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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-fifth Annual Report of the Public Service Staff Relations Board, covering the period from 1 April 2001 to 31 March 2002, for submission to Parliament.

Yours sincerely,

Yvon Tarte
Chairperson

PUBLIC SERVICE STAFF RELATIONS BOARD

2001 - 2002

Chairperson:	Yvon Tarte
Vice-Chairperson:	J. W. Potter
Deputy Chairpersons:	M.-M. Galipeau, G. Giguère E. Henry
Full-Time Members:	J. C. Cloutier, L.-P. Guindon, D. Quigley, J.-P. Tessier
Part-Time Members:	A. E. Bertrand, F. Chad Smith, S. Kelleher, Q.C., C. Taylor, Q.C.

PRINCIPAL STAFF OFFICERS OF THE BOARD

Secretary of the Board and General Counsel:	J. E. McCormick
Director, Dispute Resolution Services:	G. Baron
Assistant Secretary, Operations:	G. Brisson
Assistant Secretary, Corporate Services:	D. Benoit

NATIONAL JOINT COUNCIL OF THE PUBLIC SERVICE OF CANADA

General Secretary:	Dan Butler

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INTRODUCTION

THE YEAR IN BRIEF

A-1 The Board processed 1,149 cases during the year under review. 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-2 Yvon Tarte was re-appointed as Chairperson. J. W. Potter, Deputy Chairperson, was appointed as Vice-Chairperson to replace P. Chodos, who retired in March 2001. M.-M. Galipeau and E. Henry were re-appointed as Deputy Chairpersons and G. Giguère, Board Member, was appointed as Deputy Chairperson. D. Quigley was appointed as Board member.

ORGANIZATION AND FUNCTIONS OF THE BOARD

A-3 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*. The Board is also responsible for the administration of the *Yukon Public Service Staff Relations Act* and Part 10 of the *Yukon Education 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. Pursuant 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-4 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.

A-5 Given the high degree of success attained during the mediation pilot project, the process of mediation has now been incorporated as a permanent step in the Board's adjudication and determination processes. Mediation is well accepted by the parties because of its "win-win" approach, as opposed to the more confrontational concept associated with formal adjudication.

B

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

REVOCATION OF CERTIFICATION

B-1 The Board processed one application for revocation of certification, which was filed in August 2001 by the Union of Canadian Parole and Programs Officers – Syndicat Canadien des Agents de Libération Conditionnelle et de Programmes – CSN. The application sought to create a bargaining unit composed of employees classified as Welfare Programme Officers (WP) in the classification system of the employer. The proposed bargaining unit would have been separated from the Program and Administrative Services bargaining group, for which the Public Service Alliance of Canada is the certified bargaining agent. Simultaneously, the applicant filed an application to be certified as bargaining agent for the proposed unit. The Board decided at the outset that the application for revocation of certification would be held in abeyance pending the outcome of the application for certification. On 14 December 2001, prior to the hearing of the application for certification, the applicant advised the Board that it was withdrawing both applications.

SAFETY OR SECURITY DESIGNATIONS UNDER SECTION 78 OF THE ACT

B-2 "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. 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-3 During the year under review, the Board processed 12 referrals involving safety or security designations, of which eight were carried over from the previous reporting period. One of the 12 cases resulted in the establishment of a designation review panel which issued non-binding recommendations to the parties. In four instances, an agreement was reached between the parties prior to the establishment of a designation review panel. The seven remaining cases were settled by the parties prior to the hearing date established by the panel.

APPLICATIONS FOR EXTENSION OF TIME

B-4 The Board may, on application by a party, extend the time prescribed by the regulations to refer a grievance to adjudication and/or extend the time prescribed for presenting a grievance at a level in the grievance procedure. The Board processed eight applications for extension of time, including one carried over from the previous year. Of the total, one was upheld, two were dismissed and two were withdrawn prior to the hearing. Two applications are awaiting a Board decision, one following written representations by the parties and one after a hearing. The remaining application is scheduled to be heard during the next fiscal year.

DETERMINATION OF MEMBERSHIP IN BARGAINING UNIT

B-5 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 six such applications during the year, of which four were carried over from the previous year.

B-6 One application carried over was filed by the Professional Institute of the Public Service of Canada (PIPSC). It alleged that Tribunal Members in positions classified at the PM-06 level in the PA bargaining unit at the Trade-Marks Opposition Board were performing duties that placed them in the Law bargaining unit. At present the Public Service Alliance of Canada is the certified bargaining agent and the Treasury Board is the employer. The Board dismissed the application after a hearing, finding that the positions at issue are properly contained in the PA group (Board file 147-2-52).

B-7 In the second case carried over, the Public Service Alliance of Canada (PSAC) sought an order from the Board that persons performing duties as Native Language Teachers, Classroom Assistants, Education Assistants and Tutor Escorts at the Department of Indian Affairs and Northern Development (DIAND), pursuant to an agreement between the Six Nations Band Council and DIAND, should be included in the Education and Library Science bargaining unit. The employer requested that the application be dismissed for want of jurisdiction, since the persons in question had not been appointed under the *Public Service Employment Act*. The matter was heard and the application was granted (Board file 147-2-111).

B-8 The International Brotherhood of Electrical Workers (IBEW) asked the Board to determine that employees performing duties as Underwater Signatures and Ranges Technologists and included in the (EG) Technical Services bargaining unit should become part of the EL bargaining unit represented by IBEW. Both the employer, Treasury Board, and the PSAC, the present bargaining agent, opposed the application on the grounds that these employees were already properly classified. The matter was heard and the application was dismissed (Board file 147-2-112).

B-9 The IBEW, Local 2228, asked the Board to determine that certain employees performing duties as Technicians at the Privy Council Office should form part of the EL bargaining unit represented by IBEW. At present these employees are included in the (GT) Technical Services bargaining unit, for which the Public Service Alliance of Canada is the bargaining agent. The applicant further sought a determination that the EL bargaining unit should

also include other Technicians employed at the Privy Council Office and included in the Computer Systems bargaining unit, for which the Professional Institute of the Public Service of Canada (PIPSC) is the bargaining agent. The Treasury Board as employer and the PSAC and the PIPSC as bargaining agents opposed the application on the grounds that the positions were already classified in the proper bargaining units. After a hearing, the Board dismissed the application for the group represented by the PSAC but found that the positions reclassified in the CS group should be included in the EL group (Board file 147-2-113).

B-10 The Professional Association of Foreign Service Officers (PAFSO) asked the Board to determine that successful candidates for the Foreign Service Development Program who are required to take language training should form part of the Foreign Service group. The Treasury Board as employer opposed the application claiming that, because these individuals were not employees under the PSSRA, the Board had no jurisdiction to entertain the application. The matter was heard and the application was dismissed on the grounds that the candidates did not perform any of the duties of positions included in the Foreign Service bargaining unit until they had successfully completed their language training (Board file 147-2-114).

B-11 The Public Service Alliance of Canada (PSAC) asked the Board to determine that employees in positions as Gas Plant Safety Specialists should remain in the Engineering and Scientific Support group, for which the PSAC is the bargaining agent. The Alliance alleged that the employer, the National Energy Board, had unilaterally modified the job description, thereby moving the positions to the Professional bargaining unit, for which the Professional Institute of the Public Service of Canada (PIPSC) is the bargaining agent. The matter is scheduled for mediation in the next fiscal year (Board file 147-26-115).

APPLICATION FOR CERTIFICATION

B-12 Under section 35 of the Act, an employee organization may submit an application to be certified as bargaining agent for a bargaining unit. During the year under review, there was one such application.

B-13 This application, filed in August 2001 by the Union of Canadian Parole and Programs Officers – Syndicat Canadien des Agents de Libération Conditionnelle et de Programmes – CSN, sought to create a bargaining unit composed of employees classified as Welfare Programme Officers (WP) in the classification system of the employer. The proposed bargaining unit would have been split from the Program and Administrative Services bargaining group, for which the Public Service Alliance of Canada is the certified bargaining agent. Simultaneously, the applicant filed an application for revocation of PSAC's certification on behalf of the same employees. The Board decided at the outset that the application for revocation of certification would be held in abeyance pending the outcome of the application for certification. On 14 December 2001, prior to the hearing of that application, the applicant advised the Board that it was withdrawing both applications (Board files 142-2-358 and 150-2-51).

REFERENCES UNDER SECTION 99 OF THE ACT

B-14 Section 99 of the Act provides for disputes that cannot be the subject of a grievance by an individual employee. They come about when the employer or the bargaining agent seeks to enforce an obligation alleged to arise out of a collective agreement or arbitral award. There were 14 references under section 99 of the Act filed during the year, and nine were carried over from the previous year. Prior to the hearing, one of the 23 references was withdrawn and seven cases were settled by the parties. Three cases were dismissed, one of which was referred to the Federal Court for judicial review. Four cases were heard and the references were upheld. Four cases are pending, at the request of the parties for various reasons. The remaining four cases are scheduled for hearing in the next fiscal year.

B-15 An application filed in March 2001 by the Public Service Alliance of Canada (PSAC) stated that the parties had entered into an agreement to resolve all remaining issues surrounding pay equity complaints filed before the Canadian Human Rights Commission in 1984 and 1990. These issues related to employees in the then CR, LS, ST, HS, EU and DA Groups. That agreement had been incorporated into a Consent Order issued by the CHRT,

which was filed with the Federal Court of Canada pursuant to section 57 of the *Canadian Human Rights Act*. PSAC requested the Board to order the employer to adjust accordingly all benefits, perquisites and allowances paid since 8 March 1985 (the retroactivity period set by the CHRT for the new rates of pay). The employer argued that the CHRT Consent Order was full and final and could not be altered by the Board, and that enforcement of that order lay with the Federal Court of Canada. PSAC, however, claimed that the Board had the jurisdiction to take into account new rates of pay resulting from the resolution of pay equity complaints in enforcing provisions of collective agreements. After a hearing, the Board found that it had no jurisdiction to resolve the ambiguity in the CHRT Consent Order with respect to the retroactive calculation of benefits, perquisites and allowances. The Board invited the parties to refer their dispute to the Federal Court of Canada. The reference was denied (Board file 169-2-638).

B-16 On 28 June 2001, the Professional Institute of the Public Service of Canada filed a complaint that the employer had failed to deduct and remit membership dues from the pay of Mr. J. Janveau, in violation of article 25.01 of the collective agreement between PIPSC and Treasury Board. After Mr. Janveau's substantive CS-2 position had been reclassified to the EG-04 position in April 1999, he had continued to receive his CS-2 salary. This was in accordance with the provisions of the Memorandum of Understanding (MOU) between PIPSC and the Treasury Board signed in 1982, which provides that an encumbered position retains the former group and level. The PSAC agreed that the language of the MOU supported the position of the Institute that PIPSC was the proper bargaining agent to represent Mr. Janveau. The parties jointly requested that this matter be held in abeyance pending a decision from the Federal Court of Canada in the Janveau reference to adjudication (166-2-30455) (Board file 169-2-646).

SUCCESSOR RIGHTS

B-17 Section 48.1 requires the Board to inquire into and determine issues resulting from the transfer of an employer from Part I to Part II of Schedule I. One such issue can be an application for certification by an employee organization during a

specified time period. An employer or bargaining agent may apply to the Board to determine which employee organization shall be the bargaining agent of the newly constituted bargaining unit(s). The Board is also empowered to determine whether the collective agreement or arbitral award in force at the time of transfer shall remain in force and, if so, determine its expiry date. The Board dealt with one case relating to three applications carried over from the previous fiscal year involving the Canada Customs and Revenue Agency.

B-18 When the Canada Customs and Revenue Agency (CCRA) became a separate employer under Part II of Schedule I in November 1999, the employer and bargaining agents (the PIPSC and the PSAC) all applied to the Board for a determination under section 48.1 of the Act. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) applied to participate in the proceedings as an intervenor; however, a Board hearing determined that CAW had no standing to do so. After 57 days of hearing, the Board found that two bargaining units were appropriate for the purpose of collective bargaining. It consequently certified the PSAC as the bargaining agent for the Program and Administrative Services unit and the PIPSC as the bargaining agent for the Audit, Financial and Scientific unit (Board files 140-34-17 to 19).

COMPLAINTS UNDER SECTION 23 OF THE ACT

B-19 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 Act, 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-20 During the year under review, the Board processed 44 such complaints, including 14 carried over from the previous year. Eight complaints were settled and 10 complaints were withdrawn prior to the hearing. Of ten cases that proceeded to a full hearing before a Board member, four were dismissed, four were upheld

and two expect a decision during the next fiscal year. Four other complaints were dismissed by the Board following written representations submitted by the parties. Five cases are being held in abeyance pending the result of mediation discussions between the parties. The remaining seven complaints are scheduled for hearing in the next fiscal year.

B-21 Decisions issued this year concerned compliance with regulations, discrimination against the employee organization, discrimination against members, and duty of fair representation.

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". That term is used in the Act for the binding determination of "interest disputes", which are disputes arising in the negotiation of collective agreements. A total of 745 grievances under section 92 were referred in the year under review, in addition to 884 carried over from the previous year.

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 *P.S.S.R.B. Regulations and Rules of Procedure, 1993* 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 6 shows grievances referred to adjudication under various sections of the Act each year since April 1995 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 579 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. Of the 166 grievances in this category referred to adjudication during the year under review, 50 dealt with termination of employment.

C-5 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:	Inuvik,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, Rimouski, Sherbrooke
Saskatchewan:	Regina, Saskatoon
Yukon Territory:	Dawson City, Whitehorse

EXPEDITED ADJUDICATION

C-6 In 1994, the Board, the Public Service Alliance of Canada and the Treasury Board 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: the International Brotherhood of Electrical Workers, Local 2228; the Federal Government Dockyard Trades and Labour Council (East); and the Association of Public Service Financial Administrators. As employers, the Canada Customs and Revenue Agency and the Parks Canada Agency have also agreed to proceed to expedited adjudication. During the year under review, 61 cases filed with the Board specified the expedited adjudication process. The nine expedited adjudication hearings held during the year, each normally lasting no more than half a day, resulted in the disposition of 59 cases.

D

DISPUTE RESOLUTION

CONCILIATION

D-1 During the past fiscal year, there were nine applications for conciliation. Eleven cases carried over from 2000-2001 were also handled during the year. Nine cases were settled with the help of a conciliator appointed by the Board, while six remained unresolved. Five applications were deferred to the following fiscal year, 2002-2003.

D-2 In one case deferred to the following fiscal year, the Professional Institute of the Public Service of Canada and the Canadian Food Inspection Agency (Veterinary Science Group) agreed to submit their dispute to binding conciliation.

CONCILIATION BOARDS

D-3 During the past fiscal year, three new requests to establish conciliation boards were added to eight requests carried over from the previous fiscal year. Seven conciliation board reports were prepared, four of which concerned negotiations between the Public Service Alliance of Canada and the Treasury Board (190-2-318 to 321). One case was resolved without the conciliation board's intervention.

D-4 Three requests for the establishment of a conciliation board were deferred to the following fiscal year. One involved the Professional Association of Foreign Service Officers and the Treasury Board (190-2-325). The second involved the Professional Institute of the Public Service of Canada and the Canadian Food Inspection Agency (190-32-322). The last deferred request involved the Treasury Board and the Canadian Federal Pilots Association (190-2-326).

ARBITRATION BOARDS

D-5 Arbitration is one of the two options available to a bargaining agent in the event of an impasse in negotiations or a conflict of interest with the employer. The process selected is applicable to that round of bargaining, but the bargaining agent may opt for the other process before the notice to commence bargaining for the next round is given. In 1998-1999, Parliament passed a law prohibiting the use of arbitration; however, as of 21 June 2001, this option is again available.

D-6 During the year, the Board handled three requests for arbitration, one of which was deferred to the following fiscal year. Two arbitration boards were established. One involved the Public Service Alliance of Canada and the Communications Security Establishment, Department of National Defence (185-13-386). The other involved the Professional Institute of the Public Service of Canada and the National Energy Board (185-26-387).

REVIEWS

D-7 When, pursuant to section 5 of the Act, an employer seeks to exclude positions from a bargaining unit and the bargaining agent objects, or the bargaining agent seeks to have an exclusion lifted from a position and the employer objects, an examiner is authorized to review the tasks and responsibilities of the positions and to submit a report to the Board. If attempts to reach agreement between the parties fail, the examiner proceeds with the review. The Board then makes a decision based on the examiner's report and the parties' observations. During the past fiscal year, 331 cases of managerial and/or confidential exclusion were settled.

MEDIATION

D-8 Following the highly positive evaluation of the pilot project whereby Board members served as mediators for grievances and complaints filed with the Board for determination, a permanent program was agreed upon. Board members continued to receive training in mediation throughout the fiscal year.

D-9 In an effort to improve relations between them, the Dispute Resolution Services (DRS) also continued to respond to the joint requests for assistance made by bargaining agents and management. During the past fiscal year, the Board responded to two such requests. Moreover, the members of the DRS served as mediators in several grievance and complaint cases filed with the Board. As well, the members of the DRS intervened in several cases in a preventive capacity following requests from both management and unions.

TRAINING

D-10 The Board continued to offer its national training program on "win-win" negotiations and mediation. To promote mediation as a means of dispute resolution, a two-day training course was offered jointly to union and management representatives. In the past year, to improve the quality of this course, the Board prepared a video entitled "Best Interests: an Introduction to Grievance Mediation". More than a thousand people have already taken these courses, which will be continued on a regular basis.

INQUIRIES

D-11 DRS members were also asked by the Board's Chairperson to serve as investigators in various cases during the fiscal year.

E

BOARD DECISIONS OF INTEREST

E-1.1 Section 48.1 of the *Public Service Staff Relations Act* (PSSRA), which came into force on 20 June 1996, provides for successor rights for employees who are transferred from Part I of Schedule I of the PSSRA, for whom the Treasury Board is the employer, to Part II of Schedule I, which covers separate employers. Before that date, employees lost the representation of their bargaining agents and their negotiated terms and conditions of employment as soon as such a transfer took place. Pursuant to section 48.1, the terms and conditions of employment applicable to the employees on the date of the transfer now remain in effect until the Board has determined the new bargaining unit structure and the appropriate bargaining agents. In the first such decision rendered (*Parks Canada Agency v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 109 (140-33-15 and 16)), the Board concluded that a single unit comprising all the employees of the Parks Canada Agency was the most appropriate bargaining unit.[1] Following a representation vote, the Board certified the Public Service Alliance of Canada (PSAC) as bargaining agent for the employees in this unit.

E-1.2 In *Parks Canada Agency v. Public Service Alliance of Canada,* 2001 PSSRB 123 (125-33-100, 140-33-15 and 16), the employer requested the Board to review the description of the bargaining unit. The parties disagreed as to whether the single bargaining unit determined by the Board included employees in occupational groups that, at the time of the transfer, were not represented by a bargaining agent. The Board concluded that its authority under both subsections 48.1(3) and (7) of the PSSRA extended only to employees who were in one of the bargaining

[1] See *Thirty-Fourth Annual Report,* paragraphs F-6.1 to F-6.4.

units that existed at the time of the transfer. Accordingly, the definition of the bargaining unit did not include employees classified in occupational groups that were unrepresented at that time.

E-2.1 The *Canada Customs and Revenue Agency Act*, creating the Canada Customs and Revenue Agency (CCRA) as a new separate employer, came into force on 1 November 1999. On 21 November 2000, the PSAC requested the Chairperson, pursuant to section 77 of the PSSRA, to establish a conciliation board for four bargaining units of employees of the CCRA for which it was the bargaining agent. Subsequently, the CCRA, the Professional Institute of the Public Service of Canada (PIPSC) and the PSAC each applied to the Board pursuant to section 48.1 for a reconfiguration of the bargaining unit structure.

E-2.2 The Chairperson denied the PSAC's request for the establishment of a conciliation board: *Public Service Alliance of Canada v. Canada Customs and Revenue Agency,* 2001 PSSRB 36 (190-34-309 to 312). He stated that the successorship provisions in section 48.1 automatically continue the certification of any bargaining agent when employees are transferred to a new separate employer. These provisions also preserve the employees' negotiated terms and conditions of employment, whether embodied in an existing collective agreement or, by virtue of section 52 of the PSSRA, frozen as they existed at the moment of severance.

E-2.3 Notice to bargain had been given in relation to the employees in the four bargaining units in question prior to 1 November 1999. Therefore, by virtue of paragraph 48.1(7)(*a*), the terms and conditions of employment which had been frozen pursuant to section 52 of the PSSRA before the severance were continued in force after the severance. According to the Chairperson, the legislation does not contemplate collective bargaining between the PSAC and the CCRA with respect to these employees until the Board has made its determinations under paragraph 48.1(7)(*b*) on the appropriate bargaining unit or units and on the respective bargaining agent or agents.

E-2.4 Prior to the implementation of section 48.1 of the PSSRA, when a portion of the central administration of the Public Service

was transferred from Part I to Part II of Schedule I of the PSSRA, the employees lost all their negotiated terms and conditions of employment as well as the representation of their bargaining agents. The Chairperson stated that the purpose of section 48.1 is to ensure that this is no longer the case. The Board must first render its determinations under paragraph 48.1(7)(*b*) in relation to the employees of the CCRA represented by the PSAC, thereby establishing a stable labour relations framework for collective bargaining. Either party can then invoke the provisions of paragraph 48.1(7)(*c*) and give the other party notice to bargain.

E-2.5 This did not mean that the CCRA and the PSAC or the PIPSC could not, on joint agreement, alter either the frozen terms and conditions of employment or the provisions of the collective agreement which had been continued in force by virtue of paragraph 48.1(7)(a) and subsection 48.1(1) of the PSSRA respectively. In fact, the CCRA and the PSAC had done so previously in relation to the same four bargaining units. When the employer and the bargaining agent fail to agree, however, the dispute resolution mechanisms under the PSSRA, such as the appointment of a conciliation board, are not available to them during the transition period. An application by the PSAC to the Federal Court of Canada to review and set aside this decision was pending at year's end: Court file T-682-01.

E-3.1 Prior to 1 November 1999, the employees of the CCRA were represented by six bargaining agents and were grouped into 13 bargaining units. The Treasury Board was the employer. The CCRA, a new separate employer as of that date, applied to the Board under section 48.1 of the PSSRA proposing a bargaining unit configuration consisting of four units: 1) Program Delivery and Administrative Services (PDAS); 2) Audit, Financial and Scientific (AFS); 3) Information Technology (IT); and 4) the Management Group. The PIPSC informed the Board that, in relation to the employees whom it represented, it agreed with the CCRA proposal for the AFS and IT units. The PSAC applied to the Board under section 48.1 proposing that the employees whom it represented be encompassed by two bargaining units, one of which would consist of Customs Officers. Both the PSAC and the PIPSC objected to the Management Group proposed by the CCRA.

E-3.2 The Board responded that it was inclined towards broadly based bargaining units. The CCRA argued that it had instituted a classification plan which encompassed the Management Group and that therefore, pursuant to subsection 33(2) of the PSSRA, the Board was obliged to take this classification plan into account in determining bargaining units. The Board found that subsection 33(2) does not apply to applications under section 48.1 of the PSSRA. Furthermore, the evidence established that there was not yet a classification plan in place for the employees of the CCRA. In addition, the Board was of the opinion that, even if subsection 33(2) did apply, the Management Group was not an appropriate unit for the purposes of collective bargaining. The evidence demonstrated that the interests of the employees as a whole would be better served if these employees remained as part of the larger units.

E-3.3 The majority of the Board did not find any compelling labour relations reasons to justify the creation of separate IT and Customs Officers bargaining units; rather the relevant employees could receive adequate representation in the PDAS Group and the AFS Group bargaining units. Moreover, as the PSAC and the PIPSC had represented most of the employees in these two bargaining units prior to 1 November 1999, there was no need to hold a representation vote. Accordingly, the majority of the Board certified the PSAC and the PIPSC as the bargaining agents, respectively, for the PDAS Group and AFS Group bargaining units: *Canada Customs and Revenue Agency, Professional Institute of the Public Service of Canada and Public Service Alliance of Canada,* 2001 PSSRB 127 (140-34-17 to 19).

E-4.1 A complaint under section 23 of the PSSRA alleged that the bargaining agent had breached its duty of fair representation, contrary to subsection 10(2) of the PSSRA: *Savoury v. Canadian Merchant Service Guild,* 2001 PSSRB 79 (161-2-1143). The complainant had been authorized by his supervisor to attend a work-related conference on board a cruise ship. On the strength of that authorization, the complainant had bought a ticket for his wife to accompany him on the cruise and had arranged to take some annual leave at the end of the cruise to visit relatives in Florida. Subsequently, the employer advised him that it was withdrawing its authorization and that he was not to attend the conference on

board the cruise ship. The complainant decided to purchase his own ticket and to accompany his wife on the cruise; however, he did not participate in the conference.

E-4.2 Following an investigation, the employer imposed a five-day suspension upon the complainant and ordered him to reimburse the employer for the cost of the conference and the cruise. The complainant consulted his bargaining agent, whose assigned representative read only the first and last pages of the employer's investigation report and did not undertake any independent investigation of the matter. Accordingly, the representative was under the misapprehension that the complainant had participated in the conference, contrary to the employer's specific instructions. Consequently the representative repeatedly advised the complainant that he should admit his guilt, after which an attempt could be made to obtain a reduced penalty. The complainant refused to do so. At the representative's suggestion, the complainant, accompanied by the representative, made his own representations at the first and second levels of the grievance process. The grievance was denied at both levels.

E-4.3 At the final level of the grievance process, the bargaining agent's National Secretary Treasurer represented the complainant but without having spoken with him and without having conducted any independent investigation. The National Secretary Treasurer was under the same misapprehension as the representative; that is, he believed that the grievor had participated in the conference. After the employer had again denied the complainant's grievance, the National Secretary Treasurer advised that the bargaining agent would not be representing the complainant at adjudication, as it believed that there was no chance that the grievance would succeed. The National Secretary Treasurer did not inform the complainant that he could refer the grievance to adjudication himself, nor did he inform the complainant of the time limit involved.

E-4.4 The Board found that the duty of fair representation imposes an obligation on the bargaining agent to conduct a thorough study of the facts of the case. The bargaining agent had failed to meet this obligation so that its representation of the complainant had been arbitrary. The bargaining agent had also

failed in its obligation to advise the complainant of his right to proceed to adjudication on his own and of the time limit for doing so. Accordingly, the Board allowed the complaint. The Board directed the bargaining agent to represent the complainant on an application to the Board for an extension of time to refer his grievance to adjudication. The Board also ordered the bargaining agent to represent the complainant at adjudication if the extension of time was granted.

E-5.1 On 13 October 1999, the complainant, who had a prosthetic leg, invoked his right to refuse to work under section 128 of Part II of the *Canada Labour Code*. He believed that inadequately secured carpet tiles in his workplace constituted a danger to him, particularly in light of his disability. Following his work refusal, his superiors restricted his movement in the workplace pending the installation of new carpets. On 8 November 1999, the safety officer concluded that the flooring no longer constituted a tripping hazard. At a meeting with his superiors on 9 November, the complainant agreed to use his walker while walking on the carpeted areas in the workplace; nonetheless, the employer maintained the restrictions on his movements in the workplace. The complainant suffered from stress arising from his isolation at work and, as a result, he was absent from work from 10 November 1999 until 31 January 2000, either on sick leave or on annual leave.

E-5.2 On 1 December 1999, the complainant filed a complaint against the employer under section 133 of the Code alleging that the employer's actions constituted retaliation against him for having invoked his right to refuse to work, contrary to section 147 of the Code. The complainant sought the return of his sick leave and annual leave credits. The employer claimed that the Board lacked jurisdiction to entertain this complaint as the employer's actions did not fall within the prohibitions in section 147. The employer also submitted that the Board could not entertain any request for the return of leave taken by the complainant following the filing of his complaint.

E-5.3 The Board found that when the complainant had refused to work he had had reasonable grounds to believe that a condition in the workplace constituted a danger to him. By virtue of subsection

133(6) of the Code, the onus was on the employer to prove that the imposition of the penalty was truly unrelated to the work refusal, in light of the fact that the employer's actions were proximate to the work refusal. By maintaining the isolation of the complainant after the safety officer had stated, on 8 November 1999, that the flooring was no longer a hazard, the employer had imposed a penalty upon the complainant, contrary to section 147 of the Code. Furthermore, the employer's misconduct was of a continuing nature and had extended beyond the date on which the complainant filed his complaint.

E-5.4 The employer's decision to maintain the complainant in isolation created a high level of stress which was directly responsible for his inability to perform his duties between 10 November 1999 and 31 January 2000. The complainant had had to use his sick leave and annual leave credits, thereby incurring financial loss. The Board ordered the employer to restore the sick leave and annual leave credits utilized by the complainant to cover his absence for this period: *Pruyn v. Canada Customs and Revenue Agency,* 2002 PSSRB 17 (160-34-64).

F

ADJUDICATION DECISIONS OF INTEREST

F-1.1 The employee filed a complaint under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, (CHRA). The Canadian Human Rights Commission (CHRC) directed the employee to exhaust the grievance process but retained jurisdiction to consider the complaint at the end of that process. Does an adjudicator appointed under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, (PSSRA) have jurisdiction to hear a grievance alleging an employer's failure to accommodate its employee's medical disability in these circumstances? This is the issue that an adjudicator had to decide in *Djan v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 60 (166-2-29395).

F-1.2 Ms. Djan, a parole officer with Correctional Service Canada (CSC), had had her employment terminated because of her inability to perform the full range of her duties. She grieved the termination of her employment, seeking reinstatement and compensation for lost wages. Her grievance was denied by CSC at the final level of the grievance process.

F-1.3 Because the grievance alleged a failure of CSC to accommodate her medical disability, Ms. Djan's bargaining agent, the Public Service Alliance of Canada (PSAC), referred the matter to the CHRC. In so doing, the PSAC relied on *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.). In that decision, the Federal Court of Appeal had decided that an adjudicator appointed under the PSSRA has no jurisdiction to entertain a grievance that relates to a ground of discrimination prohibited under the CHRA. The Court's reasons were based on the availability of another administrative procedure for redress within the meaning of

subsection 91(1) of the PSSRA, namely the filing of a complaint with the CHRC.

F-1.4 The CHRC advised Ms. Djan that, pursuant to paragraph 41(1)(*a*) of the CHRA, no further proceedings were warranted on her complaint; she was directed to exhaust grievance procedures. The CHRC also advised Ms. Djan that she could ask to have her complaint revived by the CHRC at the conclusion of the grievance process if she was unsatisfied with the result.

F-1.5 All employers and bargaining agents in the federal Public Service were invited to make written submissions on the following question relating to the adjudicator's jurisdiction: does an administrative procedure for redress continue to exist within the meaning of subsection 91(1) of the PSSRA when the CHRC directs an employee to exhaust the grievance process but retains the right to consider the human rights issue at a later date? At its request, the CHRC was also permitted to make submissions on this issue.

F-1.6 Following receipt of all the submissions, the employer advised the Board that, the parties to the grievance having reached a tentative settlement, the grievance would be withdrawn from adjudication. According to the employer, this rendered moot the issue of an adjudicator's jurisdiction to hear Ms. Djan's grievance. The PSAC submitted that the grievance raised an issue of fundamental importance to labour relations in the federal Public Service, an issue that will arise again in relation to many future grievances. Therefore, the PSAC submitted that it would be in the best interests of labour relations for the adjudicator to render a decision on the jurisdictional issue for the future guidance of all employees, employers and bargaining agents in the federal Public Service. The adjudicator found the PSAC's position to be compelling.

F-1.7 The adjudicator concluded that the CHRC, having advised Ms. Djan that she could revive her complaint once she had exhausted the grievance process, did not deprive him of the necessary jurisdiction to hear and determine her grievance. In both *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.) and *Boutilier* (C.A.), the Federal Court had indicated that an

adjudicator appointed under the PSSRA would have jurisdiction to hear and determine a grievance raising an issue of prohibited discrimination, once the CHRC had determined, in the exercise of its discretion under paragraph 41(1)(*a*) or 44(2)(*a*) of the CHRA, that the grievance process ought to be exhausted. The fact that the CHRC retained the right to consider the complaint at the conclusion of the grievance process, should Ms. Djan be dissatisfied with its result, did not change matters. The jurisprudence establishes that the CHRC cannot refuse to consider a complaint merely because another tribunal has issued a decision in relation to it. Therefore, although with some concern and hesitation, the adjudicator found that he would have had jurisdiction to hear and determine Ms. Djan's grievance, had she not withdrawn it.

F-2.1 In *King and Holzer v. Canada Customs and Revenue Agency*, 2001 PSSRB 117 (166-34-30346, 30638 and 30639), an adjudicator had to decide on the length of a day in a variable-shift schedule.

F-2.2 Mr. King and Ms. Holzer worked variable shifts, usually in excess of 7.5 hours per day. In the fiscal year, they took the maximum five days of leave with pay for family-related responsibilities. The Canada Customs and Revenue Agency (CCRA) paid those leaves on the basis of the length of their shifts but subsequently reclaimed the amounts in excess of 37.5 hours' pay (5 times 7.5 hours). Mr. King and Ms. Holzer grieved that decision.

F-2.3 Mr. King had received a 10-day suspension in the past, which was calculated by the employer to equal 10 shifts' pay, rather than 75 hours (10 times 7.5 hours). The variable-shift schedule averaged 37.5 hours per week, over a period of 56 days but shifts varied in length from 7 to 13.5 hours. Mr. King and Ms. Holzer argued that their collective agreement defined a leave as an "authorized absence from duty by an employee during his or her regular or normal hours of work". They added that the collective agreement provided for leave with pay for family-related responsibilities on the basis of days, not hours.

F-2.4 The CCRA responded that the collective agreement defined a normal workday as 7.5 consecutive hours and that the variable shift schedule did not affect the length of a day for the purposes of the collective agreement. It argued that the collective agreement provided for leave credits to be converted into hours.

F-2.5 The adjudicator found that, although both parties had an arguable case, Mr. King's and Ms. Holzer's position was the most appropriate in the circumstances and was supported by the employer's own earlier interpretation of the 10-day suspension imposed on Mr. King. The CCRA's view would perpetrate an unfairness on those employees who work long shifts and would violate the collective agreement. The adjudicator ordered the CCRA to reimburse Mr. King and Ms. Holzer any money taken from their pay as an overpayment for leave with pay for family-related responsibilities. At year end, an application by the CCRA to the Federal Court of Canada to have the adjudicator's decision set aside was pending: *Attorney General of Canada v. John King and Karen Holzer*, Federal Court, Trial Division file T-2094-01.

F-3.1 What criteria should an employer use when deciding whether to suspend an employee indefinitely pending criminal proceedings? An adjudicator addressed that issue in *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9 (166-2-30267, 30268 and 30269).

F-3.2 Mr. Larson was a correctional officer employed by CSC at a medium security institution. He was arrested, charged with arson and breach of probation, and then released on bail. Following a brief investigation, the warden of the institution suspended Mr. Larson indefinitely, pending the outcome of the criminal charges against him. She believed that his continued presence constituted a risk to the security and safety of the institution; in her opinion, Mr. Larson would be unable to perform the duties of his position relevant to controlling and interacting with inmates. Mr. Larson submitted three grievances relating to this matter: two involved alleged violations of the collective agreement and the third objected to his indefinite suspension.

F-3.3 The adjudicator considered the principles that must be applied in determining whether an indefinite suspension pending

the outcome of criminal proceedings is justified. She pointed out that the employer had submitted no evidence that Mr. Larson's presence in the institution presented a reasonably serious and immediate risk to the legitimate concerns of CSC. CSC had taken no reasonable steps to ascertain whether Mr. Larson could be assigned to alternative duties. Furthermore, at no time did the warden or the person conducting the fact-finding investigation meet with Mr. Larson to obtain his version of events, either prior to, or after, the imposed suspension. The onus is on an employer to meet with its employee to obtain the latter's version. In addition, the adjudicator rejected the warden's assertion that her suspension of Mr. Larson was administrative and not disciplinary in nature.

F-3.4 Accordingly, the adjudicator concluded that the imposition of the indefinite suspension was unwarranted. She found that the employer could have conducted a proper investigation of Mr. Larson's circumstances within a month of the infraction. She therefore ordered Mr. Larson's reinstatement, with full pay and benefits, retroactive to 1 May 2000; however, she denied his request for interest on the amount owing.

F-4.1 In *Haydon v. Treasury Board (Health Canada)*, 2002 PSSRB 10 (166-2-30636), an adjudicator had to determine whether a 10-day suspension was justified where a public servant had publicly criticized government policy.

F-4.2 The Chief Veterinary Officer for Canada (CVO) had decided to suspend the importation of certain beef products from Brazil because of an alleged potential health risk from mad-cow disease. The Brazilian government objected to this decision. In an attempt to resolve the matter, it was decided that a multi-disciplinary team would go to Brazil, with representatives from Canada, the United States of America and Mexico, to conduct a site assessment.

F-4.3 Dr. Haydon was a drug evaluator with Health Canada (HC). She was contacted at home by a newspaper reporter asking for her views on the recent Canadian ban on Brazilian beef imports. She stated that there was no difference between Brazilian beef and Canadian beef, because both countries had imported beef

cattle from Europe, where mad-cow disease existed. In her opinion, the ban on the importation of Brazilian beef products was a political decision by the Canadian government relating to an on-going trade dispute with Brazil. Her comments as reported in the newspaper caused considerable embarrassment to the Canadian government and inconvenience to the CVO. As a result, HC imposed a 10-day suspension upon Dr. Haydon.

F-4.4 Dr. Haydon maintained that her right to make public her views on this matter was protected by the Charter, in particular by her fundamental freedom of expression. The adjudicator stated that, provided the criticism does not have an adverse effect on the public servant's ability to perform effectively his or her duties or on the perception of that ability, there are situations where a public servant's freedom of expression prevails over his or her duty of loyalty. Such situations arise where the Government is engaged in illegal acts or where its policies jeopardize the life, health or safety of the public. The adjudicator concluded, however, that Dr. Haydon's actions did not fall within these exceptions.

F-4.5 According to the adjudicator, where a matter is of legitimate public debate, the duty of loyalty cannot be absolute, to the extent of preventing public disclosure by a government official. However, when critical of government policy, a public servant must first raise the matter internally. Dr. Haydon had not done so. In addition, as she was a scientist with HC, Dr. Haydon's criticism carried significant weight with the members of the public.

F-4.6 The adjudicator concluded that HC's imposition of some disciplinary penalty upon Dr. Haydon was warranted. However, since Dr. Haydon had not sought out the media attention, the penalty of a 10-day suspension without pay was too severe in the circumstances; he substituted a five-day suspension. At year end, an application by Dr. Haydon to the Federal Court of Canada to have the adjudicator's decision set aside was pending: *Haydon v. Attorney General of Canada*, Federal Court, Trial Division file T-309-02.

F-5.1 Another adjudicator had to determine a similar case in *Lewicki v. Treasury Board (Canadian Grain Commission)*, 2002 PSSRB 37 (166-2-30092). Mr. Lewicki was a grain

inspector at the Canadian Grain Commission (CGC). At the invitation of a grain producer and director of the Canadian Wheat Board (CWB), he attended the Grain World 2000 Conference, on his own time, on 28 and 29 February 2000. On the first day of the conference, Mr. Lewicki told an assistant commissioner of the CGC that its lowering of the tolerance for ergot would have an adverse financial effect upon grain producers. Again on the invitation of the director of the CWB, Mr. Lewicki attended an informal meeting on the second day of the conference, to discuss, amongst other things, the financial impact of the single-grade standard. Mr. Lewicki took part in the general debate on the financial loss to be experienced by the producers and gave information on the measurement of ergot by weight, on the single-grade standard and on the issue of unregistered varieties of grain.

F-5.2 The meeting of 29 February had an effect on the CWB and formal board meetings were held on the single-grade standard and the percentage-based evaluation of ergot. The CWB submitted its concerns to the CGC, which imposed a 20-day suspension on Mr. Lewicki, on the grounds that he had damaged its reputation.

F-5.3 Mr. Lewicki testified that he had not known that he should not attend the conference; he had thought that he could give technical points of view and information as a grain inspector and had not associated these with CGC policies in the debate at the meeting of 29 February 2000. He had advised the participants at the meeting that his views did not represent those of the CGC.

F-5.4 The adjudicator found that the grievor could not be disciplined for criticizing the policies of the CGC to the assistant commissioner of the CGC on 28 February, as no one else had heard their conversation. However, he found that Mr. Lewicki's criticisms of the policies of the CGC at the meeting of 29 February could not be justified, as these CGC policies did not jeopardize the life, health or safety of public servants or others or engage Mr. Lewicki in illegal acts. The adjudicator found that Mr. Lewicki's public disclosure did not embrace a legitimate public concern requiring a public debate. Although Mr. Lewicki had previously received a written reprimand and a three-day suspension for similar behaviour, the adjudicator determined that a

20-day suspension was too severe a penalty in the circumstances and reduced it to six days.

G

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

PROCESS OF REFERRAL OF A DISPUTE TO CONCILIATION

G-1.1 The Board administers the process whereby a conciliation board is established under section 77 of the *Public Service Staff Relations Act* (PSSRA) or a conciliation commissioner is appointed under section 77.1. 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 a collective agreement, 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 PSSRA provides that either the bargaining agent or the employer may, by notice in writing to the Chairperson, request conciliation of the dispute. Upon receipt of this request, and where the parties have not jointly requested the appointment of a conciliation commissioner pursuant to section 77.1 of the PSSRA, the Chairperson may establish a conciliation board pursuant to section 77.

G-1.2 Where the Chairperson establishes a conciliation board pursuant to section 77 of the PSSRA, or appoints a conciliation commissioner pursuant to section 77.1, he is required, forthwith, to give to the conciliation board, or the conciliation commissioner, a statement setting out the matters on which findings and recommendations shall be reported (section 84 of the PSSRA).

There are certain restrictions on these matters. Subsection 87(2) of the PSSRA specifies that subsection 57(2)* applies, with such modifications as the circumstances require, to a recommendation in a report of a conciliation board or conciliation commissioner. In addition, subsection 87(3) of the PSSRA 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 PSSRA. Any matter that does so will not be included in the terms of reference.

G-1.3 Although the Chairperson established eight conciliation boards during the year under review, there were no jurisdictional objections to any of the proposals that the parties wished to refer to them.

PROCESS OF REFERRAL OF A DISPUTE TO ARBITRATION

G-2.1 The Board also administers the process whereby an arbitrator is appointed under section 65.1 of the PSSRA or an arbitration board is established under section 65. Where the parties

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*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.

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

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 PSSRA provides that either the bargaining agent or the employer 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 of the PSSRA, the Chairperson is required by section 65 to establish an arbitration board.

G-2.2 As soon as an arbitrator has been appointed or an arbitration board established, section 66 of the PSSRA requires the Chairperson, subject to section 69, to deliver a notice referring the matters in dispute to the arbitrator or to the arbitration board. There are certain restrictions of these matters. Subsection 69(2) of the PSSRA specifies that subsection 57(2) applies to an arbitral award, with such modifications as the circumstances require. Pursuant to subsection 69(3) of the PSSRA, 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) of the PSSRA 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 PSSRA place certain restrictions on the term of an arbitral award and the extent to which any of its provisions can be made retroactive. If either party objects to the referral of any matter to the arbitrator or arbitration board, the Chairperson must determine whether or not it comes within one of the prohibitions set out in the PSSRA. Any matter that does so will not be included in the terms of reference.

G-2.3 The *Budget Implementation Act, 1996* suspended arbitration as a dispute resolution process under the PSSRA for three years from 20 June 1996. Furthermore, the *Budget Implementation Act, 1999* extended that suspension until 20 June 2001 in relation to any portion of the Public Service of Canada specified in Part I of Schedule I of the PSSRA and any separate employer designated by the Governor in Council.

G-2.4 The Chairperson established two arbitration boards during the year under review and objections to the referral of proposals were raised in relation to one of them.

ISSUES WITHIN THE JURISDICTION OF THE ARBITRATION BOARD

G-3.1 In *Public Service Alliance of Canada v. National Energy Board* (185-26-385, 25 May 2001), the National Energy Board (NEB) proposed that an arbitration board determine an issue of pay administration. The Public Service Alliance of Canada (PSAC) objected to that proposal.

G-3.2 The PSAC took the view that the NEB's proposal dealt "…specifically with the demotion of employees and the rights afforded persons who find themselves in those circumstances". The PSAC argued that, since subsection 69(3)(*b*) of the PSSRA prohibits an arbitral award from dealing with a matter relating to demotion, the proposal should not be included in the terms of reference. The Chairperson, however, was satisfied that, in essence, the NEB's proposal related to an adjustment of an employee's salary following a reclassification, rather than a demotion. He therefore included the NEB's proposal in the arbitration board's terms of reference.

ISSUES NOT WITHIN THE JURISDICTION OF THE ARBITRATION BOARD

G-4.1 In *Public Service Alliance of Canada v. National Energy Board* (185-26-385, 25 May 2001), the PSAC proposed that an arbitration board determine the issue of a system of expedited adjudication. The NEB objected to that proposal.

G-4.2 The Chairperson considered the nature of the PSSRA as unique in labour relations, in that it provides for a statutory grievance process. The PSAC's proposal would have required the parties to forgo basic rights available under the statutory regime, such as the rights to adduce evidence through witnesses and to seek judicial review of the decision rendered. It would also have imposed certain obligations on the Board, which is not a party to the dispute or the proceedings before the arbitration board. The Chairperson found that a grievance system that would impose these kinds of conditions must be entered into voluntarily by the parties and the Board, and not be imposed by binding arbitration. Accordingly, the Chairperson did not include the PSAC's proposal in the terms of reference of the arbitration board.

G-5.1 In that same case, the NEB proposed that an arbitration board determine a workforce adjustment issue. The PSAC objected to that proposal.

G-5.2 The position of the PSAC was that the proposal dealt "…specifically with employees whose services are no longer required by reason of a lack of work, the discontinuance of a function or the transfer of work or a function outside of the National Energy Board". The Chairperson agreed with the PSAC's position that the proposal clearly related to the deployment and lay-off of employees in workforce adjustment situations. Paragraph 69(3)(*b*) of the PSSRA states that no arbitral award shall deal with standards, procedures or processes respecting deployment and lay-off; accordingly, the Chairperson did not include the NEB's proposal in the arbitration board's terms of reference.

H

COURT DECISIONS OF INTEREST

H-1.1 In *Singh*, 2000 PSSRB 39 (166-2-29399), the employer terminated the grievor's employment when she was unsuccessful in obtaining the secret security clearance that was a requirement of her position. The employer's security policy specified that, where a person loses his or her security clearance, termination of employment could be considered only in exceptional circumstances and only when all other options had been exhausted. Prior to making its decision to terminate the grievor's employment pursuant to paragraph 11(2)(*g*) of the *Financial Administration Act* (FAA), the employer looked only at other positions within the same branch of the department. Since these positions also required a secret security clearance, the employer was unable to locate a suitable alternative position to which the grievor could be appointed.

H-1.2 The adjudicator found that, as the grievor did not meet the requirements of the position to which she was appointed, the employer was well within its rights to deny her continuity of employment in that position. Accordingly, it would be inappropriate for the adjudicator to reinstate her in that position. In addition, the adjudicator found that he did not have the jurisdiction to reinstate the grievor in a position elsewhere within the department. The adjudicator expressed the opinion, however, that this was a situation that begged for review as the employer had acted unfairly in not reviewing all positions within the department for which the grievor might be qualified.

H-1.3 On judicial review, Dubé J. of the Federal Court, Trial Division, indicated that the employer indisputably had the right to establish the security level of the grievor's position and that the position required a secret security clearance, which she did not obtain. In addition, Dubé J. agreed that the adjudicator had no

jurisdiction to order that the grievor be appointed to an alternative position. However, this did not mean that the adjudicator had no jurisdiction to find that the employer ought not to have limited its search for other employment to a branch where the mandatory secret security clearance prevented such a position from being available to the grievor. In the opinion of Dubé J., subparagraph 92(1)(b)(ii) of the *Public Service Staff Relations Act* (PSSRA), in conjunction with paragraph 11(2)(*g*) of the FAA, affords an adjudicator the jurisdiction to enquire into whether the employer has searched diligently for alternative positions.

H-1.4 Dubé J. stated that termination of employment should be the employer's option of last resort. Upon the revocation of an employee's security clearance, the employer must make a serious effort to re-assign or appoint the employee to an alternative position at the same level within the department. Accordingly, Dubé J. set aside the adjudicator's decision and referred it back to him, or to another adjudicator appointed under the PSSRA, for redetermination in accordance with the Court's reasons: *Singh v. Attorney General of Canada,* Court file T-982-00.

H-2.1 The employer in *Leonarduzzi* (Board file 166-2-27886) purported to reject the grievor on probation under section 28 of the *Public Service Employment Act* (PSEA). The grievor submitted a grievance claiming that the termination of his employment was disguised disciplinary action. Therefore, according to the grievor, subparagraph 92(1)(*b*)(ii) gave an adjudicator appointed under the PSSRA the requisite jurisdiction to hear and determine the grievance. The employer argued that, once the employer advised an employee that he was being rejected on probation, subsection 92(3) deprived the adjudicator of any jurisdiction to determine a grievance relating to the employer's action. That subsection specifies that no grievance can be referred to adjudication with respect to any termination of employment under the PSEA.

H-2.2 The adjudicator issued an interlocutory decision dealing with the burden of proof and the order of proceeding at the hearing. He concluded that, when the issue is raised by the grievor, an adjudicator has the necessary authority to enquire into whether a rejection on probation is in fact a sham or a camouflage, in which case the adjudicator would have the jurisdiction to

determine the grievance on the merits. To enable the adjudicator to determine his jurisdiction, the employer is obliged to provide some evidence showing that there was a real employment-related reason for the termination. This falls far short of requiring the employer to demonstrate just cause as that term is normally understood in a labour relations context. A real employment-related reason having been established, subsection 92(3) of the PSSRA would apply and the adjudicator would have no jurisdiction to enquire any further into the grievance.

H-2.3 An application by the employer to review and set aside this interlocutory decision was dismissed by Lemieux J. of the Federal Court, Trial Division: *Attorney General of Canada v. Leonarduzzi*, Court file T-1321-99. He stated that, though Parliament's intent in enacting subsection 92(3) had been to forbid adjudication of rejections on probation, Parliament did not prohibit an adjudicator from ascertaining whether a rejection on probation was pursuant to the PSEA. In the face of a grievance alleging bad faith, the adjudicator required evidence from the employer to determine whether the termination was under the PSEA and, therefore, beyond the adjudicator's jurisdiction or whether it was for reasons foreign to the PSEA, so that the adjudicator had jurisdiction under section 92 of the PSSRA. The adjudicator's authority to deal with the grievance depends entirely on this factual determination. An error in determining the facts would warrant intervention by the Federal Court.

H-2.4 Lemieux J. pointed out that the adjudicator had not determined his jurisdiction. He had merely determined the procedure to be followed to assess whether the statutory exclusion under subsection 92(3) of the PSSRA applied. An adjudicator appointed under the PSSRA is master of his own procedure as long as the rules of procedural fairness and natural justice are respected. The adjudicator had said that the probationary employee had the legal and evidentiary burden of establishing that the rejection was a sham but the employer had an initial evidentiary burden of establishing that the rejection on probation was employment-related. Once an employer has tendered credible evidence pointing to some cause for rejection, valid on its face, the adjudicator has no jurisdiction to proceed further.

H-2.5 Lemieux J. went on to say that in the issue at hand the grievor was alleging that the dismissal had been made in bad faith and the employer had not given an employment-related reason other than that the grievor did not meet the required standards. The employer, however, did not tell the grievor why he did not meet those standards. The employer cannot rely on subsection 28(2) of the PSEA to reject employees without giving a *bona fide* reason. Lemieux J. concluded that the procedure adopted by the adjudicator to determine his jurisdiction was acceptable.

I

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

PROCEEDINGS UNDER SECTION 129

I-1 Cases under section 129 of the Code arise when an employee has refused to work because of an alleged danger in the workplace 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.

I-2 The responsibility for the determination of matters arising under section 129 of the Code was transferred to Human Resources Development Canada in September 2000. In the year under review, however, the Board dealt with two cases carried over from the previous fiscal year. One case was withdrawn prior to the hearing. The remaining case proceeded to a full hearing and a decision is expected during the next fiscal year.

PROCEEDINGS UNDER SECTION 133

I-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.

I-4 During the year under review, the Board processed 13 complaints. One complaint was withdrawn and one was settled by the parties prior to the hearing. A third case is scheduled for hearing in the next fiscal year.

I-5 A group of ten employees at Human Resources Development Canada alleged that the employer did not take the necessary measures to ensure their safety when crossing a picket line on returning from their lunch break. They also complained that the employer had taken disciplinary action against them because they refused to cross the picket line to enter the workplace. The employer maintained that the financial penalty, two days' pay, was imposed on the employees for their failure to report to work. The complainants were all employees who occupied designated positions within the meaning of section 78 of the *Public Service Staff Relations Act*. After a hearing, the Board dismissed the complaints; it found that the employer had not violated the Code since the employees had not availed themselves of their right to refuse to work in the case of danger as stipulated under section 128 (Board files 160-2-67 to 76).

APPENDIX

TABLES

ABBREVIATIONS USED IN TABLES

BARGAINING AGENTS

AOGA	Aircraft Operations Group Association
APSFA	Association of Public Service Financial Administrators
CATCA	Canadian Air Traffic Control Association
CAW	National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 2182 – CAW
CFPA	Canadian Federal Pilots 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
UCCO-SACC-CSN	UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN
*UCPPO-SCALCP-CSN	UNION OF CANADIAN PAROLE AND PROGRAMS OFFICERS – SYNDICAT CANADIEN DES AGENTS DE LIBÉRATION CONDITIONNELLE ET DE PROGRAMMES – CSN
UFCW	United Food and Commercial Workers

EMPLOYERS

CCRA	Canada Customs and Revenue Agency
CFIA	Canadian Food Inspection Agency
CIHR	Canadian Institutes of Health Research
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

* UCPPO-SCALCP-CSN is not a bargaining agent, but made an application for certification before the Board.

OSFI	Office of the Superintendent of Financial Institutions
PCA	Parks Canada Agency
SNPF	Staff of the Non-Public Funds, Canadian Forces
SSHRC	Social Sciences and Humanities Research Council
SSO	Statistics Survey Operations
TB	Treasury Board
OAG	Office of the Auditor General of Canada

MISCELLANEOUS

CFB	Canadian Forces Base
NDHQ	National Defence Headquarters