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Public Service Staff  
Relations Act



Before the Public Service  
Staff relations Board

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BETWEEN

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

Applicant

and

**TREASURY BOARD**

Respondent

**RE:** Application pursuant to section 21 of the  
Public Service Staff Relations Act

**Before:** Evelyne Henry, Deputy Chairperson

**For the Applicant:** M. Gingras, Professional Institute of the Public Service of Canada

**For the Respondent:** M. LeFrançois, Counsel

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Heard at Ottawa, Ontario,  
September 27 and 28, 1999.

## DECISION

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[1] On January 28, 1998, the Professional Institute of the Public Service of Canada (the Institute) filed an application for an order "pursuant to sections 21, 22 and others of the *Act*" (see Annex) to make legal adviser positions at the LA-1, LA-2A, LA-2B, LA-3A and LA-3B levels at the Immigration and Refugee Board (IRB) part of the "certified unit representing legal advisers (LA)". The case was scheduled for hearing on several occasions in 1998 and 1999 and postponed at the request of the parties.

[2] At the hearing, the Institute indicated that only the LA-1 and LA-2A positions and one LA-2B position were included in the application.

[3] The Institute called three witnesses, the first being Michel Paquette, Acting Section Head at the Institute's office in the national capital.

[4] Mr. Paquette has been responsible for the IRB since the early 1990s. He submitted in evidence as Exhibit S1 the certificate of certification for the Law Group of the Scientific and Professional Category, issued to the Institute on March 31, 1969, as amended on December 31, 1977 by the Public Service Staff Relations Board (the Board) (Board file 142-2-130).

[5] Mr. Paquette also submitted in evidence Exhibit S2, in a bundle, which includes the work description for counsel positions at the Canadian International Trade Tribunal; these positions are comprised in the bargaining unit. Mr. LeFrançois objected to the filing of this exhibit because it was irrelevant to this application. I overruled the objection because the work description for the positions included in the bargaining unit is related to the application before the Board, even though this evidence is doubtful. Mr. Paquette explained that he obtained this description to compare it with that of the legal adviser positions at the IRB. Mr. Paquette also filed in evidence as Exhibit S3 an extract of the list of employees in the LA group. The Institute's members who work at the Canadian International Trade Tribunal appear in the paragraph entitled "BCO" of Exhibit S3.

[6] Under cross-examination, Mr. Paquette admitted that he had never worked at the Canadian International Trade Tribunal or at the IRB. He has worked in the position exclusion field for approximately 12 years and confirmed that the positions on the S3 list were included in the bargaining unit with the parties' consent. Mr. Paquette stated that the employer did not suggest including the positions covered by this application in the Law Group bargaining unit. He did not testify with respect to other tribunals, such

as the Canadian Human Rights Commission, the Canadian Radio-Television and Telecommunications Commission or the Canadian Transportation Agency.

[7] The second witness was Sylvain Dubois, who has been a member of the Quebec Bar since May 1978, was a legal adviser at the IRB in Ottawa from May 1993 to December 1995.

[8] Mr. Dubois described the duties he performed at the IRB, such as preparing reports on Federal Court case law on immigration and refugee status. He worked on the training and research program for IRB members pertaining to specific points of law. Mr. Dubois acted as legal adviser to sitting Board members; he remained outside the hearing room where the members could consult him. On request, Mr. Dubois prepared legal advice for IRB management.

[9] As a LA-2A legal adviser, Mr. Dubois reported to the Director of the Ottawa office; the director position was abolished shortly before Mr. Dubois left the IRB and the position's duties were taken on by the General Counsel of the IRB, Mr. Palmer. Mr. Dubois was the Acting Special Adviser to the Chairperson of the IRB from February to September 1994. This position was classified at the LA-2A level at the time but was subsequently reclassified at the LA-2B level. During this time, he was the Chairperson's personal assistant and performed various duties directly and personally for her: legal, political, administrative and management work related to the activities of members, committees and discussion forums. Mr. Dubois drafted speeches for the Chairperson and attended meetings with the Chairperson and other stakeholders.

[10] According to Mr. Dubois, the difference between the LA-1 and LA-2 positions relates to the difficulty of the duties assigned to them. There is no difference in the nature of the work but there is in the complexity of the duties. Legal advisers began at the LA-1 level and their duties evolved over time. He indicated that the tasks were assigned in a completed egalitarian manner.

[11] The level LA-2B positions were different from the LA-2A positions in that they were management positions; there was one exception where two offices had merged and one of the LA-2B positions had become surplus. Legal advisers at the LA-1A and LA-2A levels reported to directors at the LA-2B level or the General Counsel. According to Mr. Dubois, generally, all legal advisers deal with the managers in IRB's Legal Services, namely, with the offices directors and the General Counsel. On rare occasions,

legal advisers meet with the Chairperson, with the office director or the General Counsel, as the case may be, being also present. When working in the Chairperson's office, Mr. Dubois never saw a LA-1 legal adviser discuss legal matters with her without a manager from Legal Services present. The Chairperson does not have regular meetings with LA-1 or LA-2A legal advisers. There are no restrictions on the legal advice prepared by legal advisers: it is presented at the draft stage and the orientation is discussed by management, which has it redrafted or commented. The author of the opinion can reject the new direction, in which case the work is reassigned and the document signed by the director. If the document is not satisfactory, it is redone, amended and verified. It is impossible to impose a legal opinion. If there is disagreement, one withdraws from the case. Sometimes, someone will dissent from the final opinion. A legal opinion is a memorandum prepared by a legal adviser, who signs his family name or initials in the corner.

[12] IRB members who sit as a board and the hearing officers who argue cases are not lawyers. The IRB's legal advisers are not present in the hearing room. They do not argue IRB cases before the Federal Court; counsel from the Department of Justice do.

[13] If complaints are filed against IRB members, the management team investigates, namely, the Assistant Deputy Chairperson, the Special Adviser and, often, the General Counsel. The latter is the Chairperson's second adviser.

[14] When he first began, Mr. Dubois worked for the Immigration Adjudication Board, which became a section of the IRB in 1993. Mr. Dubois was the only legal adviser at the Board and signed all legal opinions on adjudication cases himself. He continued to sign his own name for some time but gradually, he adopted the new approach and line signature by the director, or General Counsel, became the standard. Mr. Dubois added that IRB legal advisers are reprimanded when they sign legal opinions that have not been approved by management.

[15] According to Mr. Dubois, legal advisers do not have full liberty when preparing legal opinions; management reserves the right to produce different opinions. This not like private practice where lawyers are free to express their own legal opinions. At the IRB, the best collective advice takes precedence.

[16] Mr. Dubois indicated that IRB legal advisers play a significant role in developing the organization's policies; they comment on them or are involved in their development along with the Operations Branch and the Research Branch.

[17] Mr. Dubois was assigned to speech writing and, to this end, met with the Chairperson, in the presence of the General Counsel or the Special Adviser. Staff in Communications also prepare speeches. Depending on the audience, the Chairperson asks Communications or Legal Services to prepare her speeches.

[18] Under cross-examination, Mr. Dubois explained that the IRB Adjudication Division reported to the General Counsel. Hierarchically, Mr. Dubois reported to Mr. Kearley, the Director of the Ottawa Regional Office. Employees of the Adjudication Division are government employees, while the members of the two other divisions are appointed by the Governor in Council. Mr. Dubois had expertise in the adjudication area but, over time, he diversified and expanded his knowledge in the area of refugee law.

[19] Mr. Dubois was Special Adviser to the Chairperson while Chantale Bernier, Ms. Mawani's Special Adviser, was on maternity leave from February to September 1994.

[20] Ms. Nurjehan Mawani was Chairperson the entire time Mr. Dubois worked at the IRB. Mr. Palmer became General Counsel in early 1995.

[21] Ms. Louise Cormier was the Institute's last witness and, contrary to usual procedure, she testified after Ms. Mawani, who was only available on the first day of the hearing. Ms. Cormier worked at the IRB from February 1993 to May 1999. Ms. Cormier was Ms. Mawani's secretary from February 1993 to May 1998 and Mr. Palmer's secretary from May 1998 to May 1999. She is currently working at the National Library of Canada. Ms. Cormier's immediate supervisor in the office of the Chairperson of the IRB was Ms. Brown, Ms. Mawani's Executive Assistant. In Mr. Palmer's office, her supervisor was Vinca Dufresne, Administrative Assistant to the General Counsel.

[22] Ms. Cormier's duties in the office of the IRB Chairperson involved keeping the agenda up to date, recording appointments, preparing files for appointments, making travel arrangements and looking after anything that Ms. Mawani needed. Ms. Cormier

typed revisions made by Ms. Mawani to speeches prepared by Communications or Legal Services. In Mr. Palmer's office, Ms. Cormier was responsible for keeping the agenda, making appointments, making travel arrangements and preparing files for meetings.

[23] According to Ms. Cormier, the Chairperson did not have regular meetings with the IRB legal advisers but did meet once a week with the General Counsel. On occasion, Ms. Mawani dealt directly with the IRB legal advisers to ask them to draft a speech or to amend it. Legal advisers only ever came to see Ms. Mawani with the General Counsel. Ms. Cormier is not familiar with the classification of the IRB legal advisers. She confirmed that she saw Howard Eddy, a legal adviser from Legal Services, once or twice. Ms. Cormier recorded in the agenda the topic, time and location of the Chairperson's meetings, verified the requests for meetings with the Chairperson and, if approved, confirmed the meetings with the persons concerned. The IRB Chairperson met with the General Counsel when the meeting was of a legal nature. When she worked in Mr. Palmer's office, she was unaware of any requests made by IRB legal advisers to meet with Ms. Mawani since the usual procedure was to consult with the General Counsel on such matters.

#### Employer's evidence

[24] Ms. Nurjehan Mawani testified in English.

[25] Ms. Mawani has been Chairperson of the IRB since October 1992. Ms. Mawani was Vice-Chairperson of the former Immigration Board from 1986 to 1988 and Vice-Chairperson of the Immigration Appeal Division from 1989 to 1992.

[26] Ms. Mawani described in considerable detail her role as the chief executive officer of the IRB. She emphasized the two components of the position by citing sections 58 and 65 of the *Immigration Act*.

[27] Ms. Mawani's testimony focused on the operation of the IRB based on her role as Chairperson. She gave numerous examples of her contacts with IRB legal advisers in implementing policies, guidelines and the evaluation process for members of the three tribunals that make up this organization. Ms. Mawani's description of the role of IRB legal advisers was the same as that of Mr. Dubois, but she provided more details. She gave an overview of the situation, as well as a description of her personal experience at the IRB.

[28] Ms. Mawani initiates contact, especially telephone contacts, with IRB legal advisers at all levels. She has open and frank conversations with them, giving her an opportunity to think aloud. She spoke of the need to be able to "try out" her ideas on them and to obtain their advice on a range of legal and administrative matters.

[29] According to Ms. Mawani, there is now a complaints system at the IRB under which legal advisers are sometimes required to act as fact finders. This is a very sensitive and highly confidential function.

[30] Ms. Mawani stressed the importance for the Chairperson of the IRB to be able to call upon Legal Services, at whatever level, to openly discuss sensitive matters. She has to ascertain that legal advisers are aware of her role as manager, while ensuring that her actions are legal.

[31] In cross-examination, Ms. Mawani explained that IRB policies are established by the Chairperson in consultation with a management committee composed of the Executive Director, the chairpersons of the three tribunals, the General Counsel, the Director of Policy, Planning and Research, the Director of the Executive Secretariat and the Director General of Professional Development.

[32] Ms. Mawani explained that there are currently about 30 legal advisers at the IRB who draft legal opinions normally communicated by the General Counsel. The latter may be present during the Chairperson's briefing sessions with the legal advisers.

[33] Ms. Mawani acknowledged that while IRB's policies and guidelines and her speeches are public documents, they are very sensitive and highly confidential during the preparation stage.

[34] The employer's second witness was Philip Palmer who testified in English.

[35] Mr. Palmer has been the General Counsel at the IRB since January 1995. His work description refers to him as the Director of Legal Services. He worked at the Department of Justice for 15 years prior to being seconded to the IRB. Theoretically, Mr. Palmer is still an employee of the Department of Justice during his secondment but, in practice, he has no reporting relationship with that department. He reports to the Chairperson of the IRB on legal matters and to the Executive Director on administrative matters.

[36] Mr. Palmer submitted in evidence Exhibit E1, which is the generic work description for the LA-1 positions at the IRB in effect since July 5, 1992. After reading extracts from Exhibit E1, Mr. Palmer described the work allocation between the legal advisers in IRB's Legal Services. Mr. Palmer selects a legal adviser, or a regional office, which he asks to prepare a legal opinion or memorandum. In Ottawa, the work is directly assigned to the legal advisers. In the regions, he sends his request to the Regional Director, Legal Services, asking him to assign the work to a legal adviser. The selected legal adviser prepares his legal opinion, in consultation with other advisers in his region, or with those of other regions, depending on the subject matter. The legal adviser's supervisor is normally consulted to ensure consistency with the Chairperson's requirements and the IRB's overall context. In legal matters, Mr. Palmer relies on the skill and expertise of the IRB's legal advisers when they draft opinions. When an opinion is ready, it is signed by its author and sent to Mr. Palmer, who forwards it to the Chairperson after initialling the first page.

[37] Mr. Palmer submitted in evidence Exhibit E2, which is the work description for the LA-2A position at the IRB. This document is undated but Mr. Palmer stated that it has been in use since he joined the IRB. Mr. Palmer pointed out that there is little difference between the LA-1 and LA-2A positions. The LA-2A positions are described in a more general manner and with fewer restrictions than those of the LA-1 level. In theory, a LA-1 position requires more supervision than a LA-2A position. There is no real difference between the legal opinions provided by LA-1 and LA-2A legal advisers. A legal adviser at the LA-2A level normally has more experience and greater in-depth legal knowledge of the IRB's operations. He is more informed about the IRB's situation in the government structure, its relationship with the courts, the Bar and other organizations. He also has greater background knowledge of the positions taken by the IRB in the past. A LA-1 legal adviser, who does not have this experience, must be guided in his research in order to cover all the topics that may impact on his legal opinion.

[38] Mr. Palmer submitted in evidence as Exhibit E3 an organization chart of the IRB. Mr. Palmer did not hear Ms. Mawani's testimony.

[39] Under cross-examination, Mr. Palmer explained that not all LA-1 and LA-2 legal advisers report directly to him; some report to the regional directors. He confirmed that the Chairperson may have formal and informal contacts with the IRB legal



advisers; she knows them all because she has been with the IRB, or the Board, its predecessor, since 1985. Mr. Palmer gave examples of instances where the Chairperson contacted various IRB legal advisers directly on several matters. Mr. Palmer and the supervisors of the advisers were kept informed of these contacts by the legal advisers themselves.

#### Bargaining agent's argument

[40] Mr. Gingras began his argument by reading an extract from the certificate for the Law Group (Exhibit S1):

*... this Board certifies the Professional Institute of the Public Service of Canada, as bargaining agent for all of the employees of the Employer in the Law Group in the Scientific and Professional Category.*

...

This document is authoritative and covers all lawyer positions, except those identified as managerial or confidential positions.

[41] Mr. Gingras then referred the Board to subsection 2(1) of the *Public Service Staff Relations Act*, and more specifically to the definition of managerial or confidential position:

*"managerial or confidential position" means a position*

*(a) confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada or the Federal Court, the deputy head of a department or the chief executive officer of any other portion of the Public Service,*

*(b) classified by the employer as being in the executive group, by whatever name called,*

*(c) of a legal officer in the Department of Justice,*

*(d) of an employee in the Treasury Board,*

*(e) the occupant of which provides advice on staff relations, staffing or classification,*

*(f) the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (b) or (c), or*

*(g) identified as such a position pursuant to section 5.1 or 5.2, the identification of which has not been terminated pursuant to section 5.3;*

Mr. Gingras stressed the fact that IRB legal advisers are not legal officers in the Department of Justice, except for Mr. Palmer; they are employees of the IRB. Mr. Gingras argued that none of the paragraphs in the definition of a managerial or confidential position applies to the positions at issue. According to Mr. Gingras, the only IRB legal advisers with managerial duties are the regional directors and the General Counsel.

[42] Mr. Gingras read and commented on subsection 5.1(1) of the Act:

*5.1 (1) Where, in connection with the application for the certification of an employee organization as a bargaining agent, the Board is satisfied that any position of an employee in the group of employees for which certification is sought meets any of the following criteria, it shall identify the position as a managerial or confidential position:*

*(a) a position the occupant of which has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;*

*(b) a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act;*

*(c) a position the occupant of which is directly involved in the process of collective bargaining on behalf of the employer;*

*(d) a position the occupant of which has duties and responsibilities not otherwise described in this subsection and who in the opinion of the Board should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer; and*

*(e) a position the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (a), (b) or (c).*

Mr. Gingras added that paragraphs 5(1)(a), (b) and (c) of the Act do not apply in this case and paragraph 5(1)(d) should not apply because IRB legal advisers deal only with administrative law and not litigation. They cannot be in conflict of interests because

they are employed by the IRB and not the Treasury Board. Paragraph 5(1)(e) is very clear: it deals with staff relations and there is no evidence to show that LA-1 and LA-2 legal advisers at the IRB are involved in staff relations. There is no reference in Exhibits E1 and E2, the work descriptions, to staff relations matters.

[43] Mr. Gingras referred the Board to Exhibit S2 (position description for counsel positions at the Canadian International Trade Tribunal) and more specifically, to the following paragraphs:

...

*Reporting to the General Counsel, provides legal advice, interpretation, research and assistance to the Chairman, Tribunal Members, the Secretary, the Executive Director Research and staff of the Tribunal on the legislation or regulations and legal precedents relevant to the jurisdiction and hearing or inquiry process of the Tribunal including preparing for appeal and inquiry hearings and the drafting of decisions and reasons and reports of findings related to same; (...)*

...

*1. Provides legal advice, interpretation, research and assistance to the Chairman, Tribunal members, the Secretary, the Executive Director Research and staff of the Tribunal on the legislation or regulations and legal precedents relevant to the jurisdiction and hearing or inquiry process of the Tribunal including preparing for appeal and inquiry hearings and the drafting of decisions and reasons and reports of findings related to same, by:*

...

According to Mr. Gingras, these documents are authoritative and describe the positions in the bargaining unit.

[44] Exhibit E2 indicates that IRB legal advisers report to the Chairperson through the General Counsel. In any department, regardless of whether the employee is in the LA, OM, AS or PM group or at some other officer level, employees always serve the deputy head of the organization. Only a few years ago, one could hear people say "we work for the deputy minister". Exhibit E1 shows that there is an administrative hierarchy at the IRB. Mr. Gingras stated that the work descriptions for the counsel positions at the Canadian International Trade Tribunal (Exhibit S2) essentially include the functions described in the work descriptions of the legal adviser positions at the

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IRB (Exhibits E1 and E2). He added that the counsel positions at the Canadian International Trade Tribunal are part of the bargaining unit.

[45] According to Mr. Gingras, the whole of the employer's evidence shows that "the IRB's purpose is somewhat linked to legal services". The employer's witnesses even described Legal Services as a unit; they merely alluded to the fact that LA-1 and LA-2 legal advisers are not free to issue their own legal opinions. Mr. Dubois's testimony revealed the subordination of the opinions of IRB legal advisers to those of their superiors, contrary to private practice. Moreover, according to all witnesses, opinions, regulations and guidelines were intended for dissemination, which means that they could not be confidential. Witnesses Mawani and Palmer did not explain or express a need or an urgency to exclude the LA-1 and LA-2A positions from the bargaining unit.

[46] Mr. Gingras filed in evidence the decision of the Supreme Court of Canada in *Délisle v. Canada (Attorney General) et al.* (1999), 244 N.R. 33 and referred the Board to paragraphs 5 to 7. Mr. Gingras then referred to paragraphs 97 to 100 globally. These references indicate that unionization is not protected by the Constitution, but by legislation. Legislation prevents members of the Royal Canadian Mounted Police and the Armed Forces, persons appointed by order and incumbents of excluded positions from unionizing. Furthermore, legislation does not grant this right to legal officers of the Department of Justice, but does grant it to legal advisers at the IRB. Lastly, Mr. Gingras referred the Board to paragraph 126 of the same case.

[47] Mr. Gingras kindly asked the Board to consider numerous decisions from the Ontario Labour Relations Board allowing the unionization of counsel where permitted under the *Ontario Labour Relations Act*. This legislation has since been amended. While from another jurisdiction, this case law shows that lawyers do unionize when they have the right to do so. In this case, the *Act* allows IRB legal advisers to be included in the bargaining unit.

#### Employer's argument

[48] Mr. LeFrançois stated that he intended to reply briefly to the Institute's arguments before addressing the legal framework, dealing with Ms. Mawani's testimony and linking the whole case to some case law. Mr. LeFrançois filed a casebook.

[49] Mr. LeFrançois's opening comment concerned Exhibit S1 and the *Act*. The Institute did not mention section 5.2 of the *Act*. According to him, subsection 5.3(1) stipulates that:

*5.3 (1) Where, in the opinion of a bargaining agent, the duties and responsibilities of a position of an employee in the bargaining unit for which the bargaining agent was certified that was identified as a managerial or confidential position pursuant to section 5.1 or 5.2 have changed, the bargaining agent may file an objection to the identification with the Board.*

The applicant did not provide evidence that the duties and responsibilities of the legal adviser positions at the IRB had changed. In the absence of such evidence, the Institute's application is out of time pursuant to subsection 5.2(3) of the *Act*, specifically:

*(3) Within twenty days after receiving a notice under subsection (2), the bargaining agent may file an objection to the identification with the Board.*

[50] Mr. LeFrançois's second comment related to Mr. Gingras's argument comparing the work descriptions of the IRB legal advisers with those of the Canadian International Trade Tribunal and he pointed out that IRB legal advisers are subject to the control of their supervisors. Mr. LeFrançois argued that whether IRB legal advisers have supervisors is of little or no importance and, in this regard, he referred the Board to *Professional Institute of the Public Service of Canada and Treasury Board* (Board file 148-2-154) (*Lindsey-Peck*).

[51] Another comment dealt with Exhibit S2, the work descriptions for counsel at the Canadian International Trade Tribunal. The employer objected to their submission in evidence. He referred to *Professional Institute of the Public Service of Canada and Treasury Board* (Board file 172-2-294) (*Wex*) where the Board found that the work descriptions were prepared for classification purposes; in the case of exclusions, the position description is only one of many elements considered. The same applies in *Professional Institute of the Public Service of Canada* (Board file 172-2-296) (*Patry and Young*).

[52] Care must be taken in considering excerpts from *Délisle (supra)*, cited by the Institute. The decision includes extracts from the Heeney Committee, which should be read correctly. Mr. LeFrançois referred the Board to paragraphs 5 to 7 of *Délisle* and commented on the case law, which indicates that exclusion criteria cannot be ignored.

[53] Paragraph (a) of the definition of a "managerial or confidential position" in subsection 2(1) of the *Act* provides the criterion for excluding legal adviser positions at the IRB:

*(a) confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada or the Federal Court, the deputy head of a department or the chief executive officer of any other portion of the Public Service,*

[54] Paragraph 5(1)(d) of the *Act* applies to Mr. Laredo's position in the Professional Development Branch, although it is also covered by paragraph (a) of the definition of a "managerial or confidential position" in subsection 2(1) of the *Act*. It is very clear that Ms. Mawani is the chief executive officer mentioned in that definition.

[55] Ms. Mawani testified about the two components of her work as deputy head and as chief executive officer of the IRB. It is in her capacity as chief executive officer, or "Chief Judicial Officer", and because of the legal nature of the latter's activities that legal advisers interact with her. It is the Chairperson's responsibility to ensure that the IRB complies with the law. As deputy head or deputy minister, the Chairperson must remain sensitive to management requirements and responsibilities. By combining her management and confidential responsibilities, the Chairperson is the [Translation] "incarnation of the boutique" and accordingly, it is essential that Ms. Mawani know that she can act, and that she does act, openly. This is how the concept of "thinking aloud" - - something that the Chairperson believes in -- becomes a central concept. A qualitative analysis of the relationship between the Chairperson and her legal advisers reveals that the latter hold positions confidential to her.

[56] Mr. LeFrançois asked the Board to consider the nature and the quality of the relationship between Ms. Mawani and LA-1 and LA-2A legal advisers at the IRB. Mr. Palmer reads and initials the legal opinions sent indirectly to the Chairperson, but the Chairperson makes sure there is close monitoring through direct contact with the authors of these opinions. Ms. Mawani treats these exchanges with complete confidentiality; they relate to the way in which members and adjudicators exercise

their discretion and that can and does create malcontents. The *Immigration Act* states that she has responsibility in these areas. This task is certainly not an easy one and the Chairperson needs special advice; that is why she requests legal opinions. The public complaints system also needs to be considered; in that instance, a legal adviser acted as fact finder and the Chairperson had direct contact with that legal adviser. In her role as the assessor of the performance of IRB members and adjudicators, the Chairperson relies on the legal advisers who are her eyes and ears. This is a very sensitive task because the Chairperson bases her recommendations to the Minister on these performance appraisals. Mr. Larado's position has the same role. It is a sensitive matter to suggest that IRB members need training, to manage the weaknesses of members institutionally independent.

[57] What does the case law say? One test that is often used is that of "confidential advice", which is not the same thing as a "casual and fortuitous" relationship. Mr. LeFrançois cited the end of paragraph 18 at page 9 of *Lindsey-Peck (supra)*:

*... The fact that Ms. Lindsey-Peck is supervised by the Commission's General Counsel, or is classified at a lower level than other legal advisors employed in the Commission, does not per se diminish the confidential nature of her position. Nor can it be seriously argued, in light of Ms. Lindsey-Peck's testimony on this point, that the confidential relationship is, in the words of the Patry-Young decision (supra), "casual or fortuitous".*

[58] Mr. LeFrançois reviewed his casebook. He noted the Federal Court decision in *Professional Institute of the Public Service of Canada v. Attorney General of Canada*, [1972] F.C. 1316. Mr. LeFrançois noted the relevance of the words of Jackette C.J. at page 1322:

...

*A certain knowledge of government organization and of the duties of a lawyer employed to give legal advice may be assumed on the part of the Public Service Staff Relations Board. Its work is such that it must be constantly familiarizing itself with such matters and it would be an unnecessary and a useless exercise to spell such matters out on the record of each proceeding that comes before it. When a portion of the government service has a legal adviser, in the nature of things, his services are provided on a confidential basis, and, when it has a legal branch, the responsibility of the director of that branch is to provide such services, and to discharge that responsibility he must have*

*the help of lawyers whose services must be provided to him or as directed by him on a confidential basis.<sup>1</sup> If such a lawyer is not in a confidential position in relation to the director of his branch, or as the statute puts it, "confidential to" the director, I have difficulty to conceive, on the basis of my experience, of any person who is "confidential to" any other person in the Public Service.*

...

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<sup>1</sup> *This is, undoubtedly, why legal officers of the Department of Justice were excluded as a class.*

This principle still applies; a legal opinion is confidential in itself and the person who receives it does so in confidence.

[59] Mr. LeFrançois referred to the decision in *The Queen v. The Public Service Staff Relations Board*, [1979] 2 F.C. 60. The Board had refused to exclude the counsel of the National Energy Board pursuant to the definition of "person employed in a managerial or confidential capacity" contained in paragraph (f) of section (2) of the *Act*. The Court stated the following at pages 63 and 64:

...

*... the so-called "principles" applied by the Board appear to me not only to be wrong but to bear no relation at all with the question to be determined. The word "confidential" in paragraph (f) of the definition is used in its usual sense which, contrary to what the Board assumed, does not imply any delegation of functions. An executive does not delegate any functions to his legal counsel; the counsel's position is nevertheless confidential to the executive.*

*The conclusion of the Board that Mr. MacDonald was not employed in a position confidential to Mr. Lamar is, therefore, based on an error of law.*

...

However, the Board's decision was not overturned because it was not proven that Mr. Lamar had managerial duties and responsibilities related to the development and administration of government programs. On the other hand, the principle is still applicable.



[60] Mr. LeFrançois cited *Wex (supra)*, and referred the Board to paragraph 19 of that decision, which relates to the application of paragraph (a) of the definition of a "person employed in a managerial or confidential capacity" that appears in the *Act*.

[61] In referring to *Patry and Young (supra)*, Mr. LeFrançois mentioned paragraph 11 in particular. What is important is that [Translation] "the work is that of a LA or legal adviser position". Mr. LeFrançois then referred the Board to paragraphs 11 to 14 where the concept of "thinking aloud" is addressed.

[62] Mr. LeFrançois invited the Board to consider paragraphs 11 and 12 of *Professional Institute of the Public Service of Canada v. Treasury Board* (Board file 148-2-50).

[63] Paragraph 10 of *Professional Institute of the Public Service of Canada v. Treasury Board* (Board file 148-2-49) states that:

... provided that the relationship between the Chief Commissioner and Messrs. Van Berkel and Juriansz is not casual or fortuitous, the fact that they enjoy a similar relationship with the Commissioners and/or staff does not detract from their confidential relationship with the chief executive officer.

Mr. LeFrançois argued that the fact that other confidential relationships may exist is of little relevance.

[64] Mr. LeFrançois noted that the decision in *Professional Institute of the Public Service of Canada and Treasury Board* (Board file 148-298) (*Lalonde*) deals with a legal adviser position at the Immigration Appeal Board, which was replaced with the IRB, and he referred to paragraphs 32 *et seq.* of that decision. Mr. LeFrançois argued that the Board was consistent in applying paragraph (a) of the definition of a "person employed in a managerial or confidential capacity" in the *Act* and this is obvious at paragraphs 38 and 39 of the decision. Mr. LeFrançois also drew the Board's attention to paragraphs 43, 47 and 48.

[65] Mr. LeFrançois referred the Board to paragraphs 18 to 20 of the decision in *Public Service Alliance of Canada and Treasury Board* (Board file 148-2-109) and he commented in particular on the concept of "thinking aloud".

[66] Referring once again to *Lindsey-Peck (supra)*, Mr. LeFrançois invited the Board to read paragraphs 17 and 18, which contain a review of the case law. Since this is the most recent decision, it is a reminder of the applicable law.

#### Reply of the bargaining agent

[67] In reply, Mr. Gingras referred the Board to the definition of the word "auprès" given in the *Petit Robert* dictionary because this word is the key to paragraph (a) of the definition of "managerial or confidential position" contained in subsection 2(1) of the *Act*. Mr. Gingras argued that the wording of the *Act* implies that a managerial position is not the same as a confidential position. He stated that the decisions cited by Mr. LeFrançois did not relate to the facts of the case at issue. He noted that in *Lalonde (supra)*, the Immigration Appeal Board had only three legal adviser positions and the incumbents of those positions were required to attend all of the Board's meetings, which is no longer the case. These positions no longer have the same duties.

#### Reasons for decision

[68] The Institute's application is vague; it refers to "sections 21, 22 and others of the *Act*", which is to say the least ambiguous.

[69] The parties do not seem to challenge the fact that LA-1 and LA-2 level legal adviser positions at the IRB would normally be part of the bargaining unit of the Law Group in the Scientific and Professional Category. They also appear to agree that the employer had identified these positions as managerial or confidential positions, as defined in the *Act*.

[70] The sections of the *Act* relevant to this application are those dealing with the identification of managerial or confidential positions found in sections 5.1 to 5.3:

*5.1 (1) Where, in connection with the application for the certification of an employee organization as a bargaining agent, the Board is satisfied that any position of an employee in the group of employees for which certification is sought meets any of the following criteria, it shall identify the position as a managerial or confidential position:*

*(a) a position the occupant of which has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;*

*(b) a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act;*

*(c) a position the occupant of which is directly involved in the process of collective bargaining on behalf of the employer;*

*(d) a position the occupant of which has duties and responsibilities not otherwise described in this subsection and who in the opinion of the Board should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer; and*

*(e) a position the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (a), (b) or (c).*

*(2) Where the Board identifies a position pursuant to subsection (1), it shall notify the employee organization and the employer in writing of the identification.*

*5.2 (1) Where, before or after the coming into force of this section, a bargaining agent has been certified by the Board, the employer may, in the prescribed manner, identify any position described in subsection 5.1(1) of an employee in the bargaining unit for which the bargaining agent was certified as a managerial or confidential position, and for the purpose of that identification the reference in paragraph 5.1(1)(d) to the Board shall be construed as a reference to the employer.*

*(2) Where the employer identifies a position pursuant to subsection (1), it shall notify the Board and the bargaining agent in writing of the identification.*

*(3) Within twenty days after receiving a notice under subsection (2), the bargaining agent may file an objection to the identification with the Board.*

*(4) Where an objection to an identification is filed pursuant to subsection (3), the Board, after considering the objection and giving the employer and the bargaining agent an opportunity to make representations, shall confirm or reject the identification.*

*(5) An identification of a position pursuant to subsection (1) takes effect at the end of the period referred to in subsection (3) if no objection is filed within that period or, if an objection is so filed and the identification is confirmed*

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*on the objection, the identification takes effect on the date of the decision confirming it.*

*5.3 (1) Where, in the opinion of a bargaining agent, the duties and responsibilities of a position of an employee in the bargaining unit for which the bargaining agent was certified that was identified as a managerial or confidential position pursuant to section 5.1 or 5.2 have changed, the bargaining agent may file an objection to the identification with the Board.*

*(2) Where an objection to an identification is filed pursuant to subsection (1), the Board, after considering the objection and giving the employer and the bargaining agent an opportunity to make representations, shall confirm or terminate the identification.*

[71] Section 5.1 does not apply in this case because the Institute has been certified as the bargaining agent of the bargaining unit for several years.

[72] The employer asked the Board to dismiss the application based on section 5.2 of the *Act* on the ground that the duties and responsibilities of legal adviser positions at the LA-1 and LA-2 levels at the IRB have not changed and the application would have been out of time. I cannot accept this argument, no matter how attractive it may appear; no evidence was presented to support the argument that the Institute's application had been filed in objection to the employer's decision to identify the LA-1 and LA-2 positions at the IRB pursuant to section 5.2 of the *Act*, and no evidence was presented as to the date on which the Institute was allegedly informed of that identification. The burden was on the employer to present this evidence if it wished to argue timeliness based on subsection 5.2(3). Further, as I mentioned earlier, the parties appear to agree that the employer identified these positions as managerial or confidential; therefore, section 5.2 would not apply to the circumstances of the Institute's application.

[73] The Institute should have filed its application pursuant to section 5.3 of the *Act*. The employer is correct in arguing that, for this section to apply, the burden was on the Institute to show that the duties and responsibilities of the positions covered by the application had changed. The evidence shows that the duties and responsibilities of these positions have remained virtually unchanged since 1995.

[74] The only change appears to be the involvement of IRB legal advisers in the complaint process pertaining to IRB members. We do not know when this system took effect. Mr. Dubois testified that during his tenure at the IRB that is, until December 1995, complaints against members were handled at the management level. It would be difficult to justify the Institute's application on the basis of this change alone and the Institute did not raise it and presented no evidence in this regard.

[75] The Institute did not show that the positions had changed substantially. None of the legal advisers employed by the IRB at the time of the application were called to testify. In light of the testimonies of Ms. Mawani and Mr. Palmer, the work descriptions for LA-1 and LA-2 positions at the IRB do not establish the validity of the application. The only relevant testimony came from the employer's witnesses. This uncontradicted evidence shows that IRB legal advisers act as advisers to the Chairperson; she consults them and they discuss legal and administrative issues directly related to her responsibilities as chief executive officer of the IRB.

[76] *Délisle (supra)*, and the Ontario case law cited by the Institute are of no help in this case.

[77] The Institute did not seriously object to the case law cited by the employer. *Lalonde (supra)*, dealt with a position that was the predecessor to those covered by this application. That decision still appears to apply. The fact that there are now some 30 legal advisers rather than three does not in itself prove a change in their role; the IRB is a larger organization than the Immigration Appeal Board. The burden was on the Institute to show that the positions at issue in this application were different from those excluded in the decision previously mentioned and similar to those included in the bargaining unit of the Law Group. The Institute did not make its case.

[78] For all these reasons, the Institute's application is dismissed.

**Evelyne Henry  
Deputy Chairperson**

OTTAWA, February 3, 2000

Certified true translation

Serge Lareau

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ANNEX

21. (1) *The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*

(2) *The Vice-Chairperson and each Deputy Chairperson may exercise such of the powers and perform such of the duties and functions of the Board under this Act as may be assigned to them by the Board other than the power to make regulations of general application under section 22.*

22. (1) *The Board may make regulations of general application respecting*

*(a) the manner in which positions are to be identified by the employer under subsection 5.2(1);*

*(b) the determination of units of employees appropriate for collective bargaining;*

*(c) the certification of bargaining agents for bargaining units and the hearing or determination of applications to record alterations in the process for resolution of disputes applicable to bargaining units;*

*(d) the hearing or determination of any matter relating to or arising out of the revocation of certification of a bargaining agent, including the rights and privileges that have accrued to and are retained by any employee notwithstanding the revocation;*

*(e) the rights, privileges and duties that are acquired or retained by an employee organization in respect of a bargaining unit or any employee included in the unit where there is a merger, amalgamation or transfer of jurisdiction between two or more such organizations;*

*(f) the establishment of rules of procedure for its hearings and those of an adjudicator;*

*(g) the specification of the time within which and the persons to whom notices and other documents shall be sent and when the notices shall be deemed to have been given and received;*

*(h) the determination of the form in which, and the time as of which, evidence*

- (i) *as to membership of employees in an employee organization,*
- (ii) *of objection by employees to certification of an employee organization, or*
- (iii) *of signification by employees that they no longer wish to be represented by an employee organization*

*shall be presented to the Board on an application for certification of or for revocation of certification of a bargaining agent, and the circumstances in which evidence as to membership of employees in an employee organization may be received by the Board as evidence that the employees wish that employee organization to represent them as their bargaining agent;*

*(i) the hearing of complaints under section 23;*

*(j) the authority vested in a council of employee organizations that shall be considered appropriate authority within the meaning of paragraph 29(2)(b); and*

*(k) such other matters and things as may be incidental or conducive to the objects and purposes of the Board, the exercise of its powers and the attainment of the objects of the Act.*

*(2) Regulations of general application made under subsection (1) have effect on publication in the Canada Gazette.*