work.

The grievor did not dispute the essential facts but argued there were significant mitigating factors and that this charge was disproportionate to the offences. These were that he had 27 years seniority, a clear disciplinary record and exemplary performance appraisals, he was forthcoming and candid during the investigation, was apologetic and remorseful during the investigation and the hearing and accepted responsibility for his actions. He argued that his claim of lack of work as an explanation was relevant because his activities did not prejudice the employer i.e. that no one was really affected by his behaviour, no one complained, no one saw the inappropriate images, so there was no prejudice.
The adjudicator’s decision stated:

[83] It seems clear to me that there was some failure on the part of the grievor’s managers to manage him. While both his supervisors contended that they should not have to supervise minutely an employee at the grievor’s classification level, I believe that they have some responsibility to supervise, which they do not seem to have done in this case. I find it surprising that an employee could spend the amount of time that the grievor did on non-work-related activities for months without his supervisors noting a lack of production or engagement. ...it seems to me that the grievor’s supervisors had a responsibility to regularly review his work and production and to assess his workload, which clearly they did not do.

...

[98] The grievor acknowledged that, for four months in fall 2008 and for three months in summer 2009, he spent more than half his workdays surfing the Internet for non-work-related purposes and, part of that time, viewing pornographic images. While I do not agree that it constituted time theft, there is absolutely no doubt that the grievor spent seven months being paid for work he was not doing, using the employer’s equipment and electronic network for purposes unrelated to his job. Given that fact, I am reluctant to impose any disciplinary penalty that would result in him being paid for any time not actually worked.

[99] Therefore, it is my determination that, although the grievor should be reinstated, the period of suspension will be the time served up to the date of this decision. In other words, the grievor should be reinstated with no back pay. I am mindful that it is a long suspension, but I believe that it reflects the seriousness and nature of the offence and the employer’s need for deterrence.

**TAP**

1. My employer didn’t give me anything better to do.