Labour and Employment Board

Annual Report
2016–2017

New Nouveau Brunswick

Labour and Employment Board
April 1, 2016 – March 31, 2017

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ISBN 978-1-4605-1433-
ISSN 1206-2715

October 2017
Printed in New Brunswick

www.gnb.ca

Transmittal letters

To the Honourable Jocelyne Roy Vienneau
Lieutenant-Governor of New Brunswick

May it please your Honour:

It is my privilege to submit the annual report of the Labour and Employment Board, for the fiscal year April 1, 2016, to March 31, 2017.

Respectfully submitted,

Honourable Gilles LePage
Minister of Labour, Employment and Population Growth

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Sir:

I have the honour to submit the 22nd Annual Report of the Labour and Employment Board for the period of April 1, 2016 to March 31, 2017 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

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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, family status, sexual orientation, sex, gender identity or expression, 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 22nd annual report of the Labour and Employment Board for the period of April 1, 2016 to March 31, 2017.

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 66, down 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 18 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 87 matters. In so doing there were 14 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 two (2) appointments of a Conciliation Officer, one (1) appointment of a Conciliation Board and two (2) appointments of a Commissioner.

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.

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, Q.C.
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)
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)**

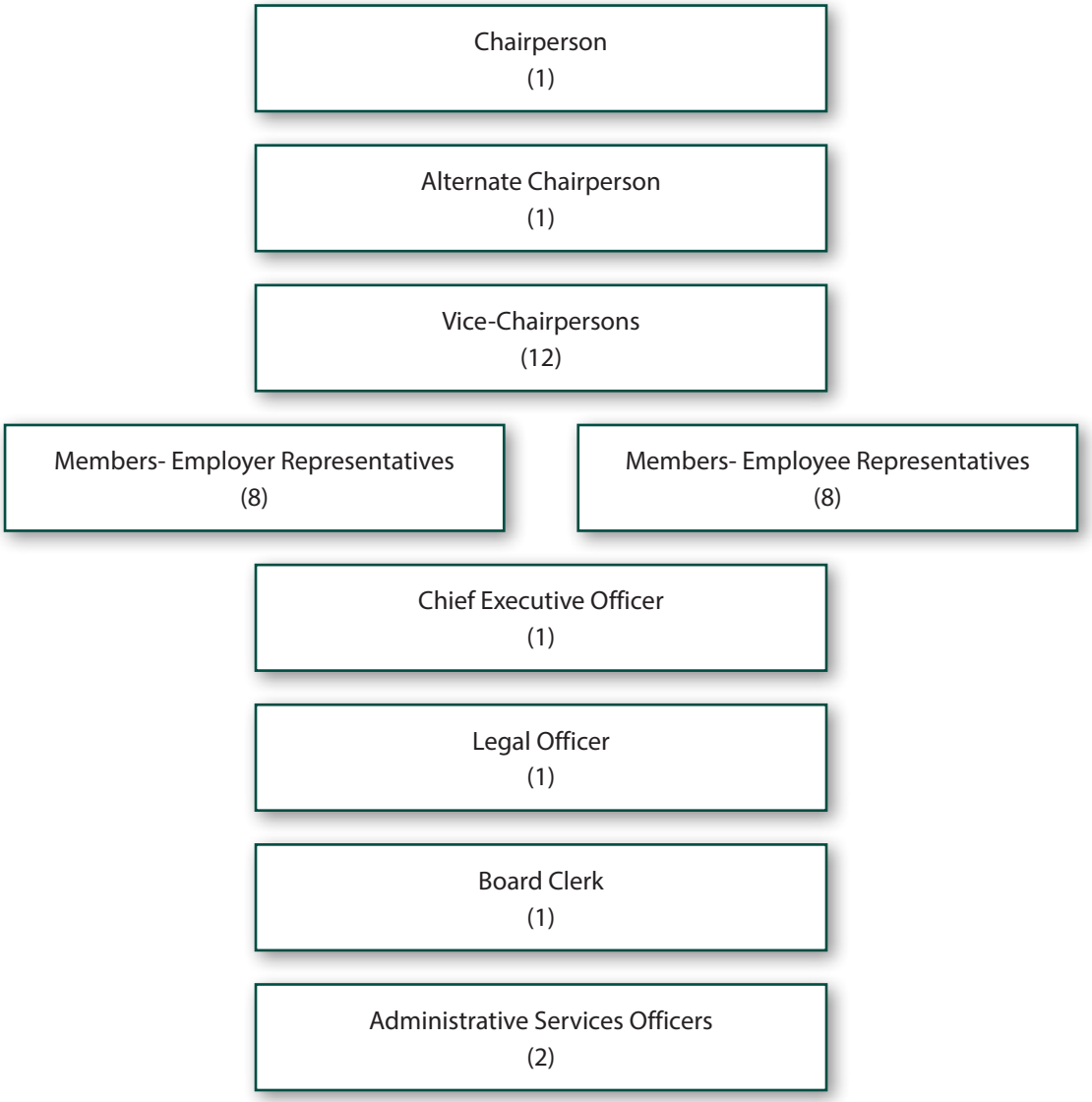
Members representing Employee interests***
Debbie Gray (Quispamsis)**
Richard MacMillan (St. Stephen)**
Jacqueline Bergeron-Bridges (Eel River Crossing)**
Gary Ritchie (Fredericton)**
Marie-Ange Losier (Beresford)*
Pamela Guitard (Point-La-Nim)**

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

Administrative Staff
Cathy Mansfield
Andrea Mazerolle
Debbie Allain

*These Members have been re-appointed effective April 27, 2016 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 no 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 73 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 46 matters pending from the previous fiscal year (2015-2016); 66 new matters were filed with the Board during this reporting period for a total of 112 matters; and 87 matters were disposed of. There remain 25 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	35	5	8	52	11
Public Service Labour Relations Act	10	14	8	4	21	3
Employment Standards Act	5	12	5	2	13	4
Pension Benefits Act	0	0	0	0	0	0
Human Rights Act	1	2	0	0	1	2
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	3	0	0	0	5
Total	**46**	**66**	**18**	**14**	**87**	**25**

Number of hearing days

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons/	Total
18	0	18

Budget 2016-2017

Primary/Primaire	Projected/Prévu	Actual/Réel
3 - Personal Services - Payroll, benefits, per diem	538,000	494,994
4 - Other Services -Operational Costs	83,100	54,277
5 - Materials and Supplies	7,800	(11,924)
6 - Property and Equipment	100	(2,756)
Total	**629,000**	**563,951**

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

Prior agreement as to description of bargaining unit does not preclude union from bringing subsequent application for certification in respect of modified bargaining unit

Public Service Alliance of Canada v. University of New Brunswick and Canadian Union of Public Employees, Local 3339, IR-016-15, 18 April 2016

In March 2013 the applicant union, the Public Service Alliance of Canada, and the respondent employer, the University of New Brunswick, reached an agreement as regards the description of a bargaining unit composed of administrative, professional and technical employees. Following a representation vote, the Labour and Employment Board issued an order for certification. The parties began negotiations but had not reached a collective agreement by June 2015, at which time the union made a subsequent application for certification of a bargaining unit of administrative, professional and technical employees which differed in description from the bargaining unit to which it had agreed in 2013. Certain employees who were not included in the 2013 bargaining unit were included in the 2015 description. The respondent employer raised a preliminary objection to the union's 2015 application for certification on the basis that the description in the 2013 agreement should prevail.

The issue, according to the Labour and Employment Board, was whether the union was prohibited from filing its 2015 application for certification in respect of a bargaining unit which differed from the one to which it had agreed in 2013. The Board recognized that freedom of association is protected by the *Canadian Charter of Rights and Freedoms* and is of paramount importance in the consideration of applications for certification. The 2013 agreement did not state that the union would be barred from bringing a further application for certification for a differently described bargaining unit. Indeed, the 2013 agreement specifically said that it was made on a "without prejudice or precedential" basis. The 2013 agreement was ambiguous. Its purpose was not to preclude future applications for certification. The Board had the authority to consider the union's 2015 application for certification and to issue an order for certification, provided that the majority of employees indicated their desire to associate with the applicant union. The employer's preliminary objection was dismissed.

Note: The employer filed an application for judicial review of the Board's decision. The application was heard by the Court of Queen's Bench on October 12, 2016. At the end of the reporting period, the Court had not yet rendered its decision.

Employee drug testing did not violate statutory freeze on terms of employment pending application for certification

Labourers' International Union of North America, Local 900 v. SCT Rail Contractors Ltd., IR-024-15, 9 June 2016

In October 2014, the applicant union, Labourers' International Union of North America, Local 900, filed an application for certification in respect of certain persons employed by Squaw Cap Trucking Company Ltd. One Hickey worked seasonally since 2010 for this employer, which had a policy on drug testing for probable cause. In early 2015, the trucking company was acquired by the respondent SCT Rail Contractors Ltd. and the union's application for certification was amended to reflect this acquisition. The respondent, which performed maintenance and repair work as a subcontractor for various rail lines, continued with the policy on drug testing for probable cause. In March of 2015, Hickey was offered employment by the respondent for the upcoming work season. He was required to sign a Conditional Offer

of Employment and a Corporate Drug and Alcohol Policy Employee Acknowledgement. In June 2015, the respondent received an email from a former rail employee which indicated that he had seen the respondent's employees using cannabis while staying at a hotel in a community in which they were working. The respondent immediately sent its safety supervisor to investigate the complaint. Upon arriving at the hotel, the supervisor opened the doors of company trucks and smelled the distinct odour of marijuana. The employees at this work location, including Hickey, were required to take a drug test pursuant to company policy. Hickey declined to be tested and was immediately dismissed. In August 2015, the union filed an application with the Labour and Employment Board alleging that Hickey's dismissal was a violation of s. 35(1) of the *Industrial Relations Act*.

The Board recognized that s. 35(1) of the Act imposes a "statutory freeze" on an employer. Where there is a pending application for certification, an employer may not alter the terms and conditions of employment, although it may continue to conduct "business as before". The purpose of s. 35(1) is to protect the rights of employees. Three conditions must be met to establish a violation of the provision: (1) the condition of employment must exist on the date the application for certification was filed, (2) the condition must be changed without consent of the employee, and (3) the change must be made during the freeze period. Nonetheless, consistent with s. 3(6) of the Act, an employer may "discharge an employee for proper cause" as determined on a case by case basis. In this instance, the respondent employer had violated s. 35(1) of the Act by requiring Hickey to sign the Conditional Offer of Employment and the Corporate Drug and Alcohol Policy Employee Acknowledgement during a period when the terms and conditions of employment were subject to a freeze. However, the policy on drug testing for cause had been implemented by the former employer, Squaw Cap Trucking, and continued by the respondent. The true question was whether the actions of the respondent altered the terms and conditions of this existing drug testing policy. The facts of the case indicated that the respondent had reasonable and probable cause to test for drugs. The applicant did not present evidence to illustrate that the drug test was inconsistent with the practice of the predecessor employer. Accordingly, the Board concluded that the requirement for Hickey to take a drug test and his subsequent dismissal for failing to do so did not constitute a change in the terms and conditions of his employment or a violation of the statutory freeze under s. 35(1) of the Act.

In the absence of notice, a successor employer is not liable for the unfair labour practice of its predecessor

Labourers' International Union of North America, Local 900 v. SCT Rail Contractors Ltd. and Squaw Cap Trucking Company Limited, IR-011-16, IR-012-16, 11 August 2016

In October 2014, the union, Labourers' International Union of North America, Local 900, filed an application for certification in respect of an employer, Squaw Cap Trucking Company Limited. That employer ceased operations and, in March 2015, sold assets to the respondent, SCT Rail Contractors Ltd., which was substituted as the employer for the purposes of the union's application for certification. In July 2015, the Board ordered a representation vote by mail to determine union support, given that it had received petitions from several employees who purported to cancel their union memberships. In January 2016, the representation vote was counted. It indicated that fewer than 50% of eligible voters favoured certification. On this basis, the Board dismissed the application for certification. In March 2016, the union filed a complaint of unfair labour practice which concerned the voluntariness of the petitions against the union. The complaint related to the time when Squaw Cap Trucking was the employer. An issue arose as to whether the Board had jurisdiction to hear the complaint against SCT Rail as the successor employer.

The Labour and Employment Board observed that under s. 60 of the *Industrial Relations Act*, a successor can be held liable for the unfair labour practice of a predecessor, but only if the successor has notice of the complaint. Here, the union did not file its unfair labour practice complaint until after the application for certification had been dismissed and, accordingly, the successor, SCT Rail, did not have notice of a complaint about the conduct of its predecessor. Moreover, the union's complaint was not timely because it was made after the 90 day limitation period for such complaints had expired. The Board dismissed the union's unfair labour practice complaint against the respondent SCT Rail.

The Board also dismissed the union's application for reconsideration of its decision against certification, noting that such applications are only granted in rare circumstances. Here, the union alleged one of the witnesses at the certification hearing was untruthful, but despite being made aware of this alleged untruthfulness prior to the counting of the vote, only brought it to the Board's attention after the counting of the vote and after issuance of the Board's final order dismissing the application for certification. The Board found that the applicant did not exercise due diligence in bringing the information to its attention, and furthermore, did not meet any of the other criteria which would cause the Board to reconsider its decision.

Purchaser of land on which business had once operated is not a successor to collective agreement which had applied to that former business

684318 NB Ltd. v. United Food and Commercial Workers International Union, Local 1288P, and Co-Op Atlantic, Moncton Co-Op Food Market, IR-019-16, 17 October 2016

A collective agreement existed between the respondent union, Food and Commercial Workers International Union, Local 1288P, and an employer, Co-Op Atlantic, Moncton Co-Op Food Market. The collective agreement covered employees who worked at a Co-Op gas bar which the employer operated in Moncton. The employer was experiencing financial difficulties and shut down the gas bar in October 2015, at which time it entered into an agreement with the applicant 684318 NB Ltd. to purchase the land on which the gas bar was located. The applicant planned to build a large new convenience store on the site of the old gas bar and to sell Irving gas after installing new tanks and pumps. The union took the position that, by entering into an agreement of purchase and sale with the former employer, the applicant had acquired a business within the meaning of s. 60 of the *Industrial Relations Act* and was, therefore, bound to the collective agreement which had existed between the union and the former employer. That agreement affected four employees who had worked at the former Co-Op gas bar. The applicant sought an order that it was not a party to, nor bound by, the collective agreement.

The issue, said the Labour and Employment Board, was whether the applicant was a successor to the former employer under s. 60 of the Act. In successor cases the central question, which is to be assessed by reference to key industry factors at the time of sale, is whether there has been a transfer of a "functional economic vehicle". Such a transfer exists where a successor continues with the business of the predecessor. In this case, the evidence indicated that the applicant had acquired no operational elements, goodwill or managerial expertise from the former employer. Rather, the applicant had acquired only a piece of land. The fact that it intended to operate a gas bar on the site of a former gas bar was insufficient to establish that it was a successor to that former business. Accordingly, the applicant was not bound by the collective agreement which had applied to that prior business.

In unusual case, Board issues order to decertify construction industry union just a few months after it had been certified

Robert Saulnier v. United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Top Tradesmen Builders Ltd., and Moncton Northeast Construction Association Inc., Saint John Construction Association Inc., IR-026-16, IR-031-16, 19 October 2016

In June 2016, the respondent union, United Brotherhood of Carpenters and Joiners of America, Local 1386, was certified as bargaining agent for the carpenters employed by Top Tradesmen Builders Ltd. Twenty days after the order for certification was issued, the applicant Saulnier, who was a Top Tradesmen employee, filed an application for a declaration to terminate bargaining rights. In response, the union asserted that the petition for decertification was not voluntary but, rather, that it had been obtained through employer influence.

The Labour and Employment Board noted that, although it was highly unusual to entertain an application to terminate bargaining rights just days after a certification order had been granted, the application was nonetheless timely because it came within the last 2 months of a collective agreement to which the employer was bound as a member of an accredited employer organization known as the Moncton Northeast Construction Association Inc. A petition for decertification will be deemed involuntary if there is the "slightest hint" of employer involvement in securing it. Here, the union adduced no evidence to show that the applicant was acting under the influence of the employer, that the employer had threatened or

coerced the employees to sign the petition, or that the employees were induced to sign by a promise of a pay increase or bonus. Moreover, the employees were aware of the purpose of the petition. The Board granted the application for a declaration terminating bargaining rights.

Long term care facility certified after Board determines that petitions against unionization were not voluntary

New Brunswick Union of Public and Private Employees v. Woolastook Long Term Care Facility Inc. carrying on business as Orchard View Long Term Care, and New Brunswick Association of Nursing Homes Inc., IR-030-16, 12 December 2016

In August 2016, the applicant union, New Brunswick Union of Public and Private Employees, filed an application for certification in respect of a bargaining unit comprised of employees at Orchard View Long Term Care in Gagetown, operated by the respondent Woolastook Long Term Care Facility Inc. In response to this application, the Chair of the Orchard View Board of Directors sent a letter to all employees which described the ongoing unionization attempt and which contained an attachment that employees could sign to demonstrate that they did not support the union. In further response to the certification application, an office manager became involved in petitions which opposed the union. She created, circulated, stored, collected and mailed the petitions to the Board. She was also involved in the solicitation of employee support for the petitions. The union asserted that the letter which the chairman of the board had sent to employees violated s. 3(1) of the *Industrial Relations Act* which says that no one may "interfere with the formation of a trade union", and that the actions of the office manager amounted to employer involvement in respect of the petitions which rendered them involuntary and, therefore, invalid.

The Labour and Employment Board noted that the sole issue at the hearing of the application for certification related to the level of union support, more specifically the voluntariness of the petitions against unionization. As regards the chairman's letter, the Board recognized that an employer may not interfere with the formation of a union, but noted that s. 3(5) of the Act protects an employer's freedom of expression so long as the exercise of that freedom is not "coercive, intimidating, threatening, or intended to unduly influence any person". The chairman's letter to the employees demonstrated that the employer opposed the union and it invited employees to take steps to join in that opposition. However, there was nothing in the letter that conferred a benefit for opposing the union, such as an improvement in working conditions or wages, and there was no suggestion that unionization might have a negative effect on the employer's operation and, by extension, the job security of employees. The chairman's letter did not impact the voluntariness of the petitions, nor did it violate s. 3(1) of the Act. However, in view of the office manager's participation in the creation, circulation and delivery of the petitions, they could not be viewed as voluntary. The petitions were also troubling in that they contained the employer's return address, some of the signatures were not witnessed, and their custody throughout the period of circulation could not be documented. The Board rejected the petitions, found that union support exceeded 50%, and issued a certification order.

Board reiterates need for it to scrutinize documentary evidence of union membership on applications for certification

International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 680 v. Imperial Theatre Inc., IR-033-16, 16 January 2017

The applicant union, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 680, filed an application for certification in respect of employees of the respondent, Imperial Theatre Inc. The application gave rise to a "threshold" issue concerning the sufficiency of membership evidence filed by the applicant, in particular whether the $1.00 initiation fee had been paid to and received by the union. The union's application for certification was supported by written applications for membership which confirmed that the employee who had signed the membership card had "paid an initiation fee of $1.00 to the witness indicated below". The question was whether the membership card complied with the relevant statutory requirements under the *Industrial Relations Act* and its Regulation.

The Labour and Employment Board emphasized that in order to maintain the integrity of the membership "card based" system, it had adopted a very stringent practice of scrutinizing such evidence to ensure its reliability.

The membership card stated that the employee had paid the initiation fee to the witness but, due to oversight, there was no clear evidence that the fee had been received by the union, or by the witness on behalf of the union. The Board concluded that the union membership evidence was insufficient because it was premised on an assumption that the fee had been received by the union, rather than clear evidence. The integrity of the system could not be maintained by an assumption. The union's application for certification was dismissed due to insufficiency in the membership documentation.

Addendum: IR-001-17, IR-003-17, 10 March 2017

The union filed a new application for certification on the same day as its original application was dismissed. In response, the employer sought an order under s. 126 of the *Industrial Relations Act* to impose a "time bar" on the union against filing any further application for certification for a period up to 10 months.

The Board recognized that the legislation gives it a discretionary power to bar a further application for certification in order to provide a "cooling off" period in circumstances where there has been a workplace disruption. Here, there was no evidence of disruption, such as a lengthy organizing campaign or employee statements in opposition to certification. The Board issued a preliminary decision in which it rejected the employer's request for a time bar and ordered that a hearing be set to deal with the merits of the new application for certification.

Public Service Labour Relations Act

Board rejects application for certification on grounds that a small bargaining unit of translators is not appropriate

Public Service Alliance of Canada v. Province of New Brunswick on behalf of the Translation Bureau, PS-001-16, 8 July 2016

In January 2016, the applicant union, Public Service Alliance of Canada, filed an application for certification under the Public Service Labour Relations Act in respect of a bargaining unit comprised of some 37 employees in the Translation Bureau of the Province of New Brunswick. The Translation Bureau includes translators, revisors and interpreters who fall within a category known as Administrative Occupational Group Number 141, which includes some 3,000 provincial employees, none of which are represented by a bargaining agent. The work performed by members of the proposed bargaining unit includes some memoranda for the Executive Council as well as some documents on collective bargaining and employment matters. The respondent employer objected to certification on the basis that the proposed bargaining unit was not appropriate and that the work performed by its members was managerial or confidential, which precluded their inclusion in a bargaining unit.

The Labour and Employment Board observed that, as regards the managerial or confidential nature of work, its jurisprudence indicates that it must ask whether members of a proposed bargaining unit have a confidential working relationship with persons employed in a managerial or confidential capacity. In this case, members of the proposed bargaining unit had only an indirect working relationship with persons employed in a managerial or confidential capacity, which was not sufficient to exclude them from a bargaining unit for the purposes of certification. Nonetheless, the proposed bargaining unit was not appropriate. The Board had adopted a policy of certification based on broad occupational classifications to avoid a proliferation of small units and to ensure greater viability, coherence and inclusion. An exception could be made for very unique situations and conditions of employment, which was not the case here. The members of the Translation Bureau had a community of interest in a professional sense, but not in the labour relations sense. There was no reason to depart from the policy against certifying smaller units. The application for certification was dismissed.

Reorganizations constitute government "business as usual" which do not violate the statutory freeze on terms and conditions of employment during negotiations for a new collective agreement

Canadian Union of Public Employees, Local 1252 v. Province of New Brunswick, as represented by Board of Management, PS-015-15, 26 September 2016

The applicant union, Canadian Union of Public Employees, Local 1252, was the bargaining agent for some 9200 government employees, including about 500 who worked at Facilicorp in health care facilities throughout the province. The union and the employer, the Province of New Brunswick, as represented by Board of Management, had a collective agreement which covered the Facilicorp employees. In early May 2015, as the expiration of the collective agreement approached, the union gave the employer notice to bargain a new collective agreement. However, in early June 2015, legislation was enacted which dissolved Facilicorp, whose employees were transferred to Service New Brunswick where they were added to pre-existing bargaining units that were represented by other unions. In September 2015, the union filed a complaint to the effect that the employer had violated the statutory freeze on terms and conditions of employment imposed during the period of negotiations for a new collective agreement under s. 46 of the *Public Service Labour Relations Act*.

The Labour and Employment Board noted that the function of the statutory freeze is to foster the right of association by imposing a duty on an employer not to change the manner in which the business is managed, although it can conduct "business as usual". A union which alleges a violation of the statutory freeze must prove that (1) a condition of employment existed on the day the previous collective agreement expired, (2) the condition was changed without consent, and (3) the change was made during the freeze period. The burden then shifts to the employer to prove that (1) the change is consistent with past management practices or, alternatively, (2) the change is consistent with the decision that a reasonable employer would have made in the same circumstances. In this case, the union demonstrated that there had been a change in the terms and conditions of employment for the 500 Facilicorp employees during the freeze period and without consent. It did not matter that the change was made by legislation rather than by the employer because the Act does not limit the source of a change. However, the reorganization of government operations and services for the purpose of achieving efficiency and cost savings through the elimination of duplication was the employer's prerogative and constituted "business as usual". Moreover, the employer had given the union notice of the program review which lead to the changes prior to the date on which notice to bargain was served. The Board dismissed the union's complaint that the employer had violated the statutory freeze.

Board declines to "carve out" a small bargaining unit of hospital trades persons from a larger bargaining unit

New Brunswick Hospital Trades Union v. Province of New Brunswick, as represented by Board of Management, and New Brunswick Council of Hospital Unions, Local 1252 of the Canadian Union of Public Employees, PS-013-15, 27 October 2016

In June 2015, the applicant organization, which identified itself as the New Brunswick Hospital Trades Union, filed an application for certification in respect of a proposed bargaining unit comprised of some 290 trades persons who worked in the hospital sector. These provincial employees were part of a larger group which was represented by the interested party, the New Brunswick Council of Hospital Unions, Local 1252 of the Canadian Union of Public Employees, which over the years had entered into collective agreements on their behalf with the respondent, the Province of New Brunswick as represented by Board of Management. The latest collective agreement expired in June 2015 at which time the applicant sought certification on behalf of the 290 hospital trades persons on the basis that this group should be "carved out" from the larger bargaining unit of some 8,800 employees because they had a community of interest and had not been adequately represented. The respondent employer as well as the interested party which had represented these employees in the past as part of the larger bargaining unit opposed the application, saying that the larger unit should not be fragmented.

The Labour and Employment Board acknowledged a reluctance to carve out a smaller bargaining unit from a larger one and indicated this could only be done in special circumstances. An applicant has the onus to satisfy the Board that there are substantive reasons to conclude that the existing union representation has not worked and that to change the bargaining agent would be a compelling solution. In this case, the applicant's central concern was that the interested party had not negotiated wages for the hospital trades persons comparable to similar positions in the private sector. However, the evidence indicated that the bargaining relationship

between the interested party and the respondent had been lengthy, successful, meaningful, and that the interested party had attained improved working conditions and wages for all members of the larger bargaining unit, including the hospital trades persons. The interested party had taken steps in the past to have most of the members of the proposed bargaining unit reclassified in a way which lead to an increase in wages. Moreover, grievances concerning the trades persons had been resolved by the interested party and specific issues had been addressed. The Board could not conclude that the members of the proposed bargaining unit had been inadequately represented by the interested party. Rather, the Board concluded that the applicant had failed to establish the existence of substantive reasons to "carve out" the proposed bargaining unit. The application for certification was dismissed.

Note: The union filed an application for judicial review of the Board's decision on January 26, 2017. The matter is scheduled to be heard by the Court of Queen's Bench in April 2017.

Judicial Review

During the current reporting period there was a decision issued by the New Brunswick Court of Appeal which heard a matter that had originated with the Labour and Employment Board.

Court of Appeal upholds decision of Labour and Employment Board that union failed to demonstrate grounds for the acquisition of successor rights

International Brotherhood of Electrical Workers, Local 1555 v. Dobbelsteyn Electric Ltd., Dobbelsteyn Service and Maintenance Ltd., and Electrical Contractors Association of New Brunswick Inc,.54-16-CA, 5 January 2017

Board Decision

The International Brotherhood of Electrical Workers represented electrical workers in the Moncton area counties through its Local 1555. The respondent Dobbelsteyn Electric (DE) had been located in Fredericton where 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 union's Moncton area Local 1555 sought a declaration of successor rights under s. 60 of the *Industrial Relations Act* to become the bargaining agent for the employees of DSM by virtue of a sale of a business from DE to DSM. In response to a preliminary objection by the respondents DE and DSM, the Board concluded that Local 1555 had not established bargaining rights for DE and, therefore, dismissed the union's application to be recognized as the bargaining agent for the employees of the successor DSM. The union brought an application for judicial review to the New Brunswick Court of Queen's Bench.

Application for Judicial Review

A judge of the Court of Queen's Bench dismissed the union's application for judicial review noting that the onus was on the union to establish that it had acquired bargaining rights in respect of DE. The union's Local 1555 had never been certified as the bargaining agent for the employees of DE. Moreover, the Board had reviewed the relevant documentation and had concluded that there was no voluntary recognition agreement between these parties. The Board had made a reasonable decision when it concluded that Local 1555 had not acquired bargaining rights in respect of DE and, therefore, did not have a foundation on which to claim successor rights as bargaining agent for the employees of DSM. The union brought the matter to the New Brunswick Court of Appeal.

Court of Appeal Decision

In the Court of Appeal, the union argued that the reviewing judge had erred by failing to conclude that the Board had made an unreasonable interpretation of the documentary evidence in support of a voluntary recognition agreement. The issue, said the Court of Appeal, was whether the judge had identified and applied correctly the governing standard of review, that of rea-

sonableness in the sense of "justification, transparency and intelligibility" within the decision-making process. Here, the reviewing judge identified the appropriate standard of review. Moreover, the judge had not erred in concluding that the Board's interpretation of the relevant documents was reasonable and that they did not establish a voluntary recognition agreement with DE which the union could use to claim bargaining rights in respect of the employees of the successor DSM. The union's appeal was dismissed.

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

Industrial Relations Act

April 1, 2016 - March 31, 2017

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	19	27	14	3	4	21	6
Application for a Declaration of Common Employer	2	--	2	--	--	--	--	2
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	1	3	4	2	1	1	4	--
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	4	--	4	4	--	--	4	--
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	1	1	2	1	--	1	2	--
Application for a Declaration Concerning the Legality of a Strike or a Lockout	--	1	1	--	--	1	1	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Miscellaneous Applications (s. 22, s. 35, s. 131	7	4	11	4	5	1	10	1
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	4	6	10	1	1	7	9	1
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107	1	--	1	--	--	--	--	1
Complaint Concerning a Work Assignment	--	--	--	--	--	--	--	--
Application for Accreditation	--	--	--	--	--	--	--	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Termination of Accreditation	--	--	--	--	--	--	--	--
Request pursuant to Section 105.1	--	1	1	1	--	--	1	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--
Total	**28**	**35**	**63**	**27**	**10**	**15**	**52**	**11**

Public Service Labour Relations Act

April 1, 2016 - March 31, 2017

Matter	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	--	2	--
Application for Revocation of Certification	--	--	--	--	--	--	--	--
Notice pursuant to s. 43.1 (Designation of Essential Services	1	--	1	1	--	--	1	--
Application pursuant to s. 43.1(8)	1	-	1	1	--	--	1	--
Complaint pursuant to s. 19	4	2	6	--	1	3	4	2
Application for Declaration Concerning Status of Successor Employee Organization	--	--	--	--	--	--	--	--
Application pursuant to s. 29 (Designation of Position of Person employed in a Managerial or Confidential Capacity)	--	1	1	1	--	--	1	--
Application pursuant to s. 31	--	1	1	--	--	--	--	1
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication	--	2	2	2	--	--	2	--
Application for Appointment of an Adjudicator/ (s. 100.1)	--	3	3	2	--	1	3	--
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer	--	2	2	2	--	--	2	--

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Appointment of Conciliation Board	--	1	1	1	--	--	1	--
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	--	--	--	--	--	--	--
Application for Appointment of Commissioner (s. 60.1)	1	1	2	1	1	--	2	--
Request for a Declaration of Deadlock (s. 70	--	1	1	--	1	--	1	--
Notice pursuant to Section 44.1 of the Act	--	--	--	--	--	--	--	--
Request for the Appointment of an Arbitration Tribunal pursuant to s. 66	1	--	1	1	--	--	1	--
Total	**10**	**14**	**24**	**12**	**5**	**4**	**21**	**3**

Employment Standards Act

April 1, 2016 - March 31, 2017

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters						Total Matters Disposed	Number of cases Pending
				Affirmed	Settled	Vacated	Varied	Withdrawn	Dismissed		
Request to Refer Orders of the Director of Employment Standards	3	9	12	--	5	--	--	3	--	8	4
Request to Refer Notices of the Director of Employment Standards	1	--	1	--	1	--	--	--	--	1	--
Application for exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause hearing, s. 75	1	3	4	--	3	--	--	1	--	4	--
Total	**5**	**12**	**17**	**--**	**9**	**--**	**--**	**4**	**--**	**13**	**4**

Pension Benefits Act

April 1, 2016 - March 31, 2017

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of Matters					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)	--	--	--	--	--	--	--	--	--	--
Request for Show Cause Hearing, s. 77.1	--	--	--	--	--	--	--	--	--	--
Total	**--**	**--**	**--**	**-**	**--**	**--**	**--**	**--**	**--**	**--**

Human Rights Act

April 1, 2016 - March 31, 2017

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)	1	2	3	--	--	--	1	1	2
Total	**1**	**2**	**3**	**--**	**--**	**--**	**1**	**1**	**2**

Essential Services in Nursing Homes Act

April 1, 2016 - March 31, 2017

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	3	5	--	--	--	--	--	5
Total	**2**	**3**	**5**	**--**	**--**	**--**	**--**	**--**	**5**

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*.