Date: 20091204

File: 521-34-3
XR: 561-34-202 and 309

Citation: 2009 PSLRB 159

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

IRENE J. BREMSAK

Applicant

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 a request for the filing of a Board order in the Federal Court under subsection 52(1) of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Applicant: John Lee

For the Respondent: Steven Welchner, counsel

Decided on the basis of written submissions
filed September 22, October 21 and 29 and November 12, 16 and 20, 2009.

Request before the Board

[1] On September 1, 2009, Irene J. Bremsak ("the applicant") filed a request that the Public Service Labour Relations Board ("the Board") file a certified copy in the Federal Court of its decision in *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, rendered on August 26, 2009. The request was made pursuant to section 52 of the *Public Service Labour Relations Act* ("the *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, which reads as follows:

> ***52.*** *(1) The Board must, on the request in writing of any person or organization affected by any order of the Board, file a certified copy of the order, exclusive of the reasons for the order, in the Federal Court, unless, in its opinion,*
>
> *(*a*) there is no indication of failure or likelihood of failure to comply with the order; or*
>
> *(*b*) there is other good reason why the filing of the order in the Federal Court would serve no useful purpose.*
>
> *(2) An order of the Board becomes an order of the Federal Court when a certified copy of the order is filed in that court, and it may subsequently be enforced as such.*

[2] The applicant was the complainant in the proceedings that led to decision 2009 PSLRB 103. In that case, the Board was seized with two complaints filed against the Professional Institute of the Public Service of Canada ("the respondent") under paragraph 190(1)(*g*) of the *Act*. The Board dismissed the first complaint but allowed the second complaint, in which the applicant alleged that the respondent had contravened subparagraph 188(*e*)(ii) of the *Act*. In its decision, the Board described as follows the nature of that complaint:

> . . .
>
> *[2] . . . 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.
>
> . . .
>
> *[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.
>
> . . .

The Board allowed the complaint and ordered what follows:

> . . .
>
> *[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.*
>
> . . .

[3] The applicant justified her request for filing the Board's decision 2009 PSLRB 103 in the Federal Court by the fact that the respondent had not complied with the Board's order and had no intention of complying with it.

[4] On September 22, 2009, the respondent opposed the applicant's request and submitted that it had filed an application for judicial review of decision 2009 PSLRB 103 with the Federal Court of Appeal and a motion for a stay of execution of that decision pending the judicial review proceedings and that, accordingly, filing decision 2009 PSLRB 103 would ". . . pre-judge the motion for a stay of execution, and be counterproductive to the judicial review proceeding presently before the Court."

[5] On October 28, 2009, the Federal Court of Appeal dismissed the motion for a stay of decision 2009 PSLRB 103: *Professional Institute of the Public Service of Canada v. Bremsak,* 2009 FCA 312.

[6] On October 29, 2009, the applicant reiterated her request that the Board file decision 2009 PSLRB 103 in the Federal Court, contending that, in light of the Federal Court of Appeal's decision to dismiss the respondent's motion for a stay, there was ". . . no more reason to prevent the PSLRB from filing the Orders with the Federal Court."

[7] On November 12, 2009, the respondent raised new elements that, in its view, should incite the Board to refuse to file its decision 2009 PSLRB 103 in the Federal Court.

[8] First, the respondent indicated that its Executive Committee had decided to suspend the applicant's membership for a period of five years, effective October 20, 2009, following an investigation into allegations of harassment against the applicant, by other members of the respondent, in which it concluded that the allegations were well founded. The respondent contends that, considering the suspension of the applicant's membership, filing decision 2009 PSLRB 103 in the Federal Court would serve no useful purpose.

[9] With respect to the portion of decision 2009 PSLRB 103 dealing with the content of the "Policy Relating to Members and Complaints to Outside Bodies" ("the Policy"), the respondent submitted that it was complying with decision 2009 PSLRB 103 since it was in the process of amending the Policy. More precisely, the respondent indicated that a revised Policy had been presented at its Annual General Meeting on November 6 and 7, 2009 and that it was expected to be approved by its Board of Directors the following week.

[10] On November 13, 2009, the Board directed the respondent to file its revised Policy by no later than November 20, 2009 and informed the applicant that she would have until November 20, 2009 to reply to the respondent's letter of November 12, 2009.

[11] On November 16, 2009, the complainant replied to the respondent's letter of November 12, 2009. She alleged that the respondent was still not in compliance with decision 2009 PSLRB 103 and that there was no evidence or assurance that the respondent's revised Policy would be in compliance with the *Act*. With respect to the respondent's decision to suspend her membership, the applicant contends that the decision was the result of unfounded allegations of harassment that were not dealt with in a proper manner by the respondent and that her suspension contravenes the provisions of the *Act*.

[12] On November 20, 2009, the respondent filed a copy of its revised Policy and confirmed that it had been formally adopted by its Board of Directors on November 18, 2009.

[13] On November 20, 2009, the applicant filed additional submissions about the revised Policy and submitted that it does not comply with decision 2009 PSLRB 103. The applicant expressed the following:

. . .

> . . . *the newly passed* Policy Relating to Members and Complaints to Outside Bodies *on November 18, 2009 by the Respondents does not meet the 5th order ruled by Board Member Steeves,* "The bargaining agent is directed to amend its "Policy Relating to Members and Complaints to Outside Bodies" to ensure that is complies with the Act.".
>
> *This newly revised policy still allows the Respondents to:*
>
> 1. *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;*
>
> 2. *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 this Part; or*

> 3. *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 of filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *Each and every one of these points is a violation of the PSLRA. Consequently, this newly revised policy does not comply with the PSLRA in any way. The purpose and intent of the* Policy Relating to Members and Complaints to Outside Bodies *is fundamentally in contradiction to Section 188 of the PSLRA of protecting the employee from abuse by the employee organization for exercising any right under the PSLRA.*
>
> *The Complainant respectfully submits that this failure by the Respondents to ensure that the* Policy Relating to Members and Complaints to Outside Bodies *comply with the PSLRA gives forth the immediate need for the PSLRB to file the Orders with the Federal Court.*
>
> [*Sic* throughout]

Reasons

[14] The mechanism set out in section 52 of the *Act* is a new feature that was introduced on April 1, 2005 when the *Act* came into force. The *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, which preceded the *Act*, did not provide any mechanism to ensure the enforcement of decisions rendered by the Public Service Staff Relations Board.

[15] For convenience, I will set out again the language of section 52 of the *Act*:

> ***52.*** *(1) The Board must, on the request in writing of any person or organization affected by any order of the Board, file a certified copy of the order, exclusive of the reasons for the order, in the Federal Court, unless, in its opinion,*
>
> *(*a*) there is no indication of failure or likelihood of failure to comply with the order; or*
>
> *(*b*) there is other good reason why the filing of the order in the Federal Court would serve no useful purpose.*

> *(2) An order of the Board becomes an order of the Federal Court when a certified copy of the order is filed in that court, and it may subsequently be enforced as such.*

[16] At the same time, Parliament introduced another mechanism for filing an adjudicator's decision in the Federal Court through section 234 of the *Act*, which reads as follows:

> ***234.*** *For the purpose of enforcing an adjudicator's order, any person who was a party to the proceedings that resulted in the order being made may, after the day provided in the order for compliance or, if no such day is provided for, after 30 days have elapsed since the day the order was made, file in the Federal Court a copy of the order that is certified to be a true copy, and an order so filed becomes an order of that Court and may be enforced as such.*

[17] The language used in sections 52 and 234 of the *Act* is quite different. Section 234 of the *Act* provides a mechanism by which an adjudicator's decision can be filed in the Federal Court, for enforcement purposes, at the sole initiative and discretion of a party to the proceedings before the adjudicator. The discretion to file the adjudicator's decision rests with the parties, and the adjudicator or the Board does not have a say in the process.

[18] By contrast, under section 52 of the *Act*, filing a decision rendered by the Board is not automatic and does not depend on the sole will of the parties. The discretion to file the decision rests with the Board, which must apply a test and determine whether the criteria set out in paragraphs 52(1)(*a*) or (*b*) are met in the circumstances of a given case.

[19] Section 52 of the *Act* is very similar to subsection 23(1) of the *Canada Labour Code* ("the *Code*"), R.S.C., 1985, c. L-2, which reads as follows:

> ***23.*** *(1) The Board shall, on the request in writing of any person or organization affected by any order of the Board, file a certified copy of the order or decision, exclusive of the reasons therefor, in the Federal Court, unless, in the opinion of the Board,*
>
> *(a) there is no indication of failure or likelihood of failure to comply with the order or decision; or*
>
> *(b) there is other good reason why the filing of the order or decision in the Federal Court would serve no useful purpose.*

[20] The Canada Industrial Relations Board ("the CIRB") has developed a long-standing jurisprudence on the interpretation to be given to the criteria set out in subsection 23(1) of the *Code*, which, given the similarity of the language used in section 52 of the *Act*, can be of some assistance in the application at hand. *Seafarers' International Union of Canada v. Seaspan International Ltd., North Vancouver, B.C.* (1979), 33 di 544, is still cited as the threshold decision with respect to the authority vested in the CIRB in applying subsection 23(1) of the *Code*. In that decision, the Canada Labour Relations Board ("the CLRB"), which preceded the CIRB, expressed in the following manner its view on the interpretation to be given to section 123 (which became section 23) of the *Code*:

. . .

> *More importantly, Parliament viewed the filing process in a larger context and enacted amendments which accord with the more comprehensive, non-punitive, labour relations problem solving role assigned to the Board and processes under the* Code *in its amendments. . . .*
>
> . . .
>
> *The major intent of these provisions is to allow and equip the Board to use its officers, administrative processes and authority to adopt an accommodative approach to the resolution of labour relations problems and to give greater meaning and authority to Board decisions. All of this is intended to be in furtherance of the objectives of Part V expressed by the Preamble as they apply to the multitude of circumstances and competing interests that arise in the dynamic circumstances of labour relations.*
>
> *Let us now turn now specifically to the new provisions of section 123* [now 23]. *Filing of Board orders on the written request of a person or organization affected by a Board order or decision is mandatory unless "in the opinion of the Board" one of two circumstances prevail. The first is that "there is no indication of failure or likelihood of failure to comply with the order or decision". The reason for this circumstance is at least threefold. It places the question of non-compliance in the forum that made the decision, namely the Board. By doing this, Parliament accepts that the Board is the best authority to interpret the meaning of its decision and order. It also allows the Board through its officers, or directly, to seek resolution of the difference in an accommodative fashion before resort is had to judicial proceedings. Perhaps a more subtle, but equally realistic reason, is to allow the Board to review its order under sections 119 and 121 to amend any order or decision to account for partial compliance or events*

> *related to the intent of its remedial order that occur subsequent to its issuance. This recognizes the Board's practice of communicating the thrust of its decision to parties and encouraging their participation in its implementation before the step of issuing a formal order is made. This practice is intended to encourage the constructive settlement of disputes as mandated in the Preamble. The criteria of "likelihood of failure" directs the parties to the active role to be played by the Board and points to the intent of the provision as not being merely a substitute for the procedures dictated by the Court in its decisions.*
>
> *The second circumstance when the Board may not file an order is very broad: "there are other good reasons why the filing of an order or decision in the Federal Court of Canada would serve no useful purpose". Here we come to the centre of the Board's accommodative role and the* Code*'s non-punitive approach to the resolution of labour relations problems. The discretion in the Board to ascertain the criteria implicit in this circumstance, like those on the exercise of discretion under section 194 to give consent to prosecute, must be exercised to further the objectives and purposes of the* Code *in any given circumstances. (For a discussion of the Board's jurisdiction under section 194 see* Conseil des Ports Nationaux, *Board decisions no. 195 and 197 both published in this issue). In short, the focus is not strict adherence to principles requiring obedience in an ordered society to orders of the courts. Rather it is recognized that the Board must act as a flexible instrument in the often shifting labour relations climate where further proceedings on its decisions can be futile or contrary to the evolved circumstances. The Board is to be sensitive and responsive to the parties' social, economic and political positions in their labour relations environment and have as its primary goal constructive accommodation. The last or another ounce of retribution in strict compliance with a Board order may not in some exceptional circumstances further future good relations, particularly where other Board recourse or intervention can achieve the same results in another manner.*
>
> . . .

I concur for the most part with the interpretation given by the CLRB and consider that it should guide me in determining whether the criteria set out in section 52 of the *Act* apply in this case. To determine whether decision 2009 PSLRB 103 should be filed in the Federal Court for enforcement purposes, I must answer the following two questions:

1. Has the respondent complied with the Board's decision?

2. If not, is there a good reason why filing decision 2009 PSLRB 103 in the Federal Court would serve no useful purpose?

[21] I will start with the first question. I find it useful, at this point, to set out again what the Board ordered in decision 2009 PSLRB 103:

. . .

> *[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.*

. . .

[22] I will first discuss the portion of decision 2009 PSLRB 103 dealing with amending the Policy. The respondent contends that its revised Policy is in compliance with the *Act*, as ordered by the Board, whereas the applicant asserts that the revised policy does not satisfy decision 2009 PSLRB 103.

[23] For the following reasons, I consider that the revised Policy is satisfactory and that it complies with decision 2009 PSLRB 103. In its initial version, the Policy provided for the automatic temporary suspension of a member from exercising the functions and duties of any elected or appointed office or position when the member made an application to an outside body, among them the Board, about an internal issue. The language of the Policy was written as follows:

. . .

> ***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 Public Service Labour Relations Board;*
>
> . . .
>
> ***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.*
>
> . . .

[24] In decision 2009 PSLRB 103, the Board found that the Policy was contrary to subparagraph 188(*e*)(ii) of the *Act*, which reads 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*
>
> . . .
>
> *(*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*

In its reasons, the Board specified that it was the automatic triggering of the suspension that was problematic and that rendered the Policy in breach of subparagraph 188(*e*)(ii) of the *Act*. On that point, the Board expressed the following:

> . . .
>
> *[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.*
>
> . . .
>
> *[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 complaints 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.*
>
> . . .

[25] In decision 2009 PSLRB 103, the Board did not order that the respondent eliminate, in all circumstances, the possibility of imposing a suspension or another measure on a member who made an application to an outside body. The Board's concerns lay more with the absence of a mechanism to balance both parties' interests and to assess, in light of the circumstances of each case, the nature of the application to an outside body and the possibility for the member to fulfill his or her duties in a

loyal fashion despite the application to the outside party and without harm to the legitimate interests of the respondent. The Board used broad language in ordering that the Policy be amended to comply with the *Act*.

[26] The revised Policy provides the following:

. . .

> *(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, the following process shall occur:*
>
> *a) The matter shall be referred immediately on receipt by the Institute of the document referring the matter to an outside body, to a Special Committee comprised of the Executive Secretary, the General Counsel and a third person who shall be an experienced lawyer selected by the Executive Secretary and the General Counsel.*
>
> *b) The Special Committee shall review the referred document and consider the following factors:*
>
> *i. the Elected or Appointed positions held by the person(s) who filed the complaint to an outside body;*
>
> *ii. the nature of the complaint filed by that person(s) and;*
>
> *iii. whether the nature of the positions held and the nature of the complaint, in each instance, raise concerns as to whether or not the person(s) filing the complaint would be able to fulfill the functions of their positions free of any conflicts and without breaching their duty of loyalty to the Institute.*
>
> *c) The Special Committee shall convene a meeting in person or by teleconference to consider the matter within no more than ten (10) Institute working days from the date on which the Institute first became aware of the filing of the complaint to an outside body by the member(s) in question.*
>
> *d) The Special Committee shall make a recommendation to the Executive Committee of the Institute as soon as possible but no later than ten (10) Institute working days after the*

conclusion of its meeting referred to above. The recommendations shall address, with reasons, what steps, if any, the Executive Committee ought to take with respect to any or all the positions held by the member(s).

e) The Executive Committee shall receive the recommendation of the Special Committee along with the other supporting documents including the complaint to an outside body filed by the member(s). The Executive Committee shall convene as soon as possible after receipt of these documents and no later then ten (10) Institute working days to consider what, if any, action to take. Upon receipt of the recommendation of the Special Committee, the Executive Committee shall advise the member(s) of the receipt of the file and shall enquire of the members in question whether or not they wish to make submissions to the Executive Committee on the question of whether or not the filing of the complaint should lead to any action by the Institute including the suspension from one or all of the positions held by the member(s). The submission by the member(s) shall be no longer than five (5) pages double spaced and may be in the official language of choice of the member(s). It is to be noted that the member(s) is not obligated to provide such submissions. The submission is to be provided within ten (10) Institute working days from the date the Executive Committee notifies the member(s) of the receipt of the file.

f) The Executive Committee shall make a determination with respect to what action it shall take and, once the decision is taken, shall be implemented forthwith.

g) The decision of the Executive Committee along with all supporting documents shall be provided to the Board of Directors in time for its next regular meeting. The member(s) in question shall be notified of the decision of the Executive Committee and shall be advised that they have a right to appeal to the Board of Directors the decision taken by the Executive Committee. Such appeal shall be filed within ten (10) Institute working days of the receipt by the member(s) of the decision of the Executive Committee. The Board of Directors' decision with respect to the appeal shall be final and binding and is not subject to any appeal to any other body of the Institute.

[27] I find that, in adopting the following approach, which is much more nuanced than its original version, the revised Policy adequately addresses the Board's concerns:

- the automatic suspension of a member who applies to an outside body has been eliminated;
- the Executive Committee and the Board of Directors of the respondent are to assess, on a case by case basis, the impact of the recourse to an outside body and the ability of the member to continue to fulfill his or her bargaining agent responsibilities in a loyal manner; and
- the member involved has the opportunity to provide his or her comments and submissions before the respondent makes a final finding.

Contrary to its original version, the language of the revised Policy cannot be said to contravene subparagraph 188(*e*)(ii) of the *Act*. However, the manner in which the respondent will apply the Policy to the circumstances of a given case will always remain subject to a determination as to whether the respondent is complying with section 188 of the *Act*. Therefore, I find that the respondent has complied with the Board's order on that matter.

[28] I now turn to the portion of decision 2009 PSLRB 103 dealing with the reinstatement of the applicant's status as an elected official of the respondent. It is not disputed that the respondent has not complied with that portion of the Board's decision and does not intend to comply with it considering that it has suspended the applicant's membership for a period of five years, effective October 20, 2009, which prevents her from holding any elected position in the Institute.

[29] That brings me to the second question of whether there is a good reason why filing decision 2009 PSLRB 103 would serve no useful purpose. When applying this criterion, the Board must strive to ensure that its decisions are complied with, while assessing whether filing the decision in the Federal Court is useful.

[30] I will discuss each of the respondent's arguments on that matter. First, the respondent alleged that filing decision 2009 PSLRB 103 would have prejudged the motion for a stay filed in the Federal Court of Appeal. I consider that argument to be moot given that the Federal Court of Appeal has ruled on the motion for a stay and has dismissed it. Second, the respondent alleged that filing decision 2009 PSLRB 103 would

be counterproductive to the judicial review proceedings relating to that decision. I do not agree with the respondent, and I consider that, by dismissing the motion for a stay, the Federal Court of Appeal clearly indicated that there was no reason why the Board's decision should not by enforced pending the judicial review proceedings. The Federal Court of Appeal expressed the following:

. . .

> *[4] According to Ms Bremsak's affidavit, the Institute has not yet complied with the Board's order, notwithstanding that it was made on August 26, 2009. The Institute's first application for a stay was filed on September 3, 2209 while the second was filed on September 21, 2009.*
>
> *[5] The requirements for the issuance of a stay of execution are well known:*
>
> > *(a) there must be a serious issue to be tried;*
> >
> > *(b) the applicant must satisfy the Court that it will suffer irreparable harm if it is not granted the stay; and*
> >
> > *(c) the balance of inconvenience must favour the applicant.*
>
> *See* RJR-MacDonald Inc. v. Canada (Attorney General) *[1994] 1 S.C.R. 311*
>
> *[6] In my view, there is clearly a serious issue to be tried in that the application of section 188 of the Act to the Institute's internal processes is a matter which is neither trivial nor a foregone conclusion. The critical issue is whether the Institute will suffer irreparable harm if it is required to comply with the Board's order and, in particular, if it is required to reinstate Ms. Bremsak to those offices to which she was originally elected or appointed.*
>
> *[7] This question came before my colleague Trudel J.A. in* Institut professionel de la fonction publique du Canada c. Veillette, *2009 CAF 256, [2009] A.C.F. No. 1004, in which she was asked to grant a stay of an order of the Board reinstating Mr. Veillette in circumstances similar to those in this case. The Institute argued in that case that irreparable harm flowed from the fact that other persons had been elected or appointed to the offices from which the Mr. Veillette had been suspended would necessarily have to be removed from office in order to reinstate Mr. Veillette. My colleague dismissed this argument, saying that it was nothing more than the normal consequence of an order for*

reinstatement, a common remedy in labour relations. Furthermore, there was no reason to prefer the democratic rights of those who had elected Mr. Veillette's replacements to those of the persons who had elected Mr. Veillette in the first instance.

[8] In this case, the applicant raises a different argument which is that Ms. Bremsak's recourse to an outside tribunal to pursue a remedy against her union puts her in a position where she is unable to carry out her duties with undivided loyalties. The Institute says that it should not be placed in a position where Ms. Bremsak can provide advice and influence and make decisions in her role in the offices to which she has been appointed or elected, while she continues to have a conflict of interest. In summary, the Institute's primary concern is to avoid having a member occupy a leadership position while at the same time challenging the Institute before an outside tribunal.

[9] While the present circumstances create an awkward situation for the Institute, they do not, in my view, rise to the level of irreparable harm. Ms. Bremsak may be opposed to her union with respect to a specific dispute but there is no reason to believe that she does not support the union's overall goals and objectives and is incapable of distinguishing between her interests and those of the membership of the union. If events should show that Ms. Bremsak has abused her position, then the normal disciplinary procedure, as provided in the Bylaws, would apply.

[10] In any event, the balance of convenience strongly favours Ms. Bremsak. In the interval since she was suspended, the term of a number of posts to which she was elected has expired. If the order of the Board is stayed until the matter is finally resolved, all them may expire before she has the opportunity to resume them, assuming she is successful. At that point, the issue would be moot from Ms. Bremsak's point of view.

[11] Insofar as staying the Board's order until the Veillette *case is concerned, there are enough differences between the two cases that the resolution of that case would not be determinative of the ultimate issue of this case. As a result, the issues of irreparable harm and balance of convenience must be addressed, and when they are, the result is the same in both motions.*

. . .

[*Sic* throughout]

[31] I will now turn to the third alleged reason put forward by the respondent for suggesting that filing the Board's decision in Federal Court would serve no purpose: the suspension of the applicant's membership. Does the respondent's decision to suspend the applicant's membership render the filing of decision 2009 PSLRB 103 useless? I do not find so and I consider that filing decision 2009 PSLRB 103 in the Federal Court will serve a useful purpose.

[32] Essentially, the respondent is asserting that, given the suspension of the applicant's membership, the Board's decision reinstating her in her elected positions is no longer enforceable and that, therefore, there is no useful purpose in filing decision 2009 PSLRB 103 in the Federal Court.

[33] The real question raised by the respondent's argument is whether the Board's decision can still be enforced, and that question, in my view, should be answered by the Federal Court.

[34] Parliament, in section 52 of the *Act*, vested the Board with the authority to determine whether parties comply with its decisions, but it has not vested the Board with the authority to enforce a decision once it has determined that its decision has not been complied with. Parliament chose to vest the Federal Court with that authority and provided, in section 52, a mechanism to file the Board's decisions in the Federal Court. Once a decision has been filed in the Federal Court, it becomes an order of the Court and it may be enforced as such (subsection 52(2)). I consider that the question of whether a Board decision is enforceable is quite different from the question of whether a decision has been complied with: the former question should be determined by the body vested with the authority to deal with the matters related to the enforcement of an order. For the above reasons, I therefore conclude that the respondent has not convinced me that filing decision 2009 PSLRB 103 in Federal Court would surve no useful purpose.

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

(The order appears on the next page)

Order

[36] I declare that the respondent has complied with paragraph 144 of the Board decision in *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103.

[37] I further declare that the respondent has not complied with paragraph 143 and 145 of the Board decision in *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103.

[38] The Board will file its order in *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, in the Federal Court.

December 4, 2009.

Marie-Josée Bédard,
Vice-Chairperson