Public Service Labour Relations Board

Annual Report
2011 - 2012

Canada

Cat. No. SR1-2012
This publication is also available on the PSLRB's website at
http://www.pslrb-crtfp.gc.ca.

The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage and Official Languages
House of Commons
Ottawa, K1A 0A6

Dear Minister,

It is my pleasure to transmit to you, pursuant to section 251 of the *Public Service Labour Relations Act*, the Annual Report of the Public Service Labour Relations Board, covering the period from April 1, 2011 to March 31, 2012, for submission to Parliament.

Yours sincerely,

Casper M. Bloom, Q.C., Ad. E.
CHAIRPERSON

PUBLIC SERVICE LABOUR RELATIONS BOARD
2011 - 2012

Chairperson: Casper M. Bloom, Q.C., Ad. E.

Vice-Chairpersons: Linda Gobeil (appointed April 28, 2011)
Renaud Paquet
Michele A. Pineau (term ended December 31, 2011)

Full-time Members: Roger Beaulieu
Stephan J. Bertrand
Dan Butler (retired October 7, 2011)
Steven B. Katkin (appointed September 1, 2011)
Catharine (Kate) Rogers

Part-time Members: Christopher James Albertyn
Ruth Elizabeth Bilson, Q.C.
George P.L. Filliter
Deborah M. Howes
Margaret E. Hughes
William H. Kydd
Paul E. Love
Allen Ponak (term ended February 18, 2012)
Joseph William Potter
W. Augustus (Gus) Richardson
John J. Steeves

EXECUTIVE OFFICERS OF THE PSLRB

Executive Director: Guy Lalonde
General Counsel: Sylvie M.D. Guilbert
Director, Compensation Analysis and Research Services: Céline Laporte (Acting Director)
Director, Corporate Services: Alison Campbell
Director, Dispute Resolution Services: Gilles Grenier
Director, Financial Services: Robert Sabourin
Director, Human Resources Services: Chantal Bélanger
Director, Registry Operations and Policy: Susan Mailer

MESSAGE FROM THE CHAIRPERSON

I am pleased to submit to Parliament the Annual Report of the Public Service Labour Relations Board (PSLRB) for 2011-2012.

I am very proud of the progress and efficiency gains that the PSLRB achieved again this year in meeting our mandated responsibilities and in collaborating with our clients to ensure that we continue to meet their needs.

Our shift to a more proactive, analytical approach to managing a caseload that has grown from 1,200 a decade ago to nearly 6,000 today, serves us well. We close approximately 1,500 cases a year, which is an excellent effort. However, we need to go further and use analytics and strong case management tools to cater more specifically and efficiently to the needs of certain parties.

Some of the case management tools that we used to accelerate the completion of case files were holding pre-hearing conferences to deal with procedural matters upfront, organizing fact-finding meetings and dealing with hearings through written submissions, when possible, or through early analysis of the underlying issues.

As over one-half of our workload has been filed by employees of the same occupational group, we established a special task force to address the particular needs of those parties, which is supported by a more robust and thorough case management system that will enable us to cross-reference cases and deal with similar cases in a similar manner.

We also continued to review, analyze and streamline our adjudication and mediation processes to optimize our resources and further enhance our efficiency in consultation with the parties through our Client Consultation Committee. The Committee, which comprises representatives from our organization, employers and bargaining agents, focused on better managing the hearing process through several initiatives such as finding ways to deal with last-minute hearing postponements and holding more expedited hearings.

I am also pleased to note that parties who voluntarily chose to use our mediation services to resolve their issues achieved considerable success. More specifically, our Dispute Resolution Services conducted 80 mediation interventions for grievances and complaints that had been referred to us, which means many files referred to adjudication were resolved without hearings. As well, some parties favoured preventive mediations to resolve disputes before their grievances and complaints were referred to adjudication. We also provided mediation support during collective bargaining when the parties were unable to progress during their face-to-face negotiations.

In the area of compensation, analysis and research, we put in place the necessary tools, processes and systems to ensure we are in a state of readiness to conduct our recurring national compensation comparability study and other studies and surveys that support collective bargaining and compensation decisions.

Finally, to continue to meet the needs of our clients and indeed Canadians, we devoted considerable time to improving our Information Management framework. I am pleased to note that we established an effective governance structure to ensure the project's success and that we plan to deploy our new system in the next fiscal year.

None of the accomplishments that we realized this year would have been possible without the help of my colleagues and all PSLRB employees. Through their hard work, professionalism and loyalty, the PSLRB continues to be recognized as a unique and leading force in the labour relations realm.

Casper M. Bloom, Q.C., Ad. E.
CHAIRPERSON
Public Service Labour Relations Board

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PART ONE:

About the Public Service Labour Relations Board

The PSLRB contributes to a productive and efficient workplace that ultimately benefits Canadians through the smooth delivery of government programs and services.

WHO WE ARE

The Public Service Labour Relations Board (PSLRB) is an independent quasi-judicial tribunal mandated by the *Public Service Labour Relations Act* (*PSLRA*) to administer the collective bargaining and grievance adjudication systems in the federal public service. It is also mandated by the *Parliamentary Employment and Staff Relations Act* (*PESRA*) to perform the same role for the institutions of Parliament (i.e., the House of Commons, the Senate, the Library of Parliament, the Office of the Conflict of Interest and Ethics Commissioner, and the Office of the Senate Ethics Officer).

The PSLRB is unique as it is one of the few bodies of its type in Canada that combines both adjudication functions and responsibilities as an impartial third party in the collective bargaining process. By resolving labour relations issues in an impartial manner, the PSLRB contributes to a productive and efficient workplace that ultimately benefits Canadians through the smooth delivery of government programs and services.

OUR RESPONSIBILITIES

In accordance with its mandate under the *PSLRA*, the PSLRB provides the following key services:

- adjudication — hearing and deciding grievances, complaints and other labour relations matters;
- mediation — helping parties reach collective agreements, manage their relations under collective agreements and resolve disputes without resorting to a hearing; and
- compensation analysis and research — compiling, analyzing and disseminating information on employee compensation determination processes in the federal public service.

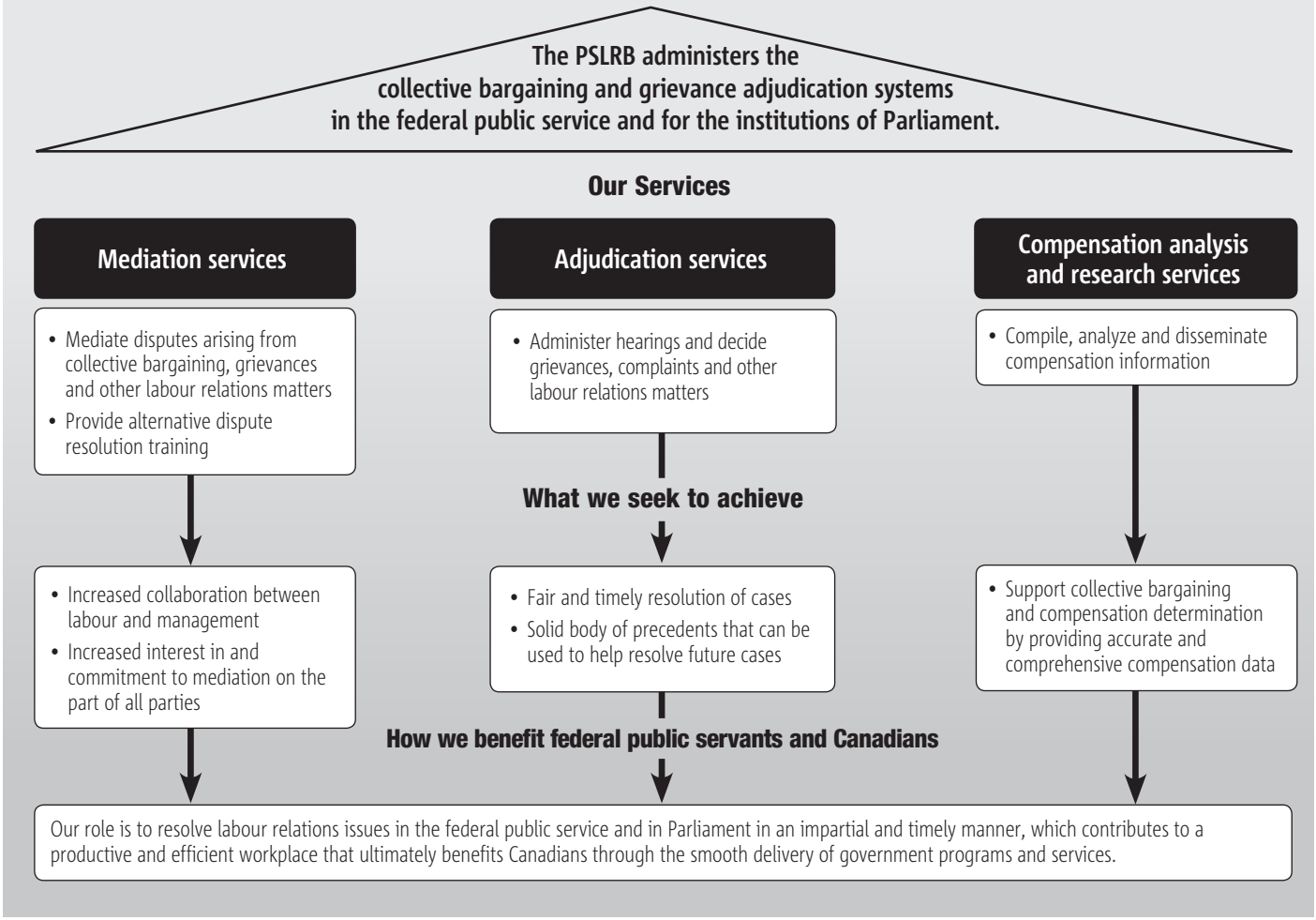
For more information about these services, please see Figure 1, *The Public Service Labour Relations Board at a Glance*.

Under an agreement with the Yukon government, the PSLRB also administers the collective bargaining and grievance adjudication systems required by the Yukon *Education Labour Relations Act* and the Yukon *Public Service Labour Relations Act*. When performing those functions, the PSLRB acts as the Yukon Teachers Labour Relations Board and the Yukon Public Service Labour Relations Board, respectively. Separate annual reports are issued for those Acts and are available on the PSLRB's website at http://www.pslrb-crtfp.gc.ca.

The PSLRB also provides physical and administrative support services to the National Joint Council (NJC), an independent consultative body of employer and employee representatives. The NJC exists to facilitate consultation about, and the co-development of, policies and terms of employment that do not lend themselves to unit-by-unit bargaining. The PSLRB houses the NJC but plays no direct role in its operation. For more information about the NJC, please see the annual report on its website at http://www.njc-cnm.gc.ca.

Finally, the mandate of the PSLRB was further expanded due to transitional provisions under section 396 of the *Budget Implementation Act, 2009*. Specifically, the PSLRB must deal with public service pay equity complaints that were or could be filed with the Canadian Human Rights Commission and with those that may arise under the *Public Sector Equitable Compensation Act* (*PSECA*) when it comes into force.

Figure 1: The Public Service Labour Relations Board at a Glance



OUR CLIENTS

The PSLRB's clients comprise approximately 245,000 federal public service employees covered under the *PSLRA* and by numerous collective agreements, as well as employers and bargaining agents. The *PSLRA* applies to departments named in Schedule I to the *Financial Administration Act*, the other portions of the core public service administration named in Schedule IV and the separate agencies named in Schedule V (see Appendix 1).

The Treasury Board employs about 177,000 public servants in federal departments and agencies. About 68,000 public service employees work for one of the other employers, which range from large organizations, such as the Canada Revenue Agency, to smaller organizations, such as the National Energy Board. For a list of employers, please refer to Appendix 1, Table 1.

As of March 31, 2012, 20 bargaining agents were certified to represent 85 bargaining units in the federal public service. Sixty-two percent of unionized employees are represented by the Public Service Alliance of Canada, 23% by the Professional Institute of the Public Service of Canada and the remainder by 18 other bargaining agents. Table 2 in Appendix 1 reports the number of public service employees in non-excluded positions by bargaining agent.

Other PSLRB clients include employees excluded from bargaining units, those who are not represented or those who choose to represent themselves.

Employees of the PSLRB work diligently to preserve the organization's independence, impartiality and integrity, all of which contribute directly to the PSLRB's coveted reputation as a leader in the labour relations realm.

OUR PEOPLE

Board Members

The Board is composed of the Chairperson, up to three Vice-Chairpersons, and full- and part-time Board members. Appointed by the Governor in Council for terms of no longer than five years, they may be reappointed.

To be considered eligible for an appointment, a candidate must have labour relations knowledge or experience. Appointments are made to ensure, to the greatest extent possible, a balance on the Board of members recommended by employers and those by bargaining agents. However, even though a Board member might have been recommended by a given party, once appointed, he or she does not represent that party and is required to act impartially at all times.

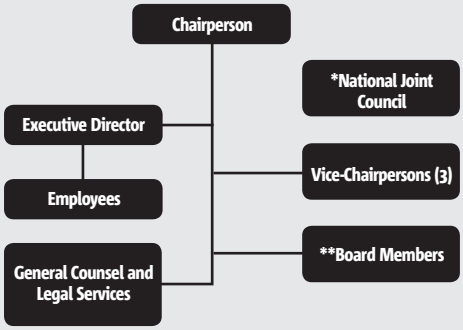
In 2011-2012, there were 3 Vice-Chairpersons and 5 full-time and 11 part-time Board members, the latter of whom play a critical and highly valuable role in addressing the PSLRB's overall workload.

Biographies of full- and part-time Board members are available on the PSLRB website at http://www.pslrb-crtfp.gc.ca.

The PSLRB Executive Committee comprises the Chairperson, the Vice-Chairpersons, the Executive Director, the General Counsel and six directors. The Committee provides strategic direction and oversight for the priorities and projects set out in the PSLRB's annual strategic plan.

The Chairperson is the organization's chief executive officer and has overall responsibility and accountability for managing the work of the PSLRB.

The Executive Director provides leadership for, and the supervision of, the daily operations of the PSLRB. Reporting to the Chairperson, he is supported by the directors, who establish priorities, manage the work and report on the performance of their units. The General Counsel also reports to the Chairperson and provides legal advice and support to him and the Board members.



* The PSLRB has no direct involvement in the operations of the National Joint Council.

** The number of Board members is determined by the Governor in Council. Members may be appointed on a full-time or part-time basis.

Employees

Employees of the PSLRB have a broad yet complementary skill set, as well as expertise in areas that include labour relations, law, research, finance, information technology, human resources and communications. They work diligently to preserve the organization's independence, impartiality and integrity, all of which contribute directly to the PSLRB's coveted reputation as a leader in the labour relations realm.

PART TWO:

The Year in Review

In 2011-2012, the PSLRB had 91 full-time equivalent positions and expenditures of $13.5 million.

Throughout the year, cases (i.e., grievances, complaints or applications) that are not settled or withdrawn through mediation or other interventions proceed to a hearing before a member of the Board selected by the Chairperson.

The Board's hearings, which are similar to court proceedings but much less formal, can be oral or they can be conducted through written submissions. Regardless of the format, they must be undertaken in a way that is fair for all concerned parties and in accordance with the law and principles of natural justice.

Under the *PSLRA*, Board members and adjudicators have the authority to summon witnesses, administer oaths and solemn declarations, compel the production of documents, hold pre-hearing conferences, accept evidence whether or not it is admissible in court, and inspect and view an employer's premises, when necessary.

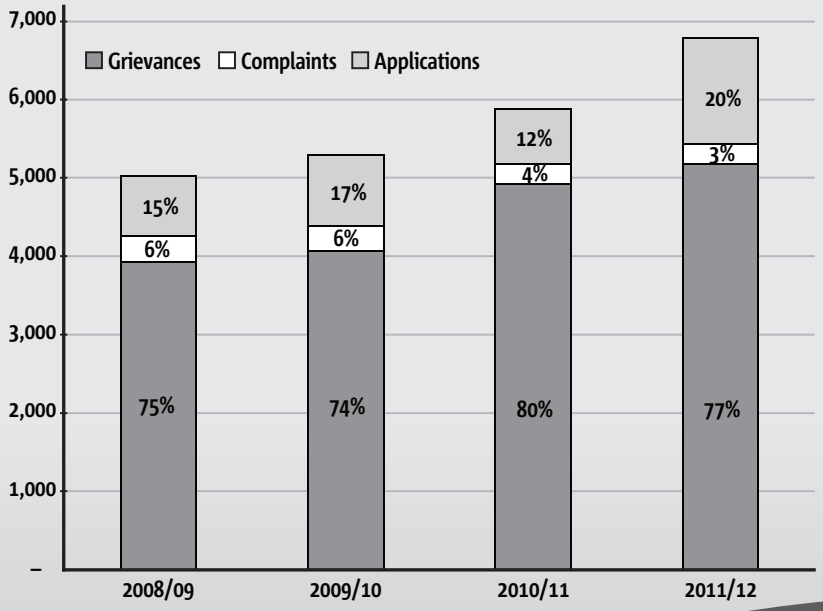
To help parties prepare for hearings, various tools and information, including guides, questions and answers, and practice notes, are available on the PSLRB website.

CASELOAD OVERVIEW

During the reporting year, the number of new cases received by the PSLRB returned to a level observed in previous years, with the exception of 2010-2011, when a record 2,100 new cases were received. While the PSLRB was able to close approximately 1,500 cases this year — which represents a significant effort — it wasn't enough to reduce the overall number of active cases due to the large influx of cases from 2010-2011. As a result, the total caseload for 2011-2012 is higher than the previous year (see Figure 2).

The PSLRB was able to close approximately 1,500 cases this year.

Figure 2: Total Caseload - A Historical Perspective



The PSLRB encourages parties to continue to work toward a settlement throughout the adjudication process as a solution created by the parties is always preferable.

Grievances

Again this year, grievances referred to adjudication made up the majority (81%) of the PSLRB's workload under the *PSLRA*.

The four types of individually filed grievances that may be referred to adjudication under the paragraphs of subsection 209(1) of that Act are as follows:

- interpretations or applications with respect to employees of collective agreement or arbitral award provisions. In such cases, the grievor must have the approval of his or her bargaining agent, which must be willing to represent the employee. Collective agreement grievances accounted for 92% of the PSLRB's carried-forward grievances and 94% of the new grievances received during the year;
- disciplinary actions resulting in terminations, demotions, suspensions or financial penalties. This type of grievance represented 7.5% of the carried-forward grievances cases and 5% of the year's new cases;
- demotions or terminations for unsatisfactory performance or any other reason that is not a breach of discipline or misconduct, or deployment without the employee's consent when consent is required. The PSLRB received very few grievances of this type, which is only for employees for whom the Treasury Board is the employer; and
- demotions or terminations made for any reasons other than breaches of discipline or misconduct and that apply only to employees of separate agencies (presently, only to employees of the Canadian Food Inspection Agency). No grievances of this type were received during the year.

In addition to individual grievances, the PSLRB received 34 new group grievances and 8 new policy grievances. Group grievances may be filed by several employees in a department or agency who believe that their collective agreement has not been administered correctly. They can ask their bargaining agent to file the grievance on their behalf, and the bargaining agent must indicate its support for the grievance to proceed. Policy grievances, which may be filed by the bargaining agent or the employer, must relate to an alleged violation of the collective agreement that affects employees in general.

It is important to note that the PSLRB encourages parties to continue to work toward a settlement throughout the adjudication process as a solution created by the parties is always preferable. This means that parties may participate in case settlement discussions with the adjudicator at any time during the process.

When grievances referred to adjudication involve certain issues under the *Canadian Human Rights Act*, adjudicators may determine that monetary relief is to be awarded. The Canadian Human Rights Commission (CHRC) must be notified of such grievances and has standing to make submissions to an adjudicator. In 2011-2012, a total of 131 grievance referrals were accompanied by notifications to the CHRC.

Figure 2, *Total Caseload - A Historical Perspective*, provides more information about the PSLRB's grievances, complaints and applications. Note that the cases in Figure 2 include new cases and those carried forward from previous years.

Complaints

Complaints may be filed under section 190 of the *PSLRA* for any of the following:

- the failure (by the employer, a bargaining agent or an employee) to observe terms and conditions of employment;
- the failure (by the employer, a bargaining agent or a deputy head) to bargain in good faith;
- the failure (by the employer or an employee organization) to implement provisions of a collective agreement or arbitral award; or
- the commission (by the employer, an employee organization or any person) of an unfair labour practice.

Historically, a smaller proportion of the PSLRB's overall active caseload has involved complaints, yet they consume a substantial amount of its time and resources either because of their complexity

or because they may involve self-represented complainants who may require assistance throughout the process.

Complaints against bargaining agents about failures to fairly represent members comprised 42% of the carried-forward complaints and more than half (51%) of this year's new cases. The PSLRB also hears complaints about reprisals under the *Canada Labour Code* (*CLC*).

More detailed information about the PSLRB's caseload, including a comparison with previous years, can be found in Appendix 2, Table 1 of this report.

As previously mentioned in this report, under the *Budget Implementation Act, 2009*, the PSLRB has the mandate to decide public service employee pay equity complaints that were before the CHRC. During the year, the PSLRB did not receive any new pay equity complaints under that Act.

Applications

Applications 2011-2012

- Total: 105 or 3% of all cases before the PSLRB
- Essential services agreement applications: 2
- Review of prior PSLRB decisions: 11
- Determination of management and confidential positions: 562
- Requests for extensions of time to file a grievance or to refer a grievance to adjudication: 77

Essential services are necessary for the safety and security of all or part of the Canadian public during a strike. When requested, the Board determines an employer's essential services, which some of its employees deliver during a strike. Those employees are members of specific bargaining units.

During the year, the PSLRB did not receive any certification or revocation of certification, or successor rights applications.

MEDIATION SERVICES

The PSLRB conducted 80 separate mediation interventions for grievances and complaints. As a result, 169 files referred to adjudication were resolved without hearings.

Case Mediation

Again this year, PSLRB mediation services provided the parties with an open, collaborative forum to resolve their disputes and spare them from more adversarial processes that could result in additional delays in resolving their issues and in strained relationships.

PSLRB mediators are impartial third parties without decision-making powers. They intervene in disputes and help parties explore the underlying reasons for their conflicts and reach mutually acceptable solutions. Mediators are either experienced, in-house professionals, or the PSLRB may appoint external mediators when required.

As mentioned earlier in this report, the PSLRB encourages the parties to engage in settlement discussions at adjudication. In some cases, adjudicators may also act as mediators and help the parties resolve matters while at adjudication.

Parties who voluntarily used mediation as an alternative have experienced considerable success. This past year, the PSLRB conducted 80 separate mediation interventions for grievances and complaints that been referred to the Board. As a result, 169 files referred to adjudication were resolved without hearings.

When resources permit, the PSLRB mediation services also handle cases not yet referred to adjudication. Those "preventive" mediations attempt to resolve disputes before a grievance or complaint is formally referred to adjudication, reducing the number of referrals to the PSLRB. In 2011-2012, in addition to the aforementioned interventions, the PSLRB Dispute Resolution Services (DRS) conducted 19 preventive mediations, all of which resulted in resolutions, meaning there were 31 fewer potential files that could otherwise have been brought before the PSLRB.

Collective Bargaining

The PSLRB also provides mediation support during collective bargaining when the parties are unable to make progress in their face-to-face negotiations. In 2011-2012, a new round of collective bargaining began. The negotiations were held over several months, and during the latter part of the fiscal year, the PSLRB's mediation assistance was requested for five files. While in all of those cases, the number of issues was reduced because of the parties' efforts during mediation, a tentative collective agreement was reached for only one of the files. As such, it is expected that the PSLRB's involvement will be requested throughout the new fiscal year.

Should the parties be unable to resolve their differences during face-to-face negotiations or with the assistance of a mediator, they may refer their disputes to the PSLRB for resolution. Under the *PSLRA*, bargaining agents may opt for either binding arbitration or conciliation, with the right to strike. If the parties choose the latter, a Public Interest Commission (PIC) would be set up. The DRS helps the Chairperson to set up and administer a PIC or an arbitration board.

A PIC is not a permanent body and comprises one or three members who are appointed by the responsible minister on the PSLRB Chairperson's recommendation. The PIC's findings and recommendations are not binding on the parties. In 2011-2012, the PSLRB received three new requests for conciliation.

Arbitration results in an arbitral award (i.e., a decision) that is legally binding on the parties and that precludes legal strike action. In 2011-2012, the PSLRB received nine new arbitration requests, in addition to one that had been carried over from the previous year. Two arbitral awards were issued; the others remain to be scheduled.

Mediation Training

In 2011-2012, the DRS delivered 11 interest-based negotiation and mediation courses. These sessions are designed for staff relations officers, union representatives, managers and supervisors, as well as those working in related fields such as employee assistance programs. The participants, a mix from both the management and the bargaining agent sides, were encouraged to share their conflict resolution views.

During the year, approximately 200 public servants participated in the two-and-a-half-day interactive courses, which enabled them to familiarize themselves with, and better understand the use of, interest-based approaches and mediation skills, which help to resolve workplace conflict and communication issues through role play.

PSLRB mediators also delivered presentations and special sessions, both within and outside the public service, to help build understanding of mediation as a dispute resolution mechanism and to provide insight into the PSLRB's mediation approach.

Compensation Analysis and Research Services (CARS)

The PSLRB is mandated to provide compensation information, obtained through market-based surveys, to employers and bargaining agents that participate in the federal public service collective bargaining process, as well as to other interested parties. The PSLRB's compensation data and research can also help arbitration boards and PICs make settlement recommendations.

Building upon its experience of the last several years, the CARS has consulted with the parties and worked collaboratively with other stakeholders and experts to finalize the methodology, tools and processes that will enable it to conduct its recurring national compensation comparability study.

Compensation Comparability Study

In 2011-2012, preparations continued for launching the PSLRB's next compensation comparability study. Some achievements during the year included developing the study's total compensation model, the questionnaire on benefits and working conditions, and the more than 80 benchmark job capsules, which have all been shared with the parties to obtain their input. The PSLRB also renewed its agreement with Statistics Canada for its assistance with ongoing updates of its study sample and the analysis and validation of the study data.

In 2012-2013, the PSLRB plans to launch the first wave of its Canada-wide *Comparability Study of Total Compensation in Canada*, based on data obtained through a census of provincial administration employers and a representative sample of municipal administrations with 1,000 employees or more. This will enable the CARS to assess its tools, process, and systems, including most of the study's benchmark job capsules, following which the CARS will be ready to fully deploy its activities.

Stakeholder Consultations

Following the conclusion of extensive consultations with the parties in spring 2011, the PSLRB continued to seek the parties' input on specific methodological aspects and tools and has kept them informed of the study's progress. This included milestones and related activities, such as the rollout strategy and related timeframes, the scope of the study and other stakeholder-involvement-related questions. The participation of the provincial and territorial governments is critical to the PSLRB's studies and of interest to the parties to bargaining. Those governments have expressed a need for a broader exchange of compensation information amongst themselves. They have also confirmed their agreement to pursue a mutually beneficial approach to meeting their compensation information requirements within the context of the PSLRB's national study.

In 2012-2013, the PSLRB plans to launch the first wave of its Canada-wide Comparability Study of Total Compensation in Canada.

Challenges and Opportunities

Case Management

An ongoing challenge for the PSLRB is to enhance its capacity to manage a robust and increasingly complex caseload that has grown from 1,200 cases a decade ago to nearly 6,000. This has a direct impact on the organization's ability to meet one of its key priorities: to effectively and efficiently deliver adjudication and mediation services and ultimately contribute to a productive workplace that is free from service disruptions.

An ongoing challenge for the PSLRB is to enhance its capacity to manage a robust and increasingly complex caseload that has grown from 1,200 cases a decade ago to nearly 6,000.

The PSLRB shifted its case management approach to use analytics and strong case management tools.

A variety of factors affect the PSLRB's ability to deliver its services as promptly and efficiently as it would like, including the availability of parties for hearings and requests for postponements and continuances.

To address these challenges, the PSLRB continued to devote considerable time and effort to implementing more streamlined, responsive and effective adjudication and mediation processes in consultation with the parties (i.e., employers and bargaining agents), particularly through its Client Consultation Committee, which convened three times during the year. The Committee focused on efficiently planning and managing the hearing process through initiatives such as reducing the paper burden during adjudications, finding solutions to deal with last-minute hearing postponements, which are unproductive and inefficient for the PSLRB, helping employers and bargaining agents achieve a common understanding of the way in which the PSLRB manages essential services agreements, and holding more expedited hearings.

Expedited adjudication, which enables certain grievances to be addressed without resorting to an oral hearing, is available to employers and bargaining agents. Either party may apply for expedited adjudication, but both must sign or have already signed a memorandum of understanding with the PSLRB. In the expedited process, the parties normally file an agreed statement of facts and no witnesses are heard. The parties agree that the decisions rendered are not precedent setting and that they will not be subject to judicial review. A verbal decision may be rendered at the hearing. A short written decision follows within five days. In 2011-2012, 17 new cases filed with the PSLRB requested expedited adjudication. Five cases were withdrawn before they were scheduled for expedited adjudication.

The PSLRB also shifted its case management approach to use analytics and strong case management tools to cater more specifically and efficiently to the needs of certain parties.

Some of the case management tools that were used to accelerate the completion of case files were holding pre-hearing conferences to deal with procedural matters upfront, organizing fact-finding meetings, and dealing with hearings through written submissions, when possible, or through early analysis of the underlying issues.

As over one-half of the PSLRB's workload has been filed by employees of the same occupational group, the organization established a special task force to address the particular needs of those parties, which is supported by a more robust and thorough case management system that will enable the PSLRB to cross-reference cases and deal with similar cases in a similar manner.

Information Management

Recognizing that information is a valuable resource that must be effectively managed to ensure that the PSLRB's clients and Canadians are properly served, enhancing the organization's Information Management (IM) framework remained a priority again this year. Key initiatives included establishing the necessary governance to ensure the project's success by creating an IM Advisory Committee with executive leadership and a working group to improve the knowledge of, and the involvement in, IM across the organization. The Committee reports to, and takes direction from, the IM Steering Committee. As part of its IM strategy, the PSLRB also determined that, in order to implement a sustainable IM framework, it needed to replace its electronic records and case management systems.

Significant progress was made during the year to implement the PSLRB's IM strategy and action plan. Initiatives included launching an IM awareness campaign, which involved providing IM training and tools to employees to help them better manage their information.

Shared Services

The PSLRB is committed to seeking opportunities to further enhance its efficiency and to introduce cost-saving measures whenever possible. This is particularly important in the current economic environment.

Of note, over the past few years, the PSLRB has engaged in partnerships with other tribunals to provide certain internal services. For example, the PSLRB currently provides information technology, web, finance, compensation and other human resources services to the Public Service Staffing Tribunal and other smaller tribunals, under formal shared services agreements.

Privacy and Openness

As a quasi-judicial tribunal that renders decisions on a broad range of labour relations matters in the federal public service, the Board operates very much like a court. As it is bound by the constitutionally protected open-court principle, it conducts its oral hearings in public, save for exceptional circumstances. This means that most information filed with it becomes part of a public record and is generally available to the public to support transparency, accountability and fairness.

The principles of administrative law require that the Board issue a written decision when deciding a matter. The decision is to include a summary of the evidence presented and the arguments of the parties, as well as an articulation of the supporting reasons. The *Protocol for the Use of Personal Information in Judgments*, approved by the PSLRB and endorsed by the Council of Canadian Administrative Tribunals, reflects the ongoing commitment of Board members to seek a balance between the open-court principle and the privacy expectations of individuals, in accordance with accepted legal principles, and to report in their decisions only that personal information that is relevant and necessary to the determination of the dispute. Also, documents filed as exhibits before a Board member that contain medical, financial or other sensitive information about a person may be sealed by order of a Board member, if appropriate. The PSLRB and other tribunals were granted intervenor status in a case before the Federal Court to argue those issues. The case was discontinued during the year in review.

The PSLRB's written decisions are available to the public in many ways. They may be consulted in its library. Most are published by specialized private publishers. Some are accessible on the Internet from publicly available databases. In addition, the full texts of decisions have been posted on the PSLRB website since 2000. As a means to balance the open-court principle and the privacy expectations of individuals availing themselves of their rights under the *PSLRA*, the PSLRB has voluntarily introduced measures that restrict global search engines from accessing full-text decisions posted on its website. It has also modified its website and administrative letters opening case files to notify individuals who initiate proceedings that its decisions are posted in their entirety on its website.

Judicial Review

On occasion, parties may apply for judicial review of a decision rendered either by an adjudicator or by the Board. Decisions of adjudicators are reviewed by the Federal Court; Board decisions are reviewed by the Federal Court of Appeal. See Appendix 3 for a summary of such applications from April 1, 2007 to March 31, 2012.

Notable Decisions

Decisions rendered by the Board or by its members in their roles as adjudicators contribute to the elaboration of jurisprudence in labour relations, specifically in the context of the federal public service, but more widely as well. Those decisions are final and binding on the parties and are subject only to judicial review under the *Federal Courts Act*. On average, of the total decisions sent for a judicial review, more than 85 percent of those issued by the PSLRB and its adjudicators are upheld. Overall, 98 percent of all decisions rendered stand as final decisions. Descriptions of several notable grievance and complaint decisions can be found in Appendix 4.

The PSLRB is committed to seeking opportunities to further enhance its efficiency and to introduce cost-saving measures whenever possible.

ORGANIZATIONAL CONTACT INFORMATION

Public Service Labour Relations Board
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Ottawa, Ontario, Canada
K1P 5V2

Tel: 613-990-1800
Toll-free: 866-931-3454
Fax: 613-990-1849

General:	Fax: 613-990-1849
Registry Operations and Policy:	Fax: 613-990-3927
Dispute Resolution Services:	Fax: 613-990-6685
Website:	www.pslrb-crtfp.gc.ca

Email address: mail.courrier@pslrb-crtfp.gc.ca

APPENDIX 1

Table 1: Number of Bargaining Units and Public Service Employees by Employer and Bargaining Agent April 1, 2011 to March 31, 2012*

Where the Treasury Board of Canada is the Employer

Bargaining agent	Number of bargaining units	Number of public service employees in non-excluded positions
Association of Canadian Financial Officers	1	4,219
Association of Justice Counsel	1	2,464
CAW - CANADA	1	6
CAW - CANADA, Local 2182	1	342
Canadian Association of Professional Employees	2	13,306
Canadian Federal Pilots Association	1	412
Canadian Merchant Service Guild	1	1,173
Canadian Military Colleges Faculty Association	1	204
Communications, Energy and Paperworkers Union of Canada, Local 588	1	10
Federal Government Dockyard Chargehands Association	1	77
Federal Government Dockyard Trades and Labour Council (East)	1	801
Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.)	1	824
International Brotherhood of Electrical Workers, Local 2228	1	1,142
Professional Association of Foreign Service Officers	1	1,320
Professional Institute of the Public Service of Canada	6	34,926
Public Service Alliance of Canada	5	108,827
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN	1	6,806
Total for the Treasury Board of Canada	**27**	**176,859**

Table 1: Number of Bargaining Units and Public Service Employees by Employer and Bargaining Agent April 1, 2011 to March 31, 2012*

Other Employers

Separate employers (by bargaining agent)	Number of bargaining units	Number of public service employees in non-excluded positions
CANADA REVENUE AGENCY		
Professional Institute of the Public Service of Canada	1	11,200
Public Service Alliance of Canada	1	32,000
Total	**2**	**43,200**
CANADIAN FOOD INSPECTION AGENCY		
Professional Institute of the Public Service of Canada	3	2,013
Public Service Alliance of Canada	1	4,614
Total	**4**	**6,627**
CANADIAN INSTITUTES OF HEALTH RESEARCH		
Public Service Alliance of Canada	1	16
Total	**1**	**16**
CANADIAN NUCLEAR SAFETY COMMISSION		
Professional Institute of the Public Service of Canada	1	755
Total	**1**	**755**
CANADIAN POLAR COMMISSION		
No bargaining agents	0	5
Total	**0**	**5**
CANADIAN SECURITY INTELLIGENCE SERVICE		
Public Service Alliance of Canada	1	163
Total	**1**	**163**
COMMUNICATIONS SECURITY ESTABLISHMENT CANADA		
Public Service Alliance of Canada	1	1,656
Total	**1**	**1,656**

Table 1: Number of Bargaining Units and Public Service Employees by Employer and Bargaining Agent April 1, 2011 to March 31, 2012*

Other Employers *(continued)*

Separate employers (by bargaining agent)	Number of bargaining units	Number of public service employees in non-excluded positions
FINANCIAL CONSUMER AGENCY OF CANADA		
No bargaining agents	0	63
Total	**0**	**63**
FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA		
No bargaining agents	0	363
Total	**0**	**363**
INDIAN OIL AND GAS CANADA		
No bargaining agents	0	85
Total	**0**	**85**
NATIONAL CAPITAL COMMISSION		
Public Service Alliance of Canada	1	442
Total	**1**	**442**
NATIONAL ENERGY BOARD		
Professional Institute of the Public Service of Canada	1	347
Total	**1**	**347**
NATIONAL FILM BOARD OF CANADA		
Canadian Union of Public Employees, Local 2656	2	104
Professional Institute of the Public Service of Canada	2	147
Syndicat général du cinéma et de la télévision, CUPE Local 9854	1	116
Total	**5**	**367**
NATIONAL RESEARCH COUNCIL CANADA		
Professional Institute of the Public Service of Canada	4	1,641
Research Council Employees' Association	6	2,056
Total	**10**	**3,697**

Table 1: Number of Bargaining Units and Public Service Employees by Employer and Bargaining Agent April 1, 2011 to March 31, 2012*

Other Employers *(continued)*

Separate employers (by bargaining agent)	Number of bargaining units	Number of public service employees in non-excluded positions
NATIONAL ROUND TABLE ON THE ENVIRONMENT AND THE ECONOMY		
No bargaining agents	0	33
Total	**0**	**33**
NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA		
No bargaining agents	0	416
Total	**0**	**416**
NORTHERN PIPELINE AGENCY		
No bargaining agents	0	40
Total	**0**	**40**
OFFICE OF THE AUDITOR GENERAL OF CANADA		
Public Service Alliance of Canada	1	180
Total	**1**	**180**
OFFICE OF THE CORRECTIONAL INVESTIGATOR		
No bargaining agents	0	32
Total	**0**	**32**
OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS		
Professional Institute of the Public Service of Canada	1	465
Public Service Alliance of Canada	1	25
Total	**2**	**490**
PARKS CANADA AGENCY		
Public Service Alliance of Canada	1	4,799
Total	**1**	**4,799**
SECURITY INTELLIGENCE REVIEW COMMITTEE		
No bargaining agents	0	0
Total	**0**	**0**

Table 1: Number of Bargaining Units and Public Service Employees by Employer and Bargaining Agent April 1, 2011 to March 31, 2012*

Other Employers *(continued)*

Separate employers (by bargaining agent)	Number of bargaining units	Number of public service employees in non-excluded positions
SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA		
Public Service Alliance of Canada	2	220
Total	**2**	**220**
STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES		
Public Service Alliance of Canada	11	713
United Food and Commercial Workers Union	12	652
Total	**23**	**1,365**
STATISTICS SURVEY OPERATIONS		
Public Service Alliance of Canada	2	2,509
Total	**2**	**2,509**
Total for other employers	**58**	**67,870**
Total from the Treasury Board	**27**	**176,859**
Total for all employers	**85**	**244,729**

*The figures in Table 1 were provided by the employers.

Table 2: Number of Bargaining Units and Public Service Employees by Bargaining Agent April 1, 2011 to March 31, 2012*

Certified bargaining agent	Number of bargaining units	Number of public service employees in non-excluded positions
Association of Canadian Financial Officers	1	4,603
Association of Justice Counsel	1	2,850
CAW - CANADA	1	6
CAW - CANADA, Local 2182	1	350
Canadian Association of Professional Employees	2	13,891
Canadian Federal Pilots Association	2	409
Canadian Merchant Service Guild	1	1,121
Canadian Military Colleges Faculty Association	1	208
Canadian Union of Public Employees, Local 2656	1	100
Communications, Energy and Paperworkers Union of Canada, Local 588	1	27
Federal Government Dockyard Chargehands Association	1	73
Federal Government Dockyard Trades and Labour Council (East)	1	831
Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.)	1	958
International Brotherhood of Electrical Workers, Local 2228	1	1,144
Professional Association of Foreign Service Officers	1	1,383
Professional Institute of the Public Service of Canada	19	54,863
Public Service Alliance of Canada	29	150,086
Research Council Employees' Association	6	1,889
Syndicat général du cinéma et de la télévision, CUPE Local 4835	1	124
United Food and Commercial Workers Union, Local 175	6	340
United Food and Commercial Workers Union, Local 864	3	240
United Food and Commercial Workers Union, Local 1518	2	100
United Food and Commercial Workers Union, Local 1400	1	5
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN	1	7,252
Total	**85**	**242,853****

* The figures in Table 2 were provided by the bargaining agents.

** The total in Table 2 does not equal the 244,729 employees indicated in Table 1 (from the Treasury Board and separate employers) because 1,876 of the employees included in Table 1 were not represented by a bargaining agent or were not tabulated in their calculations.

APPENDIX 2

Table 1: Grievances, Complaints and Applications Before the Public Service Labour Relations Board 2011-2012

	Number of cases brought forward from previous years	Number of new cases received	Total number of cases	Number of cases closed (includes cases settled, withdrawn and decided)		Number of cases carried forward to 2012-2013	Decisions or orders
				Settled & withdrawn	Decided		
Individual	3,574	1,606	5,180	1,146	149	3,885	69
Group	36	34	70	11	0	59	0
Policy	19	8	27	5	9	13	9
Total grievances	**3,629**	**1,648**	**5,277**	**1,320**		**3,957**	**78**
Complaints of unfair labour practices – DFR	32	26	58	30	38	38	26
– Other	74	25	99			51	
Complaints under the *Canada Labour Code*	25	8	33	2	0	31	0
Total complaints	**131**	**59**	**190**	**70**		**120**	**26**
Request to file certified copy of order with Federal Court	1	0	1		1	0	1
Certifications	0	1	1		0	1	0
Revocations of certification	0	0	0		0	0	0
Determination of successor rights	0	0	0		0	0	0
Membership in a bargaining unit	7	3	10		4	6	0
Designation of essential services positions	4	2	6		0	6	1
Applications for review of Board decisions	6	5	11		10	1	22
Requests for extension of time	28	49	77		20	57	4
Subtotal applications[1]	**46**	**60**	**106**		**35**	**71**	**28**
Determination of management and confidential positions	303	259	562		162	400	286[2]
TOTAL	**4,109**	**2,026**	**6,135**		**1,587**	**4,548**	**132**[3]

[1] This subtotal excludes the work done on managerial and confidential exclusion proposals.

[2] In all cases, the determinations were made by an order rendered by the PSLRB on consent.

[3] This reflects the decisions for which citation numbers were assigned.

APPENDIX 3

Synopsis of Applications for Judicial Review of Decisions

April 1, 2007, to March 31, 2012

	Decisions rendered[1]	Number of applications	Applications withdrawn	Applications dismissed	Applications allowed	Applications pending[2]	Appeals of applications pending[3]
YEAR 1 (April 1, 2007 to March 31, 2008)	112	23	8	9	6	0	0
YEAR 2 (April 1, 2008 to March 31, 2009)	114	24	4	18	2	0	0
YEAR 3 (April 1, 2009 to March 31, 2010)	183	30	11	16	3	0	0
YEAR 4 (April 1, 2010 to March 31, 2011)	126	25	1	10	7	7	4
YEAR 5 (April 1, 2011 to March 31, 2012)	150	27	4	2	0	21	0
TOTAL	**685**	**129**	**28**	**55**	**18**	**28**	**4**

Note: The figures for the last four fiscal years are not final, as not all the judicial review applications filed in those years have made their way through the court system.

[1] Decisions rendered do not include cases dealt with under the expedited adjudication process and managerial exclusion orders issued by the Board upon consent of the parties.

[2] Applications that have yet to be dealt with by the Federal Court. Does not include appeals pending before the Federal Court of Appeal or the Supreme Court of Canada.

[3] Results of appeals disposed of have been integrated into the statistics in this table.

NOTABLE PUBLIC SERVICE LABOUR RELATIONS BOARD DECISIONS

From year to year, different issues come to the fore. In addition, the federal courts render decisions on cases reviewed earlier in the Board's annual reports. These notable decisions provide a glimpse of the state of the law for some interesting issues as of March 31, 2012.

Essential Services Agreements

Last year's report dealt with ***Public Service Alliance of Canada v. Treasury Board***, 2010 PSLRB 88, in which the Board considered the extent to which it could review an employer decision to set the level of essential services at 100%. Note that, pursuant to section 120 of the *Public Service Labour Relations Act* ("the Act"), the employer has the exclusive authority to determine the level at which an essential service is provided to the public.

The Board found that circumstances could occur under which it would be appropriate to review the exercise of that discretion. The purpose of such a review would not be to substitute another determination of the level of service; it would be limited to determining whether any circumstances existed that vitiated the employer's determination of the level of service as an abuse of authority. A review would be an unusual and exceptional occurrence. The Board held that section 36 of the Act provided it with the authority to conduct such a review and that the authority was rationally related and necessary to the Act's object of maintaining effective labour-management relations. The Board added that setting certain administrative parameters within which the employer was to exercise its exclusive right under section 120, and requiring the employer to disclose information about how it set the level of service, did not limit or derogate from that exclusive right.

The Federal Court of Appeal, in ***Canada (Attorney General) v. Public Service Alliance of Canada***, 2011 FCA 257, found that the Board's decision was reasonable, deeming the Board's reasons "thoughtful and thorough." The Court confirmed that the Board had the statutory authority to review the employer's decision on the level of essential service to ensure that no abuse of authority occurred.

In another decision dealing with the disclosure of information in matters of essential services, namely, ***Public Service Alliance of Canada v. Treasury Board***, 2011 PSLRB 102, the bargaining agent requested that the Board order the employer to disclose information about its determination of the level at which the essential services would be provided to the public in the event of a strike. In an earlier decision (2009 PSLRB 55), the Board already defined the essential services and directed the employer to determine the level at which they would be delivered. The employer replied that it would establish "…the level of service at 100% of the 77% spent on the delivery of essential services." The bargaining agent then requested that the employer disclose all documentation related to its decision. Relying on the Board's decision in 2010 PSLRB 88, the Board ruled that it had the power under section 36 of the Act to consider an allegation that an employer violated a principle of administrative law or due process in the exercise of its exclusive authority under section 120 to set the level of service.

It followed that the Board had jurisdiction to issue a disclosure order and that it could rule on a request for the disclosure of relevant documents. The Board held that the applicant was not required to substantiate a formal allegation that the respondent abused its discretionary authority under section 120 of the Act as a condition to the Board addressing a disclosure issue. In proceedings related to the drafting of an essential services agreement, the Board exercises a continuing supervisory role over the collective bargaining process. To exercise the power granted to it under paragraph 40(1)(*h*), the Board need only be satisfied that the information is arguably relevant to the respondent's determination of the level of service. In such circumstances, issuing a disclosure order was consistent with the Board's administrative authority under section 36 and with the purposes of the Act.

Bargaining Agent Activity

In ***Public Service Alliance of Canada v. Treasury Board***, 2011 PSLRB 106, the employer issued a directive denying the posting of a bargaining agent's petition on the employer's bulletin boards, the distribution of the petition via the employer's electronic networks, the placing of bargaining agent stickers on the employer's equipment and the wearing of bargaining agent stickers by employees directly serving the public. The bargaining agent filed a grievance alleging that the directive violated the use-of-employer-facilities and no-discrimination clauses of a number of collective agreements.

In allowing the grievance in part, the adjudicator found that denying the posting of the petition on the employer's bulletin boards violated the use-of-employer-facilities clauses of the collective agreements as the content of the petition was not adverse to the employer's interests. The adjudicator also found that denying the distribution of the petition via the employer's electronic networks and denying the placing of bargaining agent stickers on the employer's equipment did not contravene the collective agreements. Finally, the adjudicator found that denying the wearing of bargaining agent stickers by employees directly serving the public contravened the no-discrimination clauses of the collective agreements and that it prevented employees from participating in a legitimate bargaining agent activity because the message on the stickers was not derogatory or damaging to the employer's reputation.

Policy Grievances

In ***Association of Justice Counsel v. Treasury Board***, 2011 PSLRB 135, the bargaining agent filed a policy grievance challenging the obligation on certain legal counsel to be on standby without pay on Friday evenings and weekends.

The collective agreement contained no standby pay provisions. However, before the current collective agreement was signed, standby duty was voluntary and was compensated. The employer objected to an adjudicator's jurisdiction to rule on the grievance since it involved neither an interpretation of the collective agreement nor the content of an arbitral award.

The adjudicator found that the policy was neither expressly nor implicitly part of the collective agreement. The employer informed the bargaining agent of the change in standby pay policy during collective bargaining between the parties, but the bargaining agent did not raise the issue of compensation for standby pay at the bargaining table. Therefore, the bargaining agent abdicated its right to claim standby pay. The objection to jurisdiction was allowed, and the file was closed. An application for judicial review was filed before the Federal Court and is pending (Court File No.: T-136-12).

Recusals

In ***Exeter v. Deputy Head (Statistics Canada)***, 2012 PSLRB 24, the applicant requested that the Board exercise its powers under section 36 of the Act to remove the adjudicator seized of her grievances and to refer them to another adjudicator.

The applicant alleged that the adjudicator had a personal interest in the outcome of her grievances. In dismissing the grievance, the Board found that it had no jurisdiction under section 36 to remove an adjudicator from hearing a grievance with which he or she was seized. The Board found further that, if it had that power, it would be more appropriate to let the adjudicator decide what was basically a request for recusal.

In the follow-up decision, ***Exeter v. Deputy Head (Statistics Canada)***, 2012 PSLRB 25, the grievor entered into a settlement agreement with the deputy head for nine disciplinary grievances, a duty-of-fair-representation complaint against her bargaining agent, a staffing complaint against her employer and a human rights complaint against her employer.

The grievor first sought the enforcement of the settlement agreement, alleging that the deputy head did not comply with it. The grievor later sought to void the settlement agreement, alleging that she had signed it under duress. The grievor further alleged that the adjudicator should not decide her applications, alleging that the adjudicator had a personal interest in the outcome of her cases.

The adjudicator found no cogent reasons supporting an allegation of reasonable apprehension of bias and denied the request for recusal. The adjudicator found further that the grievor was represented by counsel when she entered into the settlement agreement with the deputy head and that the agreement was final and binding on the grievor and on the deputy head. Applying ***Amos v. Canada (Attorney General)***, 2011 FCA 38, the adjudicator found that she had jurisdiction to determine whether either party complied with the settlement agreement, as far as the nine disciplinary grievances were concerned, and to order an appropriate remedy, if necessary. The adjudicator found that, in this case, the grievor failed to comply with the terms of the settlement agreement by not withdrawing her grievances. The appropriate remedy was to dismiss the grievances and order the files closed.

Damages

Last year's report detailed that Board adjudicators had rendered two decisions dealing mainly with damages, ***Tipple v. Deputy Head (Department of Public Works and Government Services)***, 2010 PSLRB 83, and ***Robitaille v. Deputy Head (Department of Transport)***, 2010 PSLRB 70. The Federal Court rendered its decisions on the judicial reviews of those decisions.

In ***Canada (Attorney General) v. Tipple***, 2011 FC 762, the Court found that the damages awarded for psychological injury were excessive. Although some evidence supported an award for such damages, the reasons did not clearly explain the calculations for the amount awarded. With respect to the award for a loss of reputation, the Court found that the employer had no duty to protect the grievor's reputation, since it had not given any such assurances. Nor did the employer attack the grievor's reputation. Therefore, the grievor was not entitled to those damages. On the issue of damages for obstruction of process based on the employer's failure to follow through on an order of disclosure, the Court found that it was, in essence, an improper award of costs, for which the adjudicator had no jurisdiction. The Court specifically confirmed that the remedial powers granted under subsection 228(2) of the Act did not include the authority to award costs, since costs are not remedial.

In ***Canada (Attorney General) v. Robitaille***, 2011 FC 1218, the Court found that the adjudicator did not have the power to order legal costs since she could not do indirectly what the Act did not authorize her to do. However, the Court confirmed that the adjudicator had the authority to award compensatory damages, including damages to cover the loss of career advancement and punitive damages.

Both decisions are under appeal at the Federal Court of Appeal.

In ***Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)***, 2011 PSLRB 110, the grievor's term employment was terminated, allegedly due to budgetary reasons. He grieved the termination, alleging that the employer discriminated against him and that it failed to accommodate his hearing disability. The adjudicator allowed the grievance in part in 2011 PSLRB 33. The adjudicator determined that, although the decision to terminate was not tainted by discrimination, the grievor nonetheless was discriminated against, and the employer failed to accommodate him. The parties did not agree on a remedy, and a hearing was held to determine the appropriate remedy.

The grievor sought damages for pain and suffering under paragraph 53(2)(*e*) of the *Canadian Human Rights Act* (*CHRA*), special compensation under subsection 53(3) of the same statute as well as several systemic remedies in accordance with subsection 226(1) of the Act.

On the issue of remedies, the adjudicator rejected the employer's argument that he had no jurisdiction to order any remedies other than damages and compensation under paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. Accepting the employer's argument would have meant that an adjudicator's powers to order remedies in human rights cases would be more limited than for other types of grievances. It could not have been the intention of the legislator to force employees to pursue grievances and complaints under both the *CHRA* and the Act.

The seriousness of the psychological impact that the discrimination or the failure to accommodate had on the complainant is the main factor to consider when determining the amount of damages to award under the *CHRA*. Therefore, the adjudicator ordered the employer to pay the grievor $10,000 for pain and suffering. He also ordered special compensation of $17,500 as the employer acted recklessly over a period of three years, was a large and sophisticated entity and was aware of its accommodation obligation. The adjudicator also awarded the grievor interest on the payments for pain and suffering and for special compensation. However, the adjudicator refused to order compensation for family counselling expenses since no receipt was provided and since there was no evidence that the employer's failure to accommodate caused him to use those services. The adjudicator also refused to order a revision of the accommodation policy or to mandate training for employees and managers.

Applications for judicial review before the Federal Court are pending (Court File Nos.: T-1669-11 and T-1657-11).

Whistle-blowing

In ***Chopra et al. v. Treasury Board (Department of Health)***, 2011 PSLRB 99, three grievors referred several grievances to adjudication following suspensions for not carrying out work as instructed by the employer, for speaking to the media without proper authorization and for the termination of their employment for insubordination.

The five grievances against suspensions for not carrying out work were dismissed as the adjudicator found that the grievors' behaviour amounted to insubordination. The grievances against suspensions for speaking to the media were dismissed. The adjudicator found that the grievors did not establish that their right to speak out took precedence

over their duty of loyalty. The grievors' interventions in the media were alarmist, did not convey new information and did not fall within the exceptions defined in ***Fraser v. P.S.S.R.B.***, [1985] 2 S.C.R. 455.

Two grievances against termination for insubordination were dismissed. The adjudicator found that the grievors refused to work and that the employer was justified in terminating their employment.

One grievance against the termination for insubordination was allowed.

Applications for judicial review before the Federal Court are pending (Court File Nos.: T-2027-11, T-2028-11, T-2029-11, T-2030-11, T-2031-11, T-2032-11 and T-2033-11).

Other Employers

A great number of the cases decided by the Board or by adjudicators are covered by the *Public Service Employment Act*, but not all. Some separate employers have their own employment legislation, a situation that lends itself to challenges in statutory construction.

Boutziouvis v. Financial Transactions and Reports Analysis Centre of Canada, 2010 PSLRB 135, was covered in the last two annual reports. It was noted that, under the Financial Transactions and Reports Analysis Centre of Canada's (FINTRAC) enabling statute, the FINTRAC can terminate employment "otherwise than for cause." Even so, the adjudicator ruled that the statute did not import common-law employment contract principles into the employer-employee relationship. The employer could not terminate employment at will other than for cause. The employee established that the termination was disciplinary and thus adjudicable. The adjudicator found that the employer did not show that the discipline was justified and reinstated the grievor.

An application for judicial review before the Federal Court was allowed in ***Financial Transactions and Reports Analysis Centre of Canada v. Boutziouvis***, 2011 FC 1300. On the standard of correctness, the Court found that the adjudicator erred because, when read as a whole, section 49 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* encompasses the power to terminate employment other than for cause. Therefore, the separate agency was entitled to terminate the employee's employment on payment in lieu of reasonable notice.

The Court found further that, were it wrong on the first issue, on the standard of reasonableness, the adjudicator did not err in his decision because the evidence presented to the adjudicator inescapably led to a finding that discipline was the primary reason for termination.

Note that an application for judicial review is pending before the Federal Court (Court File No.: T-319-11) and that an appeal is pending before the Federal Court of Appeal (Court File No.: A-472-11).

Mediation

In ***Zeswick v. Deputy Head (Correctional Service of Canada)***, 2012 PSLRB 8, in determining that a settlement agreement was final and binding, the adjudicator commented on the extent and meaning of section 243 of the Act. Specifically, the adjudicator found that mediators cannot be compelled under the Act to give evidence because Parliament has decided that mediators are not compellable witnesses with respect to information they receive and distribute in the discharge of their duties as mediators. The adjudicator stated as follows:

> *...Indeed, it is the nature of mediation (and negotiation) that various approaches and results are canvassed by the mediator (or even the parties) with the objective of finding a basis of agreement. What ends up being the final agreement can be based on very different considerations than some of the discussions during the mediation process. Parliament has obviously recognized the value of this process and, as a result of section 243 of the new Act, the parties cannot compel a mediator to give evidence about what was said.*

Discrimination

In ***Association of Justice Counsel v. Treasury Board***, 2012 PSLRB 32, the bargaining agent grieved the application of the performance pay provisions of the collective agreement as it applied to a parent taking maternity or parental leave. The bargaining agent argued that in-range progression by performance pay was a pay increment as per the collective agreement. The employer's policy stated that employees absent during part of the review period were eligible for a pro-rated performance increase if, in the year being evaluated, they performed their duties long enough to permit a meaningful evaluation of their performance.

The adjudicator found that the performance pay provisions did not contradict the collective agreement. Indeed, in-range progression by performance pay is not the same as a pay increment, because a pay increment is a quasi-automatic progression that occurs at a set date, by a pre-set amount. On the other hand, in-range performance increases and performance awards are compensation to reward performance. Only those employees who went on leave without pay and who worked long enough to permit an evaluation of their performances were eligible to be paid performance pay on a pro-rated basis.

The adjudicator stated that, when determining whether discrimination occurred, a comparative analysis is required. The comparator group in this case was employees on leave without pay. The adjudicator found that, with respect to performance pay, employees on leave without pay are treated the same as employees on maternity or parental leave. The adjudicator further acknowledged that a distinction must be made between plans or benefits that are compensatory and non-compensatory, as well as between seniority-driven and work-driven benefits. The adjudicator held that, as performance pay is a compensatory and work-driven benefit, the employer did not discriminate against employees on maternity or parental leave by pro-rating their performance pay. Thus, the grievance was denied.

Note that an application for judicial review before the Federal Court is pending (Court File No.: T-751-12).

Other follow-ups of Board and Federal Courts' Decisions

An important component of Legal Services' work is staying current with the courts' pronouncements on the Board's decisions.

Note first that last year's report dealt with ***Lâm v. Attorney General of Canada***, 2010 FCA 222, and noted that the Federal Court of Appeal ruled that the adjudicator failed to allow the parties to make submissions about the appropriate remedy and added a comment about the existing case law as to whether reinstatement was the only remedy available.

In ***Lâm v. Deputy Head (Public Health Agency of Canada)***, 2011 PSLRB 137, upon hearing the matter for the purposes of determining the appropriate remedy, the adjudicator found that she had jurisdiction to order compensation in lieu of reinstatement in circumstances in which reinstatement has no reasonable chances of success. She found that the grievor's reinstatement was not viable in the circumstances and ordered the hearing resumed to determine the appropriate remedy to compensate the grievor for the loss of her employment. Note that, unless the parties reach an agreement, a hearing will be called to determine the appropriate remedy.

Finally, the Federal Court of Appeal ruled in ***Bernard v. Canada (Attorney General)***, 2012 FCA 92. In an earlier decision, the Court asked the Board to determine the types of information that the employer must provide to the bargaining agent without violating employees' rights under the *Privacy Act* (2010 FCA 40). The Board went through such an exercise in ***Professional Institute of the Public Service of Canada v. Canada Revenue Agency***, 2011 PSLRB 34. The Privacy Commissioner was an intervenor before the Board in that process.

In reviewing the exercise, the Federal Court of Appeal found that the Board's task was to apply paragraph 8(2)(*a*) of the *Privacy Act* in a manner that struck an appropriate balance between the employee's statutory privacy rights and a bargaining agent's responsibilities under the Act. Since a bargaining agent's ability to directly and quickly contact employees in the bargaining unit is integral to the discharge of its duties of fair representation, it was appropriate for the Board to find that the bargaining agent must be able to contact employees at home. The Board's finding that no other means of communication were adequate in the circumstances was reasonable.