

Matthew R. Letson
Chair, Administrative Law Section
Canadian Bar Association – New Brunswick
801-133 Prince William Street
Saint John, NB E2L 2B5
T: (506) 633-3533
F: (506) 633-0465
E: mletson@lawsoncreamer.com

TO: Lia Daborn, Executive Director
Canadian Bar Association, NB Branch
500 Beaverbrook Court, Suite 300
Fredericton, NB E3B 5X4

FROM: Matthew R. Letson

DATE: July 22, 2010

SUBJECT: Attendance at National Administrative Law Section
Annual Meeting, St. John's, NL, June 5, 2010

I attended the National Administrative Law Section Annual Meeting in St. John's, NL, on June 5, 2010, on behalf of the New Brunswick Administrative Law Section. This memo is to provide a report with respect to that meeting.

The meeting was conducted in the Viking Room at the Sheraton Hotel, in St. John's. In addition to the National Administrative Law Executive and Executive Members, there were representatives from Newfoundland, Prince Edward Island, Ontario, Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia. No one attended from the Territories or from Nova Scotia.

The National Chair gave a brief report of the activities of the Section since November, 2009. Briefly, these activities included:

- Organizing the November 2010 Annual Conference in Ottawa; and
- Laying the groundwork for a Section Newsletter.

Each of the Provinces gave a brief update as to their professional development activities and cases of note in their jurisdictions. I gave a report on behalf of the New Brunswick Section, and am attaching a copy of that report as Appendix "A" to this memo.

The budget for the Section was then presented by Treasurer, Murray Murphy. The Section budget was approved.

Discussion with respect to the 2010 Ottawa Conference indicated that the conference agenda had mostly been set, including commitments from speakers. I should note that the Ottawa Conference will include professional development sessions from the Administrative Law Section, the Labour and Employment Law Section, and the Privacy Section. The addition of the Privacy Section as a host for the conference is new for 2010.

Incoming Chair of the National Section, Mathieu Bouchard, led a discussion as to a special project that he is proposing for the Section to address growing concerns in some Provinces with respect to the independence of Tribunals. Mathieu indicated that he would be requesting that each of the Section Chairs prepare a brief outline of any issues concerning Tribunal independence in their respective Provinces sometime in the near future. The intent will be to create a position paper for the Section which could be used to support efforts to address these concerns with the various Provincial Governments and the Federal Government in the future.

Finally, the National Executive has requested that each of the Provincial Section Chairs advise Astrid Hoffman of any upcoming professional development sessions as soon as possible so that these may be included on the Section website. This would allow members from other Provinces to know in advance if there were upcoming professional development programs that they may wish to attend. There was also a discussion of whether it would be possible to facilitate video conferencing or other electronic means of participation in the professional development sessions.

MRL:djp
Attch: Appendix "A"

**REPORT OF THE NB BRANCH OF THE CBA
ADMINISTRATIVE LAW SECTION TO THE NATIONAL
ADMINISTRATIVE LAW
SECTION MEETING OF JUNE 5TH, 2009**

By Matthew R. Letson,
Section Vice-Chair

Branch Chair Trisha Gallant-Leblanc sends her regrets as she is unable to attend.

The New Brunswick branch is blessed with a strong committee of approximately ten members. There is a good cross section of lawyers from various parts of the administrative law field including government, unions, lawyers in private practice and lawyers employed by the Human Rights Commission.

We have chosen to focus on presenting quality Continuing Legal Education courses in the administrative law field. Nancy Forbes and I presented at the CBA mid-winter meeting this past February. The topic of our presentation was "The Fallout from Dunsmuir: David Jones' thoughts in absentia".

For our fall program, we are planning to present a half-day Rapid Fire Session. This is based on a similar format that has found success on litigation topics in recent years. Planned topics for the Rapid Fire Session include presentations on:

- i) bias in light of the New Brunswick Court of Appeal decision in Moore v. NB Real Estate Association, 2007 NBCA 64;
- ii) mandatory retirement, which no doubt will discuss the ramifications of the Supreme Court of Canada's decision in New Brunswick Human Rights Commission v. Potash Corporation of Saskatchewan, 2008 SCC 45;
- iii) the human rights investigation process;
- iv) benefits of filing simultaneous human rights complaints and wrongful dismissal actions; and

- v) discussion of whether Keays v. Honda Canada, 2008 SCC 34, represents a pendulum swing and what impact this might have, and privacy and disclosure in light of the Canada (Privacy Commission) v. Blood Tribe Department of Health, 2008 SCC 44, decision by the Supreme Court of Canada.

We are in the process of attempting to attract some very notable speakers for the event. Justice Margaret Larlee of the New Brunswick Court of Appeal has graciously agreed to moderate our session. The section is understandably very excited by this new format and we anticipate a good turn out.

On the legislative front in New Brunswick, the legislature is currently considering a number of interesting measures, including legislation similar to that in place in several provinces where certain cancers contracted by firefighters are deemed to be work related and therefore compensable. The unique aspect of this legislation is that the compensation scheme for firefighters will fall outside of the normal worker's compensation scheme in the Province if the legislation passes as currently drafted. In addition, the legislature is considering two bills that would amend the procedures for disciplinary hearings in front of both the New Brunswick Law Society and the New Brunswick College of Physicians and Surgeons. To date, the enabling legislation in respect of both of these bodies provide for closed door disciplinary hearings. The new legislation would require some degree of transparency in disciplinary hearings for both of these bodies. In the case of the Law Society of New Brunswick, the change results from a Court of Queens Bench decision from the spring of last year which gave the Law Society until June 30th, 2009, to put in place a more public hearing process. The change to the process for the College of Physicians and Surgeons arises out of recommendations made by Justice Paul Creaghan in his review of pathology errors at the Miramichi Hospital associated with Dr. Raj Menon. This case gained national attention along with a similar situation in Newfoundland in the past year.

The past year has seen a number of significant cases in the province, including the decision in the Potash Corporation of Saskatchewan case by the Supreme Court of Canada. The Supreme Court recognized as distinction between the justifications that must be presented in respect of a Bona Fide Occupational Requirement verses the far less stringent "Bona Fide Pension Plan" as found in Section 3(5) of the *New Brunswick Human Rights Act*.

In Cronkhite v. Town of Nackawic, 2009 NBQB 110, the New Brunswick Court of Queen's Bench distinguished Dunsmuir for employees/officers of municipalities employed pursuant to Section 74(5) of the

Municipalities Act. Unlike in Dunsmuir, the Court held that Cronkhite's employment was not governed by the law of contract as a result of the additional restrictions imposed by Section 74(5). As a result, the Town was required to meet the standards of procedural fairness (which the court ruled it did).

The New Brunswick Court of Appeal's decision in Stewart v. WHSCC, 2008 NBCA 45 confirmed that workers employed by employers falling under the jurisdiction of the Federal *Government Employees Compensation Act* (hereinafter "GECA") need only meet the definition of accident under GECA, not the often more rigorous definition of accident under the Provincial workers compensation scheme.

For an interesting contrast, compare the decision of CUPE v. Central Carleton Nursing Home, 2008 NBQB 290 versus the decision of Ex. Dir. of Assessment v. Findlay, 2009 NBQB 56 for discussion of what constitutes sufficiently cogent reasons in a decision so as to meet the reasonableness test as described in Dunsmuir.

The New Brunswick Court of Appeal in Fundy Linen Service Inc. v. WHSCC, 2009 NBCA 13 ruled on the lack of structural independence with respect to the WHSCC Appeals Tribunal. In that case, a member of the Legislative Assembly of New Brunswick, the body with the authority to appoint Appeals Tribunal members, "represented" a worker in front of the Appeals Tribunal. The court ruled that the *WHSCC Act* constituted a valid express ouster of the common law requirement that tribunals be structured so as to be independent of those responsible for their appointment. Nonetheless, the court ruled that the common law pertaining to bias continued to impose restrictions on the role that MLA's can play in front of the Tribunal. The Court set out a strict rule that members of the executive branch of government and MLA's can not advocate for workers in front of the Appeals Tribunal. There is a slightly more flexible rule that MLA's can not testify except in exceptional circumstances. The Court made interesting comments with respect to tribunals that lack structural independence.

Finally, there are two interesting human rights decisions that will be before the courts in New Brunswick in the next few months. First, the New Brunswick Court of Queens Bench will hear a Judicial Review of a Board of Inquiry decision in Blair et al v. New Brunswick (Superintendent of Pensions). This case is interesting in that it involves legislation that is facially neutral, but which the board of inquiry found to have a discriminatory effect when combined with the application of a private pension plan. The second case, which should be heard by the New Brunswick Court of Appeal before the end of this year, is PNB v. New Brunswick Human

Rights Commission (W(A)). In this case, the Court of Queens Bench quashed the decision of the Human Rights Commission to refer a complaint of discrimination by a severely autistic resident of New Brunswick to a Board of Inquiry. The issues include whether there is a standard of review applicable to questions of procedural fairness, what constitutes a record in front of the Commission at the point where it is considering whether to refer a matter to a Board of Inquiry for a full hearing, what evidence the Commission must consider at the referral stage and whether the delays in this case were unreasonable. At issue is, potentially, the fate of a young adult with severe autism who, as a result of a claim by the Province that it can not afford the necessary services to house and care for him at the level his disability necessitates, have elected to alienate him to a facility in the State of Maine, where he has remained since approximately 2005.

I conclude on an interesting note that, while several cases in the Province have considered the standard of review analysis set out in Dunsmuir, and have applied the definitions in Dunsmuir, to date I have not located any cases in the province which have considered the more recent pronouncements on the subject as the Supreme Court of Canada in Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12. It will remain to be seen what, if any, impact the Khosa decision has in New Brunswick.