Federal Public Sector Labour Relations and Employment Board

Commission des relations de travail et de l'emploi dans le secteur public fédéral

FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD

2021–2022 | ANNUAL REPORT

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The Honourable Helena Jaczek, M.D., P.C., M.P.
Minister of Public Services and Procurement House of Commons
Ottawa ON K1A 0A6

Dear Minister,

As chairperson of the Federal Public Sector Labour Relations and Employment Board, it is my pleasure to transmit to you, pursuant to section 42 of the *Federal Public Sector Labour Relations and Employment Board Act*, this Annual Report of the Federal Public Sector Labour Relations and Employment Board, covering the period from April 1, 2021, to March 31, 2022, for submission to Parliament.

Yours sincerely,

Edith Bramwell
Chairperson
Federal Public Sector Labour Relations and Employment Board

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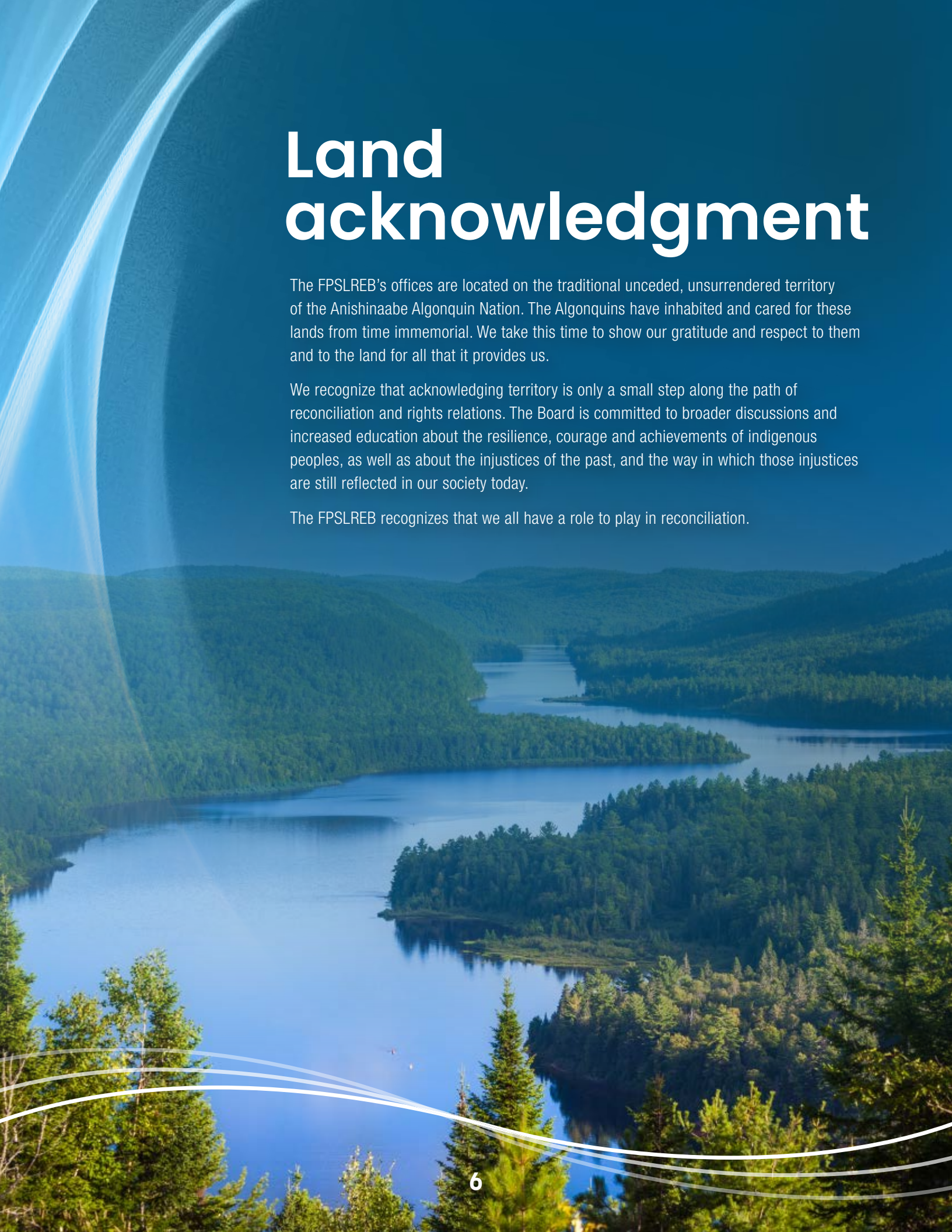
Land acknowledgment

The FPSLREB's offices are located on the traditional unceded, unsurrendered territory of the Anishinaabe Algonquin Nation. The Algonquins have inhabited and cared for these lands from time immemorial. We take this time to show our gratitude and respect to them and to the land for all that it provides us.

We recognize that acknowledging territory is only a small step along the path of reconciliation and rights relations. The Board is committed to broader discussions and increased education about the resilience, courage and achievements of indigenous peoples, as well as about the injustices of the past, and the way in which those injustices are still reflected in our society today.

The FPSLREB recognizes that we all have a role to play in reconciliation.



Message from the Chairperson

I am pleased to present the 2021-2022 Annual Report of the Federal Public Sector Labour Relations and Employment Board (FPSLREB or "the Board").

The Board's mandate is to support harmonious labour relations and employment relations in the federal public sector. This mandate encompasses matters related to collective bargaining and labour relations, staffing complaints, health-and-safety reprisal complaints, and human rights allegations, among a host of other areas of expertise.

The Board doesn't just deal with cases — it deals with people. As such, it is imperative that its services are offered in an accessible, inclusive, timely, and transparent manner. In the past year, the Board initiated a comprehensive review of its processes. This review includes ongoing consultations with stakeholders, with a focus on innovative and effective ways to address the parties' needs and enhance access to justice. The Board's approach to dispute resolution now includes many methods in addition to the traditional hearing room setting, such as increased use of written submissions, early resolution strategies, evaluative settlement conferences, and remote hearing technologies.

In this report, we showcase many of our newest initiatives aimed at increasing access to justice and helping parties reach timely resolutions. Those initiatives arise from the collaborative work of the Board, its stakeholders, and the Board's secretariat. This collaboration is invaluable in continuing to improve our processes.

I am profoundly impressed by the dedication and talent of our Board members and Board Secretariat team in piloting strategies to attain our objectives. The federal public service serves all Canadians; it needs and deserves a labour and employment board with standards of excellence. Every day, I see those standards of excellence reflected in the work of this Board. I wish to sincerely thank our vice-chairpersons, Board members, Executive Director, and the entire Secretariat team for their support, expertise, and commitment.

Together, we are building a better Board.

Edith Bramwell
Chairperson
Federal Public Sector Labour Relations and Employment Board

Who we are

Composition of the Board

The *Federal Public Sector Labour Relations and Employment Board Act* establishes the Board's composition as follows:

- 1 full-time chairperson;
- not more than 2 full-time vice-chairpersons;
- not more than 12 full-time members; and
- as many part-time members as necessary to carry out the Board's powers, duties, and functions.

During the reporting period, the Board was composed of the following members:

Edith Bramwell, Chairperson (since April 26, 2021)
Marie-Claire Perrault, Vice-chairperson (since April 30, 2021)
Amélie Lavictoire, Vice-chairperson (since July 5, 2021)
David P. Olsen, Vice-chairperson (until April 29, 2021)
Margaret T.A. Shannon, Vice-chairperson (until April 29, 2021)

Full-time Board members

Nathalie Daigle

Caroline Engmann (since September 13, 2021)

Bryan R. Gray

Chantal Homier-Nehmé

John G. Jaworski

Steven B. Katkin (until April 30, 2021)

James Knopp

Ian R. Mackenzie (since September 28, 2021)

David Orfald

Nancy Rosenberg

Part-time Board members

Joanne Archibald

Dan Butler (until September 27, 2021)

Paul Fauteux (until September 27, 2021)

Guy Giguère (since March 4, 2022)

Linda Gobeil (until September 27, 2021)

Guy Grégoire (since August 4, 2021)

Steven B. Katkin (since March 4, 2022)

Ian R. Mackenzie (until September 27, 2021)

David P. Olsen (since August 4, 2021)

Renaud Paquet

Leslie Anne Reaume (since August 4, 2021)

Augustus Richardson

Mandate of the Board

The Federal Public Sector Labour Relations and Employment Board ("the Board") is an independent, quasi-judicial statutory tribunal that offers dispute-resolution and adjudication services in key labour relations and staffing matters of the federal public sector and Parliament[1]; it administers the related collective bargaining and grievance adjudication processes, and it helps resolve complaints about internal appointments, appointment revocations, and layoffs.

The Board also resolves human rights issues in areas that range from labour relations grievances and staffing complaints to unfair labour practices and collective bargaining. It is also responsible for administering public-sector-employee reprisal complaints under the *Canada Labour Code* (*CLC*).

As of 2019, the Board's mandate was broadened to include complaints from federal public sector and parliamentary employees that are related to the *Accessible Canada Act*, which establishes a framework for the proactive identification, removal, and prevention of barriers to accessibility for persons with disabilities.

Our commitment

- Support a fair staffing environment and harmonious labour relations within the federal public sector.
- Resolve labour relations and employment issues impartially and fairly.
- Help parties resolve disputes in a fair, credible, and efficient manner that respects the terms and conditions of employment.

The Board's jurisdiction

As part of its responsibilities, the Board interprets and applies the following legislation:

- *Federal Public Sector Labour Relations Act* (*FPSLRA*)
- *Public Service Employment Act* (*PSEA*)
- *Canadian Human Rights Act* (*CHRA*)
- *Parliamentary Employment and Staff Relations Act* (*PESRA*)
- *Public Sector Equitable Compensation Act* (*PSECA*)
- *Canada Labour Code* (*CLC*), Part II
- *Accessible Canada Act* (*ACA*)

The legislative framework of the *FPSLRA* covers numerous collective agreements, bargaining agents, and employers. It applies to departments listed in Schedule I to the *Financial Administration Act* (*FAA*), other portions of the core public administration listed in Schedule IV to the *FAA*, and separate agencies listed in Schedule V to the *FAA*. The *FPSLRA* covers over 305 000 federal public sector employees, including RCMP members and reservists.

The legislative framework of the *PSEA* applies to any organization for which the Public Service Commission (PSC) or its delegate has the authority to make appointments and covers approximately 217 000 employees and managers of the federal public service.[2]

The open court principle

In accordance with the constitutionally protected open court principle, the Board's hearings are open to the public, save in unusual circumstances. The Board acts according to its Policy on Openness and Privacy to foster transparency in its processes, as well as accountability and fairness in its proceedings.

1 A separate annual report is issued for the Board's activities under the *PESRA*.

2 See the PSC's Reference List of organizations and deputy heads for which it has delegated appointment (and related) authority.

What we do

The Board's Activities

Collective Bargaining

- The FPSLREB administers the collective bargaining processes within the federal public sector, including the RCMP, and Parliament that are covered by the *FPSLRA* and the *PESRA*.
- Through collective bargaining, the Board provides arbitration and conciliation services to facilitate the resolution of disputes that arise in the context of collective bargaining.
- Please consult the collective bargaining page of the Board's website for more information.

Mediation

- Mediation helps parties resolve their conflicts through a mutually acceptable agreement and without resorting to a hearing. It is a confidential, voluntary process led by a neutral and impartial third party.
- Through mediation, the Board promotes open and respectful communication, fair and transparent employment practices, and effective dialogue.
- Please consult the mediation page of the Board's website for more information.

Adjudication

- Through adjudication, the Board achieves the fair resolution of cases through several forms of dispute-resolution approaches, including settlement conferences, case management conferences, and hearings.
- The FPSLREB has developed a broad-ranging body of precedents that can be used to help resolve future cases.
- Please consult the adjudication page of the Board's website for more information.

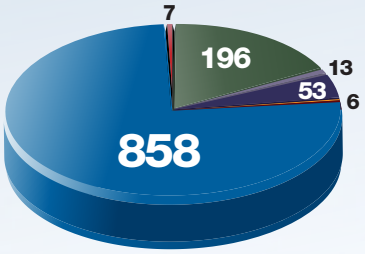
Please consult the Board's website for more information on its activities.

2021–2022 in numbers

Labour relations (*FPSLRA*)

1133 opened files

***FPSLRA* files opened as of March 31, 2022**

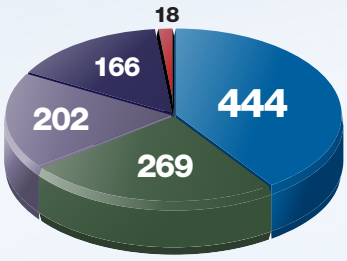


- Over 80% of new *FPSLRA*-related grievances relate to a disciplinary matter or to the interpretation or application of a collective agreement.

- Applications (196)
- *CLC* complaints (13)
- Complaints (53)
- Group grievances (6)
- Individual grievances (858)
- Policy grievances (7)

1099 closed files

***FPSLRA* files closed as of March 31, 2022**



- *FPSLRA* cases resulting in a decision being issued account for only 15% of all files closed.

- Withdrawal (444)
- Settlement (269)
- Managerial and confidential exclusion order (202)
- Decision (166)
- Administrative reason (18)

Staffing (*PSEA*)

306 opened files

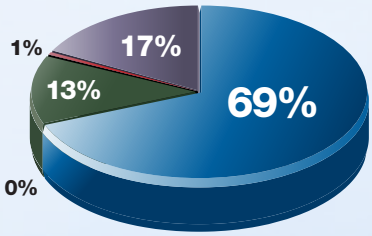
***PSEA* files opened as of March 31, 2022**

- For the sixth year, the number of staffing complaints received decreased.

- Internal appointment (s. 77) (298)
- Corrective measure (s. 83) (3)
- Lay-off (s.65) (1)
- Revocation of appointment (3)
- Unspecified (1)

383 closed files

***PSEA* files closed as of March 31, 2022**

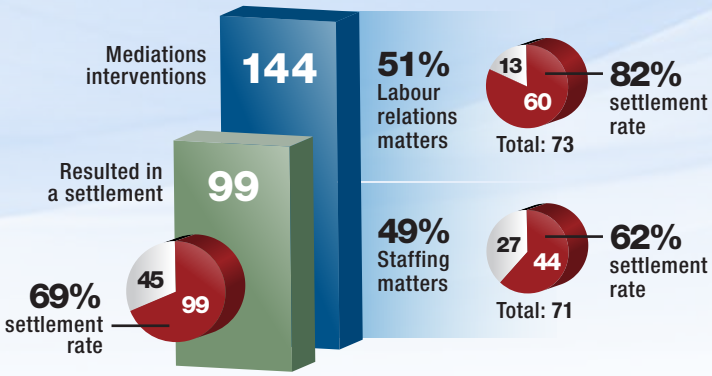


- Of the 383 files closed, 159 were opened during the 2020-2021 fiscal year.

- Withdrawal (265)
- Settlement (1)
- Decision (51)
- Administrative reason (3)
- Letter decision (63)

Mediation

Mediation settlements



- 10% of all Board files were referred to mediation.
- 142 Board files were resolved following a settlement facilitated by a Board mediator.
- All mediation interventions were held via videoconference.

Highlights of 2021–2022

Board renewal

The Board's team changed significantly in 2021-2022, starting with the appointment of a new chairperson at the end of April 2021 and two new vice-chairpersons (respectively at the end of April 2021 and the beginning of July 2021). In addition, the terms of several full- and part-time Board members expired in 2021, leading to the appointments of two full-time and five part-time Board members. At the end of the year, a process was still underway to fill the remaining vacant positions, the objective of which will be to obtain a full complement of Board members, who will bring a broad range of experience and expertise to the Board as well as fresh ideas and innovative ways to help it continue to improve its processes.

Collective bargaining

The 2021-2022 fiscal year coincided with a relatively quiet period for public service negotiations as most parties had reached multi-year settlements in the preceding two years.

What was exceptional was the occurrence of two strike actions, an uncommon feature in the federal domain over the past two decades. The Border Services (FB) group, represented by the Public Service Alliance of Canada ("the Alliance"), conducted a job action at several points of entry in early August 2021 following the release of a Public Interest Commission report. That dispute was resolved with the assistance of a Board-appointed mediator.

A second, more prolonged strike involved the Audit Services group at the Office of the Auditor General, also represented by the Alliance. A Public Interest Commission was held in July 2021, and that commission issued its report in late August. A three-month strike began in December 2021 and was settled in late March of 2022 with the assistance of the Board's Mediation and Dispute Resolution Services (MDRS).

In addition to those two mediations, MDRS was also asked to provided mediation services in relation to one other bargaining dispute. No requests seeking the establishment of an arbitration board were received during the fiscal year.

Outreach and training

Approximately 200 persons participated in one of 12 orientation sessions, 7 in English and 5 in French, offered by MDRS on how to participate in a mediation session via videoconference. While most sessions were available to all Board stakeholders, 30% of the participants were bargaining agent representatives, and 2 of the sessions were offered to a single organization that required specific training for its new representatives.

Case Flow Initiative

To respond to the growing need for more comprehensive, modern, and effective case management solutions, the Board implemented the Case Flow Initiative. Its ultimate goal is to increase access to justice by reducing unnecessary delays and resolving disputes as quickly and efficiently as possible while maintaining high-quality service — from a file's reception to its resolution.

In the past year, the Board carried out an ongoing analysis of its caseload and processes to create concise and measurable objectives and results tracking. It also examined different dispute-resolution methods and ways to conduct its operations, such as earlier and more consistent case evaluation and management and alternative scheduling approaches. The Board also held several stakeholder consultations to share ideas and seek feedback to ensure the fair and efficient resolution of labour relations matters in the federal public sector.

The following are the main mechanisms and initiatives that arose from the larger Case Flow Initiative, which have contributed to increased access to justice, improved the efficiency of our processes, and reduced the time spent waiting for a hearing. Please note that as many of these initiatives were implemented at the end of the reporting period, the results for some will be available only in the next annual report.

File review

The Board initiated a review of its file inventory. This review has several objectives, namely: distinguishing between active and inactive files, managing priorities and improving case file groupings, as well as addressing files requiring a status update.

The inactive file category includes cases held in abeyance. An abeyance may be appropriate in a variety of situations, including cases where further discussions are being held by the parties, or which have been postponed pending the outcome of other legal processes. A grouping of cases on a single topic may also be held in abeyance if the Board expects to receive more requests on that same topic, since it is sometimes more efficient to resolve those cases simultaneously as a group.

The Board is also engaging in an ongoing process of providing bargaining agents with lists of cases for which a settlement has been reached; bargaining agents are asked to reply in writing and state whether specific cases, after being settled, should be deemed withdrawn or closed and whether the Board's assistance is required to resolve any remaining disputes between the parties.

Multi docket scheduling system pilot

The Multi Docket Scheduling System Pilot was created in response to the high number of hearing cancellations and postponements and is one of many ways of fulfilling the Board's commitment to access to justice and the timely resolution of labour relations disputes.

Currently, three bargaining agents are participating in the pilot:

- Public Service Alliance of Canada,
- Professional Institute of the Public Service of Canada, and
- Canadian Association of Professional Employees.

The first notice of an initial multi docket schedule was sent to the parties in December 2021 for hearings occurring in March or April 2022. In March 2022, of the six cases that were added to the multi-docket schedule, two were the subject of a hearing, two were settled before a hearing, one was withdrawn, and one was forwarded to MDRS.

More information on the implementation of the Case Flow Initiative can be found on the Board's website.

Settlement conference pilot project

The Settlement Conference Pilot Project was implemented in March 2022 as part of the Board's commitment to improve access to justice and to increase the use of different dispute-resolution mechanisms.

The Board may determine that a case is appropriate for a settlement conference, i.e., a confidential meeting between the parties in the presence of a Board member, depending on the case's nature. Parties may also request a settlement conference.

The role of the Board member presiding over a settlement conference is to listen to the parties' positions, facilitate settlement discussions, discuss procedural issues, and provide an opinion on the case's strengths and weaknesses. After that, the parties may choose to settle the matter, pursue it to adjudication, or withdraw it.

As this pilot project was implemented at the end of the fiscal year in review, there are currently no results to report.

Stakeholder consultation (other than the Client Consultation Committee)

The Board recognizes the valuable role that stakeholder engagement plays in the success of its Case Flow Initiative and in ensuring the fair, credible, and efficient resolution of labour relations matters in the federal public sector.

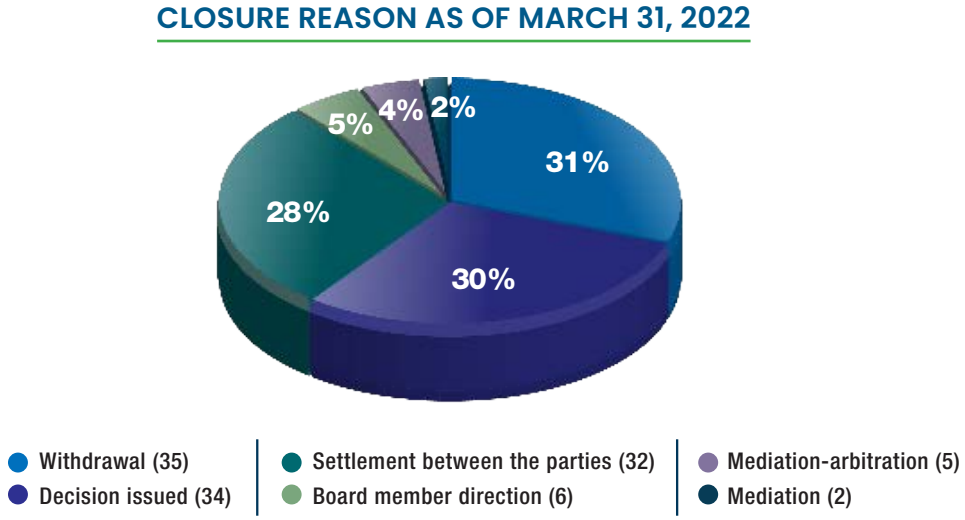
In 2021-2022, as part of Phase I of the Case Flow Initiative, the Board's secretariat held consultations with 13 individual stakeholders — ACFO, AJC, CAPE, CRA, CSC, DND, ESDC *PSEA* complaint team, PIPSC, PSC, TBS (Employer Representation in Recourse and Legal Services), *PSEA* complaint representative team, and UCCO-SACC-CSN.

The objective of those consultations was to seek feedback on the Board's processes and its file management from the moment files are referred to pre-hearing processes. The many discussion topics included preparing cases before a hearing, triage and early identification, mediation and alternate dispute resolution, and the preliminary evaluation of cases. These discussions also paved the way for many of the initiatives undertaken in the larger context of the Case Flow Initiative.

COVID-19 tracking project

The COVID-19 tracking project's goal was to monitor progress dealing with hearings that were postponed at the pandemic's onset. It enabled the Board to monitor the number of cases that were fully resolved through different methods, including settlement discussions, mediation, withdrawal, or a Board decision that normally follows a hearing. The project's final report was issued in March 2022. Here are a few key conclusions and results:

- 151 hearings of case files were postponed at the onset of the pandemic. Of that number, 114 cases were closed through different methods, as shown in this graphic:



As of March 31, 2022, the statuses of the remaining 37 active case files were as follows:

- 12 were scheduled for a hearing;
- 7 were awaiting a decision;
- 7 were settled and awaiting withdrawal;
- 7 were waiting to be scheduled for a hearing;
- 2 were held in abeyance;
- 1 was awaiting mediation; and
- 1 was scheduled to proceed by written submissions.

The COVID-19 tracking project exercise demonstrated that recovering from the cancellation of 151 hearings was no easy feat. While there is light at the end of the tunnel, some catching up remains, which will require ongoing collaboration between the Board and the parties. However, the recovery also paved the way toward the increased use of different dispute-resolution mechanisms (settlement conferences, case management conferences, mediation, etc.) and demonstrated the Board's ability to adapt in the face of adversity, both of which are important assets for the future.

Overview of the case file inventory

Average file age (in months)

The average file age is the period from the moment the file is created to the end of the current reporting period, i.e., March 31, 2022.

An **active case file** is currently in mediation, is awaiting a decision, is awaiting the parties' submissions, is waiting to be scheduled for a hearing, or has already been scheduled for a hearing.

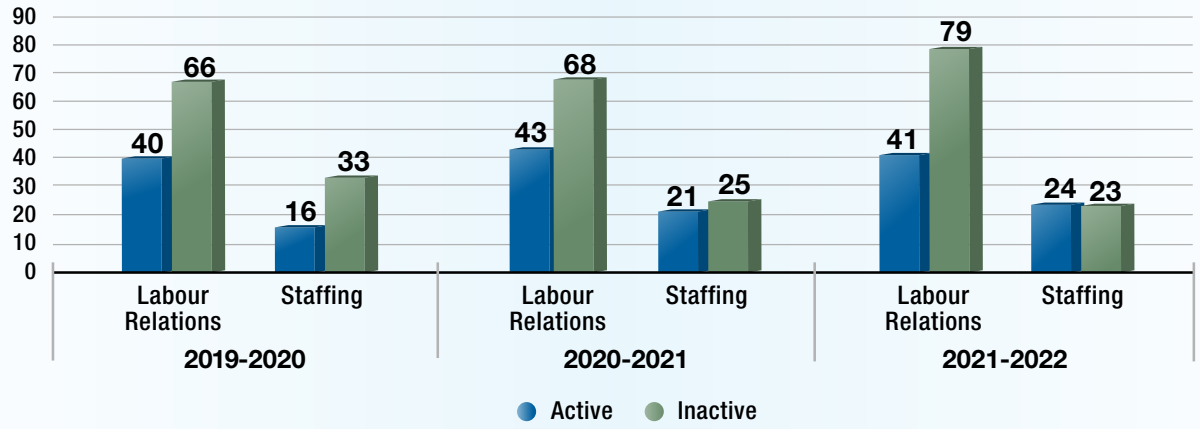
An **inactive case file** is held in abeyance or awaiting final withdrawal.

A file can be **held in abeyance**, or put on hold, on the request of the parties for reasons such as settlement negotiations to determine the most timely and efficient way to solve a matter or for reasons such as sickness, family-related obligations, or other personal reasons. A file can also be put in abeyance while awaiting the outcome of a test case.

A file **awaiting withdrawal** has a settlement that has been agreed upon but that has not yet implemented. The file is officially withdrawn once the settlement is implemented.

Overall, the average file age for labour relations case files (*FPSLRA*) — inactive and active — has been consistent in the past 3 years. However, the processing time of staffing case files (*PSEA*) — active and inactive — increased from 15 months in 2019-2020 to 25 months in 2021-2022.

AVERAGE FILE AGE (IN MONTHS) AS OF MARCH 31, 2022

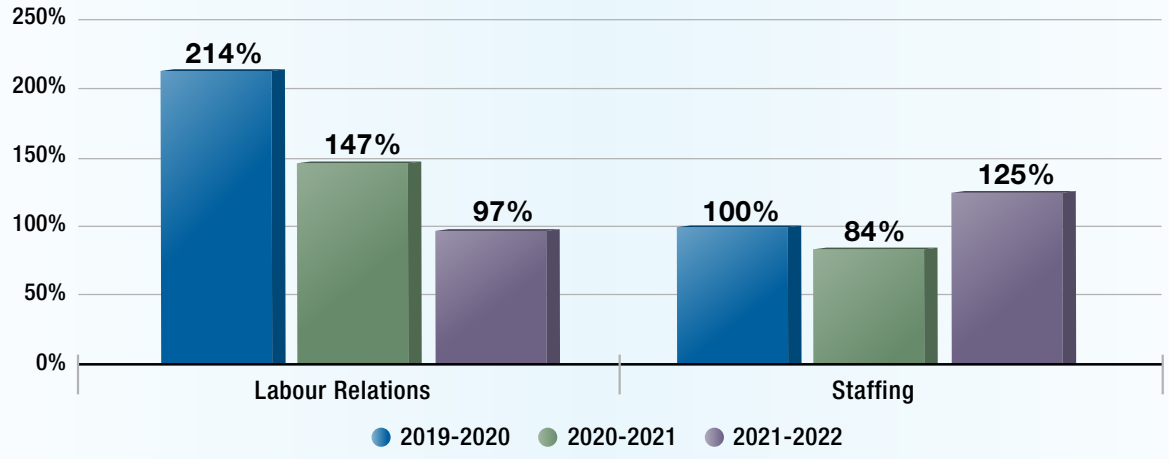


Clearance rate

The clearance rate evaluates the Board's capacity to address the volume of files it receives or, more specifically, its capacity to close as many files as it opens. If, in a year, the Board closes more files than it opens (higher than 100%), it means that its workload is manageable. If it opens more files than it closes (lower than 100%) it means that adjustments are required, to provide more timely access to justice and to avoid a potential backlog.

In 2021-2022, the clearance rate dropped as a result of a significant increase in the number of labour relations files received – 1133 new labour relations files compared to 716 in 2020-2021 – whereas the number of files closed has remained stable. See Appendix 1 – Total FPSLREB Caseload for more information.

CLEARANCE RATE AS OF MARCH 31, 2022

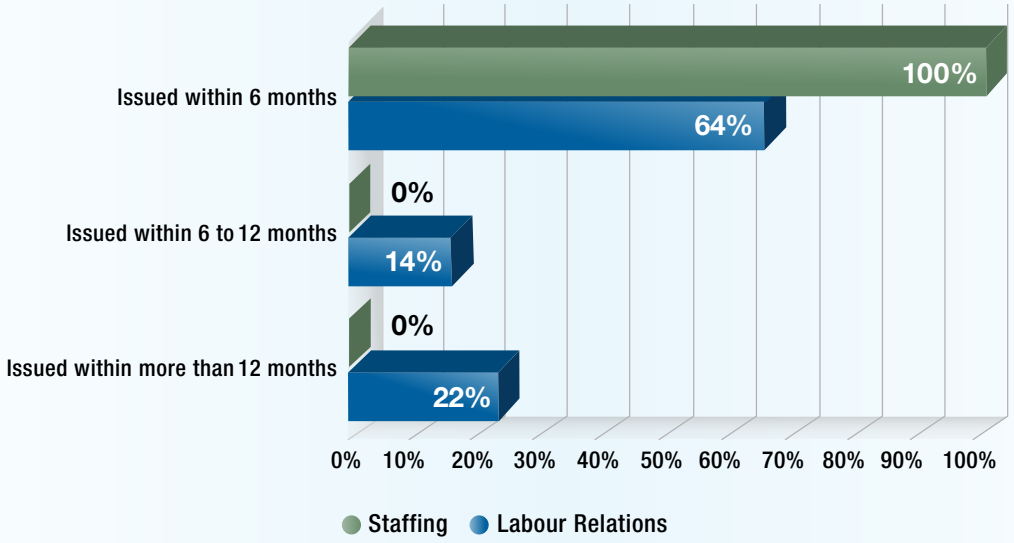


See "2021-2022 in Numbers" for a breakdown of the types of files opened and closed in 2021-2022.

Decision timeliness average

In 2021-2022, 71% of decisions were issued within 6 months of the hearing (labour relations: 64%; staffing: 100%). Twenty-three (23) of the 103 labour relations decisions were issued more than 12 months after the hearing, which significantly impacted the overall average.

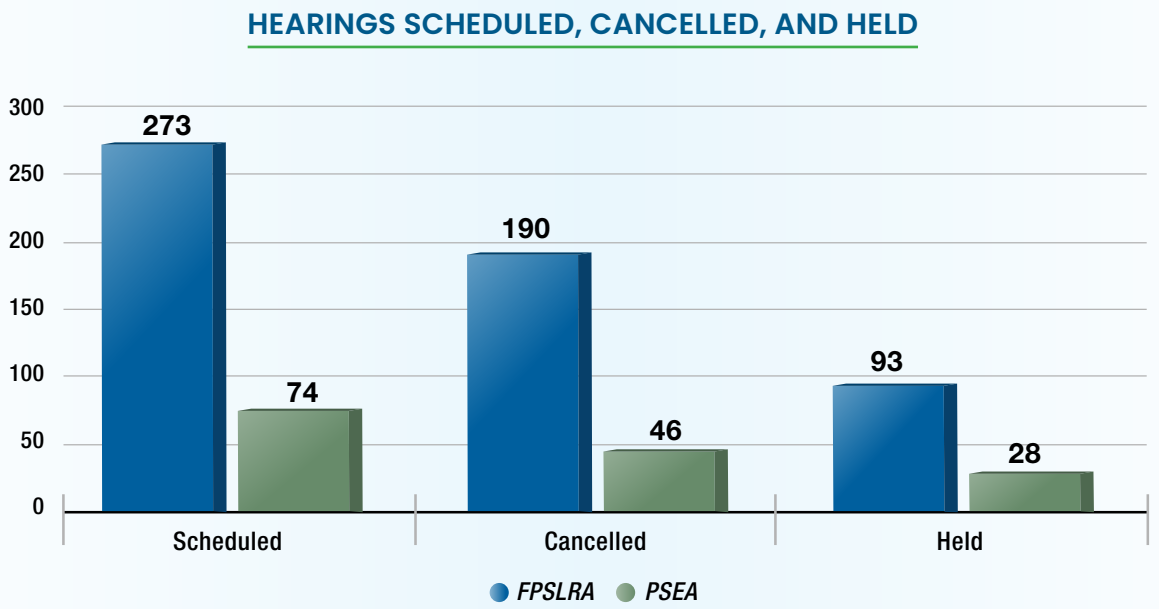
DECISION TIMELINESS AVERAGE (IN MONTHS) AS OF MARCH 31, 2022



Number of hearings scheduled

In 2021-2022, a total of 347 hearings were scheduled. In the last quarter of 2021-2022, an average of 48 hearings were scheduled per month, which is similar to the pre-pandemic average. Board members adapted and became more at ease with videoconference hearings, which contributed to this return to normal.

In 2021-2022, 68% of all scheduled hearings were cancelled, which is similar to previous years. Hearings are cancelled for many reasons, for example when a case is settled or settled in principle. Postponements may occur for several reasons, such as withdrawals, settlement discussions between the parties, pre-hearing preparations being longer than planned, or when a decision is made to proceed by written submissions.



Number of reasons for decision issued

In the past fiscal year, the Board issued 128 reasons for decision in both official languages. Of that number, 103 dealt with labour relations matters, and 25 dealt with staffing matters. In comparison with the last fiscal year, this represents a 25% increase.

Moving forward

Over the coming year, we will continue to focus on providing timely access to justice through respectful, accessible, and fair processes and on promoting harmonious labour relations in the federal public sector.

While we will continue to provide the highest quality of adjudication services, we will further explore and promote, whenever possible, alternate dispute-resolution approaches, such as settlement conferences and mediation. We will also analyze our caseload in depth, as it is of utmost importance to better assess our needs, plan for the future, monitor and evaluate our progress, and implement the proper processes.

As we progress in the 2022-2023 reporting period, we will also begin to see results from the many initiatives put in place in the last quarter of the year in review (see the Highlights of 2021-2022). As we review the results and related data, it will be important to keep a keen eye on what they tell us and to make the necessary adjustments to ensure the effectiveness of our methods and processes.

Finally, consultations with our stakeholders will continue to be a priority as they are an opportunity to share ideas and seek their feedback on present and future initiatives and to share with them the results of ongoing projects and initiatives. Those consultations also help us identify and monitor their needs and expectations as well as future challenges, enabling us to provide more effective and timely support to the parties before us.

Key decisions

Summaries of key Board decisions

Markovic v. Parliamentary Protective Services, 2021 FPSLREB 128 – Termination (rejection on probation)

The grievor was terminated from the Parliamentary Protective Service (PPS) in 2017, which he grieved under the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); "the *Act*"). The question before the Board was whether the termination constituted a rejection on probation, to determine if the Board had jurisdiction under s. 63(1) of the *Act*.

The employer objected to the Board's jurisdiction, alleging that the grievor was not an employee under the *Act* and that the termination was a rejection on probation as the grievor had been subject to a one-year term before becoming an indeterminate employee. The adjudicator found that the grievor was an employee, as defined in the *Act*, because he had more than six months of continuous service with the employer as of the termination date. The adjudicator also found that the employer did not establish that the grievor had been subject to a probationary period, as the letter of offer and collective agreement included no such information. Although the employer's witnesses testified that many PPS employees considered the first year of employment a probationary period, the adjudicator emphasized that a legal source defining the terms of employment was necessary to establish a probationary period. The adjudicator found that the employer did not establish that the grievor had been subject to a probation period.

The adjudicator found that the termination amounted to constructive dismissal without cause. He held that that the employer was not permitted to attempt to justify the termination on grounds other than those initially relied on. He ordered it to pay the grievor the salary and benefits associated with the unexpired portion of the employment term as of the termination date, along with compensatory damages of $5000 for psychological harm. Additionally, the adjudicator was shocked by the employer's conduct throughout the grievance and adjudication process, including withholding information and abuse of process, and awarded the grievor punitive damages of $20 000.

Objection dismissed.
Grievance allowed.

Shafaie v. Deputy Head (Department of Health), 2022 FPSLREB 15 – Abuse of authority (staffing)

The complainant made a complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), alleging that the respondent abused its authority in the application of merit and in its choice of a non-advertised appointment process. The respondent made a motion to dismiss the complaint because the complainant was not in the area of selection, causing her to fall outside the area of recourse under the *PSEA*. The complainant objected to the request, arguing that the respondent exercised personal favouritism when it established a narrow area of selection, to deliberately exclude her from having recourse against the appointment. Given the complainant's response, the Board sought and obtained submissions on the following issue: Does the Board have jurisdiction to hear a complaint from someone outside the area of selection when it is alleged that the deputy head restricted the area of selection to personally favour the appointment of the appointee and to prevent the complainant from exercising a right of recourse?

Based on the information provided, the Board concluded that it is clear that Parliament did not provide it with the authority to determine if an abuse of authority occurred in the establishment of the area of selection. The Board's mandate, pursuant to s. 88(2) of the *PSEA*, is limited to considering and disposing of complaints made under ss. 65(1), 74, 77, and 83. Those sections do not allow a complaint about the establishment of the area of selection as the jurisdiction for that type of complaint falls under the Public Service Commission.

When evidence has been admitted with respect to bad faith in setting an area of selection, it has generally been because the evidence was used to support an allegation with respect to matters for which the Board does have jurisdiction, such as an allegation of abuse of authority in the choice of a non-advertised appointment process. However, before hearing that evidence, a complainant must first establish their right of recourse before the Board. The Board found that the complainant was outside the area of selection; thus, she did not have a right of recourse to the Board under s. 77 of the *PSEA*. As such, the Board did not have jurisdiction to consider this complaint.

Motion granted.
Complaint dismissed.

Nash v. Treasury Board (Correctional Service of Canada), 2021 FPSLREB 121 - Application for decision review under s. 43(1) of the *Federal Public Sector Labour Relations Act*

The applicant applied for a review under Part 1, s. 43(1), of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) of the Board's decision in *Nash v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 38 ("the adjudication decision"). The adjudication decision dismissed two grievances that the applicant had referred to adjudication, alleging discriminatory treatment in violation of his collective agreement. The applicant requested that the adjudication decision be rescinded or alternatively that a panel of the Board rehear the evidence, submitting that the hearing of his grievances did not take place in a timely manner, which had caused him prejudice.

There were two threshold issues in the application. The first was whether the powers in Part 1, s. 43(1), of the *FPSLRA* apply to grievance adjudication decisions made under Part 2. If so, the second threshold issue was whether the Board can conduct a decision review of a grievance adjudication decision dealing with the interpretation or application of a collective agreement without the support of the applicant's bargaining agent.

Under the *FPSLRA* and its predecessor, the *Public Service Labour Relations Act* (*PSLRA*), the powers of decision makers with respect to grievance adjudication are set out in s. 226(1) and do not include the power to review decisions set out in s. 43(1) or any power similar to that set out in s. 43(1). Those powers are generally similar to those set out in the predecessor legislation. What distinguishes the current statutory regime is that the Board now can decide grievances referred to adjudication — this change occurred in 2014. However, this does not mean that the Board was given more powers with respect to grievance adjudication than those that adjudicators have under the *FPSLRA* or previously had under the *PSLRA* and its predecessor legislation.

The Board found that it had no jurisdiction to hear the decision review application. It determined that the Federal Court of Appeal's decisions in *Doyon v. P.S.S.R.B.*, [1979] 2 F.C. 190 (C.A.), *Sincère v. Canada (Attorney General)*, 2005 FCA 103, and *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376, are still applicable, as they better reflect Parliament's intention at the time it enacted the *FPSLRA* and its predecessor legislation, the *PSLRA*. Therefore, the Board found that the powers in Part 1, s. 43, of the *FPSLRA* do not give it jurisdiction to review adjudication decisions made under Part 2.

Application dismissed.

***Nadeau v. Deputy Head (Correctional Service of Canada),* 2021 FPSLREB 46 – Application (meaning of the term "customary deductions")**

The grievor filed a grievance that challenged his termination. After a hearing before the Board, he was reinstated as the termination was replaced with a six-month suspension without pay. Among other things, the Board ordered that the deputy head compensate the grievor in the form of his salary from May 2014, less the customary deductions, and it retained jurisdiction over the calculation of the amounts owed to the grievor for 90 days from the date of the decision.

After the decision was issued in April 2018, the parties tried to resolve issues related to the grievor's reinstatement. In July 2018, the parties advised the Board that they could not agree on the meaning of "customary deductions". The employer asked the Board to clarify that although the order did not mention the mitigation of damages, it implicitly included deductions related to an employee's obligation to mitigate his or her damages, to avoid unjust enrichment.

The Board determined that it remained seized for the calculation of the amounts owed to the grievor but not for the issue of damages as a whole. Despite the employer's argument to the contrary, the Board was not convinced that on the balance of probabilities, the term "customary deductions" is ambiguous or that it should be given a broad interpretation that includes amounts for the mitigation of damages. The Board found that that term refers to the customary deductions provided for by law, as well as other common deductions from a federal-public-sector employee's pay, such as income tax, Canada Pension Plan contributions, Employment Insurance contributions, Public Service Pension Plan contributions, union dues, healthcare insurance premiums, dental care insurance premiums, long-term disability insurance premiums, and other similar deductions.

While the application of the mitigation of damages principle is not unusual, the Board found that it is not implicit in every decision. In this case, the employer's request came too late, and the Board did not reserve jurisdiction for mitigation.

Application dismissed.

Schwarz v. Deputy Minister of Employment and Social Development, 2021 FPSLREB 92 – Abuse of authority (staffing)

The complainant applied online for a position at Employment and Social Development Canada ("ESDC" or "the respondent"). She testified that upon submitting her application, she observed a message stating that she had "… completed and submitted all mandatory sections …" of the process. She was satisfied that that confirmed that she had applied. She did not observe any further buttons or notifications indicating that she had withdrawn or that she had to resubmit her application. According to the Public Service Commission ("PSC"), which administered the online application, the complainant retrieved her application minutes after it was submitted and never resubmitted it. Consequently, the PSC never received the application, and it was not transferred to ESDC. An archived document showed that the completed application was "in progress" rather than "submitted", which suggests that either (i) the complainant retrieved her application and thus voided the submission, or (ii) something else occurred within the system that retracted her application without her will or consent.

In June 2017, the complainant made a complaint with the Board against the respondent in which she alleged that an abuse of authority occurred under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*"). She alleged that the respondent abused its authority by not considering all the circumstances of her case before refusing her application. In advertised internal appointment processes, s. 77(2)(a) of the *Act* provides that a person must be an unsuccessful candidate in the area of selection to make a complaint. The respondent and the PSC maintained that the complainant did not have recourse to the Board because she was not an unsuccessful candidate. The complainant argued that she was in the area of recourse; the system had mishandled her otherwise submitted application.

The Board was tasked with determining (i) whether the complainant had recourse before it, and (ii) whether her claim of abuse of authority was substantiated. The Board found that she did submit her application and that the respondent eliminated it from consideration. Therefore, as an unsuccessful candidate, she had recourse to make a complaint under s. 77 of the *Act*. The Board further held that the respondent abused its authority pursuant to s. 77(1)(a). An abuse of authority does not require improper intent. The respondent undermined the integrity and fairness of the process by eliminating the complainant based on inadequate information. It never sought further information from her and denied her the opportunity to explain that she did not retrieve her application. The respondent's actions were more than mere errors or omissions; they amounted to a serious flaw in the process that resulted in an outcome that was unfair to the complainant.

Complaint allowed.

***National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2021 FPSLREB 77 – Complaint (changes to terms and conditions of employment during the freeze period)**

The complaint concerned a unilateral change to terms and conditions of employment during the freeze period that follows a bargaining agent's certification application. In this case, the National Police Federation ("NPF" or "the complainant") complained against the Treasury Board ("the employer" or "the respondent") about the "civilianization" of Cadet Training Program duties during the freeze period. "Civilianization" refers to the movement of duties from regular members of the Royal Canadian Mounted Police ("RCMP") to civilian employees.

In May 2019, the RCMP announced that new AS-04 instructor/facilitator positions would be filled with public service employees to deliver an Applied Police Sciences ("APS") course to cadets at the Regina Depot Division. Before the announcement, the APS course was delivered entirely by RCMP members. Less than two months after the announcement, the NPF was certified as the bargaining agent for RCMP members and reservists. The NPF alleged that through the RCMP, the employer made a unilateral change to the terms and conditions of employment, in violation of s. 56 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Section 56 contains a provision under which an employer can seek the Board's permission to alter terms and conditions of employment. The respondent denied that the term and condition of employment cited by the NPF existed before the statutory freeze. It noted that the phrase "term and condition of employment" is not defined in the *Act* and that it has been defined broadly as being directly related to the regulation of employer-employee relations. However, it argued that the Board should look to the provision found at s. 7 of the *Act* to determine what term and condition existed before the freeze.

In deciding whether the freeze complaint was founded, the Board was asked to determine whether (i) a term and condition of employment existed at the time the certification application was made, (ii) the employer changed the term and condition of employment without the Board's permission, and (iii) if the first two questions were answered in the affirmative, whether that change was made during the freeze period.

The Board found that the employer failed to comply with s. 56 of the *Act*. The term and condition of employment at issue in this case was the assignment of APS facilitator duties, which was subject to the exercise of the respondent's discretion under s. 7. However, before the certification application was made, the respondent exercised that discretion and assigned APS facilitation duties only to RCMP members. In doing so, it established a past practice. The employer then changed the assignment of certain APS facilitator duties from RCMP to civilian positions during the freeze period without seeking the Board's consent or approval. Other civilianized RCMP positions can be distinguished from the APS facilitators. Accordingly, the choice to civilianize the positions represented a departure from the employer's business as before and resulted in a violation of s. 56.

The Board held that management rights can be circumscribed by the freeze provisions in the *Act*, which are to be given a broad interpretation, and an applicable term or condition of employment can be determined to exist based on past practice. While an employer has the discretion to change terms and conditions of employment continued in force by the freeze provision, the exercise of that discretion must be part of an established pattern. The Board has continually determined that the existence of a collective agreement provision between the parties is not the determining factor in a freeze complaint, even one under s. 107 (the bargaining freeze). Sections 7 and 56 do not conflict and can be read and function together in the scheme of the *Act*.

Complaint allowed.

A judicial review application has been made before the Federal Court of Appeal and is pending.

Summaries of key decisions that were judicially reviewed

Public Service Alliance of Canada v. Canada (Attorney General), 2021 FCA 90 – Judicial review application (mootness)

The Public Service Alliance of Canada (PSAC) made an application for the judicial review of Board decision 2019 FPSLREB 106. The decision concerned a policy grievance alleging that the employer, the Treasury Board, breached the collective agreement at issue by not providing paper copies of it to some employees. Before the Board's hearing, the employer allowed the grievance. The employer then made a motion with the Board to dismiss the grievance for mootness, which the Board granted. The PSAC's judicial review application sought to quash the Board's decision for reasons of unreasonableness.

The PSAC argued that the application was not moot on two grounds. Firstly, the PSAC sought a declaration that the employer had breached the collective agreement in its application, which the Federal Court of Appeal dismissed as it would have no practical effect if granted. Secondly, the PSAC argued that the employer's corrective action had been insufficient, which the Court rejected on the grounds that other forms of recourse were available to ensure that the employer abided by its acceptance of the grievance.

The Court determined that the application was moot, meaning that the concrete dispute between the parties had resolved and that the remaining matter was solely academic. Thus, the Court found that the matter should not be heard. The Court found that the application was moot for two reasons. Firstly, the employer had accepted the grievance, leaving no dispute to adjudicate, and secondly, the collective agreement in question had expired and was soon to be replaced.

Application dismissed.

Association of Justice Counsel v. Canada (Attorney General), 2021 FCA 87 – Judicial review application (managerial or confidential exclusions under s. 59(1)(g) of the *Federal Public Sector Labour Relations Act*)

The Association of Justice Council made an application to set aside Board decision 2020 FPSLREB 59, concerning the exclusion of an LP-04 position in the Centre for Information Law and Privacy within the Department of Justice. The Board determined that the position should be excluded under s. 59(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) as the incumbent provided advice that intersected with labour relations, staffing, and classification matters. The exclusion was made under s. 59(1)(g) rather than s. 59(1)(c) as the position's occupant did not directly provide advice on labour relations, staffing, or classification.

The applicant asserted that the Board's decision was unreasonable for two reasons. Firstly, it argued that the Board had interpreted s. 59(1)(g) too broadly and submitted that Parliament intended all labour-relations-related exclusions to fall under s. 59(c) of the *FPSLRA*, which the Board determined this position did not. Secondly, the applicant asserted that the Board's decision was unreasonably based on the experience and senior standing of the position's incumbent as opposed to the duties required of the position.

The Federal Court of Appeal found that the Board's position was reasonable, and it rejected both of the applicant's submissions. The Court determined that the Board's decision conformed to its previous decisions in which incumbents were excluded because they provided advice on matters with potential impacts similar to those of this case and that the wording of s. 59(1)(g) of the

FPSLRA confers the Board with broad discretion to infuse meaning into the provision. The Court also found that the Board's decision was not unreasonably based on the incumbent's experience but rather on the duties of the LP-04 position performed by the incumbent that created conflicts of interest.

Application dismissed.

Babb v. Canada (Attorney General), **2022 FCA 55 – Duty to accommodate**

The applicant sought to set aside a Board decision (*Babb v. Canada Revenue Agency*, 2020 FPSLREB 42). In its decision, the Board had dismissed the applicant's grievances, finding that the employer had not discriminated against him and had not acted in bad faith when it terminated his employment due to his incapacity. The Board dismissed the discrimination claim by finding that the employer's duty to accommodate had come to an end on the basis that the applicant could not return to work in the foreseeable future.

The judicial review application was about whether the Board reasonably applied the Supreme Court of Canada's decisions in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 ("*McGill*"), and in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 ("*Hydro-Québec*"), to the evidence before it.

The Federal Court of Appeal found that the Board had appropriately considered the third element of the *Meiorin* test (in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 54) by relying on both *McGill* and *Hydro-Québec* in its analysis. The Court reiterated that the purpose of the duty to accommodate is to ensure that employees who are otherwise fit to work are not improperly excluded. However, in this case, the employer was not required to alter the terms of the applicant's employment contract, given that there was no return to work in sight, and an employer need not accommodate an employee who is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. The Court found that the Board's conclusion providing that the employer met its *bona fide* occupational requirement defence under s. 15(2) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) was reasonable.

Application dismissed.

Appendix 1

Total FPSLREB caseload, 2019–2020 to 2021–2022

Federal Public Sector Labour Relations Act

Fiscal Year	Carried Forward from Previous Years	New			Total New	Closed	Carried Forward to Next Year
		Grievances	Complaints	Applications			
2019-2020	7081	538	75	239	852	1826	6107
2020-2021	6107	545	64	107	716	1050	5773
2021-2022	5773	871	66	496	1433	1099	6107

Public Service Employment Act

Fiscal Year	Carried Forward from Previous Years	New Complaints	Complaints Closed	Carried Forward to Next Year
2019-2020	585	484	485	584
2020-2021	584	319	269	634
2021-2022	634	306	383	557

Appendix 2

Matters filed per parts of the *Federal Public Sector Labour Relations Act* in 2021–2022

Federal Public Sector Labour Relations Act	Number of Matters
PART I - LABOUR RELATIONS	
Reviews of orders and decisions (s. 43(1))	**1**
Requests for arbitration (s. 136)	**1**
Complaints	**53**
Complaints (ss. 106 and 107)	2
Duty to implement a provision of collective agreement (s. 117)	1
Unfair labour practices (ss. 185, 186, 188, and 189)	12
Unfair labour practices - unfair representation (s. 187)	37
Other	1
Managerial or confidential positions	**187**
Applications for managerial or confidential positions (s. 71)	175
Applications for revocation of order (s. 77)	12
Applications - Consent to prosecution (s. 205)	**2**
PART II - GRIEVANCES	
Individual grievances (s. 209)	858
Policy grievances (s. 221)	7
Group grievances (s. 216)	6
PART III - OCCUPATIONAL HEALTH AND SAFETY	
Reprisals under s. 133 of the *Canada Labour Code* (s. 240)	**13**
Federal Public Sector Labour Relations Regulations	
PART II - GRIEVANCES	
Extensions of time (s. 61)	**5**
Total	**1133**

Appendix 3

Matters filed per parts of the *Public Service Employment Act* in 2021–2022

Public Service Employment Act	Number of Matters
PART 4 - EMPLOYMENT	
Complaints to the Board re: layoff (s. 65(1))	1
PART 5 - INVESTIGATIONS AND COMPLAINTS RELATED TO APPOINTMENTS	
Revocations of appointment (s. 74)	3
Internal appointments grounds of complaint (s. 77(1))	298
Failures of corrective action (s. 83)	3
Unspecified	1
Total	**306**

Appendix 4

Synopsis of applications for judicial review of decisions rendered by the FPSLREB under the *FPSLRA* and *PSEA*

Fiscal Year	Carried forward from previous year	Number of applications received this year*	Applications Discontinued	Applications Dismissed	Applications Allowed	Applications Pending
2019-2020	25	19	9	15	6	14
2020-2021	14	32	1	9	1	35
2021-2022	35	16	4	18	3	26

* Includes applications for judicial review of decisions rendered by the FPSLREB in any given year.