PUBLIC SERVICE STAFF RELATIONS BOARD

THIRTY FIRST ANNUAL REPORT

1997-1998

Minister of Public Works and Government Services Canada 1998
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The Honourable Stéphane Dion, P.C., M.P.
President of the Queen's Privy Council for Canada
and Minister of Intergovernmental Affairs
House of Commons
OTTAWA

Dear Mr. Minister,

It is my pleasure to transmit to you, pursuant to section 114 of the Public Service Staff Relations Act, the Thirty-first Annual Report of the Public Service Staff Relations Board, covering the period from 1 April 1997 to 31 March 1998, for submission to Parliament.

Yours sincerely,

Yvon Tarte
Chairperson

PUBLIC SERVICE STAFF RELATIONS BOARD

1997 - 1998

Chairperson:	Yvon Tarte
Vice-Chairperson:	P. Chodos
Deputy Chairpersons:	M.-M. Galipeau, M. Korngold Wexler
Full-Time Members:	J.C. Cloutier, J.W. Potter, R. Simpson, J.B. Turner
Part-Time Members:	S. Kelleher, J. Korbin, D. MacLean, K. Norman, C. Taylor, Q.C.

PRINCIPAL STAFF OFFICERS OF THE BOARD

Secretary of the Board and General Counsel:	J.E. McCormick
Director, Mediation:	N. Bernstein
Assistant Secretary - Operations:	G. Brisson
Assistant Secretary - Corporate Services:	J. Dionne

NATIONAL JOINT COUNCIL OF THE PUBLIC SERVICE OF CANADA

General Secretary:	Fernand Lalonde

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A

INTRODUCTION

THE YEAR IN BRIEF

A-1 The Board processed 1,244 matters during the year under review, an increase of 35% over the previous fiscal year. This significant increase in workload was mostly due to the resumption of collective bargaining and the resulting need for the establishment of designation review panels and conciliation boards and requests for conciliators. The Board also processed matters involving adjudication, certification, complaints and other disputes filed under the various sections of the Act administered by the Board. The work is described in the appropriate sections of this report.

A-2 The adjudication workload also increased by 15% from that of fiscal year 1996-97. Grievances relating to harassment and termination of employment have also become more complex, so that more time is required for hearing days and decision writing.

A-3 Deputy Chairperson Philip Chodos was appointed Vice-Chairperson and Messrs. J.C. Cloutier and J.W. Potter were appointed as Board members for a period of two years. Mrs. Muriel Korngold Wexler left the Board in January 1998, after 14 years with the Board.

ORGANIZATION AND FUNCTIONS OF THE BOARD

A-4 The Public Service Staff Relations Board (the Board) is a quasi-judicial statutory tribunal responsible for the administration of the systems of collective bargaining and grievance adjudication established under the Public Service Staff Relations Act (the Act) and the Parliamentary Employment and Staff Relations Act. In addition, it is

responsible for the administration of certain provisions of Part II of the Canada Labour Code concerning the occupational safety and health of employees in the Public Service. The combined functions of the Chairperson and the Board in specific areas under the Act are analogous to those performed by Ministers of Labour in private sector jurisdictions. According to the Act, the Board consists of a Chairperson, Vice-Chairperson, not less than three Deputy Chairperson and such other full-time members and part-time members as the Governor in Council considers necessary. The Board reports to Parliament through a designated minister, the President of the Privy Council. (It should be noted that the Board reports to Parliament separately with respect to proceedings under the parliamentary legislation.)

A-5 Proceedings before the Board include applications for certification, revocation of certification, complaints of unfair labour practices, the identification of positions whose duties are of a managerial or confidential nature, the designation of positions whose duties are required to be performed in the interest of the safety or the security of the public, and complaints and references of safety officers' decisions under the safety and health provisions of Part II of the Canada Labour Code. By far the heaviest volume of cases consists of grievances referred to adjudication concerning the interpretation or application of provisions of collective agreements or major disciplinary action and termination of employment. The Board also provides mediation and conciliation services when requested to do so by parties unable to resolve their disputes. Many such cases are settled without resort to formal proceedings before the Board.

A-6 The Board provides premises and administrative support services to the National Joint Council, which is composed of representatives of the employers and bargaining agents. The Council serves as a consultation forum and a mechanism for the negotiation of terms and conditions of employment that do not lend themselves to unit-by-unit bargaining.

B

PROCEEDINGS WITHIN THE BOARD'S JURISDICTION OTHER THAN ADJUDICATION AND ARBITRATION

REQUEST FOR REVIEW OF BOARD DECISIONS

B-1 Pursuant to section 27 of the Act, the Board may, upon application, review, rescind, alter or vary any of its decisions or orders. Eleven such applications were filed during the year, of which ten were from the Staff of the Non-Public funds.

B-2 Five of the applications were filed by the Staff of the Non-Public Funds seeking a merger of all employees in the administrative support category bargaining unit with all employees in the operational category bargaining unit employed at five different locations, namely: Petawawa, Goose Bay, Bagotville, Valcartier, and Ottawa. The Public Service Alliance of Canada, the bargaining agent in all five matters, did not oppose the applications. The Board allowed the applications and certified the Public Service Alliance of Canada as bargaining agent for the five new bargaining units (Board files 125-18-71 to 75). See paragraph F-1.

B-3 Two other applications were filed by the Staff of the Non-Public Funds. The first requested that all employees in the operational category employed at CFB Saint-Jean be merged with the employees in the operational category employed at CFB Montreal. The request was based on the fact that CFB Saint-Jean had ceased to exist as an autonomous base and was now considered part of CFB Montreal.

The second application dealt with the same issue but related to employees in the operational category at CFB Shearwater and CFB Halifax. The Public Service Alliance of Canada, the bargaining

agent in the first application, and the United Food and Commercial Workers Union, Local 864, the bargaining agent in the second application, did not oppose the request and were duly certified as bargaining agents for the merged bargaining units at Montreal and Halifax respectively (Board files 125-18-81 and 82).

B-4 In an earlier decision, the Board had concluded that at least some students employed by Revenue Canada, Customs and Excise, were not subsumed by the definition of "employee" contained in paragraph 2(1)(*k*) of the Act and therefore might fall within the programme administration bargaining unit (Board file 147-2-46). A request for review was filed with the Board adducing new evidence which could not reasonably have been presented at the original hearing. In the Board's opinion, this evidence established that the Memorandum of Understanding entered into by Revenue Canada and Treasury Board in 1987 authorized Revenue Canada to establish a year-round student employment program within the meaning of paragraph 2(1)(*k*) of the definition. The application was allowed by the Board (Board file 125-2-83).

B-5 An application filed by the Staff of the Non-Public Funds as the employer sought the merger of the administrative support bargaining unit, represented by the Public Service Alliance of Canada, the operational category bargaining unit, represented by the United Food and Commercial Workers Union, Local 864, and the operational bargaining unit located at 101 Colonel By, Ottawa, represented by the Hospitality and Service Trades Union, Local 261. Both the Hospitality and Service Trades Union, Local 261, and the United Food and Commercial Workers Union, Local 864 opposed the merger proposed by the employer. The Public Service Alliance of Canada indicated that, should the application be allowed, a representation vote should be ordered so as to give the affected employees the opportunity to freely choose their bargaining agent. The application was withdrawn by the employer prior to the hearing (Board file 125-18-80).

B-6 Two further applications were filed by the Staff of the Non-Public Funds, seeking the merger of bargaining units in two different locations. In the first application, the employer sought the merger of employees in the administrative support category with the employees in the operational category, all employed at Trenton. The

bargaining agent for the administrative support category is the Public Service Alliance of Canada whereas that for the operational category bargaining unit is the United Food and Commercial Workers Union, Local 864. In the second application, the employer sought a merger between employees in the administrative support category at CBF Gagetown, for which the Public Service Alliance of Canada is the certified bargaining agent, and employees in the operational category bargaining unit, also at CFB Gagetown, for which the United Food and Commercial Workers Union, Local 864 is the certified bargaining agent.

B-7 In both instances, the Alliance opposed the application and indicated that if the consolidation was to proceed, then a representation vote should take place to give employees the opportunity to select their bargaining agent. The United Food and Commercial Workers Union, Local 864, opposed the employer's proposal to merge the bargaining units. Both matters are scheduled for hearing during the next fiscal year (Board files 125-18-78 and 79).

DECLARATION OF SUCCESSOR RIGHTS

B-8 Under section 48 of the Act, an employer or a bargaining agent may apply to the Board to determine the rights, privileges and duties acquired or retained by it as a result of a transfer of jurisdiction. The Board dealt with one such application during the year under review.

B-9 The application was filed by the Canadian Food Inspection Agency, a new separate employer created by the transfer of part of the Public Service from Part I to Part II of Schedule I of the Public Service Staff Relations Act. The applicant applied under section 48.1 of the Act for various transitional determinations. The respondents were the Public Service Alliance of Canada, the Professional Institute of the Public Service of Canada, the Association of Public Service Financial Administrators, the Social Science Employees Association and the Council of Graphic Arts Unions. Only the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada elected to participate in the application.

B-10 On the consent of the respondents, the Board determined that four bargaining units were appropriate for collective bargaining. Thus,

the Professional Institute of the Public Service of Canada was certified as the bargaining agent for three bargaining units consisting of: 1) all employees classified in the veterinary medicine group; 2) all employees classified in the scientific regulation group and 3) all employees classified in the agriculture, biological sciences, chemistry, commerce, computer systems administration, engineering and land survey, purchasing and supply, scientific research, and economics, sociology and statistics groups. The Public Service Alliance of Canada was certified as bargaining agent for all other employees. The Board also determined that all collective agreements and arbitral awards that applied to employees of the applicant and that had not already expired would do so on the date of the decision. Notices to bargain were deemed to have been served in accordance with the provisions of the Public Service Staff Relations Act. The Board also extended the time for the parties to complete their obligations under sections 78.1 and 78.2 of the Act (Board file 140-32-14).

APPLICATIONS FOR CERTIFICATION

B-11 Under section 35 of the Act, an employee organization may submit an application for certification as bargaining agent for a bargaining unit. During the year under review, the Board dealt with two such applications.

B-12 In one application, the Hospitality and Service Trades Union, Local 261, sought certification as bargaining agent for all employees of the Staff of the Non-Public Funds located at 101 Colonel By, Ottawa. Following a hearing, the Board allowed the application and so certified the Hospitality and Service Trade Union, Local 261 except for persons above the rank of supervisor, office and clerical staff (Board file 142-18-320).

B-13 The Association of Marine Assessors, Inspectors and Investigators of the Public Service of Canada, applied for certification on behalf of employees whose duties involve the assessment, purchase and refitting of marine vessels; the inspection, licensing of marine vessels and docks; and the investigation of marine accidents where federal law requires one. The applicants are employees at present classified in the technical inspection bargaining unit for which the Public Service Alliance of Canada is the certified bargaining agent and the Treasury Board is

the employer. Both the employer and the bargaining agent opposed the application. The application was heard by the Board and a decision will be issued during the next review period (Board file 142-2-321).

DETERMINATION OF MEMBERSHIP IN BARGAINING UNIT

B-14 Under section 34 of the Act, the Board may determine whether any employee or class of employees is or is not included in a bargaining unit. The Board dealt with two such applications during the year, both of which were carried over from the previous review period.

B-15 One application, filed by the Public Service Alliance of Canada, requested that employees hired as "students" by Revenue Canada be deemed part of the programme administration bargaining unit. The employer maintained that the students were excluded pursuant to paragraph 2(1)(*k*) of the definition of employee in the Act. The Board found that some students employed by Revenue Canada might fall within the programme administration bargaining unit. A request for review filed by the employer adduced new evidence that could not reasonably have been presented at the original hearing. The Board's opinion was that, according to this evidence, the Memorandum of Understanding entered into by Revenue Canada and Treasury Board in 1987 authorized Revenue Canada to establish a year-round student employment program. Consequently, the "students" were found to be excluded from the programme administration bargaining unit (Board files 147-2-46 and 125-2-83). See paragraph B-4.

B-16 The other application was filed by the Association of Public Service Financial Administrators alleging that two individuals classified at the AS-5 level were actually performing duties that placed them in the FI bargaining unit. The Public Service Alliance of Canada, the certified bargaining agent for employees in the AS bargaining unit, was an interested party in the proceedings. The application was withdrawn prior to the hearing of this matter (Board file 147-2-47).

PROCEEDINGS UNDER SECTION 21 OF THE ACT

B-17 Section 21 of the Act, entitled "Powers and Duties of the Board", provides the Board with "residual powers". This section is used to consider allegations of non-compliance with sections of the Act that impose on the parties obligations that are basic to the purposes of the Act but for whose breach there is no specific remedial procedure.

B-18 The Board received five applications during the year, in addition to three cases carried over from the previous year. The Board disposed of four applications; two were dismissed and two were withdrawn prior to the hearing. The four remaining cases are scheduled for hearing during the next fiscal year.

DESIGNATION OF POSITIONS AS MANAGERIAL OR CONFIDENTIAL

B-19 As a result of amendments to the Public Service Staff Relations Act in June 1993, positions, rather than employees, are now excluded from bargaining units. At the time of certification, in the absence of the agreement of the parties, the Board determines which positions are to be designated as managerial or confidential (see sections 2, 5.1, 5.2 and 5.3 of the Act). The employer may subsequently so identify any other position it feels should be excluded. If the bargaining agent objects to the proposed exclusion, the Board makes the determination.

B-20 The Board received 289 objections to such identifications and another 69 were carried over from the previous fiscal year. Of the total, 91 were disposed of during the year, four by decision of the Board and 87 by settlement or withdrawal. The remaining 267 objections were carried into the new fiscal year. Of these, 109 are being held pending the report of an examiner and the remaining 158 will be scheduled for hearing in the next fiscal year.

B-21 Tables 3 and 4 give details of Treasury Board employees who occupy managerial or confidential positions. Table 5 gives details of such exclusions for the employees of the separate employers.

APPLICATIONS FOR EXTENSION OF TIME

B-22 The Board processed twelve applications for extension of time, including seven carried over from the previous year. Four applications were disposed of during the year; two were dismissed, one was upheld and the other was settled by the parties prior to the hearing. The remaining eight cases are scheduled to be heard during the next review period.

REVOCATION OF CERTIFICATION

B-23 The Board processed three applications for revocation of certification, two of which were carried over from the previous fiscal year. Two were disposed of by decisions of the Board. The remaining application was heard and a decision will be issued during the next fiscal year.

B-24 In one application, the employer, the Staff of the Non-Public Funds, sought the revocation of certification when the closure of a day-care centre resulted in the termination of all employees in the technical category. The Public Service Alliance of Canada, the bargaining agent, did not contest the application. Consequently, the Board revoked the bargaining agent's certification (Board file 150-18-42).

B-25 The National Research Council of Canada, as the employer, sought the revocation of the certification of the Research Council Employees' Association as the bargaining agent for employees in the data processing bargaining unit on the grounds that there were no longer any employees in that bargaining unit. The bargaining agent did not contest the application and the certification of the bargaining agent was revoked (Board file 150-09-43).

COMPLAINTS UNDER SECTION 23 OF THE ACT

B-26 Section 23 of the Act requires the Board to inquire into complaints of "unfair labour practices" as set out in sections 8, 9 and 10 of the Act, or of failure by the employer to give effect to decisions of

adjudicators or a provision of an arbitral award. Effective 1 June 1993, as a result of amendments to the P.S.S.R.A., this section was broadened to require the Board to inquire into complaints about the duty of fair representation. The Board is also empowered to order remedial action.

B-27 The Board processed 71 such complaints during the year under review, including 33 carried over from the previous year. Of the 71 complaints, 15 were dismissed by the Board, 19 were withdrawn, one was upheld and five were settled prior to the hearing. The remaining 31 complaints are scheduled for hearing during the next fiscal year.

B-28 Decisions issued this year concerned compliance with regulations, discrimination against the employee organization, discrimination against members of bargaining units, and the duty of fair representation.

SAFETY OR SECURITY DESIGNATIONS UNDER SECTION 78 OF THE ACT

B-29 "Designated positions" are those whose duties are deemed to be essential to the safety or security of the public and whose incumbents are therefore prohibited from participating in a strike. At present, conciliation is the only method of dispute resolution in a negotiation impasse with the employer. The Act provides that no conciliation board may be established, and hence no lawful strike may take place, until the parties have agreed upon or the Board has decided which positions in the bargaining unit are to be designated. Any positions on which the parties disagree must be referred to a designation review panel, appointed in the same manner as a conciliation board, which will make non-binding recommendations on whether the positions have safety or security duties. Where, after considering these recommendations, the parties continue to disagree, the Board makes the final determination.

B-30 During the year under review, the Board processed 86 referrals involving safety or security designations, of which 42 were carried over from the previous year. The Board issued 55 decisions confirming the designations in positions in 55 different bargaining units. Thirty-one referrals were carried over to the next fiscal year, three of which were referred to the Board pursuant to section 78.2 of the Act following the

recommendations of the designation review panel. These three are scheduled for hearing during the next fiscal year.

FACT FINDER

B-31 Where the parties to collective bargaining have bargained in good faith towards concluding a collective agreement but without success, either party may request the appointment of a fact finder to assist them.

B-32 The one such request received by the Board during the year involved the Treasury Board and the Professional Institute of the Public Service of Canada in respect of all employees in the auditing group bargaining unit. The fact finder appointed by the Board submitted a report to the Board and the parties.

REFERENCES UNDER SECTION 99 OF THE ACT

B-33 There were 17 references referred under section 99 of the Act during the year and eight such references carried over from the previous year. Section 99 provides for disputes that cannot be the subject of a grievance by an individual employee. They come about when the employer or bargaining agent seeks to enforce an obligation alleged to arise out of a collective agreement or arbitral award.

C

ADJUDICATION PROCEEDINGS

C-1 Part IV of the Public Service Staff Relations Act provides a grievance procedure covering a broad range of matters and a system for the determination of "rights disputes". These are grievances arising from the application or interpretation of a collective agreement or an arbitral award or from the imposition of major disciplinary action and termination of employment. The Act uses the word "adjudication" to refer to the final determination of rights disputes, though most jurisdictions refer to this process as "arbitration". The latter term is used in the Act for the binding determination of "interest disputes", which are disputes arising in the negotiation of collective agreements.

C-2 Section 91 of the Act provides a right, subject to certain conditions, to carry a grievance from the first to the final level within a department or agency to which the Act applies. The grievance procedure is set out under the P.S.S.R.B. Regulations and Rules of Procedure or in the collective agreement. Only when the grievor has exhausted this process may the matter be referred to adjudication under section 92, and then only if the grievance falls within the categories defined below. A reference is heard and determined by a member of the Board acting as adjudicator.

C-3 Table 8 shows grievances referred to adjudication under various sections of the Act each year since April 1993 and cumulative totals since April 1967. Two categories of grievances are referable to adjudication under section 92 of the Act. One category, defined in paragraph 92(1)(a), consists of grievances arising out of the application or interpretation of a collective agreement or an arbitral award. To refer such grievances, employees must have the consent of their bargaining agent. There were 451 of these grievances referred in the year under review.

C-4 The other category of grievances referable under section 92 of the Act is defined in paragraphs 92(1)(b) and (c). In this category, an employee could originally refer only grievances arising out of disciplinary action resulting in discharge, suspension or a financial penalty. As a result of the Public Service Reform Act provisions proclaimed in force on 1 June 1993, this category of grievances for employees in the central administration now includes demotion and all other terminations of employment not specifically covered by the Public Service Employment Act. In this case, the employee need not have the consent of the bargaining agent in order to refer the grievance. Also in this category may be grievances from employees not represented by a bargaining agent, including those who are excluded from the collective bargaining process because they occupy a managerial or confidential position. There were 256 grievances in this category referred to adjudication during the year under review.

C-5 During the year, 724 grievances were referred to the Board for adjudication. Table 9 shows the number of cases brought forward and received from 1993 to 1998.

EXPEDITED ADJUDICATION

C-6 In a pilot project initiated in 1994 and involving the Board, the Public Service Alliance of Canada and the Treasury Board, all parties agreed to deal with certain grievances by way of expedited adjudication. This process may or may not involve an agreed statement of facts and does not allow witnesses to testify. An oral determination is made at the hearing by the adjudicator and confirmed in a written determination within five days of the hearing. The decision is final and binding on the parties but cannot be used as a precedent or referred for review to the Federal Court. Since 1994, three other bargaining agents have agreed to proceed with expedited adjudication. These are: the International Brotherhood of Electrical Workers, Local 228; the Federal Government Dockyard Trades and Labour Council (East); and the Association of Public Service Financial Administrators. During the year under review, 54 cases filed with the Board were dealt with using the expedited adjudication process. The Board disposed of 27 cases during the year, of which eight were dismissed, 12 were upheld, six

were withdrawn prior to the hearing and one was settled by the parties at the hearing.

C-7 In order to minimize travel costs and maximize the use of Board members' time, hearing locations are normally limited to those listed below:

Alberta:	Calgary, Edmonton, Lethbridge, Medicine Hat
British Columbia:	Campbell River, Castlegar, Kamloops, Nanaimo, Prince George, Prince Rupert, Vancouver, Victoria
Manitoba:	The Pas, Thompson, Winnipeg
New Brunswick:	Bathurst, Fredericton, Moncton, Saint John
Newfoundland/ Labrador:	Corner Brook, Gander, Goose Bay, St. Anthony, St. John's
Northwest Territories:	Inuvik, Yellowknife
Nova Scotia:	Antigonish, Halifax, Sydney
Ontario:	Hamilton, Kenora, Kingston, London, North Bay, Ottawa, Owen Sound, Sarnia, Sault Sainte-Marie, Sudbury, Thunder Bay, Timmins, Toronto, Windsor
Prince Edward Island:	Charlottetown
Quebec:	Chicoutimi, Gaspé, Montreal, Quebec, Sherbrooke
Saskatchewan:	Regina, Saskatoon
Yukon Territories:	Dawson City, Whitehorse

D

ARBITRATION PROCEEDINGS

D-1 Arbitration is one of the two options that a bargaining agent may specify for resolving any negotiation impasse or "interest'' dispute with the employer. The specified method prevails for that round of negotiations, but may be altered by the bargaining agent before notice to bargain is given for the next round. Legislation was passed during fiscal year 1996-97 whereby the arbitration option was withdrawn for a three-year period.

D-2 During the year under review, the Board issued an award with respect to a request for arbitration carried over from fiscal year 1995-96. This matter involved a dispute between the Public Service Alliance of Canada and the National Capital Commission.

E

CONCILIATION AND MEDIATION

E-1 The provisions of the Public Service Compensation Act and the Government Expenditures Restraint Act 1993, No. 2, which extended the terms and conditions, including the compensation plans, embodied in the collective agreements of virtually all employees in the federal Public Service, continued in force into the 1997-98 fiscal year. Most bargaining units were no longer subject to these Acts by the end of the year, however, and resumed collective bargaining.

E-2 During the year under review, 39 requests for third-party assistance were received. Twenty-six of these requests involved bargaining units represented by the Public Service Alliance of Canada. By virtue of the structure for bargaining agreed to by the Alliance and the Treasury Board, these bargaining units were organized into five groups, each at its own negotiating table. Five conciliators were appointed, one at each table, and these arrangements have been carried over into the next fiscal year. Appointments were made for each of the 13 other requests, of which ten were carried over into the next year. Three disputes were settled with the assistance of a P.S.S.R.B.-appointed conciliator: they involved the social science support group, the computer sciences group, and the electronics group. A case carried over from 1996-97 involving the Staff of the Non-Public Funds and the PSAC was settled during the current year with the assistance of a conciliator.

E-3 During the year, there were three requests for the establishment of a conciliation board. Two of the three disputes were settled by the parties prior to the establishment of a board. In the third case, which involved a dispute between the Treasury Board and the Professional Institute of the Public Service of Canada on behalf of the auditing group, a board was established. This matter was carried over into the next fiscal year.

EXAMINATIONS

E-4 When an employer requests a managerial or confidential exclusion from the bargaining unit to which the bargaining agent objects, or when the bargaining agent proposes that a position no longer be excluded and the employer objects, an examination officer is authorized to inquire into the duties and responsibilities of the position and report to the Board. The officer explores the possibility of agreement with the parties. In the absence of agreement, an examination is held. If necessary, the Board subsequently makes a determination based on the examiner's report and submissions of the parties. Examination officers were involved in 59 cases this year, of which 55 were settled by agreement of the parties prior to the Examiner's report. A report was issued in the four remaining cases.

DESIGNATION REVIEW PANELS

E-5 Amendments to the Act in 1993 changed the process so that positions, rather than employees, are designated as having duties necessary in the interest of the safety or security of the public. Employees in positions so designated may not participate in a legal strike. Where the employer and the bargaining agent cannot agree on which positions are to be designated, the employer refers the positions in dispute to a designation review panel. The panel subsequently makes non-binding recommendations in a report to the parties.

E-6 During the year, there were 31 requests for the establishment of designation review panels and 28 were established. Two cases were settled and one case was carried over into the next year.

E-7 Mediation Services of the Board worked closely with the parties to assist them in resolving disputes over proposed designated positions.

OTHER SERVICES

E-8 The number of grievances and complaints to go through a P.S.S.R.B. mediation process more than doubled from the previous year.

E-9 Mediation Services continued to respond to joint requests for assistance in improving relations between bargaining agents and management and gave such assistance in three instances.

E-10 Mediation Services staff were also involved in facilitating. interest-based bargaining between the Canadian Union of Professional and Technical Employees and the Treasury Board of Canada on behalf of the employees in the translation group. In this method of collective negotiation, open discussion is encouraged and the underlying interests of the parties are addressed. Negotiations were ongoing at year's end.

F

BOARD DECISIONS OF INTEREST

F-1 In 1984, the Board had certified the Public Service Alliance of Canada as bargaining agent for two bargaining units, being all employees of the Staff of the Non-public Funds, Canadian Forces in the administrative support category and the operational category at the CFB Bagotville, Quebec (Board files 145-18-233 and 146-18-232). During the year under review, the employer applied to the Board under section 27 of the Public Service Staff Relations Act for amalgamation of the bargaining units: *Staff of the Non-public Funds, Canadian Forces, and Public Service Alliance of Canada* (Board file 125-18-71). The bargaining agent did not oppose the application. The Board noted that, when it had determined the bargaining units, subsection 33(3) of the Act had prohibited it from determining that a unit containing employees from more than one occupational category was appropriate for collective bargaining. Subsection 33(3) and the definition of "occupational category" contained in section 2 of the Act were, however, repealed upon the coming into force of certain provisions of the Public Service Reform Act on 1 April 1993. Accordingly, pursuant to section 27 of the Act, the Board amended the decisions above and found that the amalgamated unit was appropriate for collective bargaining. A new certificate was issued for the amalgamated bargaining unit. See paragraph B-2.

F-2 Effective 1 June 1993, the Public Service Reform Act added subsection 10(2) to the provisions of the Public Service Staff Relations Act. Subsection 10(2) specifies that no bargaining agent, or officer or representative thereof, "shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit". In *Boyle and Public Service Alliance of Canada et al.* (Board file 161-2-802), the complainant alleged that he had not been

fairly represented by the bargaining agent and the employer with respect to certain events of 1988 and 1989. The bargaining agent denied that it had failed to represent the complainant fairly and questioned whether subsection 10(2) had retroactive application. The employer submitted that this subsection applied solely to bargaining agents and had no application to an employer or its representatives. In dismissing the complaint, the Board found that the language of the subsection does not, expressly or by necessary implication, give it retroactive application. Subsection 10(2) of the Act cannot be used as the basis for a complaint with respect to events that occurred five years before it came into force. Furthermore, the Board concluded that a complaint under that subsection can be made only against an employee organization, its officers or representatives and not against an employer or its representatives.

F-3 In *Tucci and Hindle* (Board file 161-2-840), the complainant alleged that the respondent, the president of the bargaining agent, had violated subsection 10(2) of the Act by refusing to pay the travel expenses of the union steward chosen by the complainant as his representative in an appeal before a Public Service Commission Appeal Board. The complainant submitted that the refusal had been made in an unfair, arbitrary and discriminatory manner and had deprived him of his right to be represented by the bargaining agent. The respondent claimed that at no time had he denied the complainant the right to be represented by the bargaining agent; rather he had refused to authorize expenses for the complainant's self-appointed representative. According to the respondent, the responsibility to arrange representation rests with the bargaining agent, not with the complainant; moreover, the complaint related to an internal union matter which did not come within the scope of subsection 10(2) of the Act.

F-4 The Board indicated that no cogent evidence had been adduced to establish that the bargaining agent had had any negative animus toward the complainant or his chosen representative. At no point had the bargaining agent, through any of its officers, advised the complainant or his representative that it would not provide the complainant with representation. Noting that it is not unusual for unions to reserve the right to determine who will represent their members before third parties,

the Board concluded that the authority of union stewards to represent members in third party proceedings and the reimbursement of their travel expenses are internal management matters for the bargaining agent. In the absence of evidence that such activity constituted a denial of representation which had been exercised in bad faith or in an arbitrary or discriminatory manner, the Board determined that the activity did not fall within the prohibition contained in subsection 10(2) of the Act.

F-5 An employee who was also an official of a bargaining agent complained that two managers had interfered in her representation of employees, contrary to sections 6 and 8 of the Public Service Staff Relations Act: *Willan and Potts et al.* (161-2-834). The Board concluded that the evidence failed to substantiate the allegations against the first respondent. The complainant had, however, with the employer's consent, invited local Members of Parliament to attend a staff meeting dealing with the proposed lay-off of employees. The second respondent had then written to the complainant, reminding her that she owed the employer a duty of fidelity and that in her public criticism of the employer she was restricted to the matters contained in the Act. Relying on the decision of the Federal Court of Appeal in *Linetsky and Resanovic* (Court file A-142-84), the Board found that, in attempting to restrict the complainant to the provisions of the Act in her representation of the interests of employees, the second respondent had interfered with the complainant's right to represent employees and participate in the lawful activities of the bargaining agent, contrary to sections 6 and 8 of the Act. Accordingly, the Board upheld the complaint against the second respondent and directed him to abide by the provisions of the Act in future. In addition, the Board directed that its decision be posted in prominent locations in the workplace to ensure that it would come to the attention of employees represented by this bargaining agent.

G

ADJUDICATION DECISIONS OF INTEREST

G-1 In *Boutilier* (Board file 166-2-26199), the employer had denied the grievor's request for marriage leave or, in the alternative, discretionary leave in relation to a commitment ceremony. The grievor was, however, allowed to take annual leave to cover the period in question. The grievor and his same-sex partner had undergone a commitment ceremony, presided over by a minister of a Christian church, to which they had invited relatives, friends and colleagues. Prior to this ceremony, the grievor and his partner had made mutual wills and executed powers of attorney in relation to one another. The employer alleged that the grievor did not qualify for marriage leave, claiming that a same-sex couple cannot legally enter into a marriage. It was also pointed out that the no-discrimination provision of the collective agreement did not refer to sexual orientation. The adjudicator was impressed by the level of commitment between the grievor and his partner, considering it to be as high as that found in most heterosexual marriages. The adjudicator reviewed the jurisprudence, which establishes that discrimination on the grounds of sexual orientation is prohibited by section 15 of the Canadian Charter of Rights and Freedoms, as well as by the provisions of the Canadian Human Rights Act. The jurisprudence also establishes the primacy of human rights legislation. The adjudicator found that, although the grievor could not legally marry his same-sex partner, he was nonetheless entitled to marriage-leave benefits under the collective agreement, in recognition of the commitment ceremony. In reaching his conclusion, the adjudicator stated:

> *Giving marriage leave benefits to gays and lesbians pursuant to a collective agreement, does not take away from the institution of marriage between heterosexuals. Rather, the granting of such "family related" leave in situations such as the one I am*

> *faced with in this case, merely recognizes the fact that the homosexual community possesses the right to establish families in pursuance of their sexual orientation.*

The employer filed an application for judicial review of this decision in the Federal Court of Canada (Court file No. T-1450-97). This application was still pending at year's end.

G-2 The grievor's alleged destruction of government files, his unauthorised use of the government inter-city telephone network for personal long-distance calls, his unauthorized involvement in a counterfeiting investigation and his being charged with possession of and uttering counterfeit U.S. currency were considered in *Scott* (Board file 166-2-26426). The grievor, who, for more than 20 years, had been a police officer with the Royal Canadian Mounted Police (RCMP), was employed as Manager, Law Enforcement, in the National Resources Branch of Parks Canada.

G-3 The grievor had received information regarding a counterfeiting operation involving U.S. banknotes in the Maritimes and had relayed the information to the RCMP. As the RCMP decided not to act on this information, the grievor contacted the U.S. Secret Service, but without so informing his employer. On 31 March 1994, the grievor was arrested at the Ottawa airport while in possession of counterfeit U.S. banknotes; he was later charged by the local police with possession of and uttering counterfeit U.S. currency. On 1 April 1994, the employer removed the grievor from active duty and directed him not to return to the office during the employer's investigation into his activities. On 20 April 1994, the employer confirmed this by letter. On 2 April 1994, the grievor went to the office and removed confidential files on departmental informants, subsequently leading the employer to believe that he had destroyed them. The grievor eventually returned these files to the employer. In October 1994, the employer became aware that the grievor had been using his government calling card for long-distance calls, even though he was suspended from duty. The grievor claimed that he had been using the card to organize his defence and to look for another job. The employer immediately cancelled the card and the grievor reimbursed the cost of the calls. On 6 January 1995, the grievor was discharged from

employment. Subsequent to his discharge, the grievor pleaded guilty to the uttering charge and received a conditional discharge, with 15 months' probation.

G-4 On the basis of the decision of the Supreme Court of Canada in *Cie Minière Québec Cartier* v. *Québec (Grievance Arbitrator)*, [1995] 2 S.C.R. 1095, the adjudicator pointed out that, in a case of termination of employment, just cause has to be determined at the time the employee is discharged. As a general rule, the fact that an employee is facing criminal charges is not sufficient ground for discharge, although, in an appropriate case, it may be ground for suspension, either with or without pay, pending the resolution of the charges. At the time the employer discharged the grievor, the criminal charges pending against him had not been dealt with by an appropriate court. Accordingly, the employer could not rely on the outcome of these charges to support its decision to discharge the grievor. The adjudicator concluded, however, that the grievor's discharge was justified on the basis of his other acts of misconduct. Although the grievor had not destroyed the confidential files on departmental informants, as he had originally claimed, he had removed them from the office and had had no right to attempt to deprive his supervisor of access to these files. Furthermore, there was no dispute that, while he was suspended, the grievor had made unauthorized long-distance calls, over the government telephone network, for non work-related purposes. Similarly, the grievor's involvement in a counterfeit investigation in the Maritimes had not been appropriate. The grievor should rather have advised his employer of the information that he had received and left it to his employer to deal with the proper authorities. The penalty was justified under the circumstances.

G-5 In *Marinos* (Board file 166-2-27446), the grievor challenged the termination of her employment for disciplinary reasons. The employer submitted that the adjudicator had no jurisdiction to entertain the grievance, since the grievor was not an employee within the meaning of the P.S.S.R.A. She had accepted an employment contract as a correctional officer at the Cowansville Institution (Quebec) for a period of 90 days, and a second contract, for another period of 90 days, beginning the day following the expiry of the first contract. This second contract had been automatically renewed without any break. At the time of her termination, the grievor had been working for seven months.

Thus, the employer argued that she was "a person employed on a casual basis" and fell under the exception to paragraph (*g*) of the definition of "employee" contained in section 2 of the P.S.S.R.A. The employer alleged that the grievor had been appointed pursuant to section 21.2 of the Public Service Employment Act (P.S.E.A.), which authorized the Public Service Commission to "appoint any person to the Public Service for a period not exceeding ninety days" and for no "more than one hundred and twenty-five days in any year". The only reference to "casual employment" is in the heading to section 21.2 of the P.S.E.A. and a marginal note. The grievor claimed that she was an employee within the meaning of paragraph (*h*) of the definition of "employee" contained in section 2 of the P.S.S.R.A., in that she was a person employed on a term basis for a period of more than three months.

G-6 The adjudicator found that the references to casual employment in the heading and the marginal note of section 21.2 of the P.S.E.A. could not, by themselves, alter the ordinary meaning of the definition of "employee" in section 2 of the P.S.S.R.A., and in particular of paragraph (*g*) of the definition. The jurisprudence establishes that casual employment means employment at uncertain times or irregular intervals. A casual employee is one who works when the employer encounters an unforeseen need for that employee. Furthermore, a casual employee has no obligation to accept an offer of casual employment. The adjudicator concluded that the evidence did not substantiate the employer's allegation that the grievor was employed on a casual basis; rather, her services were needed on a regular basis. There was a consistent shortage of correctional officers at the institution where the grievor was working, the employer knew and could foresee this shortage, the grievor was required to be available for work at all times when the employer called upon her, and she had worked an average of 18 days per month for more than six months. Concluding that the grievor was an employee within the meaning of the P.S.S.R.A., the adjudicator decided that she had jurisdiction to hear the grievance. The employer filed an application for judicial review of this decision in the Federal Court of Canada (Court file No. T-1117-97). After year's end, the Federal Court of Canada issued a decision refusing to interfere with the adjudicator's decision. The employer filed an appeal to the Federal Court of Appeal (Court file No. A-275-98).

G-7 Notwithstanding the application for judicial review of the decision on her jurisdiction, the arbitrator resumed the hearing to deal with the substantive issue of the *Marinos* grievance: whether the termination of the grievor's employment was justified. Since the employer chose not to adduce any evidence in support of its decision to terminate the grievor's employment, the only issue remaining related to remedy. The grievor was seeking to be reinstated in her position and to be awarded damages for wrongful dismissal and mental distress. Arguing that the grievor had been appointed under section 21.2 of the P.S.E.A., which prohibited the appointment of a person to work in any particular department for more than 125 days in any year, the employer submitted that the grievor was not an indeterminate employee, but a casual employee or, at best, a term employee. The employer also stressed the fact that the grievor had worked 115 days at the time her employment was terminated and would be entitled to only ten days' pay, without any damages for either wrongful dismissal or mental distress. The grievor alleged that she had been an indeterminate employee at the time of her discharge. She maintained that her appointment under section 21.2 of the P.S.E.A. had been an artifice to skirt the law, as there was a continuing need for her services.

G-8 The adjudicator concluded that, in light of the evidence, there was no guarantee that the grievor's 90-day contract would have been renewed or that her employment would have continued indefinitely, even though the employer might have had a need for the services of correctional officers and there were a number of vacant positions at the institution. Thus, the adjudicator found that she could not reinstate the grievor, who was entitled to remuneration only for the ten days remaining before reaching the statutory 125-day maximum set out in section 21.2 of the P.S.E.A. The adjudicator considered the decisions of the Supreme Court of Canada in *Vorvis* v. *Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, and *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and concluded that the grievor had not established an actionable course of conduct, other than the termination of her employment, which could be the foundation for awarding damages for wrongful dismissal and mental distress. The employer was ordered to compensate the grievor for ten days' pay. An application for judicial review of this decision filed by the grievor in the

Federal Court of Canada (Court file No. T-167-98) was still pending at year's end.

G-9 The application of the Work Force Adjustment Directive (W.F.A.D.) was the issue in *Fortier* (Board file 166-2-27013). The employer had not provided the grievor with salary protection under the W.F.A.D. The grievor was an equipment operator at the Yellowknife airport when he was declared a surplus employee under the W.F.A.D., due to the devolution of the airport to the Government of the Northwest Territories. He was offered and accepted a position, in the same group and at the same level, in Regina, Saskatchewan. However, employees in the general labour and trades group are subject to regional rates of pay under the relevant provisions of the collective agreement; the grievor went from an hourly rate of pay of $15.19 at Yellowknife, to $12.36 at Regina. The grievor claimed that, in the spirit of the W.F.A.D., he should continue to be paid at the Yellowknife hourly rate. The employer replied that the application of the W.F.A.D. to the grievor had revealed an anomaly; however, since the W.F.A.D. is part of the collective agreement, any change to it should be pursued at the bargaining table. The employer argued that the W.F.A.D. provides for salary protection when an employee is offered a position at a lower level, not at a different regional rate of pay. The adjudicator found that the W.F.A.D. provision was not ambiguous and that he could not consider evidence relating to the intent of the parties who had negotiated it; under the W.F.A.D., salary protection is provided only to an employee who is appointed to a lower-level position. Thus the grievor in this case was not entitled to salary protection.

G-10 In *Parent* (Board file 166-2-27675), the employer had calculated the grievor's severance pay on the basis of the salary level of his substantive position, not of the position he had held on an acting basis immediately prior to retirement. The collective agreement provided that an employee's severance pay should be calculated on the basis of the rate of pay for the classification level indicated in his or her certificate of appointment. Nine weeks before leaving on retirement, the grievor had been appointed on an acting basis to a position at a level immediately above the classification level of his substantive position; the employer had confirmed this in writing seven weeks before the retirement. The grievor alleged that he was entitled to severance pay calculated on the basis of the pay for the position he held on an acting

basis and contended that the employer's letter constituted a certificate of appointment for the purposes of the collective agreement. The employer maintained that the provisions of the Public Service Employment Act in effect on the day the collective agreement was signed referred only to a certificate of indeterminate appointment under the P.S.E.A.; it did not cover a certificate of appointment for an acting position. The adjudicator concluded, however, that the employer's written confirmation did amount to a certificate of appointment for the purposes of the collective agreement, noting that the agreement did not limit certificates of appointment to appointments to a "substantive position". The adjudicator accordingly allowed the grievance.

G-11 In *Canadian Air Traffic Control Association and Treasury Board (Transport Canada)* and *Nav Canada* (Board file 169-2-588), there was no dispute that the employer (Treasury Board) had, over a six-year period, miscalculated the union dues owed by employees in the bargaining unit. As a result, the full amount of union dues had not been deducted from the wages of these employees or remitted to the bargaining agent, contrary to the relevant provisions of the collective agreement. Nav Canada was the successor employer for most, but not all, of these employees and was therefore added as intervenor. All parties agreed upon the amount owing to the bargaining agent. At the parties' request, the Board issued an interim decision directing the employers to collect these union dues proportionally and to remit them to the bargaining agent. The Board retained jurisdiction to hear any dispute relating to the employers' liability for any such dues that could not be recovered.

G-12 Subsequently, the Board had to address the issue of the employers' liability for those union dues that could not be recovered. The bargaining agent claimed that the employers are legally obliged to pay the union dues owing, regardless of whether or not they are able to recover them. The employers relied on a broad indemnity clause in the collective agreement relating to the collection of union dues to claim that they could not be held liable for the failure to collect and remit the correct amount. The bargaining agent responded that it is not appropriate for it to absorb losses that are not a result of its actions. The Board found that according to the jurisprudence, where the employer errs in the check-off of membership dues, it bears the responsibility and must remit to the bargaining agent the moneys it ought

to have deducted from the employees. The Board concluded that the indemnity clause could not be interpreted as indemnifying the employers for their breaches of the very agreement and obligation agreed to, which had caused a loss to the bargaining agent. Thus, the employers were liable to compensate the bargaining agent for any union dues that could not be recovered.

H

TERMS OF REFERENCE TO CONCILIATION BOARDS, CONCILIATION COMMISSIONERS, ARBITRATORS AND ARBITRATION BOARDS

H-1 Where the parties have bargained collectively in good faith but have been unable to reach agreement on any term or condition of employment, and where the relevant bargaining agent has specified that referral to conciliation shall be the process for resolution of a dispute, section 76 of the Public Service Staff Relations Act provides that either the employer or the bargaining agent may, by notice in writing to the Chairperson, request conciliation of the dispute. Unless it appears to the Chairperson that the establishment of a conciliation board is unlikely to assist the parties in reaching agreement, the Chairperson is required to establish a conciliation board pursuant to section 77 or, on joint request of the parties, to appoint a conciliation commissioner pursuant to section 77.1. The Chairperson is required to give to the conciliation board (or the conciliation commissioner, as the case may be) a statement setting forth the matters on which findings and recommendations shall be reported (section 84). There are certain restrictions on these matters.

Subsection 87(2) specifies that subsection 57(2)* applies, with such alterations as the circumstances require, to a recommendation in a report of a conciliation board or conciliation commissioner. In addition, subsection 87(3) provides that no report of a conciliation board or conciliation commissioner shall contain any recommendation concerning the standards, procedures or processes governing employees' appointment, appraisal, promotion, demotion, deployment, lay-off or termination of employment, other than by way of disciplinary action. If either party objects to the referral of any matter to the conciliation board or conciliation commissioner, the Chairperson must determine whether or not the matter comes within one of the prohibitions set out in the Act. Any matter that does so will not be included in the terms of reference.

H-2 Although most employers and bargaining agents recommenced collective bargaining following the expiration of the freeze imposed by the provisions of the Public Sector Compensation Act, no conciliation boards were established and no conciliation commissioners were appointed during the year under review.

H-3 The Public Service Staff Relations Board administers the process whereby an arbitrator is appointed under section 65.1 or an arbitration board is established under section 65 of the Public Service Staff Relations Act. Where the parties have bargained collectively in good faith but have been unable to reach agreement on any term or condition of employment that may be embodied in an arbitral award, and where the relevant bargaining agent has specified that referral to

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* Subsection 57(2) reads as follows:

57 (2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,

a) the alteration or elimination or the establishment of which would require or have the effect of requiring the enactment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation, or

b) that has been or may be established pursuant to any Act specified in Schedule II.

(Schedule II refers to the Government Employees Compensation Act, the Public Service Employment Act and the Public Service Superannuation Act).

arbitration shall be the process for resolution of a dispute, section 64 of the Act provides that either party may, by notice in writing to the Secretary of the Board, request arbitration in respect of that term or condition. Upon receipt of this request, and where the parties have not jointly requested the appointment of an arbitrator pursuant to section 65.1, the Chairperson is required by section 65 to establish an arbitration board consisting of three persons appointed in the same manner as the members of a conciliation board.

H-4 Section 66 of the Act requires the Chairperson, subject to section 69, to deliver a notice referring the matters in dispute to the arbitrator or to the arbitration board. Section 69 specifies certain limits on the subject-matter of an arbitral award: subsection 69(2) provides that subsection 57(2) applies, with such modifications as the circumstances require; and pursuant to subsection 69(3), no arbitral award shall deal with the organization of the Public Service or the assignment of duties to, and classification of, positions in it. Neither shall an arbitral award deal with the standards, procedures or processes governing employees' appointment, appraisal, promotion, demotion, deployment, lay-off or termination of employment, other than by way of disciplinary action. In addition an arbitral award cannot relate to any term or condition of employment that was not a subject of negotiation between the parties prior to the request for arbitration. Subsection 69(4) specifies that an arbitral award shall deal only with terms and conditions of employment of employees in the specific bargaining unit. Finally, sections 71 and 72 of the Act place certain restrictions on the term of an arbitral award and the extent to which any of its provisions can be made retroactive.

H-5 The Budget Implementation Act, 1996, suspended arbitration as a dispute resolution process under the Public Service Staff Relations Act for three years from 20 June 1996. Consequently no arbitrators were appointed and no arbitration boards were established during the year under review.

I

COURT DECISIONS OF INTEREST

I-1 Following the coming into force of the balance of the provisions of the Public Service Reform Act, effective 1 June 1993, interest arbitration under the Public Service Staff Relations Act ceased to be a function of the Public Service Staff Relations Board. This responsibility is now assigned to an ad hoc panel of three persons appointed by the Chairperson in the same manner as the members of a conciliation board. Prior to 1 June 1993, the Board, as constituted to hear the arbitration, determined its own jurisdiction to entertain a disputed proposal in light of the relevant provisions of the Act. Since that date, pursuant to subsection 66(1), the Chairperson has been required, subject to section 69, to give the arbitration board a notice referring to it the matters in dispute. Section 69 essentially sets out the jurisdictional parameters of an arbitration board.

I-2 The Chairperson was required to rule as to whether various disputed proposals in relation to an interest dispute involving a new separate employer fell within the jurisdiction of the arbitration board. As a result, he referred some of the disputed proposals to the arbitration board but did not refer others, on the ground that they did not fall within the arbitration board's jurisdiction. In particular, he ruled that the provisions of the Public Sector Compensation Act did apply to the employees of the new separate employer, thereby freezing their compensation plans as they had existed on 26 February 1991, even though the employer had not come into existence as a separate employer until 1 January 1994.

I-3 The bargaining agent applied to the Federal Court, Trial Division, for judicial review of this decision, alleging, among other things, that the Chairperson did not have exclusive jurisdiction to determine the jurisdiction of an arbitration board but rather that this could also be determined by the arbitration board itself. The Public

Service Staff Relations Board was granted permission by the Court to make submissions on two issues:

- the scope of the jurisdiction of a Chairperson when delivering a notice referring the matters in dispute to an arbitration board, pursuant to section 66 of the Act, and

- the appropriate standard applicable to the judicial review of a Chairperson's rulings pursuant to section 66 of the Act.

I-4 In dismissing the application for judicial review, Pinard J. held that, as a result of the amendments to the Public Service Staff Relations Act which came into force on 1 June 1993, the Chairperson was vested with exclusive jurisdiction to determine what matters may be included in an arbitral award: *Public Service Alliance of Canada and National Capital Commission et al.*, [1998] 2 F.C. 128. This ensures consistency of the rulings and finality in the interest arbitration process, something that is particularly important now that the arbitration board is no longer chaired by a member of the Public Service Staff Relations Board. Furthermore, the need for consistency is greater in view of the fact that the arbitration board's award, unlike a conciliation board report, is binding on the parties. Pinard J. then went on to consider the relevant jurisprudence of the Supreme Court of Canada regarding the appropriate standard of review. He noted that the bargaining agent had submitted that the standard of review should be that of correctness, given that the Chairperson was examining questions dealing with the arbitration board's jurisdiction.

I-5 In rejecting this submission, Pinard J. held that, in determining what matters may be included in an arbitral award, the Chairperson is not determining the parameters of his own jurisdiction. Rather, he is acting within the confines of the jurisdiction granted to him by Parliament. There is no privative clause in the Public Service Staff Relations Act, but nor is there any statutory right of appeal. Furthermore, the Chairperson is a specialized decision-maker with considerable expertise, who is appointed by Parliament to set the parameters for collective agreements between employers and bargaining agents. Accordingly, Pinard J. ruled that reasonableness should be the standard for review of the Chairperson's determination of the Terms of

Reference of an arbitration board. The Chairperson's jurisdictional rulings insofar as they relate to the Public Section Compensation Act, however, are subject to the standard of correctness, as it had not been established that the Chairperson frequently encountered that statute. Pinard J. then went on to find that the Chairperson's rulings in relation to the statute were correct and that his rulings in relation to the other disputed proposals were reasonable. An appeal of the decision of Pinard J. brought by the bargaining agent was pending at year's end: Court file A-820-97.

I-6 In *Barry* v. *Canada (Treasury Board)* (1997), 221 N.R. 237, the Federal Court of Appeal considered the issue of the standard to be applied to the judicial review of decisions of adjudicators appointed pursuant to the provisions of the Public Service Staff Relations Act following the repeal of the privative clause effective 1 June 1993. The adjudicator had ruled that the employer, although ultimately denying the grievor's request for vacation leave, had made every reasonable effort to grant it, as required by the relevant provisions of the collective agreement. The Federal Court, Trial Division, in denying the grievor's application for judicial review, considered the appropriate standard of review to be applied to adjudicators' decisions: (1996), 115 F.T.R. 281. In that regard, the Court stated the following at page 283:

> *Although the test for review is no longer whether the adjudicator rendered a patently unreasonable decision, the Federal Court has subsequently indicated that adjudicators should still be accorded curial deference.*[1]

I-7 The Federal Court of Appeal dismissed the grievor's appeal from the decision of the Trial Division. In so doing, the Court restored the "patently unreasonable" standard to be applied in the review of adjudicators' decisions. Robertson J.A., delivering judgment for the Court, dealt with this issue as follows:

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[1] See Twenty-ninth Annual Report, paragraphs I-1 and I-2.

> *In our respectful view, the standard of review adopted by the Motions Judge is contrary to the teachings of the Supreme Court. It is true that prior to the repeal of the privative clause, that Court had held in Canada (Attorney General)* v. *PSAC [1993] 1 S.C.R. 941 ("PSAC No. 2") that the appropriate standard of review for decisions of an adjudicator acting under the Act was whether the decision was "patently unreasonable". In our view, nothing has changed by virtue of the repeal of the privative clause. In United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction Ltd., [1993] 2 S.C.R. 316 at 337-38, Sopinka J. writing for the Court, held that even where there is no privative clause the standard of review for arbitral awards which involve the interpretation of collective agreements is circumscribed by the concept of patently unreasonable.*

I-8 In *Attorney General (Canada)* v. *Francoeur* (1997), 220 N.R. 51, the Federal Court of Appeal restored the decision of the adjudicator, which had been set aside by the Federal Court, Trial Division on judicial review: (1996), 112 F.T.R. 113. Faced with an inconsistency between the French and English versions of the provision of the collective agreement dealing with acting pay, the adjudicator had preferred the French version as being more specific than the English version; accordingly, he had denied the grievance. On judicial review, the Federal Court, Trial Division, set aside the decision and referred it back to the adjudicator for reconsideration on the basis that the English version was more in keeping with the intention of the parties as revealed in the collective agreement as a whole.[2] In allowing the appeal, the Federal Court of Appeal noted that the jurisprudence of the Supreme Court of Canada had established that the decision of an adjudicator cannot be set aside on review "unless the judge determining its validity can conclude that it is obviously and clearly wrong". In this case, the

[2] See Twenty-ninth Annual Report, paragraph I-4.

judge on review had substituted his opinion for that of the adjudicator with respect to which version of the collective agreement should be preferred. That was far from being a conclusion that the adjudicator's decision was clearly wrong.

I-9 The grievor, who had been employed by a separate employer, alleged that his lay-off was in reality a disguised disciplinary discharge and that therefore an adjudicator appointed under the Public Service Staff Relations Act had the necessary jurisdiction to entertain a grievance in relation to it. Relying on subsections 92(1) and 92(3) of the Act, the employer disputed this jurisdiction. The evidence established that the employer had for a number of years been dissatisfied with the grievor's performance and behaviour but had never formally brought this to his attention. The adjudicator found that he had jurisdiction to entertain the grievance on the ground that the employer had acted in bad faith in arbitrarily ridding itself of the ever foarge
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I-11 In relation to the grievor's application for judicial review, Richard J. noted that the authority of an adjudicator to award damages rather than reinstatement had been upheld by the Federal Court of Appeal in *Champagne* v. *Canada (Public Service Staff Relations Board)*, [1987] F.C.J. 906. Richard J. concluded that the adjudicator had fashioned what he believed to be an appropriate remedy based on the record before him, which contained sufficient evidence to justify that remedy. Richard J. also found, however, that the adjudicator should have given the grievor and the employer an opportunity to make submissions and give evidence on the method of calculation and the amount of damages to be awarded to the grievor; in failing to do so the adjudicator had breached the rules of procedural fairness. Accordingly, the adjudicator was directed to redetermine the amount of damages after providing both parties with an opportunity to make submissions and give evidence on this specific issue: *Matthews and Canada (Attorney General)* (Court file T-623-97, unreported).

J

PROCEEDINGS BEFORE THE BOARD UNDER PART II OF THE CANADA LABOUR CODE

PROCEEDINGS UNDER SECTION 129

J-1 Cases under section 129 of the Code arise when an employee has refused to work because of an alleged danger and a safety officer has subsequently ruled that no danger exists. The employee may request this decision to be referred to the Board, which shall without delay inquire into the circumstances of and reasons for the decision and subsequently confirm it or give appropriate directions to the employer.

J-2 During the year, the Board had 70 references before it, including two carried over from the previous year. Three cases were withdrawn and 66 were settled by the parties prior to the hearing. The remaining reference is scheduled to be heard in the new year.

PROCEEDINGS UNDER SECTION 133

J-3 Under section 133 of Part II of the Code, the Board may be involved in cases where the employer is alleged to have taken action against an employee for acting within his or her rights under section 129 of the Code.

J-4 The Board processed 12 references under section 133 during the year, including two carried over from the previous year. Of the 12 cases, four were disposed of by the Board; one was dismissed, two were withdrawn prior to the hearing, and one was settled by the parties prior to the hearing. The remaining eight cases are scheduled to be heard in the new year.

APPENDIX

TABLES

ABBREVIATIONS USED IN TABLES

BARGAINING AGENTS

AOGA	Aircraft Operations Group Association
APSFA	Association of Public Service Financial Administrators
CAPRO	Canadian Association of Professional Radio Operators
CATCA	Canadian Air Traffic Control Association
CGAU	Council of Graphic Arts Unions of the Public Service of Canada
CMCFA	Canadian Military Colleges Faculty Association
CMSG	Canadian Merchant Service Guild
CUPE	Canadian Union of Public Employees
CUPTE	Canadian Union of Professional and Technical Employees
FGDCA	Federal Government Dockyard Chargehands Association
FGDTLC (East)	Federal Government Dockyard Trades and Labour Council (East)
FGDTLC (Esquimalt, B.C.)	Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.)
HSTU	Hospitality and Service Trade Union
IBEW	International Brotherhood of Electrical Workers
MFCW	Manitoba Food and Commercial Workers
PAFSO	Professional Association of Foreign Service Officers
PIPSC	Professional Institute of the Public Service of Canada
PSAC	Public Service Alliance of Canada
RCEA	Research Council Employees' Association
SGCT	Syndicat général du cinéma et de la télévision
SSEA	Social Science Employees Association
UFCW	United Food and Commercial Workers

EMPLOYERS

CFIA	Canadian Food Inspection Agency
CSE	Communications Security Establishment, Department of National Defence
CSIS	Canadian Security Intelligence Service
MRC	Medical Research Council
NCC	National Capital Commission
NEB	National Energy Board
NFB	National Film Board
NRC	National Research Council of Canada
OSFI	Office of the Superintendent of Financial Institutions
SNPF	Staff of the Non-Public Funds, Canadian Forces
SSHRC	Social Sciences and Humanities Research Council
SSO	Statistical Survey Operations
TB	Treasury Board
OAG	Office of the Auditor General of Canada

MISCELLANEOUS

CFB	Canadian Forces Base
NDHQ	National Defence Headquarters