Labour and Employment Board

ANNUAL REPORT
2020–2021

New Nouveau Brunswick

Labour and Employment Board
Annual report 2020-2021

Fredericton City Centre
435 King Street, Suite 200
Fredericton, New Brunswick
E3B 1E5 CANADA

www.gnb.ca

ISBN 978-1-4605-2856-3 (bilingual printed edition)
ISBN 978-1-4605-2857-0 (PDF English edition)
ISBN 978-1-4605-2858-7 (PDF French edition)

ISSN 1206-2715 (bilingual printed edition)

13584 | 2021.12 | printed in New Brunswick

TRANSMITTAL LETTERS

From the Minister to the Lieutenant-Governor
Her Honour The Honourable Brenda 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, 2020 to March 31, 2021.

Respectfully submitted,

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

From the Chairperson
To the Honourable Trevor A. Holder
Ministre de l'Éducation postsecondaire, Formation et Travail

Sir:

I have the honour to submit the 26th Annual Report of the Labour and Employment Board for the period of April 1, 2020 to March 31, 2021 as required by Section 15 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 26th annual report of the Labour and Employment Board for the period of April 1, 2020 to March 31, 2021.

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.*

With the Province declaring a State of Emergency in March 2020 due to the COVID-19 pandemic, the Board was faced with determining how best to conduct hearings. With the assistance of the Board staff, I developed a Hearing Directive which made virtual hearings the default manner of proceeding. The Hearing Directive established a process that required the parties to participate in Pre-Hearing Conferences designed to ensure that all evidence was exchanged. This was done in an effective manner through the use of Will Say Statements or Affidavits with attached documents. Before implementing the Hearing Directive, the Board distributed it to counsel and representatives of parties who appear frequently. Subsequent to the distribution of the Hearing Directive, the Board hosted a virtual meeting and entertained questions and comments. It is my view, having conducted the majority of the Pre-Hearing Conferences and Hearings, that the Hearing Directive was extremely useful and effective. As the Province moves towards more normalcy, it is my hope that many of the features of the Hearing Directive stay in place.

The total number of matters filed with the Board during this fiscal year was 81, 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 28 days of hearing and 21 days of pre-hearing.

During the year the Board disposed of a total of 87 matters. In so doing, there were 15 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 five (5) appointments of a Conciliation Officer; two (2) appointments of a Conciliation Board; and one (1) appointment of a Commissioner.

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, Q.C. (Fredericton)*
Annie Daneault (Grand Falls)
John McEvoy, Q.C. (Fredericton)
Robert D. Breen, Q.C. (Fredericton)
Elizabeth MacPherson (Grand Barachois)
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)***
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)

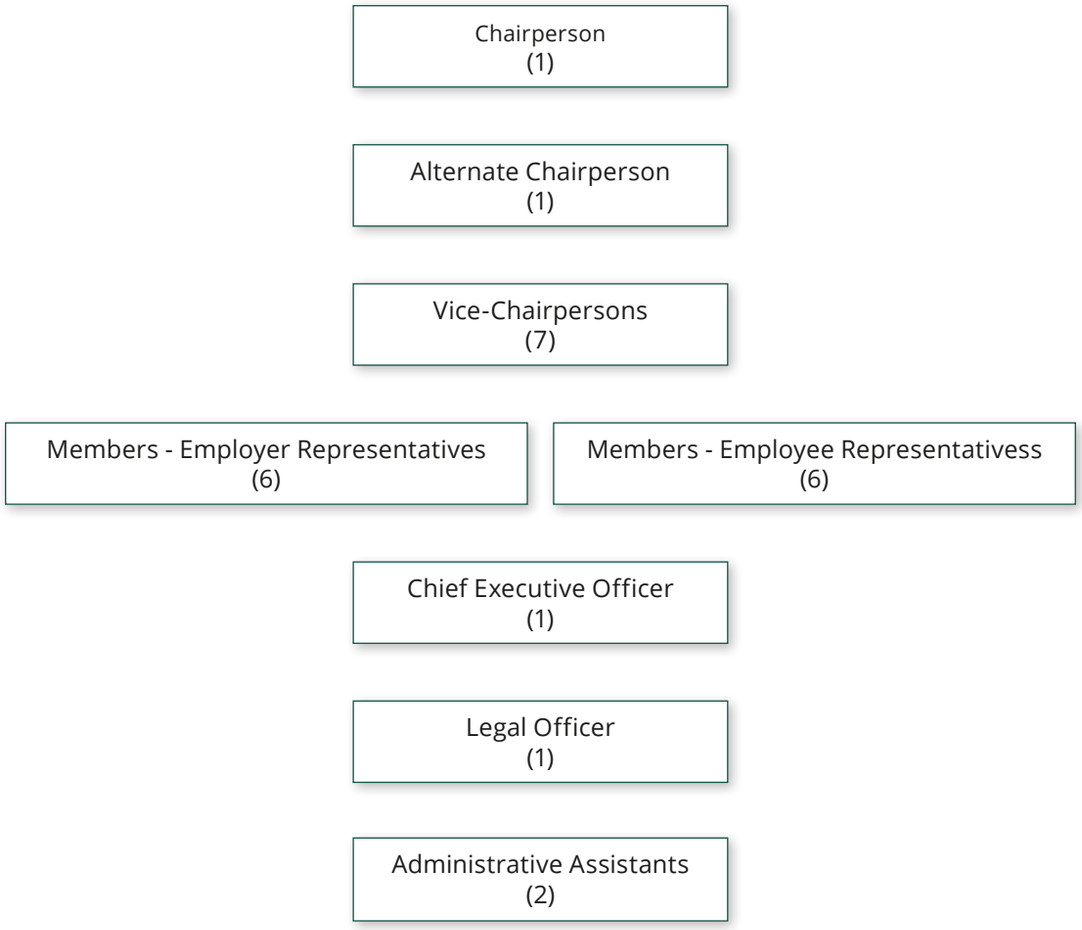
Chief Executive Officer
Lise Landry

Legal Officer
Isabelle Bélanger-Brown
Shijia Yu****

Administrative Staff
Andrea Mazerolle
Debbie Allain

* Mr. Bruce's term expired on May 31, 2020 and he had not yet been reappointed at the end of the fiscal year.
** Ms. Pilote resigned from her position in February 2021 upon being appointed to the Court of Queen's Bench.
*** Mr. Lirette's term expired on April 26, 2019 and no appointment/reappointment has yet been made.
**** Ms. Yu replaced Ms. Bélanger-Brown effective February 16, 2021.

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 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 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.

The Labour and Employment Board conducts numerous formal hearings annually, either at its offices in Fredericton as well as other centres throughout the province, or, since the COVID-19 pandemic, virtually via the Zoom platform. However, a significant portion of the Board's workload is administrative in nature. During the year in review, a total of 54 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 180 matters pending from the previous fiscal year (2019-2020); 81 new matters were filed with the Board during this reporting period for a total of 261 matters; and 87 matters were disposed of. There remain 173 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 17.

Legislation	# matters pending from previous fiscal year	# new matters filed/	# hearing days/	# pre-hearing days	# written reasons for decision	# matters disposed	# matters pending at the end of this fiscal year
Industrial Relations Act	30	36	10	9	9	47	18
Public Service Labour Relations Act	27	27	16	7	4	23	31
Employment Standards Act	6	15	2	3	2	14	7
Pension Benefits Act	0	0	0	0	0	0	0
Human Rights Act	4	3	0	2	0	3	4
Fisheries Bargaining Act	0	0	0	0	0	0	0
Public Interest Disclosure Act	0	0	0	0	0	0	0
Pay Equity Act, 2009	0	0	0	0	0	0	0
Essential Services in Nursing Home Act	113	0	0	0	0	0	113
Total	**180**	**81**	**28**	**21**	**15**	**87**	**173**

NUMBER OF HEARING DAYS

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons	Total
28	0	28

BUDGET 2020-2021

Primary	Projected	Actual
3 - Personal Services - Payroll, benefits, per diem	560,926	474,816
4 - Other Services -Operational Costs	77,200	55,492
5 - Materials and Supplies	13,800	(15,875)
6 - Property and Equipment	0	(5,496)
Total	**651,926**	**551,679**

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

The duty to bargain in good faith is triggered by a valid notice to bargain

Saint John Board of Police Commissioners v. Saint John Police Association, IR-007-20, 2 October 2020

The applicant, Saint John Board of Police Commissioners, employed members of the Saint John Police Force who were represented by the union, Saint John Police Association. The applicant employer and the union had a collective agreement which was set to expire on 31 December 2019. In mid-October 2019, the union gave the employer notice to commence bargaining to renew their agreement. The parties met in early 2020 but were unable to reach an agreement, even with the assistance of a conciliator. The employer brought a complaint to the Labour and Employment Board under s. 34 of the *Industrial Relations Act* alleging that the union had failed to bargain in good faith. It was the employer's position that the union had been intransigent and had not made a genuine effort to consider its proposals or to seek a middle ground. During a pre-hearing conference convened by the Board, the employer submitted that its complaint against the union should be centred on the actions of the union at the negotiations which took place in early 2020. The union, however, argued that to determine the matter of good faith bargaining the Board should take account of events which took place prior to the issuance of the notice to bargain in October 2019. In particular, the union argued that a meeting between the chief negotiators for the parties held in September 2019, as well as meetings of the Promotional Process Committee held in 2018 and 2019, should also be considered. The Board decided to treat this evidentiary dispute as a preliminary matter in order to assist with the scheduling of the employer's complaint.

At the September 2019 meeting between the chief negotiators for the parties, the employer suggested that the current collective agreement be extended for a year. The union interpreted this suggestion as evidence of collective bargaining which was relevant to the employer's complaint. The Board, however, observed that the employer's complaint was based on the meetings between the parties in early 2020 and ruled that the meeting of September 2019 was not relevant to the allegations which the employer had set out in its complaint. Moreover, if the union believed that an agreement to extend the current collective agreement for one year had been reached at negotiations in September 2019, there would have been no reason for the union to issue the notice to bargain in October 2019. As for the Promotional Process Committee, it had been established by the parties to determine a promotional process for a renewed collective agreement. The meetings of the Committee were essentially labour/management meetings of a type which enhance relations between parties. The Committee was designed to make recommendations as to a promotional process. It had no decision-making authority and, therefore, its meetings did not constitute collective bargaining. Accordingly, the meetings of the Promotional Process Committee were not relevant to a determination of the employer's complaint against the union for failure to bargain in good faith. Labour boards and courts have recognized that the statutory duty to bargain in good faith is triggered by a notice to bargain which, in this case, occurred in October 2019. The Board concluded that the union would not be permitted to rely on evidence of discussions or meetings held prior this time as they were irrelevant to the employer's complaint, which was based on the union's conduct at negotiations held in early 2020.

The requirement to bargain in good faith means that the parties must consider one another's proposals in search of middle ground

Saint John Board of Police Commissioners v. Saint John Police Association, IR-007-20, 2 December 2020

The complainant, the Saint John Board of Police Commissioners, was deemed to be the employer of Saint John Police Force members. The union, the Saint John Police Association, was the certified bargaining agent for all Saint John police officers below the rank of Staff Sergeant. The complainant employer and the respondent union were parties to a collective agreement which expired at the end of 2019. The City of Saint John had recently approved a Wage Escalation Policy, which the employer had adopted. In January 2020, the parties met to evaluate each other's proposals, but an impasse soon developed. Although the employer's proposals did not yet include salary, the union assumed that the

new Wage Escalation Policy would be a stumbling block and, without gathering information relevant to salary, simply rejected the employer's proposals. In February 2020, an attempt at conciliation failed as the parties both declined to modify their proposals. In early March 2020, the union requested that the Province constitute an arbitration board, but this request was denied as premature. The union reiterated the request for arbitration, following which the employer complained to the Minister of Post-Secondary Education, Training and Labour that the union had failed to make every reasonable effort to reach a collective agreement as required by s. 34 of the *Industrial Relations Act*. The Minister referred the matter to the Labour and Employment Board.

The Board observed that the duty to bargain in good faith has both a subjective and an objective element. The subjective dimension requires that both parties be committed to bargain in good faith as judged by their conduct. Objectively, the parties must make every reasonable effort to reach an agreement as measured against a standard of rational and informed discussion. There must be a genuine attempt to resolve the issues in dispute. At the very least, each party is required to explore the proposals of the other party, obtain sufficient information to assess those proposals, and seek to find a middle ground. In the case at hand, there had been no informed or rational discussion about the employer's proposals. The union did not genuinely attempt to resolve the issues in dispute or even consider potential middle ground. Rather, the union had assumed that the Wage Escalation Policy would be an obstacle and rejected the employer's proposals without gathering information relevant to salary. The Board declared that the union had failed to bargain in good faith contrary to s. 34 of the *Industrial Relations Act*, and ordered the parties to meet and make every reasonable effort to conclude a collective agreement. The parties were directed to use the services of a mediator to facilitate collective bargaining.

Payroll and Benefits Supervisor excluded from bargaining unit due to conflict of interest

City of Miramichi v. Canadian Union of Public Employees, Local 3863, IR-035-19, 26 June 2020

The applicant, City of Miramichi, maintained a position known as Payroll and Benefits Supervisor which was included in a bargaining unit represented by the Canadian Union of Public Employees, Local 3863. The incumbent had been a secretary, then a Payroll Clerk, then a Payroll and Benefits Officer and finally the Payroll and Benefits Supervisor. By the time she had become the Payroll and Benefits Supervisor, the key responsibilities and minimum qualifications for the position had expanded substantially. As part of this expansion, the incumbent had become responsible for the training and supervision of the Human Resources Secretary, who assisted with payroll duties. As Supervisor, the incumbent also had access to payroll information for some 200 employees, including management personnel. She knew their wages, sick-leave and vacation entitlements, medical conditions and the particulars of their long-term disability benefits. Moreover, when there was a payroll dispute, the Payroll and Benefits Supervisor interpreted the collective agreement from the perspective of the employer. The City of Miramichi applied to the Labour and Employment Board pursuant to s. 22 of the *Industrial Relations Act* to exclude the position of Payroll and Benefits Supervisor from the bargaining unit on the basis that it entailed management functions, access to confidential information and conflict of interest.

Section 1 of the *Industrial Relations Act* excludes from the definition of "employee" a manager or any person who is employed in a confidential capacity in matters relating to labour relations. As regards management functions, the Payroll and Benefits Supervisor gave directions to the Human Resources Secretary, answered her questions as regards payroll and verified her work. Such supervision did not amount to a management function because it occupied little time and had no impact on the economic life of the Human Resources Secretary, who was the Supervisor's only subordinate. As regards confidential capacity, there is a 3-part test for exclusion from a bargaining unit: (1) the confidential matters must be in relation to labour relations, (2) the disclosure of the information must be prejudicial to the employer, and (3) the individual must perform duties involving confidential information on a regular, as opposed to an occasional, basis. Here, the employer could meet the second and third parts of the test. However, the first part was not met because the Payroll and Benefits Supervisor possessed confidential information which was relevant to payroll, but had no direct bearing on collective bargaining. The possession of such payroll information could not justify the denial of a Charter right to belong to and participate in the activities of a union. There was, however, an issue as regards conflict of interest. It was common for disagreements to arise over such matters as an employee's entitlement to increased pay for overtime. Indeed, the Payroll and Benefits Supervisor spent about half her time dealing with such disputes. In the course of such dealings, she would interpret the collective agreement so as to advance the employer's position. The Payroll and Benefits Supervisor was not just pointing to the applicable section of the collective agreement. Rather, she was routinely making decisions from the employer's

perspective which affected an employee's economic well-being and conditions of employment. There was an obvious and untenable conflict of interest where the Payroll and Benefits Supervisor, a member of the bargaining unit, took management's position when dealing with disputes between the employer and union members. Accordingly, the Board ordered that the position of Payroll and Benefits Supervisor be excluded from the bargaining unit.

Board invokes concept of attornment to settle a question of jurisdiction

Brink's Canada Ltd. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927, IR-025-20, 28 September 2020

The applicant, Brinks Canada, provides secure transportation for valuable goods from 40 locations throughout Canada. In New Brunswick it has locations at Moncton, Saint John and Fredericton with 23 employees represented by the respondent union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927. As early as 1970, the union, or its predecessor, had been certified under New Brunswick law by the predecessor of the Labour and Employment Board to represent employees in 3 bargaining units. In 1993, the applicant and the union entered into a collective agreement that applied to all 3 New Brunswick bargaining units, as well as the Prince Edward Island bargaining unit. This collective agreement included a clause which stipulated that agreements would be negotiated according to the procedures of the *Canada Labour Code*. Over the ensuing years, a series of collective agreements were negotiated which referred to the *Canada Labour Code* as the governing statute. The latest collective agreement expired at the end of 2019. In early 2020, the union served the applicant employer with a notice to bargain. During the negotiations which followed, a conciliator and then a mediator were appointed by the federal Minister of Labour pursuant to the *Canada Labour Code*. In August 2020, the union gave the employer notice of intent to go on strike in mid-September. In response, the employer brought this application to the Labour and Employment Board to determine whether the union's strike vote complied with the requirements of the provincial *Industrial Relations Act*. The union submitted that the New Brunswick Labour and Employment Board did not have jurisdiction to deal with the employer's application because the bargaining relationship between the parties was governed by the *Canada Labour Code*, not the provincial *Act*.

The Board observed that the collective agreements between the parties said that their relationship, including dispute resolution procedures, would be governed by the *Canada Labour Code*. Moreover, in collective agreements entered into after 1993, the parties had incorporated parts of the *Code* to deal with such matters as health and safety. In the latest round of negotiations, the employer proposed the introduction of personal leave provisions which coincided with the *Canada Labour Code*. Further still, the employer did not oppose the appointments of a conciliator and a mediator by the federal Minister of Labour under the provisions of the *Code*. In this unique case, the Board applied the legal principle of attornment. A party who attorns, or submits, to a legislative jurisdiction cannot later take exception to that jurisdiction. Here, in their collective agreements since 1993, the parties had attorned, or submitted, to the use of the *Canada Labour Code* for the purposes of collective bargaining and dispute resolution. Accordingly, any dispute as to the validity of the union's strike vote had to be conducted according to the provisions of the *Canada Labour Code*, in respect of which the New Brunswick Labour and Employment Board had no jurisdiction. For this reason, the Board declined to hear the employer's application.

Board submits matter to arbitration to achieve first collective agreement between parties

Canadian Union of Public Employees, Local 5375 v. Manoir de la Sagesse Inc., IR-026-20, 1 December 2020

In 2018, the applicant union, Canadian Union of Public Employees, Local 5375, was certified as the bargaining agent for a group of employees who worked for the respondent, the operator of a special care facility in Campbellton. Shortly after certification, the union gave notice to bargain to the employer. In the 6 months that followed, the union contacted the employer 17 times by letter, email and voice messages but received no reply. The parties finally met for negotiations in November 2018 and a year later in October 2019. On these occasions, the union presented a draft collective agreement and pension plan proposal but the employer indicated that it had nothing to offer. In the summer of 2020, the parties met over a period of 5 days with the assistance of a conciliator. The employer took the position that the provisions of the *Employment Standards Act* were sufficient as regards wages and declined to provide the union with meaningful information regarding such matters as its financial position. The conciliator declared an impasse between the parties. Upon the request of

the union pursuant to s. 36.1 of the *Industrial Relations Act*, the Minister referred the matter to the Labour and Employment Board for first contract arbitration.

Section 36.1 of the *Act* authorizes the Board to refer a matter for first contract arbitration where (a) an employer has refused to recognize the authority of a bargaining agent, (b) a party has been uncompromising, (c) a party has failed to make reasonable efforts to conclude a first agreement, or (d) for any other relevant condition. Here, all 4 factors had been met. The employer failed to recognize the union's bargaining authority when it failed to respond to the union's communications and inquiries. The employer had been uncompromising by insisting without justification that the *Employment Standards Act* was sufficient as regards monetary issues. This stance also illustrated that the employer had failed to make a reasonable effort to conclude a first agreement. Moreover, the employer's conduct had resulted in the passage of two and one-half years without a first agreement. The employer had engaged in "surface" bargaining contrary to the duty to bargain in good faith. In these circumstances, the Board decided that the matter should be referred to arbitration in order to achieve a first collective agreement between the parties.

PUBLIC SERVICE LABOUR RELATIONS ACT

Board declines to create a separate bargaining unit for Licensed Practical Nurses

United Brotherhood of Carpenters and Joiners of America, Local 2717 v. Province of New Brunswick as represented by Treasury Board, and Canadian Union of Public Employees, Local 1252, PS-012-19, 8 January 2021

In June 2019, the applicant union, the United Brotherhood of Carpenters and Joiners of America, Local 2717, applied to be certified by the Labour and Employment Board under the *Public Service Labour Relations Act* as the bargaining agent for Licensed Practical Nurses (LPNs) employed by the respondent Province within several health-related organizations. In 1970, the intervenor, the Canadian Union of Public Employees, Local 1252, had been certified to represent 3 groups of provincial government employees, including the Patient Services Group. This group now included some 2,000 LPNs, although they were known until 2002 as Registered Nursing Assistants. At one time LPNs were viewed as support workers. However, the position had evolved to the point where LPNs assumed responsibility for direct patient care, much like a Registered Nurse. The LPNs who supported the applicant union wanted to be recognized for this increased responsibility through better wages and working conditions. They were also concerned about specific issues, like staff shortages and workplace violence, in respect of which, they said, their current union, the Intervenor CUPE Local 1252, had failed to provide adequate support. Both the Province, as employer, and the current union, CUPE Local 1252, opposed the application to fragment the established bargaining unit of some 3,800 employees by carving out a unit for LPNs, which would then be represented by the applicant union, CUPE Local 2717.

The Board indicated that it had developed and consistently applied a test to determine whether a specific occupation, such as LPNs, should be carved out of a larger bargaining unit. The onus is on an applicant union to establish that there are substantive reasons which demonstrate that the status quo has not worked out and that the best option is for the affected employees to form their own bargaining unit. Here, the applicant union had established that the scope of professional practice for LPNs had evolved significantly. They now function as part of a care team, handling tasks like physical assessments, intravenous injections and the administration of medication for stable patients, while Registered Nurses deal with unstable patients. However, the evolution of their roles did not mean that LPNs should be in a different occupation group or have a different bargaining unit. The evidence illustrated that the applicant union was concerned that the members of the Patient Services Group, which includes LPNs, were grouped for bargaining purposes with 2 other occupational groups that were not involved with direct medical care. Yet, the applicant's evidence did not demonstrate that LPNs no longer shared a community of interest with the other occupations in the Patient Services Group. Moreover, the applicant's evidence that the current union did not understand or represent the LPNs was weak. Rather, that union, CUPE Local 1252, had spent considerable time and effort to have the employer recognize and remunerate LPNs for the expanded scope of their professional practice. Further still, the evidence indicated that the current union was actively engaged with measures to deal with workplace violence and staffing shortages. On the basis of the evidence presented, the Board was satisfied that the current union, CUPE Local 1252, was representing the interests of the LPNs effectively. The LPNs had benefited from the bargaining power of a large bargaining unit. As a separate bargaining unit, the LPNs would have little power. The fragmentation entailed by a separate bargaining unit for LPNs would also have a dramatic impact on the Patient Services Group bargaining unit, as it would lose more than half its members. The Board dismissed the application to certify a separate bargaining unit for LPNs.

Pandemic provides Board with text-book example for use of its power to reconsider prior ruling

Canadian Union of Public Employees, Local 1190 v. Province of New Brunswick as represented by Treasury Board, PS-018-20, 25 March 2021

In November 2019, the applicant Canadian Union of Public Employees, Local 1190, filed a complaint with the Labour and Employment Board which alleged that the respondent employer, the Province of New Brunswick, had interfered with the union's representation of employees contrary to s. 7(2) of the *Public Service Labour Relations Act*. The complaint entailed the question of whether the union could conduct a strike vote by electronic means. In January 2020, the Board released its decision on the complaint in which it indicated that the strike vote could not be made by electronic means because the governing legislation and regulations indicated that a strike vote must be conducted by means of a traditional ballot box or mail-in vote. The Board could not, in essence, amend the legislation to allow for electronic voting even though this would constitute substantial compliance with the law. On 19 March 2020, the government of New Brunswick declared a state of emergency in response to the COVID-19 pandemic. Travel restrictions meant that the strike vote could not be made in person using the traditional ballot box. The union made an application for reconsideration to the Board under s. 23 of the *Act* to substitute electronic voting for the traditional in-person vote. The Province, as employer, resisted the application on the grounds that the strike vote could be taken by mail-in ballot.

Section 23 of the *Act* permits the Board to alter any decision or order that it has made. In exercising this broad power of reconsideration, the Board must take into account the competing value of finality in decision-making because of the resultant reliance which parties place on Board decisions. Accordingly, the Board will exercise its reconsideration powers only where (1) a party wishes to introduce new evidence not previously available which would likely make a difference to the outcome of the case, (2) a party intends to make submissions which it did not have the opportunity to raise at the original hearing, or (3) there are legal or policy reasons which would alter the decision being reconsidered. Moreover, the Board may take into account the impact its reconsideration decision could have beyond the immediate circumstances. In this case, the elements of the test for reconsideration were met. First, the state of emergency was new evidence not previously available which would likely alter the outcome of the case. Second, this subject had not been addressed at the original hearing. Third, the right to strike, which is important to collective bargaining and public policy on good labour relations, would be adversely affected by the Board's original decision. The pandemic prohibited the union from conducting an in-person strike vote. The mail-in voting procedure would be cumbersome in the extreme considering, in particular, that there were 2,000 union members spread throughout the province. The evidence illustrated that a strike vote by telephone and electronic means would ensure a secret ballot and likely result in greater voter participation. Moreover, although the regulatory scheme contemplated a traditional in-person or mail-in vote, it did not prohibit a vote by electronic means. The circumstances of this case illustrated a text-book example in which the use of the Board's reconsideration powers was justified. The Board declared on reconsideration of its earlier ruling that the union could conduct a telephone and electronic strike vote during the continuation of the COVID pandemic.

Board affirms employer's reclassification of position at provincial laundry facility

Canadian Union of Public Employees, Local 1190 v. Province of New Brunswick as represented by Treasury Board, PS-012-20, 16 March 2021

The applicant, Canadian Union of Public Employees, Local 1190, represented a bargaining unit of employees who worked for the Province at the Saint John Laundry, which provides laundry services to hospitals, clinics and nursing homes throughout New Brunswick. One of the positions within the bargaining unit was known as Storekeeper 1. In 2019, this position was reclassified by the employer as Clean Laundry Processor. The reclassification meant that the position would move to a different bargaining unit at the laundry facility, which was represented by CUPE Local 1251. The applicant union, CUPE Local 1190, applied to the Labour and Employment Board under s. 31 of the *Public Service Labour Relations Act* to determine whether the position of Storekeeper 1, which had been within the Local 1190 bargaining unit, ought to have been reclassified as Clean Laundry Processor and placed within the Local 1251 unit.

The Board recognized that the respondent employer had the legislative authority to classify positions. The applicant union had the burden to establish that the position ought not to have been reclassified. However, as an evidentiary matter, the onus was on the employer to demonstrate reasons for the reclassification. Here, the employer had examined the key activities of the position and concluded that they were more closely associated with those of a Clean Laundry Processor, who handles a variety of tasks relevant to laundry that has been cleaned, than to those a Storekeeper 1,

who deals with the receipt and shipping of supplies. Moreover, the decision of the employer to reclassify the position had the effect of including it with other laundry positions, such as Laundry Service Worker, Laundry Service Supervisor, and Laundry Service Coordinator. The Board has said that a reclassified position ought to be placed in a bargaining unit where there is a "community of interest" as reflected in such factors as the nature of the work, the skills of the employees and the interdependence of their working relationships. Here, the position of Clean Laundry Processor was in pith and substance integral to laundry services with which it had a community of interest. The Board affirmed the reclassification of the Storekeeper 1 position to that of Clean Laundry Processor, which would now fall within the bargaining unit represented by CUPE Local 1251.

EMPLOYMENT STANDARDS ACT

Employer's letter of termination invalid because it failed to provide reasons for dismissal

Brown v. Inteplast Bags & Films Corp., ES-008-19, 19 October 2020

The employee, Brown, worked for the employer for about 4 years, beginning in May 2015. In February 2017, the employee received a warning letter from the employer regarding absenteeism. A year later, in February 2018, he received a final warning due to absenteeism which noted that further infractions would most likely lead to termination of employment. In March 2019 an incident occurred when a sign bearing a racist message was placed on the back of a supervisor. Early in April the parties discussed the March incident. Shortly thereafter, the employee was terminated on the premise that he had placed the sign on the supervisor's back. The employer provided the employee with a letter of termination which indicated that the decision to dismiss him was based on their discussion regarding the March incident, as well as the letter of February 2018 in which he had been given a final warning. The employee filed a complaint with the Director of Employment Standards under s. 30 of the *Employment Standards Act* alleging that he had been terminated without cause and was, therefore, entitled to 2 weeks pay in lieu of notice. The employee's complaint was investigated by an Employment Standards Officer who concluded that the letter of termination complied with the requirement to give reasons for dismissal because it referred to the letter of February 2018 in which the employee had been given a final warning. Accordingly, the Director of Employment Standards dismissed the employee's complaint. The employee referred the matter to the Labour and Employment Board.

The Board noted that under s. 30 of the *Employment Standards Act*, dismissal for cause must be in writing and it must set out the reasons for the dismissal. Otherwise, an employer must provide an employee with advance notice of termination. In this case, the employee had been terminated in writing, but the letter did not provide adequate reasons for termination. It referred to the meeting of the parties regarding the March incident, but did not state a conclusion as regards this meeting. It referred to the earlier letter in which the employee had been given a final warning, but this warning related to absenteeism whereas the reason given for his dismissal arose from the racist sign incident of March 2019. The employer had failed to comply with s. 30 of the *Act* because its letter of termination did not provide the employee with a sufficiently explicit reason for dismissal. Moreover, there was doubt as to whether the employer's reason for dismissal based on the racist sign was authentic. The employee, who was a black man, had experienced racism in the workplace. The incident of the racist sign was a pretext to get rid of him. Significantly, the employer did not call as witnesses either the supervisor on whose back the racist sign had been placed or the production manager who had issued the letter of termination. This failure gave rise to an adverse inference, suggesting that their testimony would not have supported the employer's stated reason for termination. The absence of an authentic reason for dismissal was also contrary to s. 30 of the *Act*. The employee was entitled to pay in lieu of valid notice of termination for cause. The Board ordered the employer to pay him $2,033.86, being wages for two weeks plus vacation pay.

Employer may deduct insurance premiums from pay where employee agrees or receives clear economic benefit

Barton v. Nordia Inc., ES-004-20, 9 December 2020

In August 2018, the employee complainant began work for the employer as a call centre agent. At the time he was hired, the employee was informed that after 6 months of employment he would be required to join a group insurance plan provided by the employer and that the monthly premium for the plan would be split evenly between the employee and the employer. The employee wished to opt out of the plan but was informed by both the employer and the insurance company which administered the plan that he could not opt out. His premiums, which were deducted from his pay, amounted to about $27.00 per month.

The employee brought a complaint to the Employment Standards Branch alleging that the deductions from his pay as premiums for the employer's group insurance plan were not authorized under the *Employment Standards Act*. The matter was investigated following which the employee was notified that there had been no violation of the *Act*. The employee requested that the matter be referred to the Labour and Employment Board.

The Board noted that, under the *Act*, "pay" is defined to include such things as wages and vacation pay but does not include deductions that may lawfully be made by an employer. In prior decisions, the Board had concluded that deductions from pay could be made where the employee had agreed to such deductions or received a clear economic benefit from such deductions. Moreover, there had been a case in which the Board had allowed deductions for health insurance. In the case at hand, the employee agreed at the time he was hired to participate in the employer's mandatory group insurance plan, which was a term and condition of employment. He understood that half the premium for the plan would be deducted from his pay. Further, the employee had made a claim for dental benefits, which confirmed his agreement to the plan and deduction of premiums. This claim also indicated that the employee had received a clear benefit from the plan, which justified the deduction of premiums from his pay. The Board affirmed the decision of the Director of Employment Standards.

Summary tables of all matters dealt with by the Board

INDUSTRIAL RELATIONS ACT

April 1, 2020 - March 31, 2021

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	5	9	14	4	--	3	7	7
Application for a Declaration of Common Employer	2	--	2	--	--	2	2	--
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	1	2	3	2	--	1	3	--
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	14	9	23	23	--	--	23	--
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	1	2	3	--	1	1	2	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)	2	2	4	2	--	1	3	1
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	4	1	5	--	1	1	2	3
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107)	1	1	2	1	--	1	2	--
Complaint Concerning a Work Assignment	--	6	6	--	--	--	--	6
Application for Accreditation	--	--	--	--	--	--	--	--
Application for Termination of Accreditation	--	--	--	--	--	--	--	--
Request pursuant to Section 105.1	--	3	3	3	--	--	3	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Total	**30**	**36**	**66**	**35**	**3**	**10**	**47**	**18**

PUBLIC SERVICE LABOUR RELATIONS ACT

April 1, 2020 - March 31, 2021

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	1	--	1	--	1	--	1	--
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	3	7	1	--	--	1	6
Complaint pursuant to s. 19	5	4	9	--	--	4	4	5
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)	--	1	1	1	--	--	1	--
Application pursuant to s. 31	2	4	6	--	1	--	1	5
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication	--	--	--	--	--	--	--	--
Application for Appointment of an Adjudicator (s. 100.1)	5	4	9	4	--	--	4	5
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer (s. 47)	6	5	11	8	--	--	8	3
Application for Appointment of Conciliation Board (s. 49)	2	2	4	1	--	--	1	3
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	3	3	2	--	--	2	1

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Appointment of Commissioner (s. 60.1)	--	1	1	--	--	--	--	1
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	**27**	**27**	**54**	**17**	**2**	**4**	**23**	**31**

EMPLOYMENT STANDARDS ACT

April 1, 2020 - March 31, 2021

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	3	10	13	--	2	1	--	7	--	10	3
Request to Refer Notices of the Director of Employment Standards	2	2	4	1	--	1	--	1	--	3	1
Application for exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause hearing, s. 75	1	3	4	--	1	--	--	--	--	1	3
Total	**6**	**15**	**21**	**1**	**3**	**2**	**--**	**8**	**--**	**14**	**7**

HUMAN RIGHTS ACT

April 1, 2020 - March 31, 2021

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)	4	3	7	1	--	1	1	3	4
Total	**4**	**3**	**7**	**1**	**--**	**1**	**1**	**3**	**4**

ESSENTIAL SERVICES IN NURSING HOMES ACT

April 1, 2020 - March 31, 2021

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)	113	--	113	--	--	--	--	--	113
Total	**113**	**--**	**113**	**--**	**--**	**--**	**--**	**--**	**113**

Note: 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.*