ESTIMATES

Canada Industrial Relations Board

Performance Report

For the period ending
March 31, 2001

Canada

Improved Reporting to Parliament
Pilot Document

Each year, the government prepares Estimates in support of its request to Parliament for authority to spend public monies. This request is formalized through the tabling of appropriation bills in Parliament.

The Estimates of the Government of Canada are structured in several parts. Beginning with an overview of total government spending in Part I, the documents become increasingly more specific. Part II outlines spending according to departments, agencies and programs and contains the proposed wording of the conditions governing spending which Parliament will be asked to approve.

The *Report on Plans and Priorities* provides additional detail on each department and its programs primarily in terms of more strategically oriented planning and results information with a focus on outcomes.

The *Departmental Performance Report* provides a focus on results-based accountability by reporting on accomplishments achieved against the performance expectations and results commitments as set out in the spring *Report on Plans and Priorities*.

The Estimates, along with the Minister of Finance's Budget, reflect the government's annual budget planning and resource allocation priorities. In combination with the subsequent reporting of financial results in the Public Accounts and of accomplishments achieved in Departmental Performance Reports, this material helps Parliament hold the government to account for the allocation and management of funds.

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Foreword

In the spring of 2000 the President of the Treasury Board tabled in Parliament the document "Results for Canadians: A Management Framework for the Government of Canada". This document sets a clear agenda for improving and modernising management practices in federal departments and agencies.

Four key management commitments form the basis for this vision of how the Government will deliver their services and benefits to Canadians in the new millennium. In this vision, departments and agencies recognise that they exist to serve Canadians and that a "citizen focus" shapes all activities, programs and services. This vision commits the government of Canada to manage its business by the highest public service values. Responsible spending means spending wisely on the things that matter to Canadians. And finally, this vision sets a clear focus on results – the impact and effects of programs.

Departmental performance reports play a key role in the cycle of planning, monitoring, evaluating, and reporting of results through ministers to Parliament and citizens. Earlier this year, departments and agencies were encouraged to prepare their reports following certain principles. Based on these principles, an effective report provides a coherent and balanced picture of performance that is brief and to the point. It focuses on results – benefits to Canadians – not on activities. It sets the department's performance in context and associates performance with earlier commitments, explaining any changes. Supporting the need for responsible spending, it clearly links resources to results. Finally the report is credible because it substantiates the performance information with appropriate methodologies and relevant data.

In performance reports, departments strive to respond to the ongoing and evolving information needs of parliamentarians and Canadians. The input of parliamentarians and other readers can do much to improve these reports over time. The reader is encouraged to assess the performance of the organization according to the principles outlined above, and provide comments to the department or agency that will help it in the next cycle of planning and reporting.

This report is accessible electronically from the Treasury Board of Canada Secretariat Internet site:
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Performance Report

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March 31, 2001

Approved by:______________________________
The Honourable Claudette Bradshaw
Minister of Labour

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Section I: Message from the Chairperson

I am pleased to present the third annual performance report of the Canada Industrial Relations Board (CIRB) for the period ending March 31, 2001.

This past fiscal year has been a challenging one for the CIRB. In its second full year of operation, the Board continued to receive record numbers of applications and complaints. Cases before the Board have not only increased in volume but also in complexity, particularly in a number of situations involving corporate mergers and acquisitions, which require the Board to review bargaining unit structures and representation rights and their consequential issues. In its effort to deal with these increasing pressures, the CIRB welcomed the appointment of a fifth Vice-Chairperson to the Board, Mr. Douglas Ruck.

Following extensive consultations with the industrial relations community during fiscal year 2000/2001, the proposed *Canada Industrial Relations Board Regulations* were recently published in the *Canada Gazette*. This marked the launch of a 30-day consultation period as part of the regulatory approval process. The Board plans to continue to hold on-going consultations with the community to remain abreast of their concerns and of the challenges facing the Federal labour jurisdiction and the CIRB.

Operating pressures on the Board show no sign of abating in the new fiscal year. The volume of cases remains at unprecedented high levels and the Board continues to deal with a number of very complex matters requiring substantial investments of time and resources to resolve. I am confident, however, that the important experience the Board has acquired since its inception combined with an appropriate level of resources will serve the Board well in meeting the challenges that lie ahead.

J. Paul Lordon
Chairperson

Section II: Strategic Context

A. Context and Background

The Canada Industrial Relations Board (CIRB) is an independent, representational, quasi-judicial tribunal responsible for the interpretation and application of the *Canada Labour Code*, Part I, Industrial Relations, and certain provisions of Part II, Occupational Safety and Health. It was established in January 1999 through amendments to Part I of the *Canada Labour Code*. At that time, the Federal Minister of Labour, the Honourable Claudette Bradshaw, stated that the Canada Industrial Relations Board "... will be a great asset to both labour and management in the federally regulated sector."

The CIRB has jurisdiction in all provinces and territories with respect to federal works, undertakings or businesses in the following sectors:

- Broadcasting
- Chartered banks
- Postal services
- Airports and air transportation
- Shipping and navigation
- Interprovincial or international transportation by road, railway, ferry or pipeline
- Telecommunications
- Grain handling and uranium mining and processing
- Most activities in the Yukon, Nunavut and the Northwest Territories, including those that would normally be in provincial jurisdiction
- Undertakings of the First Nations on reserves
- Certain Crown Corporations (including, among others, Atomic Energy of Canada Ltd.)

This jurisdiction covers some 700,000 employees and their employers and includes enterprises that have an enormous economic, social, and cultural impact on Canadians from coast to coast. This variety of activities, their geographical spread, and their national significance contribute to the uniqueness of the federal jurisdiction and the role of the CIRB, and pose particular challenges for the Board's work.

The Board has established a series of strategic objectives in support of its mandate:

- to seek solutions to labour relations problems by determining the cause and nature of conflict and by applying the appropriate dispute resolution mechanism, including fact finding, mediation and adjudication;
- to conduct its activities in a timely, fair and consistent manner;
- to consult its clients on its performance and in the development of its regulations, policies and practices;
- to promote an understanding of its role, processes and jurisprudence; and

- to conduct its business and to manage its resources in a manner that is fiscally sound in accordance with the *Financial Administration Act* and the policies and directives of the Central Agencies.

B. Resources Used

Strategic Outcome	Planned Results	Related Activities	Resources (000)	(%)
effective industrial relations in any work, undertaking or business that falls within the authority of the Parliament of Canada	decisions on applications and complaints provided in a fair, expeditious and economical manner	• intake and investigative services • case management activities • Board deliberations, public and in-camera hearings • production, translation, and dissemination of Board decisions • legal and research services in support of Board deliberations and court proceedings • information management services and the development of mechanisms to make the Board's activities more accessible and less costly	**6,671.5**	**68**
	successful resolution of applications and complaints through alternative dispute resolutions mechanisms	• alternative dispute resolutions services	**1,334.7**	**14**
	an involved and well-informed labour relations community	• publication and distribution of *Reasons for Decisions*, newsletters, information circulars and practice notes • direct consultations with clients • response to *ad-hoc* inquiries from the public • public access to a resource center on industrial relations and administrative law • enhancement of CIRB Website • presentations by Board members and staff to the industrial relations community • effective regulations and practices through client consultations	**1,203.5**	**12**
			9,209.7	**94**

Note:

- Financial, Administrative and Human Resources services in support of Key Results Commitments represent 6%.

Additional financial tables can be found at Annex A.

C. Outcomes Achieved

Since its inception on January 1, 1999, the CIRB has experienced a significant and steady increase in its workload. In its second year of operation, the Board received a total of 1,134 new cases. This represents a 52% increase over the annual average of 746 for the last four years.

In terms of the Board's performance during the same period, the Board was able to dispose of 1,009 cases - a 46% increase over the last 4-years' average of 692 cases. Notwithstanding this considerable increase in workload, the rate of facilitated settlement of complaints remains consistent with previous years: sixty-six (66) percent of complaints disposed of were settled without Board adjudication thus eliminating the need for costly public hearings and contributing to more effective industrial relations.

The total number of files received and disposed of in 2000-01 represents the highest workload levels ever recorded by the CIRB or the former Canada Labour Relations Board. Despite the increase in workload, the CIRB has managed to reduce further, in some instances, the time necessary to process and resolve applications and complaints (see Statistical Information at Annex B). The performance improvements are attributable primarily to the enactment of a number of statutory amendments to the *Canada Labour Code, Part I*, in January 1999 allowing the Board to operate more economically, efficiently and expeditiously. For example, the amendments provide for certain cases to be heard by a single-member panel comprised of the Chairperson or a Vice-Chairperson, rather than a three-member panel comprised of the Chairperson or a Vice-Chairperson and two Members. Consequently, cases may be assigned, heard and disposed of more rapidly. The amendments also expressly allow for matters to be determined on the basis of parties' written submissions without holding public hearings. Moreover, the Board now has a statutory obligation to issue its decision in a matter within 90 days of reserving said decision.

In addition to the 1999 statutory amendments, the Board introduced a number of important changes to its internal processes as reported in the 2000-2001 Report on Plans and Priorities. These changes have greatly contributed to accelerating the processing and disposition of cases. They include the establishment of performance targets for its case management processes, improvements in the scheduling of Board hearings through block scheduling and an emphasis on holding pre-hearing case management sessions and other processes to expedite the resolution of matters. Another contributing factor to the CIRB's performance is the appointment of six part-time Members in May 2000, thus increasing its capacity to provide expeditious tripartite hearings. The appointment of a Vice-Chairperson in June 2001 also served the Board well in its ability to hear and dispose of more cases.

To further enhance its efficiency and effectiveness, the CIRB also undertook the following initiatives in 2000-01:

- the development of a comprehensive and integrated strategic and operational plan;
- the upgrade of the Board's internal communication software in the autumn of 2000, including the provision of Internet access to all Board members and personnel.

Adjudicative personnel and staff are thus able to communicate, even when travelling, through external e-mail access and have access to the Government's Intranet. The Board is now in the process of developing secure mechanisms to allow for the electronic exchange of documents;

- a complete review of the CIRB's Case Management Guidelines and Operational Procedures as part of the ongoing review of the Board's case management systems and practices to allow cases to be processed, assigned, scheduled, heard and determined in the fastest, most economical manner;
- the review and further refinement of internal standards of performance, both qualitative and quantitative.

In October 1999, the CIRB launched a series of extensive consultations with representatives of the business, labour and legal communities to develop Regulations pursuant to the amended *Canada Labour Code*. These Regulations will ensure greater operational efficiencies and enhance the communication of Board processes to the industrial relations practitioners it serves. With the assistance of the Department of Justice, the Board is now in the final phase of development of the *Canada Industrial Relations Board Regulations* to replace the *Canada Labour Relations Board Regulations, 1992.* The Regulations will be published in the *Canada Gazette* in the autumn of 2001. During that period, and in an effort to further strengthen communications with its clients, the Board plans to hold roundtable discussions during the 30-day pre-publication statutory consultation period.

As reported earlier, the CIRB has managed to improve its performance in a number of areas, but the increased complexity of the cases before the Board is placing additional pressures on its performance in some other areas. For example, the Board has been involved, during the last fiscal year, in major corporate mergers in the airline and telecommunications industry in which it is being called upon to review and determine appropriate bargaining unit structures and dispose of related matters such as bargaining agent representation and collective agreement issues. During the period under review, the CIRB was also asked to intervene in circumstances where parties adopted antagonistic and complex strategies in disputes over such primary issues as the acquisition of bargaining rights. While the Board strives to obtain voluntary resolutions to all cases, some require the full decision-making authority of the Board. As a result, the nature of the cases will influence and will cause considerable variations in the time and cost to resolve them.

It is indeed a difficult task to ascribe quantitative measures to the outcomes of the Board's work. Section 8 of the *Canada Labour Code*, Part I, stipulates that every employee is free to join the trade union of their choice and that every employer is free to join the employers' organization of their choice. The Board protects the right to organize but exercises no influence over the employees' or the employers' choice. The Board adjudicates unfair labour practice complaints with the ultimate goal of preventing labour unrest. The freedom of association, harmonious employer/employee relations and constructive collective bargaining practices are undeniably outcomes, goals and values that are widely recognized as vital elements in maintaining an equitable and democratic society, and a healthy and productive economy.

It is important in this respect to emphasize that the impact of the work of the CIRB can be both broad-ranging and significant. The Board's decisions and mediation efforts often affect in very tangible ways the working lives of thousands of Canadians, the economic position of leading Canadian corporations, and the general well-being of the Canadian public. The following highlights some of the issues that the Board has been called upon to address over the past year:

Protection of public safety and health: With the changes to the *Canada Labour Code* adopted in January 1999, the Canada Industrial Relations Board was given the authority to determine the level of operations that must be maintained during a work stoppage. In the past year, the CIRB received 16 such applications, covering workers at airports, nuclear power plants, the airline industry, the civil air navigation system, and public transportation services for the disabled. Through decisions of the Board, and also through its work with the parties to assist them in arriving at negotiated agreements, the CIRB has helped to ensure that industrial disputes do not pose a threat to public safety and health.

Corporate Mergers: Over the past year, corporate mergers and acquisitions have occurred in a wide range of significant industries throughout the Canadian economy, including telecommunications, broadcasting, and air transportation. This corporate restructuring process generates a wide range of industrial relations issues that affect not only the rights and working conditions of employees, but also the economic viability of the companies themselves. In this context, the CIRB has been called upon to assist in this process by determining appropriate bargaining units and bargaining agents, seniority rights, and the rules governing the assignment and working conditions of staff in the newly-formed enterprises. Throughout the year, the Board has issued a large number of decisions in this regard, and has also simultaneously provided mediation services to the parties to help them resolve numerous difficult issues and differences. Due to the complexity and impact of the issues involved in these files, these cases tend to require substantial time and resources to resolve, and many are still ongoing.

Bargaining Rights: Throughout the year, the CIRB continued to receive a large number of applications for certification of unions, notably in the areas of road transportation and in aboriginal communities. Through its decisions and orders, the Board has provided for the orderly and democratic development of collective bargaining relationships for thousands of Canadian workers and their employers.

Some specific key decisions issued by the Board are summarized at Annex C.

Challenges

The heavy workload is making it increasingly difficult to sustain the improvements in performance levels achieved to date. The Board is operating with the staff resource levels of January 1999, despite the sizable increase in its workload. Significant overtime work is required on a continual basis. The Board must also update its information technology infrastructure, not only to meet the Government On-Line initiative by 2004, but to maintain

its core business systems, which are quickly becoming obsolete. With appropriate funding over the next several years, the Board would like to make the following adjustments and investments:

- deploy additional resources to accelerate the management of cases and to make more use of alternate dispute resolutions mechanisms including mediation. Clients have expressed the requirement for more mediation and front line assistance from the Board's labour relations officers;
- review the entire decision-making process and allocate the resources necessary to issue decisions in a timely manner, in accordance with the 90-day statutory time limit;
- improve the pre-hearing case management processes in order to resolve more matters without litigation and ensure that the time allocated to formal public hearings is most effectively utilized;
- provide video-conferencing capabilities at the Board's head office in Ottawa as well as in each of its five regional offices to further expedite the hearing of cases, particularly in matters involving illegal work stoppages;
- begin the development of new and up-to-date case management and information management systems to ensure the efficient processing of cases and sharing of information between clients, Board members and staff as well as to provide electronic services over the Internet as part of the Government On-Line strategy;
- dedicate additional resources to comply fully with the newly defined requirements of the *Official Languages Act* as set out by the Federal Court of Appeal in *Devinat*; namely, that all Board decisions be issued in both official languages.

Annex A

Financial Tables

A. Financial Performance Summary

The total authorities granted to the Board were $2,464,456 more than originally planned. The additional authorities approved were to provide for:

- additional employee compensation due to collective bargaining and pay equity: $301,052;
- employee benefits related to the above additional personnel costs: $141,000;
- authorized spending of proceeds from the disposal of surplus Crown assets: $414;
- additional costs related to transitioning from the CLRB to the CIRB: $913,000;
- additional costs related to the appointment of a fifth vice-chair: $142,380;
- additional costs related to the improvement of the information technology infrastructure: $589,860; and
- carry-forward from previous years used for the increase of the workload: $376,750.

The actual spending was 97% of the authorized amounts. Transition costs were incurred in 1998-99, in 1999-2000 and in 2000-2001. We do not expect any transition costs in 2001-2002.

B. Financial Summary Tables

The following tables are applicable to the Board:

Table 1 - Summary of Voted Appropriations
Table 2 - Comparison of Total Planned Spending to Actual Spending
Table 3 - Historical Comparison of Total Planned Spending to Actual Spending

Financial Table 1
Summary of Voted Appropriations

Financial Requirements by Authority ($ thousands)

Vote		2000-01		
		Planned Spending	Total Authorities	Actual
	Canada Industrial Relations			
25	Program expenditures	7,837.0	10,160.0	**9,847.0**
(S)	Contributions to employee benefit plans	1,155.0	1,296.0	**1,296.0**
	Total Department	8,992.0	11,456.0	**11,143.0**

Financial Table 2

Departmental Planned versus Actual Spending ($ thousands)			
	2000-01		
Business Line: Administration of the *Canada Labour Code*	**Planned Spending**	**Total Authorities**	**Actual spending**
FTEs	97		**97**
Operating	8,992.0	11,456.0	**11,143.0**
Less:			
Respendable Revenues	0	2.7	**0**
Total Net Expenditures	8,992.0	11,458.7	**11,143.0**
Other Revenues and Expenditures			
Non-respendable revenues	(8.0)		**(3.8)**
Cost of services provided by other departments	2,383.2	2,383.2	**2,383.2**
Net Cost of the Department	11,367.2	13,841.9	**13,522.4**

Financial Table 3

Historical Comparison of Departmental Planned to Actual Spending ($ thousands)					
			2000-01		
Administration of the *Canada Labour Code*	**Actual 1998-99**	**Actual 1999-00**	**Planned Spending**	**Total Authorities**	**Actual**
Canada Industrial Relations	**9,606.0**	**10,360.3**	8,992.0	11,456.0	**11,143.0**

Annex B

Statistical Information

Figure 1 - Workload

Total Files – Certifications, Complaints and Other[1]					
	96/97	97/98	98/99[2]	99/00	00/01
On hand	453	441	474	679	671
Received/reopened	666	658	810	852	1,134
Total files	1,120	1,098	1,284	1,531	1,805
Granted	220	228	193	280	274
Rejected	192	155	136	209	262
Withdrawn/Settled	267	242	276	371	473
Total disposed	679	625	605	860	1,009
Pending	441	474	679	671	795

[1] *These figures reflect the number of matters (based on sections of the Canada Labour Code), and not necessarily the number of cases.*
[2] *The CIRB was established on January 1, 1999. Data prior to this date were recorded by the former Canada Labour Relations Board. Since the date of transition to the new Board, all outstanding cases of the former Board have either been resolved by CLRB members or transferred to the CIRB for appropriate disposition.*

In 2000-01, the CIRB received 1,134 new cases representing an increase of 52% over the annual average of 746 cases for the last four years. In terms of the Board's performance during the same period, the Board disposed of 1,009 cases representing a 46% increase over the annual average of 692 cases for the last four years.

Processing Time

"Processing time" is the time required to complete a file -- time spent investigating, mediating, hearing, where required, and deciding a case.

Figure 2 - Processing Time (average number of days from received to disposed)

	4-Year Average[1]	2000-01	Difference[2]
All cases			
with hearing	437	357	-80
without hearing	149	159	10+
Certification			
with hearing	426	420	-6
without hearing	107	154	47+
Unfair labour practice complaints			
with hearing	380	443	63+
without hearing	192	181	-11

[1] The 4-year average is calculated based on performance data from 1996-97 to 1999-00.
[2] The difference is calculated based on the 2000-01 CIRB performance and the 4-year average.

As evidenced by Figure 2 above, the CIRB took an average of 357 days to dispose of all cases that were heard and disposed of in 2000-01. The CIRB managed to improve performance times recorded in the last four years by almost 3 months while, at the same time, disposing of 46% more cases as reported earlier.

As for cases disposed of without hearing, the volume of work took a toll on performance: it took the Board an average of one and a half weeks more than the 4-year average to resolve them. The number of cases disposed of without hearing in 2000-01 totalled 844, a considerable increase over the 4-year average of 609 cases. Also, the complexity of cases before the Board have required Board officers to conduct more thorough and extensive investigations and to devote considerably more time to mediate matters between parties.

Processing time for applications for certification heard show an improvement of almost one week over the 4-year average. As for applications for certification disposed of without hearing, the figures show an increase in processing time of 1.5 months over the 4-year average. Again, the volume and complexity of cases have had a major negative impact on the Board's officers' ability to maintain past performance levels. This fiscal year, the Board has faced some particularly difficult certification cases in the banking and trucking industry, which have required considerable investigation and mediation efforts from Board officers.

Unfair labour practice complaints disposed of after hearing show an increase in processing time of 2 months compared to the 4-year average. This increase in processing time is explained by the fact the Board disposed of twice as many complaints in 2000-01 (84) as the 4-year annual average of 42 cases. Complaints disposed of without hearing, however, show an improvement of one and a half weeks over the 4-year average.

Investigation and Mediation Performance in the Regional Offices

Among the many responsibilities incumbent on the Board's regional offices, officers must investigate applications to establish and modify bargaining rights and mediate unfair labour practice complaints. The ability of the regional officers to promote the settlement of complaints is of significant benefit to the parties involved, and eliminates the involvement of the Board and therefore the need to hold costly and time-consuming hearings. (Hearing costs, excluding salaries, are estimated at $2,300 per day while engendering significant additional expenses for the parties involved.)

The settlement rates for complaints has remained fairly constant. In 2000-01, regional offices achieved a settlement/withdrawal rate of complaints of almost two-thirds of the total number of cases.

Decision-making

Board performance is also measured by the length of time it takes to decide matters before it. A panel (comprised of the Chairperson or a Vice-Chairperson in a single member panel or the Chairperson or a Vice-Chairperson and two Members in a full panel), may decide cases on the basis of written and documentary evidence (file documentation, investigation reports, written submissions) or decisions may be deferred until further evidence and information is gathered by way of a public hearing. Figure 3 presents the disposition time for both types of decision-making. [The Board measures its disposition time for cases decided with a public hearing from the date it reserves its decision (which generally coincides with the last day of the hearing) until the date the decision is issued to the parties. Where cases are decided without a public hearing, the disposition time is measured from the date the case is deemed to be "ready" for the Board's consideration until the date the final decision is issued.]

Figure 3 - Decision-making (average number of days from last hearing day or ready date to disposition)

	4-Year Average[1]	2000-01	Difference[2]
All cases			
with hearing	192	112	-80
without hearing	42	35	-7
Certification			
with hearing	18626	73	-113
without hearing		20	-15
Unfair labour practice complaints			
with hearing	145	129	-17
without hearing	61	41	-20

[1] The 4-year average is calculated based on performance data from 1996-97 to 1999-00.

[2] The difference is calculated based on the 2000-01 CIRB performance and the 4-year average.

In 2000-01, disposition time for all cases heard improved by 2.3 months compared to the 4-year average. Cases not requiring hearings were also disposed of more rapidly.

Compared to the 4-year average, disposition time for applications for certification with hearing continues to improve with a 3.7 months decrease in the time taken to dispose of those cases in 2000-01.

Disposition time for applications for certification without hearing decreased by 1.6 weeks.

With regard to unfair labour practice complaints, disposition time for cases heard improved by .5 month over the 4-year average. Disposition time for complaints disposed of without hearing has also improved.

Annex C

Illustrative Specific Board Decisions

Royal Aviation Inc., [2000] CIRB no. 69

The Royal Aviation Employees' Association (RAEA) and the Canadian Union of Public Employees, Airline Division (CUPE) applied for certification as bargaining agent for a bargaining unit including all the employer's cabin crew members. The employer had proposed two separate bargaining units, one for flight attendants and another for flight directors because, in its opinion, flight directors performed supervisory duties and should form a separate bargaining unit. The Board ruled that a single bargaining unit including all cabin crew members was appropriate because the two groups of employees had the same interests. In the Board's view, the flight directors' nominal supervisory duties did not justify excluding them from the larger bargaining unit.

George Cairns et al., [2000] [2001] CIRB nos. 70, 86 and 111

VIA Rail Canada Inc., the employer, and the International Brotherhood of Locomotive Engineers (BLE), the union, applied for reconsideration of decision no. 35, in which the Board had ordered that certain parts of the Crew Consist Adjustment Agreement be renegotiated. The reason for this application by the employer was the claim by both parties that the Board did not have jurisdiction within the meaning of section 37 of the *Canada Labour Code* to hear complaints about negotiating a collective agreement. The employer further argued that the Board had exceeded its jurisdiction in ordering that the collective agreement be renegotiated. The reconsideration panel ruled (decision no. 70) that the original panel did have jurisdiction to conduct an inquiry into the circumstances of the bargaining process. However, it referred the case back to the original panel, to allow the parties to produce evidence they had not initially produced because of a misunderstanding about the scope of a matter under section 37.

The BLE then submitted a motion to disqualify the Vice-Chairperson of the original panel because, in its opinion, she was no longer able to approach the case with objective impartiality, given the strong language she had used in her original decision, certain evidence on which she had relied, and the conclusions she had reached. The Board dismissed the motion for disqualification (decision no. 86), firstly because strong language, even from a judge, did not in itself support a reasonable apprehension of bias; secondly because the reconsideration panel did not contest any findings by the original panel; and thirdly because ordering new hearings before different panels was the exception rather than the rule.

The original panel considered the additional evidence and ruled (decision no. 111) that neither party had produced new evidence that could have persuaded it to change its original decision. The Board's decision and the order issued in decision no. 35 were therefore upheld, except concerning the time allowed to conclude the bargaining, which was extended.

(Applications for judicial review of CIRB nos. 70 and 86 to the Federal Court of Appeal were dismissed (Court file nos. A-369-00 and A-547-00).

BCTV, a Division of WIC TV Limited, [2000] CIRB no. 71

The Communications, Energy and Paperworkers Union of Canada applied for reconsideration of a decision by the former Canada Labour Relations Board. The original panel had ruled that the working conditions of new members of the bargaining unit, which had been expanded by a Board order to include non-technical employees of BCTV, a division of WIC TV Limited, the employer, after the existing collective agreement expired and before a new one was signed, were governed by individual employees' work contracts and not by the applicable provisions of the *Canada Labour Code*. Under these work contracts, the employer had laid off six of these employees and dismissed three more. The reconsideration panel of the new Board overturned the original decision, ruling that, under section 50(b) of the *Code*, the employer, the bargaining agent and the employees concerned were still bound by the repealed provisions of the collective agreement.

(Application for judicial review of this decision to the Federal Court of Appeal was dismissed for delay (Court file no. A-414-00).

BCT. Telus et al., [2000] CIRB no. 73; *TELUS Corporation*, [2000] CIRB no. 94; and *TELUS Advanced Communications et al.* (2001), as yet unreported CIRB decision no. 108

Following a merger of two large employers, TELUS Corporation and BC Telecom, the employer asked the Board to address the rights of the four unions concerned, the restructuring of the bargaining units, and the intermingling of the approximately 17,000 employees concerned. After the parties had been given time to agree on the configuration of the bargaining units, the Board was asked to rule on whether field sales representatives and telemarketers, employees who were members of various certified and voluntarily recognized bargaining units, and employees not previously represented, should be included in the bargaining unit agreed upon between the parties and approved by the Board. The Board concluded in an original decision (no. 73) that these employees should be included, and that they had the right to take part in the representation vote to choose their bargaining agent.

The employer applied for reconsideration of that decision, claiming, for example, that the original panel had breached the rules of natural justice and that its decision was flawed by a number of significant errors. After considering all these arguments and all the conclusions, the reconsideration panel ruled (decision no. 94) that the application for reconsideration did not introduce new or significant questions of fact that would justify referring the case back to the original panel, or any questions of law or policy that would call for reconsideration of the case.

The Board then reopened its hearings on matters that had not been settled by the orders it had issued in this case. The Board ruled (decision no. 108) that the existing collective agreements would continue to apply until the new collective agreement was ratified; and, concerning field sales representatives and telemarketers as well as other employee groups about which the parties could not agree, gave the parties the option of finding grounds for agreement and submitting to the Board their written findings so that this part of the decision could be finalized.

(Application for judicial review of CIRB no. 108 to the Federal Court of Appeal is pending (Court file no. A-164-01).)

Maritime Employers Association, [2000] CIRB nos. 74 and 77

Concerning a complaint of illegal lock-out under section 92 of the *Canada Labour Code*, an application for confirmation of the existence of a collective agreement, and an application for an interim order submitted by the Longshoremen's Union, Local 75 of the Canadian Union of Public Employees (CUPE), the Board first ruled on the application for an interim order (decision no. 62, March 2000). CUPE claimed that the Board's conclusions in dismissing this application prejudiced the outcome of the main matter (consideration of the applicants' rights, and the applicants' participation in a pension plan), thus violating the principles of natural justice; CUPE therefore requested a different panel. The Board dismissed the motion to disqualify the original panel (decision no. 74) because, in its opinion, the fact that a panel had ruled on an initial matter did not render it incompetent to rule on a related matter.

Then, in decision no. 77, the Board ruled that, although the parties had not formally signed as provided in the actual collective agreement, they had indeed reached a new collective agreement and behaved as if it were in effect. The Board also concluded that, in choosing to apply some clauses of the collective agreement but not others, the Maritime Employers Association had created a lock-out situation. The complaint was therefore allowed.

Air Canada et al., [2000] CIRB nos. 78, 79 and 90

The Board allowed (decision no. 78) an application by the Canadian Union of Public Employees, Airline Division, Canadian Airlines International component (CAI) to have Air Canada, CAI, and 853350 Alberta Ltd. form a single employer. The Board's order applied only to the cabin crews' bargaining units, not to the employers' other bargaining units. The Board did not require that all bargaining agents advance at the same pace, and refused to join this application with two similar ones. Since a mere declaration of single employer does not automatically merge bargaining units, bargaining rights or seniority lists, these outstanding matters were to be settled by the parties.

The Board then allowed (decision no. 79) an application by the Air Canada Pilots Association (ACPA) to have Air Canada, CAI, and numbered companies 853350 Alberta Ltd. and 866983 Alberta Ltd., operating under the business name of Air Canada Capital Corporation, declared a single employer. The Board's order applied only to the pilots'

bargaining units. Here again, the Board asked the parties to settle matters concerning bargaining units, bargaining rights and seniority lists.

At the request of Air Canada and CAI, the Board then declared (decision no. 90) that these two employers were a single employer. This declaration applied to all bargaining units not covered by the Board's previous orders (on cabin crews and pilots). The Board therefore asked the parties affected by this new declaration to meet and come to an agreement, within a reasonable time, identifying these bargaining units and settling any matters resulting from the review.

(Application for judicial review of CIRB no. 78 to the Federal Court of Appeal was withdrawn (Court file no. A-529-00).)

Mackie Moving Systems and Adams Services, [2000] CIRB no. 80

The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) filed a complaint of unfair labour practice, claiming that the employer had dismissed a member of the bargaining unit because of the member's participation in an organizing campaign. The employer claimed that its action had been merely to reassign the member for *bona fide* business reasons, a decision made following a complaint by a customer about a safety violation. In the meantime, the member had left the company, fearing that his employment would be terminated. Since the employer was prepared to continue to employ the member, the Board concluded that the member had not been reassigned for anti-union reasons but because of the employer's desire to accommodate the concerns of an important customer.

BHP Diamonds Inc., Securecheck, and Klemke Mining Corporation, [2000] CIRB no. 81

The United Steelworkers of America filed a complaint against three employers, Securecheck, BHP Diamond, and Klemke Mining Corporation, claiming that they had discriminated against a member by refusing to hire him because of his former union activities. The Board concluded that Securecheck had never employed the member and that therefore the *Canada Labour Code* did not apply to it. The Board also decided that the complaint against BHP was filed after the time limit and that there was no reason to extend it. The Board further concluded that the complaint against Klemke was unfounded given that when the complainant worked for Klemke he was represented by another union.

Transx Ltd., [2000] CIRB no. 82

In this decision, the Board was asked to determine compensation to be paid to three employees, after it had ruled a second time (*Transx Ltd*. decision no. 46) that these employees had been dismissed for anti-union reasons. The Board was to ensure that the employees received compensation corresponding to the pay they would have received if the violations (that is, the dismissals) had not occurred. The Board gave the parties responsibility for making the required calculations (with the assistance of a Board employee) concerning the periods of dismissal.

Océanex (1997) Inc., [2000] CIRB no. 83

The International Union of Operating Engineers, Local 904 (IUOE) had applied for certification as the bargaining agent for the employer's maintenance employees. However, the intervening union, the Longshoremen's Protective Union, Local 1953 of the International Longshoremen's Association, opposed the application for certification, claiming that the proposed bargaining unit was not appropriate for collective bargaining and that the employees concerned were already members of the bargaining unit it was itself certified to represent. The Board concluded that it made good industrial sense to consider that these employees had always been members of the bargaining unit even though they had not been covered by the collective agreement between the employer and the intervening union for more than 20 years. Despite its finding, the Board warned the intervening union that future neglect of the employees concerned might not be treated as forgivingly and reminded the intervening union of its duty of fair representation.

Captain Brian Woodley et al., [2000] CIRB no. 85

Three pilots filed a complaint, claiming that certain terms and conditions of a collective agreement negotiated by the union and the employer were arbitrary and discriminatory, in that they did not recognize all the seniority rights of these pilots who wished to be transferred to Canadian Airlines International. The union argued that this request was inadmissible because the complainants had learned of the events referred to in the complaint no later than the date the collective agreement was ratified. The pilots argued that the crucial date for calculating the 90-day time limit for filing their complaint was either the date the union refused to pursue their grievances, or the date they learned about the events referred to in their complaint. Since the substance of the complaint had to do with collective bargaining matters, the Board concluded that the prescribed 90-day time limit for filing complaints had expired, adding that it was not prepared to extend the time limit under section 16(m.1) of the *Canada Labour Code* since the complainants had not provided sufficient reasons for their delay that would allow the Board to exercise its discretion.

NAV Canada et al., [2000] CIRB no. 88

Pursuant to this application for reconsideration, the Board was to determine whether the incumbents in the disputed positions should have been notified of application proceedings to clarify the intended scope of the bargaining unit before the original panel. After analysing the broader legislative background and out of concern for consistency, the Board ruled that, when the scope of a bargaining unit was being defined, employees did not have standing unless standing was granted to them by the Board. The original panel had not considered it appropriate to grant this standing, and the reconsideration panel upheld that decision.

Mohawks of the (Bay of Quinte) Tyendinaga Mohawk Territory, [2000] CIRB no. 89

Pursuant to an application for certification covering First Nations police officers, the Board made an interim decision (decision no. 64) that labour relations between the band and the police officers was a matter of federal jurisdiction. Elsewhere, it had been determined that

the Ontario Provincial Police (OPP) was the actual employer of the police officers, unless it was established that the OPP enjoyed Crown immunity. The Board concluded that there was a sufficient nexus between the *Canada Labour Code* and the policing agreement in order to rule that Ontario (on behalf of the OPP) had waived immunity and that the *Code* applied to Ontario concerning the First Nations police officers of the Mohawks of (the Bay of Quinte) Tyendinaga represented by the Canadian First Nations Police Association. The Board therefore issued a certification order.

(Application for judicial review of this decision to the Federal Court of Appeal is pending (Court file no. A-7-01).)

Emerald Transport, Division of Emerald Agencies Inc., [2000] CIRB no. 91

This interim decision dealt with a preliminary objection by the employer, Emerald Transport, citing a reasonable apprehension of bias and a recent decision involving the same parties by the Vice-Chairperson responsible for hearing the union's complaints of unfair labour practices. The employer submitted a motion to disqualify this Vice-Chairperson. Although the Board acknowledged that the first case and the present complaints were linked, it dismissed the motion for disqualification as the cases were not so closely linked that a decision in the first case would necessarily apply to the second.

Air Canada, [2000] CIRB no. 96

The union applied to the Board for an interim order prohibiting the employer from breaching its May 4, 2000 memorandum of understanding with the union. The employer argued that the Board did not have jurisdiction to issue a preliminary order and that the case should be referred to arbitration. Since the case had to do with the structure of the bargaining unit following the merger of Canadian Airlines International with Air Canada, the Board concluded that it did have the jurisdiction to consider the matters before it. In light of the employer's commitment to make right the situations of all employees adversely affected by any failures on its part, the Board did not consider it appropriate to issue the interim order requested by the union. As well, given the Board's conclusion that the employer might have failed to respect the terms and conditions of the memorandum of understanding, it ordered the employer to distribute a copy of the order to all employees concerned, in order to reassure them that the memorandum of understanding would be respected.

Maritime-Ontario, Parcel Division (2000), as yet unreported CIRB decision no. 100

Local 938 of the Teamsters applied to the Board for certification as the representative of a bargaining unit at Maritime-Ontario. The employer argued vigorously that the owner-operators with whom it had reached agreements to perform the work were independent contractors, not dependent contractors within the meaning of the *Canada Labour Code*. The union claimed that the employees concerned were in a position of economic dependence on the employer. After considering the information produced by the union about whether it had the support of a majority of members of the bargaining unit, the Board concluded that the union did have such support. It added that, although the employees concerned did not meet

all the criteria of the definition of dependent contractors, they were in a position of economic dependence, and the definition therefore applied to them. The Board therefore certified the proposed unit.

Atomic Energy of Canada Limited (2001), as yet unreported CIRB decision no. 110

The Board heard a complaint alleging refusal by the employer, during negotiations to renew the collective agreement, to provide the union, the Society of Professional Engineers and Associates (SPEA), with information about raises and promotions granted to certain employees. The employer claimed that the *Access to Information Act* and the *Privacy Act* prohibited it from disclosing the requested information. The Board ruled that neither of these statutes applied to AECL and that AECL had violated the *Canada Labour Code*, and ordered AECL to provide the union with the information that would allow it to bargain collectively and represent its members fairly.

Transport Morneau Inc. et al. (2001), as yet unreported CIRB decision no. 113

The Syndicat national du transport routier - Confederation of National Trade Unions (CNTU) submitted 35 applications for certification of bargaining units of truckers assigned to intermodal transportation in the Port of Montréal. Since, the union did not provide the Board with the information and documentation essential for its inquiries, contrary to the Board's established practice, the Board's Acting Regional Director gave the union a time limit to do so. Due to the absence of the required evidence of representativeness, a Board panel dismissed the applications. The union then decided to submit applications for reconsideration, which the Board dismissed since it was not the Board's responsibility to organize the presentation of the union's documentation.

(Application for judicial review of the decision to the Federal Court of Appeal is pending (Court file no. A-214-01).)

Judicial Review

Letizia* v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 101, judgment rendered from the bench, no. A-194-99, February 13, 2001 (F.C.A.)

Mr. Letizia contested the Board's decision with respect to his complaint under section 37 of the *Canada Labour Code*. In March of 1996, Mr. Letizia was accused of and subsequently admitted to illegally taking tools from his employer's premises. His immediate dismissal was grieved by the union, resulting in a settlement between the employer and the union that saw Mr. Letizia return to work in August 1998. Before the Board, Mr. Letizia alleged in his section 37 complaint that pursuant to the collective bargaining agreement, he, and not the union, should decide whether or not to proceed to arbitration. Furthermore, he argued that the union did not pursue his grievance in a timely manner. Mr. Letizia argued that he was forced to accept the settlement the union arrived at with the employer, despite his disapproval. Furthermore, the union turned down his request to be provided with a lawyer to pursue his grievance.

In its decision, the Board clarified that its mandate with respect to section 37 complaints does not allow it to sit in appeal of a union's decision and determine whether the union arrived at the correct decision or to assess the validity of the grievance. The Board is only entitled to look at the process the union followed in reaching its decision to ensure that its actions were not discriminatory, arbitrary or in bad faith. The Board concluded that the union acted in good faith throughout the grievance period and had represented Mr. Letizia's interests in a fair manner during the settlement process. The Board found that the terms of the settlement represented a reasonable settlement, and did not amount to a breach of the standards of section 37 of the *Code*.

Mr. Letizia alleged, as the basis for the judicial review, that the decision of the Board was patently unreasonable with respect to the delay and the union's decision not to proceed to arbitration. The Court dismissed the application, upholding the Board's decision.

International Longshore and Warehouse Union, Ship and Dock Foremen, Local 514* v. *Empire International Stevedores Ltd., judgment rendered from the bench, nos A-15-00 and A-290-00, November 1, 2000 (F.C.A.) [Application for Leave to appeal to the S.C.C. dismissed on May 31, 2001]

This was an application for judicial review of the Board's decision to uphold a complaint that the union had breached its statutory duty under section 37 of the *Code* not to "act in a manner that is arbitrary, discriminatory or in bad faith in the representation" of its member, Mr. Harris, the respondent. Mr. Harris was successful in having the decision of the Board and its reconsideration decision set aside by the Court.

The issue before the Court was whether the Board was patently unreasonable in concluding that the union had breached its duty to conduct a thorough investigation of Mr. Harris' claim

under s. 37 when it failed to make further enquiries of two doctors who had submitted letters stating that Mr. Harris was unable to work because of an osteoarthritic condition of an ankle.

In order to establish that a union's process was arbitrary, and therefore, in breach of s. 37, the complainant must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory. The Court decided that the evidence before the union that the grievance was unlikely to succeed was so powerful that it was patently unreasonable for the Board to require the union to conduct further investigations.

NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228, judgment rendered from the bench, no. A-320-00, February 21, 2001 (F.C.A.)

On February 21, 2001, the employer argued that the Board's failure to hold an oral hearing constituted a breach of natural justice and asked the Court to set aside the decision of the Board.

NAV Canada, the applicant, created two new positions, Manager of Air Traffic Management and Manager of Communications, Navigational Aids, Surveillance. NAV Canada sought to have these positions excluded from the bargaining unit, arguing that the employees were managers, and not employees as defined by section 3 of the *Code*. The Board decided that an oral hearing was unnecessary, and on April 5, 2000, the Board released its decision in favour of the union, the International Brotherhood of Electrical Workers, Local 2228 (IBEW) who sought to include the managers in the IBEW bargaining unit.

NAV Canada argued that the employees allegedly affected by this decision were denied natural justice by reason of the lack of a hearing. The Board relied upon section 16.1 of the *Code* and sections 11(1) and 19(2) of the *Canada Labour Relations Board Regulations, 1992* to support its position that it may decide any matter before it without holding an oral hearing. Also, applications involving a determination of the proper scope of a bargaining unit do not require any notice to employees (see *Canadian Imperial Bank of Commerce* (1986) 65 di 1; and 86 CLLC 16,023 (CLRB no. 564)).

Furthermore, NAV Canada submitted no authority, which would give it standing to make claims on behalf of the allegedly affected employees, and the employees themselves were not parties to the application. The applicant relied solely on the submissions, which it had made in its reply. The Court found that it was too late at the appeal stage, having already seen the result of the Board's decision, to make complaints about the lack of a hearing.

Finally, NAV Canada argued that it was unfair for the Board to conclude that the applicant's material before the Board was unclear without giving the applicant an opportunity to clarify its evidence. The Court did not find any such duty on the Board to inform a party of unclear evidence.

Baton Broadcasting Inc. (c.o.b. CFRN-TV)* v. *Communications, Energy and Paperworkers Union of Canada, 62 CLRBR (2d) 30; and 2000 CLLC 220-043 (F.C.A.)

The applicant, Baton Broadcasting Inc., argued that the Board exceeded its jurisdiction by acting contrary to the policy of the *Canada Labour Code* and by relying on irrelevant and extraneous material. The Board had declared two separate broadcasting stations as one single employer on the basis that the employees' rights would be jeopardized if employees of the employer's Edmonton station would not be able to transfer to the Calgary station without losing their seniority. Baton Broadcasting Inc. contended that the Board's reasoning was improper as there were no rights of employees to transfer prior to the new agreement between employer and employees at the Edmonton station. This amounted to an interference by the Board with the principle of free collective bargaining.

The application for review was dismissed. The Court viewed that Board's decision and its reasoning as unimpeachable. Further, the Court was not persuaded of any interference with the policy of free collective bargaining and free association. The Court was therefore not persuaded that the Board exceeded its jurisdiction.

Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board) (2000), 257 N.R. 66; and 2000 CLLC 220-037 (F.C.A.)

This is an appeal from the Federal Court, Trial Division reviewing the CLRB's (now the CIRB) decision to refuse disclosure to the Privacy Commissioner of notes taken by Board members during the hearing of a complaint. The Trial Judge confirmed the CLRB's refusal under paragraph 22(1)(b) of the *Privacy Act*. Such a request would interfere with the independence and intellectual freedom of quasi-judicial decision makers.

At the Court of Appeal, the issue was whether notes are "personal information," not under the control of the Board as provided under section 12(1) of the *Privacy Act*. The notes in question were taken by Board members during the course of a hearing, a quasi-judicial proceeding. Being Governor-in-Council appointees, the Court concluded that Board members are endowed with adjudicative functions that they are entitled to perform independently. The notes taken by Board members are not obligatory and are not part of the official records of the Board, and are thus not contained in any other record keeping system over which the Board has control.

The Court concluded the Board did not have the requisite control. The Court opined that not only were the notes outside the control of the CLRB, but they were also considered by the CLRB to fall outside the ambit of its functions. Further, the Court concluded that the principle of judicial independence and its corollary, the principle of adjudicative privilege, as applied to administrative tribunals, lie at the heart of the Board's lack of control over the notes as a government institution.

Having found that the notes were not under the control of a government institution, the Court dismissed the appeal.

Marine Atlantic Inc.* v. *Canadian Merchant Service Guild (2000), 258 N.R. 112; and 61 CLRBR (2d) 174 (F.C.A.)

This is an application for judicial review of the Board's decision to certify the Canadian Merchant Marine Service Guild as the bargaining agent for a unit comprising all employees on vessels owned, operated or chartered by Marine Atlantic Inc. The employer, Marine Atlantic Inc. challenged the Board's order on the basis of the following grounds: (1) Did the Board breach the principles of natural justice by not issuing reasons accompanying its order? (2) Did the Board err in law or breach principles of natural justice in not providing the applicant employer with an opportunity for an oral hearing? (3) Did the Board reach a patently unreasonable decision?

The Court, with respect to the first question stated that it was incumbent upon the parties, before seeking judicial review, to request reasons from the Board. In this present case, Marine Atlantic Inc. failed to request reasons from the Board and offered, according to the Court, no satisfactory reasons for not doing so. There is thus no breach of fairness in response to the first question.

The Court also found that the arguments raised by Marine Atlantic Inc. with respect to the breach of natural justice due to the absence of an oral hearing is also without merit. The Court pointed to the fact that the employer failed to take the opportunity provided to it to comment on the investigator's report, which was provided to the parties. The parties were expressly invited to make submissions if they disagreed with those portions of the report outlining the positions of each of the parties. Neither party made any submission to the Board relative to the report. Furthermore, there was nothing to indicate that the written submissions filed with the Board would not have been an adequate way to handle this case.

Finally, Marine Atlantic Inc. argued that the inclusion of management personnel in the bargaining unit consisted of a decision that was patently unreasonable. The Court accepted that some of the employees' functions may have had a management component. Referring to sections 16(p) and 27(5) of the *Code*, the Court concluded, however, that the Board had the jurisdiction conferred upon it to decide, based on the information and the investigator's report, whether a group of employees was a unit appropriate for collective bargaining. As the Board was fully within its jurisdiction in this present matter, the Court concluded that the Board's certification order was not patently unreasonable.

Halifax Longshoremen's Assn., Local 269* v. *Offshore Logistics Inc. (2000), 257 N.R. 338; and 61 CLRBR (2d) 180 (F.C.A.)

This was an application by the employer, Offshore Logistics Inc., for judicial review of the Board's decision, granting the union's application to include the employer's employees in its geographical certification for the Port of Halifax. The application was dismissed by the Court.

The employer claimed that their employees' work related to oil and gas exploration and development, a type of work not covered by the union, as its application before the Board

was only to represent the employees for their dock work. At the dock, the employees loaded and unloaded Mobil vessels, work that accounted for only 25 per cent of the time at the dock. The Board rejected the claim by Offshore Logistics Inc. regarding the distinction of the work of the employees in question and concluded that the loading and unloading of ships by the employees was an integral part of the work. According to the Board, the work was not ancillary to the exploration and development, but rather constitutes longshoring subject to federal regulation, and therefore fell within the Board's jurisdiction.

The union's application was initially heard by a three-member panel of the Board. After the hearing, but before the decision was rendered, one member died and a second member withdrew. The chairman decided to continue alone and rendered his decision. Offshore Logistics Inc. challenged the Board's decision as patently unreasonable, as outside the Board's constitutional jurisdiction and as a breach of natural justice as the decision was made by the chairman alone.

The Court dismissed the appeal, finding that there was no breach of natural justice, that the Board applied the proper applicable legislation, and that the untimely death of a member of the panel did not adversely affect the proper functioning of the Board's work in that case. The Court also pointed out that Parliament had long resolved the question of whether work on docks was viewed as longshoring to be resolved by the Board. Consequently, the Board's decision satisfied the standard of review of patent unreasonableness.

Finally, the Court dismissed the constitutional arguments raised by Offshore Logistics Inc., due to the fact that proper notice was not given to either the federal or provincial attorneys-general. The Court further argued that the essential purpose of a judicial review was to review decisions and not to determine new questions that were not addressed at the Board hearing stage. Thus the Board was correct in its decision to sever the dock and pipeline work at the Halifax Harbour.

Tank Truck Transport Inc. et al.* v. *Canada Council of Teamsters et al., no. A-563-99, November 17, 2000 (F.C.A.)

The applicants instituted a judicial review of a Board decision.

The Court concluded that there was no evidence other than the applicant's failure to act diligently and according to the Federal Court Rules (1998), they were designed to achieve "a just and expeditious determination of an issue on its merits," especially in matters of a judicial review.

The Court further concluded with regards to awards of costs that the applicants should not be in a better position when their application is dismissed for delay in prosecuting it than they would be if they had to file a Notice of Discontinuance pursuant to Rule 165 of the Federal Court Rules.

The Court also stated that Rule 380, the basis for status review hearings, is aimed at ensuring that the flow of litigation submitted to the Court proceeds expeditiously according to the

Rules, and that the Court's process would not be abused. This leads to an active supervisory role played by the Court through such hearings and a proper allocation of costs in case of a dismissal.

International Brotherhood of Locomotive Engineers* v. *Cairns, nos A-369-00, A-749-00, A-747-99, May 2, 2001 (F.C.A.) [Leave to appeal to the S.C.C. requested on June 28, 2001]

In the present judicial review, the applicant, VIA (supported in part by the International Brotherhood of Locomotive Engineers (IBLE)) contested the original Board decision with regards to a violation of section 37 of the *Code*. The focus of the attack of the individual respondents was with respect to the Crew Consist Adjustment Agreement (the agreement) negotiated by the IBLE and VIA. The specific allegations relevant to the present application, as the Court determined, were with respect to (1) the requirement that conductors be selected for training as engineers, rather than being automatically eligible; (2) the loss of seniority rights due to the adoption of a "bottom-down" seniority list for retrained conductors; and (3) the agreement that conductors may be eligible to "flow back" to Canadian National Railways (CN) without any assurances that CN would accept such transfers.

Having determined that it had the jurisdiction to hear the case, the Board held the IBLE had failed to act objectively with respect to conductors' concerns and that it had failed in protecting its employees' job security and seniority rights. The Board therefore ordered that the IBLE and VIA reopen negotiations with respect to the above three enumerated concerns. The reconsideration panel affirmed the Vice-Chair's decision, and held that the remedy was not contrary to the principles of natural justice nor was it inconsistent with the policy objectives of the *Code*.

In reviewing decisions of the Board, the Court determined that it must decide whether the ultimate decision was one which Parliament intended to be left to the Board. The Court examined various factors, including the presence of a strong privative clause, according to section 22 of the *Code*, which insulates CIRB decisions from review with the exception of grounds of fraud, jurisdictional error or violation of the rules of natural justice. The Court must consider a second factor, the expertise of the Board in relation to that of the Court. The Court noted that "the CIRB has been entrusted by Parliament to administer a highly complex labour relations structure, which seeks to balance the interests of employers, unions and employees so as to maintain labour peace." (page 17). In contrast, the expertise of the judiciary with respect to issues in most labour disputes is more limited. The third set of factors the Court must consider is the purpose of the statute and the particular provision in question.

With respect to section 37, Parliament imposed upon the union a duty to represent its members fairly - in a manner that is not arbitrary, discriminatory or in bad faith. This duty is not unlimited. Thus, in keeping with the purposes and objectives of the *Code*, the duty is limited to that area where the union might most easily abuse its monopoly over bargaining with the employer. The Court concluded that, in interpreting section 37, the Board was required to take a broad and contextual approach. Thus, the appropriate standard of review is that of patent unreasonableness.

The question before the Court was whether the Board, in finding that section 50(b) of the *Code* gave conductors "rights under the collective agreement that was applicable to them," interpreted section 37 in a manner so patently unreasonable that its construction cannot be rationally supported by the *Code* and relevant legislation. The Court, in its analysis of whether the Board's decision was patently unreasonable, noted certain comments made by La Forest J. in *C.A.I.M.A.W., Local 14* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983. He stated at page 1003 of the judgment that a tribunal does have some room to make errors, "provided it does not act in a manner 'so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review' ". La Forest J. further stated that "... Privative clauses are permissible exercises of legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the Court should respect that limitation and defer to the Board." (page 1004).

The Court concluded that the interpretation of section 37 adopted by the Board in this case was not patently unreasonable. The Board's order was rationally connected to the union's breach and to its consequences. The Board found that the IBLE had failed to represent conductors fairly with respect to three specific matters in the agreement. The Court found that the remedy ordered by the Board was an appropriate one given the situation. Further, the Court concluded that the Board's order was wholly consistent with the *Code*'s purpose of balancing the principle of free collective bargaining with the protection of employees who are represented by a bargaining agent.

Public Service Alliance of Canada* v. *Bombardier Inc., [2001] 2 F.C. 429
[Application for Leave to appeal to the S.C.C. dismissed on May 24, 2001]

This is an application by the Public Service Alliance of Canada (PSAC) for judicial review of a decision of the Board refusing to allow the inclusion of certain employees as members of the PSAC bargaining unit. The application was allowed.

PSAC represented members of the support staff at the Department of National Defence in a "Tutor" training program for pilots. In 1998, the Department contracted out site-support services to the respondents, Bombardier and Frontec. PSAC applied to be certified as the bargaining agent for the employees on contract.

The Board decided that the mere fact that some former Department of National Defence employees under the NATO Flight Training in Canada program (NFTC), a similar program to the Tutor training program, did not create successor rights according to sections 44, 47 and 47.1 of the *Code*. The Board decided that the NFTC program was different enough from the previous Tutor program, the former being a new and different private venture.

The Court of Appeal found that the Board's decision to terminate the bargaining rights of the NFTC employees was made without jurisdiction, and therefore set it aside. The Court concluded that the Board did not have the authority to limit the duration of any collective agreement that was in force prior to the severance. The Court found that the Board had relied on irrelevant jurisprudence in reaching its decision and had made patently unreasonable

errors of law, in particular when considering the nature of the NFTC program as a different program altogether.

British Columbia Terminal Elevator Operators' Assn.* v. *International Longshore and Warehouse Union, Canada and Grain Workers' Union Local No. 333, no. A-233-99, March 21, 2001 (F.C.A)

On January 25, 1999, members of the Public Service Alliance of Canada (PSAC) were engaging in picketing activities arising out of a legal strike involving members of PSAC and their employer, the Canadian Grain Commission. During the same period, members of the Grain Workers' Union, Local 333 (GWU) and the International Longshore and Warehouse Union, Canada (ILWU), who were employed by various employers, were persuaded to refuse to cross the picket line. The consequence of the latter unions' refusal was that ship loading operations at the grain terminals in British Columbia came to a stop. The employers involved (the respondents) made an application to the Board, alleging that the GWU and the ILWU had contravened section 87.7(1) of the *Code*, which deals with the provision of services in connection with the loading of grain during a strike or lockout. The employers also sought, in the alternative, a declaration that the GWU was involved in a strike contrary to section 89 of the *Code*.

The Board decided that the principal order sought by the employers pursuant to section 87.7(3) of the *Code* could not be granted as the section did not apply to employees of the Canadian Grain Commission. It found that the Commission's labour relations are governed rather by provisions in the *Public Service Staff Relations Act*. The Board did, however, grant the employers the alternative remedy sought, declaring that members of the GWU were engaged in a strike in violation of sections 88.1, 89(1) and 89(2) of the *Code*. With respect to the members of the ILWU, a request was not made by the employers for a similar order. The Court observed, however, that their situation was not different in principle from that of the members of the GWU.

The applicants, the ILWU and the GWU sought a judicial review of the Board's decision. The unions argued that the Board was patently unreasonable in relying on section 88.1 of the *Code*, as amended in 1998, to conclude that there was "an apparent intention in the *Code* to treat strikes with a heightened seriousness." While the Court also had difficulty with the Board's reference to the new section 88.1, it concluded that a flaw in reasons given by a quasi-judicial tribunal does not in and of itself result in patent unreasonableness with respect to the decision. The Court found that the Board's flaw did not affect the reasoning of its decision.

The Court also heard certain Charter arguments by the intervener, the Canadian Labour Congress (CLC), even though it sought very late in the proceedings to put to the Court a notice of a constitutional question. The Charter value alleged by the CLC was that while a constitutionally protected right to strike did not exist, it does not follow that there does not exist "a constitutional protection of the freedom enjoyed by any worker to express his or her opinion and commitment to the principles of trade union solidarity by respecting the lawful picket lines of others." The Court concluded that it did not need to decide whether such a

constitutional protection exists. It stated simply that it was not yet a recognized Charter value. The Court viewed the interpretation of a Charter value by the CLC as a disguised attempt to raise a constitutional question not raised in the proceedings, and thus summarily dismissed the question.

Annex D

Departmental Overview

A. Mandate, Mission and Values

The *Constitution Act, 1867*, provides that provincial jurisdiction extends over "Property and Civil Rights", meaning that the negotiation of collective agreements containing terms and conditions of employment for employees is regulated by the provinces. The Constitution, however, assigns exclusive jurisdiction to Parliament over specific sectors of the economy, and as such, it has seen fit to enact laws regulating employment matters within those sectors that have constitutionally been reserved to it. The laws governing the federal jurisdiction are contained in the *Canada Labour Code*, which is divided into three parts:

Part I- Industrial Relations
Part II- Occupational Safety and Health
Part III- Labour Standards

Part I of the *Code* sets out the terms under which trade unions may acquire the legal right to represent employees in the negotiation of collective agreements with their employer. It also delineates the process under which collective bargaining takes place and provides remedies to counter infractions committed by any party subject to the *Code*'s provisions.

Part I of the *Canada Labour Code* had remained virtually unchanged since 1972. However, with the coming into force on January 1, 1999 of Bill C-19, an *Act to amend the Canada Labour Code (Part I), R.S. 1998 C. 26*, significant changes were made to the *Code* in an effort to modernize it and improve the collective bargaining process for federally regulated industries. The *Act* replaced the Canada Labour Relations Board with the Canada Industrial Relations Board as an independent, representational, quasi-judicial tribunal responsible for the interpretation and application of Part I, Industrial Relations, and certain provisions of Part II, Occupational Safety and Health, of the *Canada Labour Code*.

The Canada Industrial Relations Board's ***mandate*** *is to contribute to and promote effective industrial relations in any work, undertaking or business that falls within the authority of the Parliament of Canada.*

In support of its mandate, the Board established the following vision and values.

- decisions on applications and complaints provided in a fair, expeditious and economical manner
- successful resolution of cases through appropriate dispute resolution mechanisms
- an involved and well-informed labour relations community
- effective Regulations and practices developed through consultation with clients

In the discharge of its mandate and the exercise of its powers, the Board aims to be progressive and innovative, efficient and effective and accountable. The working environment at the Board promotes learning and development, harmony, teamwork and respect.

The Board's **role** is to exercise its powers in accordance with the Preamble to the *Code*, which states that Parliament considers "... the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all ... ". To that end, the Board aims to be responsive to the needs of the labour relations community across Canada in all aspects of delivering its program.

B. Departmental Organization

The Board is currently comprised of the Chairperson, five full-time Vice-Chairpersons, six full-time Members and six part-time Members (representing, in equal numbers, employees and employers). The appointment of the part-time members was done on May 29, 2000 whereas the appointment of the fifth Vice-Chairperson was done on June 25, 2001, subsequent to the period under review. All are appointed by the Governor in Council: the Chairperson and the Vice-Chairpersons for terms not to exceed five years, the Members for terms not to exceed three years.

The Chairperson is the Chief Executive Officer of the Board. The provisions of the *Canada Labour Code* assign to the Chairperson supervision over and direction of the work of the Board, including:

- the assignment and reassignment to panels of matters that the Board is seized of;
- the composition of panels and the assignment of Vice-Chairpersons to preside over them;
- the determination of the date, time and place of hearing;
- the conduct of the Board's work;
- the management of the Board's internal affairs; and
- the duties of the staff of the Board.

The Board's headquarters are located in the National Capital Region. Support to the Board is provided by the Executive Director and the General Counsel, both reporting directly to the Chairperson. The Executive Director is responsible for regional operations, case management, client and corporate services, financial services and human resources. The

Legal Services Branch provides legal assistance, as required by the Board, and acts as the Board's legal counsel in most judicial review proceedings.

The Board also has five regional offices in Dartmouth, Montréal, Ottawa, Toronto and Vancouver, with a satellite office in Winnipeg. These offices are staffed by labour relations professionals and case management teams. Each regional office is headed by a regional director, who reports to the Executive Director in Ottawa.