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Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

IRENE BREMSAK

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA ET AL.

Respondents

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

In the matter of a request for the Board to reconsider a decision under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Paul Love, a panel of the Public Service Labour Relations Board

For the Applicant: John Lee

For the Respondents: Steven Welchner, counsel

Decided on the basis on written submissions
filed December 4 and 19, 2012, and January 8, 2013.

I. Application before the Board

[1] This decision is the 16th in the dispute between Irene Bremsak and the Professional Institute of the Public Service of Canada (the "Institute") and other individual respondents. The many decisions made by panels of the Public Service Labour Relations Board ("the Board"), the Federal Court and the Federal Court of Appeal in relation to that dispute are set out in Appendix I of this decision, using the same method as set out in *Bremsak 15* (non-reinstatement, retaliation and five-year suspension complaints and applications for consent to prosecute). The following comments of the Federal Court of Appeal in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), at para 4 and 5, are indicative of the parties' relationship:

> *[4] Ms. Bremsak has been locked in a bitter five-year battle with the PIPSC and some of its officers and members. No one emerges from this sorry tale with much credit: intransigence on one side has been met by defiance from the other. Having started with a relatively minor incident, the dispute should have been settled long ago.*
>
> *[5] Instead, the conflict has escalated, and has given rise to numerous trips to the Board. Ms. Bremsak initiated some, PIPSC, imitated others; some have resulted in wins for Ms. Bremsak, others have gone PIPSC's way. Not content to stop at the Board, the parties have also instituted a flurry of proceedings in the Federal Courts.*

The full litigation history between Ms. Bremsak and the respondents is summarized in *Bremsak 15* (non-reinstatement, retaliation and five-year suspension complaints and applications for consent to prosecute).

[2] Ms. Bremsak applied for the reconsideration of the decision of a panel of the Board that dismissed her application for consent to prosecute in PSLRB File No. 597-02-07 ("the fifth application for consent to prosecute"). The fifth application for consent to prosecute was one of the nine matters decided on July 22, 2011 in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)). In that decision, Ms. Bremsak requested that a panel of the Board find that the Institute and the individuals set out in Appendix II to this decision (altogether "the respondents") committed unfair labour practices under section 188 of the *Public Service Labour*

Relations Act ("the *Act*") and that the panel give its consent to prosecute the respondents under sections 200 and 202. Sections 188, 200 and 202 provide 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 this Part; 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.*
>
> . . .
>
> ***200.*** *Every person who contravenes subsection 186(1) or (2), section 188, subsection 189(1) or section 195 or 199 is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.*

. . .

> ***202.*** *(1) Every employee organization that contravenes, and every officer or representative of one who contravenes, section 187 or 188 is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.*
>
> *(2) Every employee organization that contravenes subsection 194(1) or (2) or 197(3) is guilty of an offence and liable on summary conviction to a fine not more than $1,000 for each day that any strike declared or authorized by it in contravention of that subsection is in effect.*
>
> *(3) A prosecution for an offence under subsection (1) or (2) may be brought against an employee organization and in the name of that organization and, for the purposes of the prosecution, the employee organization is deemed to be a person.*

An employee organization or a person acting on its behalf is prohibited from taking disciplinary action or imposing any form of penalty by applying disciplinary standards in a discriminatory manner, as outlined in paragraph 188(*c*) of the *Act*. Subparagraph 188(*e*)(ii) prohibits intimidation, coercion or the imposition of a financial or other penalty on a person because the person made an application under the *Act*.

[3] Ms. Bremsak filed this application for reconsideration on December 4, 2012. It followed the judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), which was dismissed on March 15, 2012, by the Federal Court of Appeal: see *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with Bremsak 2 (original complaints)).

[4] The respondents submitted that this application should be dismissed because of a delay in filing it, that there are no new facts and that it does not otherwise meet the Board's test for reconsidering a decision.

[5] This application for reconsideration can be dealt with appropriately by a decision based on the written submissions contained in Ms. Bremsak's application for reconsideration, the respondents' reply and Ms. Bremsak's rebuttal, filed December 4 and 19, 2012, and January 8, 2013, respectively, because Ms. Bremsak and the respondents thoroughly addressed the rather narrow issue that needs to be decided and because they provided case law references in their submissions. Ms. Bremsak's

application was 3 pages long, the respondents' reply was 4 pages and Ms. Bremsak's rebuttal was 10 pages. Therefore, I exercise my discretion under section 41 of the *Act* to decide this matter without an oral hearing.

II. <u>Background</u>

[6] Ms. Bremsak was an elected official with the Institute.

[7] Ms. Bremsak originally filed two complaints with the Board (PSLRB File Nos. 561-34-202 and 339, "the original complaints"). The first original complaint was filed on November 16, 2007 and alleged that the Institute had taken a discriminatory disciplinary penalty against Ms. Bremsak (PSLRB File No. 561-34-202, "the first original complaint").

[8] On April 9, 2008, the Institute's Board of Directors suspended Ms. Bremsak from her elected offices pursuant to its the *Policy Related to Members and Complaints to Outside Bodies* ("the policy") until the first original complaint came to conclusion.

[9] The second original complaint, dated April 11, 2008 and filed on July 8, 2008, challenged the decision of the Institute's Board of Directors to apply the policy to suspend Ms. Bremsak from her elected offices (PSLRB File No. 561-34-339, "the second original complaint").

[10] On August 26, 2009, a panel of the Board decided the original complaints in *Bremsak 2* (original complaints). The panel set out the original complaints as follows, at paragraphs 3 and 4:

> *[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.

The panel dismissed the first original complaint. However, Ms. Bremsak was successful in part with the second original complaint, and the panel ordered the following:

. . .

> *[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* [*sic*] *of the decision, that she has been reinstated to all of her elected and appointed positions <u>subject to the normal operation of the constitution and by-laws of the bargaining agent.</u>*

. . .

[Emphasis added]

Paragraph 132 reads as follows:

> *[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.*
>
> [Emphasis in the original]

Following that decision, Ms. Bremsak was never reinstated into her elected offices.

[11] In *Bremsak 11* (civil contempt charges), the Federal Court found the Institute guilty of contempt for failing to comply fully with *Bremsak 2* (original complaints).

[12] In *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), the Federal Court of Appeal upheld *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), which Ms. Bremsak now seeks to review in part. Ms. Bremsak had challenged *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) based on alleged procedural unfairness and abuse of discretion. The Court of Appeal did not accept Ms. Bremsak's arguments, and stated as follows at paragraphs 21 to 25 of *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)):

> *[21] . . . In my view, it was reasonable for the Board to conclude that it has a statutory discretion to dismiss complaints without deciding their merits in order to prevent a multiplicity of proceedings. Its exercise of that discretion on the facts of the present case was similarly reasonable.*
>
> *[22] As an adjudicative administrative tribunal, the Board has an implicit discretion to control its own process, subject to the duty of fairness and any statutory limitations on its powers:* Prassad v. Canada (Minister of Employment and Immigration), *[1989] 1 S.C.R. 560 at 568-69. In addition, section 36 confers on the Board the powers that are "incidental to the attainment of the objects of this Act". In my view , it was reasonable for the Board to have decided that it could dismiss complaints without adjudicating their merits when to do so would unduly duplicate and complicate its proceedings, and thereby serve no "legitimate labour relations purpose" (at para. 46).*
>
> . . .
>
> *[24] Nor was the Board's dismissal of Ms. Bremsak's complaints an unreasonable exercise of this discretion. These complaints do contain allegations of new instances of misconduct. However, they arise from the same subject matter as complaints that have already been decided, or are being litigated before the Board or in the Federal Courts: Ms. Bremsak's temporary suspension from union offices under an invalid policy, and PIPSC's failure to comply with the reinstatement decision.*
>
> *[25] As the Board pointed out, the reinstatement decision settled the question of the validity of both the policy and her suspension. The enforcement of that decision is the subject of*

> *the contempt proceedings. The Board is also currently hearing other complaints by Ms Bremsak concerning a harassment complaint by PIPSC members, and the validity of her suspension from membership in the union.*

[13] In *Bremsak 14* (civil contempt remedy), the Federal Court ordered the Institute to pay a fine and compensation to Ms. Bremsak for its failure to comply fully with *Bremsak 2* (original complaints). The Institute has appealed that decision and the matter is currently pending before the Federal Court of Appeal.

III. <u>Summary of the arguments</u>

A. <u>For Ms. Bremsak</u>

[14] Ms. Bremsak set out the following grounds in support of her application for reconsideration:

- after *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) was issued, the Federal Court and the Federal Court of Appeal found that the Institute flouted *Bremsak 2* (original complaints) and found the Institute in contempt; Ms. Bremsak alleged that those are relevant new facts;

- the Federal Court imposed a fine of $400 000 on the Institute; Ms. Bremsak alleged that there is a significant public interest in the compliance with Board orders;

- in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), the panel of the Board failed to provide reasons for denying the fifth application for consent to prosecute;

- the Board is required to protect the public interest.

[15] Ms. Bremsak submitted that, in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), the panel of the Board did not dismiss or deal with the merits of the fifth application for consent to prosecute. She stated that the fifth application for

consent to prosecute related to *Bremsak 2* (original complaints) and was not dependent on the other complaints determined in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)). She reiterated that the panel failed to provide reasons for denying the fifth application for consent to prosecute.

[16] Ms. Bremsak argued that, as a panel the Board had not dismissed in *Bremsak 2* (original complaints) the second original complaint underlying the fifth application for consent to prosecute, the panel of the Board should have given its consent to prosecute in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)).

[17] Ms. Bremsak stressed that, in *Bremsak 11* (civil contempt charges), the Federal Court found that the Institute was in contempt of *Bremsak 2* (original complaints), and that the Federal Court of Appeal confirm that finding in *Bremsak 13* (appeal of *Bremsak 11* (civil contempt charges)). The Federal Court imposed a substantial fine on the Institute in *Bremsak 14* (civil contempt remedy).

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

[18] The respondents submitted that section 43 of the *Act* gives a panel of the Board the discretion to review or amend an order or to rehear an application.

[19] The respondents argued that Ms. Bremsak did not raise any new evidence or arguments, and she seeks to re-litigate the merits of the fifth application for consent to prosecute: see *Czmola v. Treasury Board (Solicitor General – Correctional Service Canada)*, 2003 PSSRB 93. An application for reconsideration is not an alternative method of appeal and does not permit a panel of the Board to draw a different conclusion from the evidence: see *Quigley v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 125-02-77 (19980604).

[20] The respondents added that this application for reconsideration does not meet the test set out in *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, and is not timely. The test in *Chaudhry* is set out as follows at paragraph 29:

> *[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*).*

[21] The respondents submitted that, in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints), a panel of the Board found that the complaints and applications for consent to prosecute were aimed at enforcing *Bremsak 2* (original complaints), that *Bremsak 2* (original complaints) disposed of Ms. Bremsak's concerns related to the policy and her suspension from elected offices, and that there was no legitimate labour relations purpose to address the applications and complaints.

[22] The respondents asserted that, while Ms. Bremsak argued that there are new facts, the only new facts since the issuance of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) are the Federal Court's finding, confirmed that the Federal Court of Appeal, that the Institute was in contempt of *Bremsak 2* (original complaints) and the imposition of a significant fine (now under appeal). The contempt finding and the remedy have no relevance to the decision to dismiss the complaints and associated applications for consent to prosecute in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)).

[23] The respondents added that, in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), at paragraph 31, the Federal Court of Appeal concluded that ". . . there is no practical possibility that the Board would have

consented to the prosecution of [the Institute] . . . .” The Court reached this conclusion after finding that the Institute’s conduct in implementing the overly broad policy and the Institute’s legitimate interest in ensuring that members in positions of leadership avoid conflicts of interest and breaches of their duty of loyalty “. . . would almost certainly not be regarded by the Board as such a flagrant and egregious breach of the Act as to warrant criminal prosecution.”

[24] The respondents submitted that the evidence relied on by Ms. Bremsak — namely, the contempt finding and the penalty imposed — has no relevance to the decision of a panel of the Board to dismiss the fifth application for consent to prosecute in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute’s failure to comply with *Bremsak 2* (original complaints)). This is an improper attempt to re-litigate the fifth application for consent to prosecute as Ms. Bremsak made this argument before the Federal Court of Appeal in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute’s failure to comply with *Bremsak 2* (original complaints)), and it failed.

[25] The respondents argued that this application for reconsideration was made almost a year-and-a-half after the fifth application for consent to prosecute was dismissed in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute’s failure to comply with *Bremsak 2* (original complaints)), and it should be dismissed as untimely: see *Chaudhry*.

C. <u>Ms. Bremsak’s rebuttal</u>

[26] Ms. Bremsak submitted that the *Act* stipulates no restrictions that would prevent a panel of the Board from reviewing, rescinding or making a new order. In particular, there are neither time restrictions nor any restrictions to review only new evidence or arguments.

[27] Ms. Bremsak argued that she met the legal requirement set out in sections 200 and 202 of the *Act* for a panel of the Board to consent to her instituting prosecution because another panel found a breach of subparagraph 188(*e*)(ii) in *Bremsak 2* (original complaints). A *prima facie* case was made for granting the fifth application for consent to prosecute because, in *Bremsak 11* (civil contempt charges), the Federal Court made a final order finding the Institute in contempt. There is a public and private interest in

consenting to prosecution to penalize a reprehensible conduct and deter others from engaging in that conduct: see *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1000 v. 1229026 Ontario Inc.*, [2006] OLRB Rep. May/June 307. That interest is separate from the interest in a contempt application.

[28] Ms. Bremsak argued that the panel of the Board erred in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) in finding at paragraph 47 that ". . . [t]he Board has no inherent power to punish a party for contempt of one of its orders; it is a creature of statute . . . ." Ms. Bremsak also relied on *Bremsak 5* (order to appear to respond to civil contempt charges) and on sections 200 to 205 of the *Act*, which list offences.

[29] Ms. Bremsak submitted that a panel of the Board dismissed all the applications for consent to prosecute in paragraph 51 of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) on the basis that all the complaints were dismissed, yet the fifth application for consent to prosecute related to *Bremsak 2* (original complaints) and to the respondents' non-compliance with *Bremsak 2* (original complaints). The panel gave no reasons for dismissing the fifth application for consent to prosecute.

IV. Reasons

[30] Ms. Bremsak suggested that there are no restrictions on the powers of a panel of the Board to reconsider a decision under section 43 of the *Act*. I note that she made that same argument in *Bremsak 6* (denial of reconsideration of *Bremsak 2* (original complaints)) and that the argument about "no restrictions" was rejected in that decision.

[31] Ms. Bremsak's view of section 43 of the *Act* is incorrect. That section reads in part 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.*
>
> . . .

The word “may” means that a panel of the Board has discretion to review or rehear a matter on its merits. Applications for decision review are rarely granted, as the parties must present all their evidence and arguments at the time of the original hearing. A decision is meant to be a final determination of a matter, subject to the rights of the parties to seek judicial review and further appeal. Reconsiderations are not meant to be another kick at the can or a fresh attempt to re-litigate the merits of a case.

[32] The scope of the reconsideration power of the Board under the former *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, was explained as follows at paragraph 11 of *Czmola*:

> *[11] As was acknowledged in* Public Service Alliance of Canada v. Treasury Board *(Board file no. 125-2-83), applications of this type under section 27 of the Act have been the subject of relatively few decisions. However, this is not to say that the Board has not, in the relatively few decisions it has issued, given parties clear and consistent directions on what is required in any such application. The seminal decision on the issue is* Public Service Alliance of Canada v. Treasury Board *(Board file no. 125-2-41). In this decision, the Board interpreted the scope of section 27 (formerly section 25) and decided that the purpose of section 27 was not to enable an unsuccessful party to reargue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists: see* C.A.T.T. and Treasury Board and Federal Government Dockyard Trades and Labour Council East, *Board file no. 125-2-51. The Board held that it would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of. The power to reconsider a decision must be used judiciously, infrequently and carefully.*

I am satisfied that it is appropriate to apply that standard when determining an application for reconsideration made under section 43 of the *Act*.

[33] An application for reconsideration is not intended to be an alternative appeal or a rehearing of an original decision. It is meant to deal with new evidence or new arguments that could not have reasonably been anticipated or presented at the original hearing. The authorities make it clear that the power to review a decision should be

used judiciously and sparingly. The steps of the test for determining an application for reconsideration were summarized as follows at paragraph 29 of *Chaudhry*:

> *[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).*

[34] This application for reconsideration is odd. Ms. Bremsak asked this panel to reconsider a decision that has been upheld by the Federal Court of Appeal on judicial review in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)): the Federal Court of Appeal refused to send back to the Board the issue raised by Ms. Bremsak about the fifth application for consent to prosecute. The reasons of the panel of the Board for dismissing all the complaints and applications for consent to prosecute in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) were that Ms. Bremsak clearly intended the complaints and applications to be enforcement procedures of *Bremsak 2* (original complaints) and that she was clearly in the wrong forum for enforcing it. The correct forum was the Federal Court. The Federal Court of Appeal did not quash that finding in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)).

[35] Ms. Bremsak gave no reasons for the delay in filing this application for reconsideration and this was an issue raised in the respondents' reply. One would

think that, if there were a serious issue, she would have applied to the Board in a timely manner after she received the decision of a panel of the Board in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) or, alternatively, after she received the Federal Court of Appeal decision in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)).

[36] Further, there is no material change of circumstances since *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) was issued. The findings of the Federal Court and the Federal Court of Appeal on contempt and its remedy are not new evidence or new argument that are material and determinative of the fifth application for consent to prosecute. In fact, the very reason for dismissing the fifth application for consent to prosecute in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) was to ensure that the issue of enforcement of *Bremsak 2* (original complaints) was decided in the correct forum, without enmeshing the Board improperly in a dispute about the enforceability of its decision. The panel of the Board noted as follows in *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), at paragraph 42: ". . . [i]n my view, it is unnecessary and unhelpful to file multiple applications for each alleged transgression when the real issue is whether the order to reinstate the applicant is enforceable and whether the breach of the order continues over time."

[37] The same argument that Ms. Bremsak now makes to a panel of the Board about the fifth application for consent to prosecute was considered by the Federal Court of Appeal in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)). In reviewing the substance of the fifth application for consent to prosecute, it is far from clear what Ms. Bremsak intended by filing it. The fifth application for consent to prosecute was filed on November 3, 2009, and by the time it was determined, the following had occurred:

- Ms. Bremsak had initiated the process to file *Bremsak 2* (original complaints) in the Federal Court;

- on December 4, 2009, a panel of the Board had issued *Bremsak 4* (filing of *Bremsak 2* (original complaints) in the Federal Court); and

- Ms. Bremsak had initiated contempt proceedings in the Federal Court.

The only clear thing about the fifth application for consent to prosecute, in the context of all the surrounding events, is that Ms. Bremsak filed it as an attempt to compel her reinstatement to her elected offices and to enforce *Bremsak 2* (original complaints). In *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)), the Federal Court of Appeal commented as follows, at paragraphs 28 to 33:

> *[28] Ms. Bremsak says that her fifth consent application was not linked to these complaints, but related to her original complaint that led to the reinstatement decision. Accordingly, she says, the Board erred in dismissing it on the same ground as the other applications.*
>
> *[29] Even if she is correct on this point, this is a case where the Court should take up the invitation of the Supreme Court in* Dunsmuir v. New Brunswick, *2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48, and consider the reasons that the Board could have offered for dismissing the fifth consent application. In my view, there were good reasons that the Board could have given for its decision on this issue and, in the circumstances of this case, it would be unduly formalistic to remit the matter to the Board for re-determination. Nothing will be gained by the Court's adding another round of unnecessary litigation to a dispute that has already been bedevilled by a proliferation of administrative and judicial proceedings.*
>
> *[30] Like the Ontario Labour Relations Board, the Board has stated that consent to prosecute is rarely given. Criminal proceedings are authorized only in the most extraordinary situations, because of the serious legal consequences for those prosecuted, and the negative effects that a criminal prosecution is likely to have on good industrial relations: see* Quadrini v. Canada Revenue Agency, *2008 PSLRB 37 at para. 67;* Orbine v. Service Employees International Union, *[2011] O.L.R.D. No. 1695, 197 C.L.R.B.R. (2d) 189 at para. 27.*

> *[31] In my view, there is no practical possibility that the Board would have consented to the prosecution of PIPSC and the named individuals for suspending Ms. Bremsak from her union offices under the policy that the Board's reinstatement decision held invalid. That policy provided for the automatic temporary suspension from office of union members who took an internal union matter to an outside body, including the Board.*
>
> *[32] The reinstatement decision recognized that it would be appropriate in some situations for the union to temporarily suspend a member from office who had gone to an outside body with an internal union issue. PIPSC has a legitimate interest in ensuring that members of the union's leadership avoid conflicts of interest and breaches of their duty of loyalty to the union. The problem that the Board found with the policy as drafted was its absolute character. In particular, the policy left no room for proportionality between offences and punishment. See 2009 PSLRB 103 at para. 17.*
>
> *[33] Temporarily suspending a member from office under a policy that was simply too broad would almost certainly not be regarded by the Board as such a flagrant and egregious breach of the Act as to warrant criminal prosecution.*
>
> [Emphasis added]

[38] *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) was final. If Ms. Bremsak considered that the Federal Court of Appeal had erred in its decision, she should have sought leave to appeal to the Supreme Court of Canada. Seeking reconsideration by the Board of a decision already upheld at judicial review, in which the Federal Court of Appeal refused to send the fifth application for consent to prosecute back to the Board for reconsideration, was clearly an attempt by Ms. Bremsak to re-litigate the merits of the matter. It is clear that there are no new facts relevant to the disposition of the fifth application for consent to prosecute. In fact, I note that this application for reconsideration is nonsensical, as Ms. Bremsak was successful in seeking enforcement of *Bremsak 2* (original complaints) in the Federal Court. Although enforcement proceedings are still ongoing in the Federal Court of Appeal, the enforcement issue is irrelevant to this application for reconsideration. It might well have been open to the Federal Court to make findings against the respondents and impose fines against them in its contempt process; instead, it chose to hold the Institute as the sole party responsible for not complying fully with *Bremsak 2* (original complaints).

[39] I see no labour relations purpose in rehearing the fifth application for consent to prosecute. Ms. Bremsak got her remedy from the Federal Court of Appeal. One of the important points in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)) is that quasi-judicial administrative tribunals have limited resources and are entitled to make case-management decisions that are reasonable and appropriate. The Board received 20 applications from Ms. Bremsak following *Bremsak 2* (original complaints). The Federal Court of Appeal stated as follows at paragraph 23 of *Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)):

> *[23] Contrary to Ms. Bremsak's argument, the Board's general statutory responsibility to administer the Act is not inconsistent with the existence of an implicit discretion to control its own process by dismissing complaints on the ground that their substance will be better addressed in other proceedings. Without this discretion, the Board's docket could be overwhelmed. It must be able to manage its caseload in order to ensure that limited resources are used in a manner that enables it to discharge its responsibilities for the efficient resolution of labour-related disputes.*

I also note that the Federal Court of Appeal characterized Ms. Bremsak's argument concerning the fifth application for consent to prosecute in the following terms, at paragraph 29: ". . . [n]othing will be gained by the Court's adding another round of unnecessary litigation to a dispute that has already been bedevilled by a proliferation of administrative and judicial proceedings." One would have thought that it was a clear message to Ms. Bremsak and that, at least for that issue, she had her answer, which became final when she did not seek leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada.

[40] The Board must hear and decide many labour relations disputes, which are no less serious than Ms. Bremsak's. Ms. Bremsak had the Board's answer about the policy and its application to her when *Bremsak 2* (original complaints) was issued on August 26, 2009. By the sheer number of her applications to the Board, it is apparent that Ms. Bremsak is oblivious to the Board's limited resources. It is somewhat surprising to me that she would solicit the Board's time with this application for reconsideration, which is an abuse of process, given the fulsome reasons given by the Federal Court of Appeal in *Bremsak 12* (judicial review of *Bremsak 9* (complaints and

applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints)).

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

(*The Order appears on the next page*)

V. <u>Order</u>

[42] I declare that the application for reconsideration is an abuse of process.

[43] The application is dismissed.

March 21, 2013.

Paul Love,
a panel of the Public Service
Labour Relations Board

List of *Bremsak* decisions issued by the Board and the courts

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 1* (denial of interim relief pending a decision on the first original complaint)"), 2008 PSLRB 49

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 2* (original complaints)"), 2009 PSLRB 103

- *Professional Institute of the Public Service of Canada v. Bremsak* ("*Bremsak 3* (denial of stay of *Bremsak 2* (original complaints) pending judicial review of both *Veillette v. Professional Institute of the Public Service of Canada and Rogers*, 2009 PSLRB 64 (indefinite administrative suspension from elected office), and *Bremsak 2* (original complaints))"), 2009 FCA 312

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 4* (filing of *Bremsak 2* (original complaints) in the Federal Court)"), 2009 PSLRB 159

- *Bremsak v. Canada Professional Institute of the Public Service* ("*Bremsak 5* (order to appear to respond to civil contempt charges)"), 2010 FC 661

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 6* (denial of reconsideration of *Bremsak 2* (original complaints))"), 2010 PSLRB 126

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 7* (stay of contempt hearing pending a decision on the five-year suspension complaint)"), 2011 FC 406

- *Bremsak v. North Shore Investigations and Mattern* ("*Bremsak 8* (complaint against Mr. Mattern and application for consent to prosecute)"), 2011 PSLRB 56

- *Bremsak v. Professional Institute of the Public Service of Canada et al.* ("*Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints))"), 2011 PSLRB 95

- *Bremsak v. The Professional Institute of the Public Service of Canada* ("*Bremsak 10* (order to decide on the civil contempt charges)"), 2011 FCA 258

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 11* (civil contempt charges)") 2012 FC 213

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 12* (judicial review of *Bremsak 9* (complaints and applications for consent to prosecute related to the Institute's failure to comply with *Bremsak 2* (original complaints))"), 2012 FCA 91

- *Professional Institute of the Public Service of Canada v. Bremsak* ("*Bremsak 13* (appeal of *Bremsak 11* (civil contempt charges))"), 2012 FCA 147

- *Bremsak v. Professional Institute of the Public Service of Canada* ("*Bremsak 14* (civil contempt remedy)"), 2012 FC 1396

- *Bremsak v. Professional Institute of the Public Service of Canada et al.* ("*Bremsak 15* (non-reinstatement, retaliation and five-year suspension complaints and applications for consent to prosecute)"), 2013 PSLRB 22

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