**Date:** 20130916

**Files:** 561-02-616 and 617

**Citation: 2013 PSLRB 111**

*Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations Board

BETWEEN

**PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS**

Complainant

and

**TREASURY BOARD**
**(DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT)**

Respondent

Indexed as
*Professional Association of Foreign Service Officers v. Treasury Board (Department of Foreign Affairs, Trade and Development)*

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

## REASONS FOR DECISION

***Before:*** Renaud Paquet, a panel of the Public Service Labour Relations Board

***For the Complainant:*** David Yazbeck, counsel

***For the Respondent:*** Richard Fader, counsel

Heard at Ottawa, Ontario,
April 30 and July 17 to 19, 2013.

## I. Complaints before the Board

[1] The Professional Association of Foreign Service Officers (PAFSO or "the complainant" or "the bargaining agent") is the bargaining agent for employees who are members of the Foreign Service (FS) bargaining unit. The FS collective agreement between the bargaining agent and the Treasury Board ("the collective agreement") expired on June 30, 2011. Members of the FS bargaining unit have been in a legal strike position since April 2, 2013.

[2] On April 15, 2013, the bargaining agent filed two complaints against the Department of Foreign Affairs, Trade and Development ("the respondent" or DFATD). In complaint 561-02-616, it alleged that the respondent violated subsection 186(1) of the *Public Service Labour Relations Act* ("the *Act*") by blocking email communications from the bargaining agent to members of the FS bargaining unit. In complaint 561-02-617, the bargaining agent alleged that the respondent violated section 106, subsection 186(1) and subparagraph 186(2)(*a*)(iv) of the *Act* by ordering members of the FS bargaining unit to remove an out of office auto reply message from their outgoing emails and by threatening those who did not comply with disciplinary consequences. The out of office auto reply message reads as follows:

. . .

> *Thank you for your message. Following a breakdown in collective bargaining with the Government of Canada, members of the Professional Association of Foreign Service Officers are now in a legal strike position. As a result, there may be a delay in responding to your inquiry. We regret any inconvenience. For more information please see http:/www.pafso.com/fs_action.php*

. . .

[3] On July 3, 2013, following the first day of hearing in this matter, the bargaining agent informed the Public Service Labour Relations Board ("the Board") that it wished to amend its complaint in file 561-02-616. It wanted to add an allegation that the respondent interfered with the administration of the bargaining agent and the representation of its members and failed to bargain in good faith. The bargaining agent based that allegation on the fact that the respondent put in place widespread electronic surveillance of specific interactions between the bargaining agent and its members concerning numerous items, including job action strategy and collective bargaining.

[4] The respondent objected to the complaint being amended. I asked the parties to proceed as if the complaint had been amended, and I informed them that I reserved my decision as to whether I accepted the amendment.

[5] These two complaints involve the following provisions of the *Act*:

. . .

> ***106.*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> > *(*a*) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
> >
> > *(*b*) make every reasonable effort to enter into a collective agreement.*
>
> . . .
>
> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> ***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) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> > *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
> >
> > > *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or*

> *participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2;*
>
> *(*b*) impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2; or*
>
> . . .
>
> ***190.** (1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(*b*) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> . . .
>
> *(*g*) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .
>
> ***191.** (3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*
>
> . . .

[6] As the evidence will show, the complaints also involve article 5 of the collective agreement, which deals with the use of the respondent's communication facilities. Article 5 reads as follows:

***5.01*** *The communication facilities of the Employer are for the delivery of government programs. Nevertheless, in the situations circumscribed by clauses 5.03 and 5.04 and subject to operational requirements, the Employer agrees to cooperate in providing certain facilities for communications between the Association and the employees on foreign assignment.*

***5.02*** *The Association agrees to indemnify and save the Employer harmless against any claim or liability arising out of the application of this Article.*

***5.03 Foreign Affairs Mail Distribution Service***

*Notwithstanding any restrictions on use of government mail facilities, the departmental internal mail facilities may be used for communications between the Association and the employees on foreign assignment, in conformity with applicable Employer policies as amended from time to time.*

***5.04 Departmental Electronic Mail Systems***

*a.* *The departments shall allow the Association to use the departmental electronic network to distribute information to the members of the Association pursuant to sub-paragraphs 5.04(i), (ii) and (iii);*

*i. The Association shall endeavour to avoid requests for distributing information, which the Employer, acting reasonably, could consider adverse to its interests or to the interests of any of its representatives. Distribution of information shall require the prior approval of the department.*

*ii. The Association shall provide to the authorized representative a paper and electronic (ready for transmission) copy of the documents it wants to distribute.*

*iii. Such approval shall be requested from the authorized representative or his or her delegate at the national level; it shall not be unreasonably withheld.*

*iv. The Department will endeavour to transmit the approved information via its electronic network within three working days (not counting Saturdays, Sundays and Designated Paid Holidays). The person responsible for the approval will ensure the distribution of the information.*

> *v. The departments will ensure a hyperlink to the Association's website from its intranet through the Association.*
>
> ***5.05 Bulletin Boards***
>
> *Reasonable space on bulletin boards, in convenient locations, including electronic bulletin boards where available, will be made available to the Association for the posting of official Association notices. The Association shall endeavour to avoid requests for posting of notices which the Employer, acting reasonably, could consider adverse to its interests or to the interests of any of its representatives. Posting of notices or other materials shall require the prior approval of the Employer, except notices related to the business affairs of the Association, including the names of Association representatives, and social and recreational events. Such approval shall not be unreasonably withheld.*

## II. Summary of the evidence

[7] The respondent called Claude Houde, Francis Trudel, Jocelyn Côté and Ariel Delouya as witnesses. Mr. Houde has been Director of Workplace Relations for the respondent since 2008, and Mr. Trudel, Director General of Corporate and Operational Human Resources since June 2012. Mr. Côté is the Chief Technology Officer for the DFATD at Shared Services Canada. Mr. Delouya is Executive Director of Inspections for DFATD. The bargaining agent called Ron Cochrane and Timothy Edwards as witnesses. Mr. Cochrane has been the PAFSO's Executive Director since 2001 and Mr. Edwards has been National President since October 2011. The parties adduced in evidence three binders of documents.

[8] There are approximately 1350 FSs. Most of them work in three departments: the DFATD (70% of FSs), the Department of Citizen and Immigration (24% of FSs), and the Canada Border Services Agency (3.5% of FSs). All employees involved in these complaints work for the DFATD.

[9] The FSs work in three major occupational streams: commercial and economic relations and trade policy, political and economic relations, and immigration affairs. In addition, the FS Group also comprises positions in legal affairs. FSs do not have what is commonly referred to as a substantive position to which they are appointed on an indeterminate basis at a specific location. Rather, they are appointed to a level and assigned to any one of Canada's approximate 150 missions abroad (45% of FSs) or to FS positions in DFATD headquarters in Ottawa (55% of FSs). Assignments are issued for

a specific period of two to four years depending on the hardship of the mission. Consequently, most FSs are constantly on the move and do not have a permanent long-term home address. Most missions count less than five FSs and one-third of them count only one FS. As a result, communicating with FSs posted abroad presents extra challenges.

**A. Email communications from PAFSO to its members' workplace email addresses**

[10] On March 25, 2013, the complainant realized that its messages to FS members working at DFATD or its messages to DFATD itself had been blocked. On March 27, 2013, Danielle Dauphinais, Director of the Labour Relations unit at the DFATD informed Mr. Edwards that the DFATD had decided to block all emails originating from the bargaining agent as some were considered adverse to the respondent's interest.

[11] Communications between the bargaining agent and its members at their office email address and the use of the respondent's resources by the bargaining agent to reach its members has been at issue for quite a long time. In 2002, the bargaining agent filed a complaint to the Board against the respondent's position on that issue. In 2006, a similar complaint was filed. In both cases, the bargaining agent withdrew the complaints after it reached an agreement with the Treasury Board on the renewal of the FS collective agreement.

[12] Prior to the filing of the 2006 complaint, that is, on May 4, 2006, the director of labour relations at the time wrote to the bargaining agent, to express its concerns with the "unacceptable" use of the respondent's network by the bargaining agent, which had sent two emails to its members at their workplace. The director of labour relations believed that the bargaining agent had violated the collective agreement by not asking for authorization from the respondent before sending those emails. On May 10, 2006, Mr. Cochrane replied that the collective agreement did not prevent the bargaining agent from sending email messages to its members from its office to their workplace. He stated that the respondent's approval was necessary only for messages sent on the DFATD Signet Broadcast System. That system is normally used for mass distribution of information to all DFATD employees. He added that in the past the bargaining agent had asked the respondent's permission to use that system for messages related to FSs professional development.

[13] The interpretation of article 5 of the collective agreement (which was article 4 in 2002 and 2006) is not the only contractual matter at issue between the parties. They also have a different interpretation of a memorandum of understanding (MOU) that they signed in December 2005 on the use of the respondent's facilities by the bargaining agent. That agreement reads as follows:

> ***Purpose***
>
> *In accordance with sub-clause 186(3) of the Public Service Labour Relations Act, this agreement outlines the practice established between the Department of Foreign Affairs Canada and International Trade Canada and the Professional Association of Foreign Service Officers with regards to the use of the employer's facilities to hold union meetings.*
>
> ***Practice***
>
> *Annual General Meeting*
>
> 1) *The PAFSO National Office will send a request to hold the Annual General Meeting on the employer's premises to the Director of Labour Relations and Health & Safety.*
>
> 2) *The request will be approved within five (5) working days upon receipt of the request provided that the requested space is available with the understanding that the reservation may be cancelled if the space is required for unforeseen business affairs of the department.*
>
> *Other Meetings*
>
> 1) *The PAFSO National Office will send a request to hold union meetings on the employer's premises to the Director of Labour Relations and Health and Safety for approval.*
>
> 2) *The request will be made in writing (letter or e-mail) by the PAFSO National Office and will provide for the subject, location, date and duration.*
>
> 3) *The Director of Labour Relations and Health & Safety will respond within five (5) working days upon receipt of the request.*
>
> 4) *Providing the space is available and the meeting is not considered adverse to the Employer's interests or to the interest of any of its representatives, the Director of Labour Relations and Health & Safety will approve*

> *the request. The employer will not unreasonably withhold its approval.*
>
> *5) The meeting room will not be cancelled once reserved, unless the space is required for unforeseen business affairs of the department.*¸
>
> . . .

[14] According to Mr. Houde and Mr. Trudel, the bargaining agent must seek approval from the respondent before sending an email message from the bargaining agent's office to its members at their DFATD email address. According to them, article 5 of the collective agreement obliges the bargaining agent to act that way. They also believe that the December 2005 MOU applies to communications sent to DFATD employees' work email address as that type of communication involves the use of the respondent's premises, namely its electronic network. Mr. Houde testified that the PAFSO does not need to obtain prior approval to send an individual email to one of its members at work for issues related to a specific problem or to a grievance.

[15] Mr. Cochrane testified, as he stated in the 2006 grievance, that the collective agreement does not prevent the bargaining agent from sending email messages to its members from its office to their workplace, and that the respondent's approval is necessary only for messages sent on the DFATD Signet Broadcast System. However, Mr. Houde testified that, between 2007 and 2012, the bargaining agent always requested prior approval from the respondent before sending emails to its members at their workplace. The respondent approved the requests provided they did not have an adverse effect on it.

[16] Mr. Cochrane and, to a lesser extent, Mr. Edwards testified that the bargaining agent has three different ways of communicating electronically with its members. First, it can ask the respondent for approval to send the message on the Signet Broadcast System. The bargaining agent uses that method for messages that are of a professional nature. Second, the bargaining agent can directly email its members at their workplace using a list that has been compiled using the name of its members from its check off membership list and adding the extension "international.gc.ca." That list needs to be updated constantly to reflect the turnover at the DFATD. Mr. Cochrane testified that the bargaining agent has used that method of communicating with its members for a long time and without asking for authorization from the DFATD. The bargaining agent also has a third way to send emails to its members. It has a list of approximately 1000

of its members' personal email addresses. That list needs to be updated constantly since people move and sometimes change their email address. Often, FSs do not provide their new email address. That list is used, for example, to communicate details of particular job actions. It should be used to reduce the odds that the message will be provided to or viewed by the respondent. Mr. Edwards and Mr. Cochrane both testified that messages sent using the employer's network often end up in the hands of the employer.

[17] On October 26, 2012, the bargaining agent sent an email from its office to its members at their workplace email address asking them to complete an online survey that would be used, according to the bargaining agent, to strengthen the bargaining agent's lobbying and consultation efforts and to help it establish priorities on the key concerns of its membership. On October 29, 2012, Mr. Trudel wrote to Mr. Edwards to express concerns that the bargaining agent had not sought prior approval from the respondent before sending the email, which according to Mr. Trudel was contrary to article 5 of the collective agreement. The same day, Mr. Edwards answered Mr. Trudel that the bargaining agent had not acted contrary to the collective agreement since it had not used the respondent's network to send its email message. In his testimony, Mr. Edwards also stated that communications that would address the mechanics and timing of job action would be adverse to the respondent's interests and would need to be handled differently. Mr. Edwards and Mr. Trudel had a brief informal discussion on the issue shortly afterward. They agreed to disagree.

[18] Mr. Trudel pointed out in his testimony that the bargaining agent did not file a grievance to challenge the respondent's interpretation of article 5 of the collective agreement. Mr. Cochrane testified that there was no need to do so since the issue in question did not involve article 5. He also testified that the bargaining agent did not submit any bargaining proposals to amend article 5 since it was satisfied with its wording.

[19] On December 5, 2012, the bargaining agent sent a message to its members' work email addresses entitled "Collective Bargaining – Letters to ADMs." In that message, the bargaining agent described in fairly negative terms the attitude of the Treasury Board at the bargaining table. The bargaining agent asked its members to write to their respective assistant deputy-minister (ADM) in order to convince the ADM

to "intervene forcefully" in the process. On December 10, 2012, the bargaining agent sent a reminder to its members to send the letters to the ADMs.

[20] The respondent also adduced in evidence some email messages sent in March 2013 from the bargaining agent's office to its members' workplace email addresses entitled "Job Action Update." Those emails criticized the Treasury Board positions at the bargaining table, and informed FSs on the strike vote being taken, on an upcoming after-work pub meeting, on essential services, and on the result of the strike vote. One of the messages indicated that no job action would be undertaken before April 2, 2013. That same message asked the FSs to complete a short survey to gather information on where each FS was located and to build a group of volunteers to ensure a good flow of information.

[21] On December 3, 2012, Mr. Houde sent a memorandum to the DFATD's information security unit requesting that it monitor the internal electronic system to review the content of electronic communications from the PAFSO to all intended addresses. Mr. Houde wrote that that was necessary because there were indications that the PAFSO was sending information to its DFATD members using the respondent's electronic network without proper authorization. He stated that his request was particularly important in the context of collective bargaining and of imminent potential job action or strike. The DFATD information security unit accepted Mr. Houde's request. The bargaining agent produced in evidence a document including 513 pages of material that was collected by DFATD's information security unit following Mr. Houde's request of December 3, 2012. A large part of those pages consists of identical email messages sent from the PAFSO's office to its members. The messages are general in nature and do not concern any individual grievances or advice on workplace-specific problems. They are mostly related to a survey, to updates on collective bargaining and to job action. The bargaining agent was not advised that its communications on the respondent's network would be monitored. It learned at this hearing on April 30, 2013 that this had been done.

[22] Mr. Houde testified that he received the material from the information security unit shortly before March 22, 2013. He reviewed that material and, as a result, he made a request to the chief of information technology that any communications originating from the PAFSO domain be blocked from accessing the DFATD network. He also asked that the website used by the PAFSO for its survey and the PAFSO Twitter and Facebook

links be blocked from access through the DFATD's network. Mr. Houde's request was accepted and the blockage was put in place on the evening of March 22, 2013.

[23] As stated earlier, on March 25, 2013, the bargaining agent realized that its messages to FS members working at the DFATD or its messages to DFATD itself had been blocked. No warning was given to the bargaining agent that its messages would be blocked. Later on, the general blockage was amended to allow messages from the PAFSO to the DFATD labour relations unit to get through.

[24] Mr. Houde met with Mr. Edwards on March 28, 2013 to discuss the situation. He explained that messages related to job action were contrary to the respondent's interest, and that the respondent would not allow those messages to be distributed on its network. He told Mr. Edwards that he would authorize the sending of a message by PAFSO on the DFATD network inviting all FSs working for the DFATD to provide the PAFSO with their personal email address. That message was never sent since the parties could not agree on its content. Mr. Houde testified that a similar message is sent every six months to DFATD employees who are members of two other bargaining agents. Mr. Delouya testified that FSs working abroad have access to a computer and to an Internet connection in the house where they live. However, he stated that such connection could be very expensive. Mr. Delouya and Mr. Trudel admitted that in some countries Internet service providers are not as efficient as those in Canada, even though they are reliable in general.

[25] Mr. Côté testified that the international.gc.ca extension is a crown-owned domain. It is a DFATD email network. He explained that the DFATD has the capacity to block access to that network for anybody that it wishes to block. He stated that approximately 70% of what is sent to the network is blocked, and never makes it to DFATD email recipients. He gave the example of spams and viruses that are blocked from entering the network.

[26] In support of its position, the respondent also adduced in evidence its *Network Acceptable Use Policy* and the Treasury Board *Policy on the Use of Electronic Networks* and *Guidelines for Use of Employer Facilities*.

**B. <u>The out of office email reply</u>**

[27] On April 2, 2013, the bargaining agent asked its members to advise email recipients communicating with them that the bargaining unit was in a legal strike position. The bargaining agent also asked its members to set out of office auto reply messages stating that the members of the bargaining unit were in a legal strike position, and that, as a result, there might be a delay in responding to enquiries. The message also suggested visiting the PAFSO's website for more information. That out of office auto reply reads as follows:

> *Thank you for your message. Following a breakdown in collective bargaining with the Government of Canada, members of the Professional Association of Foreign Service Officers are now in a legal strike position. As a result, there may be a delay in responding to your inquiry. We regret any inconvenience. For more information, please see http:/www.pafso.com/fs_action.php*

[28] On April 4, 2013, the respondent sent a message to all FSs working at the DFATD ordering them to immediately cease the use of the out of office email auto reply. The respondent then stated that, "[s]hould such inappropriate use of electronic mail continue, it may result in administrative or disciplinary measures up to and including termination of employment."

[29] Mr. Houde testified that some FSs were also using the out of office email auto reply while they were at work in their office. In cross-examination, he admitted that the out of office reply did not contain any false information. He also admitted that some FSs were wearing buttons at work with the message "Same work, same pay." Those employees were not asked to remove their buttons.

[30] Mr. Trudel testified that the out of office auto reply had a negative impact on the respondent's business, its stakeholders and its clients because it suggested that the service might not be received and that there could be delays. However, Mr. Trudel could not quantify that impact.

## III. Summary of the arguments

### A. For the respondent

[31] The parties agreed that the respondent should present its arguments first because it might have the burden of proof under subsection 191(3) of the *Act* since the complaints contain an allegation of a violation of subsection 186(2) of the *Act*.

[32] The respondent argued that this case cannot be about freedom of expression because it has not been raised in the complaints. It is not about picketing or "e-picketing" as the complainants might argue. Rather, this case deals with the use of the respondent's electronic network by the complainant. It is not about the message sent but about the usage of the network.

[33] The bargaining agent never grieved the respondent's interpretation of article 5 of the collective agreement. The respondent argued that an alleged violation of subsection 186(1) of the *Act* cannot be based on actions that are consistent with the specific provisions of the collective agreement where those provisions deal with the subject matter of the complaint. Clearly, the respondent was doing no more than what is provided for in the collective agreement, which was to require prior approval to use its network and not to allow material that it could reasonably consider to be adverse to its interest.

[34] In 2002 and 2006, the bargaining agent filed unfair labour practice complaints against the respondent related to the use of the respondent's electronic system. The respondent stated that the relevant language of the collective agreement has remained unchanged. The respondent argued that those successive withdrawals should act as an estoppel against the current complaints. The parties clearly identified their positions at that time, the complaints were withdrawn by a senior PAFSO official, and there is nothing in the record to suggest that the withdrawal was on a without prejudice basis. At a minimum, a negative inference should be drawn from the fact that those complaints were withdrawn.

[35] The respondent argued that the bargaining agent ought to know the respondent's position on the use of its electronic network, and its interpretation of article 5 of the collective agreement. In 2006, the bargaining agent was clearly reminded by the director of labour relations that it needed to request prior approval

before using the respondent's electronic network. In March 2012, there was also information exchanged between Mr. Houde and Mr. Edwards on the same issue, and in October 2012, between Mr. Trudel and Mr. Edwards. As a result, the bargaining agent was well aware of the respondent's position and of the requirements of the collective agreement.

[36] The respondent argued that the collective agreement contains no obligation for the respondent to provide the bargaining agent with access to its network, and the respondent's refusal to provide such access cannot be said to contravene subsection 186(1) of the *Act*. The bargaining agent could communicate with its members at their home address or home email. The evidence is that they have access to Internet while they are posted abroad. Furthermore, the respondent offered the bargaining agent the opportunity to send a message to all of its members to invite them to provide it with their personal email address.

[37] The respondent argued that, according to the case law, an employer has exclusive control over its electronic systems or material, subject to specific limitations in the collective agreement. In this case, the collective agreement does not include a positive right for the bargaining agent to use the respondent's network, and if it wants to do so, it first needs to seek the respondent's approval.

[38] In the alternative, the respondent argued that the material that the bargaining agent wanted to send to its members was harmful to its operations and reputation and warranted the actions taken. Most of the material dealt with job action or preparing for job action. Clearly, the use of the respondent's email system was inappropriate and something for which a reasonable observer would conclude could bring damage to its reputation and cause disruption to its operations. While job action could be legitimate during a strike, it is not appropriate to plan for this on the respondent's electronic system.

[39] The respondent argued that its response to the bargaining agent was measured and balanced. When it realized that the complainant was not respecting the collective agreement, it blocked its communication from entering the system. However, it invited the bargaining agent to conform to the collective agreement with respect to the distribution of mass emails to its members. It also offered the bargaining agent the opportunity to send a message to its members on the respondent's network to gather their personal information. The bargaining agent declined that offer.

[40] The respondent argued that its position on the use of its electronic network also applies to the "out of office" tool and any auto reply function of its email system. Employees, during their own time and on their own system, can electronically communicate the same message that they have attempted in this case. However, when employees use the respondent's system and a specific tool on the respondent's system to do it, they are not within their rights. Regardless of content, the auto reply is an official piece of business correspondence and it is inappropriate for employees to attach any personal message to it. No such right is provided anywhere in the legislation or in the collective agreement.

[41] The respondent argued that its refusal to allow the complainant to use its property to communicate the bargaining agent's messages is not a violation of freedom of expression. The *Canadian Charter of Rights and Freedoms* ("the *Charter*") applies to the expressive content of the message but not to its location. It does not confer a right of free expression in private spaces, such as the respondent's electronic network. The DFATD exercises tight control over the delivery of messages on its network and this historic reality suggests that this is not a public place as the term is used in the jurisprudence.

[42] The respondent's actions are prescribed by law because the limitation imposed by the respondent flows from the collective agreement and also from the respondent's authority under sections 7 and 11 of the *Financial Administration Act* (R.S.C., 1985, c. F-11). These provisions have traditionally been interpreted to allow the respondent, acting in its managerial function, to do that which is not specially limited by statute or the collective agreement.

[43] In the alternative, the respondent argued that the limitations that it imposed on the bargaining agent met the four-part test established by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103. It also argued that its positions and actions did not violate sub-section 2(d) of the *Charter* on freedom of association. I do not find it useful to summarize those arguments. First, as I will explain later, I do not find that the respondent violated the bargaining agent's right of freedom of expression. Second, the bargaining agent did not argue any violation of the freedom of association.

[44] Finally, the respondent opposed the bargaining agent's request of July 3, 2013 to amend the complaint. The bargaining agent witnesses stated that it is the respondent's practice to monitor the electronic network. It is illogical for them to now

argue that it is an unfair labour practice to do so. Furthermore, there is no expectation of privacy when sending emails on the respondent's network since the collective agreement states that prior approval is required. Also, the respondent was not trolling around looking at private communications. It was seeking mass emails from the PAFSO related to job action.

[45] The respondent referred me to the following decisions: *Almeida v. Canada (Treasury Board)*, [1990] F.C.J. No 929 (FCA); *Babcock v. Canada (Attorney General)*, 2005 BCSC 513; *Beamish v. Lunney*, PSSRB File Nos. 161-2-276 to 278 (19830623); *Bernard v. Attorney General of Canada and Professional Institute of the Public Service of Canada and Public Service Alliance of Canada*, 2012 FCA 92; *Brescia et al. v. Canada (Treasury Board) and the Canadian Grain Commission*, 2005 FCA 236; *Convention Centre Corp. v. Canadian Union of Public Employees, Local 500* (1997), 63 L.A.C. (4th) 390; *Heffernan and White v. Treasury Board (Post Office Department)* (1981), 3 L.A.C. (3d) 125; *Kinectrics Inc. v. Power Workers' Union* (2008), 179 L.A.C. (4th) 288; *Merriman and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN) v. MacNeil and Justason*, 2011 PSLRB 87; *Public Service Alliance of Canada v. Canada (Canadian Grain Commission)*, [1986] F.C.J. No. 498; *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106; *Pacific Western Airlines Ltd. v. Canadian Airline Employees' Association* (1981), 29 L.A.C. (2d) 1; *Peck v. Parks Canada*, 2009 FC 686; *Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2008 PSLRB 13; *Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2011 PSLRB 34; *Quan v. Canada (Treasury Board)*, [1990] F.C.J. No. 148 (FCA); *Pepsi-Cola Canada Beverages (West) Ltd. V. R.W.D.S.U. Local 558*, 2002 SCC 8; *Saint-Gobain Abrasives v. Communications, Energy and Paperworkers' Union of Canada, Local 12* (2003), 120 L.A.C. (4th) 73; *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141; *Cie générale des établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada)*, [1997] 2 F.C. 306; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; *R. v. Sharpe*, 2001 SCC 2; *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52; *Greater Vancouver Transportation*

*Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37; *Insurance Corp. of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, 2012 BCSC 1244; *Vancouver (City) v. Vancouver Municipal and Regional Employees' Union*, [1994] B.C.J. No. 1825; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] S.C.J. No. 71; and *Telus Communications Inc. v. Telecommunications Workers Union* (2010), 195 L.A.C. (4th) 3.

**B. <u>For the complainant</u>**

[46] The complainant argued that this case is not about a bargaining agent claim to have access to the respondent's property. It is about the respondent preventing the bargaining agent from exercising one of its rights. For a long time, the bargaining agent has communicated with its members through their "international.gc.ca" email address. The respondent is now preventing the bargaining agent from emailing its members at work because some emails are to facilitate job action activities permitted under the *Act*. The respondent's sole interest is to make it more difficult for the bargaining agent to do so.

[47] There is nothing in the collective agreement preventing the bargaining agent from sending emails from its office to its members at work. Instead, the collective agreement deals with requests from the bargaining agent to have messages sent by the respondent to all its members. Also, there is nothing in the 2005 MOU on email communications between the bargaining agent and its members. The MOU deals with the use of the respondent's premises for meetings.

[48] The bargaining agent acknowledged that it filed complaints in 2002 and 2006 on comparable issues, and that at some point it withdrew the complaints. However, it does not accept the respondent's argument that the bargaining agent is now estopped from filing a new complaint or that negative inference should be drawn from the fact that past complaints were withdrawn. The bargaining agent had reasons to withdraw those past complaints. Also, the doctrine makes it clear that the respondent cannot use estoppel as a "sword."

[49] The bargaining agent argued that it did not do anything illegal. Its messages on job action were legal and referred to job actions that were permitted under the *Act*. If the respondent wanted to infringe on the bargaining agent's legal rights, it should have had a good reason but it did not. The respondent knew that job action was imminent and its intent was to prevent the bargaining agent from exercising its legal rights. For weeks, it spied on the bargaining agent to find out how it would organize its strike. It did not go to the bargaining agent and talk about its concern. Rather, it decided to spy on its communications. That is contrary to proper labour relations.

[50] The bargaining agent argued that anybody from outside the DFATD has the right to send emails to FSs at work. The bargaining agent should not be treated differently. It is not asking that the respondent send its email. It is doing that from its own network. In blocking access to emails originating from the bargaining agent, the respondent has interfered in the conduct of the bargaining agent's business, and it blocked it from exercising its rights. It is inherent to the certification of a bargaining agent to be able to communicate with its members.

[51] The bargaining agent argued that when FSs began to use the out of office auto reply at issue in this case, they were in a legal strike position. The statement that they made was mild and did not contain anything that was not true. The respondent did not adduce in evidence anything to support its claim that the message had a negative impact on its operations. However, it ordered employees not to use the out of office auto reply at issue and it threatened them with discipline if they did not comply with the order. The respondent did not have the right to act the way it did.

[52] The bargaining agent argued that the respondent infringed on its freedom of expression by stopping the bargaining agent's messages through the use of a firewall, and by threatening employees that they would be disciplined if they used the out of office auto reply at issue. The bargaining agent and its members were simply exercising their statutory rights.

[53] The bargaining agent argued that the Board should accept to hear the amendment that it submitted in early July 2013. The bargaining agent learned about the fact that the respondent had spied on it during the first day of the hearing in April 2013 and had received the material later. There is no prejudice on the respondent for the Board to accept to hear the amendment. Furthermore, the bargaining agent could have filed a new complaint and could have asked that it be

heard together with the two original complaints. That would have led to the same result.

[54] The bargaining agent referred me to the following decisions: *Merriman*; *Pepsi-Cola Canada Beverages (West) Ltd.*; *Quan*; *Air Canada v. Canadian Air Line Employees' Assn.* (1980), 27 L.A.C. (2d) 289; *Andres et al. v. Canada Revenue Agency*, 2009 PSLRB 36; *Canadian Broadcasting Corporation*, [2003] CIRB No. 250; *Canadian General Electric Company (Re)* (1952), 3 L.A.C. 909; *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; *Professional Association of Foreign Service Officers v. Treasury Board (Department of External Affairs)*, PSSRB File Nos. 169-2-413 and 148-2-110 (19850903); *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106; *Canadian Air Line Pilots Association v. Time Air Inc.* (1989), 3 CLRBR (2d) 233; *Plainsfield Children's Home v. Service Employees Union, Local 183* (1985), 19 LAC (3d) 412; *Public Service Alliance of Canada v. Canada Customs and Revenue Agency*, 2001 PSSRB 105; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *United Food and Commercial Workers, Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Canada Post Corporation v. Canadian Union of Postal Workers*, [1993] C.L.A.D. No. 922; *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2011 PSLRB 34; *Ontario Public Service Employees Union v. Alcohol and Gaming Commission of Ontario*, [2002] O.L.R.D. No. 120; *CAW-Canada v. Millcroft Inn Limited*, [2000] O.L.R.D. No. 2581; *United Food and Commercial Workers Union, Local No. 401 v. Gateway Casinos G.P. Inc.*, [2007] A.L.R.B.D. No. 111; *PSAC v. Canada (Treasury Board)*, [1987] F.C.J. No. 240.

## IV. Reasons

[55] In its complaints, the bargaining agent alleged that the respondent violated several provisions of the *Act* by blocking email communications that it sent to its DFATD members and by ordering them to remove an out of office auto reply message from their outgoing emails. The out of office auto reply message contained a paragraph informing its readers that there was a breakdown in collective bargaining, that FSs were in a legal strike position and that there might be delays in responding to enquiries. On July 3, 2013, the bargaining agent asked to amend its first complaint in order to add an allegation that the respondent violated the *Act* in putting electronic

surveillance in place and in accessing interactions between the bargaining agent and its members.

[56] I accept the bargaining agent's request to amend its complaint for the reasons that it submitted in its arguments. First, the bargaining agent learned about the electronic surveillance on April 30, 2013, and received the material later. When it asked for the complaint to be amended, it was still within the 90 days prescribed by the *Act*, and the bargaining agent could have filed a new complaint. For obvious reasons, it was more efficient to amend the existing complaint. If a new complaint had been filed, I would have suggested to the parties that it be heard with the two existing complaints, considering that they relate to the same general topic and the same provisions of the *Act*, and that they involve the same parties and almost the same people. Also, the respondent did not submit any evidence or arguments that could lead me to believe that it suffered any prejudice from the fact that the complaint was amended. Indeed there was no request for adjournment from the respondent in order to allow it to prepare to continue the hearing

[57] The parties referred me to more than 50 decisions. I carefully reviewed all of them. Most deal with series of facts that are quite different from the facts of these complaints. With a few exceptions, I will not refer specifically to these decisions even though I considered and respected the legal logic that they are based on.

**A. <u>The respondent's blockage of the bargaining agent emails</u>**

[58] For this part of the complaints, the facts are quite simple. The respondent learned that the bargaining agent was sending email messages to its members at their workplace without prior authorization and, it concluded, in violation of article 5 of the collective agreement. The respondent believed that some of those emails could be adverse to its interest and, on March 22, 2013, it used the network firewall to block any emails coming from the bargaining agent from entering the DFATD network.

[59] The evidence clearly shows that the parties have different interpretations of the MOU on the use of the respondent's facilities, which they signed in December 2005, and of article 5 of the collective agreement.

[60] For the bargaining agent, the MOU does not apply to electronic communications but rather to the use of facilities for meetings. I agree with it. The MOU does not refer

to any form of communications, including email communications. It only refers to meetings. It outlines the practice of the bargaining agent's use of the respondent's premises for meetings. I find that the MOU is simply irrelevant to this case.

[61] The bargaining agent's position is that article 5 of the collective agreement does not apply to the present situation. According to the bargaining agent, for article 5 to apply, email communications would need to be sent from a DFATD email address to another DFATD email address. In this case, the email communications originated from the PAFSO domain and were sent to DFATD email addresses. The respondent disagrees with that interpretation. According to the respondent, when the PAFSO sent mass emails from its domain to members at their work email address, it used the departmental electronic network, and, in such a case, the procedure in article 5 must be respected. The evidence shows that that dispute on the interpretation of article 5 already existed in 2002 and 2006. It seems that it has never been resolved.

[62] The parties could have resolved that dispute. If they could not, they could have filed policy grievances in order to obtain a binding ruling from a third party. They did not do that either. Instead, they chose to ignore each other's position and to impose on the other their respective way of thinking. The bargaining agent did so by creating and updating groups of emails of its members at work and in using those groups to communicate information on collective bargaining and job action without going through the respondent first. The respondent, in turn, did so by blocking access to its network to anything coming from the PAFSO, as it does with electronic viruses and spam.

[63] That is not how labour relations should work. For the sake of industrial peace, civility and stability, under the Canadian labour relations rules and traditions, the parties normally use administrative tribunals or the courts to resolve disputes related to their rights and obligations, and do not unilaterally impose their will on the other through power.

[64] That having being said, I now turn to the issue at hand, which is the respondent's blockage of PAFSO's email communications. It is first important, given the position taken by the parties, to define the issue to be decided. The complainant says that this is not a case about its use of the respondent's system but about the respondent preventing the complainant from exercising its rights to communicate with its members. While the employer's actions did prevent the respondent from

communicating with its members in a particular manner, at its core, this case concerns the respondent's refusal to permit the complainant to use the respondent's electronic network for its communications. At its core, this complaint is about the respondent's assertion of control over its electronic resources.

[65] There are two issues which I need to decide. First, on the basis of the legislation or the collective agreement, can the respondent block emails to employees from their bargaining agent? The second question is whether, on the basis of the *Charter*, such blockage constitutes a violation of the complainant's freedom of expression.

[66] As stated earlier in this decision, I have found that neither article 5 of the collective agreement nor the MOU signed under it are applicable to the case at hand. Both article 5 and the MOU have as their purpose the creation of obligations on the employer to permit the bargaining agent to use the employer's property for certain specified reasons. As stated in *Merriman*, the corollary of these provisions is that, generally, an employee organization does not have the right to use the employer's property to communicate with its members and that where that right exists it is usually the result of collective bargaining. I also find that I have been cited no provision of any statute, aside from the *Charter*, which would operate to prevent the respondent from acting as it did. Indeed, the respondent cited to me provisions of the *Financial Administration Act* which it argued supported its right to act as it did in the exercise of its managerial authority whereas the applicant did not do so.

[67] Broadly speaking, an employer has the right to restrict the use that employees make of its electronic resources. It has, for example, the right to block access to movie or social networking sites, the right to deny employees permission to send or receive personal emails at work and the right to restrict internet usage to business-only reasons. The issue in this case is therefore whether the present context alters that right for the respondent. I am of the opinion that it does not. As was stated by this Board recently in *PIPSC* at paragraph 162, it is not appropriate for a bargaining agent to use employer facilities for its business and the ability of the bargaining agent to communicate with its members in the workplace is clearly constrained.

[68] Much attention by PAFSO was focused on the fact that given the nature of the members' employment, communication by the complainant with its members outside of work was difficult. While I am prepared to give that fact some consideration, that

fact alone does not, in my mind, alter the above constraint and the complainant presented me with no jurisprudential support for such a position.

[69] The complainant argued that it had not done anything illegal in sending the messages that it did. I agree with the union's factual position on this issue. However, employers have the ability to block more than just illegal messages. The complainant seemed to argue that if the messages it was sending through the respondent's resources were neither illegal nor detrimental to the respondent's interests, it had no right to block them. As already stated, I reject the complainant's argument on this point. I also reject the complainant's argument on the issue of detriment to the employer as it relates to the broad issue of the complainant's right to access the respondent's computer network. The cases cited to me on the issue of detriment to an employer concerned the wearing of buttons or clothing or the display of slogans in the workplace and therefore are decisions which concern freedom of expression, an aspect of this case that I will deal with later in these reasons.

[70] The complainant also argued that everybody outside the department has the right to send emails to employees within DFATD. They do. As a general rule, anybody can send an email to anybody else, as long as they have their email address. That does not, however, mean that those emails will be read by the recipient if they are sent to a work address. The issue here is not whether the union could send the emails it wished but whether the respondent has the right to block employees from receiving those emails on its resources, and I find that neither the collective agreement nor the legislation prevents it from doing so.

[71] The complainant argued that the respondent infringed on its freedom of expression by blocking its email messages from going through the firewall and by threatening employees that they would be disciplined if they used the out of office auto reply to convey a message related to the status of negotiations. The evidence shows that the respondent blocked those email messages and threatened to discipline employees for using the auto reply function for that purpose. The respondent asserted that the expression in issue was detrimental to its interests, was to be exercised during business hours and on its own equipment, and therefore must deter to the legitimate interest of the respondent. The question here is to determine whether those actions infringe on the freedom of expression guaranteed by subsection 2(d) of the *Charter*. That subsection reads as follows:

> *2. Everyone has the following fundamental freedoms:*
>
> *(a) freedom of conscience and religion;*
>
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
>
> *(c) freedom of peaceful assembly; and*
>
> *(d) freedom of association.*

[72] In my view, restricting a method of communication is not the same as preventing any contact at all. Again, as stated in *Merriman*, a distinction must be made between the communication itself and the mechanism or means of communication. In this case, the respondent denied the complainant a particular means of communication with its members, but did not deny the complainant any ability to communicate as it wished with its members.

[73] I agree with the respondent's argument that its refusal to allow the bargaining agent to use its property to transmit its messages is not a violation of freedom of expression. The *Charter* protection attaches to the expressive content of the message but not to its location. It does not confer on the bargaining agent or its members, in the case of the out of office auto reply messages, rights of free expression on the respondent's electronic network. That network is not a public place, but rather the private property of the respondent. It does not matter if the respondent is a public organization. It privately owns its internal communication network, and it has full control over the functions for which it can be used. On that last point, the Supreme Court of Canada wrote the following in *Montréal City* at paragraph 64:

> *64. The argument against s. 2(b) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the Canadian Charter, the argument continues, to confer a prima facie right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from*

> *places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.*

[74] What is at issue here is not a prohibition to diffuse the message but one to use the respondent's property as a means of transmitting that message. The respondent does not prohibit employees from carrying a message to support the bargaining agent's position at the bargaining table. Instead, it prohibits using its electronic equipment to do so.

[75] Even though I have already concluded that the respondent was in its rights in blocking the communications at issue, I still conclude that it interfered with the PAFSO's administration contrary to subsection 186(1) of the *Act*, not because it blocked the PAFSO's communication from entering its network, but because of the moment and the manner in which it did so. A bargaining agent is not an outside estranged organization, or a virus or spam, and the respondent should not treat it as such. Before making a decision to block access to its electronic network, the respondent should have had a serious discussion with the bargaining agent, confronted the bargaining agent with the fact that it was entering the DFATD's network without prior authorization and ultimately warned the bargaining agent that at a specific date it would block its communications from entering the network if the bargaining agent continued to act as such. That would have been a reasonable approach in the circumstances. It would have given time to the bargaining agent to adjust and would not have interfered with its administration. However, to block access without any form of notice is an interference, especially at the crucial time of the collective bargaining cycle, in the administration of the bargaining agent.

[76] In its complaint, the bargaining agent alleged that the respondent's actions violated its obligation to bargain in good faith contrary to section 106 of the *Act*. The complainant has not convinced me of this allegation. It is not because those incidents occurred at a time that the parties were negotiating the renewal of the collective agreement that any violation of the *Act* would be considered violations of section 106. I would at least need to be presented with some evidence or argument that the sending of emails by PAFSO to its members constituted part of the negotiation process so as to attract the duty to bargain in good faith. No such evidence or argument was made.

[77] The facts of this case differ from most cases referred to by the parties. In some of those cases, the respondent refused access to its premises or refused to provide the

union with the information it needed to serve its members or to contact them. That is not what is at issue here. The respondent did not refuse to provide the bargaining agent with mailing addresses or personal information of its members. In fact, it offered the bargaining agent the opportunity to send a message to its members at their work email address asking them to provide their personal email address to the bargaining agent. Instead, this case is about the use of the respondent's electronic material by the employees to receive information from the bargaining agent. It is also about a conflict between the parties as to how to interpret the collective agreement.

**B. <u>The respondent's electronic surveillance of the bargaining agent's email</u>**

[78] The facts related to the respondent's electronic surveillance of the bargaining agent's email are not contested. On December 3, 2012, Mr. Houde asked the DFATD's information security unit to monitor the internal electronic system to review the content of electronic communications from the PAFSO to its members. Mr. Houde felt that that was necessary because he had indications that the PAFSO was using the respondent's electronic network without proper authorization. The information security branch accepted Mr. Houde's request. As a result, during more than three months, the respondent monitored 513 pages of material that the PAFSO sent from its national office to its members at their work email addresses. The bargaining agent was not advised that its communications on the respondent network were or would be monitored. It learned that it was done after the fact, the first day of this hearing, on April 30, 2013.

[79] I find that, in the particular circumstances, the respondent's actions did violate subsection 186(1) of the *Act* so as to constitute interference in the administration of a bargaining agent and its representation of its members. While I find that the respondent's blockage of emails emanating from PAFSO was not a violation of the *Act*, the surreptitious surveillance of those emails communications does constitute such a violation in that it interfered with the administration of the bargaining agent and its representation of its members.

[80] I have no doubt but that the PAFSO was engaging in the administration of an employee organization and the representation of employees by that organization, as defined in sub-section 186(1)*a*) in sending the emails messages that it did. The evidence before me is sufficient to establish the fact that the respondent's actions of surreptitiously blocking and keeping track of incoming PAFSO emails, viewed

practically, did interfere with the complainant's efforts to administer its organization and represent its members.

[81] As stated in *NAFCO*, the general objective of section 186 is to "ensure that the employer does not involve itself in the internal affairs of employee organizations, to level the labour relations playing field and to keep management and the bargaining agent separate when it comes to certain lawful union activities". Rather than surreptitiously block and review all email correspondence to PAFSO members on its system, the respondent should simply have blocked the emails and put PAFSO on notice that it would do so. Such an approach would be consistent with the *Act* and would have served the respondent's legitimate interests while not interfering with PAFSO's legitimate rights, which rights were particularly important given the fact that this dispute arose during a crucial time in the collective bargaining cycle. While the respondent might have had sufficient business reasons to block PAFSO emails, no justifiable business reason for surreptitiously gathering such emails was ever advanced by it.

[82] Finally, as for the respondent's estoppel argument, I do not see the need to decide this issue given my decision dismissing the complaint on the issue of the blockage of emails. While I have found in favour of the complainant on the issue of the respondent's electronic surveillance of messages from PAFSO, that issue is new and is not one to which the doctrine of estoppel would apply.

**C. <u>The out of office auto reply message</u>**

[83] The out of office auto reply function is part of the email software. It allows a person who is absent to advise people who communicate with him or her of the absence. It is common knowledge that the out of office auto reply would include the date of return of its author, or the name of the person with whom someone could communicate to receive the services normally provided by the author or any other relevant information that could be helpful under the circumstances.

[84] To use that function to inform clients, stakeholders or anybody who communicates with these DFATD employees that there has been a breakdown in collective bargaining, that FSs are in a legal strike position, and that there may be a delay in responding to enquiries is to use the auto reply function to convey a message different from the usual function of an out office auto reply message. In that context,

it is not unreasonable for the respondent to decide what is improper to write in those messages.

[85] The respondent was perfectly entitled to order its employees to remove those messages from their email auto reply and to ensure compliance in threatening to discipline employees who did not obey. In doing so, it did not violate the *Act*, did not interfere with the administration of the bargaining agent and did not threaten to discipline employees that participated in its affairs or exercised their rights under the *Act* and did not bargain in bad faith. It simply ordered employees not to use the out of office auto reply for their own purpose and not for what it is designed for.

[86] The bargaining agent argued that the information contained in the message was true. In the present case, that does not matter. What matters is that the respondent is entitled to exercise some form of control over what employees write in those messages. The test is not the exactness of the message but whether the respondent was reasonable in preventing specific content from appearing in an out of office auto reply message. I have already determined that the respondent was reasonable in this case.

[87] There is a significant difference between using the out of office auto reply and wearing union buttons in the workplace to carry a labour relations message related to difficulties or issues at the bargaining table. That means of communication does not involve the use of the respondent's material to an end that is not the one for which it has been put in place. In such a case, employees carry the message in using some material that belongs to them. In the present case, the employees used the respondent's material to convey their message. The respondent is fully in its right to give directives or put restrictions on how its own material is used.

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

*(The Order appears on the next page)*

## V. Order

[89] The complaint in file 561-02-616 is partly allowed.

[90] The respondent contravened paragraph 186(1)*a*) of the *Act* by secretly monitoring all emails sent by the bargaining agent to its members at their work email address between December 2012 and March 2013.

[91] The respondent contravened paragraph 186(1)*a*) of the *Act* by not giving prior notice to the bargaining agent that it would unilaterally block the bargaining agent's access to its email network on March 22, 2013 without prior notice.

[92] The complaint in file 561-02-617 is dismissed.

September 16, 2013.

**Renaud Paquet,**
**a panel of the Public Service**
**Labour Relations Board**