Labour and Employment Board

Annual Report
2018–2019

New Nouveau Brunswick

Labour and Employment Board
Annual Report 2018-2019
April 1, 2018 – March 31, 2019

Province of New Brunswick

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Transmittal letters

From the Minister to the Lieutenant-Governor
The Honourable Brenda Louise Murphy

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, 2018 to March 31, 2019.

Respectfully submitted,

Honourable Trevor A. Holder
Minister of Post-Secondary Education, Training and Labour

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Sir:

I have the honour to submit the 24th Annual Report of the Labour and Employment Board for the period of April 1, 2018 to March 31, 2019 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

Table of contents

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 Act* 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 24th annual report of the Labour and Employment Board for the period of April 1, 2018 to March 31, 2019.

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 89, down 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 31 days of hearing.

During the year the Board disposed of a total of 104 matters. In so doing, there were 20 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; two (2) appointments of a Commissioner and one (1) appointment of a Conciliation Board.

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. There were no matters heard by a tripartite panel in this fiscal year.

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, Q.C.
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, c.r. (Fredericton)
Annie Daneault (Grand Falls)
John McEvoy, c.r. (Fredericton)
Robert D. Breen, c.r. (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)**
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

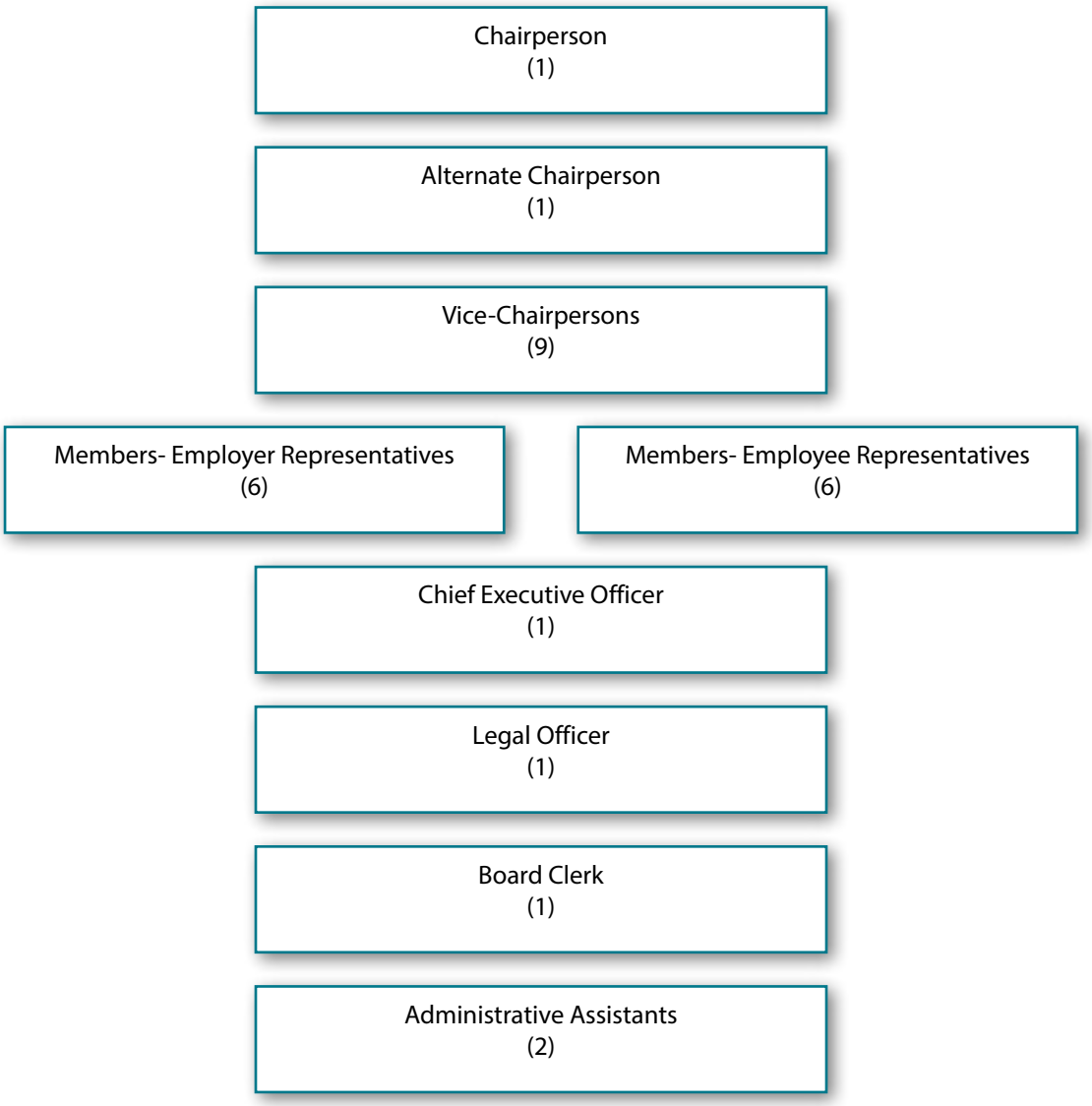
Administrative Staff
Cathy Mansfield***
Andrea Mazerolle
Debbie Allain

* These Vice-Chairs' terms expired on May 27, 2018.

** These members' terms had expired prior to the beginning of the fiscal year but they have since been reappointed effective January 30, 2019.

*** Ms. Mansfield retired in April 30, 2018.

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 65 matters pending from the previous fiscal year (2017-2018); 89 new matters were filed with the Board during this reporting period for a total of 154 matters; and 104 matters were disposed of. There remain 50 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	53	55	14	9	81	27
Public Service Labour Relations Act	3	21	8	3	10	14
Employment Standards Act	2	12	9	7	10	4
Pension Benefits Act	0	0	0	0	0	0
Human Rights Act	2	1	0	0	2	1
Fisheries Bargaining Act	0	0	0	0	0	0
Public Interest Disclosure Act	0	0	0	0	0	0
Pay Equity Act, 2009	0	0	0	0	0	0
Essential Services in Nursing Home Act	5	0	0	1	1	4
Total	**65**	**89**	**31**	**20**	**104**	**50**

Number of hearing days

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons	Total
31	0	31

Budget 2018-2019

Primary	Projected	Actual
3 - Personal Services - Payroll, benefits, per diem	544,000	452,870
4 - Other Services -Operational Costs	79,100	51,620
5 - Materials and Supplies	11,800	(18,925)
6 - Property and Equipment	100	(3,879)
Total	**635,000**	**527,294**

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

Certification ordered where Board believes employee petition against unionization not voluntary

International Union of Operating Engineers, Local 946 v. Pardy's Waste Management and Industrial Services Limited, IR-024-18, 13 November 2018

The International Union of Operating Engineers, Local 946, applied to the Labour and Employment Board to be certified as the bargaining agent for 21 employees who worked for the respondent, a full service industrial waste operation with a total workforce of 24 in Saint John. The union filed materials to reflect that it had support from more than 50% of the members of the proposed bargaining unit, which would entitle the union to automatic certification. Shortly after the union filed its application for certification, one of the employees, who was a labourer and a potential member of the bargaining unit, posted a petition at the workplace to oppose the union. He signed the petition and witnessed the signatures of 2 other employees, including an individual employed as a working supervisor. The petition was posted the same day that an informal meeting was held for 10 to 12 employees at which the employer's workplace operations manager expressed the view that the employer thought unionization was not a good idea and could result in the loss of its biggest customer. The petition, which was posted in the employer's trailer where it would be seen by both workers and management, remained in place for a week and was eventually signed by 16 employees. A union representative asked that the petition be removed, apparently to protect the anonymity of employees, but the employer refused to take it down. A question arose as to whether the petition against the union had been voluntarily signed by these employees.

The Board noted that s. 138 of the *Industrial Relations Act* is intended to preserve the anonymity of union supporters so as to protect them against employer reprisals. The fact that the petition against the union had been posted in a prominent place meant a loss of employee anonymity, which may have influenced some employees to sign the petition to show other employees that they were team players, or to indicate their support for the employer. Moreover, the refusal of the employer to allow the petition to be removed permitted the disclosure of the names on the petition, as well as those that were not on the petition. These factors cast a shadow on the petition as a true reflection of employee wishes. There was also the fact that a working supervisor had been one of the first to sign the petition, which was sufficient to suggest to employees that management was involved in the posting of the petition. Further still, the remarks made by the employer's workplace operations manager constituted a threat to the job security of employees, as well as an attempt to influence them against the union. The petitioners failed to establish that the petition had been signed voluntarily. Accordingly, the petition did not refute the membership evidence which the union had filed, which showed support by a majority of relevant employees. The Board issued an order for certification.

Board refers collective bargaining impasse to mediation officer

Canadian Union of Public Employees, Local 5243 v. Miramichi Emergency Centre for Women Inc., IR-025-18, 27 July 2018

In January 2015, the Canadian Union of Public Employees, Local 5243, was certified to represent employees at a women's centre. There were two collective bargaining sessions that year, but no agreement was reached. In the spring of 2016 the parties met with a conciliation officer but, again, there was no agreement. In September 2016 a mediator was appointed. Despite many attempts to bring the parties back to the bargaining table, they did not meet with the mediator until March 2018. Some matters were resolved with the assistance of the mediator but, still, the parties did not settle on a collective agreement. In June 2018, the union wrote to the Minister of Post-Secondary Education, Training and Labour to request arbitration pursuant to s. 36.1 of the *Industrial Relations Act*. The request was referred to the Labour and Employment Board for determination.

The Board observed that this was its first referral under s. 36.1 of the Act, which requires it to inquire into the progress of negotiations between parties towards a first collective agreement. Under certain conditions, such as a failure to make expeditious efforts to conclude a first collective agreement or «any other condition the Board considers relevant», the Board may refer the matter to the Minister for the appointment of a mediation officer or submit the matter to an arbitrator. The purpose of the legislation is not to displace free collective bargaining, which is the primary and preferred means for parties to settle upon terms and conditions of employment. Here,

the women's centre, as employer, had failed to make expeditious efforts to conclude a collective agreement, although some delays were caused by the failure of the union to respond in a timely fashion. In any event, a collective bargaining regime that has lasted more than 3 years amounted to an «other condition» which the Board considered to be relevant. The Board elected to refer the matter to the Minister for the appointment of a mediation officer, rather than impose arbitration, because there had been some movement at the bargaining table in 2018, and because mediation would allow free collective bargaining to continue.

Board reiterates that an employee petition against union support must be voluntary and without the «slightest hint» of employer involvement

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. A-1 Drywall & Acoustics Inc., Saint John Construction Association Inc., Moncton Northeast Construction Association, IR-039-18, 15 February 2019

The United Brotherhood of Carpenters and Joiners of America, Local 1386, filed an application for certification with the Labour and Employment Board regarding a unit of 17 employees who worked for the respondent, a Moncton drywall contractor. The application was accompanied by sufficient evidence of membership support to justify certification without a hearing. Shortly thereafter, the Board received a petition signed by 12 employees which indicated that they no longer supported the union. The petition had been circulated by an employee at the request of a foreman. A question arose as to whether the petition was voluntary.

The Board recognized that, due to the nature of the employment relationship, an employer is in a position to influence an employee in the exercise of rights under the *Industrial Relations Act*. Accordingly, in cases of overlap, where an employee signs a membership card to show support for a union and then signs a petition to indicate the withdrawal of such support, the Board must be meticulous to ensure that there has not been the «slightest hint» of employer involvement in the origination, circulation, execution or delivery of the petition. Here, a foreman, who was in a management position, asked an employee to circulate the petition after referring that employee to a law firm where he obtained the petition. Moreover, the foreman had also talked to several employees about the petition during a paid break at a job site. The evidence did not meet the onus of establishing that the petition was a free and voluntary expression of a change of heart of the employees who had signed it. There was at least a hint of employer involvement in the circulation of the petition which, therefore, was not reliable as a challenge to the membership evidence filed by the union. The Board issued a certification order.

Application to terminate bargaining rights dismissed where Board finds signatures on counter-petitions were voluntary

Joel Pelletier v. Local Union 325 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada v. A.R.E. Plumbing Inc., Mechanical Contractors Association of New Brunswick Inc., IR-040-18, 21 February 2019

A union for plumbers and pipefitters represented a small bargaining unit of employees who worked for the employer, A.R.E. Plumbing. In November 2018, the Board received an application to terminate the union's bargaining rights, which was accompanied by a petition signed by 4 employees. The union filed a response accompanied by 5 counter-petitions. There was some overlap in the names on the petition to terminate bargaining rights, and the counter-petitions to retain such rights. The question was whether the counter-petitions had been signed voluntarily.

The Board has consistently ruled that, in cases of overlap in the signatures for and against termination of bargaining rights, the signatures on a counter-petition constitute evidence of union support so long as they are voluntary. The evidence in this case showed that, upon learning of the application to terminate bargaining rights, union representatives had met with employees after work hours and obtained their signatures on the counter-petitions. There was no evidence to indicate that the signatures on the counter-petitions were involuntary. The application to terminate bargaining rights was dismissed.

Employer fails to have Board dismiss unfair labour practice complaint due to delay

United Steelworkers, Local 1-306 v. B.W.S. Manufacturing Ltd., IR-041-13, 18 April 2018

The United Steelworkers, Local 1-306, embarked on a drive to organize a bargaining unit of employees who worked for the employer, B.W.S. Manufacturing. In the midst of the organization drive, the employer laid-off 26 employees, 24 of whom were union members. The union filed a complaint of unfair practice against the employer and, after a lengthy hearing, the Labour and Employment Board concluded that the employer was liable for violations of s. 3 of the *Industrial Relations Act*, which prevents employer interference in the formation of a union. The Board's decision, made in May 2015, indi-

cated that the hearing would resume at the convenience of the parties to address the appropriate remedy. Over a period of nearly 2 years, from May 2015 to March 2017, the lawyers for the union and the employer communicated with one another, but they were unable to make progress on a settlement or to arrive at a mutually convenient time at which to resume the remedial component of the hearing. In November 2017, the new lawyer for the union wrote to the Board to request the resumption of the hearing. In response, the employer made a motion to dismiss the union's unfair practice complaint on the basis of delay.

The Board observed that the timely resolution of disputes helps to maintain an amicable relationship between labour and management and, therefore, time is of the essence in labour relations matters. Legislative concern for delay is illustrated by a variety of procedural time limits set out in the *Industrial Relations Act*. The party which relies on delay has the onus to show that (a) there has been inordinate delay, (b) there is no excuse for the inordinate delay, and (c) the delay will likely cause it serious prejudice. In this case, there was a total delay of 29 months between the date the Board made its decision on liability in favour of the union and the date on which the union sought to resume the hearing for the purposes of determining a remedy against the employer. On its face, this delay was inordinate and unreasonable. However, during the first part of the delay, from May 2015 to March 2017, the lawyers for the parties were in communication. Accordingly, the delay for this period of nearly 2 years was consensual and, therefore, excusable. The second part of the delay lasted from March 2017 to November 2017 during which there was apparently no contact between the lawyers for the parties. This further delay of some 7 months ought to have been explained, but it was not. In any event, the employer had not suffered prejudice due to delay. Prejudice may arise from matters which adversely affect the litigation process, such as the unavailability of witnesses or loss of relevant documents. Here, the employer was still in possession of employee records relevant to the proposed bargaining unit. The Board dismissed the employer's motion and directed that the remedial component of the hearing be scheduled in consultation with the parties.

Public Service Labour Relations Act

National union denied bid to intervene in applications for certification by its New Brunswick competitor

New Brunswick Union of Public and Private Employees v. Cannabis NB, PS-001-19, PS-002-19, 1 March 2019

The New Brunswick Union of Public and Private Employees applied to the Labour and Employment Board to be certified under the *Public Service Labour Relations Act* to represent employees of Cannabis NB at stores in Miramichi and Campbellton. Pursuant to a regulation under the Act, a competitor union, the Canadian Union of Public Employees, sought to intervene in the proceedings claiming it had an interest in the matter because it, too, had been attempting to unionize employees of Cannabis NB. The question for the Board was whether the Canadian Union of Public Employees had a direct and legal interest sufficient to intervene in the applications for certification of the New Brunswick Union of Public and Private Employees.

The Board concluded that the Canadian Union of Public Employees should not be granted intervenor status in the certification proceedings which had been commenced by its New Brunswick competitor. The test for determining intervenor status is whether the proposed intervenor can demonstrate a direct and legal interest in the proceeding. In this case, the intended intervenor wished to make an argument regarding the appropriateness of the bargaining unit, which would not differ substantially from the argument of the employer. This duplication of argument would not assist the Board, particularly where the employer, rather than the intended intervenor, could adduce the best evidence. Moreover, the intended intervenor did not have a direct and legal interest in the proceeding merely because it aspired to represent Cannabis NB employees. There was no evidence to illustrate employee support for the intended intervenor which pre-dated the application of the New Brunswick union. The Board denied the request of the intended intervenor to be added as a party.

Employer required to comply with adjudicator's award despite pending court application to quash that decision

Canadian Union of Public Employees, Local 1252 v. Province of New Brunswick, PS-004-18, 10 August 2018

The Canadian Union of Public Employees, Local 1252, created a sub-local to represent members employed by Ambulance New Brunswick which, in 2007, took over the delivery of ambulance services in the Province of New Brunswick. In 2014, and again in 2015, the union filed grievances which raised issues regarding seniority and other rights, as well as the obligation of the employer to provide services in both official languages. In April 2018, the union's grievances were upheld by an adjudicator. In May 2018, the Province filed an application for judicial review to have the court quash the adjudicator's decision, but it did not seek a stay of proceedings to prevent the enforcement of that decision pending the judicial review hearing. In response, the union filed a complaint with the Labour and Employment Board under s. 19 of the *Public Service Labour Relations Act*, which requires the

Board to inquire into the failure of a party to give effect to an adjudicator's decision. The union initially agreed to await the court's decision prior to seeking enforcement of the adjudicator's award. However, there were delays due to a request by a party for intervenor status, as well as the need for a bilingual judge. In light of these delays, the union wished to have the Board proceed to deal with its s. 19 complaint which alleged that the employer had failed to give effect to the adjudicator's decision. A question arose as to whether the parties had reached an agreement on the implementation of the adjudicator's award, in which case the adjudicator would retain jurisdiction and there would be no role for the Board, or whether the parties had reached an agreement on process, in which case the Board would have the authority to deal with the union's complaint.

The role of the Board, under s. 19 of the Act, is to determine whether an employer has given effect to an adjudicator's decision and not to deal with the merits of the case. Here, the union initially agreed to refrain from seeking enforcement of the adjudicator's award, pending the early hearing of the employer's application for judicial review. The union changed its position when that hearing was delayed. An implementation agreement outlines the steps to be taken to implement an adjudicator's award. An agreement to delay enforcement of an adjudicator's decision is not an implementation agreement over which an adjudicator retains authority. Accordingly, the Board concluded that it had jurisdiction to deal with the union's complaint, that the employer had failed to give effect to the adjudicator's award, and that the employer be granted 30 days in which to comply.

Employment Standards Act

Board requires sufficient evidence to rule on employment standards complaint

Various Employees v. Vito's Pizzeria Food Production Ltd., operating as Vito's, ES-004-18, 14 June 2018

The various employees involved in this matter worked as servers at Vito's, a pizzeria operated as a family business by the employer in Moncton. It was customary for the employees to «clock in» several minutes prior to the commencement of their shifts; however, they were not paid until the start of their shifts. One of the employee's lodged a complaint with the Employment Standards Branch seeking compensation from the moment the employees reported for work. An Employment Standards Officer conducted an investigation during which the complainant was the only employee to be interviewed. On the basis of this interview, the Officer concluded that the employer required the employees to report to work some 15 minutes early and to begin performing tasks prior to the commencement of their shifts. An order was issued on behalf of the Director of Employment Standards which required the employer to pay 38 employees a total of $13,667.19 in wages, vacation pay and public holiday pay. The employer referred the matter to the Labour and Employment Board.

The role of the Board on the referral of a matter such as the case at hand is to consider the evidence in its entirety to ensure compliance with the rules of natural justice. The Board, therefore, must act on evidence to ensure that the parties receive a fair, impartial and unbiased hearing. The order on behalf of the Director in this matter was premised on an interview with just one employee and the assumption that her evidence applied to the other 37 employees. This was not a proper investigation. The employer, as well as a significant number of employees, ought to have been interviewed to ascertain whether the employees were required to report for work early and to perform tasks prior to the commencement of their shifts. The Board acknowledged that if an employer requires its employees to report to work prior to the scheduled start of their shifts, the employer is obliged to the pay the employees from the moment they report for work. In this case, the evidence of the one employee interviewed during the investigation showed that she performed tasks prior to the commencement of her shift and, therefore, the Board confirmed the Director's order to pay her $96.59. However, as regards the other 37 employees, the Board vacated the Director's order because the evidence was insufficient to establish their claims.

***Employment Standards Act* permits employees, but not retirees, to make discrimination complaint**

Stephen Palmer v. Kennebecasis Joint Board of Police Commission, ES-010-18, 26 October 2018

In 1983, the complainant began work as a police officer for the police commission in Kennebecasis, rising to the position of Deputy Chief. In 2016, the Chief of Police retired and the complainant entered into a contract with the employer to assume the position of Chief on an interim basis for a 16 month period running from November 2016 to the end of February 2018. In 2017, the employer successfully concluded its search for a successor to the former Chief who began work in November 2017. The complainant was no longer required to report for work after the end of 2017, regardless that his contract did not expire until the end of February 2018. He remained on the payroll until 19 May 2018 in order to receive compensation for accumulated vacation and leave. On 23 May 2018, the employer held a meeting at which it rejected the complainant's request for retirement health benefits. On 28 May 2018, the complainant filed a complaint with the Employment Standards Branch to allege that he

had been subjected to discrimination by the employer contrary to s. 28 of the *Employment Standards Act* because other retirees had been provided retirement health benefits paid by the employer but the same benefits were not provided to him. The matter was investigated by the office of the Director of Employment Standards. The complaint was dismissed on the grounds that the complainant was not an employee of the commission at the time his request for retirement health benefits was rejected. The complainant referred the matter to the Labour and Employment Board.

The Board reviewed the applicable legislation which indicated that the protection against discrimination under s. 28 of the *Employment Standards Act* extends only to employees. The commission made its decision to reject the complainant's request for retirement health benefits on 23 May 2018, by which time the complainant had retired and was no longer employed by the commission. Accordingly, the Board affirmed the decision of the Director to dismiss the complaint on the basis that the complainant had not been an employee at the relevant time.

Essential Services In Nursing Homes Act

Board declares *Essential Services in Nursing Homes Act* to be of no force or effect to the extent it violates the constitutional right to strike

New Brunswick Association of Nursing Homes v. New Brunswick Council of Nursing Home Unions (CUPE), Province of New Brunswick, NH-001-11, 7 December 2018

In May 2009, the New Brunswick legislature enacted the *Essential Services in Nursing Homes Act* to prohibit strikes by nursing home employees who provide essential services. A question arose within the context of the York Care Centre in Fredericton whether the positions of Licensed Practical Nurse (LPN) and Resident Attendant (RA) should be designated as essential. The matter proceeded to the Labour and Employment Board which concluded that 90% of LPN and RA employees should receive this designation. The Canadian Union of Public Employees, which represents nursing home employees, brought a challenge to the constitutionality of the *Essential Services in Nursing Homes Act* on the basis that its prohibition against strikes by employees designated as essential constituted a violation of their freedom of association as guaranteed by s. 2(d) of the Canadian Charter of Rights and Freedoms. The Board resumed its hearing to deal with the union's constitutional challenge.

The Board recognized that, for constitutional purposes, a balance must be struck between the right of employees to strike, and the rights to health, safety and security of vulnerable nursing home residents. The union was able to demonstrate that the Act violated s. 2(d) of the Charter because the prohibition on strikes by LPNs and RAs amounted to a substantial interference with collective bargaining, particularly where 90% of these employees were designated as essential and prohibited from striking. Moreover, the Act provided no meaningful alternative mechanism for the resolution of disputes involving employees who were prohibited from striking.

The Province, which had taken up the defence of the legislation, was unable to justify this violation of the right to strike in the circumstances of this case. The evidence, comprised of expert reports and oral testimony, failed to demonstrate that the legislative limitation on the right to strike was rationale, minimal in its impairment, or proportional in its effects. The Act was not a rational means by which to achieve the objective of continued nursing home care during a labour dispute because it applied only to LPNs and RAs, but did not apply to Registered Nurses working within nursing homes. In the event of a strike by nurses, the homes would have to close in any event. Moreover, the legislation did not represent a minimal impairment of the constitutional right to strike. The Act provided no effective dispute resolution mechanism as an alternative to a strike, it placed limits on picketing, and employees designated as essential could be required to perform both essential and non-essential work in the course of a dispute. Finally, the adverse effects of the legislation on essential services employees were not proportional to the law's objective to ensure the ongoing care of nursing home residents.

In the result, the Board concluded that the *Essential Services in Nursing Homes Act* violated the constitutional right to freedom of association under s. 2(d) of the Charter because it placed an unjustifiable limit on the right to strike of essential services employees. By way of remedy, the Board declared the Act to be of no force or effect to the extent that it violated the Charter in the immediate case.

Summary tables of all matters dealt with by the Board

Industrial Relations Act

April 1, 2018 - March 31, 2019

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	8	20	28	17	5	6	28	--
Application for a Declaration of Common Employer	--	3	3	--	--	1	1	2
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	--	4	4	1	2	--	3	1
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	36	21	57	39	--	1	40	17
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	--	--	--	--	--	--	--	--
Application for a Declaration Concerning the Legality of a Strike or a Lockout	1	--	1	--	--	1	1	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Miscellaneous Applications (s. 22, s. 35, s. 131)	2	3	5	2	--	2	4	1
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	5	3	8	--	--	2	2	6
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107)	1	1	2	--	--	2	2	--
Complaint Concerning a Work Assignment	--	--	--	--	--	--	--	--
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	--	--	--	--	--	--	--	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--
TOTAL	**53**	**55**	**108**	**59**	**7**	**15**	**81**	**27**

Public Service Labour Relations Act

1 avril 2018 – 31 mars 2019

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	--	4	4	1	3	--	4	--
Application for Revocation of Certification	--	--	--	--	--	--	--	--
Notice pursuant to s. 43.1 (Designation of Essential Services)	--	1	1	--	--	--	--	1
Application pursuant to s. 43.1(8)	--	4	4	2	--	--	2	2
Complaint pursuant to s. 19	3	1	4	1	--	1	2	2
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	1	--	--	--	--	1
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication	--	--	--	--	--	--	--	--
Application for Appointment of an Adjudicator (s. 100.1)	--	5	5	--	1	1	2	3
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer (s. 47)	--	2	2	2	--	--	--	--
Application for Appointment of Conciliation Board (s. 49)	--	1	1	1	--	--	--	--
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	--	--	--	--	--	--	--
Application for Appointment of Commissioner (s. 60.1)	--	2	2	--	2	--	--	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Request for a Declaration of Deadlock (s. 70)	--	1	1	--	1	--	--	--
Notice pursuant to Section 44.1 of the Act	--	--	--	--	--	--	--	--
Request for the Appointment of an Arbitration Tribunal pursuant to s. 66	--	--	--	--	--	--	--	--
TOTAL	**3**	**22**	**25**	**7**	**7**	**2**	**10**	**9**

Employment Standards Act

April 1, 2018 - March 31, 2019

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	--	6	6	1	1	2	--	1	--	5	1
Request to Refer Notices of the Director of Employment Standards	1	3	4	2	--	--	--	1	--	3	1
Application for exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause hearing, s. 75	1	3	4	1	1	--	--	--	--	2	2
TOTAL	**2**	**12**	**14**	**4**	**2**	**2**	**--**	**2**	**--**	**10**	**4**

Human Rights Act

April 1, 2018 - March 31, 2019

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	1	3	--	--	--	2	2	1
TOTAL	**2**	**1**	**3**	**--**	**--**	**--**	2	**2**	**1**

Essential Services in Nursing Homes Act

April 1, 2018 - March 31, 2019

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	--	1	--	--	1	4
TOTAL	**5**	**--**	**5**	**--**	**1**	**--**	**--**	**1**	**4**

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