Labour and Employment Board

Annual Report
2017–2018

New Nouveau Brunswick

Labour and Employment Board
Annual Report 2017-2018

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Transmittal Letters

To the Honourable Jocelyne Roy Vienneau
Lieutenant-Governor of New Brunswick

May it please your Honour:

It is my privilege to submit the annual report of the Labour and Employment Board, for the fiscal year April 1, 2017, to March 31, 2018.

Respectfully submitted,

Honourable Trevor A. Holder
Minister of Labour, Employment and Population Growth

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Sir:

I have the honour to submit the 23rd Annual Report of the Labour and Employment Board for the period of April 1, 2017 to March 31, 2018 as required by Section 14 of the *Labour and Employment Board Act*, Chapter L-0.01, R.S.N.B.

Respectfully submitted,

George P.L. Filliter, Q.C.
Chairperson

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Introduction

The following general comments are intended to provide the reader an understanding of the role and responsibilities of the Labour and Employment Board.

This Board was created through the proclamation of the *Labour and Employment Board Act*, Chapter L-0.01, R.S.N.B. in November 1994. It represents the merger of four (4) former Tribunals, each of which was responsible for the administration of a specific Act. Consequently, the Labour and Employment Board performs the duties and functions required under the *Industrial Relations Act*; the *Public Service Labour Relations Act*; the *Employment Standards Ac*t and the *Pension Benefits Act*, and since 1996, may act as a Board of Inquiry under the *Human Rights Act*. Since December 2001, the Board is responsible for the administration of the *Fisheries Bargaining Act*, and in July 2008, the Board was given responsibility over a complaints procedure in the *Public Interest Disclosure Act*. Since May 2009, the Board is also responsible for the administration of the *Essential Services in Nursing Homes Act*, and since April 2010, it is responsible for appointing arbitrators pursuant to the *Pay Equity Act*, 2009.

The membership of the Labour and Employment Board typically consists of a full-time chairperson; a number of part-time vice-chairpersons; and members equally representative of employees and employers. To determine the various applications/complaints filed under the above statutes, the Board conducts numerous formal hearings at its offices in Fredericton as well as other centers throughout the province. At the discretion of the chairperson, these hearings are conducted either by the chairperson or a vice-chairperson sitting alone, or by a panel of three persons consisting of the chairperson or a vice-chairperson along with one member representative of employees and one member representative of employers.

The *Industrial Relations Act* sets out the right of an employee in the private sector to become a member of a trade union and to participate in its legal activities without fear of retaliation from an employer. The Board has the power to certify a trade union as the exclusive bargaining agent for a defined group of employees of a particular employer and may order a representation vote among the employees to determine whether a majority wish to be represented by the trade union. Following certification, both the trade union and the employer have a legal responsibility to meet and to begin bargaining in good faith for the conclusion of a collective agreement which sets out the terms and conditions of employment for that defined group of employees for a specified period of time.

Generally, therefore, the Board will entertain applications for: certification or decertification and in either instance, the Board may order a representation vote to determine the wishes of the majority of the employees; the effect of a sale of a business on the relationship between the new employer and the trade union; the determination of work jurisdiction disputes between two trade unions, particularly in the construction industry; complaints of unfair practice where one party alleges another party has acted contrary to the *Act*, often leading the Board to order the immediate cessation of the violation and the reinstatement of employee(s) to their former position with no loss of wages should the Board determine that a suspension, dismissal and/or layoff is a result of an anti-union sentiment by the employer.

The Board has similar responsibilities under the *Public Service Labour Relations Act* which affects all government employees employed in government departments, schools, hospital corporations and crown corporations. In addition to these functions, the Board oversees and determines, if required, the level of essential services which must be maintained by the employees in a particular bargaining unit in the event of strike action for the health, safety or security of the public. The Board is responsible for the appointments of neutral third parties, such as conciliation officers, to assist the parties in concluding a collective agreement. Excluding crown corporations, there are currently 25 collective agreements affecting more than 40,000 employees in the New Brunswick public sector.

With the Essential Services in *Nursing Homes Act*, the Board administers an essential services scheme similar to that outlined in the *Public Service Labour Relations Act*, but which applies to unionized private sector nursing home employees, excluding registered nurses.

The Board has a differing role under the *Employment Standards Act* and the *Pension Benefits Act*. Whereas applications and/or complaints arising under the *Industrial Relations Act* and the *Public Service Labour Relations Act* are filed directly with the Board for processing, inquiry and ultimately, determination, the Board will hear referrals arising from administrative decisions made by the Director or the Superintendent under the *Employment Standards Act* and the *Pension Benefits Act*, respectively. The Board has the discretion to affirm, vary or substitute the earlier administrative decision of the Director of Employment Standards. The *Employment Standards Act* provides for minimum standards applicable to employment relationships in the province, such as minimum and overtime wage rates, vacation pay, paid public holiday, maternity leave, child care leave, etc. Under the *Pension Benefits Act*, where a party has appealed a decision of the Superintendent to the Financial and Consumer Services Tribunal, the Tribunal may refer to the Board a question of law or of mixed fact and law involving labour or employment law. The Board's determination of that question becomes part of the Tribunal's decision.

The *Human Rights Act* is administered by the New Brunswick Human Rights Commission which investigates and conciliates formal complaints of alleged discrimination because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, family status, sexual orientation, sex, gender identity or expression, social condition, political belief or activity. If a settlement cannot be negotiated, the Human Rights Commission can refer complaints to the Labour and Employment Board for it to act as a Board of Inquiry, hold formal hearings and render a decision.

The *Public Interest Disclosure Act* is generally administered by the Ombud. However, where an employee or former employee alleges that a reprisal has been taken against him or her relating to a disclosure under the *Public Interest Disclosure Act*, such complaint is filed with the Board, who may appoint an adjudicator to deal with the complaint.

Under the *Pay Equity Act*, 2009, the Board is responsible for appointing arbitrators, upon application, to deal with matters in dispute relating to the implementation of pay equity in the public sector.

With the exception of the *Public Interest Disclosure Act* and the *Pay Equity Act*, 2009, each of the statutes for which the Board has jurisdiction provides that all decisions of the Board are final and binding on the parties affected. The Courts have generally held that they should defer to the decisions of administrative boards except where boards exceed their jurisdiction, make an unreasonable decision or fail to apply the principles of natural justice or procedural fairness.

Mission Statement

The mission of the Board arises out of the nine (9) statutes which provide the basis for its jurisdiction:

- Administer the *Industrial Relations Act*, the *Public Service Labour Relations Act*, the *Fisheries Bargaining Act* and the *Essential Services in Nursing Homes Act* by holding formal hearings on the various applications/complaints filed and rendering written decisions.
- Administer fairly and impartially the referral processes in relation to decisions made by the administrators of the *Employment Standards Act* and the *Pension Benefits Act* by holding formal hearings and rendering written decisions.
- Act as a Board of Inquiry arising from a complaint filed under the *Human Rights Act* when such complaint is referred to the Board for determination through a formal hearing process.
- Administer the process relating to complaints of reprisals made pursuant to the *Public Interest Disclosure Act*, and appoint adjudicators where appropriate to hold hearings and render written decisions.
- Appoint arbitrators, pursuant to the *Pay Equity Act*, 2009, to deal with matters in dispute relating to the implementation of pay equity in the public sector.
- Enhance collective bargaining and constructive employer-employee relations, reduce conflict and facilitate labour-management cooperation and the fair resolution of disputes.

Message from the Chairperson

It is a pleasure for me to submit the 23rd annual report of the Labour and Employment Board for the period of April 1, 2017 to March 31, 2018.

The Labour and Employment Board is established by virtue of the *Labour and Employment Board Act* and is mandated legislative authority to administer and adjudicate matters under the *Industrial Relations Act*, the *Public Service Labour Relations Act*, the *Employment Standards Act*, the *Pension Benefits Act*, the *Human Rights Act*, the *Fisheries Bargaining Act*, and the *Essential Services in Nursing Homes Act*. The Board also exercises a complaint administration and adjudicative appointment jurisdiction under the *Public Interest Disclosure Act*, and an arbitral appointment jurisdiction under the *Pay Equity Act*, 2009.

The total number of matters filed with the Board during this fiscal year was 112, up from the previous year. Many of these matters were resolved with the assistance of the executive staff, with the oversight of the Board. Those that were not so resolved were scheduled for determination by the Board, resulting in 20 days of hearing.

During the year the Board disposed of a total of 72 matters. In so doing, there were 16 written decisions released by the Board.

Under the *Public Service Labour Relations Act*, where the Board, in addition to its adjudicative function, is charged with authority for collective bargaining, designations, deadlocks, strikes and lockouts, the Board entertained a number of requests, including two (2) appointments of a Conciliation Officer and two (2) appointments of a Commissioner.

During the last several years, the number of hearings conducted by three-member panels has steadily declined. The decision as to whether or not to appoint a panel rests in the office of the Chairperson and various criteria are considered. However, in any matter in which a party specifically requests that it be heard by a tripartite panel, the Board will normally accede to the request.

The Board in all cases seeks to ensure that the use of its pre-hearing resolution and case management processes are maximized, hearing days are kept to a minimum, hearings are conducted in a balanced and efficient manner, and decisions are issued in a timely way.

As Chair, I continue to teach on a part-time basis at UNB Law School, and remain active speaking at various national conferences.

In closing, I want to take this opportunity to express my continuing appreciation to all members of the Board, as well as our administrative and professional staff, for their dedication and service.

George P.L. Filliter
Chairperson

Composition of the Labour and Employment Board

Chairperson
George P.L. Filliter, Q.C.

Alternate Chairperson
Geoffrey L. Bladon

Vice-Chairpersons
Brian D. Bruce, Q.C. (Fredericton)
Annie Daneault (Grand Falls)
John McEvoy, Q.C. (Fredericton)
Danielle Haché (Lamèque)*
Robert D. Breen, Q.C. (Fredericton)
James A. Whelly (Saint John)
Elizabeth MacPherson (Grand Barachois)
Cheryl G. Johnson (Saint John)
J. Kitty Maurey (Fredericton)
Marylène Pilote, Q.C. (Edmundston)

Members representing Employer interests
Stephen Beatteay (Saint John)
Gloria Clark (Saint John)
Gerald Cluney (Moncton)**
William Dixon (Moncton)**
Doug Homer (Fredericton)**
Jean-Guy Lirette (Shediac)
Bob Sleva (Saint John)**
Marco Gagnon (Grand Falls)**

Members representing Employee interests***
Debbie Gray (Quispamsis)**
Richard MacMillan (St. Stephen)**
Jacqueline Bergeron-Bridges (Eel River Crossing)**
Gary Ritchie (Fredericton)**
Marie-Ange Losier (Beresford)
Pamela Guitard (Point-La-Nim)**

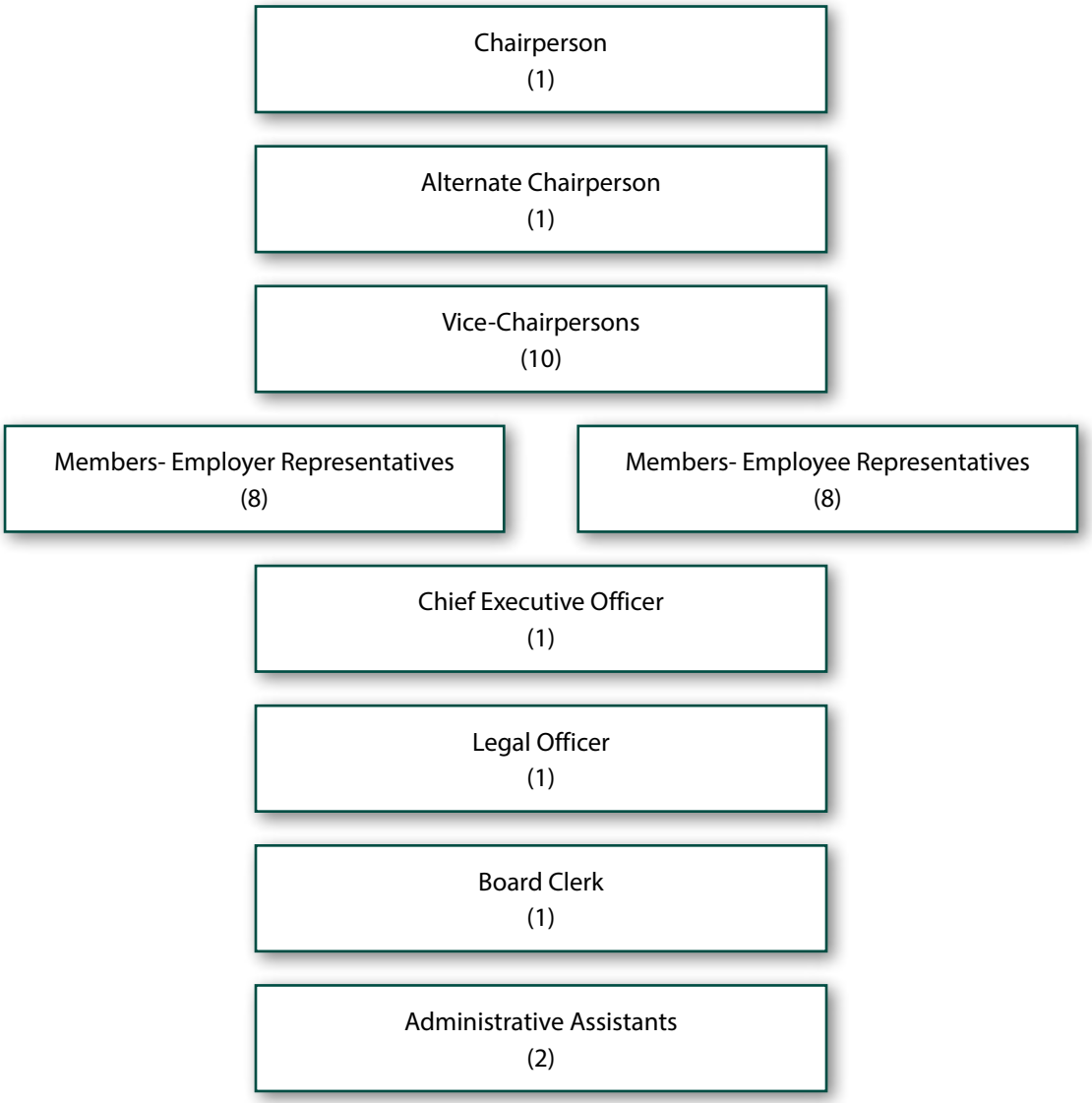
Chief Executive Officer
Lise Landry

Legal Officer
Isabelle Bélanger-Brown

Administrative Staff
Cathy Mansfield
Andrea Mazerolle
Debbie Allain

*Ms Haché resigned on September 15, 2017.
**These members' terms have expired and no reappointment/appointment has yet been made.
*** There were two vacancies at the end of the reporting period.

Organizational Chart



Administration

The membership of the Board ordinarily consists of a full-time chairperson, several part-time vice-chairpersons and a number of Board members equally representative of employees and employers. All members are appointed to the Board by Order-in-Council for a fixed term, ordinarily five years for the Chairperson and three years for Vice-Chairpersons and members representative of employers and employees. Vice-chairpersons and Board members are paid in accordance with the number of meetings/hearings that each participates in throughout the year. The current per diem rates are $286.20 for vice-chairpersons and $115 for Board members.

The chief executive officer, with the assistance of a legal officer, a Board clerk and two administrative assistants, is responsible for the day to day operation of the Board office, including overseeing legislative processes. There are in excess of 50 types of applications/complaints that may be filed with the Board. Matters must be processed within the principles of procedural fairness and natural justice. In addition, all matters must be processed within the time limit identified in the applicable legislation and its regulations, and these time limits vary considerably depending on the urgency of the application or complaint. For example, an application in the public sector alleging illegal strike activity by employees or illegal lockout by an employer must be heard and determined by the Board within 24 to 48 hours. Alternatively, an application for a declaration that a trade union is the successor to a former trade union may take up to two months to complete.

All matters not otherwise resolved must be determined by a formal hearing. The chairperson, in his discretion, may assign a matter to be heard by the chairperson or a vice-chairperson sitting alone, or by a panel of three persons consisting of the chairperson or vice-chairperson along with one member representative of employees and one member representative of employers.

Additionally, the Board's processes provide for the scheduling of a pre-hearing conference. This procedure is intended to facilitate complex cases and/or multiple parties involved in a matter by succinctly outlining for the parties the issues involved in the case scheduled for hearing. It will often involve the disclosure of documents to be introduced at the hearing, the intended list of witnesses, and the settlement of procedural issues, all of which might otherwise delay the hearing. Where appropriate, it may also involve efforts to resolve the underlying dispute. A pre-hearing conference will be presided by the chairperson or a vice-chairperson. More than one pre-hearing conference may be held in any one matter.

Generally, a direction to schedule a pre-hearing conference will be made by the chairperson at the same time that the matter is assigned for hearing. During this reporting period, there was one pre-hearing conference held.

The Labour and Employment Board conducts numerous formal hearings annually at its offices in Fredericton as well as other centres throughout the province. However, a significant portion of the Board's workload is administrative in nature. During the year in review, a total of 56 matters were dealt with by executive and administrative personnel without the holding of a formal hearing, with the Board generally overseeing this activity.

There were 25 matters pending from the previous fiscal year (2016-2017); 112 new matters were filed with the Board during this reporting period for a total of 137 matters; and 72 matters were disposed of. There remain 65 matters pending at the end of this reporting period.

Following is a general overview of activity by legislation. More detailed summary tables of all matters dealt with by the Board begin at page 15.

Legislation	# matters pending from previous fiscal year	# new matters filed/	# hearing days/	# written reasons for decision	# matters disposed	# matters pending at the end of this fiscal year
Industrial Relations Act	11	81	8	6	39	53
Public Service Labour Relations Act	3	15	0	0	15	3
Employment Standards Act	4	15	10	10	17	2
Pension Benefits Act	0	0	0	0	0	0
Human Rights Act	2	0	0	0	0	2
Fisheries Bargaining Act	0	0	0	0	0	0
Public Interest Disclosure Act	0	0	0	0	0	0
Pay Equity Act, 2009	0	1	0	0	1	0
Essential Services in Nursing Home Act	5	0	2	0	0	5
Total	**25**	**112**	**20**	**16**	**72**	**65**

Number of hearing days

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons/	Total
20	0	20

Budget 2017-2018

Primary	Projected	Actual
3 - Personal Services - Payroll, benefits, per diem	543,000	490,463
4 - Other Services -Operational Costs	79,100	63,475
5 - Materials and Supplies	11,800	(13,999)
6 - Property and Equipment	100	(2,026)
Total	**634,000**	**569,963**

Summary of sample cases

This section provides a sampling of cases rendered by the Labour and Employment Board during the current reporting period, and illustrates the diversity of matters that the Board is required to address. The summaries are indexed according to the relevant statute.

Industrial Relations Act

Prior agreement as to description of bargaining unit does not preclude union from bringing subsequent application for certification in respect of modified bargaining unit

Board concludes that six employees should be excluded from proposed bargaining unit of hotel workers

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. 663345 NB Ltd. c.o.b. Best Western Plus Bathurst, IR-005-17, 17 August 2017

The applicant union, United Brotherhood of Carpenters and Joiners of America, Local 1386, applied to the New Brunswick Labour and Employment Board to become the bargaining agent for a group of employees who worked for the respondent hotel Best Western Plus Bathurst. There were six contested employees that the employer asserted should be included in the proposed bargaining unit and the union asserted should be excluded. One employee provided accounting services by computer from her residence in Ontario. Another person, who was the manager's mother, was associated with housekeeping but did not wear a uniform or seem to perform housekeeping tasks. Two employees worked in breakfast services but both resigned a few days after the date of application for certification, citing health reasons. One employee, who was not at work on the date of the application, had worked in banquet services and another, who was also not at work on the application date, had worked as a cook. The parties agreed that the respondent hotel carried the onus of proof as to whether an employee should be included in the bargaining unit.

The Board reviewed the evidence as it related to the six employees and their inclusion, or exclusion, from the bargaining unit. There was no functional interdependence or employee interchange between the employee who did accounting and others in the bargaining unit whose core functions related to customer service. Moreover, the accountant provided her services via computer from her residence in Ontario, to whose employment laws she was subject. Further still, she, like the manager's mother who claimed to work in housekeeping, had family connections to management, while others in the bargaining unit did not. Both the accountant and the manager's mother in housekeeping were excluded from the bargaining unit due to a lack of community of interest.

The Board's ruling on the remaining four employees involved the 30/30 Rule. Under s. 14(1) of the *Industrial Relations Act*, the Board is required to determine the number of employees in the bargaining unit on the date the application for certification is made. The 30/30 Rule, which promotes labour relations democracy by reducing manipulation of union support, has been developed to assist in the interpretation of this section. All employees who are at work on the date of the application, as well as those who were at work within 30 days prior to the date of application and who returned to work or were expected to return to work within 30 days following the date of application are to be included in the bargaining unit. The Board determined the relevant date on which to assess an employer's expectation as to an employee's return to work is not the date of application but, rather, the "terminal date", which is 12 days following the date on which notice of the application for certification has been mailed to an employer. The two breakfast service employees resigned shortly after the date of application, but the employer knew before the expiration of the terminal date that they would not return and ought to have disclosed this fact in its reply to the application for certification. The two former breakfast workers were excluded from the bargaining unit. As for the banquet employee, she had not returned to work within 30 days of the date of application and, otherwise, had to be excluded because she was a casual employee who was not at work on the date of application. Finally, the cook had been out of touch with the respondent's manager

who had no grounds on which to expect that he would return to work within 30 days following the application date, so he too was excluded from the bargaining unit. In the end, the Board concluded that the bargaining unit proposed by the applicant union was appropriate and issued an order for certification.

Students working within university residences to be included in proposed bargaining unit

Canadian Union of Public Employees, Local 5310 v. Mount Allison University and Canadian Union of Public Employees, Local 3338, Canadian Union of Public Employees, Local 3433, Mount Allison Faculty Association, IR-006-17, 7 March 2018

The Canadian Union of Public Employees, Local 5310, applied to the Labour and Employment Board to be certified as the bargaining agent for a bargaining unit of students who worked at the respondent Mount Allison University. Most of the first-year students live in University residences, each of which is headed by a Don, a mature individual from the local community, but who is not a student. Each year, the University holds a competition amongst the students in each residence to select Assistant Dons, Resident Assistants and Academic Mentors, who report to the Don and who receive a stipend of between $1,200 and $3,800 by means of direct deposit to their student accounts. These "Residence Life Students" serve as role models, mediators and mentors. They also attend various training sessions and meetings throughout the school year and assist during Orientation Week. The University raised preliminary questions as to whether the 30/30 Rule should be applied to determine bargaining unit support, and whether the Residence Life Students were employees within the meaning of the *Industrial Relations Act*.

The Board observed that it was required by s. 14(1) of the *Industrial Relations Act* to ascertain the number of employees in the bargaining unit as of the date of the application for certification. The 30/30 Rule is an interpretive practice which is intended to include as many employees with an attachment to the workplace as possible. The Rule includes within the bargaining unit those who were at work on the date of the application for certification, as well as those who were at work within 30 days prior to and within 30 days following the date of application. The Rule ensures that persons who were not at work on the exact date of the certification application, but who have a clear attachment to the proposed bargaining unit, are provided with the opportunity to express their opinion. The Board can depart from the Rule, but the party which seeks relief from the Rule must demonstrate that it should not be applied in a particular case. Here, the University sought to depart from the 30/30 Rule on the basis that a review across the entire year would provide a more accurate assessment of support for the proposed bargaining unit. The Board rejected this argument noting that, although the Rule is somewhat arbitrary, it promotes certainty. In this case, the Rule would permit 58% of the student employees to express their wishes, which was an adequately representative sample of a transitory workforce.

The Board also concluded that the Residence Life Students were University employees because they were recruited and hired by the University, they applied University policies, they had signed a contract with the University, they were subject to University discipline and dismissal, and they were paid by the University through direct deposit to their student accounts.

The matter was referred back to the Board's Chief Executive Officer to establish the next steps in the certification process.

Board identifies circumstances and procedures by which employer may raise question of employee support for union

International Brotherhood of Electrical Workers, Local 2166 v. TBC Constructions Inc., and Electrical Contractors Association of New Brunswick Inc., IR-009-17, 12 September 2017

The International Brotherhood of Electrical Workers, Local 2166, applied to the Labour and Employment Board to be certified as the bargaining agent for a unit of employees who worked for a construction industry employer, the respondent TBC Constructions Inc. The parties agreed on a bargaining unit comprised of journeymen and apprentice electricians, with the exception of non-working foremen and those above that rank. The employer requested a hearing to raise a question concerning the membership evidence the union had filed in support of its application for certification. The employer said that a union representative had visited its workplace during work hours and obtained memberships through coercion

by using English documents for a significantly French speaking workforce while representing the documents as pension plan memberships. The employer provided no details in respect of these allegations, which the union denied while asserting that the employer had failed to follow the appropriate complaint procedure.

The Board indicated that it is the wishes of the employees that should be considered in the selection of a bargaining agent and that there were provisions in the *Industrial Relations Act* by which employees can disassociate themselves from a union or assert that they were duped into membership. The employer is prohibited from any involvement in the determination of employee support for a union, except in a case where fraud is alleged. In such an instance, the employer may file a notice of intention to raise an allegation of fraud or, if the union is already certified, make an application to the Board to have the union's bargaining rights revoked. The Board has established a practice of treating an employer's reply to an application for certification as a notice of intention to raise a question of fraud, but only if the employer provides the details of such an allegation, as required by regulation. Here, the employer made only bare allegations in its reply and failed to provide any information regarding details as to time, place, or the identity of the persons involved. The employer's reply could not be considered a notice of intention to complain about fraud. Further, the Board had not received any complaint from any employee in the proposed bargaining unit.

In the circumstances, the application for certification was to be decided on the basis of the written evidence of membership. The Board had received three documents by fax which purported to be withdrawals of union memberships, but these documents failed to give a source or a return mailing address and the originals were never provided. To avoid the possibility of fraud, the regulations clearly indicate that the Board cannot accept such non-compliant documents. Moreover, in the construction industry, employee support is determined on the basis of the employees at work on the date of the application for certification and the withdrawals were from individuals who were not at work on that date. In any event, the supposed withdrawals did not bring employee support below 50%. The Board issued an order for certification.

Board distinguishes between tasks of labourer and skills of carpenter in order to ascertain number of employees in a proposed bargaining unit

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. RJD Concrete Forming Ltd., and Moncton Northeast Construction Association Inc., Saint John Construction Association Inc., IR-019-17, 20 March 2018

A union, the United Brotherhood of Carpenters and Joiners of America, Local 1386, sought to be certified by the Labour and Employment Board as the bargaining agent for carpenters who worked for the respondent, a concrete forms construction company. The union indicated that there were three carpenters in the proposed bargaining unit, while the employer maintained that the unit should contain four carpenters. The disagreement centred on the question of whether one Savoie should be viewed as a carpenter within the unit, or a labourer who should be excluded.

The role for the Board was to determine the number of employees in the proposed bargaining unit under s. 14(1) of the *Industrial Relations Act*, in particular whether Savoie was a person who should be included or excluded under s. 128(2) of the *Act*. The issue between the parties related to the difference between the tasks of a labourer and the skills of a carpenter. There will often be overlap between trades which can be both logical and efficient. On a larger job, a skilled tradesperson can focus on the core skills of a trade, while leaving accessory work for others to perform. Yet, on a smaller job, that skilled tradesperson may perform such subtasks in the name of efficiency. In the case at hand, an extensive review of the evidence indicated that on the date of the union's application for certification, the majority of the work performed by Savoie included rigging, placing concrete, carrying material, tying steel and cleaning concrete off equipment and materials. These were the tasks of a labourer, rather than the skills of a carpenter. The Board concluded that Savoie should be excluded from the proposed bargaining unit of carpenters, determined that the majority of the employees who worked as carpenters were members in good standing of the union, and issued a certification order.

Employment Standards Act

Security guard awarded pay on the basis of a three hour minimum per shift

William Bray v. Securitas Canada Limited/Securitas Canada Limitée, ES-004-17, 16 May 2017

In the spring of 2015, the complainant began work as a security guard with the respondent employer, Securitas. In this capacity, he worked regular 8 and 12 hours shifts. In December 2016, the complainant was asked by a fellow employee to cover his patrol shift for a 7 day period, and the complainant agreed on the condition that he be paid for a minimum of 3 hours per shift. The patrol shifts required the complainant to travel to a commercial location in Moncton at midnight, ensure that the premises were secure, and then file a report, all of which took about one hour to complete. The employer paid the complainant for just one hour per shift, rather than for three. The complainant filed a complaint under the *Employment Standards Act*, arguing that s. 16.1 of the Act indicates that an employee, like himself, who is regularly employed for more than 3 consecutive hours per shift is entitled to be paid for a minimum of 3 hours per shift. The Director of Employment Standards rejected the complaint on the grounds that, under the *Act*, an employee qualifies for the 3 hour minimum pay only if the shift exceeds 3 hours. The complainant pursued the matter to the Labour and Employment Board.

The Board observed that the *Employment Standards Act* is remedial legislation and, as such, should be interpreted liberally to meet its goal of protecting employee interests. Section 16.1 of the *Act* is designed to guard against the payment of an unfair wage for a short shift. In this case, the complainant was regularly employed as a security guard on shifts longer than 3 hours. Accordingly, he fell within the statutory criteria for entitlement to minimum pay for 3 hours, regardless that each of the shifts in question lasted only one hour. The Board ordered that the employer pay the complainant the sum of $145.24, the balance required for a minimum of 3 hours pay per shift.

Board considers factors by which to determine whether complainant is employee or independent contractor

Mohammed Benyoussef v. Institute of International Education Canada (IEC) Inc., operating as Oriental House Atlantic, ES-013-16, 6 April 2017

The complainant was hired by the employer, a private college located in Moncton, to teach a night course in Arabic at $16.00 per hour. The complainant understood that the classes were to last for 90 minutes. He taught 3 classes, but there was only one student. It became evident to the complainant that the position would not be remunerative, and he resigned. He was paid for the first two classes, but for only 80 minutes rather than 90, and was not paid for the third class, apparently because he did not submit a pay claim in the required form. He brought a complaint to the Director of Employment Standards seeking $29.28 in wages and $2.88 in vacation pay, for a total claim of $32.16. The Director of Employment Standards issued an order in favour of the complainant. The employer thereupon referred the matter to the Labour and Employment Board, arguing that the complainant was an independent contractor and not an employee with entitlements under the *Employment Standards Act*.

The Board indicated that the onus of proof regarding the status of the complainant as an employee, rather than an independent contractor, fell on the Director of Employment Standards who had issued the order in favour of the complainant. Although the *Employment Standards Act* defines an employee as a person who works for or supplies services to an employer for wages, it does not define an independent contractor. There is a long list of factors which may be considered in determining whether a person is an independent contractor in the circumstances. These factors, which are drawn from the case law, include the degree of control the person can exercise in respect of the position, the possibility for profit or risk of financial loss, and whether the person is an integral part of the business. In this case, there was some indicia that the complainant was an independent contractor in that he was required to use his own computer and provide course materials. However, the college determined class length and required that requests for wages be submitted in a certain form. There was no chance of profit or risk of loss for the complainant who was an integral part of the college's language school operations as these related to Arabic. The Board concluded that the complainant was an employee rather than an independent contractor. He therefore fell under the provisions of the *Employment Standards Act* and

within the jurisdiction of the Board which confirmed the Director's order for payment of wages and vacation pay in the amount of $32.16.

An employer must bring cogent evidence of employee theft in order to withhold wages and vacation pay

Scott Hatchette v. 646983 N.B. Inc., operating as West End Medicine Shoppe/Ritestop, ES-015-17, 23 November 2017

The complainant worked as a clerk/attendant at a convenience store and laundromat which was operated by the employer in Moncton. One day, the business owner prepared a sizable bank deposit in an office at the back of the convenience store, then left for about 2 hours to do errands. The owner later took the deposit to the bank where a count revealed a short-fall of $400. A video camera recorded that two persons had entered the office: the complainant, who was there for an hour, and another person who worked in the building and was in the office for lunchtime. The camera did not record the events in the office itself. The owner accused the complainant of taking the $400 in question, which led to the termination of the employment relationship. The complainant, who denied taking the money and who was not charged with any offence after a police investigation, brought a complaint under the *Employment Standards Act* seeking unpaid wages of $308.00 and vacation pay of $163.02, for a total claim of $471.02. The employer had kept this amount to compensate for the loss of cash, as well as for the cost of replacing the store lock, which was done on the basis that the complainant had not returned his key. Following an investigation, the Deputy Director of Employment Standards issued an order which required the employer to pay the disputed amount to the employee. The employer referred the matter to the Labour and Employment Board for a hearing.

The Board reviewed the evidence which indicated that the owner had neither double-checked the count of the bank deposit, nor discussed the matter with the other person who had also been in the office at the relevant time. Moreover, the owner subsequently found the complainant's store key. An employer must bring cogent evidence of theft or employee consent in order to deny the payment of wages or vacation pay. In this case, the evidence did not establish that the complainant was solely responsible for any loss of cash. It was equally possible that the owner had made a counting error and that there was no missing money or theft, or that the other person who had entered the office was culpable. The evidence did not support the employer's position. The Board confirmed the order of the Deputy Director that the employer pay to the complainant the disputed amount of $471.02 for wages and vacation pay.

Judicial Review

During the current reporting period there were two decisions of note by the New Brunswick Court of Queen's Bench on matters that originated with the Labour and Employment Board.

Judge indicates that Board made reasonable interpretation of agreement between parties when it concluded that union could file subsequent application for certification

University of New Brunswick v. Public Service Alliance of Canada, and Canadian Union of Public Employees, Local 3339, FM/29/2016, 7 April 2017

Board Decision

In 2013, a union, the Public Service Alliance of Canada, was certified by the Labour and Employment Board in respect of a bargaining unit of employees who worked at the University of New Brunswick. The application for the 2013 certification led to an agreement between the parties as to the description of the appropriate bargaining unit. In 2015, the union sought to be certified as the bargaining agent in respect of positions that had been excluded from the 2013 certification. The University objected to the 2015 application on the grounds that the union was attempting to circumvent the 2013 agreement by now seeking certification for employees who had been previously excluded. The University was concerned that if the 2015 application was successful, the union would seek to consolidate the two bargaining units.

The matter proceeded to the Labour and Employment Board to determine whether the union was prevented by the 2013 agreement from filing a second application for certification in 2015 in respect of employees who had been excluded at the time of the 2013 certification. The Board recognized that, as a matter of public policy, parties should not be permitted to resile from agreements. However, the 2013 agreement, which was ambiguous, did not prevent the union from proceeding with a

further application for certification in 2015 to cover the employees who had been excluded in 2013. In reaching this conclusion, the Board recognized the importance of the right of association under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The University sought judicial review of the Board's decision on the grounds that its interpretation of the 2013 agreement was unreasonable because it had not explained its reasons for concluding that the agreement was ambiguous.

Application for Judicial Review

A judge of the New Brunswick Court of Queen's Bench indicated that the standard of review by which a court should assess the decisions of the Board was one of reasonableness. In determining whether the Board's decision was reasonable, the court was required to take a global approach to the reasons under review and to examine those reasons in relation to the result. A reviewing court should not re-weigh the evidence or re-examine the arguments. In the case at hand, the Board had found that the 2013 agreement was ambiguous because it did not explicitly address the question of how the excluded employees were to be treated in the future. The Board's decision was found to be reasonable and the University's application for judicial review was dismissed.

Court upholds Board's decision to reject a union's application to "carve out" a new bargaining unit

New Brunswick Hospital Trades Union v. Province of New Brunswick as represented by Board of Management, and The New Brunswick Council of Hospital Unions, Local 1252 of the Canadian Union of Public Employees, FM/6/2017, 27 September 2017

Board Decision

The Canadian Union of Public Employees (CUPE) had been the long-time bargaining agent for a large number of provincial government employees, including the Institutional Services Group which had 2,230 employees in 54 job classifications. The applicant, New Brunswick Hospital Trades Union, was formed for the purpose of becoming the bargaining agent for about 290 employees in the Institutional Services Group. It applied to the Labour and Employment Board to "carve out" a new bargaining unit, arguing that the 290 employees in question had not received meaningful representation from CUPE. The Board noted that the applicant had the onus of demonstrating that a new bargaining unit for the 290 employees should be created. Although some of the employees indicated that they were not being paid enough, the evidence indicated that CUPE had been successful in having the relevant classifications upgraded. The Board dismissed the applicant's bid to carve out a new bargaining unit, saying that the relationship between CUPE and the government employer had been lengthy, successful and meaningful. The applicant sought judicial review of the Board's decision.

Application for Judicial Review

The Court of Queen's Bench reiterated that the standard of review in respect of Labour and Employment Board decisions is one of reasonableness. In applying the reasonableness standard, a court must defer to the judgment of the Board, which has heard and assessed the evidence. A court, on judicial review, should not interfere with the decision of the Board if there is evidence upon which it could reasonably have reached its conclusion. An application for judicial review is neither a new hearing nor an appeal. Rather, it is a deferential review of the manner in which the Board dealt with the issues, which is accomplished by examining the Board's reasons for its conclusions. In this case, the Board had reviewed the evidence in detail, outlined the positions of the parties, identified the relevant issues, and concluded that the applicant had failed to carry the onus of showing that a new bargaining unit should be created. The Board's decision was justified by the evidence. The application for judicial review was dismissed.

Summary tables of all matters dealt with by the Board

Industrial Relations Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	6	17	23	13	2	--	15	8
Application for a Declaration of Common Employer	2	--	2	--	--	2	--	--
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	--	4	4	1	2	1	4	--
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	--	46	46	10	--	--	10	36
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	--	1	1	--	--	1	1	--
Application for a Declaration Concerning the Legality of a Strike or a Lockout	--	1	1	--	--	--	--	1
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Miscellaneous Applications (s. 22, s. 35, s. 131)	1	1	2	--	--	--	--	2
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	1	7	8	--	--	3	3	5
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107)	1	1	2	--	--	1	1	1
Complaint Concerning a Work Assignment	--	1	1	--	1	--	1	--
Application for Accreditation	--	--	--	--	--	--	--	--
Application for Termination of Accreditation	--	--	--	--	--	--	--	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Request pursuant to Section 105.1	--	2	2	--	--	2	2	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--
Total	**11**	**81**	**92**	**24**	**5**	**10**	**37**	**53**

Public Service Labour Relations Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	--	--	--	--	--	--	--	--
Application for Revocation of Certification	--	--	--	--	--	--	--	--
Notice pursuant to s. 43.1 (Designation of Essential Services	--	--	--	--	--	--	--	--
Application pursuant to s. 43.1(8)	--	2	2	1	--	1	2	--
Complaint pursuant to s. 19	2	2	4	--	--	1	1	3
Application for Declaration Concerning Status of Successor Employee Organization	--	--	--	--	--	--	--	--
Application pursuant to s. 29 (Designation of Position of Person employed in a Managerial or Confidential Capacity)	--	--	--	--	--	--	--	--
Application pursuant to s. 31	1	4	5	--	--	5	5	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication	--	3	3	3	--	--	3	--
Application for Appointment of an Adjudicator/ (s. 100.1)	--	--	--	--	--	--	--	--
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer (s. 47)	--	2	2	2	--	--	2	--
Application for Appointment of Conciliation Board (s. 49)	--	--	--	--	--	--	--	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	--	--	--	--	--	--	--
Application for Appointment of Commissioner (s. 60.1)	--	2	2	1	1	--	2	--
Request for a Declaration of Deadlock (s. 70)	--	--	--	--	--	--	--	--
Notice pursuant to Section 44.1 of the Act	--	--	--	--	--	--	--	--
Request for the Appointment of an Arbitration Tribunal pursuant to s. 66	--	--	--	--	--	--	--	--
Total	**3**	**15**	**18**	**7**	**1**	**7**	**15**	**3**

Employment Standards Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters						Total Matters Disposed	Number of cases Pending
				Affirmed	Settled	Vacated	Varied	Withdrawn	Dismissed		
Request to Refer Orders of the Director of Employment Standards	4	9	13	4	4	2	2	1	--	13	--
Request to Refer Notices of the Director of Employment Standards	--	3	3	--	1	1	--	--	--	2	1
Application for exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause hearing, s. 75	--	3	3	--	1	--	--	1	--	2	1
Total	**4**	**15**	**19**	**4**	**6**	**3**	**2**	**2**	**--**	**17**	**2**

Pension Benefits Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of Matters					Total Matters Disposed	Number of cases Pending
				Affirmed	Vacated	Varied	Remitted back for further investigation	Withdrawn		
Request to Refer a Decision of the Superintendent of Pensions pursuant to s. 73(2)	--	--	--	--	--	--	--	--	--	--
Request for Show Cause Hearing, s. 77.1	--	--	--	--	--	--	--	--	--	--
Total	**--**	**--**	**--**	**-**	**--**	**--**	**--**	**--**	**--**	**--**

Human Rights Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters				Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Settled	Withdrawn		
Complaint pursuant to s. 23(1)	2	--	2	--	--	--	--	--	2
Total	**2**	**--**	**2**	**--**	**--**	**--**	**--**	**--**	**2**

Essential Services in Nursing Homes Act

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters				Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Settled	Withdrawn		
Notice pursuant to s. 5(1)	5	--	5	--	--	--	--	--	5
Total	**5**	**--**	**5**	**--**	**--**	**--**	**--**	**--**	**5**

Pay Equity Act, 2009

April 1, 2017 - March 31, 2018

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters				Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Settled	Withdrawn		
	--	1	1	1	--	--	--	1	--
Total	--	**1**	**1**	**1**	--	--	--	**1**	--

Note: There was no activity during the reporting period under the *Fisheries Bargaining Act*, the *Public Interest Disclosure Act* and the *Pay Equity Act, 2009*.