WHAT'S NEW

ISSUE 3 – May 2011

In an effort to keep the Labour Relations Community informed on an ongoing basis of happenings at the Labour Relations Board, the Board will be producing on a monthly basis "What's New." The following is Issue 3 for May 2011.

NEWS AROUND THE BOARD

Board Caucus – A second Board caucus meeting has been scheduled for the 2011 calendar year. It will take place on November 8 and 9, 2011 in Calgary at the Sheraton Cavalier. Further details to follow.

Conference of Labour Board Chairs and Administrators – The annual meeting of Labour Board Chairs and Board Administrators is taking place in Halifax, Nova Scotia on July 12–14, 2011.

OTHER HAPPENINGS

Council of Canadian Administrative Tribunals (CCAT) – Annual conference is taking place in Ottawa on Jun 5–7, 2011.

Labour Arbitration and Policy Conference – The annual Lancaster Labour Arbitration and Policy Conference is taking place in Calgary on June 9 and 10, 2011. In addition to the usual informative agenda, the implications of the Supreme Court of Canada's recent decision in *Ontario (Attorney General) v. Fraser* on collective bargaining will be discussed.

RECENT SIGNIFICANT CASES

Ontario (Attorney General) v. Fraser:

On Friday, April 29, 2011, the Supreme Court of Canada issued its much anticipated decision in the continuing evolution of the protection provided by section 2(d) to freely associate in the context of collective bargaining.

Significantly, the decision is the second exploration by the Supreme Court of Canada of the right to freely associate in the labour relations context since the Court's 2007 landmark decision in *B.C. Health Services*.

In *Fraser*, the Supreme Court addresses the constitutionality of Ontario's latest attempt to create a constitutional labour relations regime – the *Agricultural Employee Protection Act, 2002*, S.O. 2002, c.16 ("AEPA) - for the farming sector.

Specifically, the decision addresses the Ontario Court of Appeal's finding the AEPA violates section 2(d) of the *Charter*. In so finding, the Ontario Court of Appeal held the legislation did not contain the minimum statutory protections required to enable agricultural workers to exercise the constitutional right to bargain collectively in a meaningful way, namely: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and, (3) a statutory means for resolving collective bargaining impasses and disputes.

Ultimately, the Supreme Court of Canada overturned the Ontario Court of Appeal's decision. In doing so, it rejected the Court of Appeal's position that *B.C. Health Services* constitutionalizes a full-blown *Wagner* system of collective bargaining. Rather, it emphasizes and reaffirms the more limited nature of its *B.C. Health Services* decision. According to the Court, "… what section 2(d) protects is *the right to associate to achieve collective goals.* Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless." And further, "[w]hat is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law … or by government action, a limit of the exercise of the s. 2(d) right is established …"

Interestingly, the decision is comprised of a five person majority adopting the findings and reasoning discussed above; two justices that agree in result but forcefully argue collective bargaining does not enjoy constitutional status under section 2(d); a single justice that agrees in result but disagrees with the majority's conclusion section 2(d) requires employers to consider employee representations in good faith; and a single justice that finds the legislation to be unconstitutional as it does not protect and was never intended to protect collective bargaining rights.