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Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

IRENE J. BREMSAK

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Bremsak v. Professional Institute of the Public Service of Canada

In the matter of complaints made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: John Steeves, Board Member

For the Complainant: John Lee, representative

For the Respondent: Geoffrey Grenville-Wood and Isabelle Roy, counsels

Heard at Vancouver, British Columbia,
October 27 to 31, 2008, and May 5 to 7, 2009.
Written submissions filed on May 22 and June 1, 17 and 25, 2009

I. Complaints before the Board

[1] This is a decision about two complaints made by Irene J. Bremsak ("the complainant") against the Professional Institute of the Public Service of Canada ("the respondent" or "the bargaining agent") and certain individuals elected by or employed by the bargaining agent.

[2] The complaints allege violations of paragraph 188(*c*) and subparagraph 188(*e*)(ii) of the *Public Service Labour Relations Act* ("the *Act*"). Paragraph 188(*c*) prohibits an employee organization from taking disciplinary action or imposing "any form of penalty" on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner. Paragraph 188(*e*) prohibits discrimination against a person with respect to membership in an employee organization. It also prohibits intimidation or coercion of a person, or the imposition of "a financial or other penalty on a person", because the person made an application under the *Act*.

[3] The first complaint started with an email sent by the complainant involving a controversy over a local election within the bargaining agent. The complainant was concerned that another member, who was selected as a successful candidate based on regional representation, did not step aside because of "ethical" issues and "a lack of morals." The person who had not stepped aside made a complaint to the president of the bargaining agent alleging that the complainant's comments were harassing and defaming. The bargaining agent's Executive Committee agreed with the complaint and wrote to the complainant on September 12, 2007, requesting that she apologize. The complainant declined to apologize, and the bargaining agent's Board of Directors apologized on the complainant's behalf. The complainant then filed a complaint dated November 16, 2007 with the Public Service Labour Relations Board ("the Board") alleging that this was a form of penalty and discipline and it was done in a discriminatory manner contrary to paragraph 188(*c*) of the *Act*.

[4] The second complaint is dated April 11, 2008 (but was filed with the Board on July 8, 2008) and it relates to a decision by the bargaining agent to issue a policy about applications to "outside bodies." The Board was included as an outside body under that policy. The effect of the policy is that, ". . . where a member . . . refers a matter which has been or ought to have been referred to the Institute's internal procedure to an outside process or proceeding for consideration, that member . . . shall

automatically be temporarily suspended . . .” from any elected or appointed office. On April 9, 2008, the complainant was advised by the bargaining agent’s acting president that, pursuant to that policy and because of her complaint to the Board, she was temporarily suspended from four positions to which she was either elected or appointed. She was also advised that the temporary suspension would cease once the outside procedures had been finally terminated for any reason. The complainant submits that the policy and its application amount to discrimination against her with respect to her membership in an employee organization, it is intimidation and coercion, and imposes a financial or “other penalty” on her because she made an application to the Board, contrary to subparagraph 188(*e*)(ii) of the *Act*.

II. Summary of the positions of the parties

[5] In her first complaint, the complainant objects in strong terms to the bargaining agent’s actions and to the process it used. She submits that she was discriminated against, intimidated, penalized and harassed, contrary to paragraph 188(*c*) of the *Act*. She denies any wrongdoing at all about the dispute over the 2007 election and she alleges that the bargaining agent and its officials were, among other things, “deceitful” against her. She also alleges that the bargaining agent violated its own by-laws in investigating and adjudicating her concerns. With regards to the bargaining agent’s policy about applications to outside bodies, the complainant submits that she was discriminated against contrary to subparagraph 188(*e*)(ii) of the *Act* because she made a complaint to the Board. Finally, the complainant relies on a very recent Board decision with regards to the same bargaining agent and the same policy. The complainant seeks an apology from the bargaining agent, a special time set aside to speak to the bargaining agent’s next Annual General Meeting, costs and a decision that the bargaining agent's policy was contrary to the *Act*.

[6] For its part, as a preliminary matter, the bargaining agent challenges my jurisdiction to interfere with any of its internal affairs. With regards to the first complaint, they accept they requested that the complainant apologize and, in the absence of that apology, they apologized on behalf of the organization. However, it is submitted that this was not a disciplinary action or the imposition of any form of penalty in a discriminatory manner. With regards to the second complaint, and the policy suspending members who make applications to outside bodies, the bargaining agent submits that the policy was an appropriate response to new legislation in the

form of section 188 of the *Act*. It is also a necessary and appropriate response to difficulties that the organization was having with members being in conflict with their responsibilities as elected or appointed officials at the same time as they were making applications to outside bodies about internal matters. The bargaining agent seeks the dismissal of the complaints.

III. Background

[7] The complainant has been employed by Health Canada for a number of years, most recently as an inspector of medical decisions. She has also held a number of elected and appointed positions within the bargaining agent, including membership in the Regional Executive, president of the Vancouver Branch and shop steward.

[8] The bargaining agent represents approximately 55 000 people employed in various professional positions by the Government of Canada. There are about 40 occupational groups and 6 geographical areas, which together amount to about 350 constituent bodies, each with its own by-laws and elected or appointed officials. The membership is the ultimate authority in virtually all matters, usually expressed through general meetings attended by delegates; the bargaining agent's By-law 13.2.1 states that the Annual General Meeting ". . . is the supreme governing body of the Institute." There is a president and other executive members who make up the Board of Directors and they exercise the authority of the bargaining agent between annual general meetings, including the by-laws and policies passed by those meetings (By-laws 15.2.1 and 15.2.2). There are also Regional Councils, branches, groups and sub-groups. For example, there is a British Colombia (B.C.) and Yukon Regional Council and the members are elected from within the region. The bargaining agent's president, at the time of these complaints, was Ms. Michèle Demers, whose untimely death occurred during the hearing of these complaints.

[9] The events giving rise to the complaints in this case began in June 2007, when there was an election to the B.C. and Yukon Regional Council. Four positions were to be filled, and eight individuals ran for those positions, including Susan Ramsay. Initially, the Election Committee declared that the four members receiving the most votes were elected to the Regional Council. However, an issue arose as to representation under the Regional Council's by-laws. The issue was whether anyone represented members from Victoria, B.C. Since none of the four candidates who polled the most votes were from Victoria, it was decided that Ms. Ramsay, who is from Victoria, should be declared

elected. Ultimately, after some time and two legal opinions, it was determined that it was not necessary to declare the election of Ms. Ramsay because another person on the Regional Council (who had not been up for election) satisfied the requirement for representation from Victoria. In the end Ms. Ramsay resigned from her deemed elected position.

[10] The issue about regional representation and the deemed election of Ms. Ramsay generated a good deal of controversy among the membership in the B.C. and Yukon Region. The complainant, among others, thought that Ms. Ramsay should have stepped down from the beginning and in her evidence the complainant testified that she could not "fathom" why Ms. Ramsay did not do that.

[11] A number of emails were circulated among members and the complainant wrote one dated July 1, 2007, to a number of people in the bargaining agent. Among other things, the email stated as follows:

. . .

> *. . . and finally, it is only ethical that the lower placed candidate steps aside until this issue is resolved. By stepping aside, this candidate would show respect for our Constitution and By-laws and allow due process to take effect, clearly showing higher moral ground when none of this was this person's fault. However, failure to step aside shows a lack of morals.*

. . .

[12] At the time, and in her evidence, the complainant denied this was a reference to Ms. Ramsay: she did not "pass judgment" on Ms. Ramsay and states ". . . I thought I was paying her a compliment . . . [I] thought she would just work it through when she was ready."

[13] Other members did not have the same view as the complainant about this email. In particular, on July 30, 2007, Ms. Ramsay wrote an email to the president stating that she wanted to file a formal complaint against the complainant for her comments because they were ". . . meant to harass me as well as defame my reputation . . ." Mediation was attempted but it was not successful. On September 12, 2007, Ms. Demers wrote to the complainant and stated that the Executive Committee had reviewed the July 1, 2007, email and that ". . . we are of the opinion that passing judgment on a person's ethics and morals in an email sent to forty-seven (47) people is

unacceptable and in itself poor judgment." The letter also advised the complainant that the Executive Committee found the complaint of Ms. Ramsay to be valid and the recommended redress was as follows:

. . .

> *. . . that you apologize to the Complainant, Ms. Ramsay via email with copy to the recipients of your initial email of July 2 [sic], 2007, along with a copy to the Institute's Executive Committee, by no later than September 26, 2007.*

. . .

[14] This letter ended with an offer to:

> *. . . resolve the matter informally.* However,*[s]hould you not heed to our suggestion, the matter will be referred to the Board of Directors who will apologize to the complainant and recipients on your behalf and who will also determine whether or not other measures are to be taken.*

[15] The complainant's response to the September 12, 2007 letter was to file an internal complaint against the president. This was contained in an email dated September 14, 2007. It relied on the by-laws of the bargaining agent and alleged "close" friendships and allegiances between Ms. Ramsay and officials of the bargaining agent. According to the complainant, Ms. Ramsay and others were closely involved and had an essential part in "helping" the president remove a ". . . presidential rival in the upcoming election." The complainant's letter stated there was a ". . . clear indication of your [Ms. Demers'] bias and of partisan politics. . . " in trying to help and support another person and by "discrediting me." The email also contained the following paragraph:

. . .

> *In your haste to trying to discredit me in order to help your supporter Mr. Chevalier, you now have intentionally violated our by-laws and policies and my right to a fair hearing. You clearly are aware of both the by-laws and regulations and PIPSC's Policies and therefore have no excuse for not following them. The only conclusion that I have, is that you have deliberately ignored the by-laws and policies. Therefore, I am formally filing a complaint against you, Michele Demers, regarding your conduct and the injustices you have carried out against me by prevent [sic] a fair hearing.*

. . .

As indicated in the above email, the complainant next appealed the president's decision of September 12, 2007 to the Board of Directors.

[16] At this point, some information about the bargaining agent's by-laws, policies and procedures in these matters may be useful. David Gilles is the executive secretary of the bargaining agent and, among other positions, is also the corporate secretary to the Board of Directors. He testified that the bargaining agent has a number of by-laws including By-law 24 for the discipline of members. According to Mr. Gilles, disciplining members under By-law 24 is only done in very serious matters, and he could remember only two previous times when it had been used, one of which was a matter of serious fraud.

[17] Mr. Gilles also referred to the bargaining agent's use of a number of informal processes to resolve disputes between members and elected or appointed officials. For example, there is an expectation that elected or appointed officials will respond to problems and attempt to deal with them on an individual and informal basis. This happens often, independent of any written documents and without the knowledge of the Executive Committee, the Board of Directors or the president. Don Burns, a vice-president with the bargaining agent, stated that the first step taken with disputes between members is to try and settle disputes informally so that ". . . everyone walks away satisfied." As will be seen, the complainant challenges this approach to complaints and relies on a strict interpretation and application of the by-laws, and disputes whether those by-laws were applied in this case. On the other hand, the bargaining agent submits that strict application of the by-laws is not required, that the procedures in this case were not under the by-laws nor were they required to be under the by-laws.

[18] According to Mr. Gilles, what happened in this case is that there was an informal attempt to resolve Ms. Ramsay's complaint against the complainant. When this was not successful, a policy under section 11 of the bargaining agent's Policy Manual, Part B, was applied. It is titled *Complaints By Institute Members Against Members Holding Office or Appointed Positions* and it states as follows:

. . .

> *1. Preamble*
>
> *This policy shall apply when a member is dissatisfied with the actions of members in the course of fulfilling their office in an elected or appointed Institute position. This policy does not apply to Institute members elected under By-Law 20.1.*
>
> *2. Investigation Procedures*
>
> *(1) A complaint, in writing, must be submitted to the President. The member(s) against whom a complaint has been made shall be notified of the complaint and requested to respond in writing, within a specific time frame.*
>
> *(2) The President, with the concurrence of the Executive Committee, may appoint a person or persons to facilitate an informal resolution between the parties to the complaint, and/or to investigate the matter.*
>
> *(BOD – April 19, 2005)*
>
> *3. The investigator(s) shall submit a report to the Executive Committee.*
>
> *4. The Executive Committee, based on the report, shall determine the validity of the complaint.*
>
> *(1) If a complaint is judged invalid, then no further action shall be taken after the parties (complainant(s) and elected or appointed member) have been informed of the decision.*
>
> *(2) If a complaint is judged valid, then the parties shall be so informed the parties will be given the opportunity to resolve the situation informally to the satisfaction of all. If this course of action is not possible, the elected or appointed member may choose to resign.*
>
> *5. If the informal process does not resolve the situation, the Executive Committee may recommend to the Board of Directors further action.*
>
> . . .

The evidence is that this by-law has been in place for some time. It was revised in December 1994, except for subsection 2(2), which was revised or added by the Board of Directors on April 19, 2005. A more recent version of this policy is dated August 11, 2007 and is titled "Dispute Resolution Policy."

[19] Mr. Gilles explained that the informal processes were not successful in resolving the complainant's situation and this resulted in a decision by the Executive Committee

and the letter of September 12, 2007, from the president to the complainant. Mr. Gilles also explained that there was no appeal process in the above policy but the bargaining agent had been developing other policies in this area, including a dispute resolution mechanism. Since this mechanism included an appeal or review, according to Mr. Gilles, it was decided that the Board of Directors would give the complainant an "extraordinary" opportunity to appeal. The complainant was not advised that this was an extraordinary event but she took advantage of the opportunity and provided a lengthy submission to the Board of Directors dated October 22, 2007. This was considered by the Board of Directors in a closed session on December 7, 2007, and the decision was to deny the appeal. Then, on December 12, 2007, the Board of Directors issued a statement to the 47 recipients of the complainant's July 1, 2007 email apologizing on behalf of the respondent for the inappropriate tone and content of the email.

[20] The complainant wrote to the Board of Directors on December 18, 2007, demanding immediate withdrawal of the communication to the 47 recipients of the July 1, 2007 email. She set a deadline of December 31, 2007 and failure to meet that deadline would result in an application being made to the Board. A representative of the bargaining agent advised the complainant on December 24, 2007 that there would be no change in the decision of the Board of Directors.

[21] In fact, the complainant had already made her first complaint to the Board on November 16, 2007. It alleged that the bargaining agent had failed to notify the complainant in writing before making its decision of September 12, 2007. The corrective action sought by the complainant reads as follows:

> *a) Dismissal of the complaint.*
>
> *b) Withdrawing of Executive Committee's decision of September 12, 2007.*
>
> *c) Public apology by Michele Demers admitting that she and the Executive Committee failed to follow the PIPSC By-laws and Policies in the general principles of Natural Justice.*
>
> *d) Concurrence by Michele Demers that all actions taken by the complainant have been in accordance with the PIPSC By-laws and Policies and the general principles of Natural Justice.*

[22] The bargaining agent provided the Board with a reply to this complaint on December 14, 2007. It challenged whether the complaint was filed under the correct section of the *Act* and the bargaining agent submitted that the Board did not have jurisdiction to consider what were described as internal matters.

[23] The next event is that Ms. Demers wrote to the complainant on March 3, 2008. This was a lengthy letter setting out the chronology of the events to date and Ms. Demers stated that she was ". . . very concerned by the tone of your email, the accusations, the requests that become threats, the ultimatums, the 'or elses' and the litigation you have commenced." The letter also stated as follows:

. . .

> *I am also very concerned that your aggressive and confrontational attitude and actions will prevent members from wanting to become involved as volunteers in the Professional Institute. I fear that others, in our existing group of volunteers, will want to resign because of how you have behaved. I must tell you that some have already indicated that they want to resign. I cannot sit idly by and allow such negative attitudes and intimidation of members and volunteers of our union. There is too much at stake for our members, for our staff and for the public interest for this to go on.*
>
> *I am taking this opportunity, by way of this letter, to strongly suggest to you that you must change your attitude and adopt a more positive approach to helping your fellow members. The attack and retaliation mode that you have adopted against our union and our volunteers, is counter productive, extremely harmful and totally unacceptable to the members in your region and to the whole of the Professional Institute.*

. . .

[24] The complainant's representative responded to this letter by writing to the Board on March 7, 2008 to say that it was "threatening and harassing", among other things.

[25] I next turn to the evidence as it relates to the bargaining agent's policy about complaints by members to outside bodies.

[26] The bargaining agent wrote to the complainant on April 9, 2008. That letter included a copy of a policy ". . . recently adopted by the Board of Directors, that concerns members who take proceedings against the Professional Institute to outside

bodies." The policy is titled *Policy Related to Members and Complaints to Outside Bodies*. The letter included a copy of the policy and I reproduce it as follows:

> ***1. INTRODUCTION***
>
> *The Professional Institute of the Public Service of Canada in its By-Laws and Policies provides processes for:*
>
> *1) members to file complaints against other members;*
>
> *2) the resolution of disputes between and among members: and*
>
> *3) the imposition of disciplinary measure in cases where members are found to have conducted themselves in a manner which may in any way adversely affect the interests or reputation, or restricts the activities of the Institute.*
>
> *These internal procedures provide for a fair and reasonable approach to dealing with some of the difficult issues that inevitably arise between and among members of a large and diverse organization such as the Institute.*
>
> *It is perhaps also inevitable that there will be some cases that do not end with the internal process. Some members do seek recourse to outside processes to resolve issues, when they are not satisfied with the outcome of the internal procedures.*
>
> *This policy is intended to address the difficult issues that arise when members take what are initially internal matters to outside processes.*
>
> ***2. OUTSIDE PROCESSES OR PROCEEDINGS***
>
> *This policy will apply if a member refers a matter that has been or ought to have been considered by the PIPSC internal procedures to any outside process. For the purpose of this policy, outside processes or proceedings means, but is not limited to, recourse to:*
>
> - *the Supreme Court of Canada;*
> - *the Federal Court of Appeal;*
> - *the Federal Court;*
> - *the Court of Appeal of any Province or Territory;*
> - *the Superior Court of any Province or Territory;*
> - *any Provincial or Territorial Court;*
> - *the Public Service Labour Relations Board;*

- *any other federal board or tribunal;*
- *any Provincial or Territorial board or tribunal; or*
- *any other non-PIPSC decision-making body.*

This policy will not necessarily apply if PIPSC and the member or members voluntarily and jointly agree to refer a matter in dispute to an outside process. However, for such a referral to be effective, there must be a joint memorandum of referral signed by the member or members and duly authorized officers of the Institute.

3. POLICY

(1) Where a member, or members, refers a matter which has been or ought to have been referred to the Institute's internal procedure to an outside process or proceeding for consideration, that member or those members shall automatically be temporarily suspended from exercising the functions and duties of any elected or appointed office or position that they may hold with the Institute. The temporary suspension shall cease once the outside procedures have been finally terminated for any reason.

(2) It is understood that it is inconsistent with the duty of loyalty to the Institute for any member of the Board of Directors or of any other decision-making body of the Institute, whether national, regional, local, of a group, of a sub-group, of a branch or occupying an appointed position, to represent, or participate in any way in support of, a member or members in any outside process or proceedings against the Institute. If any member of the described decision-making bodies or occupying an appointed position does in fact represent or participate in support of a member or members in an outside process or proceeding, he or she shall automatically be deemed to have resigned from all of his or her elected or appointed positions.

4. EXCEPTION

Paragraph 3.(2) of this policy will not apply if a member of the Board of Directors or of any other decision-making body of the Institute is called upon to testify in an outside process or proceeding, pursuant to a duly issued summons or subpoena.

Approved by BOD
March 19, 2008

[Emphasis in the original]

[27] The bargaining agent provided evidence about the policy's objectives and this is discussed in detail below. In summary, the concern was that, with the coming into force of section 188 of the *Act*, it is now possible for members to hold office with the bargaining agent and, at the same time, be involved in a complaint against it. This situation creates a conflict of interest and raises valid questions about the duty of fidelity of elected officials, according to the bargaining agent.

[28] The policy was first discussed within the bargaining agent in a closed session of the Executive Committee on February 14, 2008. It then came before a meeting of the Board of Directors on February 21 and 22, 2008, where a draft policy was discussed. The minutes of that meeting include the following:

. . .

> *Since the new* PSLRA *was introduced, there have been two complaints made to the PSLRB against the Institute. In one instance, the member filing the complaint has been suspended. In the other instance, the member has not. This proposed policy deals with the situation whereby someone elected, appointed or nominated to a formal Institute function who takes some action in an outside tribunal or process against the Institute should be removed from office until such a time as the proceedings have been held and the conclusions have been reached. This proposed policy is to be discussed further at the next Board meeting and will then be assigned to BLPC for the drafting of policy wording.*
>
> *Action: BOD/J. Gagnon*

. . .

[29] On behalf of the bargaining agent, David Gray who is a vice-president of the bargaining agent, recalled in his evidence that the policy was also discussed by the By-law Committee and perhaps by other people within the organization, although there is no written record of those discussions. The policy was passed by the Board of Directors on March 19, 2008 and the following is recorded in the minutes of that meeting:

. . .

> *The Institute's General Counsel joined the Board for this part of the discussion. The draft policy was presented to the Board for consideration and approval. The intent of this new policy is to shield the Institute when someone is challenging the Institute in an outside process. It seems to be common sense*

> *that an individual should not be representing Institute members in an official and/or elected capacity when engaged in a complaint process against the Institute to an outside body. This is not a disciplinary type policy.*
>
> *Moved and seconded that the Board of Directors approve the proposed policy, adding a statement with respect to being subpoenaed to be a witness.*
>
> *Clarification was sought on a situation whereby one would be called to bear witness and the testimony given would be in support of the person's case. It was clarified that if someone is called to bear witness or give testimony, one would be expected to tell the truth and provide factual statements. Being a witness in a case is different from doing something in support of the case. However, one would want to avoid discussing the matter with the person concerned.*
>
> *It was noted that this distinction should be clearly made in the policy. The wording should also make the distinction between being subpoenaed to a hearing, which is mandatory and doing so voluntarily. More parameters (examples) should be added around the "communication" limitations ("in support of"). This would also apply at the staff level. There is an understanding at the staff level that there is a process in place to deal with such circumstances.*
>
> *If approved, this policy will apply immediately, therefore, there will be follow-up action in current cases where the Institute is being challenged in an outside process. The member(s) would be temporarily suspended from exercising the functions and duties until the case is resolved. During the vacancy the constituent body executives will need to make a determination whether or not to fill the position based on their respective constitution.*
>
> . . .

[30] There is a second version of the policy but with the same dates as the version described above. Despite the same date, it is clear that it was subsequent in time to the first version and Mr. Gray described it as arising from concerns of the membership. The primary difference between the two versions was that, under subsection 3(2), an official would be "temporarily suspended" under the latest policy, instead of "deemed to have resigned" in the original policy.

[31] The policy has been controversial within the bargaining agent. James Thatcher has held and continues to hold, various elected offices within the bargaining agent and he was one of the people who received a copy of the July 1, 2007 email from the

complainant. In his evidence, Mr. Thatcher raised issues about whether the policy was consistent with By-law 24 and temporary suspensions in that by-law. He was also concerned about the application of the By-law to members such as the complainant who had made an application prior to the effective date of the By-law. In his evidence he expressed concern that the policy may be a violation of section 188 of the *Act*. Mr. Thatcher and others have raised these issues at the regional level, ultimately resulting in a resolution being presented to the Board of Directors. They seek the rescission of the policy but they have so far been unsuccessful. A resolution was presented at the Annual General Meeting in November 2008, but it was tabled.

[32] The complainant objects, in strong terms, to the bargaining agent's policy and the effect that it has had on her activities as an elected official. On April 11, 2008, her representative wrote to the Board and alleged that the bargaining agent was "retaliating" against the complainant and this was contrary to subparagraph 188(*e*)(ii) of the *Act*. Ultimately, this was considered to be a separate complaint but it was joined with the first complaint for the purpose of a hearing and decision. The complainant also sought an interim decision from the Board to reinstate her in her elected positions, among other things. In a decision dated July 4, 2008, the Board denied the complainant's application for interim relief.

[33] Even though the complainant was suspended from holding office, she nonetheless attended a number of meetings in April 2008. The bargaining agent confirmed, at that time, that her membership rights continued, including the right to attend and speak at meetings, despite the suspension from elected office. She could not, however, vote. In her evidence, the complainant described being "shocked" and "angry" with the way she was treated at these meetings; ". . . I thought this policy is so wrong, it scares members from using the tools available to them." She attended the meetings to ". . . fulfill my end of the deal. . ." because she had been elected by the members. She also testified that she ". . . did not know what the letter meant" and that she ". . . did not imagine I could not attend as a delegate."

[34] For its part, the bargaining agent anticipated some difficulties at the meetings and an email was sent from the president's executive assistant to officials in the B.C. and Yukon Region. It advised that the complainant could not be considered as a delegate to the B.C. and Yukon Regional Council but there was nothing to prevent her attending the meetings as a member. Part of the email reads as follows:

. . .

> *3. Attendance at the Branch Sub-Group Executive Meetings – There is nothing to prevent regular members from attending these meetings. In this instance, the member is to cover their own expenses; the individual is there as an observer only. Should the person be disruptive, the Chair can ask the member to leave. Should the meeting go into 'Closed Session' you then ask the individual to leave the room. FYI, the practice at the Board has been that a member would first seek permission from the Chair (Office of the President). We then inform the individual of the acceptance of the Chair, the possibility that they could be asked to leave the room if discussion goes into 'Closed Session', and we usually extend an invitation to remain for lunch with the Board.*

. . .

[35] In her evidence, the complainant described her reaction to the bargaining agent's actions as being "furious and hurt" because she was being ". . . treated like some sort of criminal."

[36] There is something of a dispute about what actually happened at these meetings. According to the complainant, she was essentially shunned, she was not allowed to participate and she was refused reimbursement of meals like everyone else. On the other hand, Mr. Gray had been asked to attend the meetings to assist the local branch ". . . in a very difficult situation." According to him, the complainant insisted on participating in the meetings as an executive member and she had to be told that she was not an executive member. At the meeting, the complainant went further in her abuse about the previous election and she was carrying on her ". . . ongoing saga about who should apologize." Mr. Gray denied that the complainant was simply being passionate on behalf of her members and Mr. Burns held the same view.

IV. Procedural and other issues

[37] As can perhaps be seen from the background set out above, many of the issues in these complaints are contentious and highly charged.

[38] There were numerous times when I had to intervene in these proceedings. The complainant was represented by lay-counsel who is also her spouse and considerable latitude was given to them to put in their evidence and examine the bargaining agent's evidence. I denied a number of objections from the bargaining agent on issues of relevance and repetition. Nonetheless, on a number of occasions I also directed the

complainant's representative to move on during his cross-examination when, for example, he insisted on asking witnesses more than once to agree with issues of argument instead of evidence. On some occasions, I had to ask the complainant's representative to be calm and less aggressive. At other times, I cautioned him that it was not appropriate to use extreme terms such as "perjury" when a witness disagreed with him or when the witness simply did not remember what had happened.

[39] A number of procedural issues arose during the hearing and I record some of those here.

A. Disclosure

[40] The parties agreed during the hearing that there were no previous decisions from the Board under section 188 of the *Act* and they indicated that some direction was being sought about its interpretation. For this reason, I concluded that some latitude was required in the admissibility of evidence to ensure that the record was sufficient to address all potential issues. This caused some difficulties for both parties and I am obliged to them for their patience. After the completion of argument, the Board issued two decisions under section 188: *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 58 ("*Veillette* 1"), and *Veillette v. Professional Institute of the Public Service of Canada and Rogers*, 2009 PSLRB 64 ("*Veillette* 2"). In both decisions, the Board allowed the complaints in part.

[41] Throughout these proceedings, the complainant and her representative have been very concerned about obtaining disclosure of documents from the bargaining agent. This issue has been the subject of voluminous correspondence and more than one pre-hearing conference. In the end, a large number of documents were disclosed to the complainant, although she describes that disclosure as "very late." In some cases disputes about disclosure were resolved between the parties, but in many cases, the Board's intervention was required, before and during the hearing of the evidence.

[42] For example, the complainant sought information about the development of the bargaining agent's policy on applications to outside bodies, specifically the minutes of meetings of the Executive Committee and the Board of Directors. However, the bargaining agent declined to provide information about closed sessions of the Board of Directors or the Executive Committee. They relied on two reasons: first, the bargaining agent submitted that the by-laws prevented the disclosure of minutes from closed

sessions of meetings of the bargaining agent. A question arose whether an order for disclosure under the *Act* would prevail over the by-laws. Second, the bargaining agent asserted privilege as a result of legal counsel being at closed sessions of various meetings. Nonetheless, the bargaining agent disclosed a large number of documents.

[43] At the beginning of the hearing, the complainant accepted that the documents that had been disclosed by the bargaining agent up to that time were sufficient. Therefore, there was no need to decide whether the *Act* prevailed over the by-laws with regards to the minutes of closed sessions and whether the presence of legal counsel made those minutes privileged or otherwise confidential.

[44] However, the issue arose again a number of times during the evidence of numerous witnesses. For example, the complainant insisted at various times during the hearing that the minutes disclosed by the bargaining agent were "doctored", primarily because they were inconsistent with other evidence. In some cases, this same allegation was made because the documents did not confirm the complainant's version of events. On another occasion, the complainant's representative alleged that a witness "perjured" himself because he did not accept the representative's assertion of a certain fact. No evidence was provided to support these assertions, and I cautioned against making extreme allegations without any foundation. On the other hand, on numerous occasions the complainant, through her representative, alleged that documents should have been disclosed because they related to a "penalty" or "discipline" as described in section 188 of the *Act*. In general, I required the complainant to provide particulars for these submissions, and in the end, a number of internal documents from the bargaining agent were admitted in evidence, including minutes from Executive Committee meetings.

[45] On the hearing day of May 5, 2009, there was another dispute about disclosure and I repeated my direction to the bargaining agent that they disclose any documents that may be relevant to the issues in the complaints before me. I emphasized that disclosure was a different process than admissibility and that whether disclosed documents are, in fact, admissible in evidence is a separate issue. Counsel for the bargaining agent made some inquiries and subsequently advised that more documents should have been disclosed. The explanation given for the failure of disclosure was that there were many people involved in many emails and that it was not possible to search every computer. The complainant considered the existence of new documents

as a violation of my pre-hearing direction of disclosure of all documents and she alleged, through her representative, that unnamed officials were being told by other unnamed officials not to disclose documents. There was no evidence to support that assertion. However, I nonetheless expressed concern about the late disclosure by the bargaining agent. Additionally, I commented that it was perhaps an unavoidable aspect of a case such as this because it involves literally hundreds of emails and other documents that can turn up as the evidence unfolds.

[46] As well, it turned out that the complainant had not disclosed all of the documents in her possession, and I directed her to make that disclosure. I commented that both parties were making the same criticism about each other on the issue of disclosure. At another point, because of the large number of documents disclosed by the bargaining agent there was a dispute about whether the complainant had actually received them. This turned out to be an issue of the complainant's ability to manage the large number of documents rather than any problem of disclosure by the bargaining agent. During another exchange, the complainant's representative stated that they were considering other legal options, including an application in court. At that news, the bargaining agent became wary that the complainant was primarily seeking documents to prepare for that litigation and they alleged an abuse of process by the complainant. For some specific documents, I agreed with the bargaining agent to the extent that the complainant's requests for information were not related to any issues before me. Moreover, there is apparently another complaint before the Board, perhaps involving different parties, and I ruled that I did not have authority to decide that complaint or to order disclosure of documents related to it.

[47] The new documents were disclosed and some of these became part of the record. While these documents had some relevance to the issues in these complaints, none were significant enough to recall witnesses or otherwise change the proceedings. I had previously raised the issue of whether the late disclosure warranted an adjournment but I subsequently concluded that was not necessary. Also, at that point, neither party was interested in another adjournment.

[48] The issue of disclosure of records from the Board of Directors and the Executive Committee was finally resolved when the complainant acknowledged through her representative that there were no more minutes of internal meetings of the bargaining agent available because there had been no meetings other than what was in the

evidence. As the representative for the complainant put it, disclosure was a ". . . dead issue because no meetings had occurred."

B. Hearing dates

[49] After the hearing's adjournment on October 31, 2008, there was a discussion of further hearing dates. The Board's letter of November 26, 2008, summarizes a dispute over the future dates and the complainant's allegation of "prejudice" against me as follows:

> . . .
>
> *A hearing date of June 23, 2008, was scheduled for 561-34-202. The respondent requested a postponement of the hearing, which the complainant did not initially oppose, and the hearing was rescheduled to be heard October 27-30, 2008.*
>
> . . .
>
> *The Board regularly schedules these type of matters for 3 to 4 days. However, following the hearing, the Board Member advised that continuation dates were required as the parties were no able to complete their evidence or begin their argument in the four days allotted* [October 28 to 31, 2008].
>
> *The current situation is that the parties estimate that at least three more hearing days are required. While the Board is currently preparing the hearing schedules for April and May, 2009, dates for March, 2009, were proposed to the parties based on the Board Member's availability. The respondent indicated it was unavailable for the proposed March dates, but provided its availability for April and May 2009. After confirming Mr. Steeves' availability, we scheduled the matters for April 27-30, 2009, which were the earliest dates for which the respondent had indicated availability. The complainant's representative advised that the complainant was not available for those dates and they were removed from the schedule.*
>
> *At this point, the parties have been asked to provide their availability for May, 2009. The respondent has provided its availability and we are awaiting confirmation from the complainant.*
>
> *The complainant has asked for a ruling on the prejudicial effect caused to his client by the delay in scheduling a continuation of the hearing. The Board is not indifferent to such concerns, and it does its utmost to schedule matters as*

> *expeditiously as possible. However, the availability of the parties and the Board Member cannot be ordered. A ruling would serve no practical purpose. The Board's Registry is already attempting to find a date for the hearing suitable for all, and has been attempting to do so since the adjournment in October. In the circumstances, there is nothing more the Board can do. Therefore, no ruling will be made on the delay.*

[50] In the end, the hearing dates of May 5 to 7, 2009 were set. The complainant continued to object to the hearing dates, in an email to the Board dated November 26, 2008, which reads as follows:

. . .

> *According to your letter, you indicated that I did not initially oppose the postponement of the June 23, 2008 hearing. However, you left out the fact that after I discovered that Mr. Grenville-Wood* [General Counsel for the bargaining agent] *had lied on his disclosure of June 6, 2008, I objected to the postponement and the Board member refused my objection. I question his reasoning for the postponement including the fact that Granville-Wood presence was vital for PIPSC at the hearing. At the October 27 hearing, Mr. Granville-Wood missed 2,5 days of the 4 day hearing and Ms. Roy represented PIPSC. Clearly Mr. Granville-Wood is not vital and the reasons for the June 23, 2008 postponement request by PIPSC were questionable. I would like these facts to also be entered in the final decision.*

. . .

The reason Mr. Grenville-Wood was not able to attend all the hearing dates in October 2008 was as a result of a medical issue that he explained on the record. The complainant has filed a complaint about Mr. Grenville-Wood with the law society alleging misconduct by him in this case.

[51] In the end, hearing dates of May 5 to 7, 2009 were set; evidence and argument were completed on those dates. At the request of the complainant, I permitted the parties to provide further submissions on the two *Veillette* decisions issued by the Board after completion of the arguments in this case. Those submissions are dated May 22 and June 1, 17 and 25, 2009.

C. Parties to the complainants

[52] As a final procedural matter, the November 2007 complaint named the late Ms. Demers as a co-respondent in the first complaint to the Board, along with the bargaining agent itself. While Ms. Demers was the person involved in a number of exchanges with the complainant, I cannot find that she was acting in any capacity other than her official duties as president. Therefore, I direct that Ms. Demers be removed as a co-respondent in this complaint.

V. Decisions and reasons

[53] As mentioned above, there are two complaints. The first began as a dispute over a regional election in 2007, and the second relates to the bargaining agent's policy about complaints by members to outside bodies about internal issues. There is also a jurisdictional issue as a result of the bargaining agent's preliminary application objecting to my jurisdiction to decide all of the concerns raised by the complainant.

[54] Both complaints are made under section 188 of the *Act*, specifically paragraph 188(*c*) and subparagraph 188(*e*)(ii). I set out section 188 in its entirety as follows:

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> (a) *except with the consent of the employer, attempt, at an employee's place of employment during the employee's working hours, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization;*
>
> (b) *expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*
>
> (c) *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;*
>
> (d) *expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or having refused to perform an act that is contrary to Part 2; or*

> (e) *discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> *(i) testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2,*
>
> *(ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iii) exercised any right under this Part or Part 2.*

[55] I will first consider the bargaining agent's submission on my jurisdiction under section 188 of the *Act* and then the two complaints.

A. Jurisdiction

[56] At the beginning of the hearing, the bargaining agent raised a preliminary issue. According to its lengthy submission, I am without jurisdiction to hear the complaints because they involve issues that are internal to the bargaining agent. The complainant disagrees and submits that I have very broad authority to inquire into and make orders about the internal affairs of the bargaining agent.

[57] In summary, the bargaining agent's submission is that there was no "disciplinary action," "penalty" or discrimination within the meaning of paragraphs 188(*c*) and (*e*). Further, the complainant's membership status was unaffected, there was no violation of the *Act* and there was no intimidation or coercion within the meaning of paragraph 188(*e*) of the *Act*. I reserved my decision on the jurisdictional issues raised by the bargaining agent in order to hear evidence relating to those issues.

[58] Prior to the existence of section 188 of the *Act*, the Board's authority over the internal affairs of bargaining agents was generally limited to adjudicating issues arising from their duty to fairly represent employees in the bargaining unit. The specific elements of this duty included consideration of whether a bargaining agent's actions were arbitrary or discriminatory or made in bad faith. This "duty of fair representation" remains in the *Act*, in section 187. The Board's general approach has been consistent with the approaches in other jurisdictions in Canada that section 187 (and its predecessors) does not confer on the Board the authority to regulate the

internal affairs of a bargaining agent unless its actions affect the employment relationship (*St. James v. Canada Employment and Immigration Union Component (P.S.A.C.)*, PSSRB File No. 100-1 (19920331), at pages 5 and 6). A member of a bargaining agent may also have rights of membership under common law and it may be that those matters will continue to be for the courts to decide (see, for example, *Hibbard v. Public Service Alliance of Canada*, PSSRB File No. 161-02-136 (19760521), at para 16).

[59] Section 188 is a relatively recent addition to the *Act* and it came into force on April 1, 2005. The parties agreed that it introduces a new level of jurisdiction for the Board, although they disagree as to the extent of that jurisdiction. The bargaining agent, at least, has presented evidence and arguments with the understanding and expectation that some new interpretive issues will arise in this case. However, as mentioned above, after the conclusion of arguments, the Board issued the two *Veillette* decisions under section 188; both involved the same bargaining agent, and one decision involved the same policy about applications to outside bodies.

[60] The *Canada Labour Code* R.S.C. 1985, c. L-2 ("the *Code*"), has for some time contained a provision that is in substance the same as section 188 of the *Act* although it differs in some respects; that was section 185 of the *Code* and it is now section 95 of the *Code*. The former Canada Labour Relations Board ("the CLRB," now the Canada Industrial Relations Board) has previously discussed those provisions, and its comments are useful for understanding the general scope of section 188 of the *Act*. In *Solly v. Communications Workers of Canada, Local 49, and Communications Workers of Canada, National Executive*, [1982] 2 Can LRBR 245, the CLRB stated as follows at page 15:

> *In administering and interpreting sections 185(f) and (g) the Board must start from some basic premises. First, the sections are intended to protect and advance individual rights against the previously unfettered authority of the union organization. Second, they do not abolish the right of the union to expel, suspend or discipline members or deny membership to non members. . . .*
>
> *The legislation recognizes unions must have institutional interests that may be advanced if they are to function as effective collective bargaining agents and democratic organizations. . . Parliament does not and cannot ensure union members participate meaningfully in their union and its affairs . . . All it can do is to foster a climate where*

> *participation is available to those who wish it. The final decision about the acceptability of candidates for membership is left to be fashioned by the union which is only restricted from certain discriminatory conduct. One of the restraints on the union is sections 185(f) and (g).*

[61] I also agree with another decision under the *Code* that pointed out the existence of section 185 of the *Code* does not mean that the CLRB is a final appeal for the internal decisions made by a bargaining agent (*James Carbin v. International Association of Machinists and Aerospace Workers* (1984) 59 di 109). In my view, that proposition applies to section 188 of the *Act* as well. That is, the Board's role under paragraph 188(*c*) is to ensure that the bargaining agent's standards of discipline are free from discriminatory action. Similarly, the role of the Board under paragraph 188(*e*) is twofold. First, it is to ensure that there is no discrimination against an employee with respect to membership in an employee organization and, second, to enforce the prohibition against intimidation, coercion or the imposition of a financial "or other penalty" because a person has filed an application or complaint under Part 1 of the *Act* or a grievance under Part 2 of the *Act*.

[62] Those provisions raise specific issues under the *Act* and they do not authorize the Board to act as the final arbitrator of all internal disputes within a bargaining agent. They do not, for example, authorize the Board to decide the scope of offences that may be the subject of discipline within the bargaining agent or that may deny membership in the bargaining agent (*Fred J. Solly*; cited in *Beaudet-Fortin v. Canadian Union of Postal Workers* (1997) 105 di 98, at para 86). Simply put, it is not for the Board to say what is a legitimate internal policy or rule or by-law of a bargaining agent except in narrow circumstances. These circumstances include where the policy, rule or by-law is itself discriminatory or its application has discriminatory consequences. Further, the *Act* prohibits intimidation or coercion because a person has made an application, complaint or grievance under Parts 1 and 2 of the *Act*.

[63] This approach is generally consistent with *Veillette* 1 and the following comment in that decision about the Board's authority under paragraph 188(*c*) and section 185 of the *Act*:

. . .

> ***27** . . . Those provisions were new law as of April 1, 2005, resulting from reforms to the* Public Service Staff Relations

> Act. *They are precise. The Board may review the discipline imposed on a member of a bargaining agent to decide whether it was discriminatory, which clearly includes the decision-making process that led to it. . .*
>
> . . .

[64] Implicit in the above comments about section 188 of the *Act* is that there are some aspects of internal bargaining agent affairs that are subject to review by the Board, under section 188. Again, this is as a result of the 2005 amendments to the *Act*, including the addition of section 188. It follows that, while there may have been more merit in the bargaining agent's submission prior to 2005, the Board now has jurisdiction over some internal affairs. As will be described in detail below, I have decided that some parts of the two complaints before me are properly under paragraphs 188(*c*) and (*e*). I have also concluded that other issues raised by the complaints are not properly matters to be adjudicated under these provisions. Of necessity, those conclusions relate to the circumstances of the two complaints before me and future complaints may well raise other unanticipated issues.

[65] The result is that the preliminary application by the bargaining agent that I am without jurisdiction to hear the two complaints is denied. Again, the particulars of this ruling are below.

B. <u>The first complaint</u>

[66] The first complaint involves the 2007 election for the B.C. and Yukon Regional Council and paragraph 188(*c*) of the *Act*. I set out that provision again:

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .
>
> (c) *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;*

[67] It will be recalled that there was a concern about whether the B.C. and Yukon Regional Council had to have representation from Victoria and Ms. Ramsay was

deemed elected to ensure there was such representation, even though some other candidates received more votes. Then it was decided that was not necessary, and Ms. Ramsay resigned from her deemed elected position.

[68] The evidence is clear that the complainant was part of a group who took exception to the decision to deem Ms. Ramsay as elected. Of course, they are entitled to take that position, individually and as a group, but unfortunately, things became very personal. As mentioned above, the complainant accepts that she wrote the email of July 1, 2007. For convenience, I set out again the critical part of that message as follows:

. . .

> *. . . and finally, it is only ethical that the lower placed candidate steps aside until this issue is resolved. By stepping aside, this candidate would show respect for our Constitution and By-laws and allow due process to take effect, clearly showing higher moral ground when none of this was this person's fault. However, failure to step aside shows a lack of morals.*

. . .

[69] At the time she made this statement, and again in her evidence, the complainant denied that she was referring to Ms. Ramsay. I find that denial to be disingenuous on her part. Everyone knew the "lower placed candidate" was Ms. Ramsay and everyone knew that the dispute was about whether she should step down or not. I similarly find that, contrary to the complainant's evidence, the references to "higher moral ground" and "lack of morals" were judgmental statements about Ms. Ramsay. Finally, it follows that I do not accept the complainant's explanation in her evidence that she was really "paying [Ms. Ramsay] a compliment." Apart from being inconsistent with the complainant's assertion that the statement was not about Ms. Ramsay, that explanation is not reflected at all in the language that was used.

[70] Following the email, events proceeded apace. Ms. Ramsay took exception to the complainant's statement and complained to the bargaining agent that the complainant had harassed her. Mediation was not successful, the Executive Committee upheld Ms. Ramsay's complaint and then told the complainant on September 12, 2007, that "passing judgement on a person's ethics and morals in an email sent to forty-seven (47) people is unacceptable and in itself poor judgement." The Executive

Committee, speaking through Ms. Demers, recommended that the complainant apologize to Ms. Ramsay. Informal resolution was available, but if no apology was made, then the Executive Committee would apologize to Ms. Ramsay "on your [the complainant's] behalf." The complainant's response to this was to file her own internal complaint against Ms. Demers on September 14, 2007, alleging "partisan politics" and bias. She also appealed the Executive Committee's decision of September 12, 2007 to the Board of Directors. These applications by the complainant were not successful.

[71] The complainant takes considerable exception to the procedures used by the bargaining agent in dealing with her complaint against Ms. Demers and the complaint of Ms. Ramsay against the complainant. The primary focus of the complainant is that the bargaining agent did not follow its own procedures. In her view, I should apply the by-laws and policies of the bargaining agent strictly and find, for example, that her situation should have been adjudicated under By-law 24. This is because By-law 24 is about the discipline of members, she was disciplined by the bargaining agent and the procedures to that discipline are set out in By-law 24. For its part, the bargaining agent acknowledges that By-law 24 is for disciplining members but it is rarely used. It is submitted that the bargaining agent did not have to follow By-law 24 because the complainant was not disciplined. Instead, there was a minor dispute between two members the Executive Committee dealt with it in an informal way, and that was the end of it.

[72] Paragraph 188(*c*) of the *Act* prohibits taking disciplinary action against an employee or imposing any form of penalty by applying "standards of discipline" in a discriminatory manner. It may be that the complainant was drawn to By-law 24 and the discipline of members because she noticed the reference to "standards of discipline" in paragraph 188(*c*). That is logical, but there is no requirement under the *Act* for a bargaining agent to be restricted to disciplinary responses to internal disputes. Rather, given that bargaining agents are in the business of resolving most disputes on behalf of their members, there is something of an expectation that informal and non-disciplinary resolutions would be used. On the other hand, I do not mean to say that paragraph 188(*c*) should be read narrowly so that only matters described or labelled as "disciplinary" are to be considered under that provision. In my view, a policy that is not named or associated with discipline could be a "disciplinary action" under paragraph 188(*c*) and a bargaining agent cannot avoid scrutiny under that

provision by the device of simply naming a practice non-disciplinary. I hasten to point out that, in this case, the bargaining agent does not take that position.

[73] It is clear that Parliament intended the Board to intervene when a bargaining agent applies disciplinary standards in a discriminatory manner. I also accept that this has a procedural aspect so that disciplinary procedures may be applied in a discriminatory manner. However, I am unable to find in section 188 the authority for the Board to adjudicate disputes about the interpretation and application of a bargaining agent's internal by-laws (or policies) beyond the issue of discrimination. Similarly, I cannot find there is authority for the Board to adjudicate whether a by-law was deficient in some way, or whether a by-law is required in a specific area. In my view, if there is a remedy for those kind of disputes they lie elsewhere. Nor can I find in paragraph 188(*c*) of the *Act* the authority to go beyond the object of that provision to prohibit discrimination with respect to membership in an employee organization or the other prohibitions in that provision.

[74] In this context, I cannot find that paragraph 188(*c*) somehow authorizes me to decide that the bargaining agent was incorrect in applying a non-disciplinary and informal approach to Ms. Ramsay's complaint and to the complainant's complaint against Ms. Demers. Mr. Burns testified that there is "a significant threshold" before a matter becomes disciplinary and By-law 24 applies. The bargaining agent is entitled to make that judgment, and I cannot find that it involves any discrimination.

[75] I also note that the bargaining agent has a policy, set out above, titled *Complaints by Institute Members against Members Holding Office or Appointed Positions* and that Mr. Gilles testified that that policy was used for the complaint by Ms. Ramsay against the complainant. That policy specifically refers to "informal resolution" as one of the procedures to be applied to these kinds of complaints. I note the decision in *Veillette* 1, where the Board Member found that when the bargaining agent bypassed By-law 24 it was a factor in finding there had been a violation of paragraph 188(*c*) of the *Act*. That was a case where there had been an altercation between two bargaining agent officials and one of them was suspended for two years from his duties. The suspension was found to be contrary to paragraph 188(*c*) because the bargaining agent had not followed By-law 24. However, the facts of that case involved the bargaining agent proceeding from an investigator's report to a decision about the suspension without the application of any policy or the by-law. In the case before me, the

bargaining agent followed a policy, and the informal process used was consistent with that policy.

[76] I agree that some process that meets the requirements of natural justice is required, but I cannot find that it is contrary to paragraph 188(*c*) of the *Act* for the bargaining agent in this case to choose one process over another. I also note that a sanction against an official for assaulting and injuring another official, as in *Veillette* 2, is clearly in the category of discipline. As it turns out, the complainant in the case before me insists that her conduct in sending the July 1, 2007 email was disciplinary, even though she denies that the email was directed at Ms. Ramsay. On the other hand, and perhaps counter-intuitively, the bargaining agent decided that her conduct was not worthy of discipline. Regardless, it has to be said that the email was of a different character than assaulting someone. Not all culpable behaviour is disciplinary, and I cannot find that it was somehow contrary to paragraph 188(*c*) for the bargaining to treat the email as non-disciplinary and apply a non-disciplinary process.

[77] With this in mind, the issue is not whether the interpretation or application of a by-law or policy was deficient generally or whether the by-law or policy was itself deficient. Instead, the issue is whether the evidence supports the elements set out in paragraph 188(*c*) of the *Act*. I agree with the bargaining agent that there is no violation of section 188 in the way it applied their by-laws and policies as they arise in the first complaint before me. I cannot find anything contrary to section 188 in offering the opportunity of informal resolution of a dispute under its validly enacted policy and not proceeding by way of the disciplinary proceedings under By-law 24. I also agree that the Board should be reluctant to apply a standard that would negate the informality provided for in the constitution and by-laws of a bargaining agent (*Ronald Wheadon et al. v. Seafarers' International Union of Canada et al.* (1983), 54 di 134, at page 150; cited in *Beaudet-Fortin* at para 81). Finally, I note that the informality of the bargaining agent's processes operated, on at least one occasion, to the benefit of the complainant when she was given the opportunity to appeal a decision of the Executive Committee that was not provided for in the policies or by-laws. The complainant took this appeal seriously, filed a submission on October 22, 2007, and the evidence is that the bargaining agent seriously considered her appeal, although they denied it in the end.

[78] This is an opportune time to address two factual issues raised by the complainant.

[79] It is true that the complainant was not given a copy of Ms. Ramsay's complaint at the first stage of the informal resolution process. The bargaining agent acknowledges that that was not done. There is no evidence that this was done deliberately or otherwise prejudiced the complainant (other than her speculation); I find it was a result of inadvertence on the part of the bargaining agent rather than any discrimination under paragraph 188(*c*) of the *Act*. It is also the case that the complainant knew what Ms. Ramsay's complaint was about from discussions she had in the informal process used to try and resolve the complaint. There were no particular factual issues because everyone knew the complaint was about the complainant's email of July 1, 2007. In addition, the complainant provided a lengthy submission dated October 22, 2007, to the Board of Directors as part of an appeal process (appealing the decision to allow Ms. Ramsay's complaint). That document indicates that the complainant received a copy of Ms. Ramsay's complaint on October 1, 2007. The complainant had the opportunity to present her case with the benefit of having the complaint, and the bargaining agent had the opportunity to consider the issue afresh in a process that was a rehearing of the matter. If there were any procedural errors early on in the process, I conclude that they were cured by the subsequent rehearing process.

[80] Finally, I might add that I do not agree with the complainant that all levels of every process are required to provide the full panoply of procedural rights. It is widely accepted that there are different and generally fewer protections at the first level of a process; this is so precisely to encourage settlements without rigid rules. For example, the first level of a grievance procedure under a collective agreement is very informal, the procedural requirements increase as a grievance proceeds to the Board, and then they are further increased if the grievance proceeds to other levels of adjudication such as the courts. As stated in *Veillette* 1:

. . .

> ***30*** *. . . Procedural fairness is not a rigid concept. It depends on the kind of power exercised and the implications of the measure contemplated as well as the practical conditions that result from a longer proceeding. The greater the consequences, the more the proceeding should be akin to a judicial procedure.*

. . .

It follows that an informal process such as was applied to the complainant's and Ms. Ramsay's situations do not need to include the extensive and rigorous procedures of a full adversarial process, as urged by the complainant.

[81] Another factual issue raised by the complainant is the offer of mediation by the bargaining agent to resolve the complaint by Ms. Ramsay. The complainant takes great issue with the statement by Ms. Demers in the letter of September 12, 2007 that mediation failed; the letter stated the following: "I understand the mediation attempt failed. I also understand that when asked to apologize, you refused to do so." In her submission of October 22, 2007, the complainant stated as follows: "Ms. Demers had been deceitful in implying that because I refused to apologize, mediation failed." In another part of her submission, the complainant stated the following:

. . .

> *I informed David Gray that I was willing to go to mediation only if both parties were present. David Gray indicated that Sue Ramsay will not attend. Therefore, it was clear that Sue Ramsay had refused to participate in the mediation, not I.*

. . .

In her evidence, the complainant maintained this position in strong terms. She invites me to agree with this characterization and accept that it is more evidence of discrimination contrary to paragraph 188(*c*) of the *Act*.

[82] Other than pointing out that Ms. Demers' letter was an accurate description of the events and not deceitful — mediation failed, and the complainant refused to apologize — I decline the complainant's invitation. Whether mediation failed or not, and the reasons given by each party for any failure (Ms. Ramsay did not testify), is not an issue that I have any authority over. I simply cannot find anything in this dispute that is relevant to whether there has been a violation by the bargaining agent of paragraph 188(*c*) of the *Act*. Failure of mediation does not necessarily mean there was discrimination.

[83] I turn next to the primary legal issue in the first complaint. It can be stated as follows: Did the bargaining agent, by requesting an apology from the complainant for her statements in the July 1, 2007 email and then making an apology on her behalf

when she refused to make an apology, take discriminatory action against the complainant or impose "any form of penalty" on her by applying the bargaining agent's standards in a discriminatory manner? That is, the Executive Committee apologized to Ms. Ramsay because the complainant refused to do so and the complainant submits this action was either disciplinary action or the imposition of "any form of penalty" contrary to paragraph 188(*c*) of the *Act.*

[84] The analysis of this issue involves consideration of the question: what is discrimination under paragraph 188(*c*)? It may be that there is an issue about whether an apology given by the bargaining agent on behalf of the complainant is "any form of penalty." I acknowledge that this is broad language and in *Veillette* 2, the Board adopted the following definition of penalty: ". . . a sanction established or imposed by a statute or authority to suppress a prohibited act" (paragraph 32). However, as will be seen, it is not necessary to decide whether there was a "penalty" in this case.

[85] With regards to the matter of discrimination I consider this to be the hallmark of the prohibition in paragraph 188(*c*). I say this because it is not every disciplinary action or every imposition of a penalty that is prohibited; the action or penalty has to be in the context of the employee organization's standards of discipline, and the action or penalty must be taken or applied "in a discriminatory manner" to come within the prohibition in paragraph 188(*c*). The Supreme Court of Canada has provided some guidance in understanding the nature of discrimination in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. After considering different definitions under human rights legislation and previous judgments, the court commented on discrimination in the context of employment as follows:

. . .

> *48 At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are not based on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.*

> *49 What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.*
>
> . . .

[86] In the context of administrative justice and labour relations, a broad interpretation of discrimination within the bounds of the legislation is appropriate, and the Board must consider not only the ". . . result of the application of disciplinary standards but also the basis for their application and the manner in which they have been applied." Further, in *Daniel Joseph McCarthy,* [1978] 2 Can LRBR 105; cited in *Beaudet-Fortin* at paragraph 84, the following was stated:

> . . .
>
> *In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by* [human rights legislation]*; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that there is no fair and rational relationship with the decision being made . . . .*

[87] In my view, those comments can be applied to considerations of discrimination under paragraph 188(*c*) of the *Act*. The goal of preventing discrimination under that provision is inclusive and is achieved by preventing bargaining agents from excluding employees from the activities of an employee organization based on attributed rather than actual abilities. The essence of the protection is to prevent illegal, arbitrary or unreasonable barriers. On the other hand, barriers or distinctions that are legally valid and genuinely based on a rule or policy that has a fair and rational relationship to the decision being made may be valid and defensible. In some cases, the treatment of an employee will be based on a valid distinction rather than prohibited discrimination, even though the distinction has a negative impact on the employee: "[n]ot every

distinction is discriminatory." In addition, the employee has the burden to prove that there was discriminatory conduct by a bargaining agent.

[88] Applying this analysis to the facts at hand, I conclude that the bargaining agent did not discriminate against the complainant. She wrote an ill-advised and intemperate email and Ms. Ramsay filed a complaint about the email. The Executive Committee considered the complaint and decided it should be allowed. They recommended that the complainant apologize to Ms. Ramsay, but the complainant maintained the righteousness of her position and refused to apologize. Indeed, she escalated the situation further by appealing the Executive Committee's decision and filing a complaint against the president. In the end, the Executive Committee apologized on the complainant's behalf, and the apology was sent to those who had received the complainant's first email.

[89] In my view, the bargaining agent was measured and fair in its conduct of the Ms. Ramsay's complaint as well as the complainant's complaint against Ms. Demers. There was a valid reason for the decision to recommend an apology and then to make the apology itself; therefore, it was not arbitrary. It was certainly not illegal. The complainant's email about Ms. Ramsay was objectionable, and the bargaining agent was entitled to enforce a minimum level of decorum among its members. Whether that enforcement creates political backlash is not something that concerns the Board. The bargaining agent's response was a remedial one based on a reasonable and valid distinction, the distinction being that the complainant's email about another member was worthy of some non-disciplinary response. Therefore, there was no disciplinary action or imposition of any form of penalty by applying the bargaining agent's standards of discipline in a discriminatory manner.

[90] As a final matter under the first complaint, there is the letter that Ms. Demers sent to the complainant on March 3, 2008. This is a lengthy document that primarily sets out a chronology of events to that date and it is generally accurate. However, at the end of the letter, Ms. Demers stated that she was ". . . very concerned that your [the complainant's] aggressive and confrontational attitude and actions will prevent members from wanting to become involved as volunteers in the Professional Institute." The complainant takes considerable exception to that statement and others by Ms. Demers such as the following: "I cannot sit idly by and allow such negative attitudes and intimidation of members and volunteers of our union." And

"I . . . strongly suggest to you that you must change your attitude and adopt a more positive approach to helping your fellow members."

[91] I agree that Ms. Demers used hard and direct language with the complainant. I also note the environment in which these comments were made. For example, in her lengthy appeal to the Board of Directors on October 22, 2007, the complainant described Ms. Demers as being "deceitful"; she characterized Ms. Ramsay's complaint as being motivated by a "political debt" by Ms. Demers, involving a complicated plot between various officials of the bargaining agent; Ms. Demers was in breach of the rules of natural justice in her conduct of the complaint; and she and others "overstepped their authority"; and ". . . there is clear evidence that Ms. Demers has both a personal and pecuniary interest both directly and indirectly in dealing with this complaint." The complainant made allegations of a similar character in her email of September 14, 2007, when she said that Ms. Demers "intentionally violated" and "deliberately ignored" the by-laws.

[92] Overall, I point out the obvious: there was considerable personal animosity between the complainant and officials of the bargaining agent. In this context, Ms. Demers wrote her letter of March 3, 2008, requesting in direct terms that the complainant change her behaviour. I can find no objectionable or otherwise discriminatory feature of that letter. Without that, I am not authorized by the *Act* to adjudicate personal disputes such as this and implicit in this conclusion is that I make no findings in support of one person or the other. One exception to this statement is that, again, I do not accept the complainant's allegation that witnesses for the bargaining agent were "lying" when they asserted that an informal process applied instead of the disciplinary process in By-law 24.

[93] For the above reasons, I deny the complainant's first complaint.

C. <u>The second complaint</u>

[94] The second complaint relates to the bargaining agent's policy that, when a member makes an application to an outside body about an internal issue, he or she is suspended from her elected positions until the outside application is completed.

[95] There are no significant factual disputes about the application of the bargaining agent's policy against the complainant. She filed a complaint with the Board on

November 16, 2007, as contemplated by subparagraph 188(*e*)(ii) of the *Act*, and she was suspended on April 9, 2008, from her elected positions as a result of the policy.

[96] The complainant submits that the bargaining agent has acted contrary to subparagraph 188(*e*)(*ii*) of the *Act*. I set out that provision again for convenience:

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .
>
> (e) *discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> . . .
>
> *(ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> . . .

[97] The purpose of this provision is to protect persons who make an application or file a complaint to the Board and it is obviously of considerable importance. Any intimidation, coercion or "other penalty" against an applicant or complainant is objectionable on its own. As well, from a policy point of view, it is important to discourage extraneous obstacles to applications or complaints filed under the *Act*. The objective of this type of provision is to ensure that rights under the *Act* are ". . . real and not merely illusionary and [not] capable of being frustrated by acts designed to discourage their exercise." It is also intended to ". . . encourage honest and candid testimony . . . " (*Latrémouille v. Union des Artistes*, *50 di 197*; citing *Grain Workers Union, Local 333, C.L.C.* (1979), 34 di 543, at pages 845 and 846).

[98] I will set out again the significant part of the bargaining agent's policy with regards to applications to outside bodies:

> . . .
>
> *It is understood that it is inconsistent with the duty of loyalty to the Institute for any member of the Board of Directors or of any other decision-making body of the Institute, whether national, regional, local, of a group, of a sub-group, of a branch or occupying an appointed position, to represent, or participate in any way in support of, a member or members*

> *in any outside process or proceedings against the Institute. If any member of the described decision-making bodies or occupying an appointed position does in fact represent or participate in support of a member or members in an outside process or proceeding, he or she shall automatically be deemed to be temporarily suspended from all of his or her elected or appointed positions.*
>
> . . .

[99] Mr. Gilles and Mr. Gray discussed the bargaining agent's view of the broad objectives of this policy in their evidence. As they noted, it is true that section 188 of the *Act* creates a broader scope of the review of internal bargaining agent actions compared to the previous standard, as reflected in the duty of fair representation. The result is that it is now possible for a person to be engaged in litigation with the bargaining agent over issues such as discrimination, intimidation and coercion while at the same time holding elected office with the bargaining agent. According to Mr. Giles and Mr. Gray, there is an obvious risk of conflict of interest in these circumstances because a person cannot be representing a bargaining agent or making key decisions about the bargaining agent while at the same time being engaged in a legal dispute with it. The evidence is that there have been a small number of situations, where meetings have been disrupted within this bargaining agent because of such a conflict. All the bargaining agent's witnesses emphasized that a person's membership rights were not affected by the policy and that a person could still attend and speak at meetings. Mr. Burns testified that the policy did not say, and did not mean to say, that making an application to an outside body was wrong, only that such an application created a conflict.

[100] In *Veillette* 2, the Board recently considered this policy and the Board Member in that case concluded that a temporary suspension was included in the phrase "any form of penalty" under paragraph 188(*d*) of the *Act* and that the policy was contrary to that provision. It prohibits expulsion, suspension, disciplinary action or the imposition of any form of penalty ". . . against an employee . . . because of that employee having exercised any right . . . under Part 1 or Part 2" of the *Act*. The complainant in *Veillette* 2 was suspended from his duties within the same bargaining agent that is the respondent in the case before me. The Board Member directed the bargaining agent to amend its policy to ensure it complies with the *Act*. In the case before me the complainant relies on subparagraph 188(*e*)(ii) of the *Act*; it refers to "person" rather

than "employee" but it is otherwise similar and it includes the phrase "other form of penalty" as one of the prohibited actions.

[101] As noted above, the *Canada Labour Code* included section 185 (now section 95) and this provision is very similar to section 188 of the *Act*. The CLRB's decisions under section 185 of the *Code* are of some assistance in understanding section 188 of the *Act.* In particular, I note *Beaudet-Fortin*, *Latrémouille* and *Carbin*. These decisions are also reviewed in *Veillette* 2.

[102] In *Carbin,* the complainant was expelled from membership in the union for working for a rival union and in a manner that undermined the union's interests. The complaint was denied because the expulsion was for undermining the union's position as a bargaining agent and not because the complainant had exercised a right under the legislation. On the other hand, in *Beaudet-Fortin* the complaint was upheld because the complainant was expelled because she was exercising her legal right to change unions. Both of these decisions were decided based primarily on the equivalent of paragraph 188(*b*) of the *Act*, the prohibition against expulsion from membership in an employee organization by the discriminatory application of membership rules.

[103] In this case, the complainant's membership in the bargaining agent has not been affected by the operation of the policy about applications to outside bodies. Indeed, the policy itself and the subsequent statements of the bargaining agent confirmed that the membership of the complainant was not affected by the operation of the policy. For example, she was and is still able to attend and speak at membership meetings. Therefore, paragraph 188(*b*) of the *Act*, the provision that prohibits the expelling or suspending of unemployed membership in an employee organisation in a discriminatory manner, has no application here.

[104] In *Latrémouille*, however, the CLRB considered and applied the then subparagraph 185(*i*)(iii) of the *Code* (now subparagraph 95(*i*)(iii)). This is very similar to subparagraph 188(*e*)(ii) of the *Act*: in substance, it is essentially the same. The facts of that decision involved a member of the union who was prevented from sitting on the executive of the bargaining agent because he participated in another proceeding before the CLRB. This other proceeding involved an application, which, if successful, would have resulted in a significant change to the type of employees who were members of the union. Essentially, the complainant wanted to maintain his status as an independent contractor and he opposed his union's application for certification. The

union was a "voluntarily recognized bargaining agent" and, therefore, not certified by the CLRB. The complainant also applied to the CLRB for an order that the bargaining agent was not a union but an employer; the Board described this application as "strange."

[105] The CLRB dismissed the complaints arising from these facts. The panel began their analysis by stating the following:

. . .

> *. . . examine the specifics of each case . . . to discover the motives and circumstances behind the parties' action. It is especially important that we examine the motives and specific circumstances of a case, because we must determine, often despite appearances, that the union against which the complaint is filed was acting in a discriminatory manner or that it was acting legitimately in the defence of its own interests as an administrative entity.*

. . .

The CLRB panel found that the conflict between the complainant and the bargaining agent was essentially political in nature. There was also no evidence that the complainant had been prevented from expressing his point of view and the situation was simply that a minority of the executive disagreed with the majority. The roles and responsibilities of minorities in the membership of a union were discussed as follows again in *Latrémouille*:

. . .

> *. . . Minorities, regardless of their viewpoint, must join up with the majority, otherwise the result is anarchy. This does not mean that the minority cannot continue its fight to convince the majority to change its views. It does mean, however, that, so long as the majority does not adopt the views of the minority, its* [the majority's] *views take precedence.*

. . .

[106] The CLRB also found that the complainant's behaviour was ". . . contemptuous of the democratic institution . . ." of the executive of the bargaining agent and it was a ". . . flagrant abuse of the recourse" provided in the *Code.* Further, the executive of the bargaining agent expelled the complainant because he had taken a position contrary to

the wishes of the majority of his colleagues on the executive and not because he had participated in proceedings under the legislation.

[107] I agree with the CLRB's analysis in *Latrémouille*. A bargaining agent is acting ". . . legitimately in the defence of its own interests as an administrative entity . . ." and ". . . preserv[ing] the integrity of its administrative structure . . ." when it prevents a person who has been "contemptuous" of the democratic process of the bargaining agent from participating in the governance of the bargaining agent.

[108] Subparagraph 188(*e*)(ii) of the *Act* is aimed at the protection of people who make applications, complaints or grievances under the *Act* and it is not to be used by a minority to supplant validly enacted decisions of the majority. Officials of bargaining agents are subject to a duty of fidelity concerning their conduct. Since they are in a position of trust and responsibility, the bargaining agent is entitled to expect fidelity from them (MacNeil, Lynk, Engelman, *Trade Union Law in Canada* (Canada Law Book; October 2003), at para 6.690). It is obviously contrary to the duty of fidelity to challenge in a significant way the interests of a bargaining agent while at the same time participating in the governance and decision-making processes of the bargaining agent. Neither act is prohibited on its own, but they cannot be countenanced together.

[109] A specific example of the application of how this situation might arise is under section 94 of the *Act*. That provision permits any person claiming to represent a majority of employees in a bargaining unit to apply for a declaration that the bargaining agent represents a majority of employees in the unit. A vote is taken under section 95 and, if a majority of employees do not wish to be represented by the employee organization, the certification must be revoked under section 96. One can readily see that, if the person making the application under section 94 is also an elected official of the bargaining agent, a very difficult situation arises. Simply put, an elected member applying to the Board for the revocation of the certification, a very serious matter for all concerned.

[110] It is reasonable to expect that the bargaining agent will need to discuss the application under section 94 of the *Act* among themselves and with counsel and other advisors. I take it as self-evident that the person commencing the section 94 application should not be part of those discussions, even though he or she is an officer who was elected to be part of discussions of that magnitude. Doing so would be a breach of the official's duty of fidelity. The correct assumption is that the person

would absent himself or herself from the discussion; but the situation may be so poisoned that the person does not withdraw. The bargaining agent is then in the position of directing that the person cannot attend the meeting. Unfortunately, the intensity of the internal affairs of a bargaining agent might well result in the expelled elected official alleging in a complaint to the Board that he or she has been the victim of intimidation, coercion or an "other penalty", contrary to subparagraph 188(*e*)(ii).

[111] This is admittedly an extreme example but it assists in understanding the purpose of subparagraph 188(*e*)(ii): it is not to provide a means for persons to interfere in the internal affairs of a bargaining agent in a way that creates real harm to the legitimate and important interests of the bargaining agent. I take it as self-evident that real harm would result if a person could compel a bargaining agent to include him or her in discussions that are properly considered privileged in the sense that he or she should not be involved in them. The purpose of subparagraph 188(*e*)(ii) is to protect persons who have made an application under Part 1 or 2 of the *Act*, and this purpose is not weakened by permitting a bargaining agent to have confidential discussions about genuinely privileged matters. In fact, I am unable to see any nexus between protecting a person who makes such an application and excluding that person from meetings of the bargaining agent about the application. Moreover, as pointed out in *Latrémouillle*, provisions like subparagraph 188(*e*)(ii) are not intended to be used to advance the views of the minority over the majority or to be used to further the political agenda of one person or group in a bargaining agent. In some cases, it is democratic, fair as well as consistent with subparagraph 188(*e*)(ii) to make the difficult decision to exclude an elected official from meetings of the bargaining agent and other internal events to ensure the legitimate interests of the bargaining agent are adequately protected.

[112] I might add that the *Latrémouillle* decision uses a number of phrases in order to capture the kind of situation where it is legitimate for a bargaining agent to take action against an elected official. Some examples from that decision are the following: a bargaining agent is entitled to defend ". . . its own interests as an administrative entity . . ." put in place ". . . reasonably defensive measures to protect its own position . . . [and] recogni[ze] and enforc[e] its legitimate interests in preserving its own existence . . . ." In my view, a bargaining agent is entitled to act in its own interests before its very existence is at issue. By this, I mean that actions based on the genuine motive of preventing real harm to the legitimate and important interests of the bargaining agent are not a violation of subparagraph 188(*e*)(ii). The reasoning for this

conclusion is that limiting the ability of a bargaining agent to act only in situations involving immediate crisis would be overly restrictive; the effective operation of a bargaining agent requires the ability to manage problems before they become crises. Viewed in this light, the example I have used above of an application under section 94 justifying some restrictive action by a bargaining agent against an elected official involved in the application is, again, an extreme one. There may well be situations involving less-direct threats to the interests of a bargaining agent but its actions will nonetheless be consistent with subparagraph 188(*e*)(ii). Individual circumstances will determine those cases.

[113] Returning to the policy at issue in this case, I read it as including the ability of the bargaining agent to exclude an elected person from privileged discussions where it is not appropriate for that person to attend. For the reasons given above, it may be necessary for a person to absent himself or herself from matters that relate to his or her application to an outside body and that also relate to the legitimate operation of the bargaining agent. Moreover, if the person does not absent himself or herself, and there is a genuine risk of real harm to the bargaining agent, then the bargaining agent must be able to direct that the person be removed. Again, that is a valid and even necessary result in some circumstances.

[114] However, I note that the policy in this case also states that a member who ". . . refers a matter which has been or ought to have been referred to the Institute's internal procedure to an outside process or proceeding for consideration . . . shall automatically be temporarily suspended . . ." from office. The suspension ceases ". . . once the outside procedures have been finally terminated for any reason." There is a reference in the policy to the duty of loyalty owed by members of decision-making bodies, but it is discussed as applying to those who ". . . represent, or participate in any way in support of a member or members in any outside process or proceedings against the Institute." I presume that the intention is that the duty of loyalty owed by officials to the bargaining agent applies to both those who make the application and those who support or represent the applicants.

[115] Overall, I take the policy to be triggered by the fact of an application to an outside body. Significantly, there is no need for an actual conflict or the reasonable perception of a conflict between the application and the duty of loyalty owed by officials to the bargaining agent. That is, a conflict appears to be presumed by the

mere fact of an application or participation in the application. Further, a person is removed from all duties, not just the duties where there is a conflict between his or her position and the application.

[116] I accept that these situations can involve intense personal and philosophical interests and that an outright suspension of all duties without any qualifications is a simple way to deal with them. However, these situations are not simple. The bargaining agent has a legitimate interest in protecting its interests from the risk of real harm. On the other hand, an elected or appointed official has been given significant responsibilities by the membership and they are entitled to carry out those responsibilities. At the same time, elected officials must act in a manner that is consistent with their loyalty to the bargaining agent. To complicate things further, the mandate of an elected official may be perceived by him or her in a way that is in conflict with his or her duty of loyalty to the bargaining agent, or, as in the case at hand, the bargaining agent and the elected official may differ about how the duty of loyalty is to be exercised.

[117] While acknowledging this complexity, I am nonetheless unable to accept that all situations involving an application to an outside body require a suspension from elected office or that all duties of such a position are properly the subject of a suspension. In my view, some proportionality is required to balance the various factors at play so that the legitimate interests of the bargaining agent are protected and harmful actions of an elected person do not threaten those interests. Unfortunately, I cannot find any such balance in the policy in dispute, and I find to be overreaching in scope. The right to make an application under the *Act* is an important one and it might be said that the policy does not directly interfere with that right. However, the legal right to make an application to the Board (or another outside body) is an important one and I consider it obvious that the prospect of a temporary suspension from elected office is a significant reason not to make an application. For the reasons given above, in some cases such a suspension is justified because of the risk of real harm to the bargaining agent and because of an official's duty of fidelity to the bargaining agent. However, in my view that risk cannot be presumed simply by the fact of an application to an outside body. I find that the policy imposes "any form of penalty" on a person because it removes him or her from his or her elected position(s) for an arbitrary reason.

[118] Finally, turning to the specific situation of the complainant in this case, she was involved in a dispute with another member, Ms. Ramsay, because the complainant wrote the email of July 1, 2007. I have found, above, that the email was ill advised and intemperate and, despite the complainant's assertion to the contrary, it was intended to be critical of Ms. Ramsay. Ms. Ramsay's subsequent complaint to the bargaining agent was upheld by the Executive Committee and then a further complaint and appeal by the complainant were dismissed. She then made her complaint to the Board in November 2007 and was suspended from her elected offices in April 2008.

[119] As the bargaining agent's witnesses testified, this matter was considered by it at the time to be a minor one. That is why it applied informal processes to the situation and why the sanction against the complainant was limited to a recommendation that she apologize. She refused to apologize, there was no further sanction for that refusal and the Executive Committee apologized on her behalf. The complainant then made her first complaint to the Board in November 2007. I have found above that there is no merit in that complaint but that is not relevant to any issue for consideration under her second complaint because she is entitled by the *Act* to make an application, meritorious or not. The result is that the subject matter that gave rise to the bargaining agent's decision to suspend the complainant from all her elected duties was a dispute between her and another member and then a dispute with the president and the Board of Directors over their handling of the original dispute.

[120] The corrective action requested by the complainant in her first complaint to the Board included dismissal of Ms. Ramsay's complaint, withdrawal of the Executive Committee's decision of September 12, 2007, a "public apology" by Ms. Demers, and "Concurrence by Michele Demers that all actions taken by the complainant have been in accordance with the PIPSC By-laws and Policies and the general principles of Natural Justice." Assuming that those remedies were available to the complainant (and her complaint was successful), I am unable to find that they raise any real harm to the legitimate and important interests of the bargaining agent. This conclusion is further evidenced by the bargaining agent's decision to treat the complainant's actions as non-disciplinary and outside the by-law dealing with discipline, By-law 24. By-law 24.1 describes discipline in terms of ". . . conduct which in any way adversely affects the interests or reputation, or restricts the activities of the Institute." Since the bargaining agent decided that the complainant's actions did not meet this threshold it cannot be reasonably said that she was causing any real harm to the organization.

[121] One aspect of the facts is nonetheless troubling in the context of this issue. The complainant attended meetings after she was suspended from office under the policy described above. She was able to speak at those meetings as a member, but she was not attending in the capacity of any of her elected offices. Unfortunately, her conduct at those meetings was disruptive to the point that other people had to intervene to maintain order. The complainant disputes that she was disruptive at these meetings but I prefer the evidence from the bargaining agent's witnesses on this point. The complainant also believe that she should have been treated the same as other delegates to these meetings in terms of reimbursement for expenses and she objects to being excluded from some parts of those meetings. I appreciate that she was angry and upset that she had been suspended from her elected positions. But suspended she was, and I can only conclude that her insistence on being treated as if she had not been suspended was unreasonable and disruptive behaviour.

[122] Despite finding that the complainant's behaviour was disruptive at the April 2008 meetings, I do not find that her behaviour created real harm to the bargaining agent. In the end, the meetings proceeded, the business of the meetings was completed and the affairs of the bargaining agent continued. It should not come as a surprise to members of the labour relations community that meetings of bargaining agents can sometimes be raucous and acrimonious. In this regards, I paraphrase as follows a finding in *Veillette* 2: ". . . the complainant's behaviour was certainly annoying and created discomfort for all but it did not put the organization at risk."

[123] Finally, it is not in dispute that the bargaining agent applied its policy in April 2008, after the complainant made her complaint to the Board in November 2007. The evidence is that the bargaining agent considered not applying the policy to members who had existing applications but they rejected this approach. The March 19, 2008 minutes of the Board of Directors stated the policy was to "apply immediately." The complainant submitted that she had been individually targeted by the policy and this was further evidence of intimidation and discrimination. However, the bargaining agent's evidence is that there were other members whom they were concerned about and this view is supported by the decisions in *Veillette* 1 and *Veillette* 2. Nonetheless, I agree with the complainant that there is a degree of unfairness in this because she could only withdraw her complaint with the Board to avoid the policy's consequences; there is some force to the complainant's submission that retroactive application in these circumstances is *per se* unfair. As well, from a policy point of view,

it is difficult to understand the deterrence effect of the policy when the complainant did not have the opportunity to consider whether to make her application with the knowledge of the consequences that would flow from the policy. Apart from fairness, the issue of retroactivity of policies is a somewhat technical matter involving the interpretation of the bargaining agent's by-laws and some areas of the general law. Neither parties addressed these admittedly detailed issues in argument. Therefore, other than the comments in this paragraph on this issue, I am unable to make any firm conclusions.

[124] It follows that I find that the complainant's second complaint, dated April 11, 2008, is allowed. This conclusion is generally consistent with *Veillette* 2, bearing in mind that that decision was made under paragraph 188(*d*) of the *Act*.

D. Remedy

[125] With regards to remedy I note that paragraph 192(1)(*f*) of the *Act* is applicable. It is as follows:

> ***192.****(1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> . . .
>
> *(f) if an employee organization has failed to comply with paragraph 188(c), (d) or (e), an order requiring the employee organization to rescind any disciplinary action taken in respect of any employee affected by the failure and pay compensation in an amount that is not more than, in the Board's opinion, any financial or other penalty imposed on the employee by the employee organization.*

[126] The purpose of this provision is to provide the Board with broad remedial powers under subsection 192(1) of the *Act* and then to authorize specific orders that it considers necessary under paragraph 192(1)(*f*) for failure to comply with paragraph 188(*e*). There is no evidence of a financial penalty against the complainant by the bargaining agent.

[127] The complainant seeks a number of remedies and I refer to the ones she identified through her representative in final argument. Those include a public apology

by the bargaining agent ". . . in every media form they have access to", costs for payment of a consultant to represent her during and for the eight days of hearing (amounting to 600 hours), an opportunity for the complainant to speak at the next bargaining agent's Annual General Meeting about her complaint at "double the time allowed," reimbursement of costs incurred when she attended meetings of the bargaining agent after her suspension, and a declaration that the policy in dispute is contrary to the *Act*.

[128] It is not the Board's practice to award costs, and I deny the complainant's request for costs for that reason. I also deny the request for a public apology because it is overly broad and is essentially an apology to the world. In addition, I am not persuaded that there is authority under the *Act* to direct a bargaining agent's internal affairs to the extent of requiring it to provide time at an Annual General Meeting for the complainant to speak about her complaint at "double the time allowed."

[129] With regard to the claim for reimbursement of expenses for attending meetings in April 2008, I note the complainant's evidence that, when she received the April 9, 2008, letter telling her that she was suspended from her elected positions, she ". . . did not know what the letter meant. . ." and she ". . . did not imagine I [the complainant] could not attend as a delegate." I accept that the complainant was, at she also said, angry and upset with the letter, but I do not accept that she was unaware of its meaning. Indeed, I find that she was upset <u>because</u> she was suspended from her elected duties. It follows that the complainant attended the meetings knowing that she could not participate in her elected capacities. For this reason, I find that it would be anomalous to compensate her for damages that were in her control. It would also be punitive to reimburse for these types of damages, and I do not have the authority to make that type of order.

[130] I agree with the complainant that it is contrary to subparagraph 188(*e*)(ii) of the *Act* for the bargaining agent to apply its policy against her and to suspend her from her elected positions. Therefore, I direct the bargaining agent to rescind the policy as it applies to the complainant. As mentioned above, I have found that the policy is consistent with the valid objective of protecting the bargaining agent from real harm to its legitimate and important interests. For this reason, I do not find that the policy as a whole is contrary to the *Act*. I have also found that the policy is overreaching in scope, as demonstrated by its application to the complainant in this case. The Board's

previous decision in *Veillette* 2 reached the same conclusion and I also adopt the conclusion in that decision that the bargaining agent is directed to amend its policy to ensure it complies with the *Act*.

[131] Finally, I consider that the real harm in this case has to be the complainant's suspension from her elected positions and that the objective of any remedy must be, as much as practicable, to correct that harm and to restore her to the situation she was in before her suspension. Therefore, I direct that the suspensions of the complainant from elected and appointed offices be rescinded. Furthermore, the fact that the membership and officials of the bargaining agent were told of the complainant's suspension is significant, and I conclude that it is appropriate to direct that the membership and officials be told the suspensions have been rescinded. Unlike in *Veillette* 2, I find that I have the authority to intervene in the bargaining agent's internal affairs to fashion a remedy that relates to the matters set out in subparagraph 188(*e*)(ii) of the *Act*. These include penalties imposed by a bargaining agent because a person has made an application to the Board and, in this case, the penalty was suspension from office. This Order is not intended to override the normal operation of the constitution and by-laws of the bargaining agent in matters such as the usual expiry of the terms of elected or appointed offices.

[132] For these reasons, I consider it necessary in the circumstances of this case to direct the bargaining agent to publish the following announcement in a prominent place in the next edition of one of its regular and significant publications to the membership (this may be an online announcement):

> ***Announcement to all members and officials of the Institute***
>
> *On April 9, 2008, Ms. Irene Bremsak was temporarily suspended from her positions of Member-at-Large, SP Vancouver Sub-Group, President, Vancouver Branch; Member-at-Large, B.C./Yukon Regional Executive; and Sub-Group Coordinator, SP Group Executive. This suspension was a result of the Institute's "Policy Relating to Members and Complaints to Outside Bodies" and a complaint filed by Ms. Bremsak with the Public Service Labour Relations Board.*
>
> *The Public Service Labour Relations Board has recently directed, pursuant to subparagraph 188*(e)(*ii*) *and section 192 of the* Public Service Labour Relations Act*, that the Institute rescind this policy as it applies to the circumstances of Ms. Bremsak and to amend the policy to ensure that it complies with the* Public Service Labour Relations Act*. The Board also concluded that there may be different circumstances when it is appropriate to suspend a member from elected or appointed office. Finally, the Board directed that this announcement be made to members and officials of the Institute.*

> *Therefore, Ms. Bremsak is reinstated to all her elected and appointed positions effective immediately, subject to the normal operation of the Institute's by-laws.*

VI. Summary

[133] In her first complaint, the complainant submits that the bargaining agent acted contrary to paragraph 188(*c*) of the *Act* when, following a disputed regional election, it allowed another member's complaint against her, denied her appeal of that decision and denied her complaint against the President of the bargaining agent.

[134] I find that the comments made by the complainant about another member in an email dated July 1, 2007 were worthy of some sanction by the bargaining agent in order to enforce a minimum-level of decorum between members. The complainant's denial that her comments were directed at another member is not credible. Further, the bargaining agent is entitled to consider complaints between members in a variety of ways, including informal processes with less procedural rigour than other more formal proceedings. The bargaining agent is also entitled to make a number of judgments about how to hear complaints without interference by the Board, as long as those judgments do not involve discriminatory considerations contrary to paragraph 188(*c*) of the *Act* and as long as they comply with the principles of natural justice.

[135] The complaint dated November 16, 2007, pursuant to paragraph 188(*c*) of the *Act,* is dismissed.

[136] The second complaint relates to a policy of the bargaining agent that any elected official who makes a complaint about an internal matter to an outside body is automatically suspended from his or her elected positions until the application is completed. The complainant submits that this policy is contrary to subparagraph 188(*e*)(ii) of the *Act*.

[137] I find that the bargaining agent's policy about applications to outside bodies is generally consistent with the objective of preventing real harm to the legitimate and important interests of the bargaining agent. However, its scope is overly broad inasmuch as it assumes that every application to an outside body involving an internal issue creates a breach of the duty of loyalty owed by elected members to the bargaining agent. In this case, the complainant's complaint to the Board involved a dispute between her and another member of the bargaining agent and a dispute about

how the bargaining agent handled that first dispute. That complaint did not create any real harm to the legitimate and important interests of the bargaining agent.

[138] Therefore I allow the complainant's complaint under subparagraph 188(*e*)(ii) of the *Act*, dated April 11, 2008, although I do not agree with the complainant's submission on the appropriate remedy or remedies. Pursuant to paragraph 192(1)(*f*), I direct the bargaining agent to rescind its decision that the policy applies to the complainant and to amend its policy to ensure that it complies with the *Act*. In order to restore the complainant's status as an elected official of the bargaining unit I also direct the bargaining agent to advise its members in the form described above (see paragraph 131 of this decision) that she has been reinstated to her previous positions.

[139] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[140] The bargaining agent's preliminary objection to the Board's jurisdiction over its internal affairs is denied.

[141] The complaint dated November 16, 2007 is denied.

[142] The complaint dated April 11, 2008 is allowed.

[143] The bargaining agent is directed to rescind the application of its "Policy Relating to Members and Complaints to Outside Bodies" to the complainant.

[144] The bargaining agent is directed to amend its "Policy Relating to Members and Complaints to Outside Bodies" to ensure that it complies with the *Act*.

[145] The bargaining agent is directed to restore the complainant's status as an elected official of the bargaining unit and to advise its members and officials, in the form described in paragraph 131 of this decision, that she has been reinstated to all of her elected and appointed positions subject to the normal operation of the constitution and by-laws of the bargaining agent.

August 26, 2009.

John Steeves,
Board Member