



Canada Industrial
Relations Board

Conseil canadien
des relations industrielles

Encouraging Fair and Productive Workplaces



Annual Report **2020 | 2021**

Canada 

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Message from the Chairperson



"The Board focuses on helping employers, employees and the trade unions representing them resolve their disputes in a timely manner in order to minimize the potential negative impact of conflict in the workplace."

—Ginette Brazeau,
Chairperson,
Canada Industrial
Relations Board

I am pleased to present to Parliament and to Canadians a report on the annual performance of the Canada Industrial Relations Board (the CIRB or the Board) for the fiscal year ending March 31, 2021.

The past year has been marked by an unprecedented global pandemic that caused many challenges for businesses and workplaces. While many courts and tribunals were forced to close or limit services, the CIRB quickly shifted its operations to virtual operations. The vast majority of the employees providing administrative services to the Board were already equipped to work remotely and were able to continue to provide services and process matters with minimal disruption. As the CIRB already decided the majority of matters before it on the basis of the written submissions, this allowed it to continue to dispose of a large number of matters without delay. The Board was also able to quickly transition to teleconference and videoconference as the principal method of holding oral hearings and conducting mediations. Board members and staff are to be commended for their hard work and commitment during this challenging period to ensure continued services to the Board's clientele.

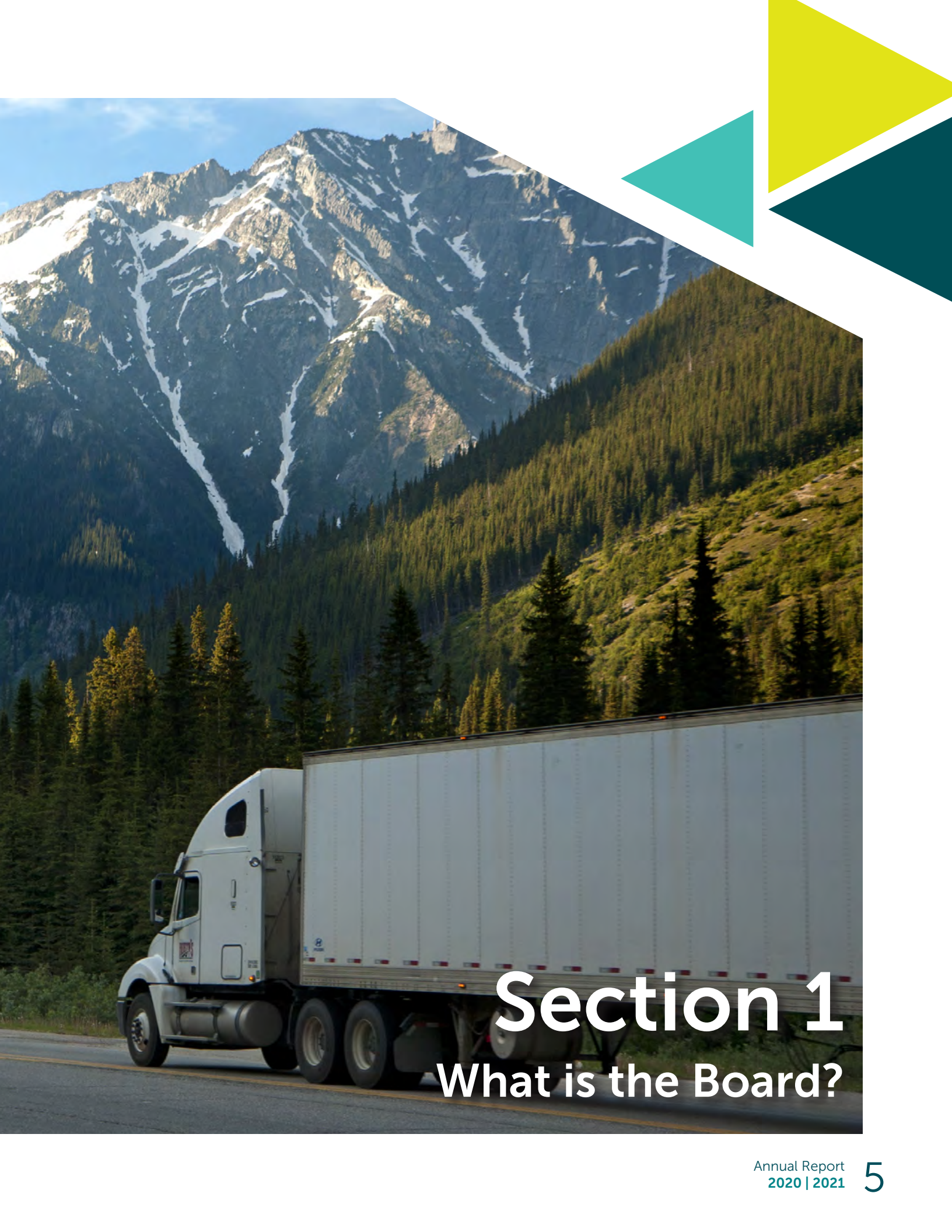
During this time, the Board also deployed a new case management system and electronic portal. These enhanced technology tools allow the Board to leverage modern technology to support its case management practices and enhance the use of electronic files and e-communications. As we finalize our transition and adjust to our new electronic environment, we can see the benefits that this modern technology will bring to all users.

Fiscal year 2020–21 was the first full year with the Board’s new responsibilities under Part II (Occupational Health and Safety) and Part III (Standard Hours, Wages, Vacations and Holidays) of the *Canada Labour Code* and under the *Wage Earner Protection Program Act*. These new mandates represent an important expansion in the Board’s areas of expertise and a significant increase in its caseload. Notably, the incoming caseload increased by 85 percent, and wage recovery and unjust dismissal matters now represent almost half of the Board’s incoming caseload. Despite the many changes and challenges of the year, the Board maintained steady results. Although the average processing time increased by 29 days, our officers achieved great success in resolving more than half of matters through mediation efforts, and 87 percent of matters disposed (cases closed) were completed within one year.

There is more work to do to ensure we handle these matters in the most effective way with outcomes that are timely and fair for all those involved. That will remain the focus for the coming months as we review and fine-tune our approach to case management.

We are grateful for the privilege of being entrusted with the responsibility of resolving disputes that affect federally regulated workplaces. The Board strives every day to earn the confidence of its stakeholders and its credibility as an effective and fair dispute resolution agency.





Section 1

What is the Board?

Section 1—What is the Board?

Composition

The *Canada Labour Code* (the *Code*) provides for the Canada Industrial Relations Board (the CIRB or the Board) to be composed of one full-time neutral Chairperson, two or more full-time neutral Vice-Chairpersons and not more than six full-time Members representing employers and employees in equal numbers. Part-time Vice-Chairpersons and Members may also be appointed to the CIRB. The Chairperson and Vice-Chairpersons of the CIRB must have experience and expertise in labour relations.

At the end of the fiscal year, the Board was composed of the following appointees:

Chairperson:

Ginette Brazeau was first appointed as Chairperson on December 28, 2014, after previously serving as Executive Director and General Counsel with the CIRB. Ms. Brazeau's current term expires on December 27, 2024.

5 full-time Vice-Chairpersons:

Annie G. Berthiaume, term ending January 25, 2025
Louise Fecteau, term ending November 30, 2025
Sylvie M.D. Guilbert, term ending July 1, 2024
Roland A. Hackl, term ending July 1, 2024
Allison Smith, term ending January 4, 2025

3 part-time Vice-Chairpersons:

Paul Love, term ending November 30, 2025
Lynne Poirier, term ending November 28, 2025
Jennifer Webster, term ending June 30, 2024

4 employer representative Members:

Richard Brabander, term ending December 20, 2023 (full-time Member)
Thomas Brady, term ending May 28, 2021 (full-time Member)
Elizabeth Cameron, term ending January 3, 2024 (full-time Member)
Barbara Mittleman, term ending December 20, 2023 (part-time Member)

4 employee representative Members:

Lisa Addario, term ending June 24, 2024 (full-time Member)
Gaétan Ménard, term ending February 25, 2024 (full-time Member)
Daniel Thimineur, term ending May 10, 2024 (full-time Member)
Paul Moist, term ending December 20, 2023 (part-time Member)

In accordance with section 12(2) of the *Code*, members whose terms expire may continue to complete the duties assigned to them during their active terms.

In addition, the Chairperson has the statutory authority to appoint external adjudicators to determine matters under Parts II, III or IV of the *Code*. A list of qualified adjudicators is established by the Chairperson after consultation with the Client Consultation Committee and can be viewed on the Board's [website](#).

Our Jurisdiction

Overall Mandate:

The CIRB is an independent, representational, quasi-judicial tribunal responsible for the interpretation and administration of Part I (Industrial Relations) and certain provisions of Part II (Occupational Health and Safety), Part III (Standard Hours, Wages, Vacations and Holidays) and, as of January 1, 2021, Part IV (Administrative Monetary Penalties) of the *Code*. The CIRB is also responsible for the interpretation and administration of Part II (Professional Relations) of the *Status of the Artist Act* and the adjudication of appeals under the *Wage Earner Protection Program Act*.

The Board's mandate is to contribute to, and promote, a harmonious industrial relations climate in the federally regulated sector while also ensuring compliance with health and safety legislation and adherence to minimum employment standards in federal workplaces.

Sectors or Industries that Fall Under the Board's Jurisdiction:

The CIRB has jurisdiction in all provinces and territories with respect to federal works, undertakings or businesses. These normally include the following sectors:

- Broadcasting (radio and television)
- Chartered banks
- Postal services
- Airports and air transportation
- Marine shipping and navigation
- Canals, pipelines, tunnels and bridges (crossing provincial borders)
- Railways and road transportation that involve the crossing of a provincial or international border
- Telecommunications
- Grain handling and uranium mining and processing



Visit the Board's [website](#) to access the list of current Board members and their backgrounds

- Most public and private sector activities in Yukon, Nunavut and the Northwest Territories
- Some First Nations undertakings
- Federal Crown corporations (for example, the national museums)

This jurisdiction covers some 900,000 employees and their employers (12,000), and it includes enterprises that have a significant economic, social and cultural impact on Canadians from coast to coast. The variety of activities conducted in the federally regulated private sector, as well as its geographical scope and national significance, contribute to the uniqueness of the federal jurisdiction and the role of the CIRB.

Part II of the Code (Occupational Health and Safety):

In addition to the sectors described above, the Board also has jurisdiction over the federal public service for the purpose of adjudicating applications to appeal decisions made by the Head of Compliance and Enforcement of Employment and Social Development Canada (the Head) concerning refusals to perform dangerous work and directions issued by the Head under the health and safety legislation.

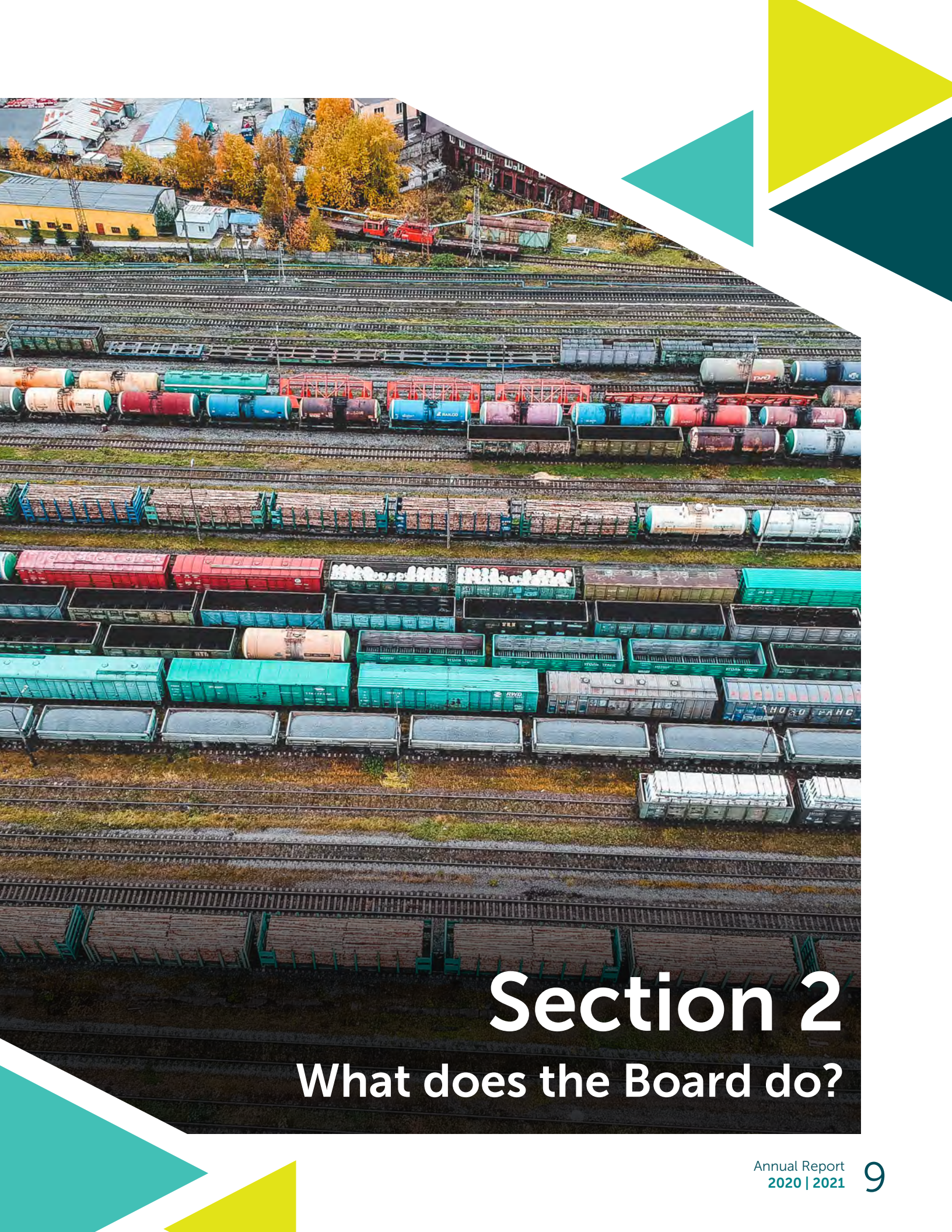
The federal public service represents some 250,000 employees and the various federal government departments and separate employers.

Status of the Artist Act:

The Board is also responsible for the interpretation and administration of Part II (Professional Relations) of the *Status of the Artist Act*, which, in addition to broadcasters and Crown corporations, applies to federal government departments and agencies.

Wage Earner Protection Program Act:

The Wage Earner Protection Program provides payment of eligible wages owing to workers whose employer has gone bankrupt or become subject to a receivership. Claims made under this program are processed by Service Canada. The Board is responsible for adjudicating all applications to appeal review decisions made by the Minister of Labour (or the delegate) pursuant to the *Wage Earner Protection Program Act*, regardless of whether the former employer was provincially or federally regulated for the purposes of labour and employment matters.



Section 2

What does the Board do?

Section 2—What does the Board do?

The Canada Industrial Relations Board (the CIRB or the Board) fulfills a vital role in recognizing and protecting the rights of employees, trade unions and employers. In accordance with the policy set forth in the *Canada Labour Code* (the *Code*), the Board promotes the well-being of Canadian workers, trade unions and employers through the encouragement of free collective bargaining and the constructive settlement of disputes.

The Board's Specific Responsibilities

Part I of the Code (Industrial Relations)

The CIRB is responsible for the interpretation and application of the provisions of Part I (Industrial Relations) of the *Code*. The Board undertakes several activities under this jurisdiction, as complaints or applications may raise a number of labour relations questions that must be addressed.

More specifically, the Board may:

- determine employer/employee status;
- define bargaining units that are appropriate for collective bargaining;
- grant, modify or terminate collective bargaining rights;
- investigate, mediate and adjudicate complaints of unfair labour practice;
- issue cease and desist orders in cases of unlawful strikes and lockouts;
- determine whether the work of certain employers falls within the federal areas of constitutional jurisdiction;
- deal with the complex labour relations implications of corporate mergers and acquisitions; and

- determine the level of services that must be maintained during a legal work stoppage to prevent an immediate and serious danger to the safety or health of the public.

The Board engages in these activities with a firm commitment to process, hear and determine matters fairly, expeditiously and economically. Before adjudication, the Board actively works to help parties resolve their disputes through mediation or alternative dispute resolution.

Part II of the Code (Occupational Health and Safety)

The CIRB is also responsible for determining certain matters under Part II (Occupational Health and Safety) of the *Code*. Under this mandate, the Board hears and determines complaints of reprisals where employees may claim that they were disciplined or terminated because they exercised their rights under the health and safety regime. Additionally, the Board is responsible for hearing and deciding applications to appeal decisions issued by the Head of Compliance and Enforcement of Employment and Social Development Canada (the Head) related to work refusals or directions issued by the Head to employers.

More specifically, in the context of a work refusal, an employee may challenge before the Board one of the following decisions issued by the Head:

- i. that a danger does not exist;
- ii. that a danger exists, but the danger is a normal condition of employment; or
- iii. that a danger exists, but the refusal puts the life, health or safety of another person directly in danger.

In addition, **an employer, an employee or a trade union** that disagrees with a direction issued by the Head can challenge that direction by filing an application to appeal with the Board. These are statutory appeals, meaning that the Board will assess each case with any new evidence or information that will be available and presented by the parties to the appeal.

Part III of the Code (Standard Hours, Wages, Vacations and Holidays)

As part of its expanded mandate, the Board is responsible for mediating and adjudicating the following:

- unjust dismissal complaints from employees who are not represented by a trade union;
- wage recovery appeals where an employer or an employee disagrees with a decision or a payment order issued by the Head; and
- reprisal complaints where an employee believes that their employer retaliated against them for exercising their rights under employment standards legislation.

Part IV of the Code (Administrative Monetary Penalties)

Part IV of the Code was brought into force on January 1, 2021. Under this part, the CIRB is responsible for determining appeals of administrative monetary penalties imposed by the Head against federally regulated employers.

Other

The CIRB is also responsible for professional relations between self-employed artists and producers at federally regulated broadcasters, federal government departments and agencies and Crown corporations, pursuant to the *Status of the Artist Act*. This includes defining the sectors of cultural activity suitable for collective bargaining and certifying artists' associations in these sectors.



The Board also adjudicates applications to appeal decisions made by the Minister of Labour (the Minister) under the *Wage Earner Protection Program Act*. These matters involve a review of the written record to determine whether there was an error of law or jurisdiction in the Minister's decision.

Outreach

The Board supports the collective efforts of workplace partners in developing good relations and pursuing constructive dispute resolution practices. As a representative Board composed of members representing employers and unions in equal numbers, the Board prioritizes proactive engagement with the labour relations community through various outreach activities. These outreach efforts allow the Board and its designated officers to inform the community of the Board's policies and procedures. They also provide opportunities to learn about the needs of employers, workers and the union organizations that represent them. These activities ensure the Board remains relevant to the parties it serves and enhance the parties' ability to participate in the Board's processes.

The Board also plays a leading role in international organizations whose objective is to support government agencies responsible for promoting dispute resolution based on the shared interests of the parties and harmonious labour relations. The CIRB's active participation in the Association of Labor Relations Agencies and the International Forum of Labour and Employment Dispute Resolution Agencies allows for broader dialogue on the new challenges and dynamics arising in modern workplaces. These forums also provide the Board with invaluable access to best practices that it can emulate and adopt to improve its performance, maximize the use of its resources and increase the impact of its services.

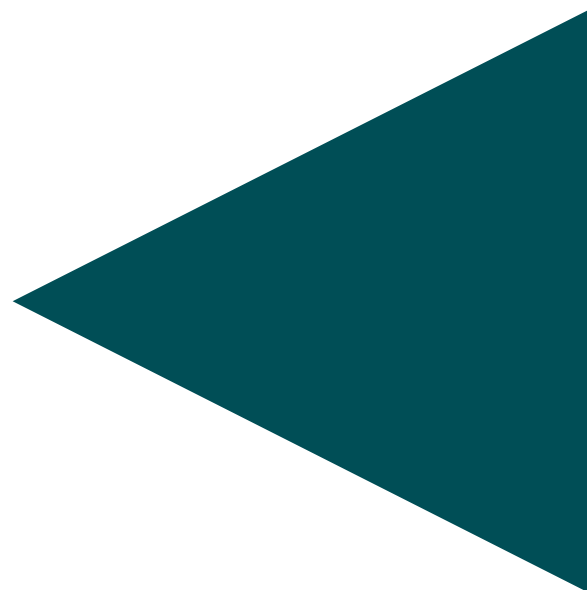
The CIRB's Client Consultation Committee

The Board maintains a dialogue with its clients through the Client Consultation Committee (the Committee) to strengthen linkages and obtain feedback from its client communities. The Committee provides advice and recommendations to the Board's Chairperson on the ways in which the Board can best meet its mandate and the needs of its clients.

The Committee is composed of representatives selected by the Board's major client groups, including:

- Federally Regulated Employers in Transportation and Communication (FETCO);
- Canadian Labour Congress (CLC);
- Unifor;
- Confédération des syndicats nationaux (CSN);
- Canadian Association of Labour Lawyers (CALL) (representing counsel for the trade unions); and
- Canadian Association of Counsel to Employers (CACE) (representing counsel for the employers).

The Committee convenes three times a year to discuss Board performance and any new initiatives that will impact the processing of matters.





Section 3

How did the Board do?

Section 3—How did the Board do?

The Board's Performance

Volume of Matters

Various factors, such as the state of the economy and lifecycles of collective agreements, result in fluctuating workloads year to year. Fiscal year 2019–20 saw a 36% increase in workload from the previous fiscal year. This increase was directly attributable to the 2019 expansion of the Board's mandate under Parts II and III of the *Canada Labour Code* (the *Code*). The trend continued in fiscal year 2020–21 with a workload increase of over 80% compared to pre-2019–20 levels.

A total of 916 applications and complaints were received in the 2020–21 fiscal year. Of these, 412 matters were unjust dismissal complaints or wage recovery appeals filed

under Part III of the *Code*, representing 45% of all matters received during the year. Under Part II of the *Code*, the Board received 106 applications and complaints, including reprisal complaints and applications to appeal decisions issued by the Minister of Labour (the Minister) or the Head of Compliance and Enforcement of Employment and Social Development Canada (the Head). Matters under Part II of the *Code* represented 11.6% of the Board's incoming caseload. The number of matters under Part I of the *Code* decreased to 380 compared to 471 in the previous fiscal year. These matters represented 41.5% of the Board's incoming caseload.

The number of cases disposed of by the Board in the last year increased over the previous year at 592 matters closed. The pending caseload has increased to 826 matters.

Chart 1—Volume of Matters by Fiscal Year

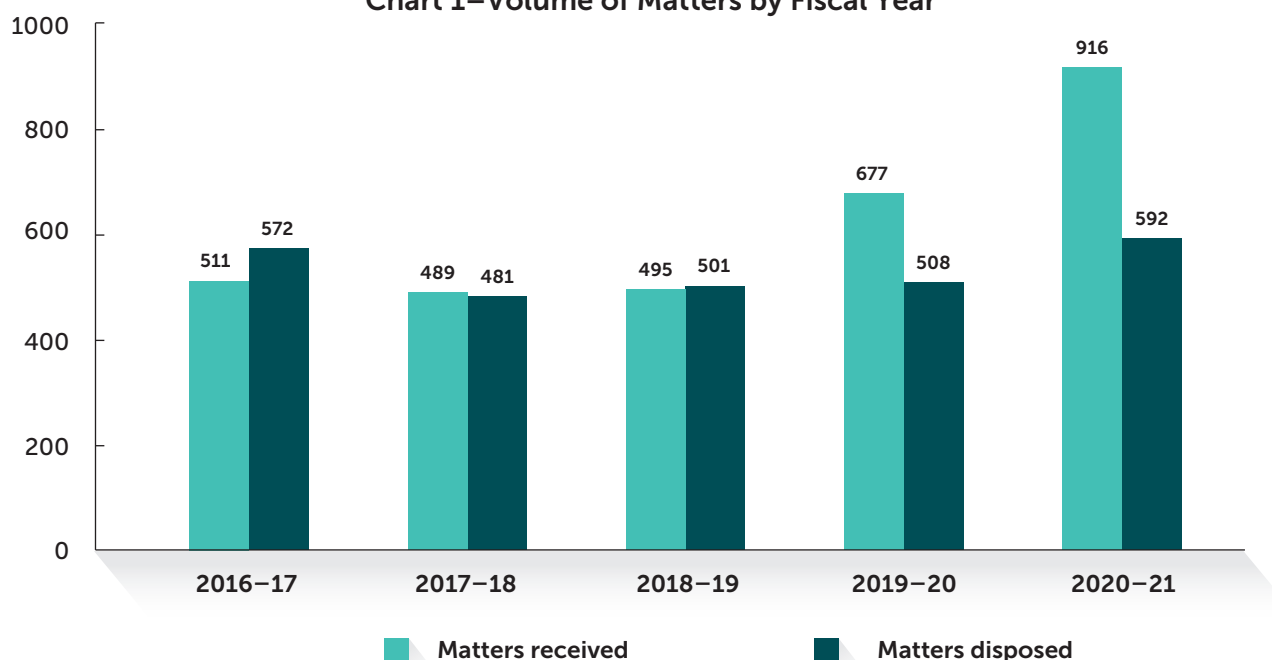
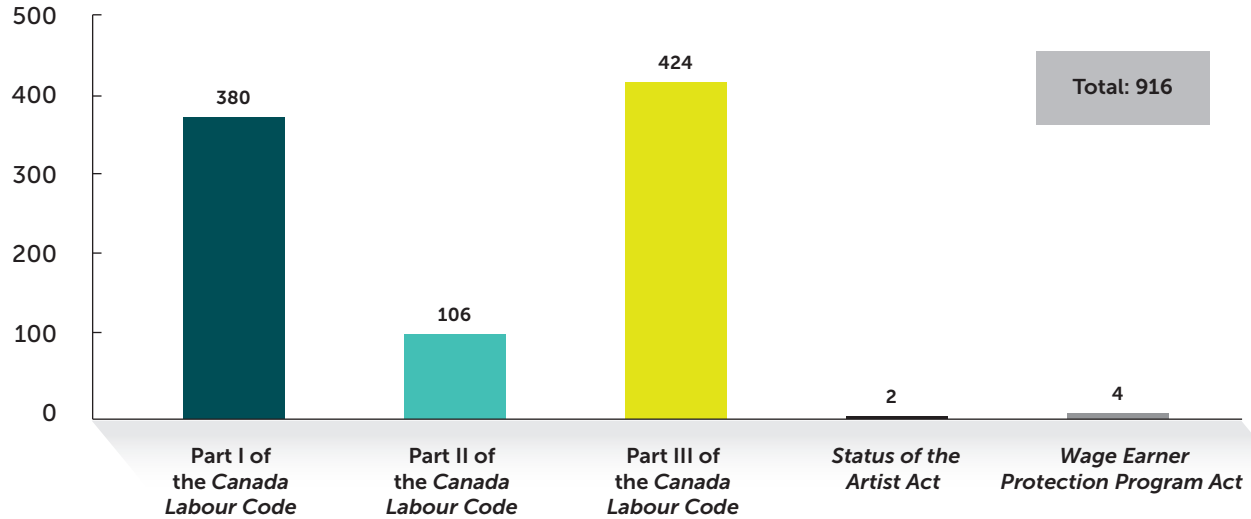


Chart 2—Matters Received in Fiscal Year 2020–21*



* Please note that the data in this annual report may differ slightly from the data communicated in previous annual reports as a result of the Board's migration to its new case management system and the reconciliation of data.

Chart 3—Matters by Region

The Board's regional offices in Vancouver (British Columbia), Toronto and the National Capital Region (Ontario), Montréal (Quebec) and Dartmouth (Nova Scotia) shared the workload as illustrated in the chart below.

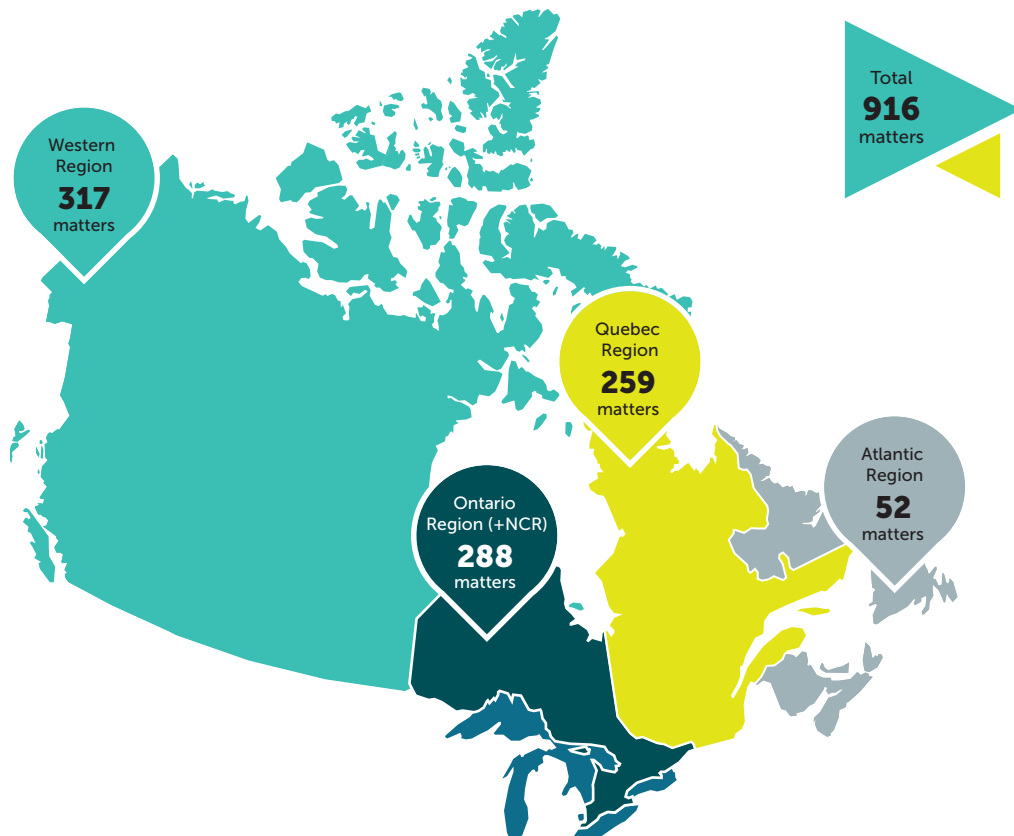
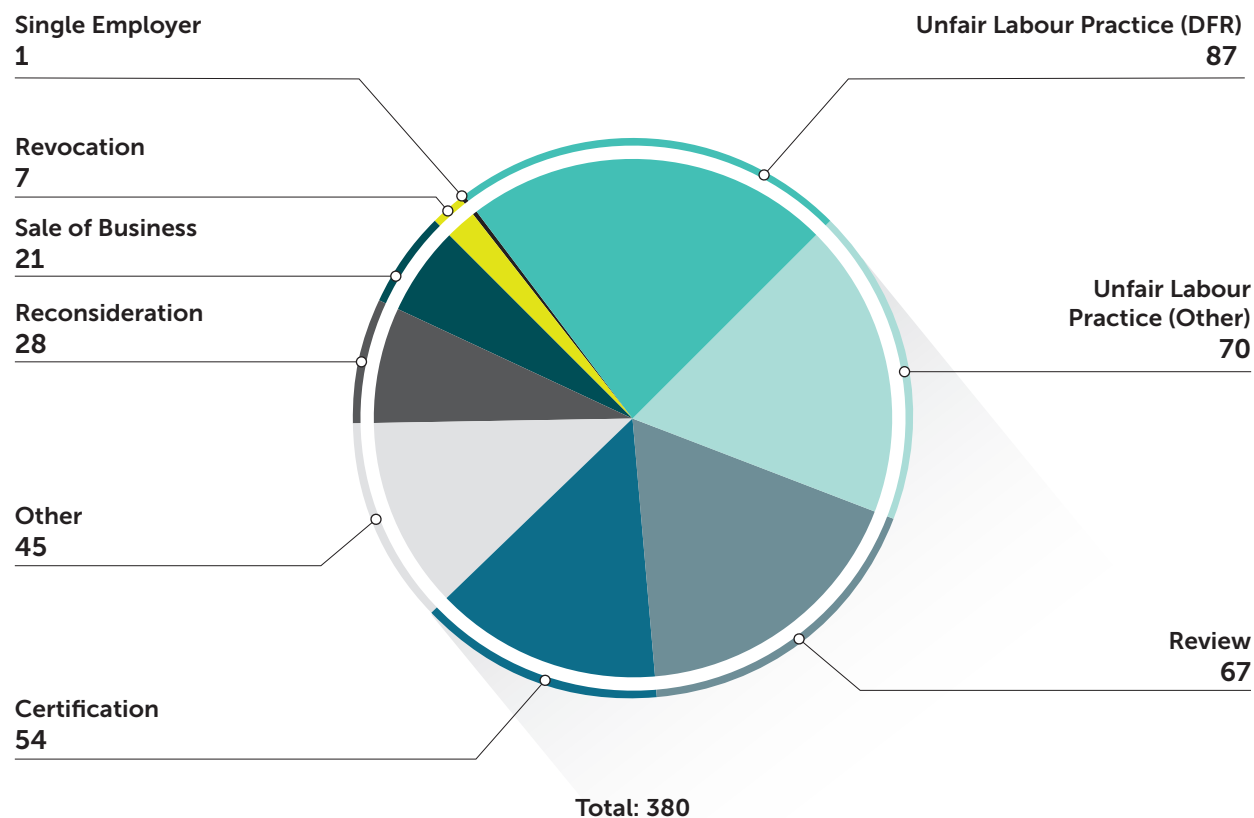


Chart 4—Types of Matters Filed Under Part I

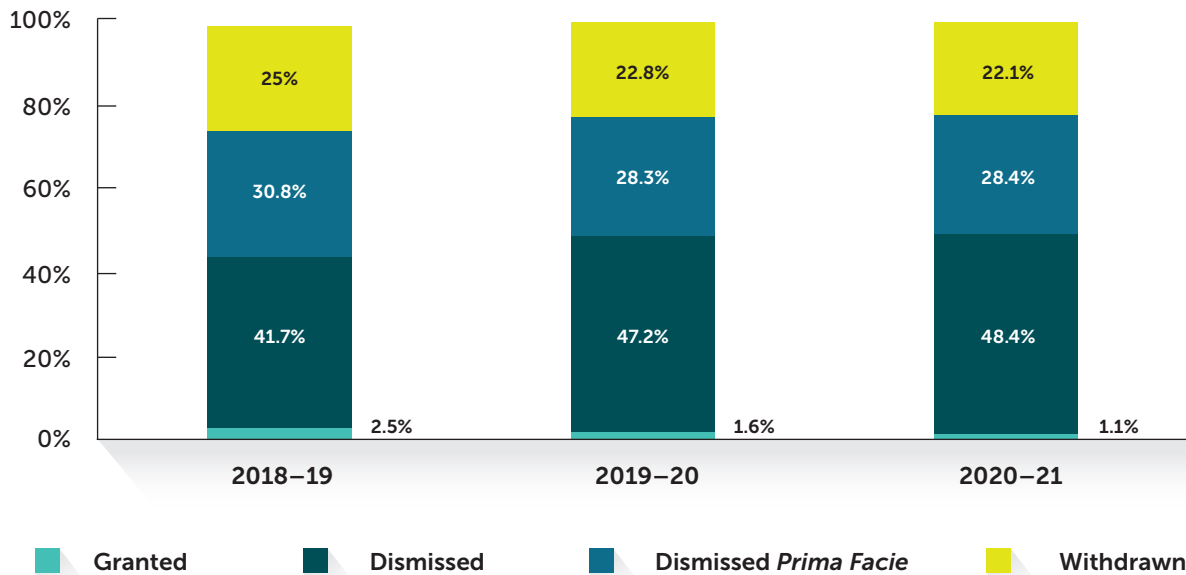


Unfair Labour Practice

Unfair labour practice (ULP) complaints, including duty of fair representation (DFR) complaints, represent the largest number of cases filed under Part I of the Code. The Board spends considerable effort in assisting the parties in those cases in support of their efforts to find a resolution. In 2020–21, 46% of ULP complaints were resolved without the need for adjudication.

DFR complaints represent the largest component of ULP complaints. The number of DFR complaints filed decreased considerably this year to 87 compared to 142 cases last year. In addition to offering dispute settlement options to the parties in these matters, the Board also disposes of approximately one third of these complaints through a preliminary assessment of the complaints (which is called a *prima facie* case analysis). This allows the Board to triage the complaints and respond to them in the most efficient manner.

Chart 5—Duty of Fair Representation Complaints Disposed



Applications for Certification and Revocation

Applications for certification also represent a significant portion of incoming matters under Part I of the *Code*. However, in 2020-21, the number of applications for certification dropped to 54 compared to 64 in the previous year and 85 in the year prior to that. The percentage of applications that were granted decreased from 80% in 2019-20 to 67% this fiscal year. The number of applications for revocation also dropped to 7 compared to 12 the previous year. The percentage of applications for revocation that were granted decreased from 57% to 33.3% over the same period.

Chart 6—Applications for Certification

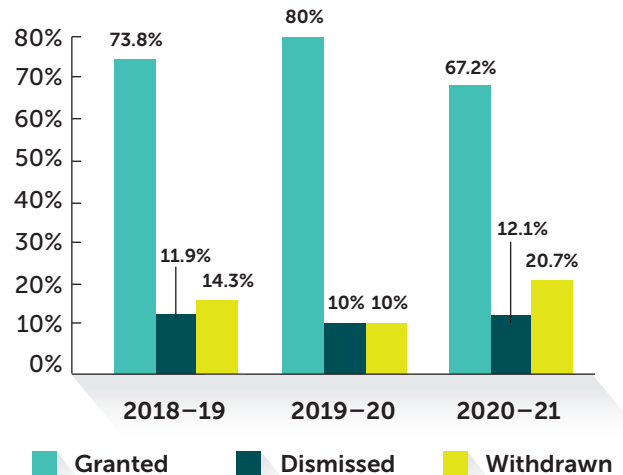
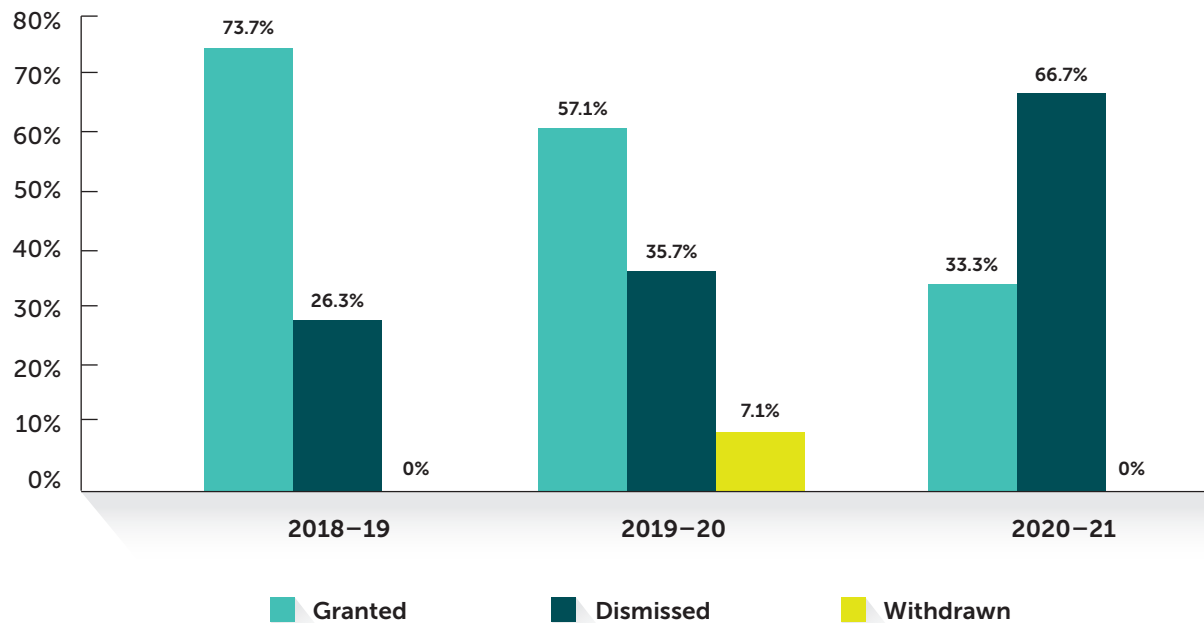


Chart 7—Applications for Revocation



Part II of the Code

A total of 106 matters under Part II of the Code were received in fiscal year 2020-21. These included 44 reprisal complaints, 45 applications to appeal a decision of no danger, 16 applications to appeal a direction issued by the Minister or the Head and 1 application for a stay of a direction.

Part III of the Code

Matters under Part III of the Code represented 46% of all matters received during the fiscal year, or 424 cases. The majority of these cases were unjust dismissal complaints, representing 83% of the caseload under Part III of the Code.

As the number of matters filed under Part III of the Code represents almost half of the Board's caseload, it is of interest to note that these complaints emanate overwhelmingly from three particular sectors: trucking, First Nations and banking.

Chart 8—Types of Matters Filed Under Part III

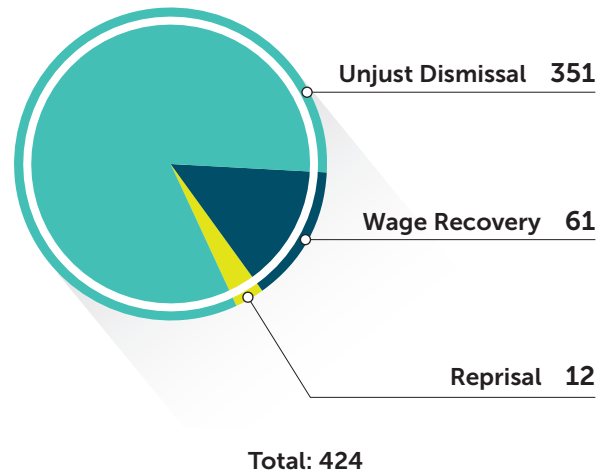
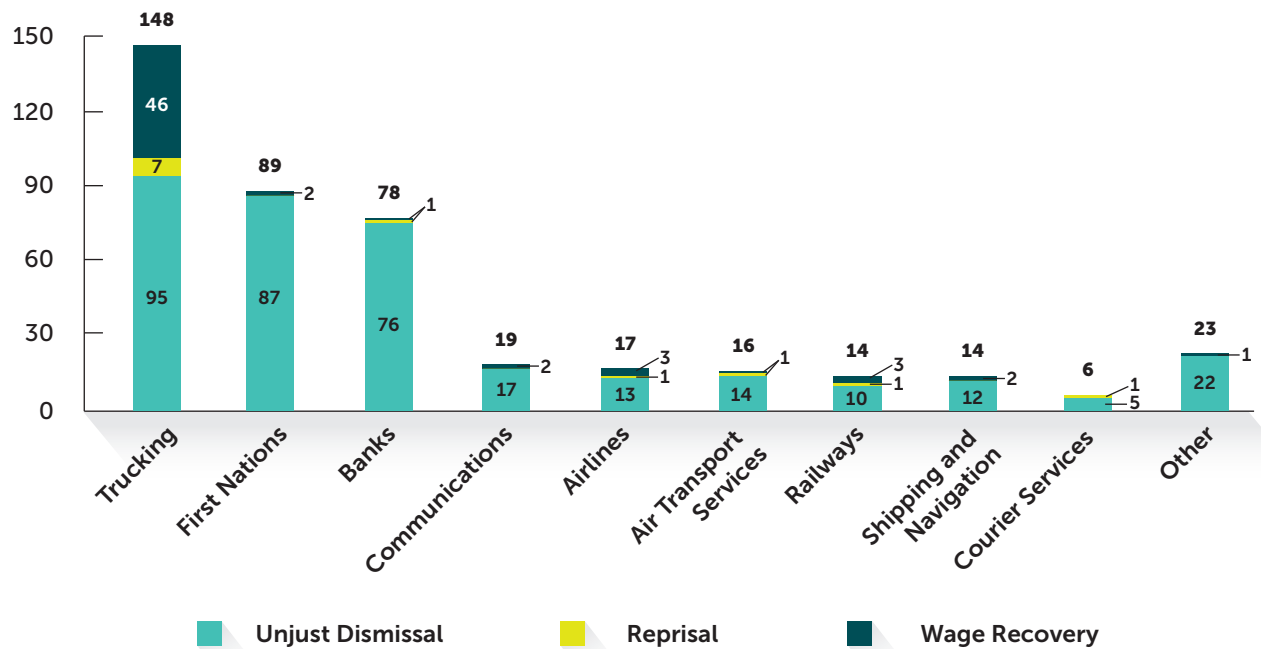


Chart 9—Matters Received Under Part III by Industry

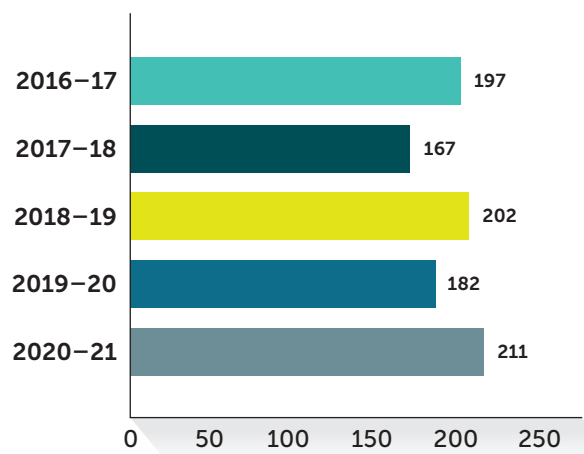


Processing Times

In 2020–21, the Board’s case files were processed, on average, within 211 days, or approximately seven months. This includes all steps in the processing of matters, such as gathering the written submissions of the parties, offering mediation, holding an oral hearing if necessary and rendering a written decision. This is an increase over the previous year as the Board adjusts to its new and diverse mandates.

The Board has set an objective of disposing of 80% of matters within one year of the filing of the complaint or application. This objective was surpassed in 2020–21, with 87.3% of cases disposed of in less than a year after the filing of the matter.

Chart 10—Average Processing Time (Days)

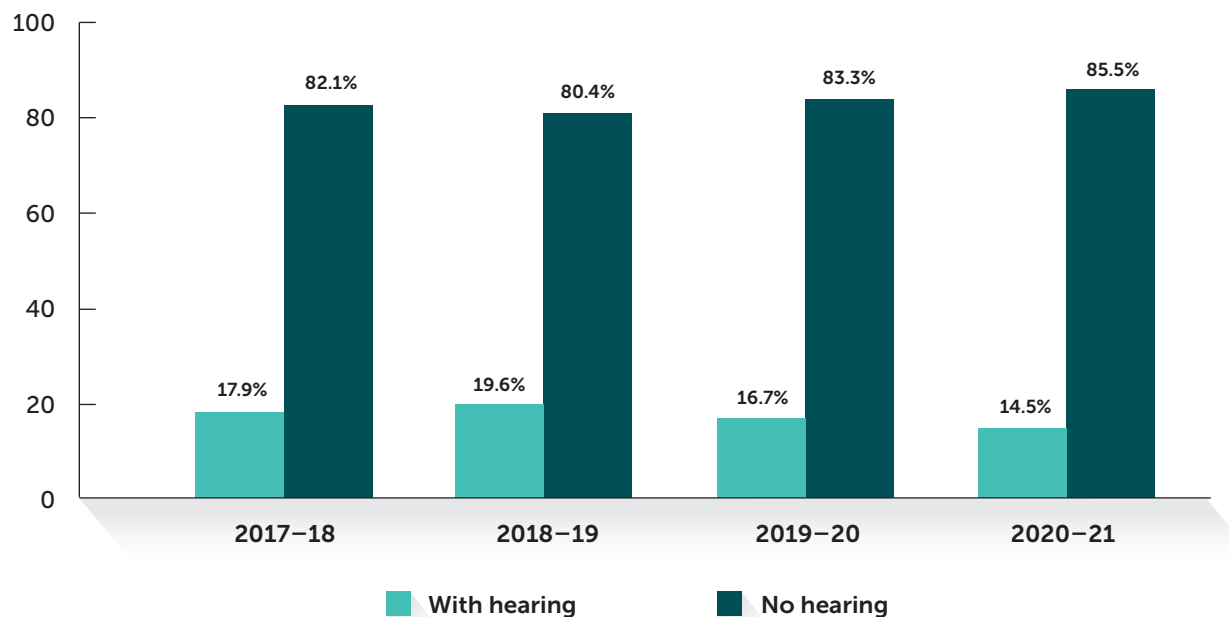


Decision-Making

The Board strives to provide timely and legally sound decisions that are consistent across similar matters in order to establish reliable and clear jurisprudence. The Board issues detailed reasons for decision in matters of broader national significance and precedential importance. For other matters, the Board issues concise letter decisions, which accelerates the decision-making process and brings more expedient solutions to the parties in labour relations matters. The Board also disposes of certain matters by issuing an order that summarizes its decision. One component of the overall processing time is the length of

time required by a Board panel to prepare and issue a decision following the completion of the hearing of a matter. A panel may decide a case without an oral hearing on the basis of the written and documentary evidence on file, such as investigation reports and written submissions. In fact, the majority of cases are decided or disposed of without an oral hearing. In some cases, an oral hearing may be scheduled to obtain further evidence and arguments in order to decide the matter. Whether a hearing is held, as well as the length of the hearing, will impact the overall processing time.

Chart 11—Case Files Disposed



Section 14.2(2) of the *Code* stipulates that a panel must render its decision and give notice of it to the parties within 90 days after the day on which it reserved its decision or within any further period that may be determined by the Chairperson. The Board met this objective, as the average decision-making time during the 2020–21 fiscal year was 85 days. The Board continues to demonstrate commitment and resolve in maintaining its rate of disposition to ensure that it does not allow a backlog of cases to occur.

Applications for Judicial Review

Another measure of the Board's performance, as well as a measure of quality and soundness of its decisions, is the frequency of applications for judicial review of Board decisions and the percentage of decisions upheld as a result of these reviews. In this respect, the Board continues to perform very well.

During the 2020–21 fiscal year, fourteen applications for judicial review were filed with the Federal Court of Appeal. Of those disposed of by the Court during the fiscal year, three applications were dismissed and one was granted.

During the 2020–21 Fiscal Year

The Board issued 168 letter decisions, 158 orders and 47 Reasons for decision.

46% of unfair labour practice complaints were settled without requiring a decision by the Board.

12 certifications were renewed under the *Status of the Artist Act*.





Section 4

Key Decisions

Section 4—Key Decisions

Canada Industrial Relations Board

Saunders, 2020 CIRB 947

WestJet, an Alberta Partnership (the employer) raised a preliminary objection to the Board’s jurisdiction to hear and determine the unjust dismissal complaint filed by Ms. Saunders (the complainant), asserting that the complainant was a manager within the meaning of section 167(3) of the *Canada Labour Code* (the *Code*). This decision only dealt with the preliminary issue of whether the complainant was a manager within the meaning of section 167(3) of the *Code*. After consideration, the Board dismissed the employer’s preliminary objection, having determined that the complainant was not a manager within the meaning of section 167(3).

This decision was the first in which the Board had to examine the managerial exclusion provision set out in section 167(3) of the *Code*, following the coming into force of Bill C-44 (*Budget Implementation Act, 2017, No. 1*). As such, the Board undertook a review of decisions by adjudicators and courts that had previously considered and interpreted the meaning of the term “manager” in the context of unjust dismissal complaints. The Board also considered its own case law that had interpreted and applied the managerial exclusion set out in section 3(1) of Part I of the *Code*.

Following this review, the Board acknowledged the jurisprudence that has developed over time and that establishes that the term “manager” found at section 167(3) of the *Code* should be interpreted in a more restrictive or in a narrower manner than the term “man-

agement functions” used in section 3(1) of the *Code* as well as in the managerial exclusion to the hours of work provisions in section 167(2)(a) of the *Code*.

The Board stated that the managerial exclusion provided at section 167(3) of the *Code* must be interpreted narrowly, in accordance with the purpose and intent of Division XIV of the *Code*, so that the unjust dismissal provisions are available to a broad range of employees. The Board explained that, to achieve this objective, it will consider the nature of the functions performed as well as the degree of independent authority, autonomy and discretion in the performance of the functions when assessing whether an individual is excluded from these provisions. The Board added that the assessment under section 167(3) of the *Code* must be made based on the particular facts of each case.

After reviewing the work and duties performed by the complainant in this case, the Board found that she had not had any authority over employees or supervisory responsibilities, nor had she exercised sufficient independent action, autonomy and discretion as are required to be considered a manager under section 167(3) of the *Code*. The Board determined that the complainant’s functions had been more akin to those of a salesperson as opposed to those of a manager in the narrow sense that the term must be given in the context of unjust dismissals. As such, the Board found that the employer had not met its burden to establish that the managerial exclusion set out in section 167(3) of the *Code* was applicable in this case.

Hayes, 2021 CIRB 961

In this unjust dismissal complaint, an objection under section 242(3.1)(b) of the *Canada Labour Code* (the *Code*) had not been raised by the parties. However, in his submissions, the employee alleged that the termination of his employment had arisen in the context of his return from a short-term disability leave and that The Royal Bank of Canada (the employer) had discriminated against him on the basis of his disability through the reorganization of his work functions. Given these submissions, the Board requested written submissions from the parties on the application of section 242(3.1)(b).

In the decision, the Board stated that it must decline to consider an unjust dismissal complaint if a substantially similar complaint has been filed under another act or if the complaint identifies issues that could reasonably constitute a basis for a substantially similar complaint. The Board examined the employee's submissions and found that the central issue was whether the employer had discriminated against him on the basis of disability when it terminated his employment. Therefore, the issues raised could reasonably constitute the basis for a substantially similar complaint to the Canadian Human Rights Commission (CHRC). Even though the employee had not filed a human rights complaint, the Board found that the language of section 242(3.1)(b) was imperative and that it could not consider the unjust dismissal complaint as there was another procedure for redress available to the employee. The Board also noted its residual jurisdiction to consider the unjust dismissal complaint if the CHRC exercised its discretion to not deal with the human rights complaint.

Brown, 2020 CIRB 948

In this unjust dismissal complaint, Warren Gibson Limited (the employer) initially submitted that the Board should decline to consider the complaint pursuant to section 242(3.1)(b) of the *Canada Labour Code* (the *Code*) as the employee had also filed a human rights complaint. The employer later withdrew this objection to the Board's jurisdiction.

In considering the application of section 242(3.1)(b), the Board noted that the unjust dismissal jurisprudence establishes that two questions should be asked: is the complaint essentially the same in the other procedure for redress, and does the other procedure provide real redress of personal benefit to the complainant?

The Board answered both questions in the affirmative and found that it was precluded from considering the unjust dismissal complaint. The Board stated that although the employer had withdrawn its jurisdictional objection, the parties could not confer jurisdiction on the Board that was otherwise limited by the *Code*.

The Board further explained that it had residual jurisdiction to consider the complaint in the event that the Canadian Human Rights Commission exercised its statutory discretion and determined that the employee's human rights complaint could be more appropriately dealt with according to the unjust dismissal provisions of the *Code*.



Federal Court of Appeal

***Ducharme c. Air Transat A.T. Inc.*, 2021 CAF 34**

Mr. Ducharme (the applicant) sought judicial review of three decisions rendered by the Board on the basis of written submissions. Two of the decisions dismissed two unfair labour practice complaints against Air Transat A.T. Inc. (the employer), and one decision dismissed a duty of fair representation complaint against the Canadian Union of Public Employees (the union).

These decisions were the culmination of a long saga between the parties that ended with the applicant losing his job as a flight attendant for the employer, a position he had held since 1993.

The Federal Court of Appeal (FCA) decided the four issues in dispute and dismissed the three applications for judicial review.

Alleged Error in Refusal to Hold a Hearing

Under section 16.1 of the *Canada Labour Code* (the *Code*), the Board has the discretion to decide a matter before it without holding an oral hearing. This provision explicitly trumps the common law and its criteria for determining whether a hearing is required and allows for the conclusion that the dictates of procedural fairness do not require the Board to hold a hearing in all cases.

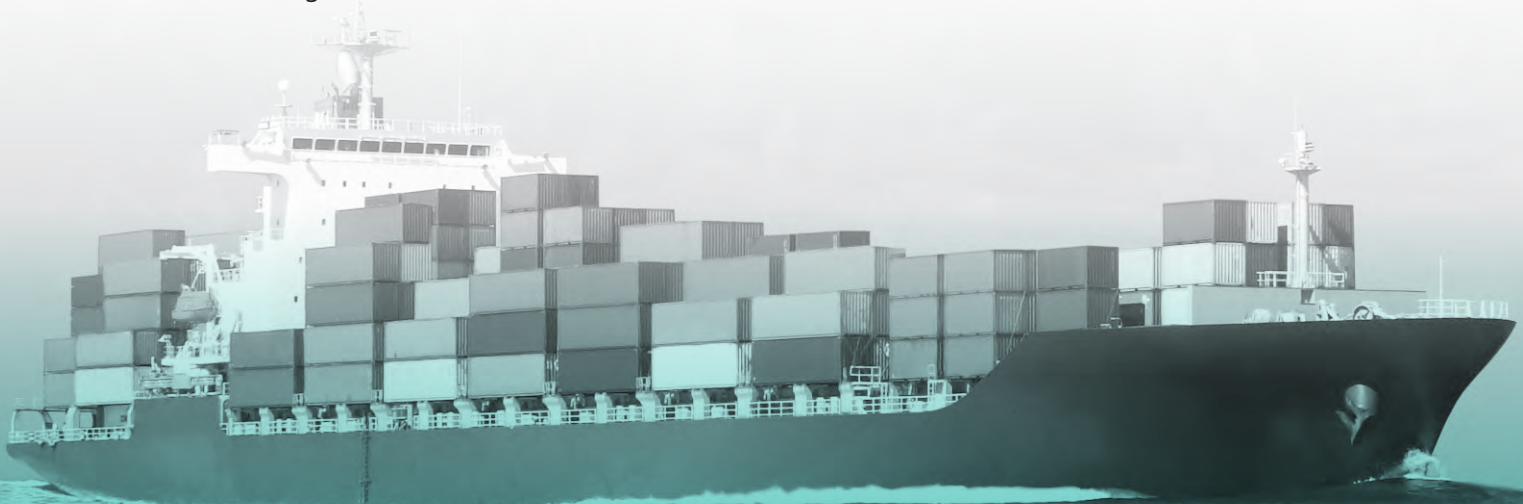
The FCA cited and affirmed its decision in *Wsáneč School Board v. British Columbia*, 2017 FCA 210, that section 16.1 gives the Board discretion to determine when a hearing is required. Although the standard of review for procedural fairness is correctness, the FCA's intervention will only be required in the rare circumstance where a party can demonstrate that the decision not to hold a hearing and to proceed on the basis of written submissions prevented the party from fully asserting its rights or from knowing the evidence it was to refute.

The mere fact that the evidence is contradictory and raises issues of credibility does not automatically justify a hearing, unless there are compelling reasons.

Error Regarding the Unfair Labour Practice Complaints

The FCA noted that the Board had conducted a thorough review of the facts at issue, had properly summarized the positions of the parties, had not erred in setting out the applicable legal principles and had provided detailed reasons for its dismissal of the two complaints. In doing so, it was not required to refer to every piece of evidence or "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion."

It is sufficient that, as in this case, the FCA be able to understand the rationale for the decision.



Applicant's Failure to Exhaust Internal Remedies

Since the exercise of supervisory power is discretionary, the FCA may dismiss a premature application if, for example, it determines that an alternative remedy was available.

However, the most recent FCA case law is no longer as categorical. Although failure to apply for reconsideration may be a factor to consider in determining whether an application for judicial review may be heard, it is not the only test that applies.

Consequently, the FCA found that reconsideration was not an appropriate alternative remedy in the circumstances of this case. The applicant did not rely on new facts or on an error by the Board in interpreting the *Code* or the principles of natural justice. Rather, he essentially reiterated arguments that he had already made before the Board and submitted that the Board had erred in reviewing the evidence and in failing to consider his positions. In these circumstances, applying for reconsideration was not required, and it was therefore inappropriate for the FCA, in exercising its discretion, to refuse to hear the application for judicial review.

Consequently, it was appropriate for the Board to point out the limits of its role in a dispute arising from a complaint under section 37 of the *Code*. It was not the Board's responsibility to scrutinize each and every one of the union's tactical choices during arbitration.

Bragg Communications Inc. v. Unifor, 2021 FCA 59

Bragg Communications Inc. (Bragg) sought judicial review of a Board order that significantly expanded the geographical scope of a bargaining unit comprising communications technicians working in different regions of Nova Scotia.

The Board had issued the order in the context of a bargaining unit review under section 18 of the *Canada Labour Code* (the *Code*) without accompanying reasons (Board order no. 11457-U). The Board granted an application by Unifor (the union) to expand its existing unit and issued an order modifying the existing unit. In the recitals of the order, the Board acknowledged that the employer was opposed to the application.

However, having determined that there was no reason to doubt the majority support within the existing bargaining unit, and when combined with the membership evidence of the employees to be added, the Board found that double majority support had been demonstrated. As such, the Board determined that no representation vote was required and that the proposed expanded bargaining unit was appropriate for collective bargaining.

The Board granted the expansion application in a concise order without accompanying reasons, which was consistent with its practice of not issuing detailed reasons in response to all applications, as stated in *Dicom Transportation Group Canada*, 2019 CIRB 911.

In the Federal Court of Appeal (FCA), Bragg argued that the Board's order was unreasonable because its reasoning was inadequate. Bragg relied on the decision of the Supreme Court of Canada (SCC) in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*), in support of its argument. Bragg argued that the Board's current practice of not always issuing detailed reasons is incompatible with the reasons-focused analysis that the SCC, in *Vavilov*, instructed reviewing courts to take on judicial review. The FCA found that there was merit to this submission, especially in circumstances where there are no reasons given for important issues raised by the parties: *Farrier v. Canada (Attorney General)*, 2020 FCA 25.

The FCA found that the reasons set out in the order on the issue of majority support and the application of the double majority rule were sufficient, but the Board did not demonstrate any of its reasoning on the appropriateness of the bargaining unit. It merely stated its conclusion. It was therefore not possible to understand the Board's reasoning on this critical point.

Without the benefit of any of the Board's reasoning on the issue of the appropriateness of the bargaining unit, the FCA found that it was impossible to assess whether the Board's conclusion was reasonable. The FCA stated that this does not mean that separate, detailed and formal reasons were required. It simply means that the Board was required to set out its reasoning on the issue of appropriateness, just as it did regarding the question of the union's representative character. In its submissions, the respondent union sought to fill this void, but it is the responsibility of the Board to set out the rationale for its decision, and its failure to do so in this case made the decision unreasonable.

The FCA concluded that, because the Board had provided no explanation of its reasoning on the appropriateness issue, the Board's order granting expansion was not reasonable. Therefore, the order was set aside and the FCA remitted the matter to the Board for redetermination in accordance with this decision.

