Hearings before the
Federal Public Sector Labour Relations
and Employment Board

January 8, 2020

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I - INTRODUCTION

1. *The purpose of this guide*

This guide is primarily intended for people who represent themselves before the Board. It will also be useful to representatives who don't have much experience appearing before the Board.

It is not meant as legal advice or as an exhaustive source of information. Instead, it has general information on what you can expect and what is expected of you at a hearing and when preparing for one.

2. *Resources to help you prepare for a hearing*

You may find the following information useful; it is on the Board's website:

About the Board

- Resources has general information on the Board and its services.
- Frequently Asked Questions are listed about labour relations matters and staffing complaints.

For labour relations matters

- Fact Sheets cover grievances, complaints, and applications, as well as mediation.
- Practice Notes explain requests for postponement of hearings, grievances, complaints, summoning witnesses, managerial and confidential exclusions, and how time limits are calculated.
- Policies cover the pre-hearing exchange of document lists, requests for postponement of hearings, as well as how the Board treats the personal information that is found in the case files and exhibits.
- Representing Yourself in Labour Relations Matters is under Resources.

- Legislation links you to the following, which may apply in your case:
    - *Federal Public Sector Labour Relations Act (FPSLRA)*
    - *Federal Public Sector Labour Relations and Employment Board Act*
    - *Federal Public Sector Labour Relations Regulations*
    - *Financial Administration Act*
    - Certain provisions of Part II of the *Canada Labour Code*

For staffing related matters

- Policies covers preparing affidavits, making a motion or request to the Board, making an accommodation request, etc.
- Procedural Guide for Staffing Complaints explains the complaint process in plain language and answers a number of frequently asked questions about it.
- Legislation links you to the following, which may apply in your case:
    - *Public Service Employment Act (PSEA)*
    - *Public Service Staffing Complaints Regulations*
    - *Financial Administration Act*
    - *Federal Public Sector Labour Relations and Employment Board Act*

3. Preparing for the hearing

If you represent yourself,

- ensure that you have the documents and information you require for your case;
- understand how the hearing will unfold;
- organize your documents clearly and logically;
- identify and prepare your witnesses and ensure they attend. You may need to ask the Board to issue you summonses (also called subpoenas) to ensure they attend. A summons is a legal document prepared by the Board that orders a person to appear at a certain time, date, and location. It may also require that person to bring any documents or items that he or she has control over and that relate to the matter;

- present your evidence and explain your case, if you testify;
- question your witnesses for the evidence you need to prove your case;
- cross-examine the other party's witnesses to obtain other evidence that may help your case or to test their evidence; and
- find cases that the Board, the courts, or other tribunals have decided that support your position, and present them in the argument portion of the hearing.

These points will be explained in more detail later on.

Please note that the Board and its Secretariat staff

- will not give you legal advice or tell you if your case might succeed;
- are not responsible for ensuring that your witnesses are present at the hearing;
- will not pay any travel or other expenses; and
- will not make photocopies for you before or during the hearing.

Tip: Look into cases that the Board has decided. This will help you decide what type of evidence is required to prove your case. Being well prepared will make it easier for the Board member hearing your case to understand what you are trying to demonstrate. On the website, the Glossary and the Advanced Search function should help your research.

II - BEFORE THE HEARING

1. The case management conferences

The Board can call a variety of case management conferences (meetings) in advance of a hearing to prepare itself and the parties. This way, the Board can deal with procedural issues and technical questions before the hearing. These conferences help avoid delays and can help resolve some issues in advance. They are usually conducted by teleconference and chaired by a Board member. Case management conferences can also be conducted during a hearing and even after a hearing to discuss a variety of issues. The Board may decide to hold a case

management conference on its own motion or accept to hold one at the request of a party.

The Board Secretariat's Registry Office will provide you with the information you need to participate in the conference, during which you may ask the Board member questions to help your understanding.

If you cannot attend, you must notify the Board and all the parties as soon as possible.

The following chart describes case management conferences and what to expect in labour relations and staffing related matters, respectively:

Labour Relations Matters	**Staffing Related Matters**
Case management conferences are not mandatory and are called at the discretion of the Board member assigned to the case. <u>Notice</u> If the Board member decides to hold a case management conference, the parties will be given a minimum of three days' notice of it. It should occur far enough in advance of the hearing to enable the parties to address any directions or orders that the member may issue at them. <u>Who participates</u> The employer and the bargaining agent will participate. If the grievor or complainant is unrepresented, he or she will also participate. <u>Issues that may be discussed:</u> • examining whether there is a possibility of settlement; • identifying preliminary objections, explained in more detail below;	Case management conferences are mandatory unless the Board decides otherwise. <u>Notice</u> A "Notice of Pre-hearing Conference" will be sent to all parties, informing them of the teleconference date, time, and location. It is typically held about four to six weeks before the scheduled hearing date. Once you receive the notice, you should review the topics that will be discussed and be ready to provide the required information at the teleconference. <u>Who participates</u> You (or your representative), the respondent, and the Public Service Commission are expected to participate. If you are representing yourself, you will speak. Otherwise, your representative will speak for you, but you can be on the line. <u>Issues that may be discussed:</u> • examining whether there is a possibility of settlement;

- the order in which the parties will present their evidence and submissions, the number of witnesses they will call, the order of witnesses, what they will testify about, the anticipated time each party requires to present its case, etc.;
- identifying uncontested facts and documents that can be produced on consent;
- how many copies of each document (evidence and jurisprudence) will be required at the hearing;
- the exchange of documents and jurisprudence between the parties;
- procedures on using expert witnesses, including the time limits for providing in advance a summary of any expert testimony or report;
- identifying and reviewing the issues, to simplify and accelerate the hearing;
- the order of proceedings;
- any issues with the remedy or corrective action;
- the need for simultaneous interpretation;
- determining whether any party or person appearing at the hearing requires some form of accommodation; and
- the estimated length of the hearing.

<u>Pre-hearing exchange of document lists</u>

Sixty days before the first scheduled hearing date, every party must deliver to every other party a document list setting out, to the full extent of the party's knowledge, all documents arguably relevant to

- questions about whether the Board has authority to hear the case (commonly referred to as "jurisdictional matters");
- facts not in dispute; the Board may ask the parties to prepare an agreed statement of facts;
- any procedural issues or other preliminary matters that need to be addressed before the hearing;
- the exchange of documents before the hearing;
- how many copies of each document (evidence and jurisprudence) will be required at the hearing;
- the order in which the parties will present their evidence and submissions, the number of witnesses they will call, the order of witnesses, what they will testify about, the anticipated time each party requires to present its case, etc.;
- procedures on using expert witnesses, including the time limits for providing in advance a summary of any expert testimony or report;
- the need for simultaneous interpretation;
- determining whether any party or person appearing at the hearing requires some form of accommodation;
- determining whether some complaints or grievances should be heard at the same time, if appropriate;
- discussing the remedies sought by the complainant; and
- any other matter that may expedite the

the matter(s) at issue. If a party fails to produce the document list, the other party may apply to the Board for an order directing that the non-complying party produce one within the time set by the Board.	proceedings. Exchange of documents The Board member will set a time frame in which you and the other parties will exchange documents. By the specified date, you must provide the other parties with the documents and jurisprudence you intend to rely on at the hearing; they will do the same for you. **Do not** send copies of your documents to the Board unless the Board member tells you to.

III – INDIVIDUALS INVOLVED IN THE HEARING

1. Who is involved in the hearing

- The Board member

A Board member will decide your case. He or she sits alone as a one-member panel. On rare occasions, a panel of the Board could be composed of three members. Board members are not public servants but rather independent decision makers appointed by the Governor in Council. They manage the hearing, hear all the evidence, and write a decision.

At the start, the Board member will briefly explain how the hearing will unfold, but his or her role is not to help you with your case as the member must remain neutral. If you are uncertain about a procedural matter, you may ask the member for clarification, but he or she cannot advise you on how best to present your case. If either you or another party raises an objection during the hearing, the member will hear both sides and will decide to grant or deny it.

A Board member may also conduct a case management conference before the hearing date. See section II (Before the hearing) for more on case management conferences.

- The parties

The following chart describes the parties in labour relations and staffing matters, respectively:

Labour Relations Matters	Staffing Related Matters
<u>The grievor or complainant</u> This is you — you filed a complaint or referred a grievance to adjudication. You may represent yourself, or in collective agreement matters you must have your bargaining agent representative.	<u>The complainant</u> This is you — you filed a staffing complaint with the Board. You may represent yourself, or you may choose a representative (e.g., a bargaining agent or a lawyer).
<u>The respondent: employer's lawyer or the bargaining agent's representative</u> For the hearing, the respondent may choose someone, possibly a lawyer, to represent it before the Board. For grievances or complaints against the employer, a lawyer is typically chosen. For a complaint against a bargaining agent, it will assign a representative or will hire outside counsel to represent it.	<u>Treasury Board legal counsel</u> In the preliminary stages of the staffing complaint process, the deputy head, who is the respondent in all staffing complaint cases before the Board, is represented by someone from inside the department against which the complaint was filed. However, as the hearing date nears, the Treasury Board's Legal Services branch assigns one of its lawyers to represent the respondent before the Board. That lawyer becomes the respondent's legal representative and is not a new party to your complaint.
<u>Any person who may be affected by the proceeding, and intervenors</u> In accordance with the *Federal Public Sector Labour Relations Regulations*, "any person who may be affected by the proceeding", while not a party to the hearing, nonetheless may have an interest in its outcome. This includes an individual, an employee organization, a council of employee organizations, or	<u>Other parties</u> In complaints about appointment processes, the "other parties" are the individual(s) who were appointed ("appointee"). In complaints about selections for lay-off, the other parties are the employees, other than the complainant, who were informed that they will be retained and not be laid-off. Under certain conditions, an appointee or a person

an employer. An intervenor, unlike “any person who may be affected by the proceeding”, may participate in a hearing after applying for and being granted that status by the Board. Any person with a substantial interest in a proceeding can apply for intervenor status. You will know ahead of time if anyone intends to participate.	who was retained in a lay-off may present evidence and testify or call witnesses. However, over the years, very few other parties have chosen to participate. Generally, they choose simply to be kept informed of any developments in the case, without participating in the complaint process. Both you and the respondent may call other parties as witnesses.
<u>The Canadian Human Rights Commission</u> If you alleged discrimination, the Canadian Human Rights Commission may attend the hearing and may make oral or written submissions. You will know ahead of time if it intends to participate.	<u>The Canadian Human Rights Commission</u> If you alleged discrimination, the Canadian Human Rights Commission may attend the hearing and may make oral or written submissions. You will know ahead of time if it intends to participate.
	<u>The Public Service Commission</u> The Public Service Commission (PSC) is also a party. Its mandate includes the authority to appoint persons within the public service. This authority is usually delegated to the deputy head, which is referred to as the respondent to the complaint. Even if the authority is delegated, the PSC has the right to be heard at the hearing. As such, it may attend and call witnesses or decide to present written submissions in which it will explain its view of the law and discuss relevant policies and guides.

2. Understanding your role

The following chart briefly describes the role of a complainant or grievor in labour relations matters and the complainant's role in staffing matters.

Labour Relations Matters	Staffing Related Matters
In complaints against either a bargaining agent or the employer, you will usually have the burden of proof. This means that you must present sufficient evidence to convince the Board member that for example, your bargaining agent failed its duty to represent you fairly, which would be an unfair labour practice. Your evidence may include your testimony and that of your witnesses, as well as documentary evidence (e.g., medical reports, charts, diagrams, photos, spreadsheets, letters, emails, etc.). Rarely, you may require an expert's opinion to prove your case. Note that in some complaints and grievances, the burden of proof will be on the employer or the bargaining agent as respondent (e.g., disciplinary action that led to a termination, demotion, suspension, or financial penalty (s. 209(1)(b), (c), or (d) of the *FPSLRA*), unfair labour practice complaints under s. 186(2) of the *FPSLRA*, and complaints of retaliation under Part II of the *Canada Labour Code)*.	Since you filed the complaint, you have the burden of proof. This means that you must present sufficient evidence to convince the Board member that for example, the respondent abused its authority in choosing to use an advertised or a non-advertised appointment process to make an appointment. Your evidence may include your testimony and that of your witnesses, as well as documentary evidence (e.g., medical reports, charts, diagrams, photos, spreadsheets, letters, emails, etc.). You will have obtained some of your evidence earlier in the complaint process, during the exchange of information period or by making a request for an order from the Board to provide information. Rarely, you may require an expert's opinion to prove your case.

Keep in mind that it is insufficient to simply state that you were unfairly disciplined or that an abuse of authority occurred in a staffing process because you feel it was unfair. You will need to demonstrate through evidence that a failure took place.

3. Identifying your witnesses and ensuring they attend

Do not assume that your allegations or your documents speak for themselves. The opposing side may not agree with you and will present evidence to support its position.

You will need to decide whether your evidence is sufficient to convince the decision maker of the merits of your case. If not, you will have to identify people who can provide testimony to support your case — they will be your witnesses. A witness can be anyone with specific knowledge of the facts (e.g., a manager, a co-worker, a physician, a bargaining agent representative, an assessment board member, a referee, etc.) or a specialist. It is important that your witnesses' testimony is relevant to your grievance or complaint.

- Making sure your witnesses attend

Once you have identified your witnesses, you must ensure that they are present on the hearing date. To ensure that they show up, you could request a summons from the Board, which is also known as a subpoena. A summons is a legal document prepared by the Board that orders a person to appear at a certain time, date, and location. It may also require that person to bring any documents or items that he or she has control over and that relate to the matter. Once you receive the summonses or subpoenas from the Board member, you are responsible for ensuring that your witnesses receive them in a timely manner.

You should not wait until the last minute to ask for summonses because you must ensure that your witnesses receive them at least seven calendar days before the hearing date.

You may send the summonses or subpoenas to the witnesses by any of the following means: registered mail, hand, process server, or fax (provided that the witness agrees to be served by fax). Whatever the means, the party providing the summonses must have **written proof** that each witness received his or hers (usually via a signature from the witness).

- Witnesses who ask to be paid

Note that witnesses are entitled to be paid for costs associated with testifying. The fee is used to pay for the costs of coming to, staying at, and returning from the hearing. It also includes a daily allowance and meals and overnight accommodations, if necessary. The party that wants a witness to testify pays the fee. The fees are the same as those that the person would be entitled to if he or she were summonsed to appear before the Federal Court. They are set out in Tariff A of the *Federal Courts Rules*. The Board does not become involved in how fees and allowances are paid; it is up to you and your witness. If your witness is willing and able to appear without a summons or subpoena, then you won't have to provide him or her with one or pay witness fees.

- Expert witnesses

Sometimes, an expert witness is necessary. This person has special skills or knowledge in his or her area of expertise and will provide opinion evidence. For example, it can be a doctor or a psychologist who can testify about a medical condition you may have. An expert witness is also entitled to be paid. Please consult Tariff A of the *Federal Court Rules* for more information on how much to pay an expert witness.

Please note the following before asking to summons or subpoena an expert witness:

- The party requesting the summons should obtain the expert's permission to summons him or her.
- If the expert witness agrees, a copy of his or her curriculum vitae must be given to the other party's counsel in advance, along with copies of any report that the expert witness will rely on to support his or her testimony.
- If the expert witness does not wish to appear, he or she may be summonsed as an ordinary witness. However, the witness may testify only on the facts of the case for which he or she has direct knowledge; he or she cannot express opinions when interpreting the facts.
- The party summonsing the expert witness must indicate how much time the expert's testimony will require, as well as the anticipated appearance date and time to appear.

4. Identifying and preparing your documents

To prove your case, you will probably want to provide evidence, which can be a document, a video, an email, or an object (CV, letter, chart, assessment, medical report, etc.). If you intend to present documents, you must make sure that they are organized properly, as follows:

- All the pages in one document must be stapled together.
- Documents consisting of only one page should not be stapled to other documents. They are to be presented separately.
- It is good practice to use a binder if you will present many documents. They should be separated by tabs, and a table of contents should be included at the front of the binder.

Unless the Board member has provided different instructions, you must bring copies of all your documents (evidence and case law) to the hearing. This means that you will need copies of both the evidence and case law for you, the member, and the respondent. You will also need a copy of the evidence for the witness. Note that the Board will not make copies for you; nor will the member allow time during a hearing to make them. Some hearing facilities do not have a photocopier, so you must come prepared. Note that if there are interpreters at the hearing, an additional copy of your documents will be required for them.

- Personal and confidential information

Remember that a hearing before the Board is public; anyone is allowed to observe it. In addition, the Board publishes its decisions on its website. Its case files are accessible to the public under its *Policy on Openness and Privacy*. Therefore, anyone may access every document put into evidence (e.g. medical information, personal information, etc.). Consequently, to avoid the public accessing non-relevant personal and confidential information, you must ensure that the information in your documents is necessary and relevant to your case. For example, if you submit your résumé because you want to prove that you have the required qualifications, there is no need for the Board or the parties to see your home address or personal record identifier (PRI), if they are on it. You can strike out that information in advance. If you want the Board to see that you have been working on complex issues and decide to provide copies of client files, the client identification numbers, names, etc., should be removed. You should make any redactions (cross out the information with a dark marker or correction tape) before the hearing.

It is recommended that you bring clean (unredacted) copies of the documents for the Board

member to see, along with the redacted ones. That way, if a question or confusion arises about what has been struck out, the member will be able to consult the clean version. After that, he or she will return it to the party that presented it.

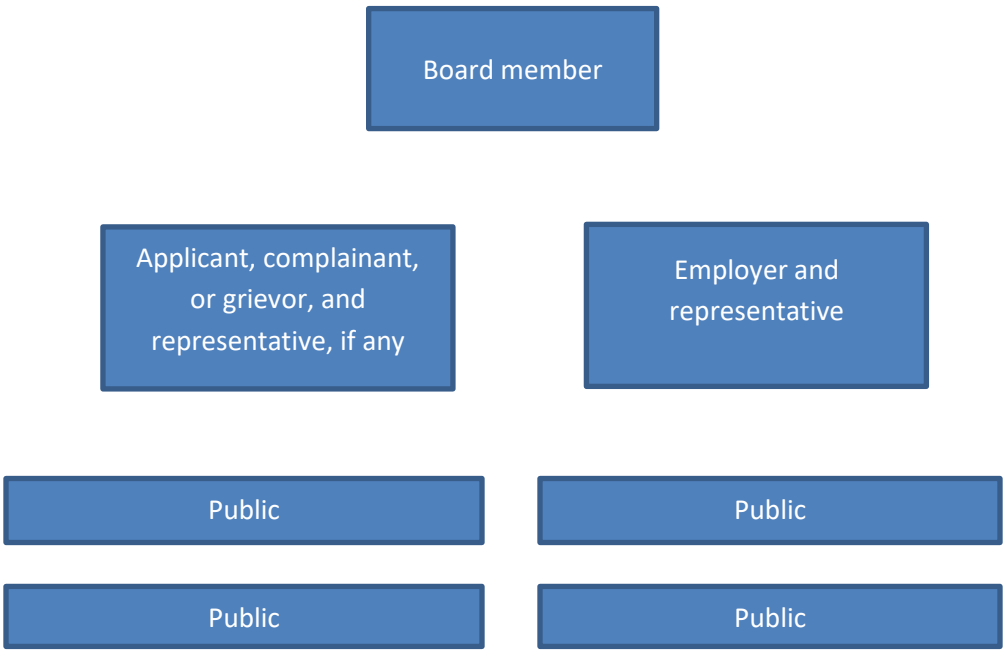
If the information cannot be redacted because you believe that is important and necessary to prove your case, you can make a request at the hearing that the document be sealed, which will protect it from public access.

IV - AT THE HEARING

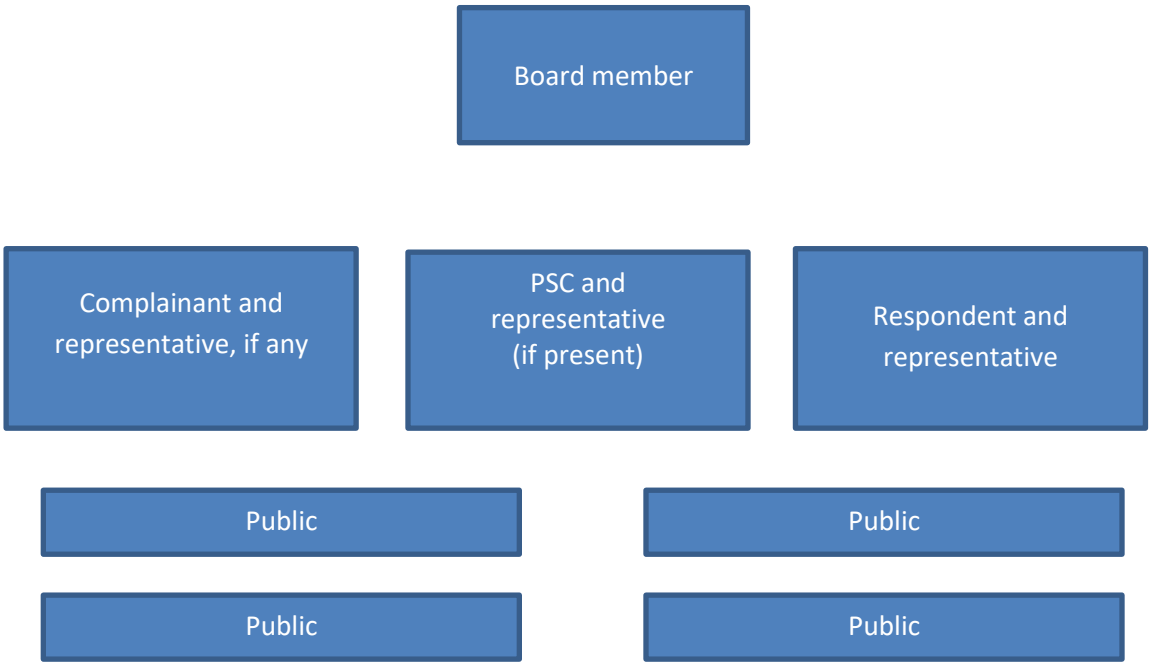
1. The location

The Board provides hearing rooms in Ottawa; it also holds hearings across Canada. It uses hearing rooms at the Federal Court and some provincial courts as well as at other provincial and federal administrative tribunals. When no rooms are available, the Board rents conference rooms at hotels or in other facilities. Given the variety, it is impossible to predict exactly what the hearing room will look like. Note that depending on the layout of the room the witness could be seated either at the left or the right of the Board member.

This diagram shows the usual setup of a hearing room in labour relations matters:



This diagram shows the usual setup of a hearing room in staffing related matters:



Board hearings are open to the public. This means that people you do not know may sit in and observe the hearing. They are simply observers and do not have a right to participate.

2. Failing to appear

If you fail to appear at the hearing, the Board member may proceed without you and render a decision. If you bear the burden of proof, to meet it, sufficient evidence must be presented to allow the member to determine whether to substantiate your grievance or complaint. This means that if he or she has not heard any proof to support your allegations, he or she may dismiss the case. The member may also decide to dismiss your case for abandonment.

Unfortunately, emergencies and unforeseen circumstances do arise. If you cannot attend the hearing, please contact the Board as soon as possible to let a registry officer know. This means that you will have to request a postponement of the hearing and provide clear and convincing reasons that prevent you from attending. Please consult the Board's *Policy on Postponements of Hearings* to help you make your request. The member will be advised immediately and will

review your request and the opposing party's reply and decide whether to grant it, based on the information provided. Postponement requests are not automatically granted, and each situation is assessed on its merits. Should you not receive a response before the hearing starts, you or someone on your behalf should attend the hearing and make the request in person.

3. How long it will take

The length of the hearing depends on the complexity of the matter, as well as the number of witnesses. A registry officer will send the parties a notice of hearing, which will state the exact number of hearing days. A hearing usually starts at 9:30 a.m. and finishes at 4:30 p.m. with a break in the morning, one for lunch, and another one in the afternoon. Note that the start and end times may vary.

4. Your conduct and that of the parties

The parties at the hearing (the complainant, the grievor, the representative, the respondent, etc.) must conduct themselves courteously and respectfully, which includes dressing appropriately (e.g., a clean shirt or blouse, a skirt or pants, etc.); a suit is not required. The Board member will not tolerate foul language, angry outbursts, shouting, intimidating, ignoring instructions, acting aggressively to a witness or a party, not respecting break times, etc.

Cellphones should be silenced and put away. It is not permitted to record testimony, especially if the Board member has issued an exclusion order (which keeps witnesses outside the hearing room until they have testified). Texting or emailing is very disruptive to everyone in the room.

Coffee and food are not allowed in the hearing room at any time. Only water is permitted. Furthermore, parties must not engage in any activity that would undermine the proper administration of justice, such as knowingly presenting false or misleading evidence, failing to disclose the existence of relevant documents, dissuading a witness from giving evidence, or encouraging a witness to lie.

5. Summary of the steps in a hearing

Each Board member may conduct a hearing differently. Other parties may also be present, so the order may vary. In any case, the member will explain how the proceedings will unfold at your hearing.

- Presentation order

Depending on the type of complaint or grievance, the presentation order may vary. The following chart shows the order in labour relations and staffing matters, respectively:

Labour Relations Matters	Staffing Related Matters
Grievances under s. 209(1)(a) of the *FPSLRA*: Generally, for individual grievances relating to the interpretation or application of a provision of a collective agreement or an arbitral award, the grievor will proceed first with his or her evidence. The employer will go second. Grievances under ss. 209(1)(b) and (c) of the *FPSLRA*: For a grievance about a disciplinary action that led to a termination, demotion, suspension, or financial penalty, the employer has the burden of proof and will present its evidence first. The grievor will then present his or her evidence. Complaints (under s. 190 of the *FPSLRA*), such as an unfair labour practice or about the duty of fair representation: Generally, the complainant will proceed first with his or her evidence, and the employer/bargaining agent will go second. If the complainant alleges an unfair labour practice by the employer under s. 186(2) of the *FPSLRA*, the employer has the burden of proof and will proceed first. The complainant will go second.	Complaints under ss. 65, 74, 77, and 83 of the *PSEA*: The complainant will proceed first with his or her evidence. The respondent will go second. If the Public Service Commission and the appointee participate, they will proceed after the respondent.

Complaint under Part II of the *Canada Labour Code* (s. 133 of the *Canada Labour Code*) The employer bears the burden of proof. Therefore it will proceed first with its evidence. The complainant will proceed second.	

6. Board member's introduction

Most hearings begin with the Board member setting out his or her understanding of the case, how the hearing will unfold, when breaks will take place, lunch, etc. The Board member may also set down some ground rules (e.g., turn off all cell phones, the hearing may not be recorded, etc.).

7. Preliminary matters

The Board member will ask the parties whether there are any preliminary matters. At this point, he or she will deal with jurisdictional objections, requests for postponement or adjournments, or other kinds of requests.

An example of these other kinds of requests is "the exclusion of witnesses". A party may request that the witnesses be kept outside the hearing room until they testify, which would prevent them from being influenced by the testimony of other witnesses. The Board member will ask the other party if it has anything to say about the request and will then immediately make a decision. Once a witness has finished testifying, he or she can remain in the hearing room if desired.

Preliminary matters may also come up during the hearing. To raise one, a party will make a request to the Board member, who will then ask the opposing party for its position. The raising party will then be given a chance to respond to the opposing party's position before the Board member makes a decision. He or she may decide the question at the hearing or may take the matter "on reserve", meaning that it will be ruled upon in the final decision.

If the parties are open to mediating a settlement, the Board member may serve as a mediator. Should the mediation fail, the mediation session will be closed, and the Board member will continue to hear the case.

8. Opening statements

The Board member will also ask the parties for their opening statements. Although making one is not essential, it is an opportunity to provide an overview of your case. You should paint a “big picture” of the evidence you will present or how you intend to prove your case. The order of presenting opening statements is the same as the order of presenting evidence and of the examination (see “Presentation order” in section 5 of this part).

Keep in mind that an opening statement should be brief and focused. You should not go through all your evidence and should not argue your case. That time will come. You simply want to provide a summary of how you intend to prove you case.

9. Swearing an oath or making a solemn declaration

A witness called to testify at a hearing must swear an oath or solemnly affirm to tell the truth for his or her testimony to be admitted as evidence. A witness asked to testify may swear on the Bible or another sacred text or object or promise to tell the truth.

Please advise the Board in writing at least two weeks in advance if a specific sacred text is required. Witnesses may also bring their own sacred texts or objects.

10. Presenting the evidence

- Testimony from a witness

One way you may present evidence is by questioning a witness. Remember that such questions are not considered evidence; only the information communicated by the witness is considered evidence. When you ask the Board member to hear your witness, you will be the first person to question him or her. Usually, when you question your witness, you may ask only open-ended questions during what is called the “examination-in-chief”. Examples are in the next section under that heading.

Examination-in-chief is the time to present documents to support your case. Usually, a witness must identify each document before the Board can accept it into evidence. This is also the time for the complainant or grievor to present all the evidence he or she will rely on to make his or her case. You cannot deliberately hold back evidence you know exists just to present it later on in the hearing.

In some cases, the complainant or grievor may be unrepresented, but he or she can still testify as a witness. In that situation, a party can testify without someone asking them questions. He or she simply sits in the witness area and presents his or her story, which consists of the facts as he or she understands them.

When you are done questioning your witness or if you have testified, the opposing party has the chance to question you or your witness. This is called the “cross-examination”. Note that when the opposing party is done questioning its witnesses, you will have the chance to cross-examine them. An example of how to conduct a cross-examination can be found in the section entitled “cross-examination”.

- Examination-in-chief

At this stage, a party asks its witnesses questions. You will ask your witnesses **non-leading** questions; they do not suggest a particular answer and are also called “open-ended” questions. They usually begin with “who”, “what”, “where”, “when”, “why”, or “how”. Examples are provided in this section. Generally, during examination-in-chief, you will not be permitted to ask leading questions of a witness you have called to testify. In a leading question, you suggest to the witness what the answer should be. However, if you call the person to testify, you can ask a few leading questions to establish neutral background information such as the person’s title, group and level, how long he or she has been working with the federal government, other government positions he or she has held, etc.

If you want your witness to refer to a document while on the witness stand, make sure to identify the document’s number, if it has one, as well as the page and paragraph. Do not forget to give the Board member time to find and look at the document before you ask the question.

Here are some helpful hints for asking non-leading questions:

Who…

With whom did you have an informal discussion? *(Instead of: You had an informal discussion with Ms. A, correct?)*

What…

What did Ms. A say to you about the report? *(Instead of: Didn’t Ms. A say that I had filled out the report?)*

What role do you think my disability played in me being terminated? *(Instead of: Isn't it a fact that my disability played a big part in my termination?)*

Where…

Where was the interview for this appointment process held? *(Instead of: They held the interview in a really small, stuffy room near the manager's office, isn't that right?)*

When…

When were you informed that you were being investigated? *(Instead of: Isn't it true that they called you while you were on vacation to tell you that you were being investigated for this position?)*

Why…

Why was I refused vacation leave? *(Instead of: Isn't it a fact that I was refused my leave because you made a mistake?)*

How…

How did you calculate the overtime pay? (*Instead of: Isn't it true that you didn't take into account the travel time, even though you were told of it?)*

How did the assessment board mark the exams? (*Instead of: Didn't the assessment board use a top-down method to mark the exam?*)

Keep in mind that what you say to your witness is not evidence. Only the witness's answer is evidence. That is why you have to ask open-ended questions in examination-in-chief. If your witness has simply answered "yes" or "no" to all your questions during the examination-in-chief, you may not have sufficient evidence to prove your case.

To elicit or "get" the evidence you want, you may have to ask a series of open-ended questions if your witness does not provide all the details you are looking for.

For example:

How would you describe your relationship with Manager X?

- *Good.*

What makes you say that the relationship was good?

- *We went for coffee together once in a while.*

Who else was there on those occasions?

- *There were other team members including Employee Y, who I think would get special treatment.*

Why do you think Manager X gave Employee Y special treatment?

- *Every time he was present, she always paid for his coffee, but she never offered to pay for mine or anyone else's for that matter.*

How often did that happen in your recollection?

- *At least three or four times in the last year.*

How did you feel about that?

- *I didn't think it was fair.*

Why not?

- *It was clear that she really liked him and was always trying to show off in front of him by paying for his coffee.*

- Cross-examination

During the cross-examination of your witness, the respondent will test the witness's credibility, to bring out any weak or contradictory evidence from the examination-in-chief or for clarification on a particular point. A cross-examination may be more difficult because the witness may not want to reveal or admit certain things. In this situation, the respondent's lawyer may adopt a hard-line approach in questioning. This is allowed in cross-examination, but appropriate language must be used throughout the hearing. When you question the respondent's witnesses, you will also be allowed to use the same type of questioning.

In cross-examination, leading questions are permitted. A leading question suggests a particular answer that the person asking the question wants confirmed — most often a simple "yes" or "no". They can also be referred to as "closed" questions. If you are cross-examining a witness that another party called to testify, you are permitted to ask that witness leading questions.

Here are some examples of leading questions:

> Isn't it true that you have lunch with your manager every Friday?
>
> Wouldn't you agree that you had already decided to discipline Mr. Smith before the investigation process was completed?
>
> Weren't you involved in a workplace dispute with one of the members of the assessment board just before the appointment process started?
>
> Wouldn't it be fair to say that you have had a long history of conflict with your superior?
>
> Would you agree that it was not possible for Appointee B to have acquired that experience in such a short time?

- Re-examination

Once the opposing party has finished questioning your witness, you can ask him or her more questions. Re-questioning your witness is allowed only to clarify or explain new issues that came up during the cross-examination.

- Documentary evidence and testimony

Evidence can take different forms and is used to prove the facts of your case. It can be a document, a video, an email, or an object, etc. It is presented at the hearing through a witness, which means that the witness will talk about the item. Things introduced as evidence and accepted by the Board member will be given an exhibit number. A copy of every document you submit must be provided to each party, the witness, and the Board member.

A witness's testimony is also evidence.

It is possible that during the presentation of your evidence the other party objects to the presentation of such evidence. That party will have to explain its objection to the Board member

and then you will have the chance to respond. The Board member will then determine whether or not to allow the objection. If the objection is allowed, the evidence will not be accepted by the Board member. You are also permitted to object to the presentation of the other party's evidence.

At the end of the hearing, the Board member will go through the parties' books of evidence or the binders in which they placed the documents that they intended to use at the hearing, and any document that was not introduced as evidence (not given an exhibit number) will be taken out and returned to the parties. Therefore, the member will not consider those documents when he or she renders the decision.

You must **not** send your evidence (exhibits) to the Board before the hearing unless the Board member specifically directs you to. If you do, your evidence will be returned to you. It will not be placed on the record; nor will the member consider it when making his or her decision. Be sure to introduce your evidence at the hearing.

11. The arguments

Arguments are made orally at the end of the hearing once you and the other parties have provided your evidence. The parties speak in the same order as for the presentation of evidence (see "Presentation order" in section 5 of this part).This is your opportunity to convince the Board member that your case has merit. **At this stage, you can no longer introduce evidence.** You simply present the facts of your case, referring to the evidence you introduced earlier. You may also refer to different sections of the law or regulations and quote cases that the Board, other tribunals, or the courts have decided in the past to support your case. You are conveying what happened using the evidence you introduced earlier in the hearing, as well as the relevant law and cases, to persuade the member to conclude in your favour.

At this stage, you reiterate your desired remedy (e.g., damages due to discrimination, setting aside a termination, revoking an appointment, etc.), which you support with your jurisprudence. It is important to mention your remedy in your opening statement if you decide to make one; you must support your claim for damages and/or your desired remedy during the hearing.

Don’t forget, the Board member will have heard all the evidence and will have taken notes; therefore, it is not necessary to repeat everything said during the hearing. Simply highlight for the member the facts and evidence that you believe are most important to your case, as well as the relevant law and supporting cases.

In certain situations, the Board member may ask you to provide written submissions rather than presenting your arguments orally. The exercise is exactly the same, except that it is done on paper. If the member chooses to proceed this way, he or she will provide you with instructions and dates for submitting your written arguments.

12. Book of authorities

The book of authorities contains copies of the case law (i.e., previous decisions issued by the Board or by courts) and legislation (sections of the law or regulations) that a party wants to rely on to make its case. If you intend to rely on more than one decision or section of the law, it is useful to put them in a binder. You should also highlight the parts of the case law or legislation that you are using to support your argument. The book of authorities is presented to the Board member when the party makes its argument, and a copy is provided to each party.

V - AFTER THE HEARING

1. The Board member’s deliberation

Once the hearing is over, the Board member who heard your case will consider all the evidence and arguments presented at the hearing, as well as the applicable law and cases, before making a decision. Decisions do not include a word-for-word account of the evidence or arguments; nor do they necessarily include references to all the exhibits. However, a decision must provide reasons — an explanation of how the Board member arrived at it based on the evidence. Keep in mind that even if he or she does not refer to all the evidence and exhibits in the decision, the member will have looked at all of it and will have considered it in the process of writing the decision.

- New evidence after the hearing has finished

Once a hearing has concluded, it is not possible to add evidence or other documents.

The finality of hearings is critical to our justice system. Only if the interest of justice requires it may a hearing be reopened for further evidence. If so, there is a test that must be met, which has been established in other cases in the past.

2. Issuing a decision

The Board's ultimate goal is to issue high-quality decisions within a reasonable time, which depends on the number of issues and the complexity of the case. The Board member's availability can also affect the time taken to issue the decision.

The decision will be issued to you and the other parties in the official language used at the hearing (either French or English). Some time later, the decision and its translation will be placed on the Board's website.

3. Contesting a decision

- Requesting judicial review

In both labour relations and staffing matters, if you are not satisfied with the Board's decision, you may be able to file a challenge before the Federal Court of Appeal by initiating judicial review proceedings. General information about judicial review applications can be found on the Court's website.

Information about courtroom locations and contact information for Courts Administration staff can be found at the Federal Court of Appeal's contact page.