Date: 20130926

File: 560-34-54

Citation: 2013 PSLRB 121

Canada Labour Code

Before a panel of the Public Service Labour Relations Board

BETWEEN

SAMANTHA SCHARF

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Scharf v. Canada Revenue Agency

In the matter of a complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Joseph W. Potter, a panel of the Public Service Labour Relations Board

For the Complainant: Herself

For the Respondent: Anne-Marie Duquette, counsel

Decided on the basis of written submissions filed June 26, 2012, and March 6, April 8, and May 9, 2013.

I. Complaint before the Board

[1] This decision pertains to the objection filed by the Canada Revenue Agency ("the respondent") to the jurisdiction of a panel of the Public Service Labour Relations Board ("the Board") to hear a complaint filed by Samantha Scharf ("the complainant") under section 133 of the *Canada Labour Code* ("the *Code*"), R.S.C., 1985, c. L-2, which alleges a violation of section 147. Sections 133 and 147 provide as follows:

> ***133.*** *(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*
>
> *(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*
>
> *(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.*
>
> *(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*
>
> *(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*
>
> *(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*
>
> ***147.*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten*

> *to take any such action against an employee because the employee*
>
> *(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> *(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> *(*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

II. <u>Chronology of events</u>

[2] This case has more twists and turns that San Francisco's famous Lombard Street. I will attempt to navigate through and arrive at the bottom of the street in as straightforward a manner as possible.

[3] The starting point for this case was the complaint that the complainant, an employee of the respondent, filed in her own name on February 12, 2009. At that time, the complainant was representing herself. The complaint reads as follows:

. . .

> *Employees of the Canada Revenue Agency(CRA) have taken action against me contrary to section 147 of the Canada Labour Code.These actions appear to be deliberate and systemic.These actions are consistent with similar actions taken against David Babb and Denis Lapointe.Employees of the Canada Revenue Agency have knowingly and willfully violated my rights and taken action/inaction against me contrary to rights under the Canadian Human Rights Act, Canada Labour Code, and the Workers' Compensation Legislation.Numerous employees of the CRA on various levels and in various capacities appear to be involved.I have been harmed and suffered injury as a result.Human Resources Skills Development Canada (HRSDC) and Workplace Safety Insurance Board (WSIB) appear to have been involved as participants.My attempts to gather information needed to identify such persons appear to have been intentionally obstructed by representatives of my employer at 875 Heron Road and Access to Information/Canada Revenue Agency.These matters have been ongoing for quite some time, focusing on the "RE: OSH Minutes" and "RE: Questions about the Plan of Action posted at 875 Heron Rd." chain of communications The persons primarily involved are as follows:William Baker,Gary Gustafson,Steve Hertzberg, Kathy*

> *Mawbey, Chris Aylward, Gillian Pranke, Denis Maurice, Parise Ouellette, Greg Currie,Jean Laronde,Claude Tremblay,Lysanne Gauvin, Larry Hillier,Gordon O'Connor,Catherine Bullard,Lucie Bisson,Therese Awada, Louise Lambert,Lyne Lamoureux,Renee Donata,Bill-R Blair,Carl Bryant, Eldon Dodds, Sean Evans, Marie-Claude Lapointe, Jeffrey Lawrence, Shelley Miller,Greg Moore,Bert Stranberg,June Whyte,Jeffrey Moffet.Persons from WSIB, HRSDC, Health Canada, and Ted Nathanson (consultant) appear to be directly involved as well. Recent email communications and gathered information indicates deliberate actions have been taken against me and others contrary to our rights.Reference"RE:OSH Minutes" emails that are presently ongoing. This is as concise as I can be.*
>
> . . .
>
> [*Sic* throughout]

The corrective action she sought was as follows:

> . . .
>
> *That I be made whole. The* [*sic*] *the Board recognize the damages caused both directly and indirectly as a result of numerous actions taken by the Canada Revenue Agency employees.*
>
> . . .

Two of the complainant's colleagues — David Babb and Denis Lapointe — filed very similar but distinct complaints, each in his own name, at around the same time. This decision, however, does not deal with the complaints filed by Messrs. Babb and Lapointe.

[4] The first turn in the road then appeared. The respondent requested that the Board join the complaint with those of Messrs. Babb and Lapointe and requested that the complainant provide particulars in support of her complaint. On April 3, 2009, the complainant sent an email to the Board, stating in part as follows: "I feel that my case should be addressed separately and apart from the other complainants' cases. . . ." The complainant also requested accommodation in the presentation of her complaint. The Board's Registry ("the Registry") joined the complaint with those of Messrs. Babb and Lapointe for administrative reasons. However, the panel of the Board initially appointed to hear the complaint directed that the complainant's complaint proceed first.

[5] When she was canvassed for hearing dates, the complainant requested that her complaint be held in abeyance for medical reasons. At that time, the Board member that formed the panel of the Board initially appointed to hear the complaint had been appointed to another organization and a newly constituted second panel of the Board directed, on October 8, 2009, that the complaint be joined with those filed by Messrs. Babb and Lapointe and that the three complaints be held in abeyance for 6 months.

[6] When the Registry followed up with the complainant in April 2010 regarding her medical status, the complainant responded as follows: "[t]he purpose of this letter is to advise of my continuing non-availability (due to medical reasons) to attend a hearing."

[7] As the Board member that formed the second panel of the Board appointed to hear the complaint was retiring, a newly constituted third panel of the Board was appointed to hear the complaint. The third panel directed that the complaint be severed from those filed by Messrs. Babb and Lapointe and that it be held in abeyance pending confirmation of the complaint's availability to proceed.

[8] Much correspondence followed, which I do not feel necessary to review, up to an email from the complainant in which she notified her change of position regarding the pursuit of her complaint and stated that separate hearings ". . . would also cause undue strain, recognizing that we all have medical issues." The third panel directed that the complainant's complaint be joined again with those filed by Messrs. Babb and Lapointe. A number of requests for postponement followed, and the three complaints were finally set down for a hearing commencing in September 2011. For approximately 8 months during that period, the complainant was represented by legal counsel provided by her bargaining agent. In the meantime, the Board member that formed the third panel of the Board appointed to hear the complaint ceased to be a Board member and I was appointed a panel of the Board to hear the complaint.

[9] On August 18, 2011, the respondent sent the complainant an email, asking for particulars in support of the complaint. On August 19, 2011, the complainant informed the Registry that "[i]t is my intention . . . to provide my initial presentation via written submission to the board . . . " The complainant also asked the Registry whether she was ". . . required I provide all of my information to the employer/respondent/CRA prior to my written submissions? . . ." The Registry replied

to the complainant on August 22, 2011, stating, in part: ". . . I ask that you please clarify as to whether it is your intention to submit a request to the Board to proceed by way of written submissions."

[10] The complainant wrote to the Registry on August 25, 2011, stating, in part the following, ". . . [t]his, combined with my disability (Environmental Illness), and the variability of having such an infliction, I have no choice but to request PSLRB allows [*sic*] me to make written submissions. . . ." On August 26, 2011, I directed that the complainant's complaint be severed from the complaints of Messrs. Babb and Lapointe to better accommodate all involved with those complaints. On August 31, 2011, the respondent informed the Registry that the complaint was not sufficiently detailed to allow the respondent to assess whether the matter could be dealt with by way of written submission. On September 2, 2011, I directed that the complaint not proceed by way of written submissions.

[11] On August 31, 2011, the complainant had sent the respondent an email, asking for disclosure of documents. On October 26, 2011, I directed that the parties confirmed whether there were outstanding issues regarding the provisions of particulars and the disclosure of documents. On November 1, 2011, the respondent confirmed that the issue of particulars was outstanding. On November 14, 2011, the complainant requested that her complaint be held in abeyance until she met with her physician. On receipt of the respondent's consent, I directed that the complaint be held in abeyance.

[12] On January 26, 2012, the complainant provided the following medical opinion in support of her request that the complaint proceed by way of written submissions:

. . .

> *Samantha Scharf was first seen by me on June 6, 2007 and has been diagnosed with environmental sensitivities manifest as multiple chemical sensitivities. This disorder is frequently co-morbid with other entities, notably anxiety and depression. In this case, there appear to be co-morbid psychiatric issues, which is not uncommon but can significantly impact on function. Presently, it is my impression that there is co-morbid anxiety and depression. When she was assessed on January 11, 2012, she demonstrated an anxious and depressed affect, as well as sensitivity to fluorescent lights and noise.*

> *Of significance is the impact on cognitive functioning. Evaluation of patients at the Environmental Health Clinic at Women's College Hospital reveals that cognitive functioning complaints reliably discriminate these patients from control groups. Cognitive function is also impacted negatively by anxiety and depression.*
>
> *She has seen two psychiatrists. Dr. K. Anderson advised her that his primary treatments were pharmacological, but he did make a diagnosis of adjustment disorder. She has also seen Dr. C. Rae who discharged her from his care because of what was termed "a breakdown of trust in the doctor-patient relationship". He did not establish a diagnosis, but was considering anxiety or a somatoform disorder.*
>
> *In this case, a request has been made to attend legal proceedings, but Ms. Scharf has asked for the right to communicate in writing which would allow her much more time to process and respond to questions and activities during the hearing. It is my opinion, given the co-morbid illnesses and their symbiotic impact on each other and cognition, that this is a reasonable request that should be accommodated.*
>
> . . .

On March 5, 2012, the respondent objected to the complainant's request because there was insufficient agreement on the facts relating to the complaint to allow for effective written submissions.

[13] The next issue of significance took place on March 6, 2012, when I directed the complainant to provide a concise statement of each act that she was complaining about as well as the date of each act. On April 20, 2012, the complainant provided a 25-page document in support of her complaint.

[14] In the meantime, I had heard the complaints of Messrs. Babb and Lapointe and rendered decisions on April 18, 2012, in which I dismissed each complaint for want of jurisdiction. Two days later, the next turn in the road arrived; the complainant requested on April 20, 2012, that I remove myself from hearing her complaint due to allegations of bias. Written submissions from the parties were received on the issue, and I rendered decision 2012 PSLRB 89 on August 31, 2012, dismissing the request for recusal.

[15] While the complainant's request for recusal was being considered, the respondent objected on June 26, 2012, as follows, to the jurisdiction of a panel of the Board to hear the complaint pursuant to section 133 of the *Code*:

. . .

PART I – BACKGROUND

1. *The complainant has been an employee of the Canada Revenue Agency (the CRA or the respondent) from April 6, 1999, until May 18, 2012.*

2. *It is the respondent's understanding that during the course of her career with the CRA, the complainant was never disciplined.*

3. *From July 4, 2007 until May 17, 2010, the complainant was absent from the work place, on leave with pay for a certain period, without for the rest.*

4. *On February 10, 2009, the complainant filed a complaint pursuant to section 133 of the* Canada Labour Code *(*CLC*). Part 3 of the complaint reads as follows:*

> *Employees of the Canada Revenue Agency (CRA) have taken actions against me contrary to section 147 of the Canada Labour Code. These actions appear to be deliberate and systemic. These actions are consistent with similar actions taken against Dave Babb and Denis Lapointe. Employees of the Canada Revenue Agency have knowingly and wilfully violated my rights and taken action/inaction against me contrary to rights under the Canadian Human Rights Act, Canada Labour Code and the Workers Compensation Legislation. Numerous employees of the CRA on various levels and in various capacities appear to be involved. I have been harmed and suffered injury as a result. Human Resources Skills Development Canada (HRSDC) and Workplace Safety Insurance Board (WSIB) appear to have been involved as participants. My attempts to gather information needed to identify such persons appear to have been intentionally obstructed by representatives of my employer at 845 heron rd and Access to Information/Canada Revenue Agency. These matters have been ongoing for quite some time, focusing on the "RE: OSH Minutes" and "Re: Questions about the Plan of Action posted at 875 Heron rd." chain of communications The persons primarily involved are as follows: William Baker, Gary Gustafson, Steve Hertzberg, Kathy Mawbey, Chris Aylward, Gillian Pranke, Denis Maurice, Parise*

> *Ouellette, Greg Currie, Jean Laronde, Claude Tremblay, Lysanne Gauvin, Larry Hillier, Gordon O'Connor, Catherine Bullard, Lucie Bisson, Therese Awada, Louise Lambert, Lyne Lamoureux, Renee Donara, Bill-R Blair, Carl Bryant, Eldon Dodds, Sean Evans, Marie-Claude Lapointe, Jeffrey Lawrence, Shelley Miller, Greg Moore, Bert Stranberg, June Whyte, Jeffrey Moffet. Persons from WSIB, HRSDC, Health Canada and Tedd Nathanson (consultant) appear to be directly involved as well. Recent e-mail communications and gathered information indicates deliberate actions have been taken against me and others contrary to our rights. Reference "RE: OSH minutes" e-mails that are presently ongoing. This is as concise as I can be.*
>
> *[*Sic *throughout]*

5. *The corrective measures asked by the complainant are as follows:*

> *That I be made whole. The [*sic*] the Board recognize [*sic*] the damages caused both directly and indirectly as a result of the numerous actions taken by the Canada Revenue Agency employees.*

6. *The complainant has one outstanding grievance, which challenges her termination of employment. This grievance has been referred to adjudication, bearing the* Public Service Labour Relations Board *(the Board)*'s *file number 566-34-6287. The complainant also has another section 133 of the* CLC *complaint, bearing the Board's file number 560-34-80.*

7. *On March 7, 2012, the Board Member assigned to this case issued the following direction:*

> Ms. Scharf is directed to provide, in writing by April 5, 2012, a concise statement of each act complained of that is prohibited by section 147 of the Canada Labour Code, including 1) dates of each act complained of; 2) names of the persons involved; and 3) alleged supporting reasons stated in paragraphs 147 (a) to (c). Section 147 provides as follow:
>
> > *147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under [Part II of the Code], have worked, or take any disciplinary action or*

> *threaten to take any such action against an employee because the employee*
>
> > *(a) has testified or is about to testify in a proceeding taken or an inquiry held under [Part II of the Code];*
> >
> > *(b) has provided information to a person engaged in the performance of duties under [Part II of the Code] regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
> >
> > *(c) has acted in accordance with [Part II of the Code] or has sought the enforcement of any of the provisions of [Part II of the Code].*

8. *Upon request by the complainant, the Board granted an extension of time for the complainant to provide the information to April 20, 2012.*

9. *On April 20, 2012, the complaint sent a 25 page document which contained the complainant's "particulars".*

10. *On April 25, 2012, the Board directed the respondent to provide its position on the details that Ms. Scharf has provided concerning her complaint.*

11. *Upon review of the complainant's letter dated April 20, 2012, the respondent is of the view that Ms. Scharf's complaint should be dismissed for lack of jurisdiction: the alleged reprisal actions do not fall within the purview of section 147 of the* CLC *and the actions do not fall within the 90 day limit period as provided by section 133 of the* CLC*.*

PART II – SUBMISSIONS

<u>No disciplinary measure or retaliation</u>

12. *The Board's role when ruling on a section 133* CLC *complaint is limited to inquiring whether or not the respondent has improperly applied discipline to an employee who has exercised his or her rights under Part II of the* CLC*, in contravention to section 147 of the* CLC*: See* Brisson (Re)*, 2004 CIRB 273 at paragraph 19.*

13. *Paragraph 133 (1) and section 147 of the* CLC *read as follows:*

133. *(1) An employee, or person designated by th employee for the purpos who alleges that an employ has taken action against th employee in contravention section 147 may, subject subsection (3), make complaint in writing to th Board of the allege contravention.*

147. *No employer sha dismiss, suspend, lay off demote an employee, impo a financial or other penal on an employee, or refuse pay an employ remuneration in respect any period that the employ would, but for the exercise the employee's rights und this Part, have worked, take any disciplinary actio against or threaten to tak any such action against employee because th employee*

*(*a*) has testified or is abo testify in a proceeding tak an inquiry held under this*

*(*b*) has provided informat a person engaged in performance of duties this Part regarding conditions of work affectin health or safety of employee or of any employee of the employer;*

*(*c*) has acted in accor with this Part or has sough enforcement of any o provisions of this Part.*

133. *(1) L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*

147. *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*

a*) soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*

b*) soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*

c*) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

14. *For a complaint under section 133 of the CLC to be successful, the complainant:*

(1) must have exercised her rights under Part II of the CLC *and*

> *(2) must have suffered retaliation within the meaning of section 147 of the* CLC *as a consequence.*
>
> Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52 at paragraph 64.*

15. *The complainant cannot be successful in her claim if there is no allegation that she exercised her rights under Part II of the* CLC *and/or if there had been no retaliation by the respondent in contradiction to section 147 of the* CLC *as a consequence.*

16. *A complaint should be sufficiently clear to the Board so that it can understand the nature of the case and the respondent can know the allegations against which it must defend:* Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96 at paragraph 57. Vague statements and assertions are not sufficient to clothe the Board with jurisdiction to hear a complaint:* Lapointe v. Canada Revenue Agency*, 2012 PSLRB 48 at paragraph 19.*

17. *The text of section 147 and its heading "Disciplinary Action", confirm that there must be some form of disciplinary action or retaliation: See* Canadian National Railway Co. (Re)*, 2010 CIRB 536 at paragraph 23.*

18. *Board member Potter explained, in* Leary v. Treasury Board (Department of National Defence)*, 2005 PSLRB 35, what type of actions could be considered as being within the purview of section 147 of the* CLC*:*

> ***70*** *I do not find that the employer's action was disciplinary in nature, nor was it a penalty as that term is used in section 147 of the Code. Section 147 says, in part:*
>
> *...*
>
> *147. [General prohibition re employer] No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee...*
>
> *...*
>
> ***71*** *Excluding the words "or other penalty", all of these prohibitions would, if carried out, result in some financial detriment to the employee. The Code is set up, I believe, largely to prevent the employer from imposing a financial*

> *penalty on the employee, where the employee had a right to withdraw his or her service. It may be possible to consider some action of the employer, non-financial in nature, as an "other penalty" as, for example, the imposition of demerit points which, once a threshold is reached, results in some financial detriment. The demerit points could then be considered in terms of "other penalty". However, given the circumstances of this case, I do not find that moving Mr. Leary is a penalty, as that term is used in the Code.*
>
> ***72*** *Mr. Leary may see management's decision as a penalty, but to paraphrase the words in the Kucher decision (supra), the Code does not prohibit the employer from penalizing the employee merely because the employee has a "genuine belief" that such action is a penalty. The employer's action must have some relationship to the totality of the language in section 147 to be considered a penalty. In my view, such a relationship does not exist in these circumstances.*
>
> ***73*** *I do not believe that an action can be deemed to be a "penalty", as I understand that term to be construed in section 147 of the Code, simply because the complainant views the action as a "penalty"… The scheme of section 147, as I see it, is not to be dependent on the personal views of the complainant, but rather it is designed to prevent the employer from taking certain action which, if looked at objectively, would violate the Code. Such an element is, I believe, absent here.*

See also Tanguay v. Statistical Survey Operations, *2005 PSLRB 43 at paragraphs 19, 20.*

19. *In her letter sent to the Board on April 20, 2012, the complainant explains at length was she believes is the basis of her complaint. It is the respondent's understanding that the complainant alleges that the following actions, or inactions, from the respondent constitute discipline or retaliation within the meaning of section 147 of the* CLC*:*

    1. *she was terminated in May 2012 because of her actions under the* CLC*;*
    2. *the employer refused to deal with her Indoor Air Quality complaints (IAQ), and/or did not investigate, record, report all accidents, correct the problems;*
    3. *the employer refused to cooperate with her WSIB's claim(s) and/or provided false information to WSIB. As a result, the complainant alleges that she suffered a penalty because she was not able to be compensated for her workplace injuries;*

4. *she suffered a financial penalty because of her having to pursue numerous complaints to PSLRB, WSIB appeals, and insurance companies lawsuit(s);*
5. *she was forced to use her sick leave instead of injury on duty, which allegedly led to her termination;*
6. *the employer prevented her from gaining information and allowing a transparent return to work process;*
7. *she was denied accommodation and the employer put barriers to disability support/rehabilitation programs;*
8. *the employer manipulated PWGSC's records;*
9. *she suffered a financial penalty because she had to pay for her ATIP requests, for information she allegedly should have received free of charge directly from the CRA.*

20. *The employer submits that none of the above alleged actions, or inactions, if proven, could be considered as being disciplinary within the meaning of section 147 of the* CLC.

21. *The employer submits that section 133 of the* CLC *provides the Board with very limited jurisdiction. The respondent submits that the complainant is using a section 133 complaint as a "fishing net" to try to capture as many work related issues or health and safety issues as possible. Yet, in the context of a section 133* CLC *complaint, it is not the Board's role:* Lapointe v. Canada Revenue Agency, *2012 PSLRB 48 at paragraph 22. In other words, it was never the intent of the legislator to have the Board examine all labour relations matters or health and safety matters when dealing with a section 133* CLC *complaint.*

22. *When ruling upon a section 133* CLC *complaint, the Board has no jurisdiction to interpret and apply the* Canadian Human Rights Act *or the "Workers Compensation Legislation" or deal with WSIB/injury on duty issues, deal with insurance claims or Access to Information and Privacy issues: See* Canadian National Railway Co. (Re), *2010 CIRB 536 at paragraphs 26-28;* Brisson (Re), *2004 CIRB 273 at paragraph 19;* Gaskin v. Canada Revenue Agency, *2008 PSLRB 96 at paragraphs 93-98;* Boivin v. Canada Customs and Revenue Agency, *2003 PSSRB 94 at paragraph 160;* Babb v. Canada Revenue Agency, *2012 PSLRB 47 at paragraphs 22-26;* Lapointe v. Canada Revenue Agency *at 2012 PSLRB 48 at paragraph 16. See also* Prentice v. Canada, *2005 FCA 395 at paragraph 35 regarding the crown immunity from actions against the*

employer that are associated with workers' compensation schemes.

23. *Moreover, the employer submits that any alleged financial loss referenced by the complainant does not amount to discipline or retaliation within the meaning of section 147 of the* CLC*:* Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43 at paragraphs 19-20.*

24. *Finally, the complainant's termination of employment cannot form the basis of this complaint, since it happened more than a year after the complainant filed this complaint. Moreover, the termination of employment is the subject of another proceeding before the Board:* Lapointe v. Canada Revenue Agency*, at 2012 PSLRB 48 at paragraph.15;* Babb v. Canada Revenue Agency*, 2012 PSLRB 47 at paragraph 20.*

25. *The employer respectfully submits that the complaint should be dismissed. Even if the complainant was able to prove all the facts she alleges, her complaint would still be without merit since none of the alleged actions, or inactions, taken by the employer could be considered as being disciplinary measures, or retaliation, within the meaning of section 147 of the* CLC*.*

Timeliness

26. *For the Board to have jurisdiction over the complaint, a complainant shall file his/her complaint to the Board no later than 90 days after the complainant knew, or ought to have known the actions or circumstances giving rise to the complaint. The limitation period is mandatory and the Board has no authority to extend the time limit set out in subsection 133(2) of the* CLC*: See* Larocque v. Treasury Board (Department of Health)*, 2010 PSLRB 94 at paragraphs 36-37,* Sainte-Marie v. Canada Revenue Agency*, 2009 PSLRB 35 at paragraph 57;* Babb v. Canada Revenue Agency*, 2012 PSLRB 47 at paragraph 9.*

27. *None of the complainant's alleged disciplinary measures, or retaliation, noted above at paragraph 19 would have happened within the 90 day limit period. The complainant was well aware of the actions, or inactions in question at the time they happened.*

28. *The employer respectfully submits that the Board should decline jurisdiction to hear this complaint for reason of timeliness.*

PART III – CONCLUSION

> 29. *The employer submits that the complaint contains only mere allegations and assertions that show no cause of action for a section 133* CLC *complaint. The complainant is seeking to use the mechanism provided by section 133 of the* CLC *as a catch all recourse that would allow her to address her multiple work related issues.*
>
> 30. *When prompted by the Board to provide the basic elements of the complaint, the complainant was unable to mention any disciplinary measure, or retaliation, that the employer took in contradiction to section 147 of the* CLC. *The employer submits that this complaint should be dismissed since the complainant was never disciplined because she acted in accordance with Part II of the* CLC.
>
> 31. *Finally, the employer submits that the grievance is untimely since the complainant knew, or ought to have known, well before the 90-day time limit, of the alleged events giving rise to the complaint.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[16] On October 3, 2012, I directed that the parties file written submissions on the respondent's objection to jurisdiction and that the complainant identify, as the case may be, any documents for which she had previously requested disclosure that she would need to address the respondent's objection. The next little turn in the road then arrived.

[17] On October 24, 2012, the complainant requested disclosure of all the documents that she had requested from the respondent on August 31, 2011. The respondent replied on November 20, 2012, stating the following:

> . . .
>
> *This is in response to your November 5, 2012, fax in which you requested the respondent to provide its position regarding Ms. Scharf's disclosure request as stated in her letter dated October 24, 2012.*
>
> *Ms. Scharf made her original request for disclosure on August 31, 2011.*
>
> *On March 7, 2012, the Board ordered Ms. Scharf to provide a concise statement of each acts complained of.*

On April 20, 2012, the employer received particulars from Ms. Scharf, as ordered by the Board.

On June 26, 2012, the employer responded to Ms. Scharf's particulars by filing an objection in writing to the jurisdiction of the Board. The employer's basis for its position was twofold:

(1) In her letter dated April 20, 2012, Ms. Scharf listed a series of actions or inactions of the employer that form the basis of her complaint. Yet, none of those actions can be considered as a disciplinary measure or as retaliation in accordance to section 147 of the CLC *and the jurisprudence.*

(2) Timeliness: None of the complainant's alleged disciplinary measures, or retaliation, noted in her letter dated April 20, 2012, would have happened within the 90 day limit period as provided by the CLC*.*

The Board sent a letter by fax on October 4, 2012, asking Ms. Scharf to provide her written submissions in response to the employer's jurisdictional objection by no later than October 25, 2012. The Board also indicated to Ms. Scharf the following:

> Should the complainant require any documents disclosed by the respondent in order to provide submissions, which are to be solely on the issue of **jurisdiction**, she is requested to identify which of the documents listed in her letter of August 31, 2011, she needs disclosed to her.
>
> Should the appointed panel of the Board decide, following completion of the written submissions on jurisdiction, that it does have jurisdiction, then the process for determining the complainant's request for disclosure in support of the merits of this complain (which was suspended pending a decision on the request for recusal) will resume.

In her letter dated October 24, 2012, Ms. Scharf stated the "[she] require[s] ALL of the documents listed in [her] letter to be disclosed to [her] as Jurisdiction can only be determined subsequent to a full hearing as [she has] maintained throughout this process".

The complainant has failed to provide any rational as to why the items listed in her email dated August 30, 2012 would be relevant to the issue of jurisdiction. As such, her request should be denied.

The employer objects to Ms. Scharf's request to obtain the documents listed in her email dated August 31, 2011 in order for her to answer to the jurisdictional issue. After a

> *careful review of the 18 items listed in the email, the employer submits that none of the requested items are relevant to determine the jurisdiction of the Board. The employer submits that Ms. Scharf's email dated August 31, 2011 is akin to a fishing expedition. The complainant is asking for hundreds if not thousands of documents in relation to health and safety issues and labour relations issues over an extensive period of time (many years) that are not relevant to her complaint and certainly not for the issue of jurisdiction. None of the documents requested would support the complainant's assertion that she was retaliated against or disciplined. In addition, most of the documents fall clearly outside of the 90 day limit period to file a complaint. Of particular concern is the fact that the complainant is asking for documents for which the Board does not have jurisdiction and/or contain third party personal information, such as Item #8 and #13.*
>
> *Moreover, the employer believes that most of these documents have already been requested by Ms. Scharf and provided to her through a multitude of ATIP requests. The complainant indicated on at least one occasion (in her letter dated April 20, 2012) that she has received documentations through ATIP. The employer submits that it is not appropriate for the Board to order the production of documents that have already been provided to the complainants through other means.*
> *(see the* Exeter *decision from the Board, dated October 20, 2008 and attached to this e-mail).*
>
> *For the above noted reasons, the employer objects to Ms. Scharf's disclosure request as stated in her email dated August 31, 2012 and reiterated in her letter to the Board dated October 24, 2012.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[18] On November 26, 2012, the complainant offered what follows:

> . . .
>
> *. . . I have several objections, as expected, namely my being referred to Access to Information for information/disclosure.*
>
> *CRA controls what I receive and what I don't via ATIP. Several times over I have made complaints to the Office of the Privacy Commissioner. The process is a charade – a*

> *sham – CRA won't give my ANYTHING they deem to be harmful to the institution . . . . . several complaints are currently under review with Privacy, In more than one complaint I had filed, Privacy determined my complaint was "well-founded". I expect move responses from that office that will also state the same thing.*
>
> *Disclosure requests were made via this process so that CRA would not continue to withold* [*sic*] *information and I would* <u>*FINALLY*</u> *be given that which I requested without issue. I expect to be given full access to all information as is required and requested. I also expect PSLRB to respond to my request without using Ms. Rachel Exeter's personal information under excuse of jurisprudence. . . .*
>
> . . .
>
> [Emphasis in the original]

[19] On November 27, 2012, I directed as follows:

> . . .
>
> *The power of a panel of the Board to order disclosure of documents is not limited by the* Access to Information Act *or the* Privacy Act. *However, before ordering disclosure of a document, the panel of the Board must be satisfied that the document may be relevant to the issues at hand. At this stage of the process, the issues in this case are:*
>
> 1. *whether there is an arguable case that the respondent has failed to respect the prohibition in section 147 of the* Canada Labour Code*; and*
>
> 2. *whether the complainant knew of any such failure within the 90 days preceding the filing of this complaint.*
>
> *The complainant is therefore requested to provide, for each one of the 18 categories of documents listed in her August 31, 2011 email, a* ***<u>brief</u>*** *explanation of the relevance of those documents to the two issues listed above.*
>
> *The complainant's submissions are to be filed by no later than January 11, 2013.*
>
> *The respondent will then have the opportunity to respond to the complainant's submissions.*
>
> . . .
>
> [Emphasis in the original]

[20] On January 11, 2013, the complainant replied, and again, another small turn in the road took place. She wrote as follows: "I was made aware via PSLRB Jan 3, 2013, that Joseph W. Potter, board member assigned to this complaint, is 'no longer with PSLRB'. . . . [Emphasis in the original]" The complainant then referenced two complaints that she had filed with the Privacy Commissioner. Finally, she wrote as follows:

. . .

> *In response to PSLRB letter Nov 27, 2012, I have a right to know as per the Canada Labour Code Part II → cease withholding as shown to be respondents' methodology to ensure I am not successful in this and other processes. See my "particulars" dated April 20, 2012, as well my letters to PSLRB dated October 24, 2012, and November 26, 2012, which substantiate my complaints and which reflect the information being withheld will further substantiate and provide motive. Specifically my particulars provided April 20, 2012, is a brief explanation of the two issues listed in PSLRB letter dated Nov 27, 2012. Please cease to ignore the information you already have.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

The Registry replied to the complainant as follows: "[t]his will confirm that Mr. Potter, who is the seized panel of the Board in this matter, is still a part-time member of the Public Service Labour Relations Board. . . ."

[21] The respondent wrote to the Board on January 29, 2013, as follows:

. . .

> *In her letter dated January 11, 2013, Ms. Scharf does not provide to the Board the required information. Ms. Scharf referred the Board and the respondent to her letters dated April 20, 2012, October 24, 2012 and November 26, 2012. Ms. Scharf states in her letter dated January 11, 2013: "Specifically my particulars provided April 20, 2012, is a brief explanation of the two issues listed in PSLRB letter dated Nov 27, 2012." [Emphasis by Ms. Scharf]*
>
> *The respondent carefully reviewed Ms. Scharf's letters dated April 20, 2012, October 24, 2012 and November 26, 2012. The respondent submits that none of these letters provide the*

> *information requested by the Board in its letter dated November 27, 2012. Therefore, the respondent respectfully submits that Ms. Scharf has not complied with the Board's order dated November 27, 2012.*
>
> . . .
>
> [Emphasis in the original]

[22] At my request, the Registry wrote to the parties on February 5, 2013, as follows:

> . . .
>
> *The panel of the Board requested, by letter dated November 27, 2012, that the complainant "provide, for each one of the 18 categories of documents listed in her August 31, 2011 email, a **brief**, [sic] explanation of the relevance of those documents" in order to address the two issues noted in that letter. The complainant's letter of January 11, 2013, has not provided the information requested, and the panel of the Board is not satisfied that these documents are relevant to the two issues noted in the letter of November 27, 2012. The complainant's request for disclosure is therefore denied.*
>
> *The next step in this matter will be to deal with the issue of jurisdiction by way of written submissions.*
>
> *The parties are asked to provide written submissions on the following issues:*
>
> *1. **If** the panel of the Board were to consider the facts alleged in Ms. Scharf's complaint as proven, would there be an arguable case that the respondent has failed to respect the prohibition in section 147 of the Canada Labour Code?, and*
>
> *2. Did the complainant know of any such failure within the 90 days preceding the filing of this complaint in this matter?*
>
> *The schedule for the written submissions, addressing the above-noted issue, will be as follows:*
>
> . . .
>
> [Emphasis in the original]

III. Summary of the arguments

A. For the complainant

[23] On March 6, 2013, the complainant filed the following written submission on the issue of jurisdiction:

. . .

> *I acknowledge receipt of PSLRB letter dated February 5, 2013. I also acknowledge receipt of Ms. Duguette's email of January 29, 2013. In regards to disclosure requested but not received from the respondent to date, my letter sent dated January 11, 2013, in response to PSLRB letter dated November 27, 2012, reiterated I have a right to know as per the Canada Labour Code Part II, that the respondent has repeatedly withheld information from me to ensure I am not successful in this — and other — processes, as well I maintained then – and still do — my particulars submitted April 20, 2012, provided the brief explanation of the two issues listed in PSLRB letter dated November 27, 2012, already. I acknowledge PSLRB decision as shown in letter dated February 5, 2013, to not order disclosure from the respondent, however disagree with the decision made. PSLRB have confirmed once again I have no rights to disclosure of material regarding hazardous exposures in my workplace, contrary to the Canada Labour Code Part II.*
>
> *Regarding the issue of jurisdiction to be decided via written submissions, please note I formally object to the issue of jurisdiction being decided prior to a formal hearing. As I stated in my letter sent dated October 24, 2012, it is my opinion jurisdiction can only be properly determined subsequent to a full hearing as all information will not be known by all the parties (specifically me as disclosure has been deemed not necessary and it is my position disclosure would have netted more information regarding jurisdiction as Access to Information has shown me to be the case).*
>
> *Irregardless of my objection to the issues of jurisdiction being decided via written submissions prior to a formal hearing, I have complied (as much as I can without being given information via requested disclosure from the respondent that is) and herein you will find my position:*
>
> **133.** (2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

Did I meet the requirement of 133.(2)? I do believe I did (see #1, #2, and #3 listed below).

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

Did I suffer any penalty in accordance with 147.? I do believe I did (see #1, #2, and #3 listed below).

#1) Our local union executive (which included David Babb, Denis Lapointe and myself) distributed to 1,560 local members, an indoor air quality survey August 2007 — October 2007 for completion.

***February 9, 2009**, I obtained information via respondent (which I had before that date been unaware of) which reflects Gillian Pranke (OSH Committee Co-Chair) completed an IAQ Chronology for 875 Heron Road which was distributed to CRA employees Gary Gustafson, Denis Maurice (CRA Human Resources Assistant Director) as well Kathy Mawbey (Health and Safety Advisor) Nov 6, 2007 (within 90 days of distribution of IAQ survey by me, David, Denis and others). The document refers to the IAQ survey completed by the local executive and distributed to employees, that the local union executive drew their own conclusions from the information gathered, linking health issues of those who completed the survey to alleged poor indoor air quality at the OTC among other things — the report noted incorrectly CRA management along with service provider SNC Lavalin ProFac and PWGSC investigated all air quality complaints brought to its attention. Gillian noted HRSDC Labour Programs along with Health Canada had also contributed to the investigations and concluded in "all cases" there was no danger, as well noted complaints had been received at PWGSC of smells and odours at*

875 Heron Road, however had all been 'addressed', that OSH committee had conducted its' own investigation as well as many other things (ie; contacts made to newspapers etc). Everything in this report is incorrect and inaccurate – my complaints of poor indoor air quality and reports of illness were never investigated by CRA, ProFac, PWGSC, Health Canada, HRSDC, OSH committee or any other body, process or person but should have been according to Canada Occupational Health and Safety Regulations 2.27, Investigations. From what I understand, this document was provided to Minister of Revenue (Parliament) – I was grouped in with David Babb and Denis Lapointe as being one of three employees who caused 'issues' at OTC with regards to indoor air quality – CRA used this chronology to discipline us (without our knowledge) for making complaints, participating on the OSH committee as well reporting injuries in the workplace (all three of us had made complaints at different times as well all three of us had made reports of work related injuries). It is noted no other employees names' are referred to within the document as having made complaints and reports of injuries however it is understood there are many others like us (I have a file from ATIP which shows numerous complaints were made – not just mine, David and Denis'). David, Denis and I all experienced penalty in that our names were used by CRA in a manner that was contrary to the Canada Labour Code – none of our complaints got investigated. The document created by CRA (Gillian Pranke / OSH Employer Co-Chair and Assistant Director of DMCC where I worked) made me (and David and Denis) look like liars and discredited my / our character. I never made IAQ complaints and reports of illness for the purpose of looking like a liar and a cheat through Parliament – nor have I ever contacted the media or other however have been made to appear as though I did. I did what I was required to do per the Canada Labour Code. I reported my injuries and made complaints as I was required to. I was punished for doing what I was required to do as seen in this document.

#2) I submitted a letter dated ***January 12, 2009****, to the respondent which was written by my physician Dr. Molot, wherein he recommended appropriate workplace accommodation for my disability of Environmental Illness was telework (work from home).* ***January 21, 2009****, I sent a fax to respondent Commissioner William Baker quote: "Please note that the Union of Taxation Employees will not be assisting and or representing me further when presenting my grievances. I, or I, with the assistance of a rep of my choice will present my grievances, any and all formal notices should be directed to me, Samantha Scharf." I requested the grievances #2006-1280-70019049 (*I grieve my workplace and my relationship with my fellow employees has been

poisoned as a result of inconsistent and incomplete application of duty to accommodate requirements), *#2006-1280-70026069 (*I grieve the letter of Sept 19, 2006, signed by Danielle Chartrand as it is willfully misleading through its omissions and misrepresentations of the facts. I believe it to be disguised discipline. It is threatening, arbitrary, in bad faith, discriminatory and retaliatory in purpose. Actions contrary to Articles 17 and 19 of my Collective Agreement), *#2006-1280-70026376 (*I grieve that I have been discriminated against contrary to Article 19 of my Collective Agreement and any other articles), *and #2007-1280-70040354 (*I grieve that I have been discriminated against through the direct actions of the following employer representatives: Gary Gustafson, Gillian Pranke, Sujata Verma, Burt Stranberg, Tracy Braithwaite, and Debbie Brereton contrary to Article 19 of my Collective Agreement, Canadian Human Rights Legislation, Canada Labour Code Part II. and any other relevant legislation)*, continue in abeyance until such time as respondent and I could establish further communications and an appropriate time and method of resolving could be agreed upon as my medical condition would allow.*

February 2, 2009, *10:15 am, I received email from Lysanne Gauvin (CRA Assistant Commissioner Human Resources Branch) who advised I was not entitled to proceed with my grievances that alleged a violation of UTE/CRA Collective Agreement unless I had the approval of and was represented by the Alliance. In that regard, as I refused to allow further interference by CRA employees, CRA dismissed grievances #2006-1280-70026069, #2006-1280-70026376, and #2007-1280-70040354. Corrective actions were never given and the grievances were never addressed or resolved. I understood CRA actions to dismiss the grievances was deliberate and a precursor to the termination of my employment — no corrective actions were provided assuring I could not re-enter the workplace. A safe work environment (my home) was not given to me. Financial penalty loss of house and home and all assets.*

Document titled "Memorandum For the Honourable Jean-Pierre Blackburn Ottawa Technology Centre — Air Quality", dated ***January 29, 2009,*** *completed by respondent makes reference to 'three' employees leaving the workplace, three employees alleging indoor air quality and other environmental issues affected their health, that the 'matter' pertained to 'three' employees, David Babb, Denis Lapointe and Samantha Scharf. Said document noted I was a member of the OTC Occupational Safety and Health Committee, as well noted all three employees alleged CRA withheld information and obstructed access to information, that several of my ATIP requests had been received by CRA. The*

reference to 'three' demonstrates consistent actions and a concentrated effort to ensure we were mobbed – the lumping of us together demonstrates we were not being dealt with as individual employees seeking our health and safety rights – but rather we were lumped together in order to paint us as criminals.

#3) December 12, 2007, I sent a request in writing to CRA Commissioner William Baker re: Request for Exposure Information for WSIB claim #23862758. I sent the request via email and copied David Babb (OTC OSH Committee Co-Chair), Chris Alyward (CRA NHSPC Member), Dominic Lavoie (PSAC Health and Safety Representative), as well Minister of Revenue Gordon O'Connor. I noted in my request I had made previous requests for like information via CRA in the past and information had been regularly withheld. My claim(s) for WSIB was under review, per WSIB policy I understood I required exposure information so that my claim could be fully adjudicated – that without the information, it was most likely my claim would not be successful. I had made several reports of injury to CRA over many years and worked in 3 different CRA buildings – my request was for exposure information for all 3 buildings. I received a letter from CRA dated January 18, 2008, signed by Lysanne Gauvin (CRA Human Resources) wherein it was noted Human Resources Skills Development Canada (HRSDC – now known as Social Development Canada) colluded with CRA noting WSIB would not ask for the information I had requested as it was not part of their mandate – that it was WSIB mandate to adjudicate claims and render decisions (NOTE: WSIB policy states when reviewing occupational disease, that WSIB take into consideration exposures history to adjudicate claims). I received information via CRA ATIP regarding my email sent to William Baker December 12, 2007. My email was passed around from CRA employee to CRA employee whose jobs it is to think up responses for the Commissioner (Gisele Scott, Catherine Bullard, Lysanne Gauvin, Lucie Bisson, Therese Awada, Louise Lambert, Lyne Lamoureux, Renne Donato, Paul Bruce, Lori McAleer, Claude P. Tremblay, Jean Laronde) – the letter I received from CRA dated January 18, 2008, was created by Paul Bruce December 27, 2007, and originally showed the signature area was to be endorsed by Minister of Revenue, Gordon O'Connor. ***November 14, 2008****, I was provided a copy of an email sent by Denis Maurice Dec 14, 2007 10:25 am to Gillian Pranke and Gary Gustafson (via respondent ATIP process) wherein he noted he had had a conversation with a manager at HRSDC who informed him WSIB would not request exposure information as it is not part of their mandate, as well I was provided another email sent from Gary Gustafson, OTC Director, dated Dec 14, 2007, 11:30 am*

> *(**November 14, 2008**), to Claude P. Tremblay, Jean Laronde and Kathey Mawbey, in regards to my exposure information request email sent Dec 12, 2007, wherein Gary included attachments to same one of which was OTC Chronology (see 1 above). Gary also wrote email as follows quote: "*Claude, as discussed I believe we should deny Samantha Scharf's request for similar reasons that we have denied (CRA ATIP blanked out the names of David Babb and Denis Lapointe) for this **exact same information** … … .....that Denis Maurice had followed up with WSIB (Gary purposely and maliciously noted it was WSIB who had provided the information all the while aware his information was incorrect and misleading — CRA did not contact WSIB – CRA – per Denis Maurice — contacted HRSDC — Note as well I contacted Denis Maurice **January 14, 2009**, and did receive a response **January 15, 2009**, that Denis has no record of which 'manager' Denis spoke with December 14, 2007, via HRSDC ATIP I learned there is no record to the effect HRSDC were even contacted by Denis as he claimed) — that WSIB had advised that the information requested by Samantha is not necessary in order to review her claim… … …". *CRA fabricated information / CRA made deliberate errors when making reference to 'WSIB' — all to ensure my claim for WSIB is not successful (as well other employees David Babb and Denis Lapointe) — that I will never be given information to support my complaints of injury / illness in the workplace. David, Denis and I came to understand February 2009 that even though we were still employees of CRA, we were treated as though our employment rights were non-existent (right to know about hazards in the workplace primarily). It became impossible to proceed with WSIB — which CRA anticipated and calculated by refusal to provide exposure information. Penalty: my employment rights (Government Employee Compensation Act) were knowingly violated and removed to ensure I could not acquire financial compensation for my work related injuries as well to ensure I could not return to my workplace.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

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

[24] On April 8, 2013, the respondent provided its written submission with respect to the two questions that, at my direction, the Registry posed in its letter of February 5, 2013. The respondent wrote as follows:

. . .

1. *The following are the respondent's submissions regarding the jurisdiction of the Board to hear Ms. Scharf's complaint.*

2. *On February 5, 2013, the Board requested the parties to answer to the following two (2) questions:*

    a) *If the panel of the Board were to consider the facts alleged in Ms. Scharf's complaint as proven, would there be an arguable case that the respondent has failed to respect the prohibition in section 147 of the Canada Labour Code?, and*

    b) *Did the complainant know of any such failure within the 90 days preceding the filing of this complaint in this matter?*

3. *In her letter dated March 6, 2013, the complainant answers to the affirmative to both questions.*

4. *The respondent submits that the answer to both questions should be "No".*

PART I – FACTS

(A) BACKGROUND

5. *The complainant has been an employee of the Canada Revenue Agency (the CRA or the respondent) from April 6, 1999, until May 18, 2012.*

6. *During the course of her career with the CRA, the complainant was never disciplined.*

7. *From July 4, 2007 until May 17, 2010, the complainant was absent from the work place, on leave with pay for a certain period, without for the rest.*

8. *On February 10, 2009, the complainant filed a complaint pursuant to section 133 of the* Canada Labour Code (CLC). *Part 3 of the complaint reads as follows:*

    Employees of the Canada Revenue Agency (CRA) have taken actions against me contrary to section 147 of the Canada Labour Code. These actions appear to be deliberate and systemic. These actions are consistent with similar actions taken against Dave Babb and Denis Lapointe. Employees of the Canada Revenue Agency have knowingly and wilfully violated my rights and taken action/inaction against me contrary

> *to rights under the Canadian Human Rights Act, Canada Labour Code and the Workers Compensation Legislation. Numerous employees of the CRA on various levels and in various capacities appear to be involved. I have been harmed and suffered injury as a result. Human Resources Skills Development Canada (HRSDC) and Workplace Safety Insurance Board (WSIB) appear to have been involved as participants. My attempts to gather information needed to identify such persons appear to have been intentionally obstructed by representatives of my employer at 845 heron rd and Access to Information/Canada Revenue Agency. These matters have been ongoing for quite some time, focusing on the "RE: OSH Minutes" and "Re: Questions about the Plan of Action posted at 875 Heron rd." chain of communications The persons primarily involved are as follows: William Baker, Gary Gustafson, Steve Hertzberg, Kathy Mawbey, Chris Aylward, Gillian Pranke, Denis Maurice, Parise Ouellette, Greg Currie, Jean Laronde, Claude Tremblay, Lysanne Gauvin, Larry Hillier, Gordon O'Connor, Catherine Bullard, Lucie Bisson, Therese Awada, Louise Lambert, Lyne Lamoureux, Renee Donara, Bill-R Blair, Carl Bryant, Eldon Dodds, Sean Evans, Marie-Claude Lapointe, Jeffrey Lawrence, Shelley Miller, Greg Moore, Bert Stranberg, June Whyte, Jeffrey Moffet. Persons from WSIB, HRSDC, Health Canada, and Tedd Nathanson (consultant) appear to be directly involved as well. Recent e-mail communications and gathered information indicates deliberate actions have been taken against me and others contrary to our rights. Reference "RE: OSH minutes" e-mails that are presently ongoing. This is as concise as I can be.*
>
> *[*Sic *throughout]*

9. *The corrective measures asked by the complainant are as follows:*

   > *That I be made whole. The [*sic*] the Board recognize [*sic*] the damages caused both directly and indirectly as a result of the numerous actions taken by the Canada Revenue Agency employees.*

10. *On March 7, 2012, the Board Member assigned to this case issued the following direction:*

    > Ms. Scharf is directed to provide, in writing by April 5, 2012, a concise statement of each act complained of that is prohibited by section 147 of the Canada Labour Code, including 1) dates of each

act complained of; 2) names of the persons involved; and 3) alleged supporting reasons stated in paragraphs 147 (a) to (c). Section 147 provides as follows:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under [Part II of the Code], have worked, or take any disciplinary action or threaten to take any such action against an employee because the employee
>
> (a) has testified or is about to testify in a proceeding taken or an inquiry held under [Part II of the Code];
>
> (b) has provided information to a person engaged in the performance of duties under [Part II of the Code] regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
>
> (c) has acted in accordance with [Part II of the Code] or has sought the enforcement of any of the provisions of [Part II of the Code].

11. *Upon request by the complainant, the Board granted an extension of time for the complainant to provide the information to April 20, 2012. On April 20, 2012, the complaint sent a 25 page document which contained the complainant's particulars.*

12. *On April 25, 2012, the Board directed the respondent to provide its position on the details that Ms. Scharf has provided concerning her complaint. On June 26, 2012, the respondent provided its position via a document entitled "Respondent's objection to the jurisdiction of the PSLRB & request for the complaint to be dismissed". . . .*

13. *In this document . . . the respondent submitted that Ms. Scharf" complaint should be dismissed for lack of jurisdiction because (1) the alleged reprisal actions did not fall within the purview of section 147 of the* CLC *and (2) the actions did not fall within the 90 day limit period as provided by section 133 of the* CLC.

14. *The respondent submits that the submissions dated June 26, 2012, demonstrate that the answers to the Board's two (2) questions should be "No". In order not to repeat unnecessarily what has already been provided to the Board, the respondent respectfully asks the Board to consider its submissions dated June 26, 2012 as being an integral part of the present submissions.*

15. *The following only focuses on the elements brought forward by Ms. Scharf in her letter dated March 6, 2013.*

(B) MS. SCHARF'S LETTER DATED MARCH 6, 2013.

16. *In her letter dated March 6, 2013, Ms. Scharf states that she was made aware of a CRA document, obtained through ATIP on February 9, 2009, which contained information in relation to an Indoor Air Quality survey distributed by the local union executive to local members in 2007. The document indicated the steps taken by the OSH committee regarding the issue. In accordance with Ms. Scharf, the information contained in this document is incorrect and inaccurate. She submits that none of her complaints were actually investigated. Ms. Scharf also submits that the document refers only to her, Mr. Babb and Mr. Lapointe as employees who made complaints regarding Indoor Air Quality at the work place. Ms. Scharf states that other employees made complaints also. Ms. Scharf submits that: "David, Denis and I all experienced penalty in that our name were used by CRA in a manner that was contrary to the Canada Labour Code" (at pp. 2, 3).*

17. *Similarly, the complainant states that a reference to "three employees" in a document dated January 29, 2009 to the attention of the Honourable Jean-Pierre Blackburn demonstrate "consistent actions and a concentrated effort to ensure that [Ms. Scharf, Mr. Babb and Mr. Lapointe] were mobbed… in order to paint [them] as criminals". (at p. 4).*

18. *Ms. Scharf refers in her letter to a request for accommodation she sent to the Employer on January 12, 2009 which was written by Dr. Molot. She refers to several grievances related to this accommodation issue (at p. 3, #2).*

19. *Ms. Scharf also mentions that she was made aware by the CRA, on February 2, 2009, that she was not entitled to proceed with her grievances that alleged a violation of the UTE/CRA collective agreement unless she had the approval of and was represented by the bargaining agent. Ms. Scharf refused to seek the approval and*

representation of the union and three of her grievances were dismissed. Ms. Scharf submits that the dismissal of the grievances was deliberate and a precursor to the termination of her employment. (at pp.3 and 4).

20. *At pp. 4 and 5 of her letter, point #3, Ms. Scharf submits that her WSIB claim was not successful because of the action or inaction of the respondent. For her claim to be successful, the complainant sates that "exposure information" had to be given to WSIB. In accordance with Ms. Scharf, the CRA fabricated information or made deliberate errors for Ms. Scharf's claim to be unsuccessful. The complainant submits that HRDC colluded with the CRA on this issue.*

PART II – SUBMISSIONS

(A) NO DISCIPLINARY MEASURE OR RETALIATION

21. *The respondent reiterates that Ms. Scharf has not been retaliated against in accordance with subsection 133(1) and section 147 of the* CLC. *The complainant was not dismissed, suspended, laid off, demoted, imposed a financial or other penalty: See* Leary v. Treasury Board (Department of National Defence), *2005 PSLRB 35 at paras. 70,71).*

22. *The Federal Court of Appeal, in* Gaskin v. CRA, *2013 FCA 36, at para.6, recently confirmed that section 133 of the* CLC *provides the Board with very limited jurisdiction. The role of the Board is to determine whether an employee has been retaliated because of the exercise of his or her rights under part II of the* CLC.

23. *The Board does not have the jurisdiction to determine whether Ms. Scharf's health and safety concerns in the workplace were appropriately dealt with by the respondent or the OSH Committee. Yet, this is what the complainant is asking the Board to rule on with this complaint. In accordance with Ms. Scharf, the respondent's failure to appropriately investigate her OSH complaints had important consequences: she alleges that she was unable to be successful in her claim with WSIB and that she ultimately lost her employment, for incapacity a few years after the complaint.*

24. *The respondent submits that the Board does not have jurisdiction to examine labour relations, WSIB or health and safety matters when dealing with a section 133* CLC *complaint. Issues in relation to WSIB, accommodation and discrimination grievances, and the dismissal of grievances dealing with the collective agreement because the complainant did not seek the support of her bargaining agent is not within the mandate of the Board.*

25. *Furthermore, the Board has ruled on several occasions that an alleged financial loss does not amount to discipline or retaliation within the meaning of section 147 of the* CLC: Tanguay v. Statistical Survey Operations, *2005 PSLRB 43 at paragraphs 19-20.*

26. *Ms. Scharf states that her name was used in CRA documents in a manner that is contrary to the* CLC. *The respondent fails to see how it used the complainant's name "contrary to the* CLC*". In any event, the respondent submits that naming Ms. Scharf in a CRA document is not a disciplinary or retaliatory action as per section 147 of the* CLC.

27. *The respondent submits that Ms. Scharf's letter dated March 6, 2013 makes it clear that the complainant has not be retaliated against, as per section 147 of the* CLC. *If the panel of the Board were to consider the facts alleged in Ms. Scharf's complaint as proven (including the facts contained in the letter dated April 20, 2012, and in her letter dated March 6, 2013), there would be* ***NO*** *arguable case that the respondent has failed to respect the prohibition in section 147 of the* CLC.

(B) TIMELINESS

28. *The respondent reiterates that none of the alleged disciplinary measures, or retaliation, noted in the complainant's complaint, her letter dated April 20, 2012 and in her letter dated March 6, 2013 came to the attention of the complainant within the 90 day limit period provided by the* CLC.

29. *The complainant was well aware of the actions or inactions in question at the time they happened, which is far beyond the 90 day limit period. The fact that the complainant received documentation through ATIP in order for her to prove her case does not extend the time limit period as established by the* CLC.

30. *Even if we were to consider that the alleged facts were retaliation measures as per section 147 of the* CLC, *the respondent submits that the complainant knew of such*

facts way before the 90 day limit period, but failed to file a complaint in due course.

PART III – CONCLUSION

31. The respondent submits that the following excerpt from the complainant's letter dated April 20, 2012, p. 19, demonstrates clearly that the complainant's complaint is not a section 133 complaint:

> *Feb 2009, David, Denis and I recognized we had gathered enough information (ATIP or otherwise … I learned from [David's] files what to expect in my own) to demonstrate the suspension of our rights contrary to provisions of the Canada Labour Code, Federal Workers Compensation legislation, Human Rights legislation etc. was undertaken by CRA, the respondent.*
>
> *[*sic *throughout]*

32. The respondent submits that this excerpt in of itself, clearly shows that the complainant's complaint dated February 10, 2009 was filed on that date because the complainant was of the view that she had gathered enough evidence to prove her case, and not because she became aware of the facts that gave rise to her complaint.

33. The excerpt also proves that the complainant is using a section 133 complaint as a fishing net to deal with OSH issues, WSIB issues, labour relation issues and human rights issues, which allegedly occurred over more than a decade of employment with the CRA.

34. The complainant was given numerous opportunities to demonstrate how her complaint fits within the strict and limited parameters of section 133 of the CLC*. The respondent submits that the complainant failed at that task.*

35. The answer to both questions asked by the Board in its letter dated February 5, 2013 is "No".

36. The respondent respectfully asks the Board to dismiss the complaint, for lack of jurisdiction.

. . .

37. [*Sic* throughout]

[Emphasis in the original]

C. Complainant's rebuttal

[25] On May 9, 2013, the complainant filed the following submission in rebuttal:

. . .

> *The Canada Labour Code is an act of parliament under the **CONSTITUTION ACT;** it must respect associated statutes and the **CANADIAN CHARTER OF RIGHTS AND FREEDOMS**.*
>
> *The Canada labour code is **"An Act to consolidate certain statutes respecting labour"***
>
> *Consolidated with the Canada Labour code are the laws applicable **"in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.***
>
> *The code has three parts. Part I — Industrial Relations. Part II- Occupational Health and Safety, Part III- Standard hours, wages, vacations and holidays. Through the various parts of the code, matters of employment (as example– basic conditions of employment, health and safety, work related illness and injury, workers compensation, leave, disability and termination) are addressed. The code also intertwines aspects of other statutes such as Human rights legislation, the criminal code of Canada etc. into its legislation in an effort of ensuring consistency to equal and greater law. The code incorporates the diverse matters of employment under its umbrella through its parts*
>
> > *Employee status preserved*
> > *(2) No person ceases to be an employee within the meaning of this Part by reason only of their ceasing to work as the result of a lockout or strike or by reason only of their dismissal contrary to this Part.*
>
> *Part II of the act **"the code"** is a public welfare statute. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided (as below).*
>
> *The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be*

generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided. Ontario (Ministry of Labour) v. Hamilton (City), 2002 CanLII 16893 (ON CA), <http://canlii.ca/t/1dwq1> retrieved on 2013-05-01

[17] This principle has been recognized and applied in several recent decisions of this court. In R. v. Timminco Ltd. *2001 CanLII 3494 (ON CA), (2001), 54 O.R. (3d) 21 (C.A.) at 27, Osborne A.C.J.O. stated:*

Employees who are afraid will not adhere to their lawful requirements under part and its purpose (as below). The no relief on employer clause under duties of employee's recognizes this reality. The intent of the part in whole is undermined in a culture of fear. If employees have no confidence of protection, the employees will not report a contravention of the code/ situation of danger. The failure of an employee to report a contravention of part out of fear ensures the part is a failure and increases the likelihood of preventable injuries and illness occurring. People do get killed and injured on the job everyday in Canada.

Part II of the code "OCCUPATIONAL HEALTH AND SAFETY' illustrates its purposes as;

***122.1** The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.*

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

***123.** (1) Notwithstanding any other Act of Parliament or any regulations thereunder, the Part applies to and in respect of employment (a) on or in connection with the operation of any federal work, undertaking or business…*

Both Federal and Ontario health and safety acts briefly define retaliation (as below). It is further defined in the Public Servants Disclosure Protection Act (again below). Notable is that the reprisal is not limited to what has taken place it may also be threatened. As well it is important to recognize the consistent entries with regard to other penalty. On the surface it appears there is an inconsistency between the federal code and Ontario legislation noting the addition of intimidate or coerce a worker within the immediate clause

but examining further it would be absurd to even anticipate that such actions would not be covered under the no other penalty of federal legislation. Certainly if such exclusion existed it would be contrary to the constitution and the criminal code of Canada.

147. *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

Occupational Health and Safety Act, R.S.O. 1990, CHAPTER 0.1, PART VI, REPRISALS BY EMPLOYER PROHIBITED

No discipline, dismissal, etc., by employer
50. *(1) No employer or person acting on behalf of an employer shall,*

(a) dismiss or threaten to dismiss a worker;

(b) discipline or suspend or threaten to discipline or suspend a worker;

(c) impose any penalty upon a worker; or

(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act, *R.S.O. 1990, c. 0.1, s. 50(1).*

Public Service Disclosure Protection Act, S.C. 2005, c. 46. *Assented to 2005-11-25 An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*

1. *This Act may be cited as the* Public Servants Disclosure Protection Act*.*

2. *(1) The following definitions apply in this Act.*

"protected disclosure" means a disclosure that is made in good faith and that is made by a public servant

- *(*a*) in accordance with this Act;*
- *(*b*) in the course of a parliamentary proceeding;*
- *(*c*) in the course of a procedure established under any other Act of Parliament; or*
- *(*d*) when lawfully required to do so.*

"reprisal"means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

- *(*a*) a disciplinary measure;*
- *(*b*) the demotion of the public servant;*
- *(*c*) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;*
- *(*d*) any measure that adversely affects the employment or working conditions of the public servant; and*
- *(*e*) a threat to take any of the measures referred to in any of paragraphs (*a*) to (*d*).*

(2) Every reference in this Act to a person who has taken a reprisal includes a person who has directed the reprisal to be taken.

The code acknowledges the need for protections from reprisal, this acknowledgement recognizes that retaliation and retribution happens. Reprisal needs to be eliminated if the intent and purpose of the part is to be realized. It is certain an employee disrupting a workplace with the concerns surrounding the safety of its operation is seen as a threat to the organizations function. Disruption of the workplace is not tolerated and the code has recognized this

Reprisal is seldom blatant and to anticipate that an employee would take a deliberate and direct retaliatory action is unlikely. Knowing the prohibition on reprisal, an employer seeking to retaliate would need to take efforts to conceal such

actions if they were to take place. Concealment is all but assured in cases where an employee is confined to the rules of ATIP to gather the necessary information to prove a retaliation complaint. It is a certainty no employer would readily release its internal information and communications etc. which are confined to its inner circles and release of such information would be contrary to the code of ethics of the employer and subject to discipline.

Health and safety committees are empowered to act as a buffer between employees and the employer. Occupational health and safety representatives are supposed to have the same protection from reprisal as employees.

In this extreme case of Scharf, Babb and Lapointe the retaliation and abuse endured not only is a violation of the code and the statutes it draws from but also the charter. The security of all three employees was deliberately violated as the three were conjoined by the employer and subjected to cruel and unusual punishment contrary to their rights under the charter (as below). Every single aspect of these three's employment rights and rights as individuals were abused in a systematic mobbing undertaken by the various departments and agents of our employer the Federal Government of Canada.

CONSTITUTION ACT, 1982 *[(80)], 1982, c. 11 (U.K.), Schedule B, PART I, CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

> *Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:*
>
> ***1.*** *The* Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to such reasonable limit prescribed by law as can be demonstrably justified in a free and democrat society.*
>
> ***7.*** *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> ***12.*** *Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.*
>
> ***24.*** *(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*
>
> ***52.*** *(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

The rights of me, Dave and Denis were restricted or denied as a direct result of abuse by agents of the employer and their systemic refusal to meet their respective obligations. We were conjoined and targeted. The retaliation we experienced resulted in not just physical but also psychological harm. We had our dignity taken from us, our reputations were destroyed, our rights to timely and appropriate medical care were undermined, our rights to any injury and illness benefit was deprived through the deliberate sabotage of such programs, we found ourselves deprived of health benefits, our access to appropriate medical care was denied, return to work programs were rendered unobtainable and undermined, our family lives destroyed, our actions criminalized, our financial security was destroyed. We have been tortured. When we three obtained the information that demonstrated we were targeted as a group and abused in a concerted and strategic manner, the retribution of our employer was clearly beyond any doubt or suspicion and we all filed a joint complaint consistent with the conjoining actions of the employer. We recognize this joint complaint has been wrongfully separated/dismantled and undermined. The right to make a complaint in accordance with the part (as below).

133. *(1) An employee, or a person designed by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

Recourse is limited to a complaint to the board (as below).

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

Recognizing the provisions of the code, our retaliation complaint offered no protection from further abuse and as health and safety officer's are excluded from any intervention, no protection was provided. This allowed the abuse to continue unmitigated. In retrospect, we see that the retaliation complaint filed precipitated a process of litigation that has taken years to go before the board rendering us stripped of our employment and rights thereunder.

According to the provisions of the code the board is required to hear the complaint (as below). Yet we have learned this is not the case.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

The jurisdiction of the Board (as below), does not limit the Board to the specific part but confers the powers, rights and privileges of the ACT. The provision enables the board to take jurisdiction to hear not simply the complaint of retaliation, but it also confers upon it considerable jurisdiction as it would any other complaint under the ACT.

***156**. (1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(c), may dispose of any complaint made to the Board under this Part, and, in relation to any complaint so made, that person*

- *(a) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and*

- *(b) is subject to all the obligations and limitations that are imposed on the Board by this Act.*

Our occupational health and safety rights stemming from the provisions of the code and related statutes such as human rights legislation are most certainly under the jurisdiction of the Board. The code does not exclude employees with injuries and disabilities nor does the code preclude employer responsibilities because an employee may have an injury or illness related to the workplace, etc. The code specifically addresses the employer's responsibilities in regard to workplace injuries, hazards, right to know, right to participate, right to refuse and more.

***131.** The fact that an employer or employee has complied with or failed to comply with any of the provisions of this Part may not be construed as affecting any right of an employee to compensation under any statute relating to compensation for employment injury or illness, or as affecting any liability or obligation of any employer or employee under any such statute.*

Certainly our acting in accordance or seeking enforcement in the matters of illness and injury as with other matters of health and safety should have been free from reprisal. Surely such matters are under the jurisdiction of the Board hearing a reprisal complaint. The decisions in the illegally divided cases of Babb and Lapointe demonstrate this contravention.

The board also has the power to make whole the person through the powers of the ACT. Again, demonstrating a broader jurisdiction.

134. *If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to*

(a) *permit any employee who has been affected by the contravention to return to the duties of their employment;*

(b) *reinstate any former employee affected by the contravention;*

(c) *pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and*

(d) *rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.*

In accordance with the provisions of the code the "Burden of proof" is also shifted to the employer to prove retaliation did not take place in cases where employees have enacted or participated in work refusals. As in itself it is evidence the contravention actually occurred. The decisions in the illegally divided cases of Babb and Lapointe demonstrate this contravention.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

In the case of the work refusals we enacted or participated in under our obligations as employees, the precondition as below (128(6) report to employer) was adhered to. Again, this requirement immediately determined the burden of proof fell to the employer in the retaliation complaint procedure. This fact has been illegally overlooked by the board, again.

128. *(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*

- *(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
- *(b) a condition exists in the place that constitutes a danger to the employee; or*
- *(c) the performance of the activity constitutes a danger to the employee or to another employee.*

(3) A complaint in respect of the exercise or a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

The provision of the code (as below) which removes an employee's right to refuse endangered the three of us, not to mention the others in the workplace who sought similar protections or whom we acted for in our respective capacities as health and safety committee members. Employer investigations covering up or finding no danger in error required employees to work in the danger with further refusal prohibited. These violations of the provisions of the code were contrary to our charter rights violating the security of our person.

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

Further to the statements above there is exclusion to the no retaliation clause in the case of work refusals under the heading of "abuse of rights" (as below). Prior to any work refusal, an employee must be certain that sufficient grounds can be demonstrated in a hearing regarding danger as without doing so an employee will be subject to sanctioned discipline.

147.*1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the*

employee who the employer can demonstrate has wilfully abused those rights.

Knowing that the code has a built in provision (as below) which allows actions against an employee, we knew that a complaint of retaliation could not be grounded in mere speculation. It has been argued by the employer that we should have known we were being retaliated against earlier based on their actions, we disagree. We do admit that yes we were aware our rights were and continued to be violated but we did not become aware of the circumstances which clearly demonstrated the employer's intent to terminate our employment or the vehicle by which they would do this. The combined information of our ATIP requests and sharing of information in relation to our present situations overlapping was our moment of awareness. When we knew we were lumped together behind the closed doors of the employer and our employment rights were equally and consistently being violated we knew we were being retaliated against. The decisions in the illegally divided cases of Babb and Lapointe were incorrect in its finding in regard to timeliness based on the information above.

Actions or Circumstances

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

The board is entitled to form an opinion as to when the employee should have known, yet fails to consider how unreasonable this clause is as it fails to take into account an employee's fears of even more retaliation and how such a complaint would further influence an employer's actions.

How many employment bruises will one endure before they realize that these bruises are not unrelated incidents but an orchestrated assault in retaliation to ones person?

It is unreasonable that the code provisions would require the board to undertake an extremely narrow interpretation of the realities of retaliation and fail to consider the reality that retaliation does indeed exist in the workplace.

The question when they <u>ought to have known</u> would be more appropriately framed as being when they became confident that they could demonstrate retaliation is and/or has taken place (notwithstanding the reverse onus in the case of work refusals) . An employee seeking to file a retaliation complaint is required to be aware of circumstances or actions giving rise to the complaint or face punishment if the opposite can

be demonstrated in accordance with the provisions of the code.

The 90 day limitation clause is contrary to the intent of the code as it undermines concept of protection from retaliation. It is also inconsistent with equal and greater law: it is contrary to the other provisions of the ACT as well.

Contrary to the intent of the code and equal and greater law, the fact that jurisdiction is routinely challenged by employers at the outset of the board's involvement and before a hearing is commenced is outrageous. Any prior jurisprudence in this regard should be overturned.

Acknowledging the code's provision for protections against reprisal an employee is granted recourse via a "Complaint to Board". Once a complaint is made under section 133, the code states it may not be referred to arbitration or adjudication. Any action or jurisprudence to the contrary would be therefore incorrect and inconsistent with the law.

Such dismissal if allowed is contrary to the code and illegally protects the employer from its obligations but also from the consequences of it actions. A dismissal based on jurisdiction would require the employer to demonstrate a zero relationship between the employees' history/ current complaint with the entire provisions of the part. This could not be done without a complete and fair hearing, yet was done with the unjustly if not illegally separated Babb and Lapointe files.

In conclusion

Although the employer has been allowed the status of a missing participant in these retaliation complaints by the board, its agent Ms Anne –Marie Duquette certainly has at her disposal our entire employment histories and the records/knowledge of what has transpired behind the closed doors of our employer. Having represented the Federal Government of Canada in the unjustly separated complaints of Babb and Lapointe her knowledge of the behind closed doors facts and situation overall is far in excess of us three employees. The board has illegally allowed and perpetuated this ongoing bias.

Our knowledge has been confined as access to necessary disclosure has been denied. The board has illegally allowed and perpetuated this ongoing bias.

The motion enacted by Ms Duquette for dismissal on grounds of timeliness and jurisdiction is not only contrary to her knowledge, but she (the employer) is aware such dismissal tactics undermine the intent, purpose and application of the

Canada Labour Code and the statues under the constitution of Canada which it incorporates which also apply to her. The board has illegally allowed and perpetuated this ongoing bias.

The employer has had every opportunity to adhere to its onus to prove it has not retaliated against us as the burden of proof is upon them as a result of our work refusals and participation in work refusals. It has chosen not to adhere to the provisions of the code. The board has illegally allowed and perpetuated this ongoing bias.

Ms Duquettes argument, which claims because we were aware of the employers continuous willful negligence in regard to their responsibilities and obligations under the code is well outside of the 90 day limitation, is anything but rational as it fails to consider the actual circumstances by which we realized an orchestrated devastation of our persons was underway. We had filed this complaint in accordance with the requirements and provisions of the code. Furthermore, we continuously raised issues of compliance and made complaints which were deliberately ignored. We were certain of this in the timeframe of the complaint.

There is no justice to be attained here, this process is tainted. Our conjoined complaints have been divided to conquer. The board has illegally allowed and perpetuated this ongoing bias.

The Federal Government of Canada through its employees, institutions and systems has deliberately violated our right to life, liberty and security of the person. The ongoing bias of the Board has upheld this violation as it has deprived us of our right to fairness and fundamental justice. This process in itself has been cruel and unusual punishment.

The application of a confined interpretation of the code and the application of its parts which violate our rights under the charter is unjust. Subjecting us to further infringements of our charter rights.

I ask that the board consider my submissions and:

1) *Recognize the employer has deliberately refused to accept the burden of proof and meet its obligations to prove it did not retaliate (work refusals which is in itself evidence the retaliation did take place). Recognize the employer has enacted tactical motions undermining the intent purpose and application of the code which may be in conflict with my rights. Recognize that this process has been contrary to my rights. Deliver a judgement*

> *that we have been retaliated against, immediately and end this continued abuse.*
> 2) *In the alternative recognize our charter and statute rights may have been infringed upon and suspend the application of any provisions of the code that are potentially in violation of our rights. Allow my complaint to be heard not in part but as a joint complaint with that of Babb and Lapointe. Recognize there has been a bias against us to date. Allow access to disclosure. Find someone independent to hear this matter in its entirety.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

It is unclear whether the complainant is specifically challenging the constitutionality of distinct provisions of the *Code*. However, the record before me does not show that she has given to the Attorney General of Canada as well as to the attorney general of each province and territory the notice mentioned in section 57 of the Federal Courts Act, R.C.S., 1985, c. F-7. Section 57 provides as follows:

> ***57.*** *(1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).*
>
> *(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.*
>
> *(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question.*
>
> *(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other*

> *tribunal, as the case may be, in respect of the constitutional question.*
>
> *(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.*

IV. Reasons

[26] On February 12, 2009, the complainant filed a complaint in her own name pursuant to section 133 of the *Code*. Section 3 of the complaint form states that the following is required: "Concise statement of each act, omission or other matter complained of, including dates and names of persons involved." In that section, the complainant wrote as follows:

> *Employees of the Canada Revenue Agency(CRA) have taken action against me contrary to section 147 of the Canada Labour Code.These actions appear to be deliberate and systemic.These actions are consistent with similar actions taken against David Babb and Denis Lapointe.Employees of the Canada Revenue Agency have knowingly and willfully violated my rights and taken action/inaction against me contrary to rights under the Canadian Human Rights Act, Canada Labour Code, and the Workers' Compensation Legislation.Numerous employees of the CRA on various levels and in various capacities appear to be involved.I have been harmed and suffered injury as a result.Human Resources Skills Development Canada (HRSDC) and Workplace Safety Insurance Board (WSIB) appear to have been involved as participants.My attempts to gather information needed to identify such persons appear to have been intentionally obstructed by representatives of my employer at 875 Heron Road and Access to Information/Canada Revenue Agency.These matters have been ongoing for quite some time, focusing on the "RE: OSH Minutes" and "RE: Questions about the Plan of Action posted at 875 Heron Rd." chain of communications The persons primarily involved are as follows:William Baker,Gary Gustafson,Steve Hertzberg, Kathy Mawbey, Chris Aylward, Gillian Pranke, Denis Maurice, Parise Ouellette, Greg Currie,Jean Laronde,Claude Tremblay,Lysanne Gauvin, Larry Hillier,Gordon O'Connor,Catherine Bullard,Lucie Bisson,Therese Awada, Louise Lambert,Lyne Lamoureux,Renee Donata,Bill-R Blair,Carl Bryant, Eldon Dodds, Sean Evans, Marie-Claude Lapointe, Jeffrey Lawrence, Shelley Miller,Greg Moore,Bert Stranberg,June Whyte,Jeffrey Moffet.Persons from WSIB, HRSDC, Health Canada, and Ted Nathanson (consultant)*

> *appear to be directly involved as well. Recent email communications and gathered information indicates deliberate actions have been taken against me and others contrary to our rights.Reference"RE:OSH Minutes" emails that are presently ongoing. This is as concise as I can be.*
>
> . . .
>
> [*Sic* throughout]

Further, on April 20, 2012, in response to my ruling to provide a concise statement of each act that she was complaining about as well as the date of each act, the complainant filed a 25-page document in support of her complaint. In that document, the complainant listed actions or inactions that she believes constitute discipline or retaliation within the meaning of section 147 of the *Code*. Finally, the complainant provided more information in the written submission that she filed on March 6, 2013, concerning the respondent's objection to jurisdiction. Therefore, I consider the complaint, the 25-page document in support of the complaint and the written submission of March 6, 2013, as providing the factual basis on which the complainant is basing her allegation that the respondent contravened section 147 of the *Code*.

[27] I have concerns with the rebuttal that the complainant filed on May 9. 2013, because it seems to contain issues that had not been raised in the respondent's written submissions. Further, the complainant seems to present in her rebuttal events in a fashion that do not accord with the record before me. For example, the complaint refers to her complaint as having been jointly presented by her and Messrs. Babb and Lapointe. However, initially, the complaint, which the complainant presented in her own name, was processed independently from those that Messrs. Babb and Lapointe had each filed in their own names. At one time, the third panel of the Board appointed to hear the complainant's complaint directed that it be joined with those of Messrs. Babb and Lapointe. Eventually, I directed that the complainant's complaint be severed from those of Messrs. Babb and Lapointe, to better accommodate all involved with those complaints.

[28] Further, I heard the complaints of Messrs. Babb and Lapointe and issued a decision in each case, dismissing each complaint because they raised no arguable case of violation of section 147 of the *Code* (*Babb v. Canada Revenue* Agency, 2012 PSLRB 47, and *Lapointe v. Canada Revenue* Agency, 2012 PSLRB 48). The complaints filed by Messrs. Babb and Lapointe have been considered and decided and

the complainant cannot now incorporate them into her own complaint by referring to them in her rebuttal as if they formed part of her own complaint.

[29] In the matter before me, the respondent has submitted that the complainant's complaint should be dismissed for want of jurisdiction.

[30] The reasons in *Babb* read in part as follows:

> . . .
>
> *[5] As was pointed out in* Gaskin v. Canada Revenue Agency, *2008 PSLRB 96, preliminary issues may be determined based on the record, without convening an oral hearing. Paragraph 240(*c*) of the* Public Service Labour Relations Act *("the* Act*"), enacted by section 2 of the* Public Service Modernization Act, *S.C. 2003, c. 22, states that the provisions of the* Act *apply to the complaint before the Board. Further, section 41 of the* Act *states as follows: "the Board may decide any matter before it without holding an oral hearing."*
>
> *[6] The respondent based its objection to the jurisdiction of the Board to hear this matter based on the following two issues:*
>
> . . .
>
> 1. Should the PSLRB dismiss this complaint without a hearing because the essential components of a 133 *CLC* complaint are not present in Mr. Babb's complaint?
>
> 2. Is the PSLRB without jurisdiction to hear this complaint because it is untimely?
>
> . . .
>
> *[7] When examining a complaint under section 133 of the* Code, *the Board inquires as to whether ". . . an employer has taken action against the employee in contravention of section 147 . . . ."*
>
> *[8] Section 147 of the* Code *prohibits an employer from taking reprisal actions against an employee. . . .*
>
> *[9] Further, the complainant had a 90-day window in which he could file a complaint, as per the provisions of subsection 133(2) of the* Code *. . . .*

> *As the respondent pointed out in its written submission, the limitation period is mandatory, and no authority exists to extend it (*Larocque v. Treasury Board (Department of Health*), 2010 PSLRB 94). Therefore, my jurisdiction to hear this complaint must be limited to examining actions of the respondent that allegedly contravened section 147 of the* Code *and that took place in the 90 days before February 6, 2009, or of which the complainant learned or ought to have known within the 90 days before February 6, 2009.*
>
> *[10] Section 3 of the complaint form filed with the Board is the applicable area that sets out the specific actions undertaken by the respondent that are complained about. That section would also be the location in which to specify the date of these actions. The written complaint must, in my view, clearly state what actions were allegedly taken and when these actions allegedly occurred. Only following the provisions of this information can the respondent investigate the allegations and respond to them. A complainant is not entitled to make allegations that are not based on facts. That principle was stated in* Gaskin*, at paragraph 57, as follows:*
>
> > [57] It is quite possible to lose sight of the essential subject of the complaint when reviewing the many allegations that the complainant makes against the employer and against public officials. As a self-represented party in this proceeding, the complainant need not be expected to frame the cause of his complaint in unequivocal and precise terms. On the other hand, he does have a responsibility to make the basis of his complaint sufficiently clear to the Board so that it can understand the nature of his case and so that the respondent can know the allegations against which it must defend.
>
> *[11] Has the complainant specified any alleged action that could arguably be a contravention of section 147 of the* Code*? Did such action take place, or become known to the grievor, within the 90 days before the filing of the complaint? If the answer to both questions is "yes," then I have jurisdiction to hear the matter. However, if the answer to any of these questions is "no," I have no jurisdiction.*
>
> . . .

I believe a similar analysis can be undertaken with this complaint.

[31] I can find nothing in the complaint filed on February 12, 2009, that could arguably be contrary to section 147 of the *Code*. It is true that the complaint raises an

allegation of contravention of section 147, but it points to no specific action of the respondent. Therefore, I must turn to the subsequent information supplied by the complainant to see if any action taken by the respondent could arguably be a violation of section 147.

[32] The complainant's April 20, 2012, 25-page document filed in support her complaint is broken down by headings. I will use those headings to determine if any action could arguably be a violation of section 147 of the *Code*.

[33] The first heading relating to particulars is "Work History." This part of the 25-page document contains background information on the complainant's work history, and no violations of section 147 of the *Code* are alleged or would apply in this case.

[34] The next heading is "Other Roles," under which the complainant outlined her role as a union representative and a member of the Occupational Health and Safety Committee. No violation of section 147 of the *Code* is alleged under that heading.

[35] Next is the heading "IAQ Complaints made." This part of the 25-page document refers to complaints that the complainant made about indoor air quality and contains a four-page listing of indoor-air-quality complaints. None of those complaints would be a violation of section 147 of the *Code*, as none is a respondent action but rather a complaint made by the complainant herself.

[36] The fourth heading is "LAB 1070's (Hazardous Occurrence Investigation Report)." "LAB 1070" forms are completed by a supervisor or by the complainant and relate to an alleged workplace injury. The filling of a form "LAB 1070" is not a retaliatory action in violation of section 147 of the *Code*.

[37] The next heading is "Form Y189, Hazard / Incident Report." This heading refers to a form that the complainant completed on January 24, 2006, which was not followed up on. I fail to see how the failure to follow up on a form Y189 can be a retaliatory action of the respondent, prohibited by section 147 of the *Code*, in relation to the complainant's participation in a process, or pursuance of a right, for which the *Code* provides. More specifically, I fail to see how such a failure can be one of the following retaliatory actions prohibited by section 147 of the *Code*: a dismissal, a

suspension, a layoff, a demotion, a financial penalty, another type of penalty, a refusal to pay remuneration, a disciplinary action or a threat of disciplinary action.

[38] Next is the heading "Medical Information Supplied to CRA management [*sic*]." The complainant lists under this heading letters that she provided to her employer regarding her medical status. The submission of a letter by the complainant is not a violation of section 147 of the *Code*. No employer action was involved.

[39] The seventh heading is "Workplace Safety Insurance Board Claims." Listed under that heading are three dates that appear to relate to three separate claims, presumably made by the complainant. None of those claims would be a violation of section 147 of the *Code*, as none is a respondent action but rather a claim made by the complainant herself.

[40] The next heading is "Health Canada Fitness to Work Evaluations." There are six listings under that heading. The first two appear to be medical letters deeming the complainant fit to return to work, with conditions. I fail to see how those letters can be retaliatory actions of the respondent, prohibited by section 147 of the *Code*, related to the complainant's participation in a process, or pursuance of a right, for which the *Code* provides. The next two items refer to the complainant's termination of employment grievances. None of those grievances would be a violation of section 147 of the *Code*, as none is a respondent action but rather a grievance made by the complainant herself. The next and final two concern medical letters dated June, October and December 2009 and February 2010. Each clearly falls after the filing of the complaint, which was on February 12, 2009, and cannot be events on which the complaint is based.

[41] Next is the heading "Grievances Filed regarding [*sic*] Health & Safety, Workplace Injury, Accommodation and Discrimination." What follows is a four-and-one-half-page list of several grievances that the complainant filed over time. They are all actions of the complainant. None is a violation of section 147 of the *Code*.

[42] The tenth heading is "Work Refusal June 4, 2007." This heading refers to a work refusal the complainant made on June 4, 2007. The complainant seems to allege that representatives of the respondent failed to comply with the *Code*'s provisions dealing with an employee's refusal to work when the employee believes in the existence of a danger in the workplace. I fail to see how such a failure can be one of the following

retaliatory actions prohibited by section 147 of the *Code*: a dismissal, a suspension, a layoff, a demotion, a financial penalty, another type of penalty, a refusal to pay remuneration, a disciplinary action or a threat of disciplinary action.

[43] The next heading is "Canadian Human Rights Commission Complaints." That heading lists three complaints presumably made by the complainant with the Canadian Human Rights Commission. Again, these are actions of the complainant — not the respondent — and do not relate to violations of section 147 of the *Code*.

[44] Next is the heading "Demotion, dismissal, financial and other penalties imposed." The first reference under that heading is to the complainant's termination of employment grievance. As stated earlier, that grievance is an action of the complainant and cannot be a violation of section 147 of the *Code*. The complainant then writes for about five and one-half pages about a number of events, many of which have been covered elsewhere in the 25-page document filed in support of her complaint. The complainant refers to an indoor-air-quality chronology that was prepared by representatives of the respondent and distributed in November 2006 and that allegedly contained erroneous information. I fail to see how such document can be one of the following retaliatory actions prohibited by section 147 of the *Code*: a dismissal, a suspension, a layoff, a demotion, a financial penalty, another type of penalty, a refusal to pay remuneration, a disciplinary action or a threat of disciplinary action. The complainant also refers to a document entitled, "Memorandum For the Honourable Jean-Pierre Blackburn Ottawa Technology — Air Quality," dated January 29, 2009, but it appears to be a briefing note, and no mention of discipline is made. That note is not in violation of secion147 of the *Code*. The next reference is to correspondence that the complainant sent on December 12, 2007, about a Workplace Safety and Insurance Board claim. I have no jurisdiction with respect to the Workplace Safety and Insurance Board. The complainant further refers to financial penalties that she allegedly incurred as a result of the respondent's handling of her access-to-information requests. The *Code* does not vest me with the jurisdiction to deal with that allegation. Other statements, such as "I have lost the respect of my peers," and "I feel I have lost years of my life expectancy," are so vague in relation to an alleged violation of the *Code* as to lead me to conclude that I do not have jurisdiction to hear them.

[45] Finally, the thirteenth heading is "Requests made via Access to Information and Privacy," which lists some six pages of requests made by the complainant. I have no

jurisdiction to look into information that she may have obtained via those, or any other, access-to-information requests under this allegation of a violation of section 147 of the *Code*.

[46] Therefore, I can see nothing in the complainant's April 20, 2012, 25-page document filed in support of her complaint that would give me jurisdiction to hear this complaint.

[47] The only other document submitted by the complainant that could arguably provide a relevant factual foundation to her complaint is her written submissions of March 6, 2013, which was a direct response to my request that parties make written submissions on the issue of jurisdiction.

[48] First, the complainant wrote, ". . . please note I formally object to the issue of jurisdiction being decided prior to a formal hearing." As *Babb* stated at para 5:

> *[5] As was pointed out in Gaskin v. Canada Revenue Agency, 2008 PSLRB 96, preliminary issues may be determined based on the record, without convening an oral hearing. Paragraph 240(c) of the Public Service Labour Relations Act ("the Act"), enacted by section 2 of the Public Service Modernization Act, S.C. 2003, c. 22, states that the provisions of the Act apply to the complaint before the Board. Further, section 41 of the Act states as follows: "the Board may decide any matter before it without holding an oral hearing."*

A formal full-fledge in-person hearing is not always necessary to decide a preliminary issue of jurisdiction, and a panel of the Board may proceeded by way of written submissions. This is specifically provided for as follows in the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22:

> . . .
>
> ***41.*** *The Board may decide any matter before it without holding an oral hearing.*
>
> . . .
>
> ***240.*** *Part II of the* Canada Labour Code *applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or*

> *business referred to in that Part except that, for the purpose of that application,*
>
> . . .
>
> *(c) the provisions of this Act apply, with any modifications that the circumstances require, in respect of matters brought before the Public Service Labour Relations Board.*
>
> . . .

I see nothing unfair or irregular with the process of dealing with the respondent's objection to jurisdiction by way of written submissions.

[49] The complainant lists three points that, she submits, demonstrate that she met the requirements of subsection 133(2) and section 147 of the *Code*. The first point she lists states, "#1) Our local union executive (which included David Babb, Denis Lapointe and myself) distributed to 1,560 local members, an indoor air quality survey August 2007 — October 2007 for completion." The complainant then explains further, discussing the indoor air quality survey, and stating,

> *. . . David, Denis and I all experienced penalty in that our names were used by CRA in a manner that was contrary to the Canada Labour Code — none of our complaints got investigated. The document created by CRA . . . made me (and David and Denis) look like liars and discredited my / our character. . . .*

To this first point, the respondent replied by stating, "[t]he Board does not have jurisdiction to determine whether Ms. Scharf's health and safety concerns in the workplace were appropriately dealt with . . . ." I agree that I do not have jurisdiction to look into the complainant's air quality complaints. The fact that her air quality complaints were not investigated to her satisfaction is not, in my view, a retaliatory action within the meaning of section 147 of the *Code*. The fact that she felt that she was made to look like a liar and that her character, she felt, was discredited, in my view, is also not a retaliatory action under section 147 of the *Code*.

[50] The second point that the complainant makes is that, on January 12, 2009, she sent a fax to the respondent, asking that two of her grievances be held in abeyance and noting that her bargaining agent ". . . will not be assisting and or representing me further . . . ." She states that the respondent replied as follows: ". . . I was not entitled to proceed with my grievances that alleged a violation of UTE/CRA Collective

Agreement unless I had the approval of and was represented by the Alliance. . . .” The grievances were allegedly dismissed. The complainant then writes, “[f]inancial penalty loss of house and home and all assets.” Again, I can find nothing in that point that would give me jurisdiction to hear this complaint under section 133 of the *Code*. The complainant refers to two grievances that were not processed because she did not have the approval of her bargaining agent to proceed with them. That is not an action that would be contrary to the *Code*, in my view. In fact, the complainant has no right under the *Public Service Labour Relations Act* to pursue herself a grievance relating to the interpretation or application of her collective agreement and subsection 208(4) specifically provides as follows:

> ***208.*** *(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.*

[51] The third and final point that the complainant makes deals with a request for information about a Workplace Safety and Insurance Board claim. As mentioned earlier in this decision, I have no jurisdiction over Workplace Safety and Insurance Board claims.

[52] Therefore, following an exhaustive review of all the relevant documentation that the complainant submitted, and following all the twists and turns of this file, I find there is nothing that would allow me to take jurisdiction in this matter. It is therefore not necessary for me to decide on the parties submissions that relate to the 90-day time limit for presenting the complaint.

[53] For all of the above reasons, the Board makes the following order.

(The Order appears on the next page)

V. Order

[54] The respondent's objection is allowed.

[55] The complaint is dismissed.

September 26, 2013.

Joseph W. Potter,
a panel of the Public Service
Labour Relations Board