Date: 20091116

File: 525-34-20

Citation: **2009 PSLRB 151**

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

MARCEL MARTEL

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Martel v. Public Service Alliance of Canada

In the matter of an application for the review of a decision under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Nathalie St-Louis, Public Service Alliance of Canada

Decided on the basis of written submissions
filed July 29, September 14, and October 7 and 13, 2009.
(PSLRB Translation)

I. Application before the Board

[1] Marcel Martel ("the applicant") filed an application under section 43 of the *Public Service Labour Relations Act* ("the *Act*") for the review of the decision that the Public Service Labour Relations Board ("the Board") rendered on February 6, 2009 in *Martel et al. v. Public Service Alliance of Canada*, 2009 PSLRB 16.

[2] The applicant initiated this proceeding through a letter dated February 18, 2009 addressed to the Board's Chairperson, which was received on February 23, 2009. He entitled the letter "Complaint" and in it made several criticisms of the Board's decision and the process that led to it.

[3] The applicant also applied to the Federal Court of Appeal for the judicial review of 2009 PSLRB 16 (Court File No. A-115-09).

[4] On March 27, 2009, the Board sent the applicant a letter informing him that, since an application for judicial review was pending in the Federal Court of Appeal concerning issues that were basically the same as those raised in the complaint, the Board would not decide the complaint and would comply with the Court's directions if the application for judicial review were allowed.

[5] On June 29, 2009, the applicant discontinued his application for judicial review. The discontinuance filed with the Court includes the following paragraph:

> [Translation]
>
> . . .
>
> *Taking into account subsection 43(1) of the Public Service Labour Relations Act, see the extract attached to this affidavit, I am of the opinion that justice would be better served if the PSLRB exercised its inquiry and review powers through a process that is procedurally fair. For these reasons, I am discontinuing the case in the Federal Court of Appeal.*
>
> . . .

[6] On July 2, 2009, the Board received a letter from the applicant dated June 29, 2009 stating that he had discontinued his judicial review application with the Federal Court of Appeal and asking the Board to "[translation] complete its inquiry into his procedural fairness complaint."

[7] The Board considered the letter to be the originating application for the review of 2009 PSLRB 16 and forwarded a copy to the respondent.

[8] On July 22, 2009, the Board received a letter from the applicant dated July 17, 2009 requesting information about the rules and procedures applicable to applications for review.

[9] On July 29, 2009, the respondent submitted its position against the application for review.

[10] On August 26, 2009, the Board informed the parties that the application for review would be dealt with through written submissions and that a timetable would be established for each party to file submissions.

[11] The applicant filed his written submissions on September 14, 2009. The respondent filed its written submissions on October 7, 2009 and referred the Board to the letter that it had filed on July 29, 2009. Mr. Martel filed his reply on October 12, 2009.

[12] To properly understand the nature of the application for review, it is appropriate to briefly set out the context of the decision at issue.

[13] The Board was seized of a complaint filed by the applicant against the respondent and its representatives that was made on November 8, 2007 under paragraph 190(1)(*g*) of the *Act* to which similar complaints filed by other complainants had been joined. The applicant and the other complainants alleged that the respondent and its representatives had committed an unfair labour practice contrary to section 187, which reads as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[14] The applicant and the other complainants criticized the quality of the representation provided by the respondent and its representatives for three series of grievances as well as the respondent's refusal to refer those grievances to adjudication. The respondent objected that the complaints relating to the first grievances were untimely because they had not been made within the 90-day time limit set out in

subsection 190(2) of the *Act*. In 2008 PSLRB 19, the Board allowed the objection and concluded that only the complaints relating to the third series of grievances, in which the applicant and the other complainants claimed acting pay, were timely.

[15] The complaint was dealt with through written submissions. At paragraph 5 of the decision, the Board noted the following: "At the respondent's request, and with the complainants' agreement, the Board decided to dispose of the complaints on the basis of written submissions."

[16] Each party filed written submissions, and on February 6, 2009, the Board rendered its decision in 2009 PSLRB 16, dismissing the complaints.

[17] The Board explained the reasons for its conclusion as follows:

. . .

> ***28.*** *In this case, the complainants have not convinced me that the respondent's decision not to refer their grievances to adjudication was arbitrary, capricious, discriminatory, wrongful or in bad faith.*
>
> ***29.*** *In her letter of September 11, 2007, Ms. Petrin explained in detail why the respondent was not referring the grievances to adjudication. She based her analysis on the case law that, in her view, was not favourable to the complainants and that, in all probability, suggested that an adjudicator would dismiss the grievances. On September 16, 2007, Mr. Martel expressed his disagreement with Ms. Petrin's position and asked her to change it. Ms. de Aguayo reviewed everything and decided to uphold Ms. Petrin's decision.*
>
> ***30.*** *Analyzing the submitted documentation shows me that the respondent acted diligently and seriously in studying the complainants' grievances. After analyzing the facts in light of the case law, it concluded that the grievances should not be referred to adjudication. That decision was not arbitrary, discriminatory or made in bad faith. Nothing in the submitted file could lead me to such a conclusion.*
>
> ***31.*** *It is possible that the respondent would have reached a different conclusion if it had chosen different case law. However, that question is not relevant since it is not my role to consider the merits of the grievances. The respondent made no error under the* Act *by not sharing the complainants' opinion on the case law applicable to the merits of their grievances. It seems to have thoroughly studied the case, which is enough. It does not have to prove*

> *that it analyzed all existing case law, as long as its analysis was done in good faith.*
>
> ***32.*** *Instead, this case involves a difference of opinion between the complainants and the respondent's representatives. The complainants are convinced that they are right that the employer is treating them unfairly by not paying them in accordance with the complexity of the work they perform. They may be correct in claiming that the respondent should have referred their grievances to adjudication, but that is not the question. Rather, the question is whether the respondent breached the duties imposed on it by section 187 of the* Act*. In the circumstances of this case, I conclude that it did not.*
>
> . . .

[18] Mr. Martel is the only applicant in this proceeding, and the application for review relates solely to PSLRB File No. 561-34-194.

II. Summary of the arguments

A. For the applicant

[19] In support of his application for review, the applicant essentially alleges that the adjudicator did not comply with the rules of procedural fairness. He also challenges the reasonableness of the decision.

[20] In addition, the applicant criticizes the adjudicator for deciding to proceed by way of written submissions. He notes that the adjudicator ordered in 2008 PSLRB 19 that hearing dates be set for the grievances. The applicant next discusses the exchange of correspondence between the Board's Registry and the respondent, of which he did not receive a copy. That exchange shows that the complaints were put on the February 2009 hearing schedule but were later removed. The applicant submits that the Board misled him and that he would never have agreed to proceed by way of written submissions had he known of that exchange of correspondence. He states the following about the exchange of correspondence in an extract from his written submissions of September 14, 2009:

> [Translation]
>
> . . .
>
> ***14*** *On April 8, 2008, Yassine Rabbouh, Registry Officer, emailed Ms. de Aguayo to suggest hearing dates in*

September and October 2008 (Exhibit 1). He did not send me a copy.

15 *On April 13, 2008, Ms. de Aguayo wrote to Mr. Rabbouh to suggest dates "in early 2009." She also wrote the following, to justify her request: "There are termination, discipline and* ***serious*** *collective agreement matters . . ." (Exhibit 2). I did not receive that email.*

16 *On October 28, 2008, Martine Paradis, Registry Officer, emailed me an* ***edited*** *copy of Ms. de Aguayo's letter dated September 26, 2008 requesting that my case be removed from the schedule because "[t]he PSAC is not available on these dates" (Exhibit 3).*

17 *On September 26, 2008, Ms. de Aguayo wrote to Ms. Susan J. Mailer (the complete letter referred to in the previous paragraph) to suggest other dates for the cases for which they would not be available. No other date was suggested for the cases in which I was the representative. She wrote that "[t]he PSAC is not available on these dates" and added the following: "However, given the* ***narrowing*** *of the issues (see Martel v PSAC 2008 PSLRB 19), the PSAC is proposing that the parties file written submissions" (Exhibit 4). I was not sent that letter.*

18 *On October 22, 2008, Ms. Paradis, Registry Officer, informed me in her letter (copied to the bargaining agent) that my case and the others in which I was serving as representative, which had been tentatively scheduled for February 2009, "had therefore been removed from the February 2009 schedule." She also wrote that "[t]he respondent has also requested that the parties make written submissions rather than holding an oral hearing into the above-mentioned complaints." I had to reply by October 15, 2008 (Exhibit 5).*

19 *On* ***October 3, 2008****, in a letter sent to a distribution list, Ms. Susan J. Mailer, Director, Registry Operations and Policy, wrote the following: "The Martel cases (561-34-194, 210 to 215), scheduled February 17 to 19 2009, have been* ***removed from the schedule*** *as requested by the bargaining agent. The PSAC is proposing that the parties file* ***written submissions****. The Registry Officer assigned to this matter will follow up on this request" (Exhibit 6). I was not on the distribution list.*

20 *On October 9 and 10, 2008, further to my request, I wanted to know the rules and procedures that applied to written proceedings, and Ms. Martine Paradis, Registry Officer, wrote in a note to her file that she had informed me (on my answering machine) that sections 36 and the*

following sections applied (Exhibit 7). Naturally, she did not send me a copy of her note.

21 *On October 14, 2008, I wrote to Ms. Paradis, Registry Officer, to confirm that I agreed to file written submissions for the complaints. It is clear that the procedure was not closed since, in the complete absence of any instructions, I wrote that "I leave it up to the Board to decide whether to hear certain witnesses of its choice if were to prove that the dispute cannot be settled in a procedurally fair manner for the complainants" (Exhibit 8).*

22 *On July 23, 2009, further to my request, Ms. Martine Paradis, Registry Officer, replied that I had to refer to the sections of the Act and the Regulations about a review under section 43 of the Act (Exhibit 9).*

23 *Therefore, both in October 2008 and in July 2009, I read and reread the relevant sections of the Public Service Labour Relations Act and the Public Service Labour Relations Board Regulations. I have also recently consulted the rules of the federal courts.*

. . .

32 *The decision of Board Member Renaud Paquet, dated February 6, 2009, citation 2009 PSLRB 16, must be rescinded for the following reasons:*

33 *He did not comply with his order of 2008-03-28, the citation 2008 PSLRB 19. He was required to make a new order with the relevant terms for the conduct of the proceeding. Several solutions were available to him under the court rules.*

34 *The Board should have denied the respondent's request to proceed by way of written submissions under the court rules.*

35 *The Board did not send me the relevant documentation needed to make an informed decision. I was misled. Had I received the emails and other documents referred to above, I would not have agreed to proceed by way of written submissions. The Board had to request other hearing dates.*

36 *The Board remained questionably silent when I filed a set of highly* ***accusatory*** *affidavits concerning the competence of certain employees of the bargaining agent. In my opinion, the Board should have suspended the process so that specific rules could have been laid down. How should the bargaining agent have replied? Providing an examination process. Finally, the bargaining agent*

> *completely disregarded all the affidavits. Just as surprisingly, Board Member Renaud Paquet did the same. And all the relevant court rules were ignored.*
>
> ***37*** *There is no section of the Public Service Labour Relations Act that provides for making written submissions. In the part dealing with the Board's authority to make regulations, the Act states that the Board may make regulations concerning the* ***procedure for hearings****. There is a legal rule that the courts must not interpret something that is clearly stated. The Act does not talk about a written hearing, which is a linguistic aberration. Nor is there any expression like "with such modifications as the circumstances require" (see 2007 FCA 345, 2007-11-02, at para 74, extract in document 3).*
>
> ***38*** *By not making a new order with specific rules to be followed, the Board Member created a process that lacked procedural fairness.*
>
> ***39*** *Which of the respondent's employees should have been examined, and how? Page 2 of a document on procedural fairness and the question of compliance (see document 1) contains the following summary of the factors set out by L'Heureux-Dubé J. in Baker v. Canada, [1999] 2 S.C.R. 817: "(i) the more the decision-making process resembles judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness." A little further on, the document states the following: "Applying these factors to Baker, L'Heureux-Dubé J. noted that parties whose interests (are fundamentally affected by the decision must have a meaningful opportunity to present the several types of evidence relevant to their case and have it fully and fairly considered)."*
>
> ***40*** *Board Member Renaud Paquet did not assess the affidavits that I submitted to the Board. Therefore, he did not fully and fairly consider the evidence.*
>
> ***41*** *The process was not fair because the Board did not provide me with an opportunity to examine some of the respondent's employees even though they were perfectly identifiable and had been identified. Examinations do not have to be conducted during a hearing. All courts recognize that an examination can be done through an affidavit.*
>
> [Emphasis in the original]

[21] The applicant further submits that he never implied that his evidence was closed when he agreed to proceed by way of written submissions and that the process denied him an opportunity to present complete evidence in support of his complaint.

[22] The applicant also alleges that the adjudicator deliberately ignored several pieces of evidence that, according to the applicant, were essential to the merits of his complaint (notably, the affidavits he filed) and that the adjudicator accepted only the bargaining agent's evidence, primarily the letter of September 11, 2007 in which Ms. Pétrin, the respondent's representative, explained why the respondent had decided not to refer the grievances to adjudication. The applicant further criticizes the adjudicator for concluding that the bargaining agent's analysis was serious and that it had acted diligently and reasonably solely on the basis of that letter, with no evidence from the bargaining agent and without analyzing the case law submitted by the applicant on the pretext that it was not his role to consider the merits of the grievances.

[23] The applicant also challenges the adjudicator's reasoning and conclusions and submits that the decision he rendered is patently unreasonable. On that point, the applicant submits the following:

> [Translation]
>
> . . .
>
> ***42*** *Board Member Renaud Paquet rendered a patently unreasonable decision. . . .*
>
> *He did not analyze my complaint based on the relevant case law. He did not say how the bargaining agent's analysis had taken into account the significance of the grievance and of its consequences for the employee. He did not say how the bargaining agent had legitimate interests. He said nothing about the bargaining agent's bad faith toward me. The bargaining agent acted arbitrarily against me by not allowing me to participate in the hearing of the grievance. As well, in the bargaining agent's reply to my submissions, its representative tried to discredit me by citing a completely irrelevant passage from my previous case before the Board in 1993.*
>
> ***43*** *It is hard to imagine that the Board Member carried out a serious analysis when he showed a surprising lack of understanding of a fact that was nonetheless clear and unambiguous, namely, my level of education. One can only wonder or speculate about the rest.*
>
> . . .
>
> ***46*** *It is fascinating to note how easily Board Member Renaud Paquet found that the case law cited by the*

> *bargaining agent was relevant (he put on his adjudicator's hat) and how easy it was for him to withdraw from the process when he did not deal with the case law that I had submitted (he took off his adjudicator's hat). At paragraph 31, he wrote the following: "However, that question is not relevant since it is not my role to consider the merits of the grievances." So, how could he reach the conclusion that the bargaining agent's analysis was the correct one? He had no evidence to that effect.*
>
> . . .
>
> ***48*** *Board Member Renaud Paquet did not ensure that the proceeding between the parties was fair;*
>
> *Board Member Renaud Paquet failed to comply with basic legal rules;*
>
> *Board Member Renaud Paquet misinterpreted the facts of the case on the sole basis that it was just a matter of opinion.*

B. <u>For the respondent</u>

[24] The respondent submits that there is no reason that would justify the Board reviewing its decision in this case and that the circumstances that may justify an application for review are not satisfied. On that point, the respondent refers to *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39. More specifically, the respondent replied to each of the reasons relied on by the applicant in support of his application for review.

[25] Replying to the allegation that the Board should not have decided to proceed by way of written submissions, the respondent submits that section 41 of the *Act* gives the Board the discretion to decide any matter before it without holding an oral hearing. The respondent further submits that the applicant agreed to proceed by way of written submissions in this case.

[26] Replying to the allegation that the Board did not consider all the evidence that was presented, the respondent submits that the Board was justified in accepting only evidence that related to and that was relevant to the complaint that it had to decide. On that point, it refers to *Laferrière v. Hogan and Baillargé*, 2008 PSLRB 48.

[27] The respondent also argues that the applicant was in no way disadvantaged by the written submission process, that he had an opportunity to file all the documents

that he wished to file and that he made all the submissions that he wished to make in support of his arguments. The respondent further notes that that the applicant had an opportunity to submit a reply after the respondent's written submissions were filed.

[28] The respondent also submits that the applicant has not identified any change in circumstances that would justify reviewing 2009 PSLRB 16 and that he has not presented any new evidence or submissions that could not reasonably have been presented during the written submission process. The respondent argues that the applicant is trying to relitigate the merits of the case through his application for review.

III. Reasons

[29] The application for review is based on subsection 43(1) of the *Act*, which provides as follows:

> ***43.****(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*

[30] That provision, which came into force on April 1, 2005, is very similar to section 27 of the *Public Service Staff Relations Act*, which was applicable before April 1, 2005. The case law of both the Public Service Staff Relations Board and the Board, which replaced it in April 2005, has interpreted those provisions and developed parameters for intervening. *Danyluk et al. v. United Food and Commercial Workers Union, Local No. 832*, 2005 PSLRB 179, clearly sets out as follows the criteria developed by the Board:

. . .

> *[14] . . . The former Board had long been of the view, based on the wording of s. 27 of the* PSSRA*, that the purpose of s. 27 was not to allow an unsuccessful party to re-argue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where there was some other compelling reason for review. Furthermore, the Board's jurisprudence has held that any new evidence or arguments raised by a party in a request for review must have a*

> *material and determining effect. I am in agreement with the position adopted by the former Board regarding the interpretation to be given to s. 27 of the* PSSRA *and I see no reason why the same interpretation should not be applied to the present* Act. . . .
>
> . . .

[31] The criteria were reiterated as follows in *Chaudhry*:

> . . .
>
> ***28*** *Applications for reconsideration of decisions of the PSLRB are not common. However, the Board has developed jurisprudence in this area that is helpful in setting out the appropriate use of the reconsideration power. The jurisprudence under the* PSSRA *is relevant for a determination under section 43 of the* PSLRA *(see* Danyluk et al. v. United Food and Commercial Workers Union, Local. 832*, 2005 PSLRB 179).*
>
> ***29*** *A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see* Quigley*,* Danyluk*,* Czmola *and* Public Service Alliance of Canada*). The reconsideration must:*
>
> - *not be a relitigation of the merits of the case;*
> - *be based on a material change in circumstances;*
> - *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
> - *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
> - *ensure that there is a compelling reason for reconsideration; and*
> - *be used ". . . judiciously, infrequently and carefully . . ." (*Czmola*).*
>
> . . .

[32] Applying those criteria to this case, I see no reason to intervene since none of the reasons that the applicant relied on meets the criteria for reviewing 2009 PSLRB 16.

[33] I will deal with each reason that the applicant relied on to support his application for review.

[34] The applicant criticizes the Board's decision to proceed by way of written submissions. He submits that he was misled by the Board and that he would never have agreed to proceed in that manner had he known about the emails that the Board exchanged with the respondent. He also suggests that the written submission process denied him an opportunity to present all his evidence in support of his complaint.

[35] I consider it relevant to note at the outset that, under section 41 of the *Act*, the Board has the power to decide to proceed by way of written submissions. That section reads as follows:

> ***41.*** *The Board may decide any matter before it without holding an oral hearing.*

[36] In this case, the written submission process was initiated not by the Board but rather at the request of the respondent. As it does in every case in which a party suggests proceeding by way of written submissions, the Board asked the other party to the case, namely, the applicant, to submit his position on the proposal. The applicant accepted the proposal, and the Board took his agreement into account and determined that it was appropriate in this case to proceed by way of written submissions. Therefore, it asked the parties to proceed on that basis.

[37] The applicant refers to the exchange of correspondence between the Board and the respondent concerning the scheduling process, implying that the Board insidiously excluded him from that exchange and stating that he would never have agreed to proceed by way of written submissions had he known about it. I would like to put that exchange of correspondence in context.

[38] Initially, there was supposed to be an oral hearing into the complaint filed by the applicant, and the Board's Registry followed the usual scheduling process. The Board always uses the same process to schedule hearings. First, the Registry prepares a tentative schedule for a given month without consulting the parties. The tentative schedule is then sent systematically to the employers and bargaining agents that appear regularly before the Board ("the regular clients"), and the Board asks them to confirm their availability for the dates suggested by the Board for hearings in the cases identified on the tentative schedule. For cases involving parties who are not the Board's regular clients or persons who represent themselves, a personalized letter is sent to the party in question asking for confirmation that it is available to proceed on the date or dates suggested by the Board. Each party is allowed to say once that they

are unavailable on the dates suggested in the tentative schedule without having to provide any justification. If a party informs the Board that it is not available on the suggested dates, the Registry removes the case from the tentative schedule.

[39] In this case, the complaints of the applicant and the other complainants were put on the tentative hearing schedule for February 2009. On September 8, 2008, the Board sent the tentative schedule to its regular clients. The letter sent to those clients contained the following passage:

> [Translation]
>
> . . .
>
> *Enclosed is the tentative hearing schedule for the month of February 2009.*
>
> *Any proposed changes should be sent to the Board by no later than* ***September 26, 2008. IT IS IMPORTANT THAT THE PARTIES RESPOND BY THAT DATE AS DELAYS AFFECT THE BOARD'S ABILITY TO SECURE HEARING ROOMS AND MAY RESULT IN CASES BEING MOVED TO THE NEXT MONTH.***
>
> . . .
>
> [Emphasis in the original]

[40] On September 26, 2008, the respondent wrote to the Board to confirm its position for each case with which it was concerned. The respondent stated that it was not available to proceed on the proposed dates for the complaints of the applicant and the other complainants. It also proposed that the parties proceed by way of written submissions, as follows: "However, given the narrowing of the issues (see Martel v. PSAC 2008 PSLRB 19), the PSAC is proposing that the parties file written submissions." In saying ". . . given the narrowing of the issues . . ." and referring to 2008 PSLRB 19, the respondent was probably referring to the fact that, as a result of that decision, the unfair labour practice complaint was limited to the quality of the representation provided for just one of the three series of grievances involved. The Board received the respondent's reply before the Registry sent the applicant a letter asking him to confirm his own availability to proceed on the suggested dates in February 2009. That was why, on October 2, 2008, the Board wrote a letter to him and to the respondent's representative stating the following:

[Translation]

. . .

This is to inform the parties that the above-mentioned cases were tentatively scheduled for February 17 to 19, 2009.

Unfortunately, before we had a chance to inform the complainant, the respondent notified the Board that it is not available on those dates. The parties are requested to note that the above-mentioned complaints ***were therefore removed from the February 2009 schedule****.*

The respondent also requested that the parties make written submissions rather than holding an oral hearing into the above-mentioned complaints.

The complainants' representative is requested to submit his position on the respondent's request by ***October 15, 2008****.*

. . .

[Emphasis in the original]

[41] The Board proceeded the same way in this case as it does every month when it prepares the tentative hearing schedule, and nothing about the intentions of the Board or the respondent can be inferred from the fact that the applicant did not receive the letter received by the respondent and all the Board's regular clients along with the tentative schedule. As stated, that standard letter was sent to all the Board's regular clients. Normally, the applicant should have received a letter asking him to confirm his availability on the suggested dates. He was not sent such a letter because the Board was informed that the respondent was not available to proceed on the proposed dates before it could send him the letter, which is why the Board sent the parties the October 2, 2008 letter. Removing the cases from the tentative schedule was consistent with established procedure since both parties were allowed to say that they were unavailable without an explanation.

[42] Therefore, the process for setting a hearing date proceeded normally. It was interrupted because the respondent proposed proceeding by way of written submissions. The Board asked the applicant to submit his position on that proposal. The same procedure would have been followed had the applicant made the proposal. The applicant could have chosen either to agree with or to oppose the request. Based on the file and the applicant's agreement, the Board decided to proceed by way of

written submissions. There is no basis for concluding that that decision violated the duty to act fairly.

[43] Nothing allows me to conclude that the applicant was prejudiced or disadvantaged by the Board's decision to proceed by way of written submissions. He had an opportunity to file all the documents on which he wanted to rely in support of his complaint and to make all the submissions that he considered relevant. After the written submission process began, he did not request that the process be converted to a hearing or ask to examine witnesses. The Board did not consider it necessary to convene a hearing.

[44] Let us turn now to the applicant's second reason for reviewing the decision. He argues that the adjudicator deliberately failed to consider all the evidence and that he ignored the affidavits that the applicant filed and that he considered essential to his complaint.

[45] The Board Member set out the items he considered and accepted as follows:

. . .

> ***6.*** *The complainants filed submissions containing 73 points followed by an 8-point conclusion as well as a 14-page reply to the respondent's submissions. Many of the complainants' documents and submissions do not seem to me to be relevant to the complaints. The same can be said of the respondent's submissions, although to a lesser extent.*
>
> ***7.*** *According to the complainants, the first 35 points of their submissions seek to answer a question that they formulate as follows:*
>
> > [Translation]
> >
> > Did the complainants have a reasonable chance of winning their grievances at adjudication if the union had agreed to refer the case to adjudication? That question relates both to their right to retroactivity and to the employer's refusal to recognize work done on an acting basis.
>
> *That is not the question, however. Analyzing the question that the complainants formulated is of no assistance in determining whether the respondent violated section 187 of the* Act. *The criteria applicable in this case are very different, and I will return to that in my reasons for decision.*

> *Although I have thoroughly examined the first 35 points of the complainants' submissions and the documentation provided to support them, I will not discuss them in my decision because they are not relevant.*
>
> ***8*** *The complainants' submissions also deal with deficiencies in the respondent's representation at the final level of the grievance process. The respondent's submissions are, in part, a reply to those submissions. Since the grievances were heard at the final level on June 4, 2007 and the complainants received the employer's decision on July 26, 2007, the complaints cannot be based on the events that surrounded presenting the grievances at the final level since those events occurred more than 90 days before the complaints were made. . . .*
>
> . . .
>
> ***10.*** *On the other hand, the complaints are timely insofar as they concern the actions, positions or decisions of the respondent in refusing to refer the grievances to adjudication. Accordingly, in this decision, I will discuss only those submissions relating to that refusal. Although the complainants' position differs from the respondent's, the parties agree on the facts giving rise to the complaints.*
>
> . . .

[46] I conclude from reading the decision that the adjudicator considered all the evidence and submissions presented by the applicant but accepted and dealt only with the evidence he considered relevant to deciding the complaint before him. The adjudicator provided reasons for his decision, and I have no basis for concluding that he disregarded relevant evidence.

[47] In support of his application for review, the applicant also argues that the decision is unreasonable and asks me to assess differently the evidence and the submissions that he presented in support of his complaint. In my opinion, this is an attempt to appeal 2009 PSLRB 16, which is not consistent with the framework for intervening developed under section 43 of the *Act*. Moreover, the applicant is not presenting any facts or submissions that he did not have an opportunity to present or could not reasonably have presented during the written submission process chosen to dispose of his complaint.

[48] In addition, the applicant has not adduced evidence establishing a change in circumstances that would justify reviewing the decision or demonstrated that there are

other compelling reasons for the Board to intervene.

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

(The Order appears on the next page)

IV. Order

[50] The application for the review of the decision rendered on February 6, 2009 in PSLRB File No. 561-34-194 is dismissed.

November 16, 2009.

PSLRB Translation

Marie-Josée Bédard,
Vice-Chairperson