Labour and Employment Board

Annual Report
2015–2016

New Nouveau Brunswick

Labour and Employment Board
April 1, 2015 – March 31, 2016

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

ISBN 978-1-4605-1096-4
ISSN 1206-2715

10865 | October 2016 | Printed in New Brunswick

Transmittal letters

To the Honourable Jocelyne Roy Vienneau

Lieutenant-Governor of the Province of New Brunswick

May it please Your Honour:

The undersigned respectfully submits the accompanying report on behalf of the Labour and Employment Board from April 1, 2015 to March 31, 2016.

Respectfully submitted,

Donald Arseneault
Minister of Post-Secondary Education,
Training and Labour

To the Honourable Donald Arseneault

Minister of Post-Secondary Education,
Training and Labour

Sir:

I have the honour to submit the 21st Annual Report of the Labour and Employment Board for the period of April 1, 2015 to March 31, 2016 as required by Section 14 of the *Labour and Employment Board Act*, Chapter L-0.01, R.S.N.B.

Respectfully submitted,

George P.L. Filliter, Q.C.
Chairperson

Table of contents

I - Introduction

The following general comments are intended to provide the reader an understanding of the role and responsibilities of the Labour and Employment Board.

This Board was created through the proclamation of the *Labour and Employment Board Act*, Chapter L-0.01, R.S.N.B. in November 1994. It represents the merger of four (4) former Tribunals, each of which was responsible for the administration of a specific Act. Consequently, the Labour and Employment Board performs the duties and functions required under the *Industrial Relations Act*; the *Public Service Labour Relations Act*; the *Employment Standards Act* and the *Pension Benefits Act*, and since 1996, may act as a Board of Inquiry under the *Human Rights Act*. Since December 2001, the Board is responsible for the administration of the *Fisheries Bargaining Act*, and in July 2008, the Board was given responsibility over a complaints procedure in the *Public Interest Disclosure Act*. Since May 2009, the Board is also responsible for the administration of the *Essential Services in Nursing Homes Act*, and since April 2010, it is responsible for appointing arbitrators pursuant to the *Pay Equity Act, 2009*.

The membership of the Labour and Employment Board typically consists of a full-time chairperson; a number of part-time vice-chairpersons; and sixteen (16) members equally representative of employees and employers. To determine the various applications/complaints filed under the above statutes, the Board conducts numerous formal hearings at its offices in Fredericton as well as other centers throughout the province. At the discretion of the chairperson, these hearings are conducted either by the chairperson or a vice-chairperson sitting alone, or by a panel of three persons consisting of the chairperson or a vice-chairperson along with one member representative of employees and one member representative of employers.

The *Industrial Relations Act* sets out the right of an employee in the private sector to become a member of a trade union and to participate in its legal activities without fear of retaliation from an employer. The Board has the power to certify a trade union as the exclusive bargaining agent for a defined group of employees of a particular employer and may order a representation vote among the employees to determine whether a majority wish to be represented by the trade union. Following certification, both the trade union and the employer have a legal responsibility to meet and to begin bargaining in good faith for the conclusion of a collective agreement which sets out the terms and conditions of employment for that defined group of employees for a specified period of time.

Generally, therefore, the Board will entertain applications for: certification or decertification and in either instance, the Board may order a representation vote to determine the wishes of the majority of the employees; the effect of a sale of a business on the relationship between the new employer and the trade union; the determination of work jurisdiction disputes between two trade unions, particularly in the construction industry; complaints of unfair practice where one party alleges another party has acted contrary to the *Act*, often leading the Board to order the immediate cessation of the violation and the reinstatement of employee(s) to their former position with no loss of wages should the Board determine that a suspension, dismissal and/or layoff is a result of an anti-union sentiment by the employer.

The Board has similar responsibilities under the *Public Service Labour Relations Act* which affects all government employees employed in government departments, schools, hospital corporations and crown corporations. In addition to these functions, the Board oversees and determines, if required, the level of essential services which must be maintained by the employees in a particular bargaining unit in the event of strike action for the health, safety or security of the public. The Board is responsible for the appointments of neutral third parties, such as conciliation officers, to assist the parties in concluding a collective agreement. Excluding crown corporations, there are currently 24 collective agreements affecting more than 40,000 employees in the New Brunswick public sector.

With the *Essential Services in Nursing Homes Act*, the Board administers an essential services scheme similar to that outlined in the *Public Service Labour Relations Act*, but which applies to unionized private sector nursing home employees, excluding registered nurses.

The Board has a differing role under the *Employment Standards Act* and the *Pension Benefits Act*. Whereas applications and/or complaints arising under the *Industrial Relations Act* and the *Public Service Labour Relations Act* are filed directly with the Board for processing, inquiry and ultimately, determination, the Board will hear referrals arising from administrative decisions made by the Director or the Superintendent under the *Employment Standards Act* and the *Pension Benefits Act*, respectively. The Board has the discretion to affirm, vary or substitute the earlier administrative decision of the Director of Employment Standards. The *Employment Standards Act* provides for minimum standards applicable to employment relationships in the province, such as minimum and overtime wage rates, vacation pay, paid public holiday, maternity leave, child care leave, etc. Under the *Pension Benefits Act*, where a party has appealed a decision of the Superintendent to the Financial and Consumer Services Tribunal, the Tribunal may refer to the Board a question of law or of mixed fact and law involving labour or employment law. The Board's determination of that question becomes part of the Tribunal's decision.

The *Human Rights Act* is administered by the New Brunswick Human Rights Commission which investigates and conciliates formal complaints of alleged discrimination because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity. If a settlement cannot be negotiated, the Human Rights Commission can refer complaints to the Labour and Employment Board for it to act as a Board of Inquiry, hold formal hearings and render a decision.

The *Public Interest Disclosure Act* is generally administered by the Ombudsman. However, where an employee or former employee alleges that a reprisal has been taken against him or her relating to a disclosure under the *Public Interest Disclosure Act*, such complaint is filed with the Board, who may appoint an adjudicator to deal with the complaint.

Under the *Pay Equity Act, 2009*, the Board is responsible for appointing arbitrators, upon application, to deal with matters in dispute relating to the implementation of pay equity in the public sector.

With the exception of the *Public Interest Disclosure* Act and the *Pay Equity Act, 2009*, each of the statutes for which the Board has jurisdiction provides that all decisions of the Board are final and binding on the parties affected. The Courts have generally held that they should defer to the decisions of administrative boards except where boards exceed their jurisdiction, make an unreasonable decision or fail to apply the principles of natural justice or procedural fairness.

II - Mission statement

The mission of the Board arises out of the nine (9) statutes which provide the basis for its jurisdiction:

- Administer the *Industrial Relations Act,* the *Public Service Labour Relations Act,* the *Fisheries Bargaining Act* and the *Essential Services in Nursing Homes Act* by holding formal hearings on the various applications/ complaints filed and rendering written decisions.
- Administer fairly and impartially the referral processes in relation to decisions made by the administrators of the *Employment Standards Act* and the *Pension Benefits Act* by holding formal hearings and rendering written decisions.
- Act as a Board of Inquiry arising from a complaint filed under the *Human Rights Act* when such complaint is referred to the Board for determination through a formal hearing process.
- Administer the process relating to complaints of reprisals made pursuant to the *Public Interest Disclosure Act*, and appoint adjudicators where appropriate to hold hearings and render written decisions.
- Appoint arbitrators, pursuant to the *Pay Equity Act, 2009*, to deal with matters in dispute relating to the implementation of pay equity in the public sector.
- Enhance collective bargaining and constructive employer-employee relations, reduce conflict and facilitate labour-management cooperation and the fair resolution of disputes.

III - Message from the Chairperson

It is a pleasure for me to submit the 21st annual report of the Labour and Employment Board for the period of April 1, 2015 to March 31, 2016.

The Labour and Employment Board is established by virtue of the *Labour and Employment Board Act* and is mandated legislative authority to administer and adjudicate matters under the *Industrial Relations Act*, the *Public Service Labour Relations Act*, the *Employment Standards Act*, the *Pension Benefits Act*, the *Human Rights Act*, the *Fisheries Bargaining Act*, and the *Essential Services in Nursing Homes Act*. The Board also exercises a complaint administration and adjudicative appointment jurisdiction under the *Public Interest Disclosure Act*, and an arbitral appointment jurisdiction under the *Pay Equity Act, 2009*.

The total number of matters filed with the Board during this fiscal year was 81, up from the previous year. Many of these matters were resolved with the assistance of the executive staff, with the oversight of the Board. Those that were not so resolved were scheduled for determination by the Board, resulting in 33 days of hearing. The Board's system of pre-hearing conferences has continued to result in a full resolution of many matters, and the limitation of the number of issues to be determined in others.

During the year the Board disposed of a total of 93 matters. In so doing there were 24 written decisions released by the Board.

Under the *Public Service Labour Relations Act*, where the Board, in addition to its adjudicative function, is charged with authority for collective bargaining, designations, deadlocks, strikes and lockouts, the Board entertained a number of requests, including three (3) appointments of a Conciliation Officer and five (5) appointments of a Commissioner.

Hearings before the Board are conducted either by the Chairperson or a Vice-Chairperson sitting alone, or alternatively by a panel consisting of the Chairperson or a Vice-Chairperson along with one member representative of employees and one member representative of employers. During the last several years, the number of hearings conducted by three member panels has steadily declined. The decision as to whether or not to appoint a panel rests in the office of the Chairperson and various criteria are considered. However, in any matter in which a party specifically requests that it be heard by a tripartite panel, the Board will normally accede to the request.

The Board in all cases seeks to ensure that the use of its pre-hearing resolution and case management processes are maximized, hearing days are kept to a minimum, hearings are conducted in a balanced and efficient manner, and decisions are issued in a timely way.

In addition to its ongoing Consultation Committees, the Board intends to continue its Advisory Committee comprised of legal representatives on behalf of management and labour. The mandate of this Committee, expected to meet with the Board Chair and the Board's Legal Officer yearly, is to act as a resource to and from the Board regarding (1) Board practices; (2) Board Policies and Rules; and (3) Board Practice Directives.

As Chair, I continue to teach on a part-time basis at UNB Law School, and remain active speaking at various national conferences.

In closing, I want to take this opportunity to express my continuing appreciation to all members of the Board, as well as our administrative and professional staff, for their dedication and service.

George P.L. Filliter
Chairperson

IV - Composition of the Labour and Employment Board

Chairperson – George P.L. Filliter, Q.C.
Alternate Chairperson – Geoffrey L. Bladon

Vice-Chairpersons
Brian D. Bruce, Q.C. (Fredericton)
Annie Daneault (Grand Falls)
Jean-François Carrier (Edmundston)
Donald MacLean (Moncton)
John McEvoy, Q.C. (Fredericton)
Danielle Haché (Lamèque)
Robert D. Breen, Q.C. (Fredericton)*
James A. Whelly (Saint John)*
Elizabeth MacPherson (Grand Barachois)*
Cheryl G. Johnson (Saint John)*
J. Kitty Maurey (Fredericton)*
Marylène Pilote, Q.C. (Edmundston)*
Isabelle Paulin (Tracadie-Sheila)*

Members representing Employer interests
Stephen Beatteay (Saint John)**
Gloria Clark (Saint John)**
Gerald Cluney (Moncton)
William Dixon (Moncton)
Doug Homer (Fredericton)**
Jean-Guy Lirette (Shediac)**
Bob Sleva (Saint John)**
Marco Gagnon (Grand Falls)

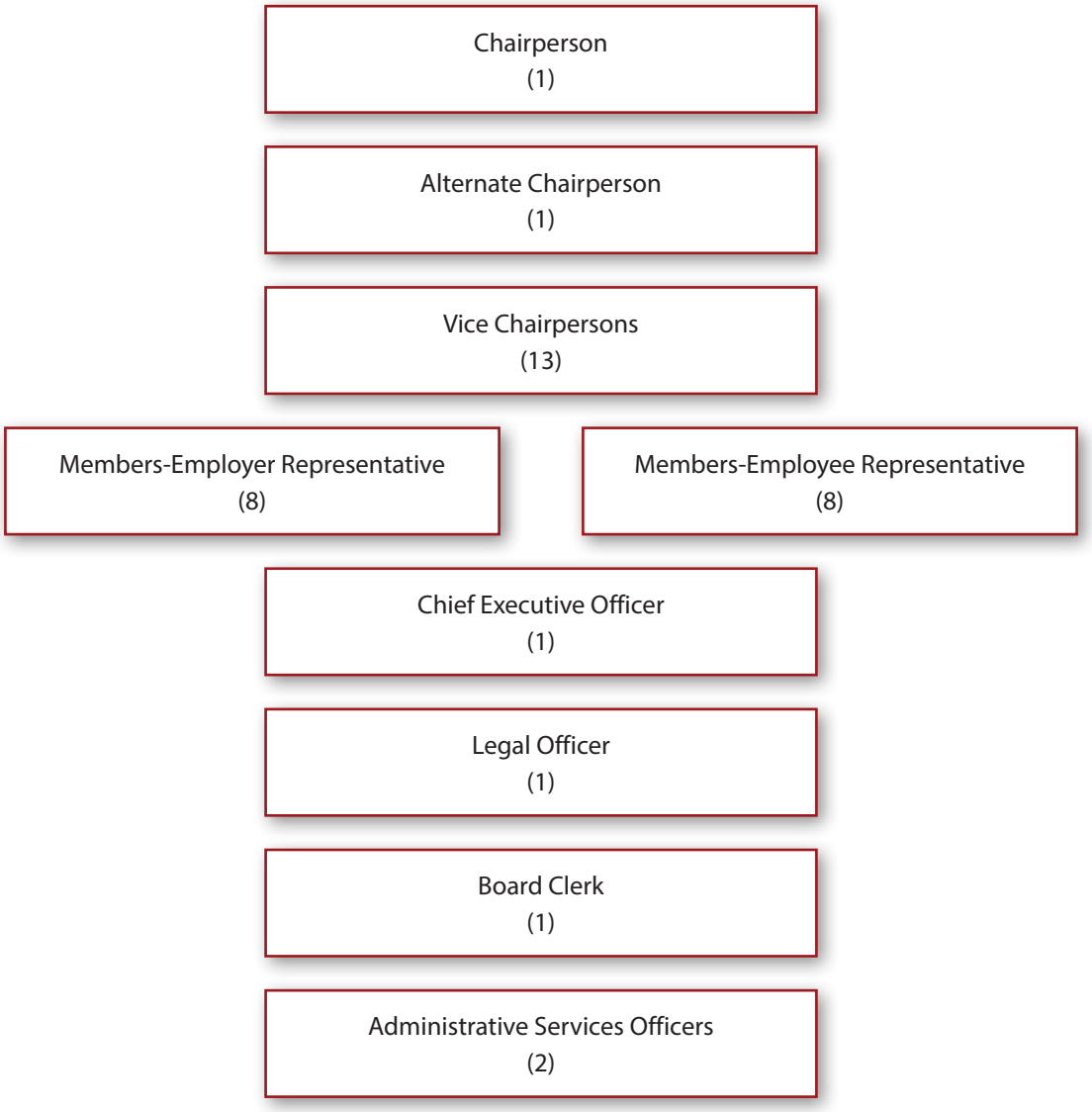
Members representing Employee interests***
Debbie Gray (Quispamsis)
Richard MacMillan (St. Stephen)
Jacqueline Bergeron-Bridges (Eel River Crossing)
Gary Ritchie (Fredericton)
Marie-Ange Losier (Beresford)**
Pamela Guitard (Point-La-Nim)

Chief Executive Officer – Lise Landry
Legal Officer – Isabelle Bélanger-Brown

Administrative Staff
Cathy Mansfield
Andrea Mazerolle
Debbie Allain

*These Vice-Chairpersons have been appointed effective May 28, 2015 for a term of three years.
**These members' terms have expired and no reappointment/appointment has yet been made.
*** There were two vacancies at the end of the reporting period.

V - Organizational chart



VI - Administration

The membership of the Board ordinarily consists of a full-time chairperson, several part-time vice-chairpersons and 16 Board members equally representative of employees and employers. All members are appointed to the Board by Order-in-Council for a fixed term, ordinarily five years for the Chairperson and three years for Vice-Chairpersons and members representative of employers and employees. Vice-chairpersons and Board members are paid in accordance with the number of meetings/hearings that each participates in throughout the year. The current per diem rates are $286.20 for vice-chairpersons and $115 for Board members.

The chief executive officer, with the assistance of a legal officer, a Board clerk and two administrative assistants, is responsible for the day to day operation of the Board office, including overseeing legislative processes. There are in excess of 50 types of applications/complaints that may be filed with the Board. Matters must be processed within the principles of procedural fairness and natural justice. In addition, all matters must be processed within the time limit identified in the applicable legislation and its regulations, and these time limits vary considerably depending on the urgency of the application or complaint. For example, an application in the public sector alleging illegal strike activity by employees or illegal lockout by an employer must be heard and determined by the Board within 24 to 48 hours. Alternatively, an application for a declaration that a trade union is the successor to a former trade union may take up to two months to complete.

All matters not otherwise resolved must be determined by a formal hearing. The chairperson, in his discretion, may assign a matter to be heard by the chairperson or a vice-chairperson sitting alone, or by a panel of three persons consisting of the chairperson or vice-chairperson along with one member representative of employees and one member representative of employers.

Additionally, the Board's processes provide for the scheduling of a pre-hearing conference. This procedure is intended to facilitate complex cases and/or multiple parties involved in a matter by succinctly outlining for the parties the issues involved in the case scheduled for hearing. It will often involve the disclosure of documents to be introduced at the hearing, the intended list of witnesses, and the settlement of procedural issues, all of which might otherwise delay the hearing. Where appropriate, it may also involve efforts to resolve the underlying dispute. A pre-hearing conference will be presided by the chairperson or a vice-chairperson. More than one pre-hearing conference may be held in any one matter.

Generally, a direction to schedule a pre-hearing conference will be made by the chairperson at the same time that the matter is assigned for hearing. During this reporting period, there were five (5) pre-hearing conferences held.

The Labour and Employment Board conducts numerous formal hearings annually at its offices in Fredericton as well as other centres throughout the province. However, a significant portion of the Board's workload is administrative in nature. During the year in review, a total of 47 matters were dealt with by executive and administrative personnel without the holding of a formal hearing, with the Board generally overseeing this activity.

There were 58 matters pending from the previous fiscal year (2014-2015); 81 new matters were filed with the Board during this reporting period for a total of 139 matters; and 93 matters were disposed of. There remain 46 matters pending at the end of this reporting period.

Following is a general overview of activity by legislation. More detailed summary tables of all matters dealt with by the Board begin at page 16.

Legislation	# matters pending from previous fiscal year	# new matters filed	# hearing days	# written reasons for decision	# matters disposed	# matters pending at the end of this fiscal year
Industrial Relations Act	28	43	16	17	43	28
Public Service Labour Relations Ac	13	27	10	1	30	10
Employment Standards Act	11	11	4	4	17	5
Pension Benefits Act	1	0	1	1	1	0
Human Rights Act	3	0	2	1	2	1
Fisheries Bargaining Act	0	0	0	0	0	0
Public Interest Disclosure Act	0	0	0	0	0	0
Pay Equity Act, 2009	0	0	0	0	0	0
Essential Services in Nursing Home Act	2	0	0	0	0	2
Total	**58**	**81**	**33**	**24**	**93**	**46**

Number of hearing days

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons	Total
33	0	33

Budget 2015-2016

Primary	Projected	Actual
3 - Personal Services - Payroll, benefits, per diem	552,533	493,528
4 - Other Services - Operational Costs	63,100	(71,777)
5 - Materials and Supplies	7,800	(12,197)
6 - Property and Equipment	100	(1862)
Total	**623,533**	**579,364**

VII - Summary of sample cases

This section provides a sampling of cases rendered by the Labour and Employment Board during the current reporting period, and illustrates the diversity of matters that the Board is required to address. The summaries are indexed according to the relevant statute.

Industrial Relations Act

Union successor rights depend on whether there has been the sale of a business, which is a question of fact

United Steelworkers, Local 1-306 v. Trevali Mining (New Brunswick) Ltd. and Blue Note Caribou Mines Inc., IR-019-14, 14 April 2015

In 2006, the Caribou mine, which is located near Bathurst, was acquired by Blue Note Caribou Mines Inc. In June of 2008, the applicant union was certified as bargaining agent for the Blue Note employees. However, in October 2008, before a collective agreement could be concluded, all employees at the Caribou mine were laid-off and operations ceased. In 2009, the assets of Blue Note Caribou Mines were acquired by Maple Minerals Inc. In 2012, Maple Minerals amalgamated with the respondent Trevali Mining (New Brunswick) Ltd. which invested heavily in the Caribou mine with a view to commencing operations in 2015. In 2014, the union brought this application to the Labour and Employment Board under s. 60 of the *Industrial Relations Act* for a declaration of successor rights as bargaining agent for Trevali's employees on the premise that there had been a sale of the business from Blue Note Caribou Mines Inc. to the respondent Trevali by virtue of Trevali's amalgamation with Maple Minerals.

The Board confirmed that the determination of whether there has been a sale of a business, which would entail successor rights, or merely the sale of assets, where a union would not obtain successor rights, is a question of fact. There is a two part test under s. 60 of the Act: (1) whether there has been a sale, and (2) whether the sale entails the transfer of a business. There had been the transfer, or sale, of assets from the predecessor employer, albeit through the convoluted manner of amalgamation. However, there had not been the sale of a business, in the sense of a functional economic vehicle. The respondent Trevali did not acquire from the predecessor employer the equipment that was necessary to extract copper. The buildings were in a state of disrepair, the mine had flooded, the operations had been shut down for four years and the respondent had not assumed the predecessor's environmental liabilities. Moreover, although not fatal to an application for successor rights, there were currently no employees in the bargaining unit. In the circumstances of this case, there had not been the sale of a business, or "going concern", within the meaning of s. 60 of the Act and, therefore, the union's application for successor rights was dismissed.

Remedy on an application for interim relief intended to balance the interests of the parties pending later resolution of the matter on its merits

United Steelworkers, Local 1-306 v. Entec Inc. (Saint John), IR-009-15, 7 April 2015

In March 2015, the complainant union held an organizing meeting at which 36 of the respondent's employees signed union cards. The proposed bargaining unit was approximately 60 employees. Shortly thereafter, the union filed an application to be certified as the bargaining agent for the employees. About the same time, six employees working on a three month period of probation were dismissed, although it was not certain whether these employees had signed union cards. The union filed this complaint of unfair labour practice with the Labour and Employment Board alleging that the six employees had been terminated contrary to s. 3 of the *Industrial Relations Act* because they were members of a union and the employer wished to intimidate the remaining employees. The union sought by way of interim relief under s. 106 of the Act to have the dismissed employees reinstated with pay, as well as an order that the employer stop breaching the Act.

An application for interim relief, said the Board, is by nature a summary process which proceeds on the supposition that the facts alleged by the complainant are true. The Board does not attempt to resolve disputed

facts or make findings of credibility. Rather, it endeavours to fashion a suitable interim remedy pending the later determination of a matter on its merits. Under s. 106 of the Act, the Board is given broad authority to make an appropriate interim order and, for this purpose, should consider whether irreparable harm will be caused by the continuation of an unfair labour practice. In the case at hand, although the dismissal of the six employees did not constitute a continued violation of the Act, the effects of the dismissals were ongoing. The fact that the evidence did not indicate that the six dismissed employees were union members was relevant but not determinative, given that their dismissal could colour the thinking of the remaining employees as regards the union. The employer's alleged conduct in dismissing these employees was a violation of s. 3 of the Act. The question, as regards remedy, entailed a balancing of harm to the employer by reinstating the employees against the harm to the union if the employees were not reinstated. Balancing these interests, the appropriate interim remedy was to allow the six probationary employees to vote in any pre-hearing representation vote, and to order the employer to cease and desist from further breaches of the Act.

Board dismisses application to terminate union bargaining rights at potato chip plant

Shea v. United Food and Commercial Workers of Canada, Local 1288P, and Covered Bridge Potato Chip Company, IR-004-15, 15 May 2015

In January 2014, the respondent union was certified as the bargaining agent for a group of employees at the Covered Bridge Potato Chip Company near Hartland. The union and the employer commenced collective bargaining but, even with the assistance of a government appointed conciliation officer, no collective agreement had been reached by year's end.

The applicant, Shea, began work for Covered Bridge as a plant supervisor in April 2014. It was his job to take the production order for the day as to the type and quantity of potato chips to be produced, ensure that the necessary staff were present, manage the personnel and monitor product quality. He could alter employee assignments during a shift, receive requests for time off, and offer an opinion to management as regards hiring, termination and lay-off decisions. It was only in September of 2014 that the applicant learned that he was a member of the bargaining unit. Collective bargaining had not been going well and he was concerned about the prospect of a strike or lockout. He said that he wished to provide employees with an opportunity to decide whether to continue with the union.

In February 2015, the applicant began to invite employees into his office where he indicated that, as an alternative to a strike or lock-out, the employees could take steps to have the union decertified. To this end, the applicant secured twenty-four statements of desire from employees indicating that they wished to hold a representation vote to determine whether a majority of the bargaining unit members desired to continue to be represented by the union. At one point, the plant manager asked the applicant what he was doing and, when informed, did not object or ask the applicant to stop pulling employees off the production line to sign the statements. With those statements in hand, the applicant brought an application to terminate the union's bargaining rights under s. 23 of the *Industrial Relations Act*. For this purpose he retained the assistance of legal counsel whose bill, he confirmed, he had paid without contribution from anyone else. The union objected to the application on the grounds that the statements of desire relied upon by the applicant were not free from employer involvement.

The Board recognized that on an application to terminate the bargaining rights of a union, the applicant has the onus to show that the statements of desire represent the voluntary expression of the bargaining unit members. There must not be the slightest hint of employer involvement, or its perception, in securing such statements. There is a reactive or responsive relationship between an employer and an employee in which it is natural for an employee to want to appear to identify with the wishes of the employer. This relationship creates the distinct possibility that a statement of desire may not express an employee's true wishes as regards union representation. In this case, the applicant had called the employees into his office, which was sufficient to raise a clear perception of management influence, particularly where the applicant held and exercised supervisory status. The employees were "paraded" across the production floor to the applicant's office in view of other employees who soon came to realize the purpose of the meetings. The plant manager was aware of the applicant's efforts to secure the statements of desire on business premises

during work hours, but did not interfere. Rather, the employees were paid for the time it took to sign the statements. The applicant failed to persuade the Board that the statements of desire represented the voluntary will of the bargaining unit employees. The application to terminate union bargaining rights was dismissed.

Union must establish bargaining rights as prerequisite to claim for Successor Rights or declaration of Common Employer under Industrial Relations Act

International Brotherhood of Electrical Workers, Local 1555 v. Dobbelsteyn Service and Maintenance Ltd., and Dobbelsteyn Electric Ltd., and Electrical Contractors Association of New Brunswick., IR-017-14, IR-018-14, 19 August 2015

The applicant union represented electrical workers in the Moncton area counties through its Local 1555. The respondent Dobbelsteyn Electric (DE), which was located in Fredericton, had performed electrical work until 1988 during which time its employees were members of Local 2166, which the Board had historically recognized as a separate electrical union for the Fredericton area counties. DE authorized an employer organization known as the Electrical Contractors Association of New Brunswick to bargain on its behalf, but only with the Fredericton Local 2166. The Association negotiated province-wide collective agreements with the electrical union, including Fredericton Local 2166, as well as the applicant Moncton Local 1555. In time, DE was succeeded by Dobbelsteyn Service and Maintenance Ltd. (DSM). The applicant union, Local 1555, sought a declaration of successor rights under s. 60 of the Industrial Relations Act by virtue of a sale of a business from DE to DSM or, alternatively, a declaration of common employer under s. 51.01 of the Act. In either case, if successful, the applicant union would become the bargaining agent for the employees of DSM. The respondents DE and DSM raised the preliminary objection that the applicant did not have bargaining rights for DE and, therefore, could not establish itself as the bargaining agent in respect of DSM.

In an earlier case the Board had explained that the purpose of the successor rights and common employer provisions of the Industrial Relations Act is to preserve established bargaining rights and collective agreements. Accordingly, the applicant union, Local 1555, had the onus to show that it had obtained the bargaining rights for DE which ought to be preserved in respect of DSM. It was clear that the union had never been certified as the bargaining agent for DE. It was also clear that there had never been any agreement in writing under which DE had voluntarily recognized the bargaining rights of the applicant union in respect of its employees. Finally, the authority of the Contractors Association to bargain on behalf of DE was limited to the geographic jurisdiction of Fredericton Local 2166 and did not extend to the applicant, Moncton Local 1555, as regards DE. The Board was not satisfied that the applicant union, Local 1555, had established the prerequisite bargaining rights in respect of DE and, therefore, dismissed the union's application to be recognized as the bargaining agent for the employees of the successor DSM.

Note: The Applicant Union, Local 1555, filed an application for judicial review with the New Brunswick Court of Queen's Bench that was heard on March 22, 2016. At the end of the reporting period, the decision is still pending.

Employer found liable for anti-union animus after dismissing employee who failed to remove union sticker from his vehicle

International Brotherhood of Electrical Workers, Local 2166 v. P.C. Long Électrique *Ltée*, IR-014-15, 31 August 2015

In the summer of 2013, one Martin became a member of the complainant union. In May 2015, Martin began work on the first of two contracts which the respondent employer had secured in Edmundston. At noon on the first day of work, the employer noticed that Martin had a union sticker on the rear window of his vehicle and ordered him to remove the sticker. Martin did not comply and was immediately dismissed. The union filed a complaint to the Labour and Employment Board under s. 3 of the Industrial Relations Act alleging that the employer had demonstrated anti-union animus when it dismissed Martin for supporting the union.

Under s. 3 of the Act, the Board said, a complainant must show by direct or circumstantial evidence that an employee was engaged in union activity to the knowledge of the employer. The burden then shifts to the employer to show that its actions were not motivated by anti-union animus. An employer cannot dismiss an employee simply for being a member of a union, or for supporting a union. The case at hand presented an unequivocal situation of anti-union sentiment on the part

of the employer, which had dismissed the employee for failing to remove a union sticker from his vehicle. The employer did not appear at the Board hearing of this matter to offer a justification for its actions. The Board ordered the employer to reinstate the employee with compensation for lost wages and benefits, or to provide compensation in lieu of reinstatement.

The "common employer" provision of Industrial Relations Act does not apply where a single employer creates a new division

Unifor, Local 33 v. Custom Fabricators & Machinists Limited and CFM Services, IR-011-15, 13 October 2015

In October 2010, the predecessor to the applicant union was certified as the bargaining agent for the respondent employer, now known as Custom Fabricators & Machinists Limited. The parties negotiated a collective agreement. In January 2015, the union was informed by the employer that it intended to create a new division within its corporate structure, to be known as CFM Services. The union applied to the Labour and Employment Board under s. 51.01 of the Industrial Relations Act for a declaration of common employer. By this application, the union hoped to extend its bargaining rights to include the employees of the respondent who worked within the new division. The employer made a preliminary motion to the Labour and Employment Board in which it objected to the union's application on the grounds that s. 51.01 of the Act did not apply in the circumstances.

The Board observed that s. 51.01 of the Industrial Relations Act indicates that where there is more than one employer under common control engaged in related activities, the Board may declare that there is a common employer for the purpose of preserving a union's bargaining rights. There is nothing in s. 51.01 of the Act which prevents an employer from creating a new division to engage in work not performed by members of a bargaining unit represented by a union. In this case, there was a single employer and, therefore, s. 51.01 did not apply. The appropriate procedure for the union was to file a grievance and have an arbitrator determine whether the work performed by employees in the new division was similar to the work of the employees in the bargaining unit for which the union had bargaining rights. The union's application to utilize s. 51.01 to extend its bargaining rights to employees in the new division was dismissed.

Employment Standards Act

Employee who chooses on own to work during lunch hour not entitled to remuneration

Edgett v. James Richard operating as A Lot of Auto Recyclers, ES-003-15, 2 July 2015

The complainant worked as a dismantler at the employer's auto parts recycling business from June 2012 until August 2013. He was advised by the employer that the hours of work were from 8 a.m. to 5 p.m. with an hour off each day for lunch. Regardless, the complainant chose to work during his lunch hours. At the time he left his employment, an issue arose as to whether the complainant was entitled to be paid at his rate of $12.00 per hour for the time he had worked during his lunch hours. He filed a complaint with the Employment Standards Branch. The Director dismissed the complaint following which the matter was referred to the Labour and Employment Board.

The Board accepted that the employer had never instructed the complainant to work during his lunch hours and that it had been the employee's choice to do so. The employer could not be held responsible for such a choice by an employee. The Board affirmed the decision of the Director to dismiss the employee's complaint.

Director of Employment Standards has limited audit powers which may not always permit access to banking records

Director of Employment Standards v. 6989454 Canada Ltd., operating as House of Dogs Professional Grooming, ES-009-15, 22 January 2016

The Director of Employment Standards ordered the employer, House of Dogs Professional Grooming, to provide records from a financial institution. The order was apparently prompted by a complaint against the employer. The Director stated that the pay stubs typically relied upon as evidence in relation to such a complaint

were not reliable and, therefore, it was necessary to obtain the relevant information from the employer's financial institution. In making this assertion, the Director claimed to be empowered to conduct audits under s. 58 of the Employment Standards Act. The employer resisted the order for disclosure of financial institution records and the matter proceeded to the Labour and Employment Board.

The Board noted that the audit powers of the Director are limited to the purpose of ensuring compliance with the provisions of the Act and regulations. The Director had stated that access to records from the employer's financial institution was required, including "books of account", but produced no evidence to verify that the disclosure of such records was for the purpose of compliance with the Act. Moreover, it was uncertain as to whether books of account include the records of a financial institution. In the circumstances of this case, the Board concluded that it was not necessary for the employer to provide the Director with records from its financial institution.

Human Rights Act

Board orders university to reinstate women's varsity hockey team

Bryson v. The University of New Brunswick and New Brunswick Human Rights Commission, HR-007-10, 2 March 2016

The complainant, who was enrolled in the graduate engineering program at the respondent University of New Brunswick in Fredericton, had played on the UNB women's varsity hockey team for four seasons. The University undertook an assessment of its varsity program with a view to "do less better", meaning to concentrate more on fewer sports. In 2008, at a time the complainant had one year of eligibility remaining, the University decided to reclassify the women's hockey team as a "competitive sports club" with a coincident loss of varsity funding. Some of the savings were to be redirected to the men's varsity hockey team which, as multiple winner of the national championship, was the university's top priority. The complainant filed a complaint with the New Brunswick Human Rights Commission under s. 5 of the province's Human Rights Act. She alleged that the decision to cut the women's hockey team as a varsity sport amounted to discrimination on the basis of sex as regards the provision of a public service. The complainant argued that women's varsity hockey at UNB had not been given the opportunities for success which had been enjoyed by the men's varsity team. She sought, as a remedy, that the women's hockey team be reinstated to full varsity status on an equal footing with the men's varsity hockey team. The matter eventually made its way to the Labour and Employment Board which sat in its capacity as a Board of Inquiry for the purposes of the Human Rights Act.

The Board began its comprehensive analysis of the case by noting that human rights legislation has a quasi-constitutional status and must be interpreted in a broad manner. The complaint met the threshold for analysis under s. 5 of the Human Rights Act because it entailed a "service" by UNB in the provision of varsity athletics which related to a "public" comprised of all students eligible to try out for such teams. A complainant has the onus to establish a prima facie case of discrimination by reference to three factors. Here, it was evident, first, that the complainant was a member of a group, the women's varsity hockey team, who possessed a personal characteristic, sex, which was protected from discrimination under the Act. Second, using the men's varsity hockey team as a tool for the purposes of contextual analysis, the complainant and her group had suffered differential treatment as regards such matters as funding, coaching, equipment and facility access. This treatment marginalized the women's team, created barriers to success and had adverse effects culminating in the relegation of the women's varsity hockey team to club status. Third, the sex of the complainant was a factor that contributed to the adverse impacts experienced by the women's team. The complainant had made out a prima facie case of sex discrimination. The onus to justify such discrimination shifted to the respondent university. The evidence indicated that it had failed to consider the *bona fides* of the women's team, including such factors

as fundraising potential, increased community support and growing administrative sophistication. Accordingly, the University had failed to show that it could not have taken reasonable steps to avoid negative impacts and stereotyping of the complainant and women's hockey. The Board ordered the University to reinstate the women's varsity hockey team for the 2017-2018 season, to provide it with sufficient human and financial resources to compete successfully at the varsity level, and to pay the complainant $5,000 for injury to dignity and self-respect. The Board also ordered the University to rewrite its Gender Equity Policy within one year to ensure that its provisions would protect substantive gender equity as regards intercollegiate athletics.

VIII - Summary tables of all matters dealt with by the board

Industrial Relations Act

April 1, 2015 - March 31, 2016

Matter	Pending from previous fiscal	Matters filed	Total	Disposition of matters			Total matters disposed	Number of cases pending
				Granted	Dismissed	Withdrawn		
Application for Certification	8	14	22	8	4	2	14	8
Application for a Declaration of Common Employer	4	1	5	--	2	1	3	2
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	2	3	5	2	2	--	4	1
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	1	7	8	4	--	--	4	4
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	2	2	4	1	2	--	3	1
Application for a Declaration Concerning the Legality of a Strike or a Lockout	--	--	--	--	--	--	--	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Miscellaneous Applications (s. 22, s. 35, s. 131	3	7	10	--	--	3	3	7
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	5	8	13	2	2	5	9	4
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107	3	1	4	1	--	2	3	1
Complaint Concerning a Work Assignment	--	--	--	--	--	--	--	--
Application for Accreditation	--	--	--	--	--	--	--	--
Application for Termination of Accreditation	--	--	--	--	--	--	--	--

Matter	Pending from previous fiscal	Matters filed	Total	Disposition of matters			Total matters disposed	Number of cases pending
				Granted	Dismissed	Withdrawn		
Request pursuant to Section 105.1	--	--	--	--	--	--	--	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--
Total	**28**	**43**	**71**	**18**	**12**	**13**	**43**	**28**

Public Service Labour Relations Act

April 1, 2015 - March 31, 2016

Cause	Pending from previous fiscal	Matters filed	Total	Disposition of matters			Total matters disposed	Number of cases pending
				Granted	Dismissed	Withdrawn		
Application for Certification	--	2	2	--	--	--	--	2
Application for Revocation of Certification	--	--	--	--	--	--	--	--
Notice pursuant to s. 43.1 (Designation of Essential Services	3	1	4	2	--	1	3	1
Application pursuant to s. 43.1(8)	1	7	8	7	--	--	7	1
Complaint pursuant to s. 19	1	6	7	--	--	3	3	4
Application for Declaration Concerning Status of Successor Employee Organization	1	--	1	--	--	1	1	--
Application pursuant to s. 29 (Designation of Position of Person employed in a Managerial or Confidential Capacity)	--	--	--	--	--	--	--	--
Application pursuant to s. 31	1	--	1	--	--	1	1	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication	--	1	1	1	--	--	1	--
Application for Appointment of an Adjudicator/ (s. 100.1)	4	2	6	5	--	1	6	--
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer	--	3	3	3	--	--	3	--
Application for Appointment of Conciliation Board	1	--	1	1	--	--	1	--

Cause	Pending from previous fiscal	Matters filed	Total	Disposition of matters			Total matters disposed	Number of cases pending
				Granted	Dismissed	Withdrawn		
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	--	--	--	--	--	--	--
Application for Appointment of Commissioner (s. 60.1)	--	5	5	4	--	--	4	1
Request for a Declaration of Deadlock (s. 70	--	--	--	--	--	--	--	--
Notice pursuant to Section 44.1 of the Act	--	--	--	--	--	--	--	--
Request for the Appointment of an Arbitration Tribunal pursuant to s. 66	1	--	1	--	--	--	--	1
Total	**13**	**27**	**40**	**23**	**--**	**7**	**30**	**10**

Employment Standards Act

April 1, 2015- March 31, 2016

Matter	Pending from previous fiscal	Matters filed		Disposition of matters					Dismissed	Total matters disposed	Number of cases pending
			Total	Affirmed	Settled	Vacated	Varied	Withdrawn			
Request to Refer Orders of the Director of Employment Standards	9	8	17	1	12	--	--	1	--	14	3
Request to Refer Notices of the Director of Employment Standards	1	1	2	1	--	--	--	--	--	1	1
Application for exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause hearing,s. 75	1	2	3	--	1	--	--	--	1	2	1
Total	**11**	**11**	**22**	**2**	**13**	**--**	**--**	**1**	**1**	**17**	**5**

Pension Benefits Act

April 1, 2015 - March 31, 2016

Matter	Pending from previous fiscal	Matters filed	Total	Disposition of matter					Total matters disposed	Number of cases pending
				Affirmed	Vacated	Varied	Remitted back for further investigation	Withdrawn		
Request to Refer a Decision of the Superintendent of Pensions pursuant to s. 73(2	1	--	1	1	--	--	--	--	1	--
Request for Show Cause Hearing, s. 77.1	--	--	--	--	--	--	--	--	--	--
Total	**1**	**--**	**1**	**1**	**--**	**--**	**--**	**--**	**1**	**--**

Human Rights Act

April 1, 2015 - March 31, 2016

Matter	Pending from previous fiscal	Matters filed	Total	Disposition of matters				Total matters disposed	Number of cases pending
				Granted	Dismissed	Settled	Withdrawn		
Complaint pursuant to s. 23(1)	3	--	3	1	--	1	--	2	1
Total	**3**	**--**	**3**	**1**	**--**	**1**	**--**	**2**	**1**

Essential Services in Nursing Homes Act

April 1, 2015 - March 31, 2016

Matter	Pending from previous fiscal	Matters filed	Total	Disposition of matters				Total matters disposed	Number of cases pending
				Granted	Dismissed	Settled	Withdrawn		
Notice pursuant to s. 5(1	2	--	2	--	--	--	--	--	2
Totals	**2**	**--**	**2**	**--**	**--**	**--**	**--**	**--**	**2**

Note: There was no activity during the reporting period under the *Fisheries Bargaining Act*, the *Public Interest Disclosure Act* and the *Pay Equity Act, 2009*.