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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-fourth Annual Report of the Public Service Staff Relations Board, covering the period from 1 April 2000 to 31 March 2001, for submission to Parliament.

Yours sincerely,

Yvon Tarte
Chairperson

PUBLIC SERVICE STAFF RELATIONS BOARD

2000 - 2001

Chairperson:	Yvon Tarte
Vice-Chairperson:	P. Chodos
Deputy Chairpersons:	M.-M. Galipeau, E. Henry J. W. Potter
Full-Time Members:	J. C. Cloutier, G. Giguère, L.-P. Guindon, R. Simpson, J.-P. Tessier
Part-Time Members:	A. E. Bertrand, F. Chad Smith, S. Kelleher, Q.C., C. Taylor, Q.C.

PRINCIPAL STAFF OFFICERS OF THE BOARD

Secretary of the Board and General Counsel:	J. E. McCormick
Director, Dispute Resolution Services:	G. Baron
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 1,210 cases during the year under review. 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-2 L.-P. Guindon was appointed as Board member in June 2000 and R. Simpson, Board member, retired in May 2000.

ORGANIZATION AND FUNCTIONS OF THE BOARD

A-3 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*. The Board is also responsible for the administration of the *Yukon*

Public Service Staff Relations Act and Part 10 of the *Yukon Education 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. Pursuant to the Act, the Board consists of a Chairperson, Vice-Chairperson, not less than three Deputy Chairpersons 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-4 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.

A-5 The Board completed its mediation pilot project in September 2000. Given the high degree of success achieved during the pilot project, the Board decided to incorporate mediation as a permanent step in the resolution of disputes before it.

B

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

REVOCATION OF CERTIFICATION

B-1 The Board processed two applications for revocation of certification during the year, both involving the Correctional Services bargaining unit. Both applications sought to remove the Public Service Alliance of Canada as the certified bargaining agent for employees at Correctional Service Canada. These two matters were placed in abeyance pending the outcome of an application filed by the UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONELS DU CANADA – CSN to be certified to represent these employees. When the UCCO-SACC-CSN became so certified, on 30 March 2001, the two files relating to the applications for revocation of certification were closed (Board files 150-2-49 and 150-2-50).

SAFETY OR SECURITY DESIGNATIONS UNDER SECTION 78 OF THE ACT

B-2 "Designated positions" are positions 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. During the reporting period, conciliation was 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, 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-3 During the year under review, the Board processed 31 referrals involving safety or security designations and issued 10 decisions confirming the designation of positions in 10 bargaining units. The parties settled 14 referrals prior to the establishment of a designation review panel. Seven referrals are being held pending further discussions between the parties.

APPLICATIONS FOR EXTENSION OF TIME

B-4 The Board may, on application by a party, extend the time prescribed by the regulations to refer a grievance to adjudication and/or extend the time prescribed for presenting a grievance at a level in the grievance procedure. The Board processed five applications for extension of time, including three carried over from the previous year. Of the total, one was settled by the parties prior to the hearing, two are being held in abeyance pending a decision from the Federal Court, and two are scheduled to be heard during the next fiscal year.

DETERMINATION OF MEMBERSHIP IN BARGAINING UNIT

B-5 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 eight such applications during the year, of which five were carried over from the previous year.

B-6 The International Brotherhood of Electrical Workers, Local 2228 (IBEW), the certified bargaining agent of the Electronics Group bargaining unit (EL), applied to have "all Electronic Technicians/Electronic Systems Technicians employed by the employer on the East Coast in the Ship Repair Group" included in the EL bargaining unit. The IBEW asserted that the Technicians had been performing duties that properly placed them in that bargaining unit. These Technicians are at present part of a

bargaining unit that includes "all employees, other than chargehands, of the Employer in the Ship Repair Group, located on the East Coast" and for which the Federal Government Dockyard Trades and Labour Council (East) is the certified bargaining agent. In opposing the application, the FGDTLC (East) emphasised the differences between the duties, responsibilities and work environment of the Technicians and those of the employees in the EL bargaining unit. The matter was heard and the application was denied (Board file 147-2-51).

B-7 The Public Service Alliance of Canada (PSAC) sought an order from the Board that persons performing duties as Native Language Teachers, Classroom Assistants, Education Assistants and Tutor Escorts at the Department of Indian Affairs and Northern Development (DIAND), pursuant to an agreement between the Six Nations Band Council and DIAND, should be included in the Education and Library Science bargaining unit. The PSAC further sought an order that the Program and Administrative Services bargaining unit should include persons who are performing duties as Administrative Assistants at DIAND, pursuant to a similar agreement between the parties. The employer requested that the application be dismissed for want of jurisdiction, since the persons in question had not been appointed under the *Public Service Employment Act*. The matter is scheduled for hearing in the next fiscal year (Board file 147-2-111).

B-8 The International Brotherhood of Electrical Workers, Local 2228 (IBEW) asked the Board to determine that certain employees performing duties as Technicians at the Privy Council Office should form part of the EL bargaining unit represented by IBEW. At present these employees are included in the (GT) Technical Services bargaining unit, for which the Public Service Alliance of Canada is the bargaining agent. The applicant further sought a determination that Technicians also employed at the Privy Council Office and at present included in the Computer Systems bargaining unit, for which the Professional Institute of the Public Service Canada (PIPSC) is the bargaining agent, should form part of the EL bargaining unit. The Treasury Board as employer and the PSAC and the PIPSC as bargaining agents opposed the application on the grounds that the positions were already classified in the

proper bargaining units. The matter is scheduled for hearing during the next fiscal year (Board file 147-2-113).

B-9 The IBEW asked the Board to determine that employees performing duties as Underwater Signatures and Ranges Technologists and included in the (EG) Technical Services bargaining unit, for which the Public Service Alliance of Canada is at present the bargaining agent, should become part of the EL bargaining unit represented by IBEW. Both the Treasury Board as employer and the PSAC opposed the application on the grounds that the employees in question were already properly classified. The matter is scheduled for hearing early in the next fiscal year (Board file 147-2-112).

B-10 An application carried over from the previous fiscal year and filed by the Professional Institute of the Public Service of Canada alleged that Tribunal Members in positions classified at the PM-06 level in the Trade-Marks Opposition Board were performing duties that placed them in the Law bargaining unit. At present the Public Service Alliance of Canada is the certified bargaining agent and the Treasury Board is the employer. The matter is scheduled for a hearing in the next fiscal year (Board file 147-2-52).

B-11 Three applications carried over from the previous fiscal year had been filed by the Association of Public Service Financial Administrators. They alleged that incumbents of positions classified at various AS levels, and for whom the Treasury Board (Department of National Defence) is the employer, were performing duties that placed them in the FI bargaining unit. The Public Service Alliance of Canada, the certified bargaining agent, requested intervenor status in the proceedings before the Board. The applications were withdrawn prior to a hearing (Board files 147-2-108 to 110).

APPLICATIONS FOR CERTIFICATION

B-12 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, there were two such applications.

B-13 In one application, the Public Service Alliance of Canada sought certification as bargaining agent for all employees of the Statistics Survey Operations engaged in survey activities primarily outside Statistics Canada offices. Following an inquiry into the matter by two officers of the Board, the application was allowed and the Public Service Alliance of Canada was certified (Board file 142-24-354).

B-14 In the other application, the UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN sought to displace the Public Service Alliance of Canada as bargaining agent for all employees of the Treasury Board in the Correctional Services Group. The result of a representation vote held by mail ballot indicated that the applicant had the support of a majority of the employees in the bargaining unit. Consequently, the UCCO-SACC-CSN was certified as bargaining agent (Board file 142-2-356).

COMPLAINTS UNDER SECTION 23 OF THE ACT

B-15 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 Act, 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-16 During the year under review, the Board processed 197 such complaints, including 133 carried over from the previous year. It dismissed a group complaint consisting of 133 complaints based on the written submissions of the parties. Two complaints were settled prior to the hearing, one was withdrawn, two were upheld, and 36 were placed in abeyance pending the result of a representation vote. The remaining 23 complaints are scheduled for hearing during the next fiscal year.

B-17 Decisions issued this year concerned compliance with regulations, discrimination against the employee organization, discrimination against members, and duty of fair representation.

REFERENCES UNDER SECTION 99 OF THE ACT

B-18 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. There were 11 references under section 99 of the Act filed during the year and 16 such references were carried over from the previous year. Of the 27 references, 17 were withdrawn, and three were settled prior to the hearing. Three references were heard and decisions are pending. The remaining four cases are scheduled for hearing during the next fiscal year.

SUCCESSOR RIGHTS

B-19 Section 48.1 requires the Board to inquire into and determine issues resulting from the transfer of an employer from Part I of Schedule I to Part II of that schedule. Such a transfer may result in an application for certification by an employee organization during a specified time period. An employer or bargaining agent may also apply to the Board to determine which employee organization shall be the bargaining agent of the newly constituted bargaining unit(s). The Board is also empowered to determine whether the collective agreement or arbitral award in force at the time of transfer shall remain in force and, if so, determine its expiry date. The Board dealt with five separate applications during the year under review, of which two were related to the Parks Canada Agency and the other three to the Canada Customs and Revenue Agency.

B-20 The first case dealt with the Parks Canada Agency (PCA), which became a separate employer in December 1998. The Professional Institute of Canada (PIPSC) applied to be recognized as the bargaining agent for all employees it had represented prior to the creation of PCA, as well as those employees formerly represented by the Social Science Employees Association (SSEA). The employer requested that all bargaining units in existence prior

to the creation of PCA be amalgamated into two bargaining units. The Public Service Alliance of Canada applied to be recognized as the bargaining agent for all employees it had represented prior to the creation of PCA, as well as employees in the Social Science support group (SI) represented by SSEA. The Association of Public Service Financial Administrators (APSFA) applied to be recognized as the bargaining agent for all employees in the Financial Management group, which it had represented prior the creation of PCA. A hearing was conducted and the Board decided that a single bargaining unit for all employees of PCA was the most appropriate option. The Board ordered a representation vote by mail ballot which would include the names of both the PIPSC and the PSAC. The Board also ordered that all collective agreements would continue in force until the 60th day following the Board decision certifying either the PIPSC or the PSAC as the bargaining agent. After the representation vote, the PSAC became the bargaining agent for all employees at the Parks Canada Agency (Board files 140-33-15 and 16).

B-21 The second case dealt with the Canada Customs and Revenue Agency (CCRA), which became a separate employer under Part II of Schedule I in November 1999. The PIPSC and the PSAC both applied to the Board for a determination under section 48.1 of the Act. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) applied to participate in the proceedings as an intervenor; however, a Board hearing determined that CAW had no standing to do so. The Board continued the hearing with the remaining parties for 57 days in order to determine the most appropriate bargaining unit structure at CCRA. The decision is expected during the next fiscal year (Board files 140-34-17 to 19).

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". That term is used in the Act for the binding determination of "interest disputes", which are disputes arising in the negotiation of collective agreements. A total of 863 grievances were referred in the year under review, in addition to 855 carried over from the previous year.

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, 1993* 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 6 shows grievances referred to adjudication under various sections of the Act each year since April 1995 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 664 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*). There were 188 such grievances referred to adjudication during the year under review. 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 1 June 1993, this category of grievance 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.

C-5 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:	Cornerbrook, 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 St. Marie, Sudbury, Thunder Bay, Timmins, Toronto, Windsor

Prince Edward Island:	Charlottetown
Quebec:	Chicoutimi, Gaspé, Montreal, Quebec, Rimouski, Sherbrooke
Saskatchewan:	Regina, Saskatoon
Yukon Territory:	Dawson City, Whitehorse

EXPEDITED ADJUDICATION

C-6 In 1994, the Board, the Public Service Alliance of Canada and the Treasury Board 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: the International Brotherhood of Electrical Workers, Local 2228; the Federal Government Dockyard Trades and Labour Council (East); and the Association of Public Service Financial Administrators. The Canada Customs and Revenue Agency and the Parks Canada Agency have as employers also agreed to proceed to expedited adjudication. During the year under review, 184 cases filed with the Board specified the expedited adjudication process. The Board rendered 53 expedited adjudication decisions resulting in the disposition of 132 cases. There were 10 expedited adjudication hearings during the year, each normally lasting no more than half a day.

D

ARBITRATION PROCEEDINGS

D-1 Arbitration is one of 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. Under legislation passed during fiscal year 1998-99, the arbitration option was withdrawn for a further three-year period. During the year under review, the Board processed five such requests including two carried over from the previous fiscal year.

D-2 In the first case carried over, the Public Service Alliance of Canada had requested the establishment of an arbitration board with respect to employees in the Administrative Support and Operational categories for whom the Staff of the Non-Public Funds is the employer. The employer objected to the request on the grounds that it contravened the *Budget Implementation Act*, whereby arbitration had been withdrawn as an option for the resolution of disputes. The parties were asked to submit written representations on the issue of the Board's jurisdiction to establish an arbitration board. The Board concluded that it would await a decision from the Federal Court of Appeal in a similar case before deciding on the request (Board file 185-18-381).

D-3 The second request carried over involved the Public Service Alliance of Canada and the National Energy Board as employer for employees other than those in the Professional bargaining unit. The parties reached an agreement for a one-year period prior to the establishment of an arbitration board (Board file 185-26-382).

D-4 The first request received in the year under review involved the Public Service Alliance of Canada as bargaining agent and the

Communications Security Establishment, Department of National Defence, as employer for employees in the Technical category. The arbitration board issued an arbitral award covering a one-year period (Board file 185-13-383).

D-5 The next request involved the Public Service Alliance of Canada and the Office of the Auditor General of Canada as employer for employees in the Audit Professional bargaining unit. The parties met and reached an agreement prior to the establishment of an arbitration board (Board file 185-14-384).

D-6 The third request received this year involved the Public Service Alliance of Canada and the National Energy Board as employer for employees other than those in the Professional bargaining unit. The request was received at year end and the establishment of an arbitration board is planned for the next fiscal year (Board file 185-26-385).

E

CONCILIATION AND MEDIATION

E-1 One case, carried over from 1998-1999, was resolved with the assistance of conciliators.

E-2 During the past year, the Board received 19 applications for third-party intervention. Of these applications, eight involved bargaining units represented by the Public Service Alliance of Canada and eight others involved the Professional Institute of the Public Service of Canada. Four were resolved with the assistance of a Board-appointed conciliator; four others remained deadlocked. Eight were carried forward to the following year. The remaining three each involved bargaining agents other than those identified above. Of these three cases, one was resolved with the assistance of a Board conciliator and the other two were carried forward to the following year.

E-3 During the past year, five applications for conciliation boards were received. In three of these cases, reports were produced by conciliation boards; two cases were carried forward to the following year.

E-4 The first conciliation board report dealt with the negotiations between the Professional Association of Foreign Service Officers and the Treasury Board (Board file 190-2-313); the second with the Association of Public Service Financial Administrators and the Treasury Board (Board file 190-2-314); and the third with the Staff of Non-Public Funds, Canadian Forces and the Public Service Alliance of Canada (Board file 190-18-316).

E-5 Of the two applications for conciliation boards carried forward to the following year, one involved the Public Service Alliance of Canada and the Canadian Food Inspection Agency (Board file 190-32-315), and the other application involved the

Treasury Board and the Professional Institute of the Public Service of Canada, representing employees in the Computer Systems Administration Group (Board file 190-2-317).

MANAGERIAL OR CONFIDENTIAL POSITIONS

E-6 When an employer applies for the exclusion of certain positions from a bargaining unit and the bargaining agent opposes the application, or when the bargaining unit proposes that the exclusion of a position be terminated but the employer objects to the proposal, an examiner is authorized to review the duties and responsibilities of the positions and submit a report to the Board. The examiner first tries to bring the parties to an agreement; if these efforts fail, the examiner conducts a review. If required, the Board then makes a decision on the basis of the report and representations by the parties. During the past year, more than 100 applications for exclusion of managerial or confidential positions were settled.

DESIGNATION REVIEW PANELS

E-7 The legislative provision on the designation of positions having safety or security duties was amended in 1993. Employees occupying such designated positions may not take part in legal strikes. When the employer and the bargaining agent cannot agree on designated positions, the employer refers the case to a review panel, which reviews the positions and makes non-binding recommendations to the parties. During the past year, there were no new applications for review panels. The two applications carried over from the previous year were settled.

MEDIATION

E-8 In 1999-2000, the Board considerably expanded its mediation program by setting up a pilot project whereby Board members acted as mediators in grievances and complaints referred to the Board for adjudication. After far-reaching consultations, management and union representatives agreed to the introduction of this dispute resolution mechanism, the purposes of which are to reduce the number of grievances referred to adjudication and to improve relations between the parties in a sustainable manner.

During the past year, Board members continued to receive training in mediation as part of the pilot project, which continued until September 2000. The project was evaluated by an independent team, which issued a very positive report.

E-9 Dispute Resolution Services (DRS) also continued to respond to joint applications for assistance from bargaining agents and management, in order to improve relations between parties. During the year under review, the Board responded to four such applications. As well, DRS members acted as mediators in a number of cases.

TRAINING

E-10 During the past year, the Board set up a national training program on mediation and interest-based bargaining. As part of the Board's efforts to promote mediation as a dispute resolution mechanism, a two-and-a-half-day training course was offered jointly to union and management representatives. Over 500 persons have already taken this course, which DRS members will continue to provide on a regular basis.

INQUIRIES

E-11 DRS members were also called upon to conduct inquiries in various cases during the past year. In particular, they took action in cases involving the Canada Customs and Revenue Agency, on successor rights (Board files 140-34-17 to 19); Statistics Survey Operations, on an application for certification (Board file 142-24-354); and Correctional Service Canada, on an application for certification (Board file 142-2-356).

F

BOARD DECISIONS OF INTEREST

F-1.1 In *Jones v. Frontec Corporation,* 2000 PSSRB 27 (166-2-29200), the Chairperson decided that only an adjudicator appointed under the *Public Service Staff Relations Act* (PSSRA) had the authority to hear and determine a grievance relating to the termination of employment of an employee whose position had been transferred from the Public Service to the private sector.

F-1.2 Civilian employees of Treasury Board (Department of National Defence) had been providing site support services for military pilot training at 15 Wing CFB Moose Jaw (Base). These employees were subject to the provisions of the PSSRA and the Public Service Alliance of Canada (PSAC) had been certified as their bargaining agent. The PSAC had given notice to bargain to the Treasury Board (TB), thereby triggering the statutory freeze of those employees' terms and conditions of employment pursuant to section 52 of the PSSRA.

F-1.3 As a result of its agreement with the federal government, Bombardier Inc. took over the military pilot training programme and subcontracted the site support services provided at the Base to Frontec Corporation. As part of its contractual obligations, Frontec Corporation offered employment to some of the civilian employees who had previously been providing those services. Mr. Jones, one such employee, worked for Frontec from 1 June 1998 until his employment was terminated for disciplinary reasons on 11 January 1999.

F-1.4 On 2 February 1999, the PSAC submitted to the Department of National Defence a grievance from Mr. Jones alleging that this termination was unjustified. The Department advised both Mr. Jones and the PSAC that, as the Treasury Board was no longer Mr. Jones' employer, they should raise the matter

with Frontec Corporation. On 30 August 1999, the PSAC referred the grievance to the Board for adjudication, without its ever having been formally presented to Frontec Corporation.

F-1.5 On 27 October 1998, the PSAC had applied to the Canada Industrial Relations Board (CIRB) under section 47.1 of the *Canada Labour Code* (Code) for a determination of successor rights in relation to the civilian employees transferred to Frontec Corporation. On 14 January 2000, a CIRB decision continued the PSAC's status as bargaining agent: *Public Service Alliance of Canada v. Bombardier Inc.* (CIRB files 19046-C and 19048-C).

F-1.6 Frontec Corporation acknowledged that, after the site support services had been transferred to it from the Public Service, section 47.1 of the Code continued in force the frozen terms and conditions of employment in the relevant collective agreement until the parties bargained to an impasse. Frontec Corporation also acknowledged that the PSSRA applies "in all respects" to the interpretation and application of that agreement. Nonetheless, arguing that it was not an employer under the PSSRA and that Mr. Jones was no longer an employee under the PSSRA, Frontec Corporation submitted that any disputes arising under the collective agreement must be resolved by arbitration under the Code.

F-1.7 The PSAC submitted to the Chairperson that, pursuant to section 47.1 of the Code, only an adjudicator appointed under the PSSRA had jurisdiction to entertain Mr. Jones' grievance. Relying on the provisions of section 47.1 of the Code, the Chairperson agreed and made such determination.

F-2.1 In *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 33 (161-2-1111), the Board decided that an employee who is part of a bargaining unit represented by a bargaining agent possesses no absolute right to be represented by that bargaining agent.

F-2.2 Mr. Lai complained that his bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC), had breached its duty of fair representation set out in subsection 10(2) of the PSSRA when it refused to represent his interests on judicial review of an Appeal Board decision rendered pursuant to section

21 of the *Public Service Employment Act*. The evidence presented at the hearing established that the PIPSC had decided not to represent Mr. Lai before the Federal Court after receiving a legal opinion that the application for judicial review was unlikely to succeed.

F-2.3 Though expressing doubts as to whether the duty of fair representation extends to matters outside the scope of the PSSRA, the Board concluded that the PIPSC had not acted arbitrarily, discriminatorily or in bad faith when it relied on the legal opinion to deny Mr. Lai's request for it to represent him.

F-2.4 The Board took a similar approach in *Richard v. Public Service Alliance of Canada*, 2000 PSSRB 61 (161-2-1119). It found that the evidence did not establish bad faith in the PSAC's decision not to provide Mr. Richard with representation in the grievance process. Also, in *Lipscomb v. Public Service Alliance of Canada*, 2000 PSSRB 66 (161-34-1127), the Board found that the PSAC's decision not to represent Mr. Lipscomb at adjudication had been made in good faith and without discrimination.

F-3.1 In *Tucci v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 80 (161-34-1129), the Board found that the prohibitions contained in section 8 of the PSSRA do not apply to an employee organization.

F-3.2 Mr. Tucci had filed a complaint alleging a failure by the PIPSC to observe the prohibitions contained in subparagraphs 8(2)(*c*)(i) and (ii) of the PSSRA and alleging that he had been coerced into resigning his stewardship with the PIPSC and prohibited from running for office with the PIPSC. Mr. Tucci, an auditor with the Canada Customs and Revenue Agency (CCRA), had dealings with a rival employee organization, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada). Allegedly, the PIPSC considered that he had given support to CAW-Canada in order to become the bargaining agent for his bargaining unit.

F-3.3 The PIPSC objected to the Board's jurisdiction to hear the complaint, arguing that the subject of the complaint related to union matters. The Board found that the prohibitions contained in subparagraphs 8(2)(*c*)(i) and (ii) of the PSSRA have to be read in

their context. It concluded that the prohibitions contained in paragraphs 8(2)(*a*), (*b*) and (*c*) of the PSSRA do not apply to an employee organization. The Board has no jurisdiction under those subparagraphs to regulate the internal proceedings of a bargaining agent.

F-3.4 The Board took the same position in *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 79 (161-34-1128), and *Godin v. Public Service Alliance of Canada*, 2001 PSSRB 16 (161-2-1121). Similarly, in *Martel v. Veley*, 2000 PSSRB 89 (161-2-1126), the Board found that the prohibitions contained in paragraphs 8(2)(*a*), (*b*) and (*c*) of the PSSRA do not apply to a person acting on behalf of an employee organization.

F-4.1 In *Bracciale v. Public Service Alliance of Canada*, 2000 PSSRB 88 (161-34-1130), the Board found that the duty of fair representation imposed by the PSSRA on a bargaining agent with respect to employees in a bargaining unit for which it is certified is limited to disputes relating directly to the employment relationship.

F-4.2 Mr. Bracciale and some of his colleagues were part of a bargaining unit represented by the PSAC. They complained to the national president of their component and to the PSAC about irregularities relating to the election of the executive council of their bargaining unit local and the day-to-day operations of the local. The national president of their component and the PSAC responded that the matter had been settled to the satisfaction of the executive of the local. Because Mr. Bracciale and his colleagues were believed to have posted a copy of their complaint in the workplace, their bargaining unit local decided that they should be investigated for a possible violation of its by-laws. The resolution of the local to that effect was also posted in the workplace

F-4.3 Mr. Bracciale and his colleagues filed a complaint against the PSAC, alleging that it had failed in its duty of fair representation contained in subsection 10(2) of the PSSRA. The PSAC objected to the Board's jurisdiction to entertain that complaint, arguing that it related to internal union matters.

F-4.4 The Board addressed the issue whether the duty of fair representation contained in subsection 10(2) of the PSSRA applies to the relationship between a bargaining agent and an employee in a bargaining unit it represents. It found that such duty is intended to apply only to disputes relating directly to the employment relationship.

F-5.1 In *Gascon*, 2000 PSSRB 68 (166-2-28934), the Board specified the circumstances in which it is appropriate to dismiss a grievance summarily for want of jurisdiction.

F-5.2 Mr. Gascon and some of his colleagues filed a grievance challenging the employer's refusal to establish a single list for the allocation of overtime amongst employees in the bargaining unit at the workplace. The employer filed a series of motions objecting to the adjudicator's jurisdiction to hear the grievance. It alleged that the facts invoked could not be the subject of a grievance under section 91 of the PSSRA and could not be referred to adjudication under paragraph 92(1)(*a*) of the PSSRA. One of those motions requested that the Board dismiss the grievance pursuant to section 84 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (Regulations).

F-5.3 The Board concluded that having recourse to the procedure set out in section 84 of the Regulations is appropriate where there are serious doubts as to whether a grievance may be referred to adjudication pursuant to section 92 of the PSSRA. In the case at hand, however, the Board found that, on the face of the record, there was an arguable case that the grievance might be so referred. The employer's motion was dismissed.

F-5.4 The Board also followed that approach in *Kehoe*, 2001 PSSRB 9 (166-2-29657), where it found that, on the face of the record, the essence of Ms. Kehoe's grievance related to fundamental human rights issues for which a complaint process is set out in the *Canadian Human Rights Act*. On the basis of *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.), the Board found that the grievance could not be presented pursuant to section 91 of the PSSRA. Also, in *Godin v. Public Service Alliance of Canada*, 2001 PSSRB 16 (161-2-1121), the Board applied the same principles to dismiss summarily a complaint

pursuant to section 8 of the Regulations. The Board found that, on the face of the record, it was without jurisdiction to hear Mr. Godin's complaint, as the prohibitions on which his complaint was based do not apply to an employee organization.

F-6.1 In *Parks Canada Agency v. Professional Institute of the Public Service of Canada, Public Service Alliance of Canada and Association of Public Service Financial Administrators*, 2000 PSSRB 109 (140-33-15 and 16), the Board reviewed the criteria for the determination of a bargaining unit appropriate for collective bargaining.

F-6.2 By legislation, the Parks Canada Agency (PCA) became a separate employer on 21 December 1998. Until that date the PIPSC, the PSAC, the Social Science Employees Association (SSEA) and the Association of Public Service Financial Administrators (APSFA) had been the bargaining agents representing PCA employees.

F-6.3 The bargaining agents applied to the Board pursuant to section 48.1 of the PSSRA to continue to represent those employees. The employer requested that all bargaining units in existence prior to 21 December 1998 be amalgamated into two: one for the employees involved in programme delivery and the other for employees involved in programme development.

F-6.4 The Board restated its historical position that to have a fragmentation or multiplicity of bargaining units in the workplace did not provide the best environment for productive and effective bargaining. In considering the most appropriate bargaining unit, the Board considered the PCA's structure, the need to deal effectively with labour relations issues, mobility and multi-tasking combined with team work, and common bonds and communities of interests, as well as the upcoming PCA universal classification standard. The Board concluded that a single bargaining unit comprising all the employees of the PCA was the most appropriate option.

F-7.1 In *Treasury Board v. Professional Association of Foreign Service Officers*, 2000 PSSRB 38 (148-2-369), the Board had to decide whether the negotiating team of a bargaining agent had failed to bargain collectively in good faith.

F-7.2 The representatives of the TB and of the Professional Association of Foreign Service Officers (PAFSO) agreed to recommend approval of a tentative collective agreement to their respective "principals". The TB's chief negotiator understood the agreement as meaning that the PAFSO negotiating team had to recommend approval of the tentative collective agreement to the PAFSO's membership at large. The PAFSO's chief negotiator, however, stated at that time that he would have to present the tentative collective agreement to the PAFSO's executive committee.

F-7.3 Though the PAFSO negotiating team recommended approval of the tentative collective agreement to the PAFSO's executive committee, the latter decided not to recommend approval to the PAFSO's membership. The TB then complained that the PAFSO team had failed to bargain in good faith.

F-7.4 The Board found that the TB had not established that the PAFSO had violated the good-faith-bargaining provisions of the PSSRA. Rather, the evidence indicated that the word "principals" had been left undefined by the parties to the tentative collective agreement. According to the Board, the TB should have specified that the tentative collective agreement had to be recommended for ratification to the PAFSO's membership. Similarly, the PAFSO should have insisted that the word "principals" be replaced by the expression "executive committee".

F-8.1 In *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 103 (151-2-19), the Board denied an employer an extension of time to implement a collective agreement.

F-8.2 On 7 July 2000, the TB and the PSAC had executed a collective agreement covering the employees in the Operational Services Group bargaining unit. That collective agreement did not contain a specific date for its implementation. Pursuant to paragraph 57(1)(*b*) of the PSSRA, however, it had to be implemented within 90 days of the date of its execution; that is, by 4 October 2000.

F-8.3 The TB advised the PSAC of implementation problems on 22 September 2000, but the parties could not agree to a solution. On 29 September 2000, the TB applied for an extension of the

implementation period, citing its own inability to cope with workload demands, particularly as they related to pay equity payments following agreements reached between the TB and the PSAC in October 1999. The TB also referred to the great number of collective agreements to be implemented at about the same time. The TB acknowledged that, even at the best of times, 90 days would not be sufficient to fully implement all the provisions of the collective agreement. It could not say whether the implementation of the agreement had been discussed by the parties at the bargaining table.

F-8.4 The Board pointed out that, approximately one year before, the TB had requested an extension of the 90-day time limit contained in section 57 of the PSSRA for the implementation of the previous Operational Services Group collective agreement: *Treasury Board v. Public Service Alliance of Canada* (Board files 148-2-367, 151-2-13 and 14). In that case, the Board had stressed to the TB that it should always raise the question of implementation at the bargaining table; yet the TB had once more failed to do so. The Board confirmed that there is a heavy onus on an employer to establish that delays in implementation have been caused by circumstances that could not reasonably have been foreseen by the employer, or by matters beyond its control. The Board concluded that the TB had failed to meet this heavy onus.

F-9.1 In *Canada Customs and Revenue Agency v. Professional Institute of the Public Service of Canada, Public Service Alliance of Canada, Association of Public Service Financial Administrators, Social Science Employees Association and National Automobile, Aerospace, Transportation and General Workers of Canada*, 2000 PSSRB 75 (140-34-17 to 19), the Board dealt with successor rights.

F-9.2 By legislation, the Canada Customs and Revenue Agency (CCRA) became a separate employer on 1 November 1999. Until that date the PIPSC, the PSAC, the APSFA and the SSEA had been the bargaining agents representing CCRA employees.

F-9.3 The CCRA as employer and the PIPSC and the PSAC as bargaining agents applied for a determination pursuant to section 48.1 of the PSSRA. The CAW-Canada applied for intervenor

status in those proceedings on the basis that it had the support of some of the employees affected by the applications.

F-9.4 The Board's review of the jurisprudence established that the purpose of successor rights provisions is to maintain and protect the collective bargaining rights of employees upon the sale or transfer of a business or operation from one employer to another. What is generally of concern is the continuity of existing collective bargaining relationships to ensure that employees affected by a change of employer are not thereby denied the previously acquired protections and benefits of collective bargaining. The substantive interest of the CAW-Canada in those proceedings was clearly quite different from the preservation of existing bargaining rights. The right to make an application pursuant to section 48.1 of the PSSRA is limited to those parties that already had a relationship prior to the transfer of the employees to the new employer. Accordingly, the Board found that the CAW-Canada had no standing to participate in those proceedings.

G

ADJUDICATION DECISIONS OF INTEREST

G-1.1 In *Chopra*, 2001 PSSRB 23 (166-2-29385), the adjudicator considered the limits on the duty of loyalty owed by an employee to the employer as it relates to the issue of racial discrimination in the work place and the right to freedom of expression. The National Capital Alliance on Race Relations, of which the grievor was a past president, filed a complaint with the Canadian Human Rights Commission alleging discrimination by Health Canada against persons who belong to visible minorities and are employed by that department, contrary to section 10 of the *Canadian Human Rights Act* (CHRA). On 19 March 1997, a Canadian Human Rights Tribunal found in favour of the complainant and ordered Health Canada to implement a special corrective measures program, which the department proceeded to do.

G-1.2 Subsequently the grievor, who was an employee of Health Canada and a member of a visible minority, was invited by Heritage Canada to participate in a panel at an Employment Equity Annual Meeting on 26 March 1999. As part of the panel, the grievor expressed the opinion that Health Canada was doing nothing in the field of employment equity. In response, the employer imposed a five-day suspension upon the grievor on the grounds that such public expression was a breach of the duty of loyalty owed to the employer. The grievor, on the other hand, claimed he had merely exercised his right to freedom of expression.

G-1.3 The adjudicator stated that it was her responsibility to render decisions that are in conformity with the values protected by the CHRA and the Charter. She concluded that the grievor had expressed a personal opinion; he was entitled to do this, even if the

opinion was not shared by other persons at Health Canada. In addition, he was entitled to hold this opinion, even if some people believed it was not valid. Public servants have the right to express themselves publicly on issues such as employment equity, equality before the law, and the right to the protection of the law without discrimination based on race, national or ethnic origin and colour. These issues relate to rights that are protected by provincial and federal human rights legislation and reflect fundamental Canadian values that extend beyond the employment relationship.

G-1.4 The adjudicator found that the complexity and scope of the issue and the subjectivity involved in the perception and identification of racism, discrimination and employment inequity mean that there will always be room for individuals (and departments) to form and express their own opinions on these matters. Furthermore, by clamping down on individuals who voice their opinions on issues such as racism, discrimination and employment equity, a department risks reinforcing a perception that there is validity to the claim of racism within that department. The adjudicator allowed the grievance and concluded that the grievor's comments constituted an exception to his duty of loyalty to the employer; furthermore, he had spoken out on an important public issue.

G-2.1 The grievor, whose employment had been terminated for disciplinary reasons, entered into a mediated settlement with the employer: *Skandharajah*, 2000 PSSRB 114 (166-2-24127). Several weeks later, the grievor advised the Board that she wished to rescind the mediated agreement and to have her grievance determined at adjudication. The employer objected, claiming that the parties were bound by the settlement agreement. The adjudicator appointed to hear the matter had first to determine whether or not the grievance was subject to a binding settlement agreement. The grievor alleged that she had been pressured to enter into the agreement by her union representative. She also maintained that the agreement had been conditional or tentative.

G-2.2 The grievor attempted to adduce evidence of what the mediator had said or done during the mediation session. The employer objected to the admissibility of this evidence on the ground that it was confidential. The adjudicator concurred and so

ruled, finding that it is a recognized rule before labour arbitration boards that any communication between a mediator and the parties is confidential and therefore not admissible as evidence. Furthermore, a qualified privilege attaches to a mediation session as an extension of the privilege that attaches to settlement negotiations arising out of litigation.

G-2.3 The adjudicator stated that, to succeed in vitiating the agreement on the basis of duress or distress, the grievor would have to establish that the employer's conduct, rather than that of her union representative, had prevented her from giving a valid consent to the agreement. There was, however, no evidence that the grievor's distress was the result of improper conduct by the employer, whose representatives had, throughout the mediation session, been in a different room from the grievor. In addition, there was no medical evidence that the grievor's capacity to enter into an agreement had been affected by emotional distress. Nor did the evidence support her allegation that the settlement agreement had been conditional or tentative. The adjudicator concluded that the grievor had entered into a binding settlement agreement and that she had had the emotional, physical and intellectual capacity to give her consent. Accordingly, there was no longer any dispute between the parties and therefore no matter to be determined by an adjudicator.

G-3.1 In *Joss,* 2001 PSSRB 27 (166-2-27331), the adjudicator considered what constitutes harassment in the federal Public Service, particularly in light of the provisions of the Treasury Board (TB) Harassment Policy. The employer had imposed a ten-day suspension upon the grievor for his alleged harassment of both a subordinate and a human resources advisor.[1] The evidence established that the subordinate, on the advice of the human resources advisor, had filed harassment complaints against the grievor. Assigned by the employer to investigate the complaints, the same human resources advisor ultimately found that the grievor had harassed his subordinate. The grievor questioned the

[1] It should be noted that this grievance was originally denied by another adjudicator in a decision rendered on 13 January 1998. That decision was set aside on review by the Federal Court, Trial Division, for breach of the rules of procedural fairness with a direction that the matter be reheard by a different adjudicator: *Joss v. Canada (Attorney General)* (1999), 176 F.T.R. 118. See Thirty-third Annual Report, paragraph I-3.

impartiality of this finding. As a result, the advisor also filed harassment complaints against the grievor. The evidence established that the grievor and the human resources advisor had long had a contentious relationship.

G-3.2 The grievor grieved the penalty imposed on him for the harassment of his subordinate. He attempted to obtain information to defend his position. When the grievance was settled, the grievor disclosed the settlement document, which did not contain a non-disclosure clause, to other employees. As a result, the subordinate filed further complaints of harassment against him. When a Public Service Commission (PSC) harassment investigator found that the grievor had again harassed the complainants, the employer imposed the ten-day suspension in question.

G-3.3 Neither of the complainants testified at the hearing before the adjudicator. Instead, the employer relied upon the testimony and the report of the PSC harassment investigator. This was problematic for the adjudicator as this testimony was primarily hearsay in nature and therefore unreliable. In his testimony, however, the grievor admitted to the facts in question. The adjudicator found that the definition of harassment in the TB Harassment Policy contains a subjective element that was not proved, as neither of the alleged victims had testified. In any case, the adjudicator concluded that the grievor's actions on which the employer relied did not constitute harassment of either of the complainants. In particular, she found that the grievor's accusation of lack of impartiality on the part of the human resources advisor was well-founded in the circumstances. The adjudicator noted that charges of harassment should not be founded on non-consequential incidents, non-culpable errors of judgment, or foolish behaviour. Nor should it be employed as a weapon in the work place, especially where such use is furthering personal vendettas. The proper function of the law of harassment and harassment policies in the work place is to protect those in need of protection. Accordingly, the adjudicator allowed the grievance.

G-4.1 Because the grievor's position was about to be eliminated due to downsizing, he was allowed to switch places with another employee who wished to benefit from the early retirement package available at the time: *Nnagabo*, 2001 PSSRB 1 (166-2-30045).

Despite repeated warnings, the grievor was not performing at the substantive level of his new position after 20 months of training. Furthermore, he said that he was not interested in doing the type of work in question and would like to be employed elsewhere. Ultimately, the employer terminated his employment for incompetence.

G-4.2 The adjudicator stated that in cases of termination for cause due to incompetence the employer must establish that: it has acted in good faith; set appropriate standards of performance that were clearly communicated to the employee; given the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time; and warned the employee in writing that failure to meet the set standards by a reasonably set date would lead to the termination of employment. It must also establish that the employee has failed to meet these standards. In addition, the Treasury Board Manual imposes on the employer the duty to explore alternative solutions before terminating an employee or demoting an employee for cause.

G-4.3 The adjudicator found that the employer had failed to explore such alternative solutions as offering a severance package or circulating the employee's curriculum vitæ to other parts of the department and to other departments and agencies. In light of the grievor's negative and critical attitude towards the employer, the adjudicator concluded that reinstatement was not an appropriate remedy. He directed the employer to give the grievor the equivalent of one year's salary in lieu of reinstatement.

G-5.1 Many collective agreements in the federal Public Service contain a provision that requires the employer to provide an employee with a complete and current statement of duties upon his or her request. In the case of disagreement as to whether the employer has complied with this obligation, the employee may, provided he or she has the support of the bargaining agent, file a grievance that may ultimately be referred to adjudication pursuant to paragraph 92(1)(*a*) of the *Public Service Staff Relations Act*.

G-5.2 In *Jaremy et al.*, 2000 PSSRB 59 (166-2-28628 and 26921), the grievors alleged that the generic job description they had received from the employer set out their key activities so

briefly that it violated the collective agreement. In denying the grievances, the adjudicator concluded that the job description, though less detailed than the grievors would have liked, did adequately describe, in broad terms, their duties and functions.

G-5.3 The adjudicator reached a similar conclusion in *Hughes*, 2000 PSSRB 69 (166-2-29542). The grievor alleged that his generic job description was not sufficiently detailed or accurate to meet the requirements of the collective agreement. The adjudicator stated that a job description need not contain a detailed listing of all the activities performed under a specific duty, nor should it necessarily list at length the manner in which those activities are to be accomplished. The adjudicator found that the grievor had failed to establish that the employer had violated the collective agreement; therefore, he dismissed the grievance.

H

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

H-1.1 The Board administers the process whereby a conciliation board is established under section 77 of the *Public Service Staff Relations Act* (PSSRA) or a conciliation commissioner is appointed under section 77.1 of the PSSRA. 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 a collective agreement, 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 PSSRA provides that either the bargaining agent or the employer may, by notice in writing to the Chairperson, request conciliation of the dispute. Upon receipt of this request, and where the parties have not jointly requested the appointment of a conciliation commissioner pursuant to section 7.1 of the PSSRA, the Chairperson is required by section 77 of the PSSRA to establish a conciliation board.

H-1.2 Where the Chairperson establishes a conciliation board pursuant to section 77 of the PSSRA, or a conciliation commissioner pursuant to section 77.1 of the PSSRA, he or she is required, forthwith, to give to the conciliation board, or the conciliation commissioner, a statement setting out the matters on which findings and recommendations shall be reported (section 84 of the PSSRA). There are certain restrictions on these matters. Subsection 87(2) of the PSSRA specifies that subsection 57(2) of

the PSSRA* applies, with such modifications as the circumstances require, to a recommendation in a report of a conciliation board or conciliation commissioner. In addition, subsection 87(3) of the PSSRA 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 it comes within one of the prohibitions set out in the PSSRA. Any matter that does so will not be included in the terms of reference.

H-1.3 Although the Chairperson established four conciliation boards during the year under review, there were no jurisdictional objections to the referral of any proposals to a conciliation board.

H-2.1 The Board also administers the process whereby an arbitrator is appointed under section 65.1 of the PSSRA or an arbitration board is established under section 65 of the PSSRA. 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 arbitration shall be the process for resolution of a dispute, section

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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*).

64 of the PSSRA provides that either the bargaining agent or the employer may write to the Secretary of the Board to 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 of the PSSRA, the Chairperson is required by section 65 of the PSSRA to establish an arbitration board.

H-2.2 As soon as an arbitrator has been appointed or an arbitration board established, section 66 of the PSSRA requires the Chairperson, subject to section 69 of the PSSRA, to deliver a notice referring the matters in dispute to the arbitrator or to the arbitration board. There are certain restrictions on these matters. Subsection 69(2) of the PSSRA specifies that subsection 57(2) of the PSSRA applies to an arbitral award, with such modifications as the circumstances require. Pursuant to subsection 69(3) of the PSSRA, no arbitral award shall deal with the organization of the Public Service or the assignment of duties to, and classification of, positions in it. Nor 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) of the PSSRA specifies that an arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made. Finally, sections 71 and 72 of the PSSRA place certain restrictions on the term of an arbitral award and the extent to which any of its provisions can be made retroactive. If either party objects to the referral of any matter to the arbitrator or arbitration board, the Chairperson must determine whether or not it comes within one of the prohibitions set out in the PSSRA. Any matter that does so will not be included in the terms of reference.

H-2.3 The *Budget Implementation Act, 1996* suspended arbitration as a dispute resolution process under the PSSRA for three years from 20 June 1996. Furthermore, the *Budget Implementation Act, 1999* extended that suspension until 20 June 2001 in relation to any portion of the public service of

Canada specified in Part I of Schedule I of the PSSRA and any separate employer designated by the Governor in Council.

H-2.4 Although the Chairperson established one arbitration board during the year under review, there were no jurisdictional objections to the referral of any proposals to that arbitration board.

I

COURT DECISIONS OF INTEREST

I-1.1 In *Pachowski* (Board file 166-2-28543),[2] the adjudicator had upheld the termination of an employee who, after having been on sick leave for 49 months following her filing of a harassment complaint, was not prepared to return to her substantive position. The employer had offered her a number of other positions, which she did not accept. The adjudicator did not accept Ms. Pachowski's allegation that she had been lulled by the employer's past actions into a false feeling that her employment would not be terminated if she did not report to work.

I-1.2 Ms. Pachowski filed an application for judicial review of the adjudicator's decision: Federal Court, Trial Division file T-1798-99. Blais J. found that it was a requirement of Ms. Pachowski's position that she report to work. He did not agree with Ms. Pachowski's contention that the adjudicator had approached the issue of her termination as a disciplinary matter; an adjudicator may be required to assess similar evidence and apply similar principles whether termination is disciplinary or not. Blais J. found that the adjudicator had correctly applied the appropriate test and had not been patently unreasonable in rejecting the claim that Ms. Pachowski had been lulled in to a false sense of security. The application for judicial review was dismissed.

I-2.1 In *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, 118 F.T.R. 1, 41 Admin. L.R. (2d) 49, the Federal Court, Trial Division was asked to review a decision of the Canada Labour Relations Board (CLRB) not to disclose notes taken by some of its members at a hearing. The Board and other administrative tribunals applied for and were granted intervenor status in those proceedings.

2. See *Thirty-Third Annual Report*, § G-5.1 to G-5.3.

I-2.2 The various tribunals at the hearing argued that such notes were exempted under paragraph 22(1)(*b*) of the *Privacy Act* because their disclosure "…could reasonably be injurious to the enforcement of [a] law of Canada…", as it would interfere with the independence of quasi-judicial decision makers. The tribunals also took the position that such notes were not under the control of the tribunal to which the members were appointed. Noël J. agreed with those positions and dismissed the application for review. Noël J. found that, since administrative tribunals are bound by the duty of fairness, their members must be shielded against any type of intrusion into their thought process beyond what is revealed by their reasons. He also found that such notes were not personal information available to the individual under discussion.

I-2.3 The Privacy Commissioner appealed that decision in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* (2000), 257 N.R. 66, 25 Admin. L.R. 305. For the Court, Desjardins J.A. found that the issue of control over the notes was determinative. She found that the principle of adjudicative privilege, which is to administrative decision makers what the principle of judicial independence is to courts, precluded the CLRB from having control over the notes of its members. The appeal was dismissed, with costs.

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 twelve references before it, including ten carried over from the previous year. The Board held hearings and issued decisions in eight cases. One case was withdrawn prior to the hearing, one case is being held in abeyance pending a decision from the Federal Court, and the two remaining cases are scheduled to be heard in the new year. The responsibility for the determination of matters arising under section 129 of the Code was transferred to Human Resources Development Canada in September 2000.

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 During the year under review, the Board had three complaints before it. Two complaints were settled by the parties at

the hearing. The remaining case is scheduled for hearing in the next fiscal year.

APPENDIX

TABLES

ABBREVIATIONS USED IN TABLES

BARGAINING AGENTS

AOGA	Aircraft Operations Group Association
APSFA	Association of Public Service Financial Administrators
CATCA	Canadian Air Traffic Control Association
CAW	National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 2182 – CAW
CFPA	Canadian Federal Pilots 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
UCCO-SACC-CSN	UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN
UFCW	United Food and Commercial Workers

EMPLOYERS

CCRA	Canada Customs and Revenue Agency
CFIA	Canadian Food Inspection Agency
CIHR	Canadian Institutes of Health Research
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
PCA	Parks Canada Agency
SNPF	Staff of the Non-Public Funds, Canadian Forces
SSHRC	Social Sciences and Humanities Research Council
SSO	Statistics Survey Operations
TB	Treasury Board
OAG	Office of the Auditor General of Canada

MISCELLANEOUS

CFB	Canadian Forces Base
NDHQ	National Defence Headquarters