Labour and Employment Board

ANNUAL REPORT | 2023-2024

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TRANSMITTAL LETTERS

From the Acting Minister to the Lieutenant-Governor

The Honourable Louise Imbeault
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, Province of New Brunswick, for the fiscal year April 1, 2023, to March 31, 2024.

Respectfully submitted,

Honourable Jean-Claude D'Amours
Acting Minister

From the Chairperson to the Acting Minister

The Honourable Jean-Claude D'Amours
Acting Minister of Post-Secondary Education, Training and Labour

Sir:

I am pleased to be able to present the 29th annual report describing operations of the Labour and Employment Board for the fiscal year April 1, 2023, to March 31, 2024, as required by section 15 of the *Labour and Employment Board Act*, RSNB 2011, c 182.

Respectfully submitted,

David Mombourquette
Chairperson

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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*. In January 2023, the Board was given certain responsibilities under the *Pooled Registered Pension Plans Act.*

The membership of the Labour and Employment Board typically consists of a full-time chairperson; a number of part-time vice-chairpersons; and 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 25 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*, the *Pension Benefits Act* and the *Pooled Registered Pension Plans 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 under the *Employment Standards Act*, or the Superintendent under the *Pension Benefits Act* and *Pooled Registered Pension Plans Act.* 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, childcare leave, etc. Under the *Pension Benefits Act* and the *Pooled Registered Pension Plans 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 Ombud. 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.

MISSION STATEMENT

The mission of the Board arises out of the ten (10) 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,* the *Pension Benefits Act* and the *Pooled Registered Pension Plans 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.

MESSAGE FROM THE CHAIRPERSON

I am honoured to submit the 29th annual report of the Labour and Employment Board for the period of April 1, 2023, to March 31, 2024.

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*, the *Essential Services in Nursing Homes Act*, and the *Pooled Registered Pension Plans 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 Board conducts in-person hearings both at the Board's offices and, in the case of human rights and employment standards matters, at various locations in the Province. The Board continues to conduct pre-hearing conference through a video platform and, with the consent of the parties, some substantive hearings. Counsel often find that virtual hearings are more efficient and cost effective for their clients, particularly where witnesses are located far from Fredericton.

The Board continues to dialogue with the chairpersons and chief administrators of the various Federal and Provincial labour relations boards. The annual conference was held in person in Prince Edward Island in September 2023. These discussions are valuable in keeping current with the evolving labour board practices and decisions in other jurisdictions, many of which have legislation similar to that in New Brunswick.

The total number of matters filed with the Board during this fiscal year was 155, a more than 50% increase from the previous year. Human rights matters, which often involve complex issues and require lengthy hearings, increased dramatically from six new files in the previous year to 20 new files in this fiscal year. We anticipate that the number of human rights matters will continue to increase in the coming fiscal 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 56 days of hearing and 63 pre-hearing conferences.

During the year the Board disposed of a total of 127 matters. In so doing, there were 26 written decisions released by the Board.

Under the *Public Service Labour Relations Act*, the Board entertained a number of requests for intervention in the collective bargaining process, including three (3) requests for the appointment of a Conciliation Officer; and two (2) requests for the appointment of a Conciliation Board.

The decision as to whether or not to appoint a tripartite 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. One tripartite panel was requested and appointed in this fiscal year.

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 Chairperson, I have continued my participation in the Bar Admission course sessions conducted by the Law Society of New Brunswick. I also moderated an online seminar about accommodation of workplace injuries and disabilities.

I wish to thank all current and past members for their valuable contributions to the Board. Three new Vice-chairpersons were appointed during this fiscal year.

In closing, I extend a special thank you to the Board's administrative and professional staff, who ensure that the Board operates in an effective and efficient manner. The Board could not fulfill its mandate without their professionalism and dedication.

David A. Mombourquette

Chairperson

COMPOSITION

Chairperson

David A. Mombourquette

Alternate Chairperson

John P. McEvoy, K.C. (Fredericton)

Vice-Chairpersons

Brian D. Bruce, K.C. (Fredericton)

Annie C. Daneault, K.C. (Grand Falls)

Bernard T. LeBlanc (Grand-Digue)

Michael Marin, K.C. (Fredericton)

Sylvie Godin-Charest (Moncton)

Daniel Léger (Dieppe)[1]

David Brown (Saint John)[1]

Johanne Thériault Paulin (Beresford)[1]

Members representing Employer interests[2]

Stephen Beatteay (Saint John)

Gloria Clark (Saint John)

Marco Gagnon (Grand Falls)

William Dixon (Moncton)

Members representing Employee interests

Debbie Gray (Quispamsis)

Richard MacMillan (St. Stephen)

Jacqueline Bergeron-Bridges (Eel River Crossing)

Gary Ritchie (Fredericton)

Pamela Guitard (Point-La-Nim)

Carl Flanagan (Grand-Digue)

Chief Executive Officer

Lise Landry

Legal Officer

Shijia Yu

Administrative Staff

Jennifer Presley

Debbie Allain

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1. Mr. Léger, Mr. Brown and Ms. Thériault Paulin were appointed effective December 7, 2023, for a three-year term.

2. There were two vacancies at the end of the reporting period.

ORGANIZATIONAL CHART

ADMINISTRATION

The membership of the Board ordinarily consists of a full-time chairperson, several part-time vice-chairpersons and a number of 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 $450.00 for vice-chairpersons and $115 for Board members.

The chief executive officer, with the assistance of a legal officer 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 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 the Board, usually through 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 cases 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.

The Labour and Employment Board conducts numerous formal hearings annually, either at its offices in Fredericton as well as other centres throughout the province, or, since the COVID-19 pandemic, virtually via the Zoom platform. However, a significant portion of the Board's workload is administrative in nature. During the year in review, a total of 101 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 133 matters pending from the previous fiscal year (2022-2023); 155 new matters were filed with the Board during this reporting period for a total of 288 matters; and 127 matters were disposed of. There remain 161 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 25.

Legislation	# matters pending from previous fiscal year	# new matters filed	# hearing days	# pre-hearing days	# written reasons for decision	# matters disposed	# matters pending at the end of this fiscal year
Industrial Relations Act	19	94	32	37	17	76	37
Public Service Labour Relations Act	27	26	6	5	2	27	26
Employment Standards Act	11	13	12	7	5	14	10
Human Rights Act	9	20	6	14	2	8	21
Essential Services in Nursing Home Act	66	0	0	0	0	0	66
Public Interest Disclosure Act	1	2	0	0	0	2	1
Fisheries Bargaining Act	0	0	0	0	0	0	0
Pay Equity Act, 2009	0	0	0	0	0	0	0
Pension Benefits Act	0	0	0	0	0	0	0
Pooled Registered Pension Plans Act	0	0	0	0	0	0	0
TOTAL	**133**	**155**	**56**	**63**	**26**	**127**	**161**

Number of hearing days

Chairperson or Vice-Chairperson Sitting Alone	Panel of Three Persons	Total
55	1	56

BUDGET 2023-2024

Primary	Projected	Actual
3 - Personal Services - Payroll, benefits, per diem	614,300	547,084
4 - Other Services - Operational Costs	62,000	(103, 871)
5 - Materials and Supplies	14,700	(19,811)
6 - Property and Equipment	0	(2,427)
Total	**691,000**	**673,194**

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

Employer memo to employees during organizing drive seen by Board as interference with union rights of representation

Canadian Union of Public Employees, Locals 5412 and 5449 v. Paladin Security Group Ltd., IR-029-22, IR-030-22, IR-031-22, 31 August 2023.

In 2020, the Canadian Union of Public Employees, Local 5412 (CUPE 5412), was certified as bargaining agent for the employees of Garda Canada Security, which provided security services at 13 provincial hospitals run by Horizon Health Network, a governmental health authority. Later that year, Canadian Union of Public Employees, Local 5449 (CUPE 5449), was certified as bargaining agent for the Garda employees who worked in security at the 11 hospitals of another government health authority, Réseau de santé Vitalité. In 2022, Garda was replaced by the respondent Paladin Security Group which specializes in providing security to hospitals. It hired many of the former Garda employees but did not voluntarily recognize either CUPE 5412 or CUPE 5449 as bargaining agents. Both union locals began a drive to organize Paladin employees in response to which Paladin sent a memo to employees which indicated that it was aware of the CUPE efforts to solicit employee interest in forming bargaining units. The memo indicated that a commitment to a union has potentially binding consequences, that unions will often make unrealistic promises regarding wages and benefits, that employees may say no to union organizers, that employees should contact the employer or the labour board if they felt pressured, intimidated or harassed in any way, and that once a union is certified the process to decertify is complex. The memo also referred the employees to the Labour Watch website which, the employer said, was an independent site for information about unions. In October 2022, CUPE 5412 filed an application with the Labour and Employment Board for certification in respect of 120 employees who worked for Paladin Security at Horizon Health Network; CUPE 5449 applied at the same time to be certified as bargaining agent for the 105 Paladin Security employees at Réseau de santé Vitalité. Although there had been a high level of employee support at the time of the Garda certifications and its employees were satisfied with CUPE representation, membership evidence in support of the applications for certification at Paladin indicated that CUPE had the support of less than 10% of the employees in each of the proposed bargaining units. CUPE asserted that this drop-in employee support was attributable to the Paladin memo issued during the organizing drive which, it said, amounted to interference with its rights of representation. Accordingly, on the same date as they filed their respective applications for certification, CUPE 5412 and CUPE 5449 filed a complaint alleging that the employer Paladin had interfered with their rights of representation contrary to s. 3(1) of the Industrial Relations Act, and that it had engaged in intimidation contrary to ss. 3(3) and 6(2) of the Act. Pursuant to s. 106 of the Act, CUPE asked the Board to grant their applications for certification on the grounds that employer misconduct made it unlikely that the true wishes of the employees could be ascertained by a representation vote.

The Board had no hesitation in dismissing the aspects of the CUPE complaint which alleged intimidation or coercion contrary to ss. 3(3) and 6(2) of the Act. The Paladin memo did not contain threatening language and, as a union witness attested, it would not have dissuaded him from attending a union organizing meeting. As regards interference with union rights of representation under s. 3(1) of the Act, the Board examined the legal authorities as they relate to employer free speech and concluded that in its memo to its employees the respondent Paladin had exceeded the permissible limits of employer communications. The memo was issued at a time when the employees were particularly vulnerable, having moved from a familiar unionized workplace to a new non-union employer with new management and policies. The memo went beyond mere statements of fact or opinion on the employer's business to question the motives and tactics of the union locals, and it referred the employees to the Labour Watch website which was clearly skewed towards the management perspective. The respondent employer, through its memo to employees, had interfered with union rights of representation contrary to s. 3(1) of the Act. However, the union failed to establish that the violation was sufficiently serious to derail a promising organizing campaign or to make it likely that the true wishes of the employees could not be ascertained by a representation vote. Moreover, the membership evidence presented by CUPE was less than 10%. These circumstances were insufficient to support the extraordinary remedy of certification under s. 106 of the Act. Accordingly, the CUPE applications for certification were dismissed, but with no time bar on filing a new application.

Board recognizes union successor rights in a construction industry case

Fram Enterprises Inc. v. Labourers' International Union of North America, Local 900, Monarch Construction Ltd., IR-035-22, 19 July 2023

In 2019, the respondent union, Labourers' International Union of North America, Local 900, was certified as bargaining agent for the employees of Monarch Construction, which worked in the water and sewer sector of the construction industry in Moncton and area. Monarch had 50 to 60 workers and revenues between $6 and $7 million dollars. One of Monarch's employees, Richard Fram (RF), wished to start his own water and sewer construction company but he could not afford to buy Monarch and decided to start small and build up his own business. RF discussed his plans with Monarch's principal who, contemplating retirement, gave his support, initially by subcontracting city snow removal contracts to RF. Monarch paid for RF to take a safety training program, which he would need to bid on municipal tenders, and Monarch's principal taught RF the bidding process. In 2017, RF incorporated the applicant, Fram Enterprises (Fram), and located its head office at the same address as Monarch. In 2020, RF left his job with Monarch to focus on Fram, which bought a variety of construction equipment from Monarch. Fram hired Monarch's only mechanic, as well as a number of its construction workers. Fram continued to work from the Monarch location, although it had separate offices, computer systems, phone numbers and filing cabinets. In 2022, Monarch's principal vacated the office. That same year, the respondent union filed a grievance alleging that Fram was a successor employer to Monarch and, therefore, that it was obliged to recognize the union's rights as bargaining agent for its employees. In response, Fram applied to the Labour and Employment Board under s. 60 of the Industrial Relations Act for a declaration that it had not purchased all or part of the Monarch business and was not bound by the Monarch certification order. The union, in turn, applied to have the Board declare that Fram was the successor employer to Monarch.

The Board affirmed that its longstanding approach to the interpretation of s. 60 of the Act is to determine whether there has been a transfer of a "functional economic vehicle" or, as otherwise

described, the "continuation of the business". A review of the evidence convinced the Board that there had been a sale of the business from Monarch to Fram. Monarch's principal had provided Fram with its initial source of income, its ability to obtain financing, its knowledge of the bidding process, and the use of hundreds of thousands of dollars of essential equipment on the basis of a handshake. Monarch also gave Fram the opportunity to fill its role in the water and sewer sector of the construction industry, provided Fram with an experienced mechanic and construction workers, and supplied Fram with a place to conduct its business and store its equipment. These elements together persuaded the Board that Monarch had transferred the core of its business to Fram as a functioning economic vehicle. The Board declared that the applicant Fram was indeed the successor employer to Monarch Construction and, therefore, that the union had successor bargaining rights in respect of Fram's employees.

Board called on to identify true employer in a case where carpenters sought certification

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Koval Construction Ltd. and 739963 NB Ltd., Saint John Construction Association Inc., Moncton Northeast Construction Association Inc., IR-035-23, IR-045-23, 15 February 2024

On 4 July 2023, the union, United Brotherhood of Carpenters and Joiners of America, Local 1386, applied to be certified for a bargaining unit of 3 carpenters. On the date of the application for certification, these carpenters worked to install floor panels at a Rothesay construction site under the supervision of one Koval who had incorporated the respondents Koval Construction Ltd. and 739963 NB Ltd. Koval, as owner of the companies, said that Koval Construction built residential homes while the numbered company constructed apartment buildings. He asserted that at the relevant time one of the carpenters worked for Koval Construction while the other two worked for 739963 NB Ltd., albeit on the same project. An issue arose as to the identity of the true employer.

The Board concluded that the respondent Koval Construction was the true employer because it had control and direction in respect of the 3 employees. Significantly, the respondent Koval Construction was the only entity known to the employees, who were not aware of the numbered company. Accordingly, the Board granted the union's application for certification observing that it had the support of more than 50% of the employees. Otherwise, the Board dismissed as premature the union's Application for a Declaration of Common Employer. Such an application can only be made where there are existing collective bargaining rights in need of protection and, here, the parties did not have a pre-existing collective bargaining relationship.

Union must show significant change to include in a bargaining unit a position which the parties have historically excluded by agreement

Canadian Union of Public Employees, Local 486 v. City of Saint John, IR-10-23, 16 February 2024

In 1958, the Canadian Union of Public Employees, Local 486, was certified to represent a bargaining unit of City of Saint John employees who performed clerical and technical work, commonly referred to as inside workers. Over the years, the union and the City entered into a number of collective agreements which, since at least 1981, contained a recognition clause that excluded the position of

Planner from the bargaining unit. Planners are involved with planning policy and implementation, the review of planning applications and documents, changes to by-laws and zoning, as well as the preparation of reports for City Council. In 2023, the union applied to the Labour and Employment Board under s. 22 of the Industrial Relations Act to have the Planner position included in their bargaining unit.

The Board recognized that s. 22 of the Act allows it to amend an existing certification order to include specific classifications of employees in a bargaining unit, whether such classifications are long-standing or newly created. A review of the law indicated that where an applicant seeks to include in a bargaining unit a position which has been historically excluded by the agreement of the parties, the onus is on the applicant to demonstrate that there have been significant changes in the duties and responsibilities of the position in issue. Here, it was clear that the position of Planner, as well as that of Senior Planner, had been historically excluded from the bargaining unit by agreement of the parties and that the applicant union had not provided any evidence to show that there had been a change in the position sufficiently substantial to justify its inclusion in the bargaining unit. Accordingly, the union's application was dismissed.

PUBLIC SERVICE LABOUR RELATIONS ACT

Employer correct to reclassify Orthopedic Technologists trained as Licenced Practical Nurses within bargaining unit represented by Nurses Union

Canadian Union of Public Employees, New Brunswick Council of Hospital Unions (Local 1252) v. Province of New Brunswick, New Brunswick Nurses Union, PS-015-22, PS-001-23, 4 August 2023

The applicant, Canadian Union of Public Employees, Local 1252 (CUPE), was certified in 1970 to represent all employees within the Patient Services Group of the Operational Category as defined by the Public Service Labour Relations Act. This Group included 15 Orthopedic Technologists (OTs), 11 of whom held the designation of Licenced Practical Nurse (LPN). The New Brunswick Nurses Union was the certified bargaining agent for the Nurses Group of the Scientific and Professional Category under the Act, which included all nurses, nurse practitioners and LPNs. In October 2021, the respondent employer, Province of New Brunswick, without timely notice to CUPE, reclassified all 5 OTs employed by Réseau de santé Vitalité as Licenced Practical Nurses (LPNs), which meant that they were removed from the CUPE bargaining unit and placed in the bargaining unit represented by the New Brunswick Nurses Union. A few months later, in February 2022, the employer reclassified the 6 OTs employed by Horizon Health Network who held the LPN designation, meaning that they also moved to the bargaining unit represented by the Nurses Union. In March 2022, CUPE filed an application under s. 31 of the Act to assert that the reclassifications were inappropriate and to ask that the OTs be placed back into the CUPE bargaining unit. CUPE later filed complaints which alleged that the respondent Province had violated s. 30.1 of the Act by failing to give timely notice of reclassification, and that the reclassifications constituted interference with its right of representation contrary to s. 7(2) of the Act.

The Board noted that it has a long-established test to determine what bargaining unit a group of employees should fall within. This three-part test includes an examination of essential duties, job descriptions and the appropriate occupational category or group. The core duties of an OT include dealing with immobilization devices like casts and braces, the application and removal of traction

apparatus, as well as wound debridement. Such orthopedic and wound care is included in the job descriptions of both OTs and LPNs. There is also overlap in ancillary services, like the development of patient care plans, catheter installation and specimen collection. Although OTs may perform some of these shared functions at a higher level then LPNs, the "raison d'être" of OT duties is the treatment of orthopedic conditions, a function consistent with the role of an LPN. The 11 OTs who also held LPN qualifications had a community of interest with the LPNs who worked in orthopedic clinics. The employer's decision to have all OT work performed by LPNs was consistent with the Board's conclusion that the best fit for the OT position was within the Nursing Group of the Scientific and Professional Category as represented by the Nurses Union. Moreover, the LPN classification already existed and included the core duties of the OT classification. Accordingly, it could not be said that these duties were exclusively CUPE bargaining unit work. The CUPE application under s. 31 of the Act was dismissed as it had failed to establish that the best fit for the OT duties was within its bargaining unit. Otherwise, the Board agreed with CUPE that the employer Province had failed to give timely notice of reclassification contrary to s. 30.1 of the Act. This led to a cessation of dues, which the Board ordered that the employer pay to CUPE for the period prior to the giving of notice. In addition, the Board declared that the Province had violated s. 7(2) of the Act because its failure to give timely notice of a significant decision like reclassification had a direct impact on CUPE's representation of its members.

Duty to make a reasonable effort in negotiations includes the provision of information relevant to bargaining as well as the timely presentation of a monetary proposal

Canadian Union of Public Employees, Local 1190 v. Province of New Brunswick, PS-034-22, 26 September 2023

The complainant, Canadian Union of Public Employees, Local 1190, represented general labourers and trades workers employed in 8 departments by the respondent Province of New Brunswick. About 2 months before the collective agreement between the parties was set to expire, the union gave the employer notice to bargain towards a new collective agreement. For the purposes of bargaining, the union sought information from the employer on matters such as employee lists, departmental classifications and payroll costs. Given long delays in reaching past collective agreements, the union indicated that it wished to adhere to the time limits set out in s. 45 of the Public Service Labour Relations Act which stipulates that, in the absence of agreement, the parties must commence negotiations within 20 days after notice to bargain has been given, they must bargain in good faith and make every reasonable effort to conclude a collective agreement, and that collective bargaining shall not continue for more than 45 days. The parties did not reach an agreement and, by the time negotiations concluded, the employer had not provided the union with certain information it had requested, such as departmental classifications. Also, the employer waited until the end of negotiations to present its monetary proposal. The union asked the Labour and Employment Board to find that the employer had failed to bargain in good faith and make every reasonable effort to conclude a collective agreement within 45 days from the commencement of bargaining, as required by s. 45 of the Act.

The Board took the opportunity to clarify s. 45, indicating that its 45-day limit on negotiations refers to 45 calendar days, not 45 bargaining days. To ensure that the collective bargaining process will not be unduly delayed, either party may request the appointment of a conciliation board at the end of the

45-day period. However, the duty to bargain is not limited to the initial 45-day period but, rather, continues during conciliation, impasse, or job action until the parties reach a collective agreement. In the Board's view, the employer had not bargained in bad faith. Collective bargaining is a complex process and the sheer number of proposals and individuals involved in these negotiations made it unlikely that an agreement would be reached in 45 days, particularly given that the parties had vastly different positions on the wage issue. Although the union hoped to reach agreement in 45 days, there was nothing in the evidence to suggest that the employer was intentionally delaying the process. On the other hand, the employer had failed to meet the "reasonable effort" standard to conclude a collective agreement within 45 days. It had failed to respond to the union's requests for information in a timely manner. The duty to disclose such information is necessary for parties to engage in a rational and informed discussion of the competing bargaining proposals. Disclosure must be made in sufficient time to permit meaningful negotiations. Moreover, the employer provided its monetary offer far too late in the negotiating process to permit the union to make an informed response. The union had presented its monetary proposal at the outset of negotiations but the employer withheld its proposal because it felt the union's demands were too high. The employer finally submitted its monetary proposal at the end of the negotiation period, when there was no time left for the union to consider it and respond. The Board indicated that it would issue an order to recognize that the employer had violated s. 45 in two respects: the failure to respond to the union's information requests, and the failure to disclose its monetary offer in a timely manner.

EMPLOYMENT STANDARDS ACT

Employer fails to rebut presumption that termination related to employee's recent harassment complaint

Campbell v. Opportunities New Brunswick, ES-017-22, 21 December 2023

The employee, Campbell, worked from June 2016 to July 2020 as a Business Development Executive in the Investment Attraction Department of the employer, Opportunities New Brunswick, a crown corporation responsible for economic development in the province. The role of the employee was to identify companies willing to invest in businesses in New Brunswick. In August 2019, the employee brought a complaint under a Policy on workplace harassment mandated by an Occupational Health and Safety Act regulation in which he alleged that certain of his superiors had engaged in harassment, vulgar language and intimidation. He raised concerns, as well, under the Ombud Act. In June 2020, the employer dismissed the complaint on the basis that it did not raise a prima facie violation of the workplace Policy. The employee disagreed that his harassment complaint did not raise a prima facie case and indicated that he would continue to pursue his complaint and other legal options. In July 2020, the employee was terminated on the premise that his skill set did not meet the needs of the employer. In April 2021, the employee brought a complaint under s. 28 of the Employment Standards Act in which he alleged that he had been terminated for pursuing his statutory rights against harassment. In July 2022, the Director of Employment Standards dismissed his Employment Standards Act complaint, which prompted the employee to refer the matter to the Labour and Employment Board.

The Board recognized that the key principles in the application of s. 28 of the Employment Standards Act include a recognition that the Act is remedial legislation and must be given a broad interpretation, that the question is whether the termination was in any way related to the employee's complaint and

that, where termination occurs near the time of the complaint, the employer must show that the reasons for termination were not related to the employee's complaint in order to rebut a presumption to the contrary. The central issue was whether the employee's termination was related in any way to his harassment complaint in the sense that there was a nexus between the termination decision and the filing of the complaint. The employer asserted that the employee had been terminated for legitimate business reasons but the evidence established that the employer was frustrated by the employee's intention to continue to pursue his harassment complaint after it had been dismissed by the employer. Otherwise, there was no evidence to corroborate the employer's assertion as to problems with the employee's performance and attendance. Indeed, in the prior year the employee had received a positive performance assessment. In the Board's view, the employer had failed to rebut the presumption that its termination of the employee was motivated, at least in part, by the employee's ongoing intention to pursue his statutory rights against harassment. The Board concluded that the employer had violated s. 28 of the Employment Standards Act and retained jurisdiction to provide a remedy in the event the parties were unable to reach agreement on this point.

Board orders reinstatement of employee who was terminated following a workplace injury

Sky Watters v. Sobey's Capital Incorporated, ES-001-23, 25 October 2023

The complainant employee worked for 12.5 years at the employer's warehouse in Oromocto. In July 2019, the employee sustained a workplace injury when her right knee buckled as she stepped down from a reach truck. In October 2019 she underwent knee surgery followed by a course of physiotherapy. From February 2020 until March 2021, the employer placed the employee in a temporary accommodated position to assist with her gradual return to work. By January 2021, the employee had completed her rehabilitation plan but was left with physical limitations with respect to standing, walking, crouching, and lifting. In April 2021, the employer terminated the employee saying, in effect, that it could no longer accommodate her as it did not have suitable employment for someone with her medical restrictions. In July 2021, the employee filed a complaint with the Director of Employment Standards. She alleged that she had been dismissed prior to the expiry of the two-year period in s. 42.3 of the Workers Compensation Act, which is deemed to be a provision of the Employment Standards Act. She sought compensation and reinstatement. The Director inquired into the employee's complaint and concluded that the employer had not failed to comply with the Act. The employee requested that the matter be referred to the Labour and Employment Board.

The Board observed that s. 42.3 of the Workers Compensation Act stipulates that an employer may not dismiss a worker who has suffered a compensable workplace injury until 2 years after the date of injury. Here, the employee was injured in July 2019 and dismissed in April 2021, some three months prior to the expiry of the requisite 2-year period. The Board held that the employer had violated s. 42.3 by failing to respect the 2-year period and ordered the employer to compensate the employee for any economic loss during the balance of this period, including any loss of wages, vacation pay and holiday pay, as well as any losses resulting from the termination of employee benefits. Otherwise, the Board concluded that the Director had the authority under s. 65(1) of the Employment Standards Act to order that the employee be reinstated to the position held at the time she was improperly dismissed regardless her physical abilities. The focus of s. 65(1) is to ensure that a worker is placed in the position she would have held if the employer had not breached s. 42.3. Accordingly, the Board

ordered the employer to reinstate the employee to the accommodated position she held immediately prior to the date her employment was terminated.

HUMAN RIGHTS ACT

Board confirms the bona fides of a university retirement plan with a provision for mandatory retirement

Robson v. University of New Brunswick, Canadian Union of Public Employees, Local 3339, and New Brunswick Human Rights Commission, HR-002-20, 15 May 2023

The complainant, Robson, who was a member of the respondent, Canadian Union of Public Employees, Local 3339, had been employed by the respondent, University of New Brunswick (UNB), at its Saint John campus between 2010 and 2017. Article 26 the collective agreement between the union and the employer contained a mandatory retirement provision, Article 27 provided for a retirement allowance, and Article 28 dealt with participation in a public service pension plan. The complainant, who was acknowledged to be a good employee, turned 65 and was compelled to retire against her will on 30 June 2017. About a week prior to her mandatory retirement, the complainant filed a complaint with the New Brunswick Human Rights Commission against the respondents union and UNB alleging that her termination amounted to discrimination on the basis of age contrary to s. 4 of the New Brunswick Human Rights Act. The respondents replied that the mandatory retirement requirement in Article 26 of the collective agreement was permitted as part of a bona fide retirement plan in accordance with subsection 4(6)(a) of the Act. The Commission investigated and concluded that the complainant had an arguable case of age discrimination. In December 2020, it referred the matter to the New Brunswick Labour and Employment Board to act as a Board of Inquiry under the Human Rights Act.

The issue, said the Board, was whether the complainant Robson had been required to retire in accordance with a bona fide retirement plan pursuant to s. 4(6)(a) of the Human Rights Act. The Board was required to consider (a) the burden of proof, (b) whether a retirement plan existed, and (c) if such a plan did indeed exist, whether it was bona fide. The Board was able to make its determination without the assistance of expert evidence which, it said, was not necessary. First, as regards burden of proof, the union and UNB established that the plan in question was a genuine plan adopted in good faith for legitimate purposes and not for the purpose of defeating protected rights. The onus then shifted to the complainant, who did not show that the plan was a sham. Second, the Board determined that the provisions of the collective agreement dealing with mandatory retirement as well as a retirement allowance and pension plan were sufficient to create a retirement plan within the meaning of s. 4(6)(a) of the Act. Third, the Board concluded that the UNB retirement plan was bona fide in both an objective and a subjective sense. Objectively, the parties to the collective agreement accepted mandatory retirement at age 65 with a retirement allowance, rather than to end mandatory retirement with a reduction or the elimination of the retirement allowance. Subjectively, both UNB and the union had legitimate reasons to maintain their positions on mandatory retirement and the retirement allowance which was designed, in part, to alleviate the economic impact of retirement. UNB viewed mandatory retirement as a benefit in their financial and organizational planning while the union was not willing to make a concession to reduce the retirement allowance in exchange for the elimination of mandatory retirement. The retirement plan was bona fide given that the parties adopted its provisions in the interests of sound and accepted business practice. Accordingly, the Board concluded that the

retirement provisions of the collective agreement constituted a bona fide retirement plan under s. 4(6)(a) of the Act and that UNB did not engage in unlawful discrimination when it required the complainant Robson to retire at age 65 in compliance with these provisions. Having made this determination, the Board indicated that it would schedule a further hearing to consider whether the exemption in s. 4(6)(a) amounts to a violation of the Canadian Charter of Rights and Freedoms, which would be necessary for the complainant to succeed.

Employer ordered to pay worker $10,000 in general damages because of discrimination on the basis of physical disability

Joseph East v. Fundy Roofing Ltd., Mark Dugay and New Brunswick Human Rights Commission, HR-002-23, 13 December 2023

Beginning in 2004, the complainant East worked seasonally from early spring to early winter as a roofer for the respondent roofing company. In August 2017, the complainant fell from a ladder while at work and injured his back. He was off work for the rest of the season during which he received workers compensation benefits and underwent a rehabilitation program which included physiotherapy and occupational therapy. The complainant returned to work in the spring of 2018 with a medical recommendation for modified duties because of his diagnosis, which included chronic back symptoms. In June 2018, the complainant suffered a crush injury to his thumb which again resulted in time off work, rehabilitation and workers compensation benefits. He returned to work and resumed light duties but in September 2018 he underwent carpal tunnel surgery which yet again necessitated time away from work and more rehabilitation. During the times he returned to light duties, the complainant was advised by WorkSafeNB not to climb ladders, work on roofs, or use his injured hand. The complainant was laid off at the end of the 2018 roofing season, as usual, with the expectation of being recalled in the spring of 2019 by which time he was deemed physically able to perform the vast majority of his pre-accident job duties. However, the employer did not recall him to work in 2019. The complainant took the view that he had not been recalled because of his work-related physical disabilities. He brought a complaint under s. 4 of the New Brunswick Human Rights Act alleging that the employer had discriminated against him by terminating his employment because of disability. The Human Rights Commission referred the complaint to the Labour and Employment Board to act as a Board of Inquiry.

The Board indicated that the complainant was required to demonstrate a prima facie case of discrimination following a three-part test developed by the Supreme Court of Canada: (1) that he had a characteristic protected from discrimination, (2) that he experienced an adverse impact, and (3) that the protected characteristic was a factor in the adverse impact. On the basis of the complainant's largely unchallenged evidence, as corroborated by WorkSafeNB witnesses and medical documents, the Board concluded that the complainant had made out a prima facie case of discrimination based on employment-related physical disability. He had been rehired seasonally until 2018 but was not recalled in 2019 because of disabilities arising from two work-related injuries. Moreover, the complainant was criticized and belittled by the employer's owner in the presence of his coworkers for failing to perform the usual work of a roofer. The complainant felt "sick to his stomach" and suffered from depression, sleeplessness, anxiety, and stress that changed his life and made him feel "useless". Once the complainant made out a prima facie case of discrimination, the burden shifted to the employer to refute the complainant's case. However, the employer's owner did not wholly refute the complainant's allegations, nor did he refute the evidence of WorkSafeNB case managers, occupational

therapist or physiotherapist. The Board found that the complainant had been discriminated against on the basis of physical disability contrary to s. 4 of the Human Rights Act. It awarded him $10,000 in general damages to compensate for his job termination as well as injury to his dignity, feelings, self-respect and self-worth. In addition, the employer's owner was ordered to undergo a one-day human rights training course on the duty to accommodate.

SUMMARY TABLES OF ALL MATTERS DEALT WITH BY THE BOARD

Industrial Relations Act

April 1, 2023 - March 31, 2024

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	6	58	64	20	5	18	43	21
Application for a Declaration of Common Employer	--	2	2	--	1	1	2	--
Intervener's Application for Certification	--	--	--	--	--	--	--	--
Application for Right of Access	--	--	--	--	--	--	--	--
Application for a Declaration Terminating Bargaining Rights	1	4	5	3	--	--	3	2
Application for a Declaration Concerning Status of Successor Rights (Trade Union)	--	--	--	--	--	--	--	--
Application for Declaration Concerning Status of Successor Rights (Sale of a Business)	1	--	1	1	--	--	1	--
Application for a Declaration Concerning the Legality of a Strike or a Lockout	1	1	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 Consent to Institute a Prosecution	--	2	2	--	--	--	--	2
Miscellaneous Applications (s. 22, s. 35, s. 131)	4	13	17	9	2	2	13	4
Complaint Concerning Financial Statement	--	--	--	--	--	--	--	--
Complaint of Unfair Practice	3	11	14	1	--	8	9	5
Referral of a Complaint by the Minister of Post-Secondary Education, Training and Labour (s. 107)	3	3	6	--	1	2	3	3
Complaint Concerning a Work Assignment	--	--	--	--	--	--	--	--
Application for Accreditation	--	--	--	--	--	--	--	--
Application for Termination of Accreditation	--	--	--	--	--	--	--	--
Request pursuant to Section 105.1	--	--	--	--	--	--	--	--
Stated Case to the Court of Appeal	--	--	--	--	--	--	--	--
Reference Concerning a Strike or Lockout	--	--	--	--	--	--	--	--
TOTAL	**19**	**94**	**113**	**34**	**9**	**33**	**76**	**37**

Public Service Labour Relations Act

April 1, 2023 - March 31, 2024

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters			Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	--	--	--	--	--	--	--	--
Application for Revocation of Certification	--	--	--	--	--	--	--	--
Notice pursuant to s. 43.1 (Designation of Essential Services)	1	1	2	1	--	--	1	1
Application pursuant to s. 43.1(8)	4	2	6	1	--	--	1	5
Complaint pursuant to s. 19	12	6	18	3	1	5	9	9
Application for Declaration Concerning Status of Successor Employee Organization	--	--	--	--	--	--	--	--
Miscellaneous (s. 63)	--	--	--	--	--	--	--	--
Application pursuant to s. 29 (Designation of Position of Person employed in a Managerial or Confidential Capacity)	--	--	--	--	--	--	--	--
Application pursuant to s. 31	1	1	2	1	1	--	2	--
Application for Consent to Institute a Prosecution	--	--	--	--	--	--	--	--
Reference to Adjudication (s. 92)	--	5	5	5	--	--	5	--

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 an Adjudicator (s. 100.1)	7	6	13	4	1	1	6	7
Application for Appointment of a Mediator (s. 16)	--	--	--	--	--	--	--	--
Application for Appointment of Conciliation Officer (s. 47)	1	3	4	1	--	1	2	2
Application for Appointment of Conciliation Board (s. 49)	1	2	3	1	--	--	1	2
Application pursuant to s. 17	--	--	--	--	--	--	--	--
Application for Reconsideration (s. 23)	--	--	--	--	--	--	--	--
Application for Appointment of Commissioner (s. 60.1)	--	--	--	--	--	--	--	--
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	--	-	--	--	--	--	--	--
TOTAL	**27**	**26**	**53**	**17**	**3**	**7**	**27**	**26**

Employment Standards Act

April 1, 2023 - March 31, 2024

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	2	4	6	--	--	1	--	1	--	2	4
Request to Refer Notices of the Director of Employment Standards	6	7	13	4	--	1	--	3	--	8	5
Application for Exemption, s. 8	--	--	--	--	--	--	--	--	--	--	--
Request for Show Cause Hearing, s. 75	3	2	5	2	1	--	--	1	--	4	1
TOTAL	**11**	**13**	**24**	**6**	**1**	**2**	**--**	**5**	**--**	**14**	**10**

Human Rights Act

April 1, 2023 - March 31, 2024

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)	9	20	29	3	--	--	5	8	21
TOTAL	**9**	**20**	**29**	**3**	**--**	**--**	**5**	**8**	**21**

Essential Services in Nursing Homes Act

April 1, 2023 - March 31, 2024

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)	66	--	66	--	--	--	--	--	66
TOTAL	**66**	**--**	**66**	**--**	**--**	**--**	**--**	**--**	**66**

Public Interest Disclosure Act

April 1, 2023 - March 31, 2024

Matter	Pending from Previous Fiscal	Matters Filed	Total	Disposition of matters				Total Matters Disposed	Number of cases Pending
				Granted	Dismissed	Settled	Withdrawn		
Complaint of Reprisal	1	2	3	1	1	--	--	2	1
TOTAL	**1**	**2**	**3**	**1**	**1**	**--**	**--**	**2**	**1**

Note: There was no activity during the reporting period under the *Fisheries Bargaining Act*, the *Pay Equity Act*, 2009, the *Pension Benefits Act* and the *Pooled Registered Pension Plans Act*.