PUBLIC SERVICE STAFF RELATIONS BOARD

THIRTY-SECOND

ANNUAL REPORT

1998-1999

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The Honourable Stéphane Dion, P.C., M.P.
President of the Queen's Privy Council for Canada
and Minister of Intergovernmental Affairs
House of Commons
OTTAWA

Dear Mr. Minister,

It is my pleasure to transmit to you, pursuant to section 114 of the Public Service Staff Relations Act, the Thirty-second Annual Report of the Public Service Staff Relations Board, covering the period from 1 April 1998 to 31 March 1999, for submission to Parliament.

Yours sincerely,

Yvon Tarte
Chairperson

PUBLIC SERVICE STAFF RELATIONS BOARD

1998 - 1999

Chairperson:	Yvon Tarte
Vice-Chairperson:	P. Chodos
Deputy Chairpersons:	M.-M. Galipeau, E. Henry J.W. Potter
Full-Time Members:	J.C. Cloutier, G. Giguère, R. Simpson, J.B. Turner
Part-Time Members:	S. Kelleher, Q.C., J. Korbin, D. MacLean, K. Norman, C. Taylor, Q.C.

PRINCIPAL STAFF OFFICERS OF THE BOARD

Secretary of the Board and General Counsel:	J.E. McCormick
Director, Mediation:	N. Bernstein
Assistant Secretary - Operations:	G. Brisson
Assistant Secretary - Corporate Services:	J. Dionne

NATIONAL JOINT COUNCIL OF THE PUBLIC SERVICE OF CANADA

General Secretary:	Fernand Lalonde

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INTRODUCTION

THE YEAR IN BRIEF

A-1 The Board processed 1,184 cases during the year under review, a decrease of less than five per cent from the previous fiscal year. The Board processed matters involving adjudication, certification, complaints, designations, conciliations and other disputes filed under the various sections of the Act administered by the Board. The work is described in the appropriate sections of this report.

A-2 The adjudication of grievances relating to harassment and termination of employment has become more complex, so that more time is required for hearing days and decision writing.

A-3 Board members J.W. Potter and Mrs. E. Henry were appointed as Deputy Chairpersons and G. Giguère was appointed as a Board member.

ORGANIZATION AND FUNCTIONS OF THE BOARD

A-4 The Public Service Staff Relations Board (the Board) is a quasi-judicial statutory tribunal responsible for the administration of the systems of collective bargaining and grievance adjudication established under the Public Service Staff Relations Act (the Act) and the Parliamentary Employment and Staff Relations Act. In addition, it is responsible for the administration of certain provisions of Part II of the Canada Labour Code concerning the occupational safety and health of employees in the public service. The combined functions of the Chairperson and the Board in specific areas under the Act are

analogous to those performed by Ministers of Labour in private sector jurisdictions. According to the Act, the Board consists of a Chairperson, Vice-Chairperson, not less than three Deputy Chairpersons and such other full-time members and part-time members as the Governor in Council considers necessary. The Board reports to Parliament through a designated Minister, the President of the Privy Council. (It should be noted that the Board reports to Parliament separately with respect to proceedings under the parliamentary legislation.)

A-5 Proceedings before the Board include applications for certification, revocation of certification, complaints of unfair labour practices, the identification of positions whose duties are of a managerial or confidential nature, the designation of positions whose duties are required to be performed in the interest of the safety or the security of the public, and complaints and references of safety officers' decisions under the safety and health provisions of Part II of the Canada Labour Code. By far the heaviest volume of cases consists of grievances referred to adjudication concerning the interpretation or application of provisions of collective agreements or major disciplinary action and termination of employment. The Board also provides mediation and conciliation services when requested to do so by parties unable to resolve their disputes. Many such cases are settled without resort to formal proceedings before the Board.

A-6 The Board provides premises and administrative support services to the National Joint Council, which is composed of representatives of the employers and bargaining agents. The Council serves as a consultation forum and a mechanism for the negotiation of terms and conditions of employment that do not lend themselves to unit-by-unit bargaining.

B

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

REQUEST FOR REVIEW OF BOARD DECISIONS

B-1 Pursuant to section 27 of the Act, the Board may, upon application, review, rescind, alter or vary any of its decisions or orders. The Board dealt with nine such applications during the year including three carried over from the previous year.

B-2 One such application dealt with a grievance filed in 1983 by Mr. Quigley, seeking damages, such as the loss of his home and lost overtime opportunities, arising out of his discharge in 1982. The grievances were denied. The grievor commenced an action for damages in Federal Court, which was ultimately dismissed in 1994, on the basis that the sole avenue available to him was a reference to adjudication pursuant to the Public Service Staff Relations Act. The grievor filed a new grievance in April 1996, claiming damages. The employer objected to the jurisdiction of the adjudicator to proceed, on several grounds, including timeliness. The grievor had not sought leave to file a grievance before the hearing. The adjudicator found that the subject-matter of this new grievance was the same as in the 1983 grievance and that the application could not be granted. A judicial-review application in relation to this decision was dismissed by the Federal Court.

B-3 In October 1997, the grievor applied under section 27 of the Act for a review of the decision on his new grievance. The employer objected to the jurisdiction of the adjudicator. The grievor argued that at the hearing on his new grievance he had not had an opportunity to

explain why he had not filed this grievance at an earlier date. He submitted that he had been acting in good faith, on the basis of the employer's representation that the grievance process could not appropriately deal with his claim for damages arising out of his 1982 discharge. The employer claimed that the adjudicator could not review the adjudication decision on the grievor's 1983 grievances and argued that the grievor had not demonstrated a change in circumstances since the decision on his new grievance, nor had he brought forward any new evidence or grounds that he could not have presented at the hearing on this grievance. The adjudicator found that at that hearing the grievor had been given an opportunity to present evidence to explain the 13-year delay in pursuing this grievance. The evidence established that the grievor had made a wilful decision not to file his new grievance at an earlier date, preferring to pursue his Federal Court action. Concluding that the grievor had not presented evidence substantially different from that he had presented at the hearing on his new grievance, the adjudicator dismissed the application (Board file 125-2-77).

B-4 Two applications were filed by the employer, the Staff of the Non-Public Funds (SNPF), seeking the merger of bargaining units in two different locations. The first application sought the merger of employees in the administrative support category with employees in the operational category, all employed at CFB Trenton. The second application sought a merger between employees in the administrative support category at CFB Gagetown and employees in the operational category bargaining unit, also at CFB Gagetown. In both applications, the certified bargaining agent for employees in the administrative support category is the Public Service Alliance of Canada and that for employees in the operational category is the United Food and Commercial Workers Union (Locals 175 and 864).

B-5 In both instances, the Public Service Alliance of Canada (PSAC) opposed the application and stated that, for the consolidation to proceed, a representation vote should first take place to give employees the opportunity to select their bargaining agent. The United Food and Commercial Workers Union (UFCWU) Local 864 also opposed the employer's proposal to merge the bargaining units. The

employer withdrew its application for the merger of the bargaining units at Trenton prior to the hearing (Board file 148-18-79).

B-6 By decision dated 26 November 1984, the Board had certified the Public Service Alliance of Canada as bargaining agent for a unit comprising all the employees of the SNPF in the administrative support category at the Canadian Forces Base, Gagetown, New Brunswick (Board file 145-18-231). By decision dated 17 June 1981 and amended on 27 June 1991, the Board had certified the United Food and Commercial Workers Union, Local No. 864 as bargaining agent for a unit comprising all the employees of the SNPF in the operational category at the Canadian Forces Base, Gagetown, New Brunswick (Board file 146-18-190). The SNPF had applied under section 27 of the PSSRA for a consolidation of the bargaining units, arguing that this would allow it to implement a new job evaluation plan, thereby complying with its obligations under the Canadian Human Rights Act. The employer also wanted to simplify the organizational structure at CFB Gagetown.

B-7 The evidence established that, because of a historically difficult relationship between the parties, SNPF had made no attempt to work with the two bargaining agents to resolve this issue. The bargaining agents disputed SNPF's submission that it could not comply with its obligations under the Canadian Human Rights Act without the consolidation and alleged that bargaining solutions could easily be found while maintaining the two bargaining units. The UFCWU argued that administrative convenience is not a ground for seeking a review of the appropriateness of the bargaining units. PSAC argued that there was no need to interfere with the current stable bargaining relationship. In reply, SNPF submitted that neither UFCWU nor PSAC had argued that the proposed new bargaining unit would interfere with satisfactory representation of the affected employees within the meaning of subsection 33(2) of the PSSRA. The Board found that this subsection must find strict application only in cases of new certification pursuant to section 28 of the PSSRA. Applications for review for the consolidation of long-standing bargaining units must be approached with caution and strong and cogent evidence to justify alteration of a bargaining structure that appeared to have worked well over many years. The Board

concluded that the application was premature; SNPF had not made the necessary attempts to work with UFCWU and PSAC to implement a new job evaluation plan in the two existing bargaining units (Board file 125-18-78).

B-8 An application filed by the bargaining agent, the Hospitality and Services Trades Union (HSTU), Local 261 requested the Board to amend a certificate issued to it by including four employees of the Staff of Non-Public Funds (SNPF) in the retail operations bargaining unit. The employer agreed to the amendment, provided that the Board was satisfied that the four employees in question had expressed their wish to be so included. At the request of the Board, the employer posted a Notice to Employees of Application for Request for Review, which stated that any employee(s) affected by the application could submit their opposition in writing to the Board. After no such statements had been filed, the Board granted the application and included the four employees in the bargaining unit (Board file 125-18-84).

B-9 In August 1998, the Public Service Alliance of Canada (PSAC) presented a reference under section 99 of the Public Service Staff Relations Act (PSSRA). An attached statement of particulars noted that PSAC was the certified bargaining agent for employees involved in the property management of federal government buildings across Canada. The PSAC further alleged that, on 28 May 1998, the respondent, Brookfield Lepage Johnson Controls (BLJC), had become a successor employer by operation of section 47.1 of the Canada Labour Code (CLC). By way of remedy, the PSAC requested, *inter alia*, that the Public Service Staff Relations Board (PSSRB) issue an order declaring this to be the case.

B-10 In response to the section 99 reference, the respondent argued that it and its employees fell outside the jurisdiction of the CLC. Moreover, the PSSRB had no jurisdiction to entertain the section 99 reference in the absence of a finding that section 47.1 of the CLC is applicable to BLJC. The PSSRB informed the parties to the section 99 reference by letter of its view that any determination as to whether a group of employees is subject to the provisions of Part I of the CLC must be made by the former Canada Labour Relations Board (CLRB),

now the Canada Industrial Relations Board (CIRB). Consequently, no hearing would take place with respect to this reference until the CLRB/CIRB had made this determination. The PSAC wrote to the Board, asking that its decision be reconsidered in accordance with the provisions of sections 21 and 27 of the PSSRA.

B-11 In view of the novel nature of the matter and the fact that the parties had not been given a full opportunity to present their views on it, the PSSRB agreed to review its decision and asked the parties to submit written arguments. The Board dismissed the application and decided that it would adjourn the matter, pending a decision of the Canadian Industrial Relations Board, thereby avoiding the possibility of conflicting decisions that could be to the detriment of all parties involved (Board file 125-2-89).

B-12 The employer, the Office of the Superintendent of Financial Institutions, filed three applications with the Board requesting that it amend its original certification decisions by consolidating all the employees of this employer in a single bargaining unit. During the hearing, the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada requested the establishment of two bargaining units, an administrative support bargaining unit and a professional bargaining unit. The matter was heard at year-end and a decision will be issued in the next fiscal year (Board files 125-23-85 to 87).

B-13 In a 1997 complaint pursuant to section 23 of the Act, Mr. Reekie alleged that the employer representative had interfered with his union representation at a disciplinary hearing, contrary to the provisions of subsections 8(1) and 9(1) of the Act. The employer argued that such a complaint is open only to an employee organization and not to an employee. Following a hearing, the Board concluded that, as subsections 8(1) and 9(1) had been established to protect employee organizations and not individual employees, it did not have the jurisdiction to hear the complaint. Mr. Reekie then filed an application pursuant to section 27 of the Act asking the Board to review and amend its decision relating to the complaint. The parties were asked to

submit written sub-missions and a decision will be issued in the next fiscal year (Board file 125-2-88).

DETERMINATION OF MEMBERSHIP IN BARGAINING UNIT

B-14 Under section 34 of the Act, the Board may determine whether any employee or class of employees is or is not included in a bargaining unit. The Board dealt with three such applications during the year.

B-15 One application, filed by the Public Service Alliance of Canada, alleged that incumbents identified as senior technicians in positions classified at the EL-5 level were actually performing duties that placed them in the INM group of the general labour and trades bargaining unit, for which the PSAC is the certified bargaining agent. The International Brotherhood of Electrical Workers, the certified bargaining agent for employees in the EL bargaining unit, requested intervenor status in the proceedings before the Board. The application was withdrawn by the applicant prior to a hearing (Board file 147-2-49).

B-16 Another application was filed by the Federal Government Dockyards Trades and Labour Council (Esquimault). It requested the transfer of the employees of the Department of Fisheries and Oceans, Marine Repair Fleet, located at the Institute of Ocean Sciences, from the GLT bargaining unit, for which the Public Service Alliance of Canada is the bargaining agent, to the ship repair bargaining unit, for which the Council is the bargaining agent. The application was not opposed by the Alliance but was opposed by the Treasury Board, the employer, on the basis that the employees did not meet the basic conditions for inclusion in the ship repair group. The matter is scheduled for hearing in the next fiscal year (Board file 147-2-50).

B-17 The third application, on behalf of all electronic technicians/electronic systems technicians employed in the ship repair group in the operational category on the East Coast, was filed by the International Brotherhood of Electrical Workers, Local 2228, in conjunction with an application under section 35 of the Act (Application for Certification). The application is being held in abeyance, pending

replies from the bargaining agent, the Federal Government Dockyard Trades and Labour Council (East), and the employer, the Treasury Board, with respect to the determination of membership.

APPLICATION FOR EXTENSION OF TIME

B-18 The Board may, on application by a party, extend the time prescribed by the regulations to refer a grievance to adjudication and/or to extend the time prescribed to present a grievance at a level in the grievance procedure. The Board processed 53 such applications for extension of time, including eight carried over from the previous year. Thirteen applications were disposed of during the year; three of these were dismissed, one was upheld, and nine were settled by the parties prior to the hearing. The remaining 40 cases are scheduled to be heard during the next fiscal year.

REVOCATION OF CERTIFICATION

B-19 The Board processed five applications for revocation of certification, one of which was carried over from the previous fiscal year. In one application, which involved a complaint pursuant to section 10(2), the complainants submitted that the PSAC national president had breached the PSAC Constitution and Regulations and the Policy on Harassment by failing to establish an independent investigation committee to handle their complaint of alleged harassment and discrimination on behalf of the national president of a component. The respondent argued that the case related to internal union matters and that it was beyond the jurisdiction of the Board to entertain the complaint under section 10(2) of the Act. The application for the revocation of certification was dismissed for want of jurisdiction (Board files 161-2-808 and 150-2-44).

B-20 In the other applications, which also involved a complaint pursuant to section 10(2), it was alleged that a member of the PSAC had accepted a position on the contract negotiating team for the Public Service Alliance of Canada while acting in a managerial position for the employer. The complainants requested the Board to issue an order revoking the certification of the Public Service Alliance of Canada as

the bargaining agent for the correctional group bargaining units. The matters were heard during the latter part of the fiscal year and a decision will be rendered in the new year (Board files 161-2-938, 946, 947, 161-2-939, 944, 945, 953 to 955, 161-2-942, and 150-2-45, 140-2-46, 150-2-47 and 48).

COMPLAINTS UNDER SECTION 23 OF THE ACT

B-21 Section 23 of the Act requires the Board to inquire into complaints of "unfair labour practices" as set out in sections 8, 9 and 10 of the Act, or of failure by the employer to give effect to decisions of adjudicators or a provision of an arbitral award. Effective 1 June 1993, as a result of amendments to the PSSRA, this section was broadened to require the Board to inquire into complaints about the duty of fair representation. The Board is also empowered to order remedial action.

B-22 The Board processed 119 such complaints during the year under review, including 31 carried over from the previous year. Of the 119 complaints, 14 were dismissed by the Board, 60 were withdrawn and 15 were settled prior to the hearing. The remaining 30 complaints are scheduled for hearing during the next fiscal year.

B-23 Decisions issued this year concerned compliance with regulations, discrimination against an employee organization, discrimination against members, and duty of fair representation.

SAFETY OR SECURITY DESIGNATIONS UNDER SECTION 78 OF THE ACT

B-24 "Designated positions" are positions whose duties are deemed to be essential to the safety or security of the public and whose incumbents are therefore prohibited from participating in a strike. At present, conciliation is the only method of dispute resolution in a negotiation impasse with the employer. The Act provides that no conciliation board may be established, and hence no lawful strike may take place, until the parties have agreed or the Board has decided which positions in the bargaining unit are to be designated. Any

positions on which the parties disagree must be referred to a designation review panel, appointed in the same manner as a conciliation board, which will make non-binding recommendations on whether the positions have safety or security duties. Where, after considering these recommendations, the parties continue to disagree, the Board makes the final determination.

B-25 During the year under review, the Board processed 34 referrals involving safety or security designations including 32 carried over from the previous year. The Board issued 56 decisions, 38 of which confirmed that positions were designated in 38 bargaining units. The remaining 18 decisions reflected changes agreed to by the parties for the addition or deletion of designated positions in certain bargaining units.

REFERENCES UNDER SECTION 99 OF THE ACT

B-26 Section 99 provides for disputes that cannot be the subject of a grievance by an individual employee. They come about when the employer or bargaining agent seeks to enforce an obligation alleged to arise out of a collective agreement or an arbitral award. There were eight references under section 99 of the Act during the year and 17 such references were carried over from the previous year. Of the 25 references, 17 are being held pending a decision of the Federal Court of Appeal, one was withdrawn, one was dismissed by the Board, and five were settled prior to the hearing. The remaining case is scheduled for hearing during the next fiscal year.

C

ADJUDICATION PROCEEDINGS

C-1 Part IV of the Public Service Staff Relations Act provides a grievance procedure covering a broad range of matters and a system for the determination of "rights disputes". These are grievances arising from the application or interpretation of a collective agreement or an arbitral award or from the imposition of major disciplinary action and termination of employment. The Act uses the word "adjudication" to refer to the final determination of rights disputes, though most jurisdictions refer to this process as "arbitration". The latter term is used in the Act for the binding determination of "interest disputes", which are disputes arising in the negotiation of collective agreements.

C–2 Section 91 of the Act provides a right, subject to certain conditions, to carry a grievance from the first to the final level within a department or agency to which the Act applies. The grievance procedure is set out under the PSSRB Regulations and Rules of Procedure or in the collective agreement. Only when the grievor has exhausted this process may the matter be referred to adjudication under section 92, and then only if the grievance falls within the categories defined below. A reference is heard and determined by a member of the Board acting as adjudicator.

C–3 Table 8 shows grievances referred to adjudication under various sections of the Act each year since April 1994 and cumulative totals since April 1967. Two categories of grievances are referable to adjudication under section 92 of the Act. One category, defined in paragraph 92(1)(a), consists of grievances arising out of the application or interpretation of a collective agreement or an arbitral award. To refer such grievances, employees must have the consent of their bargaining

agent. There were 336 of these grievances referred in the year under review.

C–4 The other category of grievances referable under section 92 of the Act is defined in paragraphs 92(1)(b) and (c). In this category, an employee could originally refer only grievances arising out of disciplinary action resulting in discharge, suspension or a financial penalty. As a result of the Public Service Reform Act provisions proclaimed in force 1 June 1993, this category of grievance for employees in the central administration now includes demotion and all other terminations of employment not specifically covered by the Public Service Employment Act. In this case, the employee need not have the consent of the bargaining agent in order to refer the grievance. Also in this category may be grievances from employees not represented by a bargaining agent, including those who are excluded from the collective bargaining process because they occupy a managerial or confidential position. There were 155 grievances in this category referred to adjudication during the year under review.

EXPEDITED ADJUDICATION

C–5 In a pilot project initiated in 1994 and involving the Board, the Public Service Alliance of Canada and the Treasury Board, all parties agreed to deal with certain grievances by way of expedited adjudication. This process may or may not involve an agreed statement of facts and does not allow witnesses to testify. An oral determination is made at the hearing by the adjudicator and confirmed in a written determination within five days of the hearing. The decision is final and binding on the parties but cannot be used as a precedent or referred for review to the Federal Court. Since 1994, three other bargaining agents have agreed to proceed with expedited adjudication. These are the International Brotherhood of Electrical Workers, Local 228; the Federal Government Dockyard Trades and Labour Council (East); and the Association of Public Service Financial Administrators. During the year under review, 62 cases filed with the Board specified the expedited adjudication process. The Board disposed of 42 cases during the year, of which six were dismissed, 16 were upheld, seven were withdrawn prior to the hearing and 13 were settled by the parties prior

to the hearing. The remaining 20 cases are scheduled for hearing in the next fiscal year.

C–6 In order to minimize travel costs and maximize the use of Board members' time, hearing locations are normally limited to those listed below:

Alberta:	Calgary, Edmonton, Lethbridge, Medicine Hat
British Columbia:	Campbell River, Castlegar, Kamloops, Nanaimo, Prince George, Prince Rupert, Vancouver, Victoria
Manitoba:	The Pas, Thompson, Winnipeg
New Brunswick:	Bathurst, Fredericton, Moncton, Saint John
Newfoundland/ Labrador:	Cornerbrook, Gander, Goose Bay, St. Anthony, St. John's
Northwest Territories:	Yellowknife
Nova Scotia:	Antigonish, Halifax, Sydney
Ontario:	Hamilton, Kenora, Kingston, London, North Bay, Ottawa, Owen Sound, Sarnia, Sault St. Marie, Sudbury, Thunder Bay, Timmins, Toronto, Windsor
Prince Edward Island:	Charlottetown
Quebec:	Chicoutimi, Gaspé, Montreal, Quebec, Sherbrooke
Saskatchewan:	Regina, Saskatoon
Yukon Territory:	Dawson City, Whitehorse

D

ARBITRATION PROCEEDINGS

D-1 Arbitration is one of the two options that a bargaining agent may specify for resolving any negotiation impasse or "interest'' dispute with the employer. The specified method prevails for that round of negotiations, but may be altered by the bargaining agent before notice to bargain is given for the next round. Legislation was passed during fiscal year 1998-99 whereby the arbitration option was withdrawn for a three-year period.

D-2 During the year under review, the Board received four requests for arbitration. These matters involved a dispute between the Public Service Alliance of Canada and the Canadian Security Intelligence Service, which is exempt from the legislation. They affected employees in the communications, clerical and regulatory, office equipment, and secretarial, stenographic and typing bargaining units. Members have been appointed for all four arbitration boards and a hearing has been scheduled for the next fiscal year.

E

CONCILIATION AND MEDIATION

E-1 The provisions of the Public Service Compensation Act and the Government Expenditures Restraint Act 1993, No. 2, which extended the terms and conditions, including the compensation plans, embodied in the collective agreements of virtually all employees in the federal public service were no longer in force during the 1998-99 fiscal year.

E-2 Of the 16 requests for third party assistance carried over from the previous year, 11 were settled with the assistance of Board-appointed conciliators during the current year. No settlement was reached in four other cases and one case was carried over into 1999-2000. The Board appointed 19 conciliators to deal with all 49 requests received in 1998-99. Because of joint and master bargaining in nine instances the conciliator was able to deal with from two to 11 requests at the same bargaining table. Settlements were reached with the conciliators' assistance in 39 cases. Of the remaining ten cases, no settlement was achieved in five cases and five cases were carried over into 1999-2000.

E-3 There were 39 requests for the establishment of a conciliation board during the year under review and one case was carried over from the previous year. Of these 40 cases, 34 were settled by the parties before or after a conciliation board report. Two cases were not settled and four cases, involving a dispute between the PSAC and the Communications Security Establishment on behalf of four bargaining units, were carried into the next fiscal year.

E-4 Of the settled cases, three were settled with the assistance of the conciliation board; two involved the PSAC and Treasury Board on behalf of the education and library services bargaining units and the other, carried over from the previous year, involved PIPSC and

Treasury Board on behalf of the auditors bargaining unit. Board-appointed conciliators assisted in the settlement of 16 cases, 10 prior to a conciliation board meeting, the others following the report of the conciliation board. These disputes were between the PSAC and Treasury Board and involved six bargaining units of technical employees and 10 units containing some 90,000 administrative support employees. Two strikes took place following conciliation board reports. One, involving 14 bargaining units of operational employees in a dispute between PSAC and Treasury Board, was settled by the parties with assistance of a Board-appointed conciliator. The other, involving employees of the National Energy Board represented by the PSAC, was settled by the parties. A strike involving two bargaining units of security personnel in federal prisons was averted by legislation.

EXAMINATIONS

E-5 When an employer requests a managerial or confidential exclusion from the bargaining unit to which the bargaining agent objects, or when the bargaining agent proposes that a position no longer be excluded and the employer objects, an examination officer is authorized to inquire into the duties and responsibilities of the position and report to the Board. The officer explores the possibility of agreement with the parties. In the absence of agreement an examination is held. If necessary the Board subsequently makes a determination based on the examiner's report and submissions of the parties. During the year there were no requirements for examination officers to be involved in any examination cases.

DESIGNATION REVIEW PANELS

E-6 The Act was amended in 1993 changing the process by which positions are designated as having duties necessary for the safety or security of the public. Employees in positions so designated may not participate in a legal strike. Where the employer and the bargaining agent cannot agree on which positions are to be designated, the employer shall refer the positions in dispute to a designation review panel which is to review the positions and make non-binding

recommendations to the parties. During the year there were no requests for the establishment of designation review panels.

OTHER SERVICES

E-7 The program of grievance and complaint mediation saw the number of requests for mediation slightly reduced from the previous year. In 1999-2000 the Board will be expanding its grievance mediation program significantly by instituting a pilot project in which Board members will act as mediators of grievances referred to the Board for adjudication. During the year Board members received extensive training in mediation skills in preparation for the pilot project.

E-8 Mediation Services continued to respond to joint requests from bargaining agents and management for assistance in improving relations between them. During the year assistance was given in three instances.

E-9 Interest-based bargaining is a method of collective negotiation in which open discussion is encouraged in addressing the underlying interests of the parties. Mediation Services staff were involved in facilitating interest-based bargaining between the Canadian Union of Professional and Technical Employees and the Treasury Board of Canada on behalf of the employees in the translation group. A settlement was reached during the current year. Facilitation was begun between the Canadian Association of Professional Radio Operators and the Treasury Board, but it was not completed. The parties continued negotiation without the further assistance of Mediation Services staff.

F

BOARD DECISIONS OF INTEREST

F-1 In 1981, the Public Service Staff Relations Board (PSSRB) had certified the United Food and Commercial Workers Union, Local 864, as bargaining agent for all employees of the Staff of the Non-Public Funds, Canadian Forces, in the operational category at Canadian Forces Base Gagetown, New Brunswick (Board file 146-18-190). In 1984 the PSSRB also certified the Public Service Alliance of Canada as bargaining agent for all employees of the same employer in the administrative support category at this location (Board file 145-18-231). During the year under review, the employer applied to the Board under section 27 of the Public Service Staff Relations Act (PSSRA) seeking the amalgamation of the two bargaining units: *Staff of the Non-Public Funds, Canadian Forces, and United Food and Commercial Workers, Local 864, and Public Service Alliance of Canada* (Board file 125-18-78). The purpose of this request was said to be to enable the employer to implement a new gender-neutral job evaluation plan pursuant to its obligations under the Canadian Human Rights Act. In light of the history of poor relations between the bargaining agents, the employer believed that the new job evaluation plan could not be implemented with two bargaining units. The employer also relied on subsection 33(2) of the PSSRA which requires the Board to establish a bargaining unit that is coextensive with the employer's classification plan unless this would prevent the satisfactory representation of employees.

F-2 The bargaining agents objected to the proposed amalgamation on the ground that the employer had failed to establish the existence of a fundamental labour relations problem that could not be resolved mutually. They indicated their willingness to work together constructively towards the implementation of the new classification plan.

In addition, they referred to jurisprudence which establishes that, in determining the appropriateness of a bargaining unit, the considerations applied by a labour relations board in an amalgamation application will be different from those applied in an initial application for certification. Furthermore, labour relations boards will not lightly interfere with an established bargaining structure, particularly where to do so would result in the loss of bargaining rights for one of the employee organizations involved. To succeed in an amalgamation application, the applicant must establish that there will be real and demonstrable adverse labour relations consequences unless the current bargaining structure is changed. Mere administrative inconvenience and inefficiency are not enough to justify a labour relations board's intervention in a long-standing bargaining relationship.

F-3 In dismissing the employer's application, the PSSRB said that strict application of subsection 33(2) of the PSSRA is required only in cases of new certifications under section 28. Applications for the consolidation of long-standing bargaining units must be approached with caution. Strong and cogent evidence is required to justify altering a bargaining structure that appears to have worked well over many years. The PSSRB was not satisfied that the applicant in this case had presented such evidence. In any case the application for review was premature, as the employer had not made the necessary attempts to work diligently with the bargaining agents to resolve any possible difficulties in implementing the new classification plan.

F-4 An employee organization claimed that the respondent was a successor employer within the meaning of sections 47 and 47.1 of the Canada Labour Code. It sought to enforce the provisions of a collective agreement negotiated under the PSSRA by referring the matter to the PSSRB under section 99 thereof. The PSSRB advised the parties that any determination as to whether a group of employees was subject to the provisions of Part I of the Code had to be made by the Canada Industrial Relations Board (CIRB). Accordingly, the PSSRB did not intend to proceed with the matter until such time as the CIRB had made such a determination. The applicant applied to the PSSRB under section 27 of the PSSRA to review its decision: *Public Service*

Alliance of Canada and Brookfield Lepage Johnson Controls (Board file 125-2-89).

F-5 After giving the parties full opportunity to make any relevant submissions, the PSSRB dismissed the application, stating that sections 47 and 47.1 of the Code made clear that their application in any situation was contingent on whether a portion of the Public Service of Canada had become part of a business to which Part I of the Code applied. These sections apply only to employees who are employed on or in connection with the operation of a federal work, undertaking or business as defined by the Code. Furthermore, the Board referred to in section 47 of the Code could only be the CIRB mentioned in section 3. The legislative intent was that the CIRB was the appropriate tribunal to interpret its own legislation and determine whether a corporation or business was covered by Part I of the Code. Without such a determination, the employee organization's reference under section 99 of the PSSRA could not be entertained by the PSSRB. The PSSRB further stated that, even if it had concurrent jurisdiction with the CIRB in the matter, the preferable approach would be to defer to the CIRB to avoid the possibility of conflicting decisions.

F-6 The complainant had been acting in a managerial position when three employees had made allegations of personal harassment against her. After the employer had found the allegations to be well-founded, it imposed a two-day suspension upon the complainant and reassigned her to a lower-level position within the bargaining unit. The complainant then sought the assistance of the bargaining agent, which refused to represent her in her grievance against the disciplinary action. She submitted a complaint under section 23 of the PSSRA alleging that the bargaining agent had thereby breached the duty of fair representation it owed to her, contrary to subsection 10(2) of the PSSRA. The PSSRB pointed out that the duty of fair representation requires the bargaining agent to give fair representation to employees in the bargaining unit. As the complainant had not been a member of the bargaining unit when the events leading to the grievance had arisen, the bargaining agent had no obligation to represent her interests in the grievance proceedings. Accordingly, the PSSRB dismissed her complaint: *Downer and Public Service Alliance of Canada et al.* (Board files 161-2-846 to 848).

F-7 The applicants in *Gualtieri and Guenette* (Board file 165-2-203) had invoked their right to refuse to work under Part II of the Canada Labour Code on the ground that the employer's continuing abuse of authority and harassment constituted a danger to their physical and mental health. Following an investigation, the safety officer found that no danger existed; in his view, danger as defined in the Code must be visible and quantitative. At the request of the applicants, the safety officer referred his decision to the PSSRB, pursuant to subsection 129(5) of the Code. The parties agreed that the PSSRB would first determine whether stress-related illness resulting from harassment and abuse of authority constitutes a danger for the purposes of Part II of the Code. The PSSRB concluded that the definition of danger in Part II of the Code is confined to circumstances where the alleged danger is of such an acute or immediate nature that the use of the particular machine, thing or place must cease until the situation is rectified. The applicants' mental and emotional problems were the result of a prolonged state of affairs over a period of years. Furthermore, the PSSRB found that the danger must relate to a machine, thing or the physical condition in the workplace. Such danger does not include stress or conflict arising out of human relationships. Accordingly, the PSSRB confirmed the decision of the safety officer.

F-8 In another decision involving the application of Part II of the Code, six employees submitted a complaint under section 133, alleging that the employer had violated paragraph 147(a) by refusing to pay them for their time spent assisting a safety officer in an investigation after four of them had refused to work: *O'Neil et al.* (Board files 160-2-55 to 60). The four employees who had refused to work were paid for the shift they missed. The other two complainants were safety and health representatives in the workplace. All six complainants submitted overtime claims for the time spent with the safety officer in their off-duty hours; these claims were denied by the employer. The complainants, while co-operating with the safety officer, were not scheduled to work, nor did they perform any of their regular duties. The PSSRB therefore dismissed the complaints on the basis that the complainants were not entitled to compensation.

G

ADJUDICATION DECISIONS OF INTEREST

G-1 The 1997-1998 Annual Report of the Board discussed the grievance of an employee who alleged that his lay-off had in reality been a disguised disciplinary discharge: *Matthews* (Board file 166-20-27336). The adjudicator found that the grievor's employment had effectively been terminated for disciplinary reasons. Although the adjudicator concluded that the grievor's overall conduct did not warrant the ultimate penalty of termination, he did not reinstate him; in lieu, he awarded him financial compensation equal to slightly more than one year's pay.

G-2 The grievor applied for judicial review of this decision: *Canada (Attorney General)* v. *Matthews* (1997), 139 F.T.R. 293 (F.C.T.D.). Richard J. noted that the authority of an adjudicator to award damages rather than reinstatement had been upheld by the Federal Court of Appeal in *Champagne* v. *Canada (Public Service Staff Relations Board)* (unreported, Federal Court of Appeal file A-198-87, dated 1 October, 1987). Richard J. concluded that the adjudicator believed that he had fashioned an appropriate remedy on the basis of the record before him, which contained sufficient evidence to justify that remedy. Nevertheless, Richard J. also found that the adjudicator had breached the rules of procedural fairness in not having given the grievor and his employer an opportunity to make submissions and give evidence on the method of calculation and the amount of damages to be awarded. The adjudicator was thus directed to re-determine this amount, after providing both parties with an opportunity to make submissions and give evidence on this specific issue.

G-3 Since the last annual report, the adjudicator convened a hearing and received additional evidence and submissions from the parties.

Among other things, the grievor sought compensation for having been deprived of the opportunity to apply for the Early Retirement Incentive (ERI) Program, the interest on the amount owing to him, and compensation for his legal costs. He submitted that the Public Service Staff Relations Act (PSSRA) gives an adjudicator the authority to award such damages. In the adjudicator's opinion, the possibility that the grievor might have been in a position to take advantage of the ERI Program, had his employment not been wrongfully terminated, was too speculative to justify an award of damages. The adjudicator also found that the concept of "reasonable notice" that applies to a termination of employment governed by the common law does not apply under the PSSRA; when an employee is awarded compensation in lieu of reinstatement under the PSSRA, adjudicators take the common law decisions into account by analogy only, for guidance regarding the appropriate amount. The adjudicator also concluded that he had no authority to award the grievor interest or compensation for his legal costs. In light of all the evidence adduced and the submissions of the parties, the adjudicator awarded the grievor $95,000 as compensation in lieu of reinstatement; this amount was to be in addition to any severance pay and other benefits received from the employer upon the termination of employment. The adjudicator refused to order the employer to provide the grievor with a letter of reference or to recommend that the employer apologize to the grievor.

G-4 In *McElrea* (Board file 166-2-28144), the adjudicator had to deal with a request to re-open the cross-examination of witnesses on the basis of the rule enunciated in the English case of *Browne and Dunn* (1894), 6 R. 67 (H.L.). This stands for the principle that, if a party intends to argue that a witness is not telling the truth on a given point, or if a party intends to adduce evidence to contradict the testimony of the witness on a given point, that party has an obligation to give the witness notice of such intention and to cross-examine the witness, so as to give the witness an opportunity to provide an explanation.

G-5 The grievor grieved a two-week suspension. During the hearing, the grievor's representative, one of his bargaining agent's officers, requested an adjournment to seek legal representation for him for the

remainder of the hearing. The adjudicator granted the request, on the understanding that the hearing would continue from that point onward.

G-6 When the hearing resumed, the grievor's new representative sought to re-open the cross-examination of the employer's witnesses. She argued that, during cross-examination, these witnesses had not been warned that parts of their testimony would be challenged. She also alleged that important points had been omitted during that cross-examination which would deprive the grievor of a fair and full hearing. The employer claimed that the grievor's new representative was really seeking to re-cross-examine these witnesses.

G-7 The adjudicator found that the rule enunciated in *Browne and Dunn* did not prevent the grievor's new representative from adducing evidence to contradict the testimony of the employer's witnesses and added that, were she to do so, the employer would be allowed either to re-examine its witnesses or present rebuttal evidence. The adjudicator further found, however, that, though the initial cross-examination of the employer's witnesses had not provided the grievor's new representative with the evidence she desired, this was not sufficient to allow her to re-open the cross-examination.

G-8 In *Wilson and Gardner* (Board files 166-2-28289 and 28290), the grievors were two of seven employees who had relocated to the Canadian Embassy in Tokyo, Japan. They had been in temporary accommodation from their arrival until new living quarters were ready to receive them; until that time, they had been assured that they would continue receiving a meal and incidental allowance. The employer had specifically instructed them not to open the containers in which their basic household goods had been shipped. Following the arrival of a new financial officer at the Embassy, these employees were asked to reimburse the meal and incidental allowance amounts they had received up to then; they complied with this request.

G-9 One of the seven employees filed a grievance against this reimbursement and it was agreed that the remaining six employees would be treated in accordance with the outcome of her grievance. She returned to Canada, however, before a decision on her grievance was

reached. It was eventually settled more than two-and-one-half years after it had been filed, with the employer refunding to the employee the moneys she had reimbursed. The employer did not inform the other grievors of this settlement.

G-10 Only upon his return to Canada, had one of the two grievors learned of the settlement. After attempts to be treated in accordance with the settlement, he filed his own grievance for the repayment of the moneys he had reimbursed. The second grievor in this case, learning of the settlement of the original grievance a few months after it had been reached, requested the same treatment. When the employer denied this request, she filed her own grievance. The adjudicator found that by having to obey their employer's instructions the grievors had incurred significant expenses that they would not normally have had to bear. The adjudicator further found that the employer was estopped from refusing to repay the grievors the moneys they claimed. The grievances were allowed.

G-11 *Webb* (Board File 166-2-28379) involved the same principle. The grievor, a foreign service officer posted to the United States, had considered whether it would be preferable for him to sell or to rent out his family home. Under the Foreign Service Directives (FSD), an employee's legal and real estate fees upon the sale of a residence could be reimbursed once in his or her career. The grievor had not believed that he qualified for this benefit but his employer had informed him that he did. On the basis of this representation, the grievor put his house on the market and, to effect a quick sale, accepted a selling price lower than he would otherwise have done. His employer compensated the grievor for his legal and real estate fees. Subsequently, the employer demanded their reimbursement, however, on the ground that the FSD did not apply to the grievor's situation; the grievor complied. He submitted that the employer was estopped from reclaiming the money, as he had relied upon his employer's representation to his detriment. The adjudicator found that the grievor had not been unreasonable in relying on his employer's representation and that it would be unfair to allow his employer to evade the consequences. The adjudicator therefore directed the employer to repay the grievor the real estate and legal fees in dispute.

G-12 *Hutchinson* (Board file 166-2-28535) dealt with the termination of the employment of an employee who had on several occasions invoked her right to refuse to work under the occupational safety and health provisions of Part II of the *Canada Labour Code*. The grievor was working in the Queen Square Building, in Halifax, Nova Scotia. At one time, citing an environmental illness, she had been away from work on long-term disability for two years. At her request, and for health-related reasons, the grievor then became a seasonal worker.

G-13 In 1995, the grievor made numerous complaints relating to her allergic reaction to scented personal-grooming products used by other employees in the workplace. At the suggestion of her employer, she assisted in the promulgation of a policy on a scent-free workplace. While renovations proceeded at the Queen Square Building, she was relocated to various floors in the building to assist her in coping with her environmental concerns. Even though each floor in the building had a separate ventilation system, the grievor still had difficulties. She rejected on several occasions her employer's proposals to relocate her to other federal government buildings. Her employer also offered her, on several occasions, the possibility of teleworking, which she rejected each time. The grievor's physician wrote to the employer concerning the deteriorating health status of the grievor, who took an indefinite sick leave for the remainder of that season.

G-14 In preparation for the grievor's return to work, her employer asked staff to refrain from using scented personal-grooming products, in light of "the potential impact your use of such products may have on your co-workers". At the grievor's suggestion, her employer also purchased an air cleaner and a respirator for her use at the office. A few months later, the grievor advised the employer that she was withdrawing her services under Part II of the *Canada Labour Code*. Following an investigation, the safety officer found that no danger existed. At the grievor's request, the safety officer referred this decision to the Board, which confirmed it.

G-15 After a brief return to work, the grievor withdrew her services once again. She rejected again her employer's proposal that she

consider telework. The safety officer upheld her work refusal, on the ground that her medical condition caused the workplace to be unsafe for her. The regional safety officer rescinded this decision, however.

G-16 As directed by her employer, the grievor returned to work, where she remained for one-half day before withdrawing her services once again. The employer immediately terminated her employment, on the ground that her health condition made her incapable of performing the duties of her position for the foreseeable future. The adjudicator took into account that the grievor had been employed for 25 years and had a discipline-free record and good performance reports. Unfortunately, her extreme environmental sensitivities precluded her from working at the Queen Square Building. The parties acknowledged that efforts had been made to find suitable alternative work locations for her, but to no avail. The adjudicator found that, while an employer has a duty to accommodate an employee with a medical incapacity, such an employee also bears a duty to facilitate the search for an accommodation. The grievor had breached this duty by refusing to consider teleworking; as teleworking could not be forced on her, the employer was left with no alternative but to dismiss her.

G-17 In *Teeluck* (Board file 166-2-27956), the grievor's employment had been terminated on the ground that he had touched the breast of a female fellow correctional officer while the two employees were on duty. The grievor denied the allegation and maintained that the complainant was not telling the truth about the incident, which was said to have occurred in a small office in the presence of another correctional officer. That officer claimed that, as he had not been paying attention, he could neither confirm nor deny the allegation.

G-18 The evidence established that the complainant had registered her complaint immediately after the incident and the grievor had been acquitted of criminal charges arising out of it. The evidence also established that a similar incident was said to have occurred earlier, between the grievor and another female fellow correctional officer, although this employee had come forward only after the complaint leading to the grievance in this case. The adjudicator found that the evidence adduced by the employer was more reliable than that of the

grievor and concluded that discharge was an appropriate penalty under the circumstances.

G-19 The adjudicator also commented on the probable effect that a "rat code" at the penitentiary had had on the testimony of the correctional officer who had been present at the incident:

> The adjudicator said that, although the bargaining agent claimed that staff restricted the use of this code to minor infractions, and that they always reported major infractions, such as cases of sexual harassment, to management, the evidence was to the contrary. It was clear that employees who reported fellow officers for any reason were persecuted by other correctional officers, both in and out of the workplace, with a range of malicious acts that in some cases had compelled the victims to move away from the area. The adjudicator expressed his disgust with those who perpetrated such acts, saying, "such twisted thinking is abhorrent to any right-thinking person whose duty as peace officers is to uphold the law". He said that such acts of retaliation must cease.

G-20 The grievor's application for judicial review of this decision was pending at year's end (Federal Court, Trial Division, file T-1825-98).

H

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

H-1 Where the parties have bargained collectively in good faith but have been unable to reach agreement on any term or condition of employment, and where the relevant bargaining agent has specified that referral to conciliation shall be the process for resolution of a dispute, section 76 of the Public Service Staff Relations Act provides that either the employer or the bargaining agent may, by notice in writing to the Chairperson, request conciliation of the dispute. Upon receipt of such a request, the Chairperson is required to establish a conciliation board pursuant to section 77 or, on joint request of the parties, to appoint a conciliation commissioner pursuant to section 77.1. The Chairperson is required to give to the conciliation board (or the conciliation commissioner, as the case may be), a statement setting forth the matters on which findings and recommendations shall be reported (section 84). There are certain restrictions on these matters. Subsection 87(2) specifies that subsection 57(2)* applies, with such alterations as the

* Subsection 57(2) reads as follows:

> 57 (2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,
>
> a) the alteration or elimination or the establishment of which would require or have the effect of requiring the enactment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation, or
>
> b) that has been or may be established pursuant to any Act specified in Schedule II.

circumstances require, to a recommendation in a report of a conciliation board or conciliation commissioner. In addition, subsection 87(3) provides that no report of a conciliation board or conciliation commissioner shall contain any recommendation concerning the standards, procedures or processes governing employees' appointment, appraisal, promotion, demotion, deployment, lay-off or termination of employment, other than by way of disciplinary action. If either party objects to the referral of any matter to the conciliation board or conciliation commissioner, the Chairperson must determine whether or not it comes within one of the prohibitions set out in the Act. Any matter that does so will not be included in the terms of reference.

H-2 Although the Chairperson established many conciliation boards during the year under review, on only one occasion did the employer object on jurisdictional grounds to the referral of certain proposals of the bargaining agent to the conciliation board.

ISSUES WITHIN THE SCOPE OF BARGAINING

H-3 The following proposals made by the bargaining agent and objected to by the employer were held to be within the scope of bargaining and were therefore referred to the conciliation board:

- *A proposal respecting the Universal Classification Standard.*
- *A proposal respecting the classification grievance procedure.*
- *A proposal respecting the pooling of ships' crews.*

The only objection raised by the employer to the referral of these proposals was that they violated section 7 of the Act. Section 7 specifies that nothing in the Act "shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein". In support of its objection the employer referred to the decision of Mr. Justice Teitelbaum of the Federal Court, Trial Division in *Canada* v. *Public Service Staff Relations Board et al.* (1988), 21 F.T.R. 199. The

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(Schedule II refers to the *Government Employees Compensation Act*, the *Public Service Employment Act* and the *Public Service Superannuation Act*).

Chairperson pointed out that, as this decision relates to binding conciliation, it is clearly distinguishable from the case before him. Furthermore, the Federal Court of Appeal has found that proposals falling under section 7 of the Act can nonetheless be made legitimate subjects of bargaining: *Public Service Alliance of Canada* v. *Canada (Treasury Board),* [1987] 2 F.C. 471 and *Public Service Alliance of Canada* v. *Canada (Treasury Board)* (1987), 76 N.R. 229. Therefore, the Chairperson concluded that such proposals can be referred to a conciliation board which only has the authority to make recommendations that are binding on neither party. He also referred to the fact that, since the issuance of these last two decisions, the Chairperson of the Board has consistently referred to the conciliation board proposals where the employer's only objection has been that they violate section 7 of the Act. Accordingly, the Chairperson included the disputed proposals in the terms of reference: *Firefighters Group et al. Terms of Reference* (Board files 190-2-267 to 280).

H-4 The Public Service Staff Relations Board administers the process whereby an arbitrator is appointed under section 65.1 of the Public Service Staff Relations Act or an arbitration board is established under section 65. Where the parties have bargained collectively in good faith but have been unable to reach agreement on any term or condition of employment that may be embodied in an arbitral award, and where the relevant bargaining agent has specified that referral to arbitration shall be the process for resolution of a dispute, section 64 of the Act provides that either party may write to the Secretary of the Board to request arbitration in respect of that term or condition. Upon receipt of this request, and where the parties have not jointly requested the appointment of an arbitrator pursuant to section 65.1, the Chairperson is required by section 65 to establish an arbitration board consisting of three persons appointed in the same manner as the members of a conciliation board.

H-5 As soon as an arbitrator has been appointed or an arbitration board established, section 66 of the Act requires the Chairperson, subject to section 69, to deliver a notice referring the matters in dispute to the arbitrator or to the arbitration board. Section 69 specifies certain limits on the subject-matter of an arbitral award. Subsection 69(2)

provides that subsection 57(2) applies, with such modifications as the circumstances require. Pursuant to subsection 69(3), no arbitral award shall deal with the organization of the Public Service or the assignment of duties to, and classification of, positions in it. Neither shall an arbitral award deal with the standards, procedures or processes governing employees' appointment, appraisal, promotion, demotion, deployment, lay-off or termination of employment, other than by way of disciplinary action. In addition, an arbitral award cannot relate to any term or condition of employment that was not a subject of negotiation between the parties prior to the request for arbitration. Subsection 69(4) specifies that an arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made. Finally, sections 71 and 72 of the Act place certain restrictions on the term of an arbitral award and the extent to which any of its provisions can be made retroactive.

H-6 Because the Budget Implementation Act, 1996, suspended arbitration as a dispute resolution process under the Public Service Staff Relations Act for three years from 20 June 1996, no arbitrators were appointed and no arbitration boards were established during the year under review.

I

COURT DECISIONS OF INTEREST

I-1 Subsection 91(1) of the Public Service Staff Relations Act (PSSRA) provides that an aggrieved employee may present a grievance at each level of the grievance process in relation to any matter affecting his or her terms and conditions of employment "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament". In *Chopra* v. *Canada (Treasury Board)*, [1993] 3 F.C. 445,[1] the grievor sought judicial review of an adjudicator's decision that he lacked jurisdiction to entertain a grievance because the Canadian Human Rights Act provided another administrative procedure for redress. The grievor had sought to rely on the "no discrimination" provision of the collective agreement to challenge the decision not to appoint him to an acting position; he had also filed a complaint arising out of the same incident with the Canadian Human Rights Commission. Simpson J. of the Federal Court, Trial Division, agreed with the adjudicator's conclusion that he had no jurisdiction to entertain the grievance. Accordingly, she dismissed the application for judicial review.

I-2 This issue was again considered during the year under review in *Mohammed* v. *Canada (Treasury Board)* (1998), 148 F.T.R. 260. Relying solely on the "no discrimination" provision of the collective agreement, the grievor submitted a grievance alleging that two superiors had harassed her on the basis of her race and religion. Relying on the decision of Simpson J. in *Chopra*, the adjudicator concluded that, as the grievance was founded solely on the "no discrimination" provision of the collective agreement and did not invoke any other provision, he had no jurisdiction to entertain it as it could be the subject of a complaint to

[1] See Twenty-ninth Annual Report, paragraph I-3.

the Canadian Human Rights Commission. The grievor sought judicial review of this decision.

I-3 Cullen J. of the Federal Court, Trial Division, pointed out that, as the decision related to the adjudicator's jurisdiction, correctness was the applicable standard of review. The grievor relied on two decisions of the Supreme Court of Canada establishing that disputes arising out of the collective agreement must be handled through the dispute resolution process in the collective agreement and the governing legislation: *Weber* v. *Ontario Hydro,* [1995] 2 S.C.R. 929; *St. Anne Nackawic Pulp and Paper Co.* v. *Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704. Cullen J. found, however, that "the wording of subsection 91(1) of the PSSRA mandates a different focus". He said, "the test is not simply whether the dispute arises under the collective agreement but the way in which the legal action is framed in order to determine whether there is another procedure for redress available".

I-4 Relying on the principles established by the Federal Court of Appeal in *Byers Transport Ltd.* v. *Kosanovich and Mellors* [1995] 3 F.C. 354, Cullen J. found that the factual situation complained of must be essentially the same in the other procedure for redress. The administrative procedure for redress referred to in subsection 91(1), however, does not have to be identical to the grievance procedure mandated by the PSSRA. Nor do the remedies given in the two procedures have to be identical. All that is required under subsection 91(1) is the existence of another procedure for redress resulting in some personal benefit to the complainant.

I-5 Cullen J. drew a distinction between a grievance based solely on the "no discrimination" provision of the collective agreement and a grievance based on another provision of that agreement with the "no discrimination" provision being used only as an aid to interpretation, as was the case in *Yarrow* (Board file 166-2-25034) and *Sarson* (Board file 166-2-25312).[2] An adjudicator appointed under the PSSRA would have no jurisdiction to entertain the grievance in the former case, but would have jurisdiction in the latter. The subject of the claims was not

[2] See Twenty-ninth Annual Report, paragraphs G-7 and 8.

discrimination *per se*, but whether the employees were entitled to the benefits requested; the discrimination claim was merely incidental to the claim for benefits. Cullen J. dismissed the claimant's application for judicial review as her grievance was solely based on the "no discrimination" provision of the collective agreement. The adjudicator had been correct in concluding that he had no jurisdiction to determine it because the Canadian Human Rights Act provided another administrative procedure for redress. An appeal of this decision was pending at year's end (Court file A-405-98).

I-6 In another case, the adjudicator allowed a grievance against the employer's denial of a request for marriage leave in order for the employee to participate in a commitment ceremony with his same-sex partner. The employer's denial had been on the ground that the commitment ceremony did not constitute a "marriage" within the meaning of the collective agreement. In making his decision, the adjudicator applied the law of the land, including human rights principles. On judicial review, the employer for the first time raised the issue of the adjudicator's jurisdiction (*Canada (Attorney General)* v. *Boutilier*, [1999] 1 F.C. 459).

I-7 McGillis J., of the Federal Court, Trial Division, allowed the application for judicial review. In rendering her decision, she stated at page 476:

> Parliament … chose, by virtue of subsection 91(1) of the *Public Service Staff Relations Act*, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the *Canadian Human Rights Act* apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a

> grievance under the provisions of the *Public Service Staff Relations Act* in the event that the Commission determines, in the exercise of its discretion under paragraphs 41(1)(a) or 44(2)(a) of the *Canadian Human Rights Act*, that the grievance procedure ought to be exhausted.

I-8 McGillis J. concluded that the "entire substance" of the grievance was "an allegation of discrimination based on the denial of an employment benefit to him for reasons directly related to his sexual orientation". Furthermore, she said, "the allegation of discrimination underlies and forms the central, and indeed the only, issue in the grievance". Accordingly, she was satisfied that, as the Canadian Human Rights Act provided the grievor with an administrative procedure for redress within the meaning of subsection 91(1) of the PSSRA, the grievor was not entitled to present his grievance at any of the levels of the grievance process or to refer his grievance to adjudication. Consequently, the adjudicator had no jurisdiction to entertain the grievance. Mr. Boutilier's appeal of the decision of McGillis J. was pending at year's end (Court file A-724-98).

I-9 The same issue was considered by Wetston J. of the Federal Court, Trial Division, in another application for judicial review: *O'Hagan* v. *Attorney General of Canada* 99 CLLC 220-013. The grievors had referred grievances to adjudication alleging that they had been subjected to sexual harassment over a considerable period, contrary to the provisions of the collective agreement. The adjudicator concluded that he had no jurisdiction to entertain the grievances as the Canadian Human Rights Act provided an administrative procedure for redress within the meaning of subsection 91(1) of the PSSRA. Wetston J. stated that, while the grievors had made a number of very persuasive arguments, he was nonetheless aware that there was "persuasive precedent in this Court" which he should also seriously consider. He referred, in particular, to the decision of McGillis J. in *Boutilier*. In the case before him it was clear that sexual harassment, recognized by section 14 of the Canadian Human Rights Act to be a prohibited ground of discrimination, formed the central and, indeed, the only issue in the grievances. Wetston J. expressed the opinion that, where possible, like

cases should be treated alike. On balance, he could not find any principle, approach or precept that would cause him to find differently from the previous judges of the Federal Court, Trial Division. Accordingly, he dismissed the application for judicial review. The grievors' appeal of this decision was pending at year's end (Court file A-56-99).

I-10 In an earlier decision in *Francoeur* (Board file 166-2-25922), the grievor, who was required to perform the work of a corporal in the Royal Canadian Mounted Police (RCMP), claimed that she should receive acting pay at the rate of an RCMP corporal. The adjudicator denied her grievance on the basis that the French version of the acting pay provision in the collective agreement restricted compensation to classifications recognized under that agreement. Richard J., of the Federal Court, Trial Division, preferred the English version of the provision as being most faithful to the scheme of the collective agreement and allowed the grievor's application for judicial review (*Francoeur* v. *Attorney General (Canada)* (1996), 112 F.T.R. 113[3]).

I-11 Relying on the decision of Richard J., the adjudicator in *Cleary* (Board file166-2-26108) upheld the grievance of a civilian employee who was required to perform the duties of a major and sought compensation at that pay rate. Subsequently, the decision of Richard J. was reversed by the Federal Court of Appeal on the basis that the adjudicator's decision had not been unreasonable and therefore intervention by the Federal Court on judicial review had not been warranted: *Attorney General (Canada)* v. *Francoeur* (1997), 220 N.R. 51.[4] Accordingly, the employer sought judicial review of the adjudicator's decision in *Cleary* alleging that, in light of the decision of the Federal Court of Appeal in *Francoeur*, it was patently unreasonable.

I-12 Rothstein J., of the Federal Court, Trial Division, pointed out that the standard of review of a decision of an adjudicator appointed under the PSSRA is patent unreasonableness. Though stating that he

[3] See Twenty-ninth Annual Report, paragraph I-4.
[4] See Thirty-first Annual Report, paragraph I-8.

had difficulty with the notion that the acting pay provision of the collective agreement contemplated recognition of classifications outside the collective agreement, and though, in his opinion, the adjudicator may not have been correct in his decision, he could not say that the adjudicator's decision was patently unreasonable. He therefore dismissed the application for judicial review (*Attorney General of Canada* v. *Cleary* Court file T-1533-96).

J

PROCEEDINGS BEFORE THE BOARD UNDER PART II OF THE CANADA LABOUR CODE

PROCEEDINGS UNDER SECTION 129

J-1 Cases under section 129 of the Code arise when an employee has refused to work because of an alleged danger and a safety officer has subsequently ruled that no danger exists. The employee may request this decision to be referred to the Board, which shall without delay inquire into the circumstances of and reasons for the decision and subsequently confirm it or give appropriate directions to the employer.

J-2 During the year, the Board had 10 references before it, including eight carried over from the previous year. Six cases were dismissed, one was settled, one was held in abeyance, pending the holding of a grievance hearing. The remaining two are scheduled to be heard in the new year.

PROCEEDINGS UNDER SECTION 133

J-3 Under section 133 of Part II of the Code, the Board may be involved in cases where the employer is alleged to have taken action against an employee for acting within his or her rights under section 129 of the Code.

J-4 The Board processed four references under section 133 during the year. Of the four cases, three were disposed of by the Board, with two being upheld and one dismissed. The remaining case is awaiting a decision.

APPENDIX

TABLES

ABBREVIATIONS USED IN TABLES

BARGAINING AGENTS

AOGA	Aircraft Operations Group Association
APSFA	Association of Public Service Financial Administrators
CAPRO	Canadian Association of Professional Radio Operators
CATCA	Canadian Air Traffic Control Association
CGAU	Council of Graphic Arts Unions of the Public Service of Canada
CMCFA	Canadian Military Colleges Faculty Association
CMSG	Canadian Merchant Service Guild
CUPE	Canadian Union of Public Employees
CUPTE	Canadian Union of Professional and Technical Employees
FGDCA	Federal Government Dockyard Chargehands Association
FGDTLC (East)	Federal Government Dockyard Trades and Labour Council (East)
FGDTLC (Esquimalt, B.C.)	Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.)
HSTU	Hospitality and Service Trade Union
IBEW	International Brotherhood of Electrical Workers
MFCW	Manitoba Food and Commercial Workers
PAFSO	Professional Association of Foreign Service Officers
PIPSC	Professional Institute of the Public Service of Canada
PSAC	Public Service Alliance of Canada
RCEA	Research Council Employees' Association
SGCT	Syndicat général du cinéma et de la télévision
SSEA	Social Science Employees Association
UFCW	United Food and Commercial Workers

EMPLOYERS

CFIA	Canadian Food Inspection Agency
CSE	Communications Security Establishment, Department of National Defence
CSIS	Canadian Security Intelligence Service
MRC	Medical Research Council
NCC	National Capital Commission
NEB	National Energy Board
NFB	National Film Board
NRC	National Research Council of Canada
OSFI	Office of the Superintendent of Financial Institutions
SNPF	Staff of the Non-Public Funds, Canadian Forces
SSHRC	Social Sciences and Humanities Research Council
SSO	Statistical Survey Operations
TB	Treasury Board
OAG	Office of the Auditor General of Canada

MISCELLANEOUS

CFB	Canadian Forces Base

NDHQ	National Defence Headquarters