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Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

DAVID IAN TENCH

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Tench v. Canadian Association of Professional Employees

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

REASONS FOR DECISION

Before: Bruce P. Archibald, Board Member

For the Complainant: Himself

For the Respondent: Fiona Campbell and Amy Groothius, counsel

Heard at Halifax, Nova Scotia,
May 6 to 8 and December 15 to 17, 2008.

I. Complaints before the Board

[1] This decision deals with two complaints by David Ian Tench ("the complainant") against his bargaining agent, the Canadian Association of Professional Employees ("the Association"), stating that it committed unfair labour practices by acting ". . . in a manner that is arbitrary or discriminatory or that is in bad faith . . ." in the representation of the complainant, contrary to section 187 of the *Public Service Labour Relations Act* ("the *Act*"). The complainant is a customer relations manager in the Corporate Services Division at the Department of National Defence's ("the department") Formation Construction Engineering (FCE) operations in the Atlantic Region. He alleges that the Association, of which he is the sole member in his workplace, failed to fairly represent him in numerous grievances or incidents, which he believes were rooted in racial discrimination by the department and its employees.

[2] The key allegations contained in the two complaints must be set out in full. The first complaint ("complaint one"), formally filed pursuant to section 190 of the *Act*, dated September 17, 2007 and signed by the complainant, who described himself as "self-represented," contains the following four statements under the heading on the form that states "Concise statement of each act, omission or other matter complained of, including dates and names of persons involved":

> *1. Beginning in or around 4 January 2006, CAPE officials persuaded me not to file a classification grievance against my employer – National Defence (DND) – following a reclassification because CAPE officials assured me that the upcoming "conversion" would address my concerns.*
>
> *2. CAPE officials developed and filed a PSLRB application on my behalf, dated 22 June 2007. CAPE officials refused to allow me to participate in the development thereof and made significant mistakes. CAPE now refuses to correct the errors and has put conditions upon the application that are unfair and unreasonable.*
>
> *3. Since September 2006, my employer has been actively physically and verbally assaulting, discriminating against me on prohibited grounds, abusing their authority over me, professionally undermining me, and failing to take the proscribed steps to accommodate my disability. In spite of my pleas and protestations, CAPE officials have completely denied me access to the grievance process and on occasion has sided with my employer and conspired with my employer.*

classification process that affected many Association members and that is, in fact, referred to in paragraph 1 of complaint one (see paragraph 2 of this decision). The "APN" refers to an "Advanced Personal Notification," which was part of the reclassification process to which reference will be made later in this decision. Suffice it to say that there are a number of complaints alleged in this case against the Association and that complaint one and complaint two overlap. The corrective actions sought under complaint two are the following: (a) $30,000.00 for the Association's withdrawal of complaint one; (b) $300,000.00 in ". . . future lost income damages . . ."; (c) $100,000.00 in ". . . punitive damages for the intentional and malicious behaviour . . ." of the Association; (d) $250,000.00 in ". . . aggravated damages for the intentional and malicious behaviour . . ." of the Association; and (e) $1 million in exemplary damages ". . . to be paid to an independent legal fund . . . ." In the alternative, the complainant sought ". . . the Board's permission to make application to the courts for the disposition of any matters the Board deems outside its' [*sic*] jurisdiction to address." The amount of these remedial damage claims are an early indication of the complainant's tendency, which became evident throughout testimony and argument, to assert matters that were not sustainable on the law or the facts.

[4] A word is in order about the length of this decision. Unfair representation complaints, to be resolved, often require an explanation of the issues between the complaining employee and his or her employer before one can analyze the allegations made by a complainant against a bargaining agent for failure to adequately represent him or her in such disputes. Thus, while the allegations analyzed here are those by the complainant against the Association, one can understand this secondary dispute only by understanding the context, which is the underlying dispute between the complainant and the department. This is particularly the case where a complainant has what appear to be serious issues with an employer and plausible arguments, at least on their face, as to why the bargaining agent has failed to adequately take up the cudgels in the fight with the department.

II. Duty of fair representation: general principles

[5] As mentioned above, the key statutory source for the duty of fair representation in this case comes from section 187 of the *Act*. That section enunciates the following principle:

> ***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.*

The breach of this provision is declared by section 185 of the *Act* to be an "unfair labour practice," and paragraph 190(1)(*g*) of the *Act* imposes a duty on the Public Service Labour Relations Board ("the Board") to ". . . examine and inquire into any complaint made to it that . . . an employee organization or any person has committed an unfair labour practice within the meaning of section 185." However, both parties to these complaints acknowledge that the jurisprudential starting point for the analysis of unfair labour practice is found in the decision of the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at pages 521 to 527, which in fact predates some statutory statements. The Supreme Court of Canada summarized the jurisprudence in the following manner, at pages 526 to 527:

. . .

> *The duty of representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit.*
>
> *In* Syndicat catholique des employés de Magasins de Québec Inc. v. Compagnie Paquet Ltée, *[1959] S.C.R. 206, Judson J. for a majority of this Court described at p. 212 the status conferred on a certified union of exclusive representative of all employees who are members of the bargaining unit:*
>
>> *The union is, by virtue of its incorporation under the* Professional Syndicates' Act *and its certification under the* Labour Relations Act, *the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated.*
>
> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a*

> *corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

. . .

From these principles a voluminous jurisprudence has grown through the efforts of labour boards and courts across the country; see MacNeil, Lynk and Engelmann, *Trade Union Law in Canada*, looseleaf ed., Chapter 7. Relevant decisions from that jurisprudence were being cited during the discussions of each of the separate matters at issue in this case. However, as it turns out, the matter can be resolved by analyzing the facts in relation to the wording of section 187 of the *Act* and the principles from *Gagnon et al.* just set out.

III. <u>Discussion of the evidence</u>

[6] Over the course of six days of hearings, five witnesses testified, three called by the complainant (himself, his wife and Tony Cranford, a long-term employee at the complainant's work site and a shop steward with the Public Service Alliance of Canada) and two called by the Association (Claude Archambault, a labour relations officer for the Association, and Jean Ouellette, the Association's director of labour relations). The witnesses introduced over 120 documents in evidence, in addition to the authorities presented in relation to argument. Much of the documentary evidence consisted of copies of email correspondence among the key players in the relevant events. Counsel for the Association was very helpful in winnowing from the hundreds of pages of documents the essence of the complaints that the complainant hade made against the

Association. The Association thus asserted correctly that there were at least eight specific allegations and one general assertion against the Association that underlay the two complaints. The evidence and argument in relation to each claim will be examined.

A. Commissionaire grievance

[7] The first matter, and indeed the central issue that gave rise to complaint one, was that the complainant felt he was not fairly or adequately represented by the Association in what he perceived as racial discrimination by a member of the Canadian Corps of Commissionaires ("the commissionaire") on security duty at his workplace. The complainant completed the Treasury Board form for the presentation of an individual grievance against the commissionaire's actions on November 14, 2006. It was approved by Ben Black as Association representative, who is the president of the Nova Scotia Local, on the same date, and receipt was acknowledged by the complainant's then supervisor, Captain Chris M. Quillan, as representative for the department. The facts as alleged by the complainant were laid out on the form in the following terms:

> *The following is without prejudice. I reserve the right to prescribe other grievance details and/or prescribe other areas where the CAPE Collective Agreement has been violated during mediation and/or the grievance procedure. I grieve that on the 3rd Sept., 26 and 31 October 2006, the Department of National Defence failed in its' duty to provide me with a workplace free from racial, marital and personal discrimination contrary to s. 16.01 of the collective agreement. The particulars for which are as follows: 1) On 3 Sept. 2006, in or around 12:30 p.m. I was stopped at the entrance to Willow Park, a place where I have been working for over 5 years, by a security officer and asked to provide identification. Notwithstanding* [sic] *I provided this officer with identification as requested and eventually was allowed to enter the compound and building. 2) On 26 October 2006, in or around 2:45 p.m. while standing inside the fence near the entrance to Willow Park, the same security officer approached me and asked me to show identification. I motioned for her to check with the officer she was relieving. 3) On 26 October 2006, in or around 2:55 p.m., I met up with my wife, who had already entered the security compound and as we were leaving, the same security officer approached her and I and demanded to see my wife's identification. 4) On 31 October 2006, in or around 3:00 p.m. an employee advised me that there were MP's in the building who wanted to speak with me. While the employee thought that it might have to do with a security incident, he could not be sure. I was required to scramble and try and speak to my*

> *union. As I was unable to, I wrote a brief letter to the MP's and handed it to them. They said they wanted to get a statement from me about the security incident. I told them what I had to say on the matter on that date was explained in my letter. I handed it to them and then I exited the room.*

As corrective action, the complainant sought three things: (a) that the commissionaire be barred from working at the department for the rest of the complainant's career there; (2) that, henceforth, the security at his place of work be manned at all times by both a commissionaire and a military police officer; and (3) that the commissionaire be imposed a $1000 "fine" payable to the complainant.

[8] The Association represented the complainant in the three-level grievance process for that matter in what became a long, drawn out and contentious affair. Claude Archambault was the Association's labour relations officer who was assigned to handle the case. Mr. Archambault, who thus had carriage of the grievance on behalf of the Association, initially explored the possibility of mediation with Heather Kilby, a Human Resources Advisor at the department. However, by December 4, 2006, Mr. Archambault informed a Ms. Grant for the department that the complainant was not interested in mediation. On December 5 and 7, 2006, there was an exchange of long emails between Mr. Archambault and the complainant where the nature of the grievance process, burden of proof, strategies in presenting evidence, the role of an adjudicator and the place of potential judicial review were discussed. During that exchange, Mr. Archambault explained that, under clause 16.01 of the collective agreement and the facts, discrimination based on marital or family status could not be an issue. In response, the complainant asserted that ". . . another process is required to address my wife's treatment . . ." in apparent response to Mr. Archambault's correct statement that the Association did not have an obligation to represent persons who are not employees in the bargaining unit. Mr. Archambault attended, with the complainant, the first-level grievance meeting on December 13, 2006, and presented an argument about the complainant's situation that was based on racial discrimination. On January 8, 2007, the complainant was sent, with a copy to Mr. Archambault, a letter from Captain Jason Porteous informing the complainant that his grievance had been denied. This two-and-a-half-page letter set out the results of an "investigation" conducted by Capt. Porteous (who spoke to the commissionaire and the military police) in which he accepted a different version of events from those alleged by the complainant and summarized that he was ". . . unable to conclude that you were treated differently,

negatively or adversely as a result of your race or marital status during the incident in question."

[9] On that same day, the matter was transmitted to the second level of the grievance process at the complainant's request and with the authorization of the Association. The second-level meeting was set for January 31, 2007, and in the period leading up to that date, the complainant requested and received from the department disclosure of several emails and other documents. The documents led the complainant to conclude that the commissionaire was lying and that ". . . Capt. Porteous has totally screwed this up . . .", to quote from a long email dated January 30, 2007 to Ms. Kilby, which was copied to the department's senior officers as well as to Mr. Archambault and Mr. Black. The meeting went ahead on January 31, 2007, but there was an exchange of emails between Mr. Archambault and Ms. Grant, on behalf of the department, requesting an extension of time for providing a decision. Mr. Archambault, Ms. Grant and the complainant exchanged inconclusive emails on the subject of corrective action. When there was no decision from the department on the second-level outcome by February 26, 2007, the Association, at the behest of the complainant, transmitted the grievance to the third level of the grievance process, which was acknowledged by the department. However, by April 12, 2007, there was still no response from a management representative. On that date, Mr. Archambault sent a strongly worded email to Ms. Klassen, a management representative, with a copy to the complainant, which reads as follows:

> *Further to my e-mail of 4-04-07 regarding the above noted matter, it is imperative that Mr. Tench's discrimination grievance, DND file # LAB-06-01-HAFY-00100-0211 be scheduled as soon as possible, as per the proposed dates in April/07. The second level grievance meeting for Mr. Tench's grievance was held on January 31, 2007 and to-date, the employer's response has not yet been released in accordance with the prescribed time limits of CAPE's collective agreement. As a result of these serious delays, a transmittal at the third level of the grievance process was filed and acknowledged by management on February 26, 2007. The delays by management to respond at level 2 are unacceptable and prejudicial to our member, and undermine Mr. Tench's rights to be treated fairly and equitably in a timely manner, which in the end violates the doctrine of procedural and natural justice. JUSTICE DELAYED, JUSTICE DENIED.*

> *Accordingly, it light of these prejudicial actions, it is paramount that Mr. Tench's grievance hearing be scheduled as soon as possible at level 3, and failing to confirm a grievance meeting date at the final level by April 18/07, the Association will have no other alternative but to refer forthwith the grievance to adjudication.*
>
> *At your earliest convenience, we respectfully request that you provide a response regarding the above.*

This message seemed to get results.

[10] The third-level grievance hearing was scheduled to be held in Ottawa on April 26, 2007. On April 19, 2007, the complainant sent Mr. Archambault a long email in which he detailed the manner in which he wished Mr. Archambault to present his case. Mr. Archambault replied as follows on April 20, 2007:

> *Thank you Ian. I will present your grievance on April 26, 2006 on your behalf. Thank you for providing the important points that you raised in your e-mail that I will be relying on in my presentation. After the grievance hearing I will call you to give you a complete update.*
>
> *With respect to the carriage issue as depicted in your e-mail below, the process for which CAPE reviews grievances to determine whether it will support a grievance to adjudication was sent to you in an e-mail dated December 6, 2006 3:56 PM. I have copied that e-mail for you. (see below). The review process as explained in my December 6-06 e-mail is the approach that we adopt for all grievances where CAPE has carriage rights, which requires the approval of the bargaining agent. For all other grievances where it does not involve the interpretation or application of a provision of the collective agreement, CAPE will provide the same judicious review, however, if the decision of CAPE is that it will not support the grievance, the member can file the grievance to adjudication without the approval of CAPE.*

On May 28, 2007, the complainant received from Monique Paquin, Director General, Labour Relations and Compensation, the third-level response. Mr. Archambault, Ms. Grant and Ms. Kilby received a copy as well. The response reads as follows:

> *This is the final level response to the above-noted grievance and the presentation made by your union representative, Mr. Claude Archambault, at the final level of the departmental grievance process.*
>
> *You grieved that the Department of National Defence failed in its duty to provide you with a workplace free from racial,*

> *marital and personal discrimination contrary to Article.16.01 of the Economics and Social Science Services collective agreement.*
>
> *Upon reviewing your grievance, I find no evidence of discrimination based on any of the prohibited grounds pursuant to Article 16.01 of your collective agreement. Commissionaires are responsible for the safety and security of personnel, protection of property, information and equipment. In exercising this responsibility and in accordance with established procedures, Commissionaires are to check identification cards of personnel entering the facility to ensure that only authorized personnel gain access to the premises.*
>
> *In this case, the correct procedures were followed and there was no evidence to indicate you were treated differently or in a manner inconsistent with the functions and policies that Commissionaires have to follow.*
>
> *Accordingly, your grievance is denied and the corrective action requested will not be granted.*

After this response, relations between the complainant and the Association began to sour, although not immediately.

[11] In early June 2007, the complainant, over a two-day period, attended training sessions established by the Association that were intended to provide participants with the qualifications required for appointment to the position of shop steward for the Association. Mr. Archambault conducted some of the training. It covered such matters as the basics of the collective agreement and the role of a shop steward in grievances along with harassment complaints and occupational health and safety matters, and participants were provided with binders of materials including a protocol on the representational relationship between the Association and employees in the bargaining unit. On June 12, 2007, the complainant sent Mr. Archambault an email in which he stated the following about the shop steward training:

> *I certainly was very impressed by yourself and all of the instructors. It was a very engaging and memorable experience for me for certain. I thank you and all CAPE for the opportunities.*

However, the complainant also mentioned three substantive matters. The first was his desire to file a classification grievance (to be discussed in detail later in this decision). The second was a work assignment dispute involving Capt. Quillan (again to be

discussed later in detail). The third was a request to discuss with the Association the commissionaire grievance ". . . that should be on the road to the PSLRB, just to make sure I fully understand that process." Mr. Archambault's response to the complainant on that email was doubtless the beginning of the complainant's disenchantment with the Association. On the first substantive issue, Mr. Archambault stated that he needed more information from the complainant before the Association could decide if and how it might be entitled to represent him. With respect to the dispute with Capt. Quillan, Mr. Archambault warned the complainant that his course of conduct could be viewed as insubordination and that he should govern himself by the well-known adage of "obey now, grieve later." Finally, for the commissionaire grievance, Mr. Archambault informed the complainant of a decision that became the crux of this case. The words used in his email reply were as follows:

> *On the final matter, I have thoroughly reviewed all of the merits of your current discrimination grievance against* [the commissionaire]*, with the Director of Labour Relations at CAPE, and it is the decision of CAPE not to refer the grievance to adjudication for a hearing on the merits. Notwithstanding this, CAPE will conditionally refer the aforementioned grievance to adjudication for the sole purpose of attempting to resolve the matter through mediation which will be offered by the Public Service Staff Relations Board.*
>
> *In the event you and/or the employer refuse mediation as stated above, or if mediation is unsuccessful in resolving the matter to the parties* [sic] *satisfaction, the referral of the discrimination grievance to adjudication will be withdrawn by CAPE.*
>
> *Prior to commencing the mediation proceedings, I will have to review with you the corrective measures that you are seeking in the grievance presentation which, in part, are not supported by case law.*
>
> *I will call you this afternoon to discuss the above matter. Best regards.*

The complainant was not pleased.

[12] In an email reply to Mr. Archambault on June 19, 2007, the complainant reasserted his position that he had a good case, that the commissionaire was lying and that the Association's decision would be a deprivation to him and to his family. The complainant concluded his email with the following paragraphs:

. . .

> *The Association should make the application to the PSLRB for adjudication pending mediation as it seems silly for the Association to suggest it as required and then not do so. However, I cannot see how what I have to say makes any difference to the Association and to believe any differently would be very slothful. I will still be making my own application individually to the PSLRB notwithstanding what the Association or the Department does or objects to there, here or anywhere, as I feel the Association has not only overstepped its boundaries, but also is moving in a way that deprives me and my family, whom* [sic] *was also adversely affected by these discriminations a real chance of obtaining a just resolution.*
>
> *I am not opposed to mediation, in fact I support mediation as a solution. The way in which the Association is going about it leaves a lot to be desired. So you have my direction, I am not opposed to mediation with the Department, if possible. I am however and will always remain stanchly opposed to the either/or logic and will not be bullied by the Association or the Department.*

Mr. Archambault's reply merits quotation in full:

> *Thank you Ian for your email.*
>
> *It is not clear in your email if you will be referring by yourself the article 16 grievance to the PSLRB. If you do the referral, as the grievance deals with the application and/or interpretation of the collective agreement, the Registrar of the PSLRB will contact CAPE to ascertain whether or not we support the referral as same is required under the PSLRA.*
>
> *As per our protocol on representation, the Director of Labour Relations decides whether CAPE will proceed with a case to adjudication. As you know, I have discussed your grievance with him and he approves the referral as per the conditions that you have already been made aware of. The conditional nature of the referral will remain confidential, that is neither the PSLRB nor the employer will be advised that the referral is a conditional one. This is to insure that knowledge of this fact does not have an impact on the position the employer may take in the mediation process should the parties agree to same.*
>
> *Please confirm if you intend to refer the grievance to adjudication or if you wish that CAPE do so. If you refer the grievance directly to the PSLRB, we will advise the PSLRB that we support the referral when it contacts us.*

> *We will, at a later point in time, advise the PSLRB and the employer that we agree to mediation. We will contact you to set this up if the employer agrees to same.*

Mr. Archambault received no reply from the complainant because the latter decided to take the matter up directly with the Association's director of labour relations, Jean Ouellette.

[13] On June 20, 2007, Mr. Ouellette had an approximately 25-minute conversation with the complainant. Mr. Ouellette said that he tried to explain the rationale for the idea of a conditional reference to adjudication so as to enable a mediation process, if both the complainant and the management representatives agreed to mediate. However, Mr. Ouellette's evidence was that the complainant's position was that a conditional reference for the purpose of mediation was inadequate. He wished a full reference for the purposes of obtaining an adjudicative decision. Mr. Ouellette said that the complainant's view was that this was required "to stop the racists" and that the complainant would "rather be dead" than mediate. It was Mr. Ouellette's evidence that during the conversation the complainant was very aggressive and the he continuously interrupted Mr. Ouellette if he attempted to say something with which the complainant might disagree. Mr. Ouellette testified that the complainant characterized Mr. Ouellette's views as "bullshit," said that Mr. Ouellette "did not understand" him and told Mr. Ouellette the following: "Don't treat me like an idiot." Mr. Ouellette said that he was unable to convey his reasoning for the Association's proposed course of action because he was continuously interrupted.

[14] In his testimony, the complainant denied having been aggressive or rude with Mr. Ouellette or having prevented him from fully explaining his position. However, he confirmed that he never agreed during that conversation to a conditional reference to adjudication for purposes of attempting a mediated settlement. However, Mr. Ouellette was undeterred. In his review with Mr. Archambault, he had concluded that the complainant did not have a good case and that, in particular, the complainant's remedial demands were unrealistic. Nor had Mr. Ouellette given up on the possibility of a mediated outcome, which he felt was the best option if the complainant and management representatives could be persuaded to adopt that course of action. Mr. Ouellette authorized Mr. Archambault to refer the commissionaire grievance to adjudication, on the understanding that the purpose would be to mediate, not to carry the matter to full adjudication. He also authorized Mr. Archambault to give the

required notification to the Canadian Human Rights Commission ("the CHRC") that a reference to adjudication involved an allegation of discrimination contrary to a prohibited ground under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, so that the CHRC could intervene if it so wished. The management representatives were notified of those formal steps but, as a strategy by the Association, they were not notified that the purpose of the exercise was purely mediation and that the reference would be abandoned if the employer or the complainant refused to mediate.

[15] Despite an email from the complainant on June 21, 2007, in which he again objected to the Association's proposed course of action, Mr. Archambault referred the grievance to adjudication, gave notice to the CHRC and sent copies of the documents to the complainant on June 22, 2007. On June 26, 2007, the complainant sent an email to Mr. Archambault in which he stated that, among other things, the Association should be allowing him a greater role in processing the reference to adjudication for the commissionaire grievance and stating that the ". . . Association's outright dismissive approach hobbles not only me but also the locals in this region." On the same date, Mr. Archambault sent a reply email indicating that the Association's process was standard procedure for federal public service bargaining agents and that the complainant would be receiving copies of the documentation. On June 28, 2007, the complainant sent Mr. Archambault and Mr. Ouellette an email in which, among other things, he acknowledged receiving the forms, complained about not having been ". . . in on the development of the application . . ." and objected that the notice to the CHRC was in "error" since it mentioned as the grounds for complaint only "race" and not ". . . marital status, gender and even a personal . . ." ground. On July 11, 2007, the complainant sent a follow-up email to, among other things, obtain clarification on whether the Association had rectified the "error" in the scope of his grievance. Mr. Archambault replied the same day stating that ". . . there are no errors in the submission of your grievance to the PSLRB . . .", that the areas were the ones submitted in "the original grievance" and that, given Federal Court jurisprudence, one could not expand into new grounds beyond the original ones.

[16] In the meantime, on June 29, 2007, the CHRC informed the Board's Registry that it did not wish to intervene in the proceedings. Then, on July 12, 2007, the employer informed the Board's Registry that ". . . it does not intend to participate in mediation at this stage." However, the Association, according to Mr. Archambault (who had consulted with Mr. Ouellette), decided not to withdraw the grievance immediately and

to request that the management representatives reconsider mediation. On August 1, 2007, it was agreed to keep the grievance in abeyance pending a decision from the employer on the Association's request and gave a deadline of August 17, 2007, for a reply.

[17] By that time, the complainant was of the view that the Association was being unfair in its representation. On July 23, 2007, the complainant spoke to Mr. Ouellette, stating that he had previously requested from the Association information on its appeal mechanism about decisions on member representation. In an email later that day, Mr. Ouellette confirmed that telephone conversation, stated that he did not recall the prior request and provided the complainant with the Association's website address for obtaining a copy of the appropriate appeal protocol. In an email exchange with Claude Danik, Executive Director of the Association, from August 3 to 11, 2007, the complainant invoked the internal appeal process, but to no avail. The details of that correspondence will be reviewed later in this decision since it deals not only with the commissionaire grievance, but also with another matter, which the parties generally referred to as the "harassment grievance."

[18] To complete the narrative on the commissionaire grievance, the Association, for a variety of reasons, including Mr. Archambault's summer vacation, sought an extension to August 23, 2007 from an adjudicator to inform it of whether the Association was going to withdraw the grievance. Correspondence had been received by the Association in the intervening period that specified that the employer was hanging tough on its refusal to mediate. On Mr. Archambault's return from vacation, the Association withdrew the grievance. It was done on August 23, 2007 and, according to Mr. Archambault, he sent a copy of the correspondence with the Board's Registry to the complainant on the same date. The complainant stated that he never received the correspondence. The Association put in evidence a copy of the envelope containing the correspondence that had been sent to the complainant's correct address by registered mail through Canada Post but returned to the Association with the stamp from the postal service marked: "Unclaimed." No satisfactory evidence was adduced as to why this might have occurred.

B. Harassment grievance

[19] The following paragraphs describe the evidence adduced for the first "harassment incident" referred to in complaint one (see item 3 in paragraph 2 of this

decision). This harassment incident allegedly took place on December 19, 2006. In particulars attached to complaint one, the complainant describes the incident and the Association's response in the following terms:

> *On 19 December 2006, the complainant was again physically and verbally assaulted by his supervisor Capt. J. Porteous while the complainant was in his office quietly grieving his father's recent death (Feb 2006) on what would have been his father's birthday. The complainant advised CAPE officials about the events and complained to his employer (filed a harassment complaint) and reported the incident to the Military Police. The respondent failed to advise the complainant that he could and should file a discrimination grievance against his supervisor who was in violation of the collective agreement since the supervisor was in the complainant's office serving a disciplinary letter without written or verbal notice to the respondent or the complainant.*

From the evidence, it appears that the complainant's supervisor, Capt. Porteous, met with the complainant in his office on December 19, 2006. Capt. Porteous brought a letter addressed to the complainant entitled "Performance Counselling - Reporting of Absences." It referred to previous discussions, held in October 2006, concerning what was alleged to be the complainant's failure to notify the department of his absence from work due to sickness or for other reasons and then referred to two unexplained absences in December and set out a procedure that the complainant was to follow concerning notice of unapproved leave. It ended by informing the complainant of the Employee Assistance Program and indicating that the complainant's attendance performance would be reviewed in four months. It also stated that a copy of the letter would be placed in the complainant's personal file.

[20] The complainant made a "harassment" complaint to the commanding officer of the Formation Construction Engineering unit, Lieutenant-Colonel J.M. Bruno Simard, on January 9, 2007. Lt.-Col. Simard replied on March 1, 2007, stating that he had considered the complaint and a contradictory report from Capt. Porteous and that, in the absence of any corroborating evidence from another witness, he had concluded that further investigation was not required and that the incident did not constitute harassment. The letter ended by suggesting there might be "inter-personal [*sic*] relations issues" between the complainant and Capt. Porteous that could benefit from an alternate dispute resolution process.

[21] The complainant filed a harassment grievance in relation to the alleged harassment incident pursuant to section 208 of the *Act* on April 4, 2007, after having consulted over the telephone the previous day (and perhaps earlier) with Mr. Archambault. In the form, under the heading "Grievance Details," the complainant stated the following:

> *The grievor reserves the right to proscribe* [*sic*] *new issues to this grievance.*
>
> *The grievor grieves the decision of LCol Simard dated 1 March 2007, in relation to the grievor's harassment complaint dated 9 January 2007 as discriminatory. The grounds are per article 16.01-.02 and 35.01-.06.*
>
> *LCol Simard's decision that no harassment occurred is in error and the error produces a situation where the terms of the collective agreement are not being adhered to by FCE management.*
>
> *In specific, Capt Porteous failed under s. 35.01-06 to notify the grievor in writing or otherwise, prior to meeting in the grievor's office, that the purpose and intent of the meeting was to administer discipline. While this was not the only thing that was harassing about the meeting from the grievor's standpoint, it is a clearly harassing aspect of the meeting. The decision that no harassment occurred necessarily is a failure to take this element of the meeting into account. It is unacceptable that LCol Simard would overlook this fact. Notwithstanding the decision is an act and the act is discriminatory.*

Under the heading "Date on which each act, omission or other matter giving rise to the grievance occurred," the complainant inserted "1 March 2007" with no reference to December 19, 2006. Then, under the heading "Corrective Action Requested," the complainant wrote the following:

> *1. To have the harassment complaint filed by the grievor re-opened and re-examined by an officer of the Court and to have them render a decision.*
>
> *2. No disciplinary action against the grievor can be initiated by this LCol without the explicit consent of the Base Commander.*
>
> *3. None of the issues arising out of or connected with this grievance and the harassment complaint may be used as a basis for a PER/PAS downgrading of the grievor.*

> *4. In order to eliminate discrimination, it must come at a price. While perhaps not intentional, it was avoidable, the effects are felt nonetheless - $1500.00.*

That concluded the substantive content of the grievance. However, the procedural context is most important for the complainant's dispute with the Association.

[22] The complainant discussed that grievance with Mr. Archambault on April 3, 2007, and Mr. Archambault sent the complainant a confirmation email on April 4, 2007 indicating that, before the Association could endorse the grievance, Mr. Archambault would have to review all the facts and the documentation. The email carefully laid out the distinctions between breaches of the collective agreement on the one hand and breaches of the Treasury Board harassment policy on the other and the procedural differences for the Association between the two. Despite this caution, the complainant filed the grievance and falsely indicated on its face that the original had been signed by Mr. Archambault, giving his approval on behalf of the Association that it was supporting the grievor's allegation of a breach of the collective agreement. However, the complainant did forward documentation about his grievance to Mr. Archambault, which prompted him to respond as follows:

> *Further to my e-mail of 4-4-07, please be advised that I have received some documentation that we discussed regarding the issues surrounding the grievance that you have filed on April 4, 2007. Since you are invoking that clause 35.01 has been violated, before CAPE can support an alleged violation of a clause in the collective agreement a thorough review of the facts and merits will have to be undertaken by CAPE. I noticed that you indicated on the grievance form that I signed the original grievance. Please be advised that is not the case, since I clearly indicated to you over the phone on April 3, 2007, that since you are invoking that a clause of the collective agreement has been violated, CAPE cannot endorse your grievance until it has an opportunity to thoroughly review the facts and merits surrounding your grievance. It is important Ian that you follow the direction that is provided by me, and as such, failing to follow my instructions in the future could jeopardize CAPE's representation that is offered to you. The later* [sic] *applies to all the membership, and please do not view this as a threat, but I must stress the importance of abiding to my instructions on behalf of CAPE, especially when they are agreed to.*
>
> *Moreover, as discussed the essence of your grievance is also compounded by the fact that the issues which gave rise to the alleged violation of clause 35.01 are outside the time limits to grieve. Notwithstanding, CAPE will review the merits*

> *of your grievance, and until we are provided with the information/documentation that is required to conduct a review, CAPE cannot support your grievance. The aforementioned is a standard position that CAPE follows for all grievance requests which involve the interpretation and application of the provisions of the collective agreement.*
>
> *If you have any questions regarding the above, please contact me.*

Under the circumstances, this was a careful and measured response to a member of the Association who was apparently beginning to behave inappropriately and who was difficult to manage. A less-experienced labour relations officer might have reacted somewhat angrily, out of frustration. Mr. Archambault's conduct was a model of patience and propriety.

[23] However, the complainant was not insensitive to Mr. Archambault's position and on April 12, 2007 sent a detailed email to the latter explaining why he had felt it necessary to act on the Association's behalf (i.e., indicating that he had had Mr. Archambault's authorization), why he believed he was justified in doing so and why he felt that the grievance was not out of time since, in his view, the event triggering the breach of the collective agreement was Lt.-Col. Simard's decision of March 1, 2007 and not the original actions of Capt. Porteous on December 19, 2006. The complainant concluded his email with the following sentence:

> *So I will leave it there and hope that you all set aside any outrage at my "upstartedness"* [sic] *through filing a grievance, because it was not done to inflame nor incite, but only to expeditiously do what you would have done and wanted done had you been aware of the full scope of the issues sooner.*

This reply did not have the desired effect on the Association from the complainant's perspective.

[24] After a telephone discussion with the complainant, Mr. Archambault sent him the following email on April 16, 2007, informing him why the Association would not support his April 4, 2007 grievance:

> *As discussed, CAPE has thoroughly reviewed the facts and merits surrounding your grievance challenging the decision of LCol Simard dated 1 March 2007, on the basis that it violated article 16.01 and 35.01 of CAPE's collective agreement. It is the decision of CAPE that it will not support*

your grievance alleging violation of article 35.01 based on the following assessment findings, as well as the alleged violation of article 16.01. CAPE will re-consider its position to support this portion of the grievance if additional information and/or evidence is provided that can substantiate a violation of the prohibited grounds under 16.01.

Alleged violation of clause 35.01. The issues which gave rise to the alleged violation of article 35.01 occurred on December 19, 2006. Within the prescribed time limits in accordance with the grievance procedure, you had 25 working, days to grieve the matter after you became aware of an action or circumstance giving rise to the grievance. Since you did not file your grievance within the prescribed time limits, that is January 26, 2006, your grievance dated April 4, 2006 is untimely and as such, CAPE cannot endorse the portion of your grievance dealing with clause 35.01.

Alleged violation of clause 16.01. The issues that you raised in your harassment complaint dated 9 January 2007, was specifically a harassment complaint which did not refer to any alleged violation of the prohibited grounds under clause 16.01 of the collective agreement. In order for the department to investigate an alleged discrimination of the prohibited grounds under clause 16.01, an allegation regarding this matter must be made at the time the complaint was filed, which would have allowed the department to properly investigate the allegation. The aforementioned requirements are consistent with Treasury Board's Policy on Harassment in the workplace. The department can only investigate allegations that are presented at the time a complaint is filed, and since you failed to include the alleged December 19, 2006 incident between yourself and Capt. Porteous, you cannot assume that the department should have investigated this matter. Moreover, had you filed the December 19/06 as an allegation, it is the view of CAPE that the issues and evidence that you presented surround the incident in question does not substantiate or establish that any of the prohibited grounds were violated under article 16.01 of the collective agreement. In cases where serious allegations are made, such as an allegation of discrimination, there is an obligation on the member and CAPE to adduce clear, precise and cogent evidence in support of the allegation(s). Failing this, CAPE will not approve nor support a grievance alleging violation of article 16.01. Accordingly, please provide to the undersigned, at your earliest convenience and before XX DATE, any evidence that you have that can support an allegation of racial discrimination.

Since your grievance deals with the interpretation and/or application of the collective agreement and in light of the

> *above-mentioned, CAPE will not authorize this grievance and will advise the employer accordingly unless we are provided with evidence that can support your allegation. As previously communicated to you, prior to submitting a grievance involving a provision of the collection agreement, prior approval of CAPE is required.*
>
> [*Sic* throughout]

The complainant sent a detailed six-paragraph email to Mr. Archambault later that day attempting to refute Mr. Archambault's position and presenting his arguments as to why the Association was wrong in not supporting his grievance. Mr. Archambault and the Association were unmoved by the complainant's reasoning, but Mr. Archambault testified that, consistent with the open-ended "XXDATE" reference in his email, the Association would not withdraw the grievance but rather would hold it in abeyance so that the complainant might have the opportunity to come forward with further factual evidence in support of his claim of racial discrimination.

[25] The evidence reveals little or no activity with respect to either the commissionaire grievance or the harassment grievance during the month of May 2007. One might infer that both the Association and the complainant were waiting for management's decision on the commissionaire grievance, which was sent to both of them on May 28, 2007, in the form of the letter from Ms. Paquin set out in paragraph 10 of this decision. The complainant and the Association were also engaged in other issues, which will be described later in this decision. However, the complainant did attend the shop steward training workshop in early June. While no specific mention was made in evidence about this, one might infer that the Association was hoping that the complainant's participation in the workshop training might make him more aware of and receptive to the Association's internal decision-making structures and responsibilities. On the other hand, the complainant may have been seeking to improve his knowledge about and status within the Association so as to be more effective in advancing his grievances. Setting aside these rather speculative inferences about the parties' motivations, Mr. Archambault provided clear evidence about the information conveyed during the course of the workshop. In particular, it was Mr. Archambault's evidence that the workshop dealt with a memorandum entitled "Redress Representation (update)" dated February 7, 2007, which contained a document called "Protocol 1 - Redress Representation and CAPE."

[26] That document describes the role of the Association and its officials in redress procedures. The redress procedures covered include: informal representation; collective agreement grievances (and National Joint Council ("the NJC") grievances); grievances outside the collective agreement; classification grievances; harassment complaints; harassment grievances; NJC letters of appeal; staffing complaints; complaints to the CHRC; workers' compensation appeals; and procedures for reintegrating an employee into the workplace. The "General Principles" applicable to all the foregoing procedures are described as the Association's commitment to "professional" labour relations; an acknowledgement of the Association's duty of fair representation; the Association's mandatory authority under the collective agreement, under which it must be held strictly accountable; voluntary representation matters where the Association may agree to assist a member and accept the obligation to be fully accountable to members; and the need for financial responsibility in representing members. Concerning the particular modalities of representation, the document sets out several roles and expectations in the following terms:

> ***3. Representation***
>
> *A) General*
>
> *i) The responsibility of representation on labour relation and employment matters at CAPE belongs to CAPE's Labour Relations Officers, reporting to the Director of Labour Relations.*
>
> *ii) The Labour Relations Officer may ask a local officer for assistance in a matter of representation, including signing a grievance form or transmittal form, communicating information to a member or making the representation before the employer representative.*
>
> *iii) CAPE's role of representation includes providing information to the member, evaluating the member's case, providing advice, preparing the representation to be made before the employer representative, a service provider, an arbitration board or other administrative tribunals.*
>
> *iv) CAPE advocates on behalf of the member; it is not a mediator.*
>
> *v) Failure by the member to provide the relevant information or documentation in a timely manner will result in an automatic decision by the Association to reject representation.*

> vi) *At any time, the Director of Labour Relations may choose to make exceptions to Protocol 1, so long as those exceptions are in the best interests of the Association and the membership as a whole.*
>
> vii) *The Director of Labour Relations will decide whether CAPE will proceed with a case to adjudication, and/or to Federal Court. In the event that a member has the options of self-representation and of representation by another party, the member will be advised by CAPE.*
>
> viii) *CAPE considers its legal obligation to the membership, and to employment equity groups when pursuing a matter on behalf of an individual member.*

In his testimony, the complainant was less than forthright in acknowledging that these matters were covered in the shop steward workshop that he attended. However, they are absolutely basic, and I accept Mr. Archambault's evidence that they were part of the curriculum. Not only in this section, but also for other representation functions, the document notes explicitly that the Association makes representation decisions ". . . in the interest of the membership in general as well as the interests of the member who wishes to file a grievance . . ." or to have the Association represent him or her in some other way. This principle is one that the complainant has difficulty understanding or accepting as relevant to the particular situations in which he found himself with the Association.

[27] The foregoing discussion concerning the shop steward workshop is an important context for what follows. On June 14, 2007, the complainant sent an email to Capt. Quillan with copies to Lt.-Col. Simard and Ms. Kilby. The email stated that the complainant wished ". . . to take this grievance out of abeyance and continue on with it individually." He further ". . . advised that no extensions on any level will be permitted." However, he did not amend the grievance to remove the reference to breaches of the collective agreement. Mr. Archambault responded on June 15, 2007 by an email that reads as follows:

> *As previously stated in my e-mail to you dated April 13, 2007, CAPE communicated to you that they did not support your grievance alleging violation of clause 16.01 and 35.01. While you can grieve your harassment claim on your own without the representation of CAPE, in doing so you cannot rely on clause 16.01 and 35.01. To that end, I respectfully request that you confirm the aforementioned to management and Human Resources in your work area by June 19, 2007, otherwise, I will be informing the parties*

> *accordingly that you cannot invoke clause 16.01 and 35.01 in your grievance. This should be no surprise to you, since the reasons regarding CAPE's position on this matter was* [*sic*] *clearly communicated to you in an e-mail dated April 13, 2007. Best regards.*

Mr. Archambault could also have mentioned the shop steward training. In any event, there were further skirmishes between the complainant and Mr. Archambault on June 28, July 3 and July 6, 2007, in which each party reiterated their respective views of the commissionaire grievance, as well as of the next matter to be discussed in this decision.

[28] From the Association's perspective, the commissionaire grievance achieved a certain measure of closure on July 8, 2007. On that date, the complainant sent the following email to Mr. Archambault:

> *I have advised CAPE and the Department, employer, that the grievance to which you refer to below, 0093, is not supported by the Association. I advised the employer of this glaring fact when the grievance was taken out of abeyance. To this end the employer has asked if I intend to amend the grievance per 40.05, which I may do, since there are other regulations that might be cited; notwithstanding, it is no longer any of yours nor the Association's concern. Suffice it for me to say, for other reasons and before I took any steps, I wanted to give the Association one final chance to reconsider its' position. The Association, by your email below, has to some degree completed this; albeit not to my satisfaction. I don't really care what the Association's policy is regards to this kind of thing, as the policy is unprofessional and cowardly. Notwithstanding, I think however that recent court rulings regarding to the admissibility of evidence may have found that emails may be used in some situations as demonstrative evidence. I will have to check that out more thoroughly.*
>
> *As the Association has clearly stated to me that it is not a part of that issue, I will accept and respect that position. The Association will no longer be involved in that issue. I further, as a member and a citizen, direct the Association to step back and to refrain from making any inquiries, involve itself to any degree or partake in any communications or correspondence on the issue.*
>
> *You speak about CAPE's instructions and that you were "clear". I am not in possession of these clear instructions. I will have to examine them from my workplace, if they still exist as my employer has been breaching my emails.*

> *I do not want the Association to take this the wrong way, such as threatening; but, any attempts by the Association to make maneuvers or inquiries behind my back, the "check up on me", or to gather any more information regards to this incident for any reason, will we be regarded as obstructive, instigator and bad faith and will be dealt with swiftly and harshly. In fact, I do not want to hear a single other word about 0093 from the Association for any reason at all, I mean it. I will have the final word on this issue, and I have spoken it.*
>
> [*Sic* throughout]

While a variety of observations could be made concerning the tone of this email, from the Association's perspective it certainly, and correctly, constituted an acceptance by the complainant of the procedural obligations to be undertaken by him solely to proceed with an individual grievance and an apparent acceptance of the Association's decision not to represent him in the furtherance of this particular grievance.

C. <u>March 30, 2007 discipline</u>

[29] From April to June 2007, when the commissionaire grievance and the harassment grievance were at the forefront of concerns between the complainant and the Association, another dispute arose between the complainant and the department that also had repercussions on his relationship with the Association. The origins of the dispute between the complainant and the department, in this instance, were not fully explored in evidence since none of the principal participants, other than the complainant, gave evidence. However, a chain of emails was adduced from which one can infer the context. It appears that, as customer relations manager, the complainant proposed that "voluntary waiting staff" for a particular entertainment event attend a "seminar" on "hosting" to be put on by an external consultant known as "Chrysalis Performance Strategies." Discussions ensued between the complainant and certain managers, including Capt. Quillan, and among the managers about whether funds could be made available for such a purpose, and if so, out of what budget. A difference of views emerged as to whether such a seminar might be "training" or "education," which could have had an impact on the availability of the funds sought by the complainant. Capt. Quillan indicated to the complainant what he considered to be the appropriate funding source and ordered the complainant to pursue that avenue. The complainant believed that the proposed course of action could not be accomplished in time to fund the seminar before the event and that it would nullify his plans. Moreover, he believed that Capt. Quillan was being disingenuous and that he was really

trying to sabotage the seminar by suggesting a fruitless method to obtain funds. On March 30, 2007, he wrote the following email to Capt. Quillan:

> *To a large extent the success of this event does not hinge upon whether or not FCE utilizes Chrysalis services; as such, your attempts to derail the event and to do so without being seen as "holding the bag" will similarly fail. Perhaps you think that if this event fails you shall be able to pin something upon me. THESE THINGS DON'T FAIL. THERE IS NOT PASS / FAIL* [*sic*].
>
> *Perhaps you plan on not being here for very long. Your life will continue and you will receive promotions and accolades and your career will be totally unaffected by the goings on in this little tiny and insignificant moment in space and time with these people.*
>
> *I would tell you to not worry that there is no boogey-man* [*sic*] *that is going to come and get you in the night nor perhaps a wrathful and vengeful God that will punish you eventually when you expire. I don't know if you have realized that sometimes in this life people get away with doing horrible and rotten things to others. They do these things willfully* [*sic*] *and maliciously and they wreak havoc and carnage where ever they go and walk away unscathed. Always, they walk away unscathed. They have power, their friends have power and they abuse it all the time.*
>
> *But I digress.*
>
> *Since what I said below does not matter, neither shall what you have suggested or would you command me to behave any differently from you. I will behave differently however in one principal way. When staff ask me why the seminar is not going ahead I won't lie to them, I will tell them the truth. Enjoy!*

The complainant immediately received an email from Lt.-Col. Simard, which stated as follows:

> *I find the content and tone of your email completely unacceptable and it will not be tolerated any further. You are directed to cease this type of behavior immediately.*
>
> *As for the issue of the training request, it must be processed as per existing regulations and as directed by Capt. Quillan . . .*

This *contretemps* became significant for the relations between the complainant and the Association because Lt.-Col. Simard not only copied Mr. Archambault on his reply, but

also apparently included the whole email chain that had provoked the complainant's electronic outburst.

[30] Mr. Archambault was faced with a member of the Association who was already engaged in two other disputes with the key management players in this email exchange and the Association was involved, or potentially involved, in representing that member — the complainant. Quite sensibly, Mr. Archambault decided to provide the complainant with some cautionary advice. The same day, March 30, 2007, he sent the complainant the following email:

> *I recommend that you comply with Mr. Simard's instructions. The tone and insinuations in your e-mail are not acceptable as well is not in keeping with the principles of a respectful workplace, and as such could lead to disciplinary measures if you continue this route. I realize and empathize with all you are going through at the present time, but it is in your best interest that you cease sending these types of e-mails.*
>
> *Best regards*

The complainant replied to Mr. Archambault by email on April 2, 2007, saying as follows:

> *I am no coward, Sir. You capitulate too soon. There will be no peace until these racists quit their crap.*

[31] On April 2, the complainant replied to Lt.-Col. Simard as follows by email at 10:14: "I ask that you please provide for me what is 'unacceptable', why it is unacceptable as it pertains to my message by 12:00 noon today." On April 4, 2007, Lt.-Col. Simard sent the complainant an email that began with the following: ". . . the information which you are seeking will be provided to you in a more formal venue in the near future." The email also stated that the complainant would be relieved of the responsibility for organizing the event, which was the focus of the initial controversy over funding. Disciplinary proceedings were commenced against the complainant shortly after that for his March 30 email. However, the disciplinary letter that he admitted receiving was never put in evidence in this proceeding. Moreover, for reasons that will become clear later in this decision, the Association also never received a copy of the letter.

[32] The department, apparently in early to mid-April, commenced an investigation into the circumstances that led to the complainant sending his March 30, 2007 email.

There were discussions between the complainant and Mr. Archambault concerning if and how the Association might best represent the complainant in an upcoming "investigation meeting" to which the latter had apparently been summoned by the department. On April 12, 2007, Mr. Archambault sent the complainant an email about the March 30 email and the commissionaire grievance as discussed earlier in this decision. As far as the former is concerned, Mr. Archambault wrote the following:

> *As discussed this morning, the following is to confirm that it is your preference that I attend the upcoming investigation meeting regarding the above-noted matter, via video conferencing or by conference call. Please be advised that in the event you wish to have me present in Halifax for this meeting, I can make arrangements to attend.*
>
> *With respect to the position that you wish to take at the investigation meeting, it is in your best interest to respond to the questions that will be stated, since the employer will rely on all the facts that will be weighed in their decision. In order for CAPE to adequately challenge the department's findings, it is important that you convey all the facts that will put us in the best position. As your CAPE representative I will also argue, that procedural and privacy issues were not followed during the investigation which prejudiced your rights.*

The complainant replied in language that indicates that he was beginning to believe that the Association and the department were engaged in a conspiracy against him. On April 17, 2007, he wrote the following:

> *Per my email this morning, I am not entirely sure that I wish to have CAPE represent me in this investigation as yet. I have some questions of my own that need answering and CAPE will have to answer these questions before it can adopt the lofty status as my representative in this disciplinary issue. I also have many questions that the department must answer before I participate in their investigation, in order to alleviate my concerns that this so-called investigation is little more than a witch hunt. Once those questions have been answered to my satisfaction, from both camps, I shall make a decision about what I shall and shall not subject myself* [to]*. It matters little how much the department or CAPE scream foul, how much protest is lodged, or what actions are taken in respect of my position, since I will not be bullied into selling myself out.*

Mr. Archambault, in reply to the complainant on April 18, 2007, indicated that there could be negative disciplinary consequences for the complainant if he failed to attend the meeting and stated the following: "If you refuse CAPE's recommendations to attend

a disciplinary meeting as previously stated, it could affect our ability to represent you." He then concluded with a reminder that the complainant had the right to challenge the department's findings and its processes.

[33] Other matters preoccupied the parties during the month of May 2007, which will be discussed later in this decision. However, on June 28, 2007, the complainant sent an email to Mr. Archambault about the commissionaire grievance and its reference to adjudication (with notice to the CHRC), the harassment grievance, and the discipline for the March 30, 2007 email. With respect to the latter two matters, the complainant was now seeking ". . . a signed letter, on Association letterhead . . .", clearly stating ". . . that CAPE would not represent him in these disputes." On July 3, 2007, Mr. Archambault and the complainant had a conversation about "association representation" in relation to the three matters then at issue. The complainant then sent Mr. Archambault a long confirmation email, ending with a repetition of his formal request for a "statement from CAPE" that it would not represent him on the harassment grievance and the March 30 discipline. The following excerpt from the email gives the tone of the complainant's thinking at that time:

> *. . .*
>
> *As we clarified during our discussion, the Association did not say that it would not represent me on the issues regarding the disciplinary actions taken by my unit; however, given the Association's biased position on the tone of the email as influenced by my employer, and its' direction of cautioning me on the tone of my email, I think I would not be well-served by the Association on this matter. I say biased because the Association made a knee-jerk judgement* [*sic*] *call without having all of the facts and information. I won't be providing all of the facts and information either, because I am very sick and very tired of having to prove my claims to the Association. I feel that the Association is "far too willing" to accept the sovereignty of the employer and all that goes with that and "far too ready" to discount my position.*
>
> *. . .* [With respect to the various issues]
>
> *I am expected and required to behave to a higher standard than anybody else in this unit. Yet still, even when the Association is presented with evidence of unlawfulness on the part of my employer, it seeks to discount that evidence effectively moving the goal posts back farther on me. The Association does not apply a consistent standard for the acceptance of claims and if it does, it certainly keeps it under*

> *cloak and does not reveal it. I think that the Association has gone too far beyond what is reasonable.*
>
> . . .

The complainant also added the following: "I wholeheartedly believe I am in a fight for my honour, my reputation and my professional work life within the government under this unit leadership for the most part." All this was being written after the complainant's confrontational discussion with Mr. Ouellette but before the formal withdrawal of the commissionaire grievance.

[34] Mr. Archambault, perhaps fearful at this point about a possible allegation of a potential breach of the duty of fair representation by the complainant, refused to simply tell the complainant that the Association would not represent him on the March 30 email discipline matter. On July 6, 2007, he sent the complainant an email that essentially stated that the Association had insufficient information to make a decision on the matter. The carefully worded email reads as follows:

> *Further to your e-mail of July 03, 2007, thank you for clarifying the Association's position that it would not represent you on the issues regarding an alleged misconduct stemming from an e-mail that you sent to Capt. Quillan dated March 30, 2007, which resulted into an investigation conducted by management. Your comment in your Jul 03, 2007 e-mail that the Association is biased on this matter, is not founded and quite frankly not helpful in these proceedings.*
>
> *There is no record on file, which suggest or confirms that the Association would not represent you on this matter. In fact, in an e-mail that I forwarded to you on April 12, 2007, I provided you with advise to prepare for the investigation meeting, as well I offered to attend the meeting via tele conferencing. In response, you indicated in an e-mail to me dated April 17, 2007, that you were not entirely sure that you wished to have CAPE represent you in the investigation as yet.*
>
> *It was not until June 28, 2007, that you raised again the above matter to my attention, whereby you requested that the Association provide you with a signed letter, on Association letterhead, that in respect to the disciplinary actions taken by the employer on you following their investigation, that the Association would not represent you on these matters.*

> *Please be advised, that the Association will judiciously review all of the merits regarding this matter in accordance with CAPE's protocol on representation. To that end, in order to fulfill the review of this matter, I will require that I be provided with the letter of warning that was issued to you following management's investigation. Once I receive the letter of warning, I will provide you with a decision whether or not the Association will represent you.*
>
> *If you decide to grieve the recent disciplinary actions taken by the employer, you must file the grievance within 25 working days following the date you received the letter of warning, and as previously stated you cannot invoke any clauses or articles of the collective without the expressed authorization of the Association.*
>
> [*Sic* throughout]

On July 11, 2007, the complainant replied, essentially asserting that he had provided all the information that the Association needed to make a decision and complaining that the Association was refusing to tell him whether it would represent him on the March 30 discipline "grievance," which he now claimed to have filed with the department within the appropriate 25-day period on his own, apparently alleging a violation of clause 16.05 of the collective agreement on racial discrimination. The grievance document itself, if it exists, was never put in evidence. The Association, according to Mr. Archambault, never received the documentation or factual information that it required to determine whether it could support the grievance. Despite the complainant's claims to the contrary, he adduced no evidence that demonstrates the point on a balance of probabilities, and the evidence of Mr. Archambault, supported by the email record, is credible and convincing. Finally, on July 11, 2007, Mr. Archambault sent the following email, reiterating the Association's position in explicit and concise terms:

> *Thank you for your patience. I just arrived from Statistics Canada, and I am returning from 2 days of negotiations.*
>
> *In response, to your question below I can provide you with the Association's position regarding the above-noted matter that I responded to you in part on July 6, 2007. As you can appreciate, in order for the Association to do a proper assessment of your file, we must be provided with all the information that is available. As evidenced in my e-mail to you dated July 6, 2007, I was not entirely involved in these proceedings based on your wishes, nor was I provided with a copy of the employer's decision which led to a letter of warning. In order for the Association to do a proper and fair*

> *assessment of the merits regarding this matter, I need to be provided with a copy of the letter of warning which will provide other facts that are necessary for my assessment.*
>
> *Based on the information and facts that I have to date, including the information that you have provided to me, after a thorough review, it is the position of the Association that based on the merits of the facts and evidence that I have before me, the Association will not support your grievance that you filed on your own alleging violation of article 16.01. Please be advised, as previously communicated, you are not authorized to invoke article 16.01 or any other clause in CAPE's collective agreement.*
>
> *The Association will reconsider its position to support you on your grievance, if it is provided with the letter of warning that was issued by the employer, and/or other new information or facts that you can provide to the Association.*

The parties, in their own minds, had apparently reached a stalemate on the issue concerning the March 30 discipline. However, the complainant bore the onus in this circumstance and must live with the consequences of his failure to adequately inform the Association of the factual foundation of the case that it would have to meet if it decided to represent him.

D. <u>Employee survey terms of reference</u>

[35] Most of the month of May 2007, so far as the complainant and the department were concerned, was taken up with a dispute about the terms of reference of an employee survey ("the terms of reference") that the complainant had been asked to complete by the department before the end of November of that year. The complainant had conducted such surveys in the past, but modified terms of reference and timelines were now being established by management. On May 14, 2007, Capt. Quillan requested formal management approval that the complainant be asked to conduct the survey on the basis of the new terms of reference. Lt.-Col. Simard gave the green light on May 17, 2007, which was conveyed the same day to the complainant. The complainant replied immediately that the terms of reference had ". . . substantial errors and is in violation of the Association Collective Agreement . . ." and added "[p]lease revise lest I be required to file a grievance." Capt. Quillan responded on May 23, 2007 by asserting that the terms of reference had been ". . . created with the utmost care and hasn't any substantial change from the previous version . . . which you have used in the past." He concluded as follows: "You are required/directed to abide by the TOR as provided." That same day, the complainant responded with a number of objections to the task, as

follows: (1) the monthly progress report was new and arguably beyond his work description; (2) the terms of reference could not be achieved with known measurement tools; (3) ". . . nor will I attach my name and professional reputation to a procedural sham designed to knowingly put a falsely deceptive series of make-believe metrics out for display"; (4) he would report the matter to the Auditor General and file a formal "corruption" complaint; and: (5) "[n]ow, you can either amend the document to correct what I consider a gross dereliction or not." On May 29, 2007, the complainant sent a series of emails seeking a response to the previous one, asking for extended timelines, for Lt.-Col. Simard to provide written instructions to carry out the task and for relief from the monthly-reporting obligation for the current month — no mention of corruption, dereliction, reporting to higher authorities, etc. Capt. Quillan replied as follows on the same day to the complainant's original email of May 23, 2007, with admirable restraint and conciseness:

> *Response to 23 May (4 paragraphs written on the 23 May)*
>
> *Point 1. A reporting schedule of 1 month is more than reasonable. If there is a clause in your collective agreement or work description stating that you don't have to report your work progress to supervisor/management please identify.*
>
> *Point 2. The timelines for conducting the survey are sufficient and the TOR has been approved by the FCEO. See email response (23 May 12:38).*
>
> *Point 3. There isn't any subversive intent.*
>
> *Point 4. You are to adhere to the approved TOR as directed.*

On that same day, further emails were exchanged over the meaning, implementation and amendment of the terms of reference.

[36] On May 31, 2007, the complainant sent a 14-point email to Capt. Quillan enumerating his objections to the terms of reference assignment, referring to himself in the third person as "the CRM" (customer relations manager). The 14-point email concluded with two paragraphs which read as follows:

> *You have assigned a task, given a timeline for its completion, and assigned responsibility for its completion; but have neglected to provide a basis for how it is to get done, what methodological approach and tool are to be used to achieve*

> *the desired level of intensity and you have refused to amend and have dug in.*
>
> *I see no alternative, but to file charges against the you and the unit, as the request represents not only a significant departure from the work produce expected from the CRM, but by your failings are harassing and discriminatory, since not even the unit itself can provide clarity or a hierarchical basis to substantiate the request. I am very sorry, but there is no other way as the unit has dug in. Furthermore, until these grievance and harassment issues are clarified, the CRM cannot be expected to deliver upon these end products.*
>
> [*Sic* throughout]

The complainant forwarded a copy of this email to Mr. Archambault on June 12, 2007 as an attachment to an email that dealt with the terms-of-reference problem and some of the other issues. As to the terms-of-reference problem, the complainant asked that the Association approve the wording of a draft grievance so that he could submit it by June 15. However, on June 13, Mr. Archambault replied in part as follows:

> . . .
>
> *In regards to your first issue, before* [*sic*] *CAPE will provide representation for this type of grievance, however prior to endorsing the grievance, I will have to review the essence surrounding the grievance that you intend to file. If it involves a classification issue, the rules which allow an employee to grieve his/her classification level are rigidly prescribed by Treasury Board policy who as the employer has the exclusive rights on classification matters, s. 7 of the PSLRA. In short, in order to grieve the level of your classification, you must have an official decision from the employer that your position has been reviewed and evaluated which will be followed with a formal classification decision regarding your position at which point you will be informed in writing that you can grieve the classification decision within 25 working days. Before, I can provide you with a clear position on this matter, I will need to obtain from you all of the particulars regarding this matter. Following CAPE's review of this matter, in the event CAPE does not provide representation, you can file the grievance on your own.*
>
> *In regards to the e-mail that you sent to Capt Quillan on May 31, 2007, the concerns that you are articulating to him are reasonable and just, however your implied refusal to deliver the end products established by management could be viewed as insubordination. Unless your health and safety is at a risk, you cannot refuse to perform the duties that are*

> *requested by the employer. There is a well known statement in labour relations which summarizes this legal notion. Obey now, grieve later.*

. . .

On June 14, in an email dealing with a range of issues, the complainant informed Mr. Archambault that, with respect to the terms-of-reference matter, he was not refusing work but simply trying to find out ". . . what he was being asked to do." He then asked "[w]hy is asking questions about the task being asked tantamount to insubordination?" This was clearly a serious misapprehension on the complainant's part of the situation in which he found himself.

E. Flex hours

[37] At about that time in mid-June, another incident developed between the complainant and his supervisor, Capt. Quillan. It appears that inquiries were made about the complainant's whereabouts during working hours and that this was raised in a meeting with the Commanding Officer. To regularize the complainant's attendance patterns or hours of work, Capt. Quillan sent him an email on May 14, 2007 requesting that, in accordance with the "flex hours" regulations, the complainant choose a regular eight-hour shift period beginning on an hour or half-hour between 07:00 and 17:00, which are apparently the office hours for his place of work. According to a confirmation email sent by Capt. Quillan on June 7, the complainant apparently chose to work from 08:00 to 16:00 with a half-hour lunch break. Capt. Quillan requested notification if the complainant were unable to attend during these hours and referred to a counselling letter that flowed from the December 19, 2006 attendance incident described earlier in this decision. The complainant, in an email reply, took umbrage with the idea that people were enquiring of his whereabouts and demanded to know who was making the inquiries. He also questioned whether any absence from 08:00 to 16:00 would be a violation of attendance requirements, and he objected to any reference to the December 19, 2006 events and their aftermath since they were the subject of the harassment grievance. On June 8, 2007, Capt. Quillan replied by email that he required knowing the complainant's whereabouts during work hours and referred the complainant to the website laying out the regulations. However, he did not inform the complainant of who had been asking about his whereabouts. On June 11, the complainant sent an email demanding to know who was asking about him so that he could "contact them." At that point, Capt. Quillan sent a terse reply: "You have your

work hours and avenues to deal with issues." The complainant said that he filed a grievance concerning this matter on June 19, 2007.

[38] The complainant forwarded to the Association copies of the foregoing email exchanges on flex hours, which overlap in time with the complainant's dispute with the department over the terms of reference. His covering email to Mr. Archambault on June 21, 2007 reads as follows:

> *As* [*sic*] *the Association and you can clearly see, the utter disrespect this supervisor has toward me and disdain he harbours for the grievance process. Notice how in spite of my warning he callously challenges me to file a grievance. Perhaps he and the rest of the unit and department know something that I don't know. Perhaps their confidence may derive from a prior or inside knowledge about how the Association may react. The question that I cannot seem to answer is, if they have pre-knowledge about how the Association would react, from where could they be getting that knowledge? Moreover, even if my emails sent from this office are being intercepted and read by department officials, that still doesn't explain the obvious degree of comfort required to respond as they have or does it?*

Choosing to ignore the suspicious tone concerning collusion between the Association and the department, to say nothing of conspiracy in the workplace, Mr. Archambault prepared the following reply, which stuck to the substantive issues:

> *The current e-mail as well as the previous ones that I responded to recently, do not amount to a violation of the collective agreement, of any Acts or Regulations, as well it is my belief that the substance of the issues and concerns that you are raising are within management's rights. I am concerned that the direction you are taking is one that is confrontation, which is heading towards an untenable position, for which it will be very difficult for the Association to effectively assist you.*
>
> *You have the choice of either working with management to deal with your issues and problems and to resolve them in a non-confrontational way, or continue to formally challenging* [*sic*] *the employer, which by experience has clearly shown us that it will not resolve or improve the relationship with the employer.*
>
> *CAPE encourages that you adopt the non-confrontational approach. To that end, if you agree to have the Association approach the employer to attempt to get an informal third party intervention, preferably with the mediation services*

> *offered by the Public Service Staff Relations Board* [*sic*], *please provide a response by June 26, 2007. Please note that for mediation to be successful, the parties must not impose pre-conditions to same.*
>
> *Please be advised that in the event you continue what we view to be a confrontational approach, the Association is not prepared to file a limitless number of grievances as that will not be in your interest or in the Association's interest. As well, the Association has limited resources to respond to all of your inquiries and questions.*
>
> *Thank you for your attention on this matter.*

This email did nothing to calm the complainant's fears of collusion. On June 22, 2007, he sent Mr. Archambault two emails. One was largely a substantive defence of his conduct and his work "track record" in the context of a workplace that espoused a "continuous improvement framework," which he implied was not appreciated by the Association, which he in turn accused of ". . . operating in the past with historical presumptions about roles between employee and employer." The second email reasserted the complainant's belief that, contrary to the views of Mr. Archambault, the department had breached the Association collective agreement. He concluded as follows:

. . .

> *I fully support the lowest level problem resolution. However, the notion that I must only file grievances when the moon is full and the planets are aligned with Neptune and the cock crows twice, is not one that I will be following, nor am I required to follow, anytime soon.*

Once again, for the flex-hour dispute, as with other recent disputes, the Association was unable to convince the complainant of its position, and he decided to "go it alone."

F. <u>Leave form</u>

[39] The next matter that caused friction between the complainant and the Association began as an apparently trivial misunderstanding between the complainant and the department. It appears that, in early July 2007, the complainant requested paid leave. He knew that he was paid for 7.5 hours per shift and, therefore, apparently filled in a form describing the days and hours he wanted off, with shifts from 08:30 to 16:00 (the actual form was never put in evidence). The department's convention for dealing with such matters was to have employees request their normal 8-hour shift off,

with an understanding that there was always a half-hour lunch break scheduled, and that they would be paid for only 7.5 hours per shift taken as leave. The complainant's supervisor edited or "corrected" the complainant's paid leave request to conform to the department's administrative convention by indicating that each shift requested off for paid leave would start at 08:00 rather than 08:30 as indicated by the complainant.

[40] This action by Capt. Quillan was somewhat bizarrely interpreted by the complainant to be "harassing and belittling," to use the language of his email to Capt. Quillan on July 5, 2007. The complainant then provided Capt. Quillan with the following instructions on how to handle his leave forms:

> *If you wish to take issue with a leave form that I have submitted, you are respectfully asked to denote your objection and send the unsigned leave forms back to me for amendment. If I agree with your objection, I will correct then resubmit, or provide you with my position. I think* [*sic*] *you for your cooperation.*

In his email reply the same day, Capt. Quillan apologized to him as follows while agreeing to comply with his wishes:

> *Sorry my actions . . . were taken in such a negative way. I can assure you no malice was intended on my part. Normally small oversight and administrative corrections of this nature are a common occurrance* [*sic*] *and are amended accordingly, my only intent was to expedite the processing of your leave submission. Leave forms will be returned to you for adjustment in the future.*

The complainant, in a reply to Capt. Quillan on July 6, 2007, initially purported to accept the latter's apology but then criticized him for not using the prefix "Mr." or his first name or calling him "Sir" in his email salutation. The complainant called this alleged omission an "insolent and negligent failing" for which his superiors would be made responsible. Capt. Quillan then explained in a return email that he hoped that ". . . common sense and professionalism would prevail and the recipient would afford the sender the benefit of the doubt and recognize that nothing malicious was intended." Capt. Quillan also asked that the complainant review previous email correspondence between them, which he asserted were ". . . always written with the utmost care and respect." He ended with what turned out to be unwarranted optimism: "I hope that we can put this issue behind us."

[41] This entirely civil response from Capt. Quillan provoked the complainant. In an email sent to Lt.-Col. Simard and to Mr. Archambault at the Association on July 9, 2007, the complainant stated the following:

> *This is harassment. It is intentional. It is malicious. It is racist and it is going down. It is intended to belittle and cajole, humiliate and embarrass me and it is completely and totally way out of line. Mission accomplished.*
>
> *What is this guy's problem? He hopes that "common sense" and "professionalism" would prevail and the recipient would afford the sender the benefit of the doubt. So, let me see if I have this right. If he, as the sender, does not get it right and is not afforded the benefit of the doubt, that make* [*sic*] *the intended receiver, me, a person whom* [*sic*] *lacks common sense and professionalism? What kind of mindless bovine scatology is this guy spouting?*
>
> *Common sense and professionalism are what I have respectfully requested from him. The best answer that he can muster in his defence/offence is to be more offensive and push the argument into absurdity. Let's be sure, so if he doesn't get it right (he fails to demonstrate common sense and professionalism) if I call him on it, I lacks* [*sic*] *common sense and professionalism? I am ignorant because I call him on his ignorance. What grade is this guy in "I know you are but what am I". What a crock. Were Capt Quillan about 8 years old, I would expect this kind of childishness. He is not a child, so his actions are not childish inability to reason, but purposive and intentional adulthood abuses.*
>
> *I shouldn't even have to say that I want to press charges.*

Lt.-Col. Simard, in a temperately worded response on July 11, 2007, did the following two things: (1) he asked the complainant to convert his email allegations to a complaint on a form (which he attached) that was part of the department's Harassment Prevention and Resolution Guidelines; and (2) he stated that he considered some of the contents of the complainant's emails to be "completely inappropriate" and indicated that he would be ". . . initiating a notice of alleged misconduct."

[42] In a reply, on July 11, 2007, to Lt.-Col. Simard, with copies to Mr. Archambault, Mr. Ouellette and other Association officials, the complainant attempted to shift the terrain of this dispute between himself and the department. The complainant claimed to be acting in the capacity of "shop steward" for the Association and therefore that his ". . . communication is not subject to the same constraints as between an employer and an employee and so the disciplinary process is not applicable." Mr. Archambault's

evidence was that, although the complainant had taken the course that gave him the qualifications to be a shop steward, he had never been so appointed by the Association. Mr. Archambault indicated that there was a formal procedure for appointing members to such positions and that one could not reasonably infer that one had become a shop steward merely by taking the training. At the hearing, the complainant asserted that, nonetheless, he believed that he was a shop steward simply because he had attended the June workshop. I find the complainant's evidence on this point to be highly implausible and indeed not credible. However, even if it were thought that he had somehow been clothed by the Association with the ostensible authority to act as a shop steward, his communication with Capt. Quillan, Lt.-Col. Simard and Mr. Archambault on the leave-form matter was clearly as an upset employee. Under no circumstances could his series of emails be construed as the action of a responsible shop steward, and indeed it was not. This fact was not in any way altered by the complainant's email of July 12, 2007, where he clarified how he would sign his subsequent email correspondence when acting as an employee on the one hand or as a "union official" on the other. Also on July 12, 2007, the complainant, by email, asserted that, contrary to any reasonable assessment of the facts, by altering his leave forms or requiring them to be filled in accordance with its interpretation of its own regulations, department management was requiring him to engage in criminal fraud. Those at the Association must have understood this to be without foundation, but Mr. Archambault was careful not to characterize the allegation in a manner that might inflame the complainant.

[43] On July 13, 2007, Mr. Archambault emailed the complainant to inform him that ". . . CAPE will not intervene or become involved" in the leave-form issue. Moreover, he stated the Association's view that ". . . this issue is another indication that you are not willing to adopt a non-confrontational approach with the employer." He also urged the complainant to refer to his email of June 22 (see paragraph 15 of this decision) and indicated that a failure to do so ". . . could jeopardize our ability to represent you." In an email on July 16, 2007, the complainant indicated that the term "non-confrontational" in that context meant that the Association was asking him to "'. . . shut my mouth' because it is sick of dealing with me." On July 24, 2007, Mr. Archambault sent the following email:

> *Further to my e-mails to you dated June 22 and July 16, 2007, your continued demonstration to adopt a*

> *confrontational approach with management as outlined below is not productive, as well as contrary to CAPE's beliefs which has clearly shown that the confrontational approach will not resolve or improve your relationship with the employer.*
>
> *Furthermore, CAPE has thoroughly reviewed the facts and evidence surrounding your alleged claim of harassment and discrimination in your e-mails below dated July 23, 11, 12 (other e-mail) and 9, 2007, and it is the position of CAPE that there are no merits to support and represent you on these matters.*
>
> *To that end CAPE encourages again that you adopt a different approach as outlined in my e-mail to you dated June 22, 2007, and failing to follow CAPE's recommendations could jeopardize the Association's ability to represent you.*

That same day, the complainant wrote to Mr. Archambault saying that his position ". . . is a further example of the Association's failure to represent him . . ." and that he was contacting the Association's executive director, José Aggrey. On July 24 and 25, 2007, there was another flurry of emails in which the complainant attempted to justify his position at length, while the Association reiterated its view that his leave-form claims were without merit.

[44] With respect to the department, the complainant had written to Lt.-Col. Simard on July 23, 2007, saying that he would not use the department harassment form because it was a "stall tactic" and that it was ". . . redundant and further evidence of discrimination and harassment." He further demanded that Lt.-Col. Simard investigate his harassment speedily or else it would be ". . . dealt with in the Federal Court very swiftly." He added that he had ". . . rights under the Charter that supersede any labour law or regulatory claims this department may cite." Lt.-Col. Simard apparently responded, at least in part, by setting a meeting for August 1, 2007, to deal with the leave-form issue. That, or something else, at any rate, sparked a change in the complainant's attitude and approach. On July 27, 2007, he sent Lt.-Col. Simard and Mr. Archambault a purported retraction of some of the offensive language he had used in his July 9, 2007 email broadside directed against Capt. Quillan. In another email on July 27, 2007, to Lt.-Col. Simard and Mr. Archambault, the complainant said that ". . . any correspondence or personal interactions that I have with various individuals whom I perceive to be harassing or discriminating against me may be subject to irritability." What that last phrase might have meant seems unclear, subject to what will be said bellow in paragraph 46 and following. On the same date, the complainant

also appears to have sent a formal harassment complaint against Lt.-Col. Simard to a Captain St. Jean. However, on July 31, 2007, the complainant sent an email to Lt.-Col. Simard stating that he had ". . . an appointment tomorrow and I will be unable to attend . . ." the leave-form meeting. He then indicated he would not be available for such a meeting until the week of August 13, 2007. Lt.-Col. Simard, in an email on August 1, 2007, postponed the investigation meeting on the leave-form complaint to August 16, 2007 but complained that the short notice on cancellation was unprofessional. On August 2, 2007, the complainant replied, justifying the short notice by medical reasons and saying that such leave could not be unreasonably denied under the collective agreement. By a copy of the email to an apparent superior, Capt. St. Jean, he also added the criticism from Lt.-Col. Simard to the list of his harassment grounds against the latter (it is to be noted that, according to Mr. Archambault, the Association was never formally asked to provide representation to the complainant on the grievance against Lt.-Col. Simard). Despite continued protests from the complainant, the disciplinary meeting on the leave-form matter went ahead on August 16, 2007. Mr. Black attended the meeting on behalf of the Association as President of the CAPE local to, in the words of Mr. Archambault, ". . . give support, provide advice and ensure that proper procedures were followed."

[45] Lt.-Col. Simard issued a disciplinary suspension to the complainant for his July 9, 2007 email, by letter of August 23, 2007. The body of that formal letter reads as follows:

> *As a result of my investigation into your alleged misconduct I have determined, based on the evidence, that you did misconduct yourself in that you were insubordinate, demonstrating disrespectful behavior toward your supervisor, Captain Quillan, in your email "RE: Leave Harassment" sent to me 1245 pm Monday 09 July 2007.*
>
> *The language and tone used in this email to refer to your supervisor's actions is completely inappropriate and constitutes an unacceptable and unwarranted response in reaction to the preceding email exchange with your supervisor.*
>
> *You were not acting as a union representative as you indicated subsequently, but rather as an employee and therefore any leeway that may be accorded to a union representative for disrespectful behavior is not applicable. I acknowledge that you retracted/corrected specific wordings by email on 27 July 07, almost three weeks later, in which*

> *you also indicated that you suffer from a disabling condition which makes you susceptible to irritability. This retraction does not however excuse your inappropriate behavior.*
>
> *At our 16 August 07 meeting to discuss the issue, you represented that this email was sent to me as part of a study you were conducting to validate whether or not FCE management encourages the expression of opinion by FCE employees. This explanation is not considered plausible and does not justify your actions.*
>
> *I am very concerned that this incident has occurred n* [*sic*] *light of recent disciplinary action for similar misconduct. As previously advised, this type of behavior will not be tolerated and it is expected that it will not occur again.*
>
> *As for disciplinary measure, I have considered that you have previously received a written reprimand for misconduct. As a mitigating factor I have also considered that your retraction demonstrates a measure of acknowledgement that the behavior is inappropriate. As a result, I have decided to impose the disciplinary measure of a one-day suspension. The suspension is to take place 1000-1800 hrs on 28 August 2007. I sincerely hope that this action achieves the desired effect of ensuring this behavior does not occur again. In keeping with the concept of progressive discipline you are advised that further misconduct may result in more severe disciplinary measures, which could ultimately lead to termination.*
>
> *You are also advised that the Employee Assistance Program (EAP) is available to you should you be experiencing problems of a personal nature. Should there be a medical condition contributing to this behavior, I am prepared, at your request, to initiate with Health Canada a Fitness to Work Evaluation in order to determine any employment limitations.*
>
> *A copy of this letter will be placed on your personnel file. It will be destroyed after two years provided that no further disciplinary action has occurred during this period. You have the right to grieve this decision in accordance with Article 40 of the Economics and Social Science Services collective agreement.*

On August 27, 2007, the complainant went to see Mr. Black after having spoken at length to him on the phone. When the complainant presented Mr. Black with a grievance form for him to sign and authorize the complainant to grieve the suspension imposed by Lt.-Col. Simard, Mr. Black baulked. He referred the matter to Mr. Aggrey on the grounds that he was not sure of his authority to authorize the grievance in the

circumstances and that he wanted the complainant to deal through the Association's head office since the complainant's issues ". . . are beyond what can be handled by a small newly established local." Mr. Archambault testified that he never saw the grievance form that the complainant filled out. He also indicated that, since it apparently alleged a breach of the collective agreement, the Association's authorization would have been required for it to go forward. Mr. Archambault stated that he was never asked to sign it (unlike Mr. Black). In cross-examination, the complainant stated that he never filed the grievance form and that he used it only in his internal complaint under the Association's appeal procedures in relation to his allegations that the Association had unfairly failed to represent him on the several matters at issue in this case.

G. Accommodation

[46] While the "irritability" reference arose late in the formal procedural discussions surrounding the leave-form issue, it is linked to an accommodation question that potentially underlies all the issues described above as the basis for the complainant's dissatisfaction with the Association and indeed also with the department. It appears that, before working with the department as a customer relations manager, the complainant worked for the Correctional Service of Canada ("the Service"). It also appears that the complainant moved from the Service to the department as the result of an accommodation arrangement flowing from a CHRC proceeding, the details of which were never put in evidence in this case and are not strictly relevant to the representational matters at issue. The complainant asserted in testimony and in email that, when he first arrived to work at the department, his commanding officers were aware, through discussions with him, of certain "medical conditions/disability" that rendered him irritable when closely monitored and when ". . . being 'nickled and dimed' regarding time." His view was that the former manager, Major Wheeler, had accommodated him in this regard and had protected him from supervisors who ". . . chastised me for not calling in when I was sick." The implication was that, early on, the complainant was allowed to set his own hours and pretty well run his own show as a customer relations manager. The complainant asserts that this changed when Capt. Porteous took over from Maj. Wheeler in 2006.

[47] It also appears that, in emails dated November 28, 2006, the complainant approached his managers and raised ". . . a medical condition resulting in employment limitations." It will be recalled that this timeframe coincides with the early procedural

development of the commissionaire grievance, which began with events in September 2006. It also appears that the Association, through Mr. Archambault, became aware of these accommodation issues only when oblique references were made to them by Ms. Kilby during the commissionaire grievance first-level meeting in Halifax on December 13, 2006. Mr. Archambault wrote an email on this topic on January 9, 2007 and has notes dated January 10, 2007 of a telephone conversation with the complainant concerning his request to the department for accommodation. The notes followed a long email from the complainant on January 9, 2007, in which he states his reluctance to reveal medical information on the grounds that it might be misused by his superiors in the context of his harassment and discrimination allegations. The complainant followed up the January 10, 2007 conversation with Mr. Archambault with an email that confirmed matters discussed about accommodation and that referred to other ongoing issues.

[48] On January 11, 2007, Mr. Archambault helpfully followed up on the accommodation communications by sending some general information drawn from a CHRC "Q & A web-page" dealing with the duty to accommodate. On January 19, 2007, the complainant sent Mr. Archambault the draft of a memorandum intended for the department to substantiate the accommodation request that he had made in November. Mr. Archambault received that draft the same day and provided inter-lineated commentary to the original document, which he attached to his return email. That covering email read as follows:

> *I attached my comments/recommendations directly to your document as per the attachment. My comments are aimed at providing you with the elements which meets* [sic] *the requirements of accommodation under the Canadian Human Rights Act and other statutes. The restrictions that your medical condition may have should concentrate on the functional or other limitations that require accommodation. For example, your medical condition requires you to have a flex work schedule which you explained well in your document. Also, your medical condition requires that management provides you with a properly planned work schedule with reasonable deadlines to reduce your stress. Harassment issues may have a causal effect on your medical condition, but these matters are covered by another section of the Human Rights Act, harassment policy. Best regards. Should you wish to discuss my comments, please contact me.*

As will be shown later in this decision, the complainant and the Association began to diverge on the approach to take concerning the accommodation issue, but it did not immediately cause a complete rupture in their working relationship.

[49] On February 2, 2007, Mr. Archambault sent the complainant an analysis of the procedural and substantive aspects of an accommodation claim as it would apply to his circumstances. The content of that email is as follows:

> *Further to my discussions during my visit to Halifax this week, as noted below in the tools and resources which is produced by the Canadian Human Rights Commission as well in Treasury Board's Policy on accommodation, the employer may request a report from the employee's doctor to the extent of requesting an opinion of outside expert in this case it would be Health Canada. In my previous e-mail regarding this matter, an employee who is requesting an accommodation need, has the responsibility to convey to the employer what are the functional restrictions and limitations which are related to the medical or disability condition. The employer on the other hand, as explained in the highlighted section below may request a report from employee's doctor who is requesting accommodation. This is standard practice in the Federal Public Service, and based on my experience with other members of our Association who are requesting accommodation needs, this same practice applies to them equally.*
>
> *In regards to the notion of undue hardship that you have invoked, this would apply when the employer takes a position that an accommodation request would cause them economic hardship. At this stage DND has not advanced undue hardship and cannot advance under hardship until the accommodation limitations or restrictions are clearly stated and supported by a medical physician if requested. The notion of bone fide requirement as defined by the Court's apply when an employer establishes that a certain work requirement is bone fide. For example, Fire department's have established physical tests as a bone fide requirement in order to qualify for employment. In your instance, I do not believe bone fide requirement is not an issue. To that end, with respect to the accommodation procedures, CAPE recommends that you follow the above process.*
>
> *As I explained to you in my previous e-mail there may be issues such as harassment, work goals and objectives which you raised as accommodations matters which do not fall under the above. The recourse for these matters should be addressed by the appropriate avenues, harassment complaint under Treasury Board Policy, work objectives and*

> *deliverables are work performance issues which can be grieved.*
>
> [*Sic* throughout]

It is at this point that it became likely that the Association and the complainant would part company on the issue of how to handle the accommodation request.

[50] On February 5, 2007, the complainant acknowledged that he understood the standard process that the Association wanted him to follow but asserted that it assumed that the department was acting in good faith, while he wanted to know how to proceed if he could prove that it was acting in bad faith. Later that same day, after further reflection, the complainant sent a long email, based on a "bad faith" assumption, which included the following paragraph summarizing his position:

> *No, Claude. We will not be providing DND with any medical information because we are not looking for them to make a workplace accommodation for me; but rather "to continue to accommodate me." It is my testimony that this was done. It is my testimony that prior XO's and FCEO's were aware of where I came from, the circumstances of my employment, and the outcomes. It is my position that Health Canada provided that a workplace free from discrimination and harassment was required, not just processes to address these as those processes existed in CSC. It is my position that Justice Canada has knowledge that they could impart upon DND to enable DND to correct itself, and that Justice Canada could do this without disrespecting my rights to confidentiality or privacy. It is in fact DND's request which comes from a very evil place that precludes them from talking to Health Canada and Justice Canada. It is the fact that DND could not even begin to frame their request, which is only because they are more interested in my limitations so that they can exploit same than the accommodations.*

Mr. Archambault was unwilling to give up and responded in a manner that revealed his tacit unwillingness to adopt the complainant's "bad faith" assumption. Here is the relevant excerpt from his reply of February 6, 2007 (which also dealt with other matters):

> *Thank you Ian for your response. While the department may have been accommodating you since your arrival, as confirmed during our grievance meeting in Halifax, management's claim* [sic] *that they have no records that could substantiate the accommodation in question. As eluded* [sic] *in your e-mail below, we would need some documented proof that your accommodations were made in the past. As I*

> *previously communicated to you, we have numerous instances where our members provided accommodation requests backed up by a physician which were not utilized by the employer in a hurtful manner. My only concern is at the end of the day, the employer will not force you to comply, that is to provide them with your accommodation needs, however it may absolve them of their responsibilities as explained in the Qs&As Human Rights document that I provided you with. (please see below)*

. . .

The complainant replied with two emails on February 7, 2007. In the first, he indicated that he had enlisted the aid of a co-worker, Patrick Ryan, who had experience in such issues, to assist him in discussions with the department on the accommodation question. The second suggested that Mr. Archambault was being unreasonable in suggesting that "... the only way that I have my employer provide me with a workplace free from harassment and discrimination is to provide a medical certificate. . . ."

[51] On the same day, Mr. Archambault replied as follows:

> *You have indicated that you will not be complying with the employer's request that you provide a medical certificate regarding your accommodation needs. It is CAPE's position that the employer is entitled to such a medical certificate and that its request is not unreasonable. It is our analysis that such a request does not constitute harassment or discrimination. We understand that you do not agree with our analysis and position. Accordingly, this is to advise that CAPE will not be representing you any further as it concerns the matter of your accommodation needs.*

Some emails were exchanged over a suggestion by the complainant that the Association was punishing him for having ". . . lent an ear to Mr. Patrick Ryan on this issue . . .", whom he said had sought him out, rather than the reverse. However, Mr. Archambault and the complainant appear to have cleared the air in a telephone conversation on February 8, 2007. The complainant sent an email to Mr. Archambault, which read in part as follows:

. . .

> *I enjoyed our conversation today. We are all clear on the workplace accommodation matters and I fully understand CAPE's option to withdraw on this issue."*

. . .

This, of course, is not the end of the story.

[52] While the record of correspondence and evidence in this hearing is not entirely complete on the communications between the complainant and the department on the accommodation question, Lt.-Col. Simard, on February 22, 2007, sent the complainant a response to his request for workplace accommodation. That response, a negative one on the substance of the request, but with an opening for further medical evidence, is as follows:

> *This is to reconfirm the requirements indicated in my email correspondence dated 24 January 2007 concerning your request for Workplace Accommodation.*
>
> *In your emails dated 28 November 2006 you have indicated that you have a medical condition resulting in employment limitations with respect to your employment as Customer Relations Manager. Further, at our meeting on 10 January 2007 and in your Memorandum dated 19 January 2007, you have requested a number of workplace accommodations.*
>
> *I am committed to meeting the Employer's obligation as per DAOD 5015-0, Workplace Accommodation. However, in order for me to appropriately assess your accommodation request, you must provide supporting documentation from a health care professional to clarify the precise job related limitations and the nature of the accommodations required. This is a requirement in accordance with your responsibility as an employee in the Workplace Accommodation process to provide sufficient information to support your accommodation request.*
>
> *The existing medical documentation, a letter from Health Canada dated 13 January 1998, 18 months prior to your appointment to FCE, confirms your fitness for work other than that of your former position. This letter does not identify any employment limitations. Given your recent indication that you have a medical condition resulting in employment limitations, and the significant accommodation requirements you have requested, there is a requirement for updated medical information.*
>
> *You have related your accommodation request to the Employer's responsibility to provide a workplace free from discrimination and harassment. I can assure you that I am committed to ensuring that all FCE employees enjoy a workplace that is free from discrimination and harassment. The particular discrimination/harassment concerns that you*

> *have raised separately are being addressed though* [*sic*] *the redress avenues available to you.*
>
> *I am unable to consider your request for Workplace Accommodation further until the requested information is provided. As previously indicated, at your request arrangements can be made to obtain the information through an occupational health assessment performed by a medical officer at Health Canada. I request that you advise of your intentions by 7 March 2007.*

Lt.-Col. Simard copied Mr. Archambault on the letter, even though the Association, with the knowledge and assent of the complainant, had elected not to represent the complainant in the matter. Whether the complainant might have fared better had he accepted the Association's advice is a moot point — he had decided to go it alone and to do it his way.

[53] Lt.-Col. Simard, having received no statement of intent from the complainant by March 7, 2007, sent the complainant confirmation by email on March 9, 2007 that his request for workplace accommodation would no longer be considered. This sparked a response from the complainant. On June 11, during the flex-hours dispute, the complainant replied by email to the missive from Lt.-Col. Simard. He "apologized" that ". . . this one almost slipped through the cracks . . .", and then castigated Lt.-Col. Simard for his arbitrariness in setting a ". . . time-limit on when the provision of supporting medical evidence must be tendered. . . ." It was not until July 25, 2007 that the complainant wrote to Ms. Kilby indicating that he was ". . . in possession of medical evidence to substantiate my earlier request for workplace accommodation . . .", although he also indicated that he had "contacted Health Canada" but that the contact there had not known to whom to refer him. The complainant, in addition to copying Lt.-Col. Simard and Capt. Quillan on this email, sent copies to Mr. Archambault and Mr. Black. He would later argue that this informal notification to the Association should have been sufficient to reactivate the Association's duty of representation, although he did not provide the Association with the requested medical evidence. On July 26, 2007, Ms. Kilby emailed the complainant further information on the exact nature of the medical information required to make a case for accommodation, and the complainant replied that he would get it from his physician if Health Canada were not helpful. Lt.-Col. Simard and the same Association personnel were copied on this correspondence in reply from the complainant. The issue was still not resolved by the time of this hearing, and the complainant, according

to Mr. Archambault, never provided the Association with the medical information it required to assess his initial request for representation.

H. <u>EC conversion</u>

[54] The complainant, as a customer relations manager, was part of a job classification or occupational grouping that was composed of two federal job classifications: Economics, Sociology and Statistics (ES), and Social Science Support (SI). The complainant claimed that he was the only ES/SI employee in the region. In November 2006, the Canada Public Service Agency ("the Agency") finalized a new classification, EC, which was to replace the outdated ES and SI classifications. A process was put in place to manage the transition from the old to the new job classification, which was known as the EC conversion. It appears that the timeframe for implementing the new system was a bit of a moving target. The Association, as a matter of background, introduced into evidence a "Milestones" schedule for the process that was updated as of February 28, 2008. It indicated that the new classification was finalized in November 2006. Final drafts were issued to federal departments in March 2007. The Agency training was given to departmental staff from March to November 2007, with the new classification having been officially approved by the Treasury Board in June of that year. The process apparently involved having Advanced Personal Notifications sent to employees so that they could raise concerns about the application of the new classification to their particular circumstances, while final "Official Personal Notification," with applicable levels and pay rates, were to be released only after the classification was formally dealt with at collective bargaining. The process was no doubt of great concern to federal employees and affected bargaining.

[55] The complainant expressed concern about the EC conversion process to regional human resources personnel in an email to a Mr. Topilnyckyj on August 24, 2007, which he copied to Mr. Black and Mr. Archambault. His concerns were that, when his position was reclassified on January 4, 2006, he had not received proper credit for supervisory duties and that this aspect of his job would not be reflected through the EC conversion. He also believed that his "civilianized" position had replaced two military positions and that his current position classification did not adequately reflect the nature of the job. He said that he had not filed a grievance on the re-classification because, in the past, he had had difficulty in obtaining a rewritten, authorized work description, and did not wish to push his luck because he had previously grieved the

old classification. On October 2, 2007, the complainant sent Mr. Topilnyckyj another email asking for information on where he stood in the EC conversion process. Once again, copies went to Association officials.

[56] On October 3, 2007, Mr. Topilnyckyj replied, informing the complainant that his file had been ". . . sent to Ottawa for them to look at and complete paperwork . . ." and re-assuring him that his Advanced Personal Notification would be back soon. That same day, the complainant sent Mr. Black and Mr. Archambault an email "[f]or your information and action . . .", entitled "EC Conversion." The complainant wanted to know whether other Association members had received their Advanced Personal Notifications, whether it was odd that his file was sent to Ottawa and whether he would have adequate input under the circumstances, and what his options were. Mr. Archambault provided the complainant with the following information by return email the same day:

> *The advance personal notification (APN) has been pushed to November 6, 2007. All employees in the EC group will Be* [*sic*] *receiving their advance personal notification on November 6, 200* [*sic*]*, which will confirm to the employee their EC level in the group. By this date, work descriptions should be finalized in draft so that the work description can be evaluated against the new EC standard to determine the appropriate level. I recommend Ian that you obtain a copy of your EC work description before the APN date, so that you can review it to ensure that it is complete. Once you receive your work description, it is important that you obtain confirmation that it is still in draft form or in the event it has an effective date, (unlikely scenario), the time lines to challenge the content of your work description will start. The more likely scenario, your work description will be in draft format which will allow you to negotiate changes if required prior to the official personal notification (OPN) which will only be released in late 2008, or early 2009, at which point employees will have the opportunity to challenge the level of their EC group, as well as the content of their work description.*

That same day, the complainant replied to Mr. Archambault that he had been in discussion with Formation Construction Engineering unit management and that he had signed a "classification action record" for them to which his current, reclassified work description was attached. He sent a copy of the document as an attachment to Mr. Archambault. The complainant also opined that ". . . the structure does lend itself for EC conversion because all of the components found in the new EC classification standard are found in this WD." To complete the day's email exchange,

Mr. Archambault replied that the information provided "... allows you time to discuss your WD with management, since it is clearly stated on your WD that it is a draft." Mr. Archambault's testimony was that he never heard back from the complainant on this issue and that the latter appeared "happy" with the outcome.

I. <u>Collusion or bad faith</u>

[57] It is to be noted that, from time to time in relation to many of the foregoing substantive concerns, the complainant asserted that the Association was acting in bad faith or colluding with the department to undermine his position. The complainant was particularly suspicious on certain occasions when a manager for the department, such as Lt.-Col. Simard or Ms. Kilby, would send emails to Mr. Archambault or copy him without sending a copy to the complainant. It is to be noted that in those situations Mr. Archambault would invariably copy the complainant on his reply to the management representative, thus ensuring transparency about the communications. It was Mr. Archambault's evidence that, consistent with general practices about the administration of the collective agreement, managers or human resource personnel will from time to time communicate directly with Association officials to sort out problems. This can be a natural and healthy aspect of efficient administration of collective agreements as long as such communications are available to affected persons in relevant circumstances. However, for the most part, the evidence reveals that the complainant feared conspiracy and collusion between the department and the Association when the latter's officials disagreed with his perceptions on various matters or advocated that the complainant take a cooperative or "non-confrontational" approach in his dealings with the department.

[58] The evidence does reveal that the complainant seems to have had his suspicions about collusion, conspiracy and bad faith confirmed, at least to his own satisfaction, when his appeal through the Association's own internal process was rebuffed by senior Association officials. This internal appeal process will be described briefly. The frustration for the complainant seems to have peeked by late July 2007. On July 23, 2007, the complainant notified Mr. Aggrey that, "... in response to a number of failures by CAPE officials and arbitrary, capricious and bad faith issues ...", he had "contacted legal authorities" and was "... proceeding with formal charges against CAPE." He added that he felt this "regrettable," but believed that "... CAPE and I will make it through this turmoil and be stronger for it."

[59] On August 3, 2007, after a telephone conversation with Mr. Archambault the day before, the complainant sent an email to Mr. Danik, which reads in its entirety as follows:

> *Hello. My name is Ian Tench and I am a member of CAPE NS Local #201. I write to you today to appeal decisions by Mr. Claude Archambault and Mr. Jean Ouellette as it pertains to CAPE representation of me in regards to two separate incidents.*
>
> *Incident #1 – Conditional referral to adjudication*
>
> *On 22 June 2007, CAPE made application on my behalf to the PSLRB. Prior to that application being made, I asked to be a part of the development of that application procedures. My request was denied. The application was made without my participation and qualitative and quantitative errors were made. Specifically, the grievance pertains to a number of discriminations contrary to art 16.01. In the application ONLY race was cited, which is in error. When I brought these complaints to the attention of Mr. Archambault and Mr. Ouellette, they refused to correct the errors. Moreover, they also advised me that the application was conditional upon myself and the employer agreeing to mediation. Here is the real kick in the groin, they told me and confirmed to me in writing that if either party objected to mediation they would instantly withdraw the application. The wording of my grievance allowed for the addition of new claims and alterations to the claims, so in spite of their arguments that they cannot legally add other elements other than race to the application, it wouldn't be because it would be prejudicial to the other party; but rather because it would underscore their failing. One reason I was told the matter would not go to adjudication was due to the fact that there wasn't enough evidence. My response is that the SCC in the Shakes case and in subsequent cases, and through my law classes have stated that the standard for racial discrimination is purposefully set high in Canada for a reason. The legal principle that is generally followed as such is that where the standard is high, the amount of evidence need not be as substantial as would be required if the standard were lower. I accept this legal reasoning and make the claim that my discrimination complaint is not only racial, but sexual, marital and personal. Furthermore, there is very little in the way of racial discrimination cases in the law books in this country especially in relation to "adverse discrimination" and this would be of great benefit to society and to the case law paradigm, as it would more clearly define a relatively new area of discrimination. I also have eyewitness testimony to support my complaint. CAPE will not survive a failure to represent in regards to this incident if someone in CAPE does*

not intercede. I am looking for confirmation from CAPE that it will not withdraw this application should the department opt out of mediation or not participate in good faith or not proffer me what I would be entitled to through adjudication. I am looking for CAPE to notify the PSLRB and the CHRC that the application is in error and to add the additional prohibited terms to expand the application so that it may succeed.

Issue #2 – Discrimination by Supervisor/Manager

Following the filing of my grievance and complaints I made about my treatment to my supervisor/manager, I have been under intense scrutiny by my manager LCol Simard. He has made racial slurs and instigated junior officers to attack me. He has abused his authority and broken defence department policy in the process. He has reprimanded me in a capricious and arbitrary manner and he has done it all with the tacit, implicit and hegemonies permission of the Association. I have filed harassment complaints against his minions, but he is the one that conducts the investigations and he always rules, if he even investigates the complaint, that no harassment occurred; usually because of lack of evidence and outright lies by his minions. I have turned around and tried to use the discrimination clause in the CA only to have the Association decline to support my application. I have filed a CHRC complaint against him which is being examined for investigation. This was only possible after I was able to have Mr. Archambault on behalf of the union put it in writing that they were not supporting my discrimination complaints. The problem for the Association is that as is the nature of racists, they can't leave well enough alone. His hatred for me because of the color of my skin means that he will not leave it alone. The Association has lamely tried to argue that I am being "confrontational". I suffer from a disabling condition, which causes me to have restless sleep when I am able to sleep and to be prone to irritability when harassed and discriminated. I have been diagnosed with depression and anxiety disorder and have been so diagnosed since the beginning of my employment with DND. My appointment to DND from CSC was via a disability priority that came on the heels of a CHRC complaint of racism against my employer CSC. My manager refuses to recognize my disability unless he is provided with proof, to which Health Canada and not he is not entitled. They also refuse to set up a HC assessment for me. This head in the sand mentality along with the cross-burning and lynching mentality are all happening under the watchful eye of CAPE officials. The Association will not survive a PSLRB failure to represent application on these issues. I would like CAPE to allow me to file the discrimination grievances and to if necessary prior to adjudication hand over carriage of these grievances so that I

> *may proceed individually if necessary. To block me access to the grievance procedure is unjust. Mr. Archambault and Mr. Ouellette are not judges and are not in my shoes.*
>
> *The information relating to any of these matters can be provided, but you should already have access to them as the Association has this information already on file. My time is short, as I am being discriminated against daily. How much time will you require?*
>
> [*Sic* throughout]

The entire email has been reproduced to demonstrate that, based on the foregoing review of the relevant facts, the complainant's serious and damaging allegations are based on misperceptions and cannot be substantiated by any reasonable assessment of the evidence available. Mr. Danik, in a short email reply, indicated that he was aware that the complainant had been informed by Mr. Ouellette of the Association's internal appeal processes on representation issues and that, based on his personal review of the allegations, the file and discussions with Mr. Archambault and Mr. Ouellette, "I cannot find that the Association has been arbitrary, discriminatory or has acted in bad faith."

[60] In an August 8, 2007 email, the complainant expressed his frustrations with Mr. Archambault in particular and the Association in general. From August 13 through 15, 2007, the complainant exchanged emails with Ms. Kilby concerning the fact that the Association was not supporting a number of his grievances, and asking the department to hold them in abeyance while he pursued internal appeal processes with the Association, and concerning a possible duty-of-fair-representation complaint with the Board. On August 27, 2007, the complainant contacted Mr. Aggrey about the negative role that Mr. Black was allegedly playing in his relations with the Association and Mr. Aggrey's "decision" not to appoint him, the complainant, as a shop steward so that the Association's business in the region could be improved.

[61] On August 30, 2007, Mr. Ouellette sent the complainant a carefully crafted letter on Association letterhead. That letter confirmed that the complainant should deal with the Association only through its legal counsel about the representation issues that he was appealing, that the "Protocol 1 - Redress Representation and CAPE" governed representational matters, that Mr. Archambault, as a labour relations officer, was the appropriate person with whom he should deal on all matters not under appeal, and that Mr. Archambault and not the local executive should be handling his

representational issues. Mr. Ouellette concluded that failing to deal with Mr. Archambault in a professional and cooperative manner could "impact" the services that the Association would provide. Despite the letter, the complainant opened an email dialogue with Mr. Aggrey, which ran from August 31 to September 12, 2007, in which Mr. Aggrey explained the actions of Mr. Black, Mr. Archambault, Mr. Ouellette and the Association in general, while the complainant repeated the grounds for his dissatisfaction. In his last email, dated September 12, 2007 to Mr. Aggrey, the complainant confirmed that he would be making a complaint with the Board, and he filed complaint one.

[62] On October 16, 2007, Mr. Aggrey provided the complainant with a response to his various email complaints, treating them as having been submitted under the Association's redress protocol when in fact the complainant had not complied with the normal formalities. That formal letter from Mr. Aggrey, on Association letterhead, reads as follows:

> *I am writing to you in the matter of your appeal as provided for in CAPE's Protocol 2 Protocol on Member Representation. While I have not received an official appeal application or document from you and while I am not convinced that you have submitted your appeal as per the procedure outlined in the protocol, I have nonetheless dealt with the matter as the final level of CAPE's recourse mechanism.*
>
> *As you know, CAPE's Protocol 2 - Protocol on Member Representation provides that a member may allege that his or her matter has been dealt with in an arbitrary or discriminatory manner or in bad faith by CAPE.*
>
> *On that basis, I have reviewed all of your emails and the notes of our August 29 telephone conversation and have determined that you allege, inter alia, that your matter was treated by CAPE in an arbitrary manner or in bad faith. I have not read in your emails nor heard during our telephone conversation that you are alleging that your matter has been treated in a discriminatory manner by CAPE. I have therefore considered your appeal on the grounds that you are alleging that your matter has been treated by CAPE in an arbitrary manner or in bad faith.*
>
> *In considering your appeal, I have carefully reviewed all of the emails that you sent me.*
>
> *I have also reviewed some of the documents contained in your files and discussed the matter of CAPE's representation to you with the staff of the National Office that handled your*

> *matter. On all of the labour relations matters that you contacted CAPE about, I reviewed the representation provided, the representation offered to you but that you declined and the decisions to not provide representation. In doing so, I took into account CAPE's practices, established policies and protocols, and in particular the provisions of CAPE's Protocol 1 - Protocol on Redress Representation.*
>
> *I am satisfied, on the basis of the thorough review that I have conducted, that your matter has not been dealt with by CAPE in an arbitrary manner or in bad faith. I am of the opinion that CAPE provided you with and/or offered you professional representation services and also provided you with constructive and appropriate advice. Your interests and concerns were fully taken into account by CAPE in its decisions regarding the provision of representation.*
>
> *I note that since you have launched this appeal process, you have also recently filed a complaint with the PSLRB alleging that CAPE has failed in its duty to represent you as a member of the bargaining unit. As a result, any issues and questions that may arise out of my response to you must now be addressed through the Board's proceedings in the context of your complaint.*
>
> *On a final note, and as you have been informed previously in correspondence from CAPE, I want to reiterate that should you have any requests to make regarding representation on any labour relations matter other than those raised in your August 3, 2007 email, that you should contact Mr. Claude Archambault, CAPE's Labour Relations Officer assigned to your region. You will be provided with any required representation by Mr. Archambault, as per CAPE's practices and established policies and protocols.*

This letter led to complaint two.

IV. Arguments of the parties

[63] The complainant presented his argument, which, in an effort to finally hear him out completely, was uninterrupted (with the exception of a break that he requested). The complainant was also given time for rebuttal. One way or another, many of the arguments referred to in the email documentation were rehearsed. The complainant urged that, where it differed, his testimony should be preferred over that of the Association's witnesses. The complainant correctly identified the principles from *Gagnon et al.* as being central to the questions to be decided in determining whether he received proper representation from the Association. However, his presentation focussed on the substance of his grievances against the department, while simply

making continued assertions that the Association's officials were negligent in erroneously failing to see and adopt his point of view.

[64] The complainant also referred to certain cases from the labour relations jurisprudence, such as the following: *Canada (Attorney General) v. Brooks*, 2006 FC 1244; *Fraser v. Communications, Energy and Paperworkers Union of Canada, Local 191*, 2004 CanLII 22122 (Ont. L.R.B.); *Global Television v. Communications, Energy and Paperworkers Union of Canada*, 2004 FCA 78; and *Guzman v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9376 (F.C.T.D.). The complainant did not establish how those decisions reasonably relate to his case against the Association.

[65] In general, the complainant, in presenting his case, regularly confused his earnestly held beliefs about the extent to which he had suffered discrimination, or been the object of improper procedural treatment, with actual evidence of such matters. There was very little of the latter, and none that was credible since it was virtually all based on unsupported assertions by the complainant. In conclusion, the complainant urged the need for a decision that would "... bring an end to this madness which is harm to health [*sic*] as well as financial and personal loss."

[66] Counsel for the Association did their best to bring order to the numerous factual and legal assertions with which they were faced. They also stayed within a two-hour time limit. They presented a small number of relevant cases from the jurisprudence on the duty of fair representation. However, as mentioned previously, the case can be decided on its merits by reference to section 187 of the *Act* and the principles set out in *Gagnon et al.*

V. Reasons

[67] The bottom line, as a reading of the facts will no doubt have indicated, is that the evidence has not demonstrated any arbitrariness, discrimination or bad faith on the part of the Association. In fact, the evidence demonstrates the contrary. Mr. Archambault and Mr. Ouellette treated the complainant with respect, paid careful attention to and were patient with the several representational issues that he put to them in their respective roles as officials of his certified bargaining agent. Mr. Black, Mr. Danik and Mr. Aggrey, within the roles appropriately allocated to them under the Association's protocols and procedures, acted with care and attention as well, as far as

the complainant's grievances against both the Association and the department were concerned. The actions of the Association officials were the antithesis of arbitrariness.

[68] There is no evidence that any Association officers discriminated against the complainant on racial, marital or personal grounds. Mr. Archambault and Mr. Ouellette, both very experienced labour relations specialists, treated the complainant with not only consummate professional skill but also with great compassion, despite the fact that, as time wore on, the complainant treated them with a growing lack of respect. Even in August 2007, and indeed at the hearing in 2008, where lesser individuals might have reacted with anger, frustration or even hostility to the complainant's personal attacks and insults, they maintained an attitude of even-handedness, composure and patience.

[69] Throughout all the events described above, there is no indication whatsoever that any of the Association's officers acted in bad faith. The Association's officials, particularly Mr. Archambault and Mr. Ouellette, acted with honesty and integrity. They were prepared to defend the legitimate interests of the complainant and hold the feet of the department to the fire when it was justified, while giving the complainant sound advice as to when to mediate, provide more information or act in a less-confrontational manner when, in their view, it would have been in his best interests. Although the complainant may have disagreed with the judgment of Association officials when they failed to find the evidence to support his allegations or could not agree with his approach, their assessments of the situation were unfailingly reasonable and in no way characterized by negligence.

[70] Explicit findings are in order in relation to each incident that can be teased from the evidence as the basis for the allegations made by the complainant in complaint one and complaint two. Complaint one, in its paragraph "4.2," and complaint two, in its initial details in paragraph 4, deal with the commissionaire grievance. The complainant is absolutely convinced that the circumstances are obvious evidence of racial, personal and marital discrimination. Setting aside the procedural difficulties revealed earlier in this decision in the narration of that case, the Association's decision (after having represented the complainant through three levels of the grievance process) that the complainant would not have a good case on the facts and would be better served by a mediated solution, was entirely reasonable in the circumstances. The Association has carriage of the grievance under the law (see *Gagnon et al.*) and was entirely within its

rights to make that decision. It communicated the decision to the complainant, despite his assertions to the contrary in light of convincing evidence, and was in no way "... malicious, arbitrary, in bad faith, capricious [or] discriminatory ..." as alleged by the complainant.

[71] Paragraph "4.3" of complaint one makes a blunderbuss allegation that:

> *... since September 2006 my employer has been actively physically and verbally assaulting and discriminating against me on prohibited grounds and abusing their authority over me, professionally undermining me and failing to take the prescribed steps to accommodate my disability.*

This can be broken down into a number of incidents alleged and described earlier in this decision, none of which have been proved by the complainant, and in relation to most of which the Association could not proceed because of the complainant's failure to cooperate with the Association in its representational function.

[72] On April 4, 2007, the complainant filed a grievance about the actions of Capt. Porteous, which took place on December 19, 2006. The Association argues, probably correctly, that, , the grievance is out of time since, under section 68 of the *Public Service Labour Relations Board Regulations*, a grievance must be filed not later than 35 days after the complainant knew or, in an adjudicator's opinion, ought to have known of the action or circumstances giving rise to the grievance. However, assuming that there is a plausible argument that the complainant had 35 days from the receipt of Lt.-Col. Simard's decision of March 1, 2007 not to investigate the allegations against Capt. Porteous, does the complainant have a viable complaint of unfair representation against the Association? The answer to this question must be an emphatic "no". Mr. Archambault reviewed the information made available to him and quite reasonably took the view that, before the Association could support the complainant, more information would be required. That opportunity was offered, but the complainant failed to provide further information. This is not evidence of arbitrariness, discrimination, bad faith or negligence on the part of the Association in its representation of the complainant.

[73] The next issue relates to the facts narrated earlier in this decision concerning the discipline imposed on the complainant for his intemperate email of March 30, 2007. Mr. Archambault rightly expressed concern about the tone of the complainant's

email on which he had been copied but was prepared to attend a discipline meeting if the complainant provided a copy of the disciplinary letter. The complainant did not. The complainant refused representation explicitly, although the Association kept open the possibility of representing him if full information were to be provided for review. This never happened. These are not circumstances under which the Association can be successfully found in breach of its duty of fair representation.

[74] The issue of the Association's representation on the terms of reference could also fall under the broad allegation in complaint one. Mr. Archambault agreed to review the matter if provided with further information. However, the grievance could not go forward on the basis of a breach of the collective agreement without the Association's authorization. The complainant did not provide sufficient information, and the Association took matters no further. As the Association points out, there is now a problem with timeliness for this allegation, but the main point is that the Association fulfilled its obligations to the complainant without trace of arbitrariness, discrimination or bad faith.

[75] The flex-hour dispute also falls within the ambit of the general allegation made in complaint one. The Association quite reasonably concluded that the actions of Capt. Quillan in the circumstances involved no breach of the collective agreement and properly informed the complainant of its decision that the Association would not support his grievance. The complainant once again attempted to invoke the department's alleged collective-agreement violation without the authorization of the Association, contrary to the legally established process of which he was fully aware. In this instance as well, the actions of the Association and its officials involved no breach of the duty of fair representation, which it owed to the complainant under sections 187 and 190 of the *Act*.

[76] The leave-form dispute also falls under the general rubric of the broadly worded allegation in complaint one. The Association, again, came to the reasonable conclusion that there was no merit in the complainant's claims that he was being discriminated against by Capt. Quillan in his administrative approach to the leave-form issue and its aftermath. The Association properly informed the complainant of its reasoning and prudently cautioned him to moderate his confrontational approach with the department. There is no evidence that the Association was acting in a manner that was arbitrary, discriminatory or in bad faith — quite the reverse.

[77] A subsidiary issue in relation to the leave-form dispute was an allegation in July 12 and 17, 2007 emails by the complainant that the administrative practices of the department would require him (and the department) to commit fraud. This literalist position on his part was, quite frankly, unreasonable, but he was impervious to arguments from both the department and the Association in their attempts to dislodge him from his extreme views. Mr. Archambault's email of July 24, 2007, quite understandably saw in their allegations the continuation of a fruitless confrontational approach with the department on the part of the complainant. The Association's refusal to support the complainant in this regard was based on an entirely reasonable assessment of the lack of merit in the complainant's case and is certainly not a breach of its duty of fair representation.

[78] Another aspect of complaint one is the Association's alleged denial of the complainant's access to the grievance process in relation to Lt.-Col. Simard's discipline of the complainant for his remarks in the email of July 9, 2007, which had flowed from the leave-form matter. This matter is also referred to in complaint two. In this case, the complainant focused his attention on Mr. Black's refusal to authorize a grievance in the complainant's visit to him on August 27, 2007 and its aftermath. By that point, the complainant had been fully informed on numerous occasions that Mr. Archambault had the last word on such matters. The complainant was being obstinate, to say the least, in his refusal to accept the Association's entirely legitimate decision-making structure in this regard, a position that the complainant reasserted several times at the hearing. However, in this instance, the complainant never formally requested that Mr. Archambault authorize the grievance, knowing (no doubt) what his answer would be, based on their correspondence in the matter. In any event, the Association's officers approached this issue in accordance with its established and reasonable procedures, as Mr. Aggrey explained at some length to the complainant by late August and early September, 2007. There is no evidence of arbitrariness, discrimination or bad faith arising out of these circumstances.

[79] The final matter of concern in complaint one is the allegation that the Association gave inadequate representation to the complainant in respect of the department's ". . . failing to take proscribed [*sic*] steps to accommodate my disability." The record as described above is clear on this issue. The Association, through Mr. Archambault, gave very detailed and helpful general advice to the complainant on how to proceed in making an effective request for accommodation. The key to such a

request, — and quite correctly — in the Association's view, was the necessity for the complainant to provide the department with appropriate medical information. Mr. Archambault made it quite clear to the complainant that the Association could not represent him on the accommodation question under the circumstances. The complainant acknowledged the Association's position but decided to "go it alone." He never provided the required medical information. His arguments that the department — and the Association — should simply accept his unsubstantiated claim that he had a disability based on apparently unavailable former Health Canada information is not an adequate response. In essence, the Association is correct that the complainant, after his initial agreement with the Association's inability to represent him, never formally requested further assistance — copies of emails between the department and the complainant are insufficient to engage the Association's duty to represent. However, even if that last proposition were thought incorrect, the Association did everything for the complainant that it reasonably could have, given his continued recalcitrance on the need to provide current medical information as to the nature of his disability.

[80] A matter raised in complaint two is the complainant's allegation that the Association failed to represent him adequately on the EC conversion question. On that matter, the complainant is simply off-base with respect to his expectations as to what the Association could have done under the circumstances. As described earlier in this decision, the Association had a limited role in the EC conversion process. It is largely a matter within the purview of the department's management rights. The complainant was frustrated over the delay in the department's issuance of his Advanced Personal Notification. This, however, is not a matter over which the Association had any control. The complainant alleged no breach by the department of the collective agreement that would engage the Association's responsibility and made no actual request for representation by the Association. Mr. Archambault provided the complainant with helpful advice on how the complainant should approach the department on the EC conversion given the facts at hand. Even if the Association's duty of fair representation were thought to be engaged in this process, its actions toward the complainant were entirely appropriate.

[81] The final phrase in paragraph 4 of complaint two, the "Concise Statement of . . . Matter[s] Complained of . . ." reads as follows: "The Respondent's misconduct is deliberate and calculated and is collaborative with the employer to bring about my demise." As indicated above, this general allegation is wholly without factual

foundation. Mr. Archambault and Mr. Ouellette are highly experienced and qualified specialists in labour relations. They gave straightforward, consistent, comprehensive and coherent testimony. Where their evidence varied from that of the complainant, it was invariably more credible and reliable. The total of the voluminous evidence in this matter provides not a shred of evidence that the Association failed in its duty to provide fair and competent advice to the complainant or that it acted with arbitrariness, discrimination or bad faith. While the complainant may have believed that there was collusion between the Association and the department when the Association refused to concur with or support his allegations against the department, there is absolutely no evidence of collusion between the Association and the department or a conspiracy to bring about the complainant's "demise."

[82] The circumstances of this case are somewhat tragic. The complainant is an intelligent and able professional, who seems in the past to have given useful service to the department as its customer relations manager. The complainant has a sophisticated understanding of both overt (or intentional) and systemic racial discrimination in Canada, of its historical development and of its devastating impact on African Canadians. However, in his desire to champion the struggle against racial and other forms of discrimination in his workplace, he seemed to lose a sense of perspective. This case is not directly about the substance of his allegations concerning the department's managers and other employees. However, the nature of those allegations, the circumstances in which they arose and the Association's responses to them require an appreciation of the context of the substantive matters. At almost every turn, the complainant seemed to misconstrue the actions of the Association and others around him and to resist the sensible advice he received from the Association in this regard. The complainant is so convinced of the correctness of his perceptions and the justness of his cause that he has been unable to appreciate the careful and judicious assessments of his situation provided by Mr. Archambault and Mr. Ouellette. Moreover, the complainant's sense of entitlement in the circumstances led him to disregard appropriate standards of procedure and civility in relation to the officials of the Association and others, even though he became distressed at his perceptions of having not received such treatment from others. Finally, the complainant's steadfast but misguided pursuit of a "principled adjudicative victory" in several legal fora led him to reject mediated or restorative approaches that might have enabled the Association to provide him with positive long-term solutions to his issues with the

department. All this has no doubt come at great personal cost to the complainant, to say nothing of those embroiled by him in this saga. However, the facts do not demonstrate his claims on anything approaching a balance of probabilities, and his complaints before the Board against his bargaining agent, the Association, must be denied.

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

(The Order appears on the next page)

VI. Order

[84] The complaints are denied.

November 19, 2009.

Bruce P. Archibald,
Board Member