Date: 20120511

File: 561-02-498

Citation: 2012 PSLRB 58

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Stephan J. Bertrand, Board Member

For the Complainant: Shannon Blatt, counsel

For the Respondent: Christine Diguer, counsel

Heard at Ottawa, Ontario,
November 21 and 22, 2011.

I. Complaint before the Board

[1] On February 2, 2011, the Public Service Alliance of Canada ("the bargaining agent") filed a complaint with the Public Service Labour Relations Board against the Treasury Board ("the employer") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The bargaining agent alleges that the employer committed an unfair labour practice in contravention of section 185. In particular, the bargaining agent alleges that by refusing to grant one of its negotiators access to premises of the Canada Border Services Agency (CBSA) in order to meet with employees in the Border Services Group bargaining unit ("the bargaining unit") and hold discussions on bargaining issues, the employer violated paragraphs 186(1)(*a*) and (*b*). Those paragraphs provide as follows:

> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(*a*) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> *(*b*) discriminate against an employee organization.*

[2] At the hearing, the bargaining agent also alleged that the employer failed to give due consideration to section 5 of the *Act* when it denied access to the bargaining agent's negotiator. Section 5 reads as follows:

> ***5.*** *Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities.*

[3] The employer refuted the bargaining agent's allegations and asserted that its actions were at all times in accordance with clause 12.03 of the bargaining unit's collective agreement ("the collective agreement"), which provides as follows:

> *12.03 A duly accredited representative of the Alliance may be permitted access to the Employer's premises, including vessels, to assist in the resolution of a complaint or grievance and to attend meetings called by management. . . .*

II. Summary of the evidence

[4] Two witnesses were called to testify and a total of seven documents were introduced as evidence. The bargaining agent called Morgan Gay and the employer called Camille Therriault-Power.

[5] Mr. Gay has been a national negotiator with the bargaining agent since 2006. He acts as its chief spokesperson for collective bargaining purposes and is responsible for a number of bargaining units, including the bargaining unit at issue in this case. He indicated that in order for him to properly represent employees in the bargaining unit at the bargaining table, he needed to meet with them to gain a firm grasp of the workplace issues that they were regularly facing, to inform them of on-going bargaining discussions and developments, and to familiarize himself with the CBSA's operations.

[6] According to Mr. Gay, the bargaining unit consisted of approximately 10,000 positions when he joined in 2006, seventy percent of which were border services officer positions.

[7] Late in the summer of 2010, the bargaining agent and the employer entered into a process of preparatory contract negotiations to reach new collective agreements which would come into force upon the expiration of collective agreements between them. According to Mr. Gay, those discussions were initiated at the request of the employer in anticipation of upcoming operating budget freezes by the Government of Canada. The collective agreement was to expire on June 20, 2011.

[8] Although some new collective agreements were reached for certain bargaining units, no new collective agreement was reached for the bargaining unit. The normal course of bargaining resumed in April 2011 and the bargaining agent and the employer were still negotiating when the hearing proceeded before me in this matter.

[9] Shortly after the failed preparatory negotiations in 2010, Mr. Gay sought to access employees in the bargaining unit at their place of work during non-working hours, in order to discuss bargaining demands and priorities directly with them and to gain the best possible understanding of the key operational issues arising in the workplace. This objective, according to Mr. Gay, could only benefit the collective bargaining process.

[10] However, in the fall of 2010, bargaining agent representatives who were attempting to arrange worksite visits for Mr. Gay were informed by the CBSA that he would not be permitted access to the workplace to discuss bargaining matters with employees at the CBSA. Only matters unrelated to collective bargaining would be permitted for discussion purposes. Since Mr. Gay's objective was clearly to discuss collective bargaining issues with employees in the bargaining unit, access was denied. Instances of such denials occurred for proposed visits of CBSA facilities located in Windsor, Ontario, and in various locations in Saskatchewan.

[11] On December 6, 2010, Ron Moran, the National President of the Customs and Immigration Union, one of the bargaining agent's components, wrote to the President of the CBSA, Luc Portelance, in an attempt to resolve the access issue. Ms. Therriault-Power, the CBSA's Human Resources Vice-President, responded to Mr. Moran shortly thereafter, indicating that the CBSA's decision to allow access only if no discussions of collective bargaining took place was consistent with article 12 of the collective agreement relating to the "Use of Employer Facilities".

[12] Mr. Gay indicated that the CBSA's position in October 2010 ran contrary to an established practice that had been allowing him to meet with employees in the bargaining unit unconditionally in the past. He indicated that between 2007 and the summer of 2010, he had visited over 40 CBSA worksites and been allowed to meet with employees in the bargaining unit to discuss workplace issues, observe the different types of operations and answer any questions they may have had. At no point during that period was he ever denied access or prohibited from discussing collective bargaining matters with those employees, which he confirmed doing without management's presence. Mr. Gay added that this access was provided in each case with the knowledge and authority of the concerned facilities' chief of operations. He indicated that he had never been provided with an explanation or rationale by CBSA officials for the sudden change in position and felt this constituted retribution on the part of the employer for the preparatory negotiations that had failed shortly before the denials. In cross-examination, he conceded that he was not aware if his previous access had been granted pursuant to some formal agreement between CBSA headquarters and the bargaining agent.

[13] Mr. Gay indicated that the first time he was denied access was on October 13, 2010, when a request was made to visit a CBSA worksite in Windsor,

Ontario, and to be provided with a space at the worksite to meet and hold discussions with employees in the bargaining unit. The response given by a CBSA labour relations officer at that time was that access would only be given if he could provide assurances that his discussions would not relate to collective bargaining or issues that employees wanted to raise during the next round of negotiations. The second denial occurred on October 29, 2010, when a similar request was made to visit four different worksites in Saskatchewan. The reason for the denial, provided by the Chief of Operations for the CBSA Saskatchewan district, was essentially identical to the Windsor response he had received earlier. Mr. Gay conceded in cross-examination that he was unaware as to whether CBSA headquarters had been consulted regarding these two denials.

[14] Mr. Gay stated that the denials had a significant impact on the bargaining agent. He explained that the bargaining unit faces many different unique and complicated operational issues. For example, while scheduling is handled in one particular manner at the Regina airport, it is handled in a very different fashion in Windsor and in many other facilities. Mr. Gay added that CBSA's access denials have prevented him from gaining much needed feedback from employees in the bargaining unit and severely hindered his ability to understand the nuances in the issues at the different worksites, which in turn harmed the collective bargaining process.

[15] Finally, Mr. Gay stated that he felt that he was being censored as to what he could discuss with employees in the bargaining unit during his visits and that he was unaware that any censorship had ever been imposed on any other organization that had previously been granted access to CBSA worksites, such as Weight Watchers, the Canadian Blood Services and the United Way.

[16] Ms. Therriault-Power joined the CBSA in May 2009. She testified that she had not been consulted regarding the two access denials that had occurred in October 2010 or been made aware of those at the relevant period. According to her, the matter was brought to her attention for the first time at the end of October 2010. I note that the Saskatchewan denial was communicated to the bargaining agent on October 29, 2010. She added that when consulted by the Director General of Labour Relations of the CBSA about the access issue, she agreed with the denials since the proposed use of the premises by Mr. Gay was inconsistent with article 12 of the collective agreement. This is confirmed in an email exchange involving Ms. Therriault-Power and the Director General in question, which took place between October 29, 2010 and

November 1, 2010. The email exchange also confirmed that the access denials by local CBSA managers had occurred pursuant to directions by the CBSA Human Resources headquarters. No names were mentioned in that regard.

[17] In early December 2010, Ms. Therriault-Power was asked to respond to Mr. Moran's letter, which alleged that the CBSA's access denials amounted to interference with an employee organization's administration and representation of employees and discrimination against an employee organization, in violation of section 186 of the *Act*. In her response, she refuted the alleged violation and re-iterated her support for the access denials, which she believed were consistent with the contemplated use of employer facilities as set out in the collective agreement.

[18] According to Ms. Therriault-Power, there is no separate agreement or policy that deals with the use of the employer's premises, beyond what is provided under article 12 of the collective agreement. That provision clearly sets out the conditions that must be met in order to gain such access. She added that while access for the purpose of exposing the bargaining agent's negotiators to CBSA operations and worksites may be permissible, access for the purpose of discussing collective bargaining issues with employees in the bargaining unit is not permissible under article 12.

[19] Ms. Therriault-Power testified that she was not aware of Mr. Gay's past access to CBSA worksites to meet with employees in the bargaining unit for purposes unrelated to those provided by the collective agreement. She added that the use of the employer's premises was a hot topic at the bargaining table and that the bargaining agent was attempting to negotiate expanded access rights through bargaining, which she felt was the proper course of action. She referred to an update published on the bargaining agent's website, which contained a proposed amendment of clause 12.03 of the collective agreement that had been tabled by the bargaining agent (Exhibit 6). It reads as follows:

> *12.03 Any duly accredited representative of the Alliance can have access to the Employer's premises for the purpose of resolving a complaint or a grievance, attending a meeting with management, meetings with members or attending a general assembly of Union, providing a notice indicating who's coming onto the Employer's premises, for which purpose and when the meeting will be taking place is given to the Employer, one (1) day in advance if possible.*

[Emphasis added]

That update (Exhibit 6) was introduced on consent during Mr. Gay's cross-examination. It was not introduced as extrinsic evidence, nor did I consider it as such.

[20] When he testified, Mr. Gay admitted that the proposed amendment to clause 12.03 of the collective agreement (Exhibit 6) would have had the effect of expanding the current access provision, but added that the amendment was simply designed to ensure that the collective agreement afforded the bargaining agent the same rights as those already provided in sections 5 and 186 of the *Act*.

[21] When cross-examined, Ms. Therriault-Power conceded that Mr. Gay's contemplated discussions with employees in the bargaining unit amounted to a lawful activity, that she was not aware of any negative operational impact that might be caused by such discussions, and that she was unaware of any past complaint related to such discussions. She also conceded that allowing Mr. Gay to access the worksite would allow him to gain a better contextual understanding of the issues and could be beneficial to the collective bargaining process.

[22] Ms. Therriault-Power also confirmed that the reply to the complaint, which was filed with the Public Service Labour Relations Board on February 18, 2011, represented the formal position of the employer in relation to the issue at hand. The essence of the employer's position is summarized in the following paragraph of the reply:

. . .

> *The respondents respectfully submit that they have complied with these negotiated provisions and that the complainant is just using this complaint as a means to expand on what it has expressly agreed to in the collective agreement. Given that neither the PSLRA, nor the collective agreement, contain provisions which create any obligation on the employer to make its premises available for the purposes identified by the complainant, the respondents respectfully request that the Board exercise its powers under section 40(2) and dismiss this complaint as being frivolous and vexatious.*

. . .

[23] Ms. Therriault-Power also conceded in cross-examination that she had not read or referred to section 5 of the *Act* when she was asked to reply to Mr. Moran's letter in December 2010, but indicated that she always did her best to comply with the *Act*.

III. Summary of the arguments

A. For the bargaining agent

[24] The bargaining agent argued that the access denials in October 2010 originated from CBSA headquarters and were not the actions of a few rogue regional managers. In any event, the positions taken by those regional managers were eventually condoned by CBSA headquarters, as evidenced by Ms. Therriault-Power's letter of December 10, 2010 and the employer's reply to the complaint.

[25] According to the bargaining agent, the employer's position is illegitimate and unsupported by any reasonable rationale. The ability of the bargaining agent to meet and hold discussions with employees in the bargaining unit on collective bargaining issues is essential. Without it, it cannot properly administer the employee organization or represent the employees in the bargaining unit. The bargaining agent contended that the employer's actions clearly endeavoured to hinder that ability, contrary to paragraph 186(1)(*a*) of the *Act,* and to prevent employees in the bargaining unit from participating in an otherwise lawful activity, contrary to section 5.

[26] The bargaining agent argued that clause 12.03 of the collective agreement should not be viewed as a complete code of access to the employer's facilities by the bargaining agent and that regard must be given to the *Act*, more specifically to sections 5 and 186. According to the bargaining agent, basic rights that are conferred by the *Act* should not be taken away from the bargaining agent and the employees that it represents simply because they are not incorporated into the collective agreement. In support of this argument, the bargaining agent referred me to *Quan v. Canada (Treasury Board),* [1990] 2 F.C. 191 (C.A.), which found, at page 195, that interpreting a provision of the collective agreement involves ". . . trying to ascertain the parties' intention in the context within which the interpretive question lies . . .", an approach that ". . . necessarily takes one to consider the effect of the language of section 6 [now section 5]."

[27] According to the bargaining agent, the employer failed to give due consideration to the effect of the language of section 5 of the *Act* when it denied access to Mr. Gay. This was confirmed in Ms. Therriault-Power's testimony.

[28] The bargaining agent further argued that the wording "administration of an employee organization" referred to in paragraph 186(1)(*a*) of the *Act* refers to a broad

and inclusive concept that encompasses all internal matters of a union. In support of this argument, it referred me to Part VIII of the reasons given in *National Association of Broadcast Employees and Technicians – CLC v. CFTO-TV Limited* ("*CFTO-TV Limited*"), 97 di 35 (C.L.R.B.), which dealt with a union's access to an employer's premises. It also referred me to paragraph 94(1)(*a*) of the *Canada Labour Code* ("the *Code*"), R.S.C., 1985, c. L-2, which is practically identical to paragraph 186(1)(*a*) of the *Act*. The bargaining agent relied on *CFTO-TV Limited* to suggest that when considering access to an employer's premises, one must reconcile the employer's own legitimate business concerns with the bargaining agent's legitimate statutory rights, rather than relying upon strict property rights.

[29] The bargaining agent contended that the actions of the employer seriously hindered Mr. Gay's ability to gain an invaluable appreciation of workplace issues, therefore interfering with the representation of employees in an employee organization, contrary to paragraph 186(1)(*a*) of the *Act*.

[30] The bargaining agent added that since no legitimate business or operational concerns had been identified by the employer to justify its access denials, it could reasonably be inferred that the employer's actions were motivated by anti-union animus, which originated from the failure of the preparatory contract negotiations in 2010. This inference should be made, according to the bargaining agent, because of the timing of the CBSA's change in position, which occurred shortly after the failed negotiations of 2010, and because of the fact that such an approach was detrimental to the overall collective bargaining process. Although the bargaining agent contended that it is trite law that the employer's actions do not need to be motivated by anti-union animus for there to be a violation of paragraph 186(1)(*a*) of the *Act*, as suggested in *CFTO-TV Limited,* it argued that the evidence suggests the presence of anti-union animus which tainted the CBSA's decision to deny Mr. Gay access to its facilities.

[31] The bargaining agent also referred me to *Canadian Union of Postal Workers v. Canada Post Corporation*, 69 di 91 (C.L.R.B.), which accepted the argument that an employee's right to participate in the employee organization's lawful activities should not be prohibited on the employer's premises without compelling and justifiable business reasons, provided these activities do not take place during the working hours of the employees involved. In this case, the CBSA did not raise any compelling and

justifiable business or operational reasons in support of its decision to deny Mr. Gay access to its premises. On this point, the bargaining agent referred me to *National Association of Broadcast Employees and Technicians v. CFCN-TV (CFCN Communications Ltd.)*, 76 di 8 (C.L.R.B.), which provided examples of compelling and justifiable business reasons by referring to activities of the union that were disruptive of productivity, discipline, order, safety or security, or were contrary to some compelling employer business interest.

[32] The bargaining agent also argued that the employer acted in a discriminatory fashion by imposing censorship on the subject matter of meetings to be held by the bargaining agent on its premises when it imposed no such censorship on any other organization that was granted access to meet with employees in order to discuss other topics, such as fund-raising and weight reduction. This differential treatment was unwarranted, unjustified and contrary to paragraph 186(1)(*b*) of the *Act*.

[33] The bargaining agent argued that the evidence clearly established that the employer's actions interfered with the bargaining agent's administration of its organization and with the representation of employees that it represents, contrary to paragraph 186(1)(*a*) of the *Act*. It further argued that the differential treatment of the bargaining agent, which consisted of imposing censorship that it did not impose on any other organization, was discriminatory and in violation of paragraph 186(1)(*b*) of the *Act*.

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

[34] The employer argued that no consideration should be given to section 5 of the *Act*, since it is declaratory in nature and is unenforceable. In addition, that provision is aimed at employees rather than employee organizations and should not be used as grounds for a complaint by a bargaining agent.

[35] The employer also contended that while paragraph 186(1)(*a*) of the *Act* prohibits interference with the administration of an employee organization, it does not confer a right of access to the employer's facilities. And since the *Act* is silent on what access is permissible, it is up to the parties to the collective agreement to determine, through bargaining, what this access will consist of. In this case, the bargaining agent and the employer have negotiated this issue and agreed that only three circumstances would warrant access to the employer's facilities by representatives of the bargaining agent:

(1) to assist employees in the bargaining unit with grievances; (2) to assist employees in the bargaining unit with complaints; and (3) to attend meetings called by management. According to the employer, those are the rules that the parties to the collective agreement agreed to at the bargaining table and any other type of access not specifically mentioned in the collective agreement is subject to the discretion of the employer, which is free to administer its facilities as it sees fit.

[36] The fact that the bargaining agent tabled an amendment which attempted to expand on the wording of clause 12.03 of the collective agreement (Exhibit 6) is, according to the employer, recognition by the bargaining agent that the use of the employer's premises is an issue that must be negotiated and acquired through bargaining.

[37] The employer argued that no consideration should be given to the position taken by the CBSA local managers in connection with the two access denials in October 2010, since Ms. Therriault-Power had not been consulted nor made aware of those denials in advance. It added that since Ms. Therriault-Power was unaware of past access having been granted to representatives of the bargaining agent for purposes unrelated to those provided by the collective agreement and since the bargaining agent had not established a past practice of broad access to CBSA facilities, no consideration should be given to Mr. Gay's prior visits to CBSA facilities.

[38] The employer argued that no compelling evidence was adduced by the bargaining agent to establish anti-union animus, which is required when alleging a violation of paragraph 186(1)(*b*) of the *Act*. In support of this argument, the employer referred me to *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers v. Correctional Service of Canada*, 2006 PSLRB 76, at paragraphs 97 and 98.

[39] The employer also referred me to *Merriman and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN) v. MacNeil and Justason*, 2011 PSLRB 87, to support the argument that an employee organization generally does not have the right to use the employer's property to communicate with employees that it represents, unless that right has been agreed to as a result of collective bargaining. According to the employer, the representation of employees under paragraph 186(1)(*a*) does not create a right of access. It contends that

article 12 of the collective agreement is a complete code of access to employer premises.

[40] Finally, the employer submitted that I am not bound by *CFTO-TV Limited* as it dealt with the statutory scheme under the *Code* while the complaint before me alleges a violation of the *Act* but nevertheless encouraged me to consider the reasons supporting the dissenting opinion in that case.

C. Bargaining agent's rebuttal

[41] The bargaining agent stated that it is not alleging a violation of section 5 of the *Act* or founding its complaint on that provision. It added that while the violations it is alleging are related to section 186, a contextual approach dictates that section 5 be given due regard.

[42] Finally, the bargaining agent submitted that both *Merriman and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN)* and *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers* were easily distinguishable and had no application to the facts of this case.

IV. Reasons

[43] After considering and weighing the evidence and the parties' arguments, I conclude that the employer violated paragraph 186(1)(*a*) of the *Act* for the reasons that follow.

[44] While I agree with the employer that I am not bound by *CFTO-TV Limited* and that it deals with a different statutory scheme, I am nevertheless of the view that there are many similarities between that decision and this matter, including the fact that the wording of paragraph 186(1)(*a*) of the *Act* practically mirrors that of paragraph 94(1)(*a*) of the *Code*. In addition, I also believe that some of the labour principles referred to in that decision should be applied to this case, particularly the balancing test, which requires an employer to have compelling and justifiable business reasons for preventing an otherwise lawful activity by the bargaining agent on the employer's premises.

[45] I disagree with the employer's argument that clause 12.03 of the collective agreement is a complete code of access to the employer's premises. Having considered the broader context in which the *Act* ought to be interpreted, and in particular the purposes of effective labour-management relations, collaborative efforts, expression of diverse views in the establishment of terms and conditions of employment, credible and efficient resolution of matters arising in respect of terms and conditions of employment, bargaining agents' representation of the interests of employees in collective bargaining, bargaining agents' participation in the resolution of workplace issues, mutual respect and harmonious labour-management relations that are expressly stated in its preamble, I am of the view that the representation of employees that is envisioned by the *Act* ought not to be limited to assisting in the resolution of a complaint or grievance and attending meetings called by management. It also ought to envision the equally important responsibility of advancing legitimate demands and positions at the bargaining table, which can only be achieved through some form of dialogue with the constituency, which in turn emphasizes the need to have access to employees in the bargaining unit. Representatives of employee organizations are the common vehicle for conveying the demands and positions of the employees to the employer. Hindering their ability to gain a better contextual understanding of the issues, without compelling and justifiable business reasons, can only harm the collective bargaining process.

[46] In its reply to the complaint, the employer proposed that while subsection 186(3) of the *Act* provides that permitting a bargaining agent to use the employer's premises for the purposes of the employee organization does not constitute an unfair labour practice, no provision in the *Act* is suggesting that the converse would constitute an unfair labour practice. While that may be the case, I am mindful of the fact that the legislator saw fit to include such a provision in the *Act* which would appear indicative that such a practice was and continues to be a common and acceptable one. Subsection 186(3) provides as follows:

> ***186.*** *(3) The employer or a person does not commit an unfair labour practice under paragraph (1)*(a) *by reason only of*
>
> *(*a*) permitting an employee or a representative of an employee organization that is a bargaining agent to confer with the employer or person, as the case may be, during hours of work or to attend to the business of the employee organization during hours of work without any*

> *deduction from wages or any deduction of time worked for the employer; or*
>
> *(b) permitting an employee organization that is a bargaining agent to use the employer's premises for the purposes of the employee organization.*

Subsection 186(3) also suggests that such a practice is a reality that can occur in the absence of a collective agreement provision authorizing such use. Otherwise, there would be no need to resort to subsection 186(3) to legitimize the permitted use, as it would already be permissible under the collective agreement.

[47] Many prior decisions of the Public Service Labour Relations Board and of the Federal Court of Appeal have recognized that employees can legitimately express their views on a collective bargaining issue by wearing stickers or buttons in the workplace. I fail to see why employees should be prohibited from expressing similar views in private with a negotiator of the bargaining agent during non-working periods, especially when no compelling and justifiable business reason for such prohibition has been offered by the employer, other than the fact that such activity or usage of the employer's premises is not specifically mentioned in the collective agreement.

[48] An employer should not unilaterally prevent a bargaining agent from meeting in the workplace employees that it represents to discuss bargaining issues during off-duty hours, unless it can justify such prohibition with reference to compelling business reasons and objective facts, such as a disruption of productivity, order, safety or security, or some other legitimate business interest. In stating this, I am especially mindful of Ms. Therriault-Power's concession that allowing Mr. Gay to access CBSA worksites would allow him to gain a better contextual understanding of workplace issues and could be beneficial to the collective bargaining process.

[49] In this case, the employer failed to demonstrate that it attempted to reconcile compelling and justifiable business reasons with the bargaining agent's legitimate objectives. In fact, no concerns were raised by the employer in denying Mr. Gay access to its premises. Rather, it appears as though the employer' access denials were initially founded entirely upon the employer's property rights and subsequently upon a strict interpretation of the collective agreement. I agree with the bargaining agent's suggestion that it is to be expected that union activities may take place at an employer's premises not out of tolerance but because it is normal in a democratic society. Subsection 186(3) of the *Act* certainly suggests that much.

[50] I disagree with the employer's contention that no consideration should be given to the reasons provided by the CBSA local managers in connection with the two access denials of October 2010. While it may be true that Ms. Therriault-Power was not consulted or made aware of those denials before they were conveyed to the bargaining agent, the evidence clearly established that those managers acted under the guidance and direction of CBSA officials at headquarters, as evidenced by email exchanges between the managers and headquarters officials (Exhibit 7). The evidence established that the denials were not based on any compelling and justifiable business reason or even on clause 12.03 of the collective agreement.

[51] I also do not accept the employer' suggestion that no consideration should be given to Mr. Gay's prior visits to CBSA facilities simply because Ms. Therriault-Power was unaware of his past access or because the bargaining agent had not established a past practice of broad access to CBSA facilities. Such a suggestion fails to consider the fact that Ms. Therriault-Power had only joined the CBSA in May 2009, that the regional chiefs of operations had approved Mr. Gay's prior visits, that other senior officials of CBSA headquarters may have been aware of Mr. Gay's prior access, and that the bargaining agent is not alleging estoppel in this case. According to Mr. Gay's testimony, between 2007 and the fall of 2010, he had been given access for purposes other than those provided in article 12 of the collective agreement in over 40 different CBSA facilities across the country with the knowledge and authority of the chief of operations of those facilities. Those facts were not contradicted by the employer and ought not to be ignored. While I recognize that an employer can deny access to union representatives who are strangers to the workplace, we are not dealing with such a scenario here. Mr. Gay was no stranger to the employer. He had been granted access to over 40 different CBSA facilities within a three year span and was the designated chief spokesperson of the bargaining agent for collective bargaining relating to the bargaining unit. This past practice was, in my view, consistent with the representation of employees in paragraph 186(1)(*a*) of the *Act* and in harmony with the object and intent of section 5 of the *Act*, especially if the purposes of the *Act* that are expressly stated in its preamble and the broader context in which the *Act* ought to be interpreted are to be given any meaning.

[52] I am of the view that *Merriman and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN)* and *International Association of Machinists and Aerospace Workers and District Lodge 147, National*

Association of Federal Correctional Officers, upon which the employer relies, can be distinguished and are of limited assistance in the determination that I must make. In *Merriman and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN),* the dispute involved the use of a correctional institution's telephone system by an off-duty employee for the purpose of communicating with his bargaining agent's representative, who was at work. It should be noted that the employee was not prohibited from talking to his bargaining agent but was rather prohibited from using the employer's telephone system to do so and that the employer had raised legitimate concerns for the safety and well-being of the employee and his co-workers. At the heart of *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers* was the ability of an employee organization to solicit potential members on the employer's premises during normal working hours.

[53] I find that the bargaining agent's purported activity, as described by Mr. Gay in his testimony, was lawful, part and parcel of its administration of the employee organization and of its representation of employees in the bargaining unit.

[54] I further find that the actions of the employer interfered with the bargaining agent's administration of its organization and with the representation of employees in the bargaining unit, contrary to paragraph 186(1)(*a*) of the *Act* and that those actions were taken without due regard for section 5 of the *Act*. In fact, the actions of the employer ran contrary to fostering effective labour-management relations, collaborative efforts, expression of diverse views in the establishment of terms and conditions of employment, credible and efficient resolution of matters arising in respect of terms and conditions of employment, bargaining agents' representation of the interests of employees in collective bargaining, bargaining agents' participation in the resolution of workplace issues, mutual respect and harmonious labour-management relations, which are legislative purposes expressly stated in the preamble of the *Act*.

[55] I agree with the bargaining agent's contention that the employer's actions need not be motivated by anti-union animus for there to be a violation of paragraph 186(1)(*a*) of the *Act*. Although the actions of the employer in this case could easily be perceived as retaliatory in nature, no such finding is required to conclude that a violation of paragraph 186(1)(*a*) took place in these circumstances.

[56] While I do not purport to create an unrestricted right of the bargaining agent to use the employer's premises for the contemplated purpose of meeting with employees in the bargaining unit to discuss collective bargaining issues, I believe that the employer's discretion to refuse the bargaining agent the use of its facilities should not be absolute. It should be exercised in a manner that strikes a fair balance between the bargaining agent's ambition to advance the legitimate interests of the employees in the bargaining unit and any compelling and justifiable business reasons that the employer might have that such activities might undermine its legitimate workplace interests.

[57] In conclusion, my findings should not imply that any future access denial by the employer will automatically amount to a violation of paragraph 186(1)(*a*) of the *Act* or that the parties should not continue to strive, through collective bargaining, to agree on the use of the employer's premises that is tailored to their mutual legitimate interests.

[58] For all of the above reasons, the Public Service Labour Relations Board makes the following order:

(The Order appears on the next page)

V. Order

[59] I declare that denying Mr. Gay access to CBSA premises on October 13 and 29, 2009 for the purpose of meeting with employees in the bargaining unit during non-working periods to discuss collective bargaining issues, violated paragraph 186(1)(*a*) of the *Act* and were taken without due regard to section 5 and to the purposes of the *Act* that are expressly stated in its preamble.

[60] I order the Treasury Board and the CBSA to cease denying such access in the absence of compelling and justifiable business reasons that such access might undermine their legitimate workplace interests.

May 11, 2012

Stephan J. Bertrand,
Board Member