Date: 20130423

File: 561-02-587

Citation: 2013 PSLRB 46

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

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

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

REASONS FOR DECISION

Before: David Olsen, a panel of the Public Service Labour Relations Board

For the Complainant: Andrew Raven and Dana Steinfeld

For the Respondent: Richard Fader and Allison Maynard

Heard at Ottawa, Ontario,
December 11, 12 and 13, 2012.

I. Complaint before the Board

[1] On August 29, 2012, the Public Service Alliance of Canada and the Customs and Immigration Union ("the PSAC" or "the complainant") filed a complaint with the Board under section 190 of the *Public Service Labour Relations Act* ("the *Act*" or "the *PSLRA*") alleging a violation by the respondent of section 107 of the *Act*. In particular, the complainant maintained that the respondent violated the statutory freeze on terms and conditions of employment imposed by section 107 of the *Act* by terminating the agreement between the complainant and the respondent by which the Canada Border Services Agency ("the CBSA" or "the respondent" or "the employer") agreed to pay specified complainant officers union leave with pay on a full-time basis and in some instances a part-time basis.

[2] The respondent asserts that the CBSA, as part of its support for the government's deficit reduction action plan ("DRAP"), reviewed the ongoing practice of paying for CBSA employees to serve as full-time union officers or representatives. The CBSA determined that this practice would be discontinued and that going forward the practice would be in line with the negotiated provisions of the collective agreement and, accordingly, the complainant's terms and conditions of employment have not been altered by this change in practice and that section 107 of the *PSLRA* has not been violated.

[3] The respondent also submits that the adjudicator appointed to hear this complaint under section 190 of the *PSLRA* does not have jurisdiction in this matter on the basis of timeliness.

[4] The complainant called two witnesses, Morgan Gay, National Negotiator with the PSAC, and Jean Pierre Fortin, the National President of the Customs and Immigration Union.

[5] The respondent called witnesses Camille Theriault-Power, the Vice-President of Human Resources, CBSA, Joe McMahon, the Acting Director of the Windsor Port of Entry, Christine Durocher, Director of Passenger Operations, Greater Toronto Area, Ted Leindecker, negotiator, Treasury Board, and Martin Bolduc, Associate Vice-President of Operations for CBSA.

II. Issues

[6] Is the complaint timely? The respondent argues that the complaint was filed 50 days beyond the 90-day time limit provided for in subsection 190(2) of the *PSLRA*, and consequently, it must be dismissed for timeliness.

[7] Assuming the complaint is timely, did the respondent violate the *PSLRA* statutory freeze on terms and conditions of employment by terminating the agreement by which the CBSA agreed to pay specified complainant officers union leave with pay on a full-time basis and in some instances on a part-time basis?

[8] I propose to deal first with the timeliness issue and, assuming I find the complaint is timely, then with the complaint on its merits.

III. Summary of the evidence/facts on the timeliness issue

A. Jean Pierre Fortin

[9] Jean Pierre Fortin is the National President of the Customs and Immigration Union. He has been employed by the CBSA and its predecessors since 1981, initially as a customs officer, classified PM-01. His position subsequently was reclassified in 1987 to PM-02. He has a long history with the union, serving six years as a Union Steward in Noyon, and six years as a Union Steward in Clarenceville. He became Financial Officer of the Eastern Township branch of the union in 1987 and the second Vice-President and the President of the branch in the early 1990s.

[10] In 2011, Mr. Fortin was elected President of the union.

[11] There existed a practice whereby full- or part-time representatives of the union were granted leave with pay by the employer on a full-time or part-time basis for union business over and above the provisions for leave in the collective agreement.

[12] The four National Vice-Presidents, the equal-opportunities representative and four Branch Presidents were on full-time leave with pay. Eleven Branch Presidents were on part-time leave with pay.

[13] On April 11, 2012, Mr. Fortin received a telephone call from Luc Portelance, the President of the Canadian Border Service Agency. Mr. Portelance advised him that the agreement with respect to the granting of leave with pay for union representatives

would no longer be maintained and that Mr. Fortin would be receiving a letter to that effect. He explained that this decision was part of the agency's DRAP. Mr. Fortin stated that he was devastated by this decision as it was occurring during his first mandate as National President. He advised Mr. Portelance that this would have an impact on union-management relations.

[14] On April 11, 2012, he received a letter by email and on April 17, 2012 in hard copy from Camille Theriault-Power, the Vice-President of Human Resources at the Canada Border Services Agency.

[15] The union's response was to call the PSAC centre to determine whether they were the only group that was receiving a letter like this, as this type of arrangement was in place with other components of the PSAC.

[16] Mr. Fortin had subsequent discussions with Mr. Portelance as to why in his view his component was being singled out and was advised that the discontinuance of this practice was being looked at for other components.

[17] He consulted with his national management committee and was given a mandate to negotiate a resolution to the issue along the lines that other unions had done. The members of the committee did not want their bargaining unit to be singled out.

[18] On June 12, 2012, there was a National Labour Management Consultation Committee meeting between CBSA and the PSAC. The minutes of that meeting reflect that Mr. Fortin in his opening remarks noted ". . . that the last six months have been very eventful," referring to the 2012 budget, the various DRAP initiatives as well as collective bargaining for the FP group. He further indicated that the CIU continues to be open to working collaboratively with management in the interests of their membership and would like to meet with Mr. Portelance to continue discussions on issues of mutual interest. The minutes also reflect under the title "commitment" that Mr. Portelance and Mr. Fortin would meet within the next few weeks "to discuss issues of mutual interest." Mr. Fortin stated that the issue of mutual interest that the parties agreed to discuss was that of the discontinuance of the practice of paying the union representatives.

[19] A meeting took place on June 21, 2012 between Mr. Fortin and Mr. Portelance. The meeting did not go well, according to Mr. Fortin. Mr. Portelance questioned whether he should have a partnership with the union when the union was criticizing him in the media over an incident that had occurred in Toronto. The discussions were difficult, as Mr. Fortin's main concern was to address the pay issue, whereas Mr. Portelance wished to address the media incident. They agreed to meet again.

[20] Mr. Fortin and Mr. McMichael, the first national vice-president, met with Marc Thibodeau, the Director of Labour Relations, on June 26, 2012. At that meeting, Mr. Fortin was seeking a postponement of the August 1, 2012 date for the implementation of the discontinuation of the practice of continuing to pay the union representatives in order that Mr. Fortin could meet with his Board of Directors. Mr. Thibodeau advised him that he would relay his request to Ms. Theriault-Power.

[21] Mr. Fortin met with Ms. Theriault-Power on June 28, 2012. He was advised that the answer to his request was "no" and that the August 1, 2012 date for the implementation of the decision was to be maintained.

[22] On July 10, 2012, Mr. Fortin met privately with Mr. Portelance. The mandate from his Board of Directors at this meeting was to negotiate the same thing as the other unions had in place, namely, to maintain the agreement with respect to union leave with pay. Mr. Portelance answered, "No." They discussed other options such as maintaining the five national positions and the four large Branch President positions as fully detached.

[23] Mr. Fortin advised Mr. Portelance that he had no other mandate than the restoration of the full benefits and would need to consult with his national executive. Mr. Portelance advised that he would need to consult on his side and that they would talk in the near future.

[24] Mr. Fortin went back to his executive and consulted with each of the national executive members. The two options being considered by the union were having the August 1 deadline postponed until November 1, 2012 and the status quo continue until that time for the nine positions, or the five national and the four Branch Presidents would remain detached until April 1, 2013. He received a mandate from his executive members to pursue both options.

[25] Mr. Fortin and Mr. Portelance subsequently spoke by telephone about this and a number of other topics. Mr. Portelance advised him that the people he had consulted on this issue were still talking. Mr. Fortin saw that as a good sign and suspected the persons that Mr. Portelance was referring to were in the Minister's office.

[26] Mr. Fortin received another telephone call from Mr. Portelance on July 25, 2012 to advise him that the proposals were off the table and that the employer was maintaining its position and that he would be receiving an official notice.

[27] Mr. Fortin sent an email to his members that day advising them that:

> *As you are all aware, we have made several attempts to convince the CBSA to alter its position on the question of paid union leave, specifically its decision to limit the leave as of August 1, 2012.*
>
> *Mr. Luc Portelance, President, CBSA, telephoned this afternoon to provide me with the agency's final decision, made in consultation with the minister's office: the cut-off date of August 1, 2012 will stand.*

[28] On July 27, 2012, he received a telephone call from Ms. Theriault-Power advising him that the date of August 1, 2012 for implementation would have to be postponed until August 15, 2012.

[29] On August 1, 2012 Mr. Fortin received a letter from Mr. Thibodeau that read in part as follows:

> *This is further to your discussion of Friday, July 27, 2012, with Camille Theriault-Power regarding the discontinuation of the practice of providing compensation for union officials.*
>
> *During this conversation, Ms. Theriault-Power advised you that the implementation date of the deficit reduction action plan [DRAP.] proposal regarding paid union leave would be August 15 rather than August 1, 2012 as previously communicated to you in our April 16, 2012 letter.*
>
> *This letter is to confirm your decision that regional Branch Presidents and any other regional representatives will reintegrate the workplace on August 15, 2012. Effective that day, should they request leave for union business, they must do so in accordance with the provisions of their respective collective agreements and as far in advance as possible.*

> *With respect to the four national Vice Presidents, namely: Mr. Jason McMichael. Mr. Carmen Filice, Mr. Peter Russell, and Mr. Ron Moran and the equal opportunity representative, Ms. Karen Church, this is to confirm your decision that they will be on leave without pay for other reasons as of August 15, 2012.*

[30] Mr. Fortin confirmed that the bargaining agent had made the decision to pay the national representatives until the next meeting of the union's board of directors at the end of October 2012. Representatives, whether fully detached or partially detached, other than the five national representatives, went back to work immediately. In the event that union representation for members was required, leave was to be applied for in accordance with the provisions of the collective agreement.

B. Camille Theriault-Power

[31] Ms. Theriault-Power's current position is that of Vice President, Human Resources for Canada Border Services Agency. She joined the public service in 1984 and has spent 20 years in human resources. She was a director general of human resources with the Department of Justice. She joined CBSA in May 2009.

[32] In her present position, she is responsible for all human resources, training, recruitment and operational training. She reports to Mr. Portelance, the president. She has a number of director generals reporting to her, including Mr. Thibodeau, who is responsible for labour relations and compensation.

[33] She was asked how she responded to the suggestion that the decision communicated in the letter of April 11, 2011 was not final. She stated that the decision was a Cabinet decision. She was the lead on this issue for the agency. She stated that at no time was it ever suggested that the decision to implement the discontinuance of union pay was under review. She stated that the agency informed the union as soon as they could and that the letter of April 11, 2012 was the official notification of the decision.

[34] On July 27, 2012, she acknowledged the discussion between herself and Mr. Fortin. She recalled that Mr. Fortin informed her of the union's desire to return Branch Presidents to the front line. Because the public service is paid two weeks in advance, she required two weeks' notice to get the Branch Presidents back on payroll. That is the reason that the implementation was delayed.

[35] The reason that the agency provided four months' notice was to provide the union with sufficient time to adapt to the change. She was under the impression that the union wished to continue the previous arrangement with the same number of fully and partially deployed representatives but on the union payroll.

C. Argument of the respondent

[36] Subsection 190(2) provides a mandatory timeline for filing complaints: "Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 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."

[37] The PSAC alleges a breach of the freeze provisions of the *PSLRA*, specifically section 107. The complainant suggests that there was an agreement between the parties to pay certain employees salary when they were on leave for union business, either full- or part-time. There is no dispute that any such practice operated outside of the collective agreement. There is also no dispute that the employer's termination of this practice occurred after notice to bargain collectively was served.

[38] Notice to bargain was served on February 21, 2011, while the CBSA terminated the practice on April 11, 2012. The complaint was filed on August 29, 2012. The complaint focuses squarely on the termination of the agreement between the complainant and the respondent. It is the position of the respondent that this termination occurred when the complaint was notified that the practice would come to an end, i.e., April 11, 2012.

[39] As a result, the complaint was filed 50 days beyond the 90-day limit provided for in subsection 190(2) of the *PSLRA*. It is trite law that the Board has no discretion to extend this mandatory timeline. Once it is determined that the complaint falls outside of the 90-day limitation, it must be dismissed for timeliness.

[40] The complainant's case on timeliness is based on (a) the suggestion that the parties continued to negotiate this issue until July 25, 2012, and therefore, there was no final decision until that time, and/or (b) that subsection 190(2) was not engaged until the decision to terminate the practice was actually implemented.

[41] The facts of this case clearly established that, on April 11, 2012, the decision of the CBSA was communicated to the complainant. The finality of the decision to terminate the practice must be distinguished from its implementation. While the complainant attempted to advocate its position in hopes of getting the decision reversed and negotiated specifics with respect to implementation, the evidence is clear that there remained an unwavering decision to terminate the practice.

[42] The jurisprudence establishes that consultation or lobbying does not extend the timelines for filing the complaint. In support of these arguments, the employer referred to the following authorities: *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34, *Williams v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 28, *Boshra v. Canadian Association of Professional Employees,* 2009 PSLRB 100, *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7, and *Roy v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 142.

[43] When does a complaint crystallize?

[44] The legislation makes reference to the action or circumstances "giving rise to the complaint." It is this concept of "giving rise to the complaint" that reflects Parliament's intent. Clearly, Parliament intended for a complaint to be made early in the process. There is no requirement for the complainant to wait until a decision at issue is implemented. To determine what gave rise to the complaint, we must determine the nature of the complaint itself. The complaint focuses squarely on the respondent's decision to terminate the "agreement."

[45] The CBSA referred to the following authorities on this issue: *Newfoundland and Labrador Association of Public and Private Employees v. Labrador School Board District No. 1*, [2005] N.L.L.A.A. No. 11 (QL)*, Barr and Flannery v. Treasury Board (Department of National Defence)*, 2006 PSLRB 85, and *Bunyan et al. v. Treasury Board* (*Department of Human Resources and Skills Development*), 2007 PSLRB 85. These cases arose in the context of grievances that were arguably filed outside of the timelines in the various collective agreements. The cases stand for the proposition that a complaint crystallizes in circumstances where there has been a course of conduct that has been implemented or of a statement of intention to implement.

D. Argument of the complainant

[46] The evidence in the present case confirms that the alteration of the terms and conditions of employment addressed in section 107 occurred on August 15, 2012. The complaint filed on August 30, 2012 was well within the prescribed time limits.

[47] The test for timeliness under the *PSLRA* is the date on which the complainant knew or ought to have known of the circumstances giving rise to the complaint. This is a question of fact in each case. First, the Board determines what the essence of the complaint is. Second, the Board decides what the triggering event for the complaint is, also referred to as the date the complaint crystallized. The time limit begins to run from the date of the triggering event. In the context of this case, the triggering event occurs on the date that section 107 was breached.

[48] First, the essence of this complaint is that, contrary to section 107, the employer altered a term or condition of employment that may be included in the collective agreement by ceasing to abide by the union leave agreement on August 15, 2012.

[49] This Board has recognized that, in determining the timeliness of a complaint, the context of each case is important. The unique nature of the statutory freeze complaint under the *PSLRA* as opposed to other causes of action must inform the timeliness analysis. A statutory freeze complaint arises when the obligation that is required to be maintained under section 107 is not maintained.

[50] The complainant referred to the following authorities in support of its arguments: *Éthier* and *Hager et al. v. Statistical Survey Operations (Statistics Canada)*, 2011 PSLRB 79.

[51] Timeliness considerations for duty of fair representation complaints are necessarily different from statutory freeze complaints.

[52] Given the essence of this complaint is that there was a breach of section 107, the triggering event for the complaint is the date that the terms and conditions of employment frozen under the *PSLRA* are not observed. There is no breach of the *Act* until such a failure occurs.

[53] Timeliness in a statutory freeze complaint must be determined from the date of implementation; see *Canadian Air Line Pilots Association v. Air Canada* (1977), 24 di 203, and *Canadian Union of Public Employees v. Air Alliance Inc.* (1991), 86 di 13.

[54] A complaint under section 107 of the *PSLRA* would be premature if submitted while the terms and conditions were still being observed; see *Vaillancourt v. Treasury Board (Transport Canada)*, PSSRB File No. 165-02-60 (19881219), *McInnis et al. v. Air Canada Pilots Association and Air Canada*, 2009 CIRB 454, and *International Brotherhood of Electrical Workers – Local 2228 v. Treasury Board (Department of National Defence)*, 2008 PSLRB 36.

[55] In this case, the uncontradicted evidence is that discussions between the parties were ongoing until July 25, 2012. The employer could have altered its position on the union leave agreement at any time throughout the negotiations and did in fact consider the possibility of a progressive transition, which would have left the partial form of union leave in place until April 1, 2013. The position of the employer was ambiguous until the employer communicated its final decision on July 27, 2012. It is clear that the plan for implementation could be altered given that the employer changed the date for termination of the agreement from August 1, 2012 to August 15, 2012.

[56] The *Act* was not violated on April 11, 2012, and the employer notified the complainant of its intention to terminate the agreement. The *Act* was violated on August 15, 2012 when the employer ceased to observe the terms and conditions of employment that were frozen on the date the notice to bargain was issued. As such, there was no violation of the *Act* until that date and no cause of action for complaint. The complaint crystallized on the date that the breach of statutory freeze occurred.

[57] Accordingly, the complaint of August 30, 2012 is timely.

IV. Conclusions on the timeliness issue

[58] The relevant statutory provisions read as follows:

. . .

> ***107.*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the*

> *employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > *(*a*) if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
> >
> > *(*b*) if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*
>
> . . .
>
> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> > *(*c*) the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions) . . . .*
>
> . . .
>
> *(2) Subject to subsections (3) and (4), a complaint under subsection(1) must be made to the Board not later than 90 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.*
>
> . . .

[59] There is no dispute that the termination of the practice to pay certain employees' salaries when they were on leave for union business either part-time or full-time occurred after notice to bargain collectively was served. Noticed to bargain was served on February 21, 2011.

[60] It is not disputed that on April 11, 2012 Mr. Fortin received a telephone call from Mr. Portelance advising him that the arrangement with respect to the granting of leave with pay for union representatives would no longer be maintained and that he would receive a letter to that effect. The same day he received a letter by email and subsequently in hard copy from the VP of human resources at the CBSA. The letter stated that CBSA would discontinue the practice and ensure that, going forward, CBSA employees who conduct union business during working hours do so in accordance with collective agreement provisions. The letter stated that the decision would take effect on August 1, 2012.

[61] Mr. Fortin testified that he met with Mr. Portelance on two occasions, June 21, 2012 and on July 10, 2012 concerning the issue of the discontinuance of the paid leave. The first meeting did not go well as Mr. Portelance wished to address the media incident described in the review of the evidence.

[62] The meeting on July 12, 2012 was a private meeting. At that meeting, Mr. Fortin testified that the two men explored other options, such as maintaining the five national positions and the four large Branch President positions as fully detached. Mr. Fortin's evidence was that both agreed they would need to consult with others and that they would talk in the near future.

[63] He and Mr. Portelance did speak subsequently by telephone. Mr. Portelance advised him that the people he had consulted on the issue were still talking. Mr. Fortin saw this as a good sign and suspected that the persons Mr. Portelance was referring to were in the Minister's office.

[64] On July 25, 2012, Mr. Portelance called Mr. Fortin to advise him that the proposals were off the table and that the employer was maintaining its position and that he would be receiving an official notice to that effect.

[65] Ms. Camille Theriault-Power was asked how she responded to the suggestion that the decision communicated in the letter of April 11, 2012 was not final. Her evidence was that the decision was a Cabinet decision. She was the lead on the issue for the agency. She stated that at no time was it ever suggested that the decision to implement the discontinuance of union pay was under review.

[66] I accept the evidence of Mr. Fortin that in his private discussions with Mr. Portelance they explored other options as described by Mr. Fortin and both sought a mandate to pursue further discussions. I conclude therefore that the decision was not final until July 25, 2012. I accept as well Ms. Theriault-Power's evidence to the extent of her knowledge; however, accepting that the meetings and discussions between Mr. Portelance and Mr. Fortin were in private, she would not be in a position to contradict Mr. Fortin. Mr. Portelance was not called as a witness. I also accept the uncontroverted evidence contained in the August 1, 2012 letter which set August 15, 2012 as date of implementation of the change in practice.

[67] The test for timeliness under section 107 is the date on which the complainant knew or ought to have known of the circumstance giving rise to the complaint. This is a question of fact in each case.

[68] I accept the line of jurisprudence that in determining timeliness of a complaint the context of each case is important and that given the complaint alleges a contravention of the statutory freeze provision the nature of the complaint must inform the timeliness analysis.

[69] I find compelling the argument that the triggering event for the complaint is the date that the terms and conditions of employment that are frozen are no longer observed. There can be no contravention of the *Act* until the terms and conditions of employment are changed.

[70] On virtually identical language with respect to the time in which a complaint must be filed alleging a contravention of the freeze period, the Canada Labour Relations Board has determined that timeliness is to be determined from the date of implementation of a proposed change. I adopt the reasoning in *Canadian Air Lines Pilots Association* and *Canadian Union of Public Employees* where it was found that the time limits begin to run when the contested policy is implemented.

[71] In the circumstances of this case, as I have concluded on the facts that the alleged contravention cannot be said to have occurred until August 15, 2012 when the CBSA officially confirmed the implementation of the decision through its action, as of that date, of reintegrating the concerned individuals in the workplace and requiring that requests for leave for union business be made in accordance with the provisions of the collective agreements. Thefore, I conclude that the complaint that was filed on August 30, 2012 was timely.

V. Summary of the evidence/facts on the merits of the complaint

[72] Did the respondent violate the *PSLRA* statutory freeze on terms and conditions of employment by terminating the agreement by which the CBSA agreed to pay specified complainant officers union leave with pay on a full-time basis and in some instances on a part-time basis?

A. Morgan Gay

[73] Morgan Gay testified on behalf of the applicant. He has been employed by the PSAC as a national negotiator since November of 2006. He began working with the FB border services bargaining unit prior to certification in December of 2006. He was involved in the negotiation of the first collective agreement for the FB group that was ratified in early 2009. That collective agreement expired on June 20, 2011.

[74] The PSAC served notice to bargain on February 21, 2011 and tabled its demands in February 2011. The parties commenced bargaining in March 2011, and met monthly thereafter until March 2012, at which time the applicant requested conciliation and the establishment of a public interest commission to assist the parties in reaching a collective agreement. A public interest commission was appointed and met on December 10, 2012.

[75] Article 14 of the expired collective agreement contained a provision dealing with the issue of union leave with pay.

[76] The article provided generally that, when operational requirements permitted, the CBSA would grant leave with pay to employees who act on behalf of an employee making a complaint to the Public Service Labour Relations Board or to an employee who acts on behalf of the PSAC making such a complaint. The article contained similar provisions with respect to applications for certification and representations and interventions with respect to applications for certification; arbitration board hearings; public interest commission hearings; alternate dispute resolution process meetings; adjudication hearings; meetings during the grievance process; as well as meetings between the PSAC and management not otherwise specified in the article.

[77] The article provided that the CBSA, when operational requirements permitted, would grant leave without pay for employees to attend contract negotiation meetings on behalf of the PSAC, for employees to attend preparatory contract negotiation meetings, to attend Board of Directors meetings, executive board meetings and conventions, as well as representatives training courses.

[78] Mr. Gay testified about an agreement or practice whereby full- or part-time representatives of the union were granted leave with pay by the CBSA on a full-time or part-time basis for union business. In particular, four National Vice-Presidents of the

PSAC, the equal-opportunities representative and four Branch Presidents were on full-time leave with pay. Eleven Branch Presidents were on part-time leave with pay. The PSAC representatives that were on full-time leave with pay for union business did not perform any of the duties of their positions. The representatives who were on part-time leave with pay for varying amounts of time per week did perform the duties of their position when not engaged in union business. Representatives on full-time leave for union business who did not perform any of the duties of their positions were referred to as "detached." Representatives on part-time leave for union business who performed the duties of their positions part of the time were referred to as "non-detached."

[79] This agreement or practice existed outside of the provisions of the collective agreement.

[80] Prior to the current round of bargaining, there were four Branch Presidents that were on full-time leave with pay for union business, the Branch Presidents in Toronto, Montreal, Vancouver and Headquarters. Other Branch Presidents were experiencing difficulty in obtaining leave with pay to perform their representational duties.

[81] Mr. Gay did not know whether the practices of granting leave with pay were contained in written agreements or not. They were referred to by the Branch President as agreements.

[82] Mr. Gay was asked whether the PSAC when going into bargaining was aware of the employer's need to cut costs. Mr. Gay stated that he had no knowledge of the need to cut union paid leave. There was no indication that that was imminent.

B. Mr. Fortin

[83] Mr. Fortin, the National President, described the historical practice of the employer granting leave with pay for union business. The Branch Presidents were the first ones to obtain union leave with pay. Not all of the Branch Presidents were fully detached. The four big branches, Montreal, Toronto, Vancouver and Headquarters, were fully detached. He stated that the Montreal Branch President had been fully detached for approximately 25 years, the Vancouver Branch President had been fully detached for 10 years and the Toronto Branch President had been fully detached.

[84] At the time notice to bargain was given in February 2011, the first, second, third and fourth Vice-President positions had all been fully detached for approximately 10 years. The equal-opportunities representative had been fully detached for approximately 7 years.

[85] At the time of notice to bargain, approximately 10 Branch Presidents were granted varying amounts of part-time leave with pay for union business, i.e., partially detached. Approximately 6 Branch Presidents were neither fully nor partially detached but were granted leave for union business in accordance with the provisions of the collective agreement as necessary.

[86] Mr. Fortin was involved in negotiating agreements at the regional level for 7.5 hours of leave with pay per week for union business on behalf of the three Branch Presidents in the Atlantic Region. This was in addition to what was allowed in the collective agreement.

[87] To the best of Mr. Fortin's knowledge, prior to April 2012, the employer never advised the union that the arrangements with respect to the fully detached positions were being repudiated.

[88] As discussed in the section on timeliness, on April 11, 2012, Mr. Fortin received a telephone call from Mr. Portelance. Mr. Portelance advised him that the agreement with respect to the granting of leave with pay for union representatives would no longer be maintained and that Mr. Fortin would be receiving a letter to that effect. He explained that this decision was part of the agency's DRAP. Mr. Fortin stated that he was devastated by this decision as it was occurring during his first mandate as National President. He advised Mr. Portelance that this would have an impact on union-management relations.

[89] On April 11, 2012, he received a letter by email and on April 17, 2012 in hard copy from Ms. Theriault-Power. The letter read in part:

. . .

> *Further to our recent discussion, I am writing to you regarding the deficit reduction measures contained in Budget 2012 that was recently tabled in Parliament.*

> *All departments and agencies were called upon to develop proposals that sought to support the Government's deficit reduction plan. The Canada Border Services Agency (CBSA) has been actively engaged in supporting this process.*
>
> . . .
>
> *In developing our proposals, it became apparent that CBSA could no longer maintain the practice of continuing pay for CBSA staff that serve as full-time union executives if the practice was going to place front-line jobs at risk. In addition, the proposal will bring the current practice in line with the negotiated provisions contained in the collective agreement and the practice in place in most other government departments.*
>
> *Consequently, as part of our deficit reduction plan, we will discontinue this practice and ensure that, going forward, CBSA employees who conduct union business during working hours do so in accordance with collective agreement provisions.*
>
> *This decision applies to all CBSA employees that serve as union representatives and will take effect on August 1, 2012, to provide the customs and immigration union (CIU) an appropriate transition period.*
>
> *I encourage you to contact myself or Mark Thibodeau, Director General, Labour Relations and Compensation, to discuss how we can best support you in this transition.*
>
> . . .

[90] In cross-examination, Mr. Fortin acknowledged that in 1987 the position of the local Branch President for the Eastern Townships was fully detached whereas at the time notice to bargain was served, the position was neither fully nor partially detached.

[91] He also acknowledged having a discussion with the regional director for Quebec in 2007-2008 concerning the Branch President's position in Lacolle, Quebec. At the time, Mr. Bisson was the Branch President and was fully detached.

[92] When Stefan Laroche was elected president in February 2012, the local Branch President position in Lacolle went from being fully detached to non-detached. This was due to the fact that Mr. Laroche did not want to lose his entitlement to benefits that accrued from performing the duties of his position.

[93] Christine Miller, the Branch President for the Eastern Townships, subsequent to her election, went from being fully detached to non-detached.

C. Ms. Theriault-Power

[94] Ms. Theriault-Power stated that the arrangement with the union concerning leave with pay for union representatives was not subject to a written agreement; nor was there any written policy with respect to this type of leave.

[95] She stated that this type of leave was granted when union representatives submitted time sheets to their supervisors for approval.

[96] She testified that the decision to discontinue the practice of continuing pay for union representatives was made because the agency was undergoing a number of cost-cutting exercises as a result of a strategic round of review. As a result of the review in the summer of 2011, CBSA was required to absorb an operating budget saving of 5%, which was equivalent to $143 million. As the agency came to grips with finding savings, it became apparent the agency could not continue to pay union representatives during working hours while at the same time having to cut positions. Between 50 to 60% of the agency's total budget was related to salary for operations.

[97] Prior to 2011, measures had been taken to reduce costs. In 2007, as a result of a strategic review, the department's operations budgets were frozen. There were caps placed on travel and hospitality. The agency was required to produce savings in the amount of $58 million. This led to a reduction in staff. Nevertheless, the agency guaranteed a reasonable job offer to those impacted by the reduction. Reductions were achieved through attrition or the redeployment of staff.

[98] With the requirement in 2011 to find $143 million in savings, the agency identified some 1100 positions to be eliminated. In the past, when the agency was required to reduce costs, the agency targeted the back office as opposed to operations. However, with the size of the cost savings mandated in 2011, both headquarters and the regions needed to be included in the reductions.

[99] The agency was not saying “no” to all types of leave for union business and certainly was prepared to grant leave for union business in accordance with the provisions of the collective agreement.

[100] In cross-examination, Ms. Theriault-Power stated that the extent of the reductions did not become publicly known until they were tabled in Parliament on March 29, 2012. Prior to that time, they were subject to Cabinet confidence. One of the proposals of the agency to Cabinet was the cessation of the practice of paying union leave. She believed that correctional services as well as the CBSA made such proposals.

[101] She was asked whether she disagreed with the evidence of Mr. Fortin that managers expressed the view that there were cost efficiencies in having union representatives on full-time leave as there would be no necessity to backfill positions on an overtime basis. She stated that she did not know as she was not there at the time.

[102] She acknowledged that the agency did not take into account the cost savings that might be attributed to not having to backfill representatives who had to take leave to perform the union responsibilities.

[103] She agreed that the arrangement with respect to the granting of union leave with pay could not be implemented without the agreement of both the union and the employer.

[104] As of December 11, 2012, there had been no involuntary layoffs; however, it was anticipated that there may be some prior to the end of the fiscal year. The agency was forecasting some 250 involuntary departures, which included management.

D. Joe McMahon

[105] Mr. Joe McMahon is the acting director of the Windsor port of entry. He commenced employment as a customs inspector in 1990, and during the period from 2005 to 2010, he was the human resources director for Windsor. In that capacity, he was responsible for the ports of Windsor, Sarnia and London, Ontario.

[106] There were three branches of the bargaining agent that corresponded with the three ports.

[107] In or about 2005, the local Branch President in Windsor, Marie Claire Coppel, reported in uniform but performed mainly union functions and rarely performed any functions as a border services officer. In 2006, she went to a national position. Similarly, a Mr. Jason McMichael from Sarnia went to a national position. Thus, the

Windsor port of entry had two border services officers performing duties at the national level.

[108] The region was concerned about paying two border services officers at the national level to perform union duties as well as having three local presidents with various arrangements. The local union president in Windsor, Karen Church, was on full-time leave with pay for union business. The local president was granted two hours per shift to perform union business. The local president in London didn't request any time for leave to perform union business as he had a desk job and was able to perform his union business while maintaining his other responsibilities.

[109] In 2008, Karen Church became a member of the national executive. Mr. Anthony Essex became local president in Windsor. Mr. McMahon received a direction from the centre to review the arrangements with the local presidents in terms of granting leave for union business. Consequently, the arrangement with respect to the local president in Windsor changed, and the hours per week devoted to paid union business were reduced from 37.5h to 22h per week. This was a management decision and was not negotiated with the union.

[110] In September 2009, Mr. Essex requested an additional four hours per week to work on union business. This request was denied. There were no grievances filed as a consequence of the reduction of hours.

E. Christine Durocher

[111] Ms. Christine Durocher has been the director of passenger operations since October of 2011 in the greater Toronto area for CBSA responsible for Terminal One and Terminal Two. She commenced employment with the Canada Customs and Revenue Agency in 1989 in Fort Erie. She moved to Toronto in 2001 as chief of intelligence and from there to director of trade operations.

[112] She stated that since October 2011 leave with pay for union business outside of the collective agreement does not exist in passenger operations in Toronto. When she assumed her present position, the local president was Jeneena Lebond. She was not aware of whether there was an arrangement with respect to granting leave for union business outside of the collective agreement to Ms. Lebond as she worked in the enforcement centre and did not report to her.

[113] The Branch President changed in November 2011. The new president was Mark Weber. Shortly after his election, she met with Mr. Weber. He requested access to the union desk that previously existed in Terminal One. He also asked to continue his work schedule of five days on, four days off, and hours of work from 05:00 until 15:00. Ms. Durocher stated that she was amenable to his proposal and agreed to it.

[114] He wanted to have the same arrangements as the previous presidents in Toronto, which was not to work in uniform and to be on permanent full-time union leave with pay.

[115] She testified that her response was that that was not the practice in her experience. Coming from the trade organization, her experience was that the union presidents from the trade organizations for the greater Toronto area as well as for Fort Erie, Windsor/St. Clair, London and Hamilton still worked as border services officers and applied for leave at various times. She specifically referenced Fort Erie and Windsor.

[116] He responded that he was going to have to have discussions with the regional director general and labour relations. She committed to have follow-up discussions with him. There was no grievance filed or any formal complaint made.

[117] Mrs. Durocher referred to a series of emails exchanged between the parties between December 16, 2011 and February 10, 2012 reflecting the different positions of the parties that culminated in an understanding.

[118] It was Ms. Durocher's view that Mr. Weber would report each day in uniform to the 7 a.m. roll call where he would be added to the daily roster. He was to work with the superintendent to determine the actual scheduling of the extent to which he would be performing border services officer duties or requesting “6400” leave for union duties or leave without pay.

[119] Mr. Weber, having spoken with the director and the director general, expected that he would be extended the same courtesy that had been extended to the last three local presidents in that he would not be in uniform and would be using 6400 leave while on all union duties. He stated that his uniform was in his locker and that he would be willing to lend a hand were the superintendent on duty in dire need of line staff.

[120] In February, it was brought to Ms. Durocher's attention that Mr. Weber had been requesting union leave with pay on a weekly basis and not wearing a uniform.

[121] Ms. Durocher spoke to Mr. Weber concerning this issue. On February 9, Mr. Weber met with the director general to discuss the issue. On February 10, 2012, the director general wrote an email to Mr. Weber referring to a meeting between them the previous day. The email reads in part as follows:

. . .

> *Let me start by thanking you for the meeting yesterday which I found both positive and productive in articulating the manner in which your activities will be managed to ensure that you are able to provide adequate representation for your members and that management has appropriate assurance that the application of union leave is managed in accordance with the provisions of the collective agreement. I want to verify the discussion we had yesterday...*
>
> *The Chief that you will report to regarding your attendance and requests for union leave will be Darrell Maillet…*
>
> *As we discussed, you are expected to be in uniform to perform your duties as BSO when you were not conducting approved union activities. If you have received approval in advance for union leave at the beginning of your shift you will not be expected to report in uniform but will be required to change once your union activities are completed and report for duty. I also recognize there may be entire days where the leave has been approved during which time you will not be required to be in uniform as the employee representative conducting union activities.*

. . .

[122] In cross-examination, Ms. Durocher was asked, during the period of February 2012 until August 2012, how many days Mr. Weber worked as a border services officer. It was her understanding that Mr. Weber would report to the chief each day and apply for 6400 leave. The chief was given a lot of flexibility to permit him to establish a local in the greater Toronto area. She acknowledged that the 6400 forms for union leave were not submitted to her.

[123] The personal leave status report for Mr. Weber and a business record of the employer filed as an exhibit in the proceedings indicates that Mr. Weber was invariably granted leave with pay for union business, code 6400, for the days he worked subsequent to October 2011.

F. Martin Bolduc

[124] Mr. Bolduc is the associate VP of operations for CBSA. He has been employed in the public service since 1988 starting as a student customs inspector and then as a customs inspector, and he held a variety of positions at the regional level. In 1995, he was appointed to manage the operations in Dorval. He became the executive director for the Quebec region in 2004 and the regional director general in 2007. He moved to Ottawa and commenced the duties of his present position in April 2010. In his present position, he is the regional director general for Quebec operations and is responsible for the management of some 2500 employees.

[125] He testified as to the union leave status of the various Branch Presidents in Quebec. During the time he was the director general for the region, Jacques Lafleur was the Montreal Branch President, and Claude Bisson was the Montigny Branch President. Both had responsibility for Montreal. Both were fully detached for union business. They provided the employer with timesheets.

[126] The situation changed when Mr. Bisson retired. The branch held an election, and Stefan Laroche was elected as president. He had discussions with Mr. Fortin prior to Mr. Bisson's retirement in the summer of 2007 in an informal meeting about what would happen when Mr. Bisson retired. He told Mr. Fortin that the agreement with respect to paid union leave for that branch would end at that time.

[127] He was asked whether he was aware of any other examples where the employer had denied requests for union leave with pay. He stated that, in 2008, Fleurent Roi had been the local president for the Eastern Townships. Mr. Roi was a border services officer who took a regular shift and also tried to perform his union responsibilities. Mr. Roi was seeking more time on leave to take care of union responsibilities. Mr. Bolduc's answer to him was "No."

[128] In cross-examination, Mr. Bolduc stated that the agreement with respect to Mr. Bisson's status as being fully detached was in place before he got there.

[129] It was proposed to him that these agreements were put in place to benefit both the employer and the union for the purpose of problem solving. He answered that that was not happening and there was only limited success.

[130] He explained that Mr. Roi, the Branch President for the Eastern Townships, was replaced by Christine Miller. Mr. Roi was performing a regular job on the night shift and was doing union business during the shift. In the summer of 2008, he was seeking one day a week to perform his union responsibilities.

VI. Merits

A. Argument of the complainant

[131] After notice to bargain is issued by one of the parties, the statutory freeze imposed by section 107 requires the parties to observe each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in the collective agreement and that is in force on the day the notice is given.

[132] The decision in *The Queen in right of Canada as represented by the Treasury Board v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.), remains the leading pronouncement on this issue. In that case, the Federal Court of Appeal determined that a term or condition of employment can take the form of an agreement or unilateral exercise of management authority after consultation. The Court accepted that the overtime policy at issue in that case, that employees would only work overtime on a voluntary basis whether it was established through agreement or management authority, was a term or condition of employment because ". . . the policy was a measure of rights and obligations. It could have legal consequence."

[133] The decision further established that the statutory freeze provision applies not just to terms and conditions of employment included expressly in the collective agreement but also to those terms and conditions, which may be included in the collective agreement.

[134] In *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 148-2-118 (19860611) a statutory freeze complaint over the employer's repeal of its public servant's conflict of interest guidelines, the Board held that there was no doubt that the old public servant's conflict of interest guidelines are terms and conditions of employment that might have been or may be in the future embodied in the collective agreement.

[135] The term or condition of employment must have been in force at the time notice to bargain was given. The words "in force" in the context of the statutory freeze provision mean "in place," "existing" or "operating." The words "in force" do not mean "enforceable in law."

[136] The Board's jurisprudence supports taking a broad approach to the freeze established by section 107. The existing terms or conditions of employment that are in place at the time of notice to bargain are required to be observed.

[137] The freeze complaint will be substantiated even in cases where the term or condition could have been rescinded prior to the freeze taking effect.

[138] In the present case, the union leave agreement between the parties was a term or condition of employment capable of being embodied in the collective agreement. The agreement was in force when the notice to bargain was issued. The employer's unilateral termination of the agreement during the freeze period is therefore a breach of section 107 of the *Act*.

[139] The bargaining agent relied upon the following authorities: *Treasury Board v. Canadian Air Traffic Control Association*, *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-02-187 (19910502), *Public Service Alliance of Canada v. Her Majesty in right of Canada as represented by Treasury Board*, PSSRB File No. 148-2-75 (19820406), and *Canadian Federal Pilots Assn. v. Treasury Board*, 2006 PSLRB 86.

B. <u>Argument of the respondent</u>

[140] The case raises the following questions/legal principles:

- Was the practice of granting leave with pay for union business a term or condition of employment applicable to the employees in the bargaining unit, or were they a series of individual arrangements not captured by section 107 of the *Act*?

[141] The employer submits that the practice was a series of individual arrangements not captured by the section. Section 107 of the PSLRA does not apply to the respondent's decision respecting an individual employee situation or that of a small

group of employees. The section is aimed at those terms and conditions of employment applicable to the employees in the bargaining unit collectively. What the evidence reveals is a practice outside of the collective agreement to give a small number of employees leave for union business. The practice at issue was more a privilege extended to the bargaining agent than it is a term or condition of employment for the employees in the bargaining unit.

[142] In the "Open Landscape Offices" case, *Professional Institute of the Public Service of Canada v. Canada (Treasury Board)*, PSSRB File No. 148-02-11 (19730709), the Public Service Staff Relations Board ("the former Board") indicated that it had some doubt whether the obligation to consult with the trade union could be regarded as a term or condition of employment applicable to employees. The Board observed that the obligation could probably be more accurately described as a right, privilege or duty of the bargaining agent and the employer. The respondent also relied upon *Royal Ottawa Health Care Group*, [1999] OLRB Rep. July/August 711, and *Canadian Union of Operating Engineers & General Workers v. AES Data Limited*, 79 C.L.L.C. 16,185 (Ont.L.R.B.).

[143] The evidence established that the practice varied from region to region from time to time and from employee to employee, and at best, these were a patchwork of individual arrangements that did not necessarily pass from one employee to the new incumbent. Accordingly, the complaint should be dismissed because the alleged agreement does not fall within the scope of the protection afforded in section 107.

[144] In the alternative, looking at the practice in its full context, was the respondent's authority to opt out of granting this leave carried into the freeze period? The respondent argues that, by virtue of the principles under the *Financial Administration Act* and under the business-as-usual/reasonable expectations test, the employer's authority to opt out of granting this type of leave was carried into the freeze period.

[145] It is well settled that the respondent has the authority to unilaterally alter the terms and conditions of employment subject only to a specific limitation in the statute or collective agreement. The root of this authority is paragraph 7(1)(*e*) and section 11.1 of the *Financial Administration Act*. There can be no dispute that the respondent had the authority, before notice to bargain collectively, to opt out of the practice of granting union leave outside of the collective agreement.

[146] The respondent argues that on the facts we are faced with an ad-hoc arrangement that seems to differ from time to time and one representative to another. We have evidence that the respondent exercised its authority to deny or amend the leave granted. It points to the situations described in the evidence in Windsor, Saskatchewan, Lacolle, the Eastern Townships and Toronto.

[147] This discretion or authority was part of the terms and conditions of employment that carried into the freeze period, and the employer's decision to cancel the practice was a mere exercise of this discretion. This approach has been characterized as the business-as-usual or reasonable expectations test that has been adopted by the Board. The reasonable expectation of employees on this type of leave would be that, during periods of serious economic downturn and significant budget cuts, this discretionary practice could be brought to an end by the respondent and is consistent with the respondent's normal business practice.

[148] The respondent referred to the following authorities: *Spar Aerospace Products Ltd.*, [1978] 1 Can. LRBR 61; *Royalguard Vinyl Co.*, [1994] OLRB Rep. January 59; *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-02-186 (19910724); *Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016); *Public Service Alliance of Canada v. National Capital Commission*, [1996] F.C.J. No. 57 (C.A.)(QL) ; and George W. Adams, Q.C., *Canadian Labour Law*, 2nd ed.

[149] In the further alternative, the employer argues that it was utilizing its customary latitude to respond to extraordinary circumstances.

VII. Conclusions on the merits

[150] I conclude on the facts based on the evidence of Mr. Fortin that, at the time notice to bargain was given in February 2011, the positions of the first, second, third and fourth vice-presidents had all been fully detached for approximately 10 years. I also conclude that the position of the equal-opportunities representative had been fully detached for approximately 7 years.

[151] Based on the evidence of Mr. Fortin, I also conclude that the position of the Montreal branch president had been fully detached for approximately 25 years, and

the position of the Vancouver and Headquarters branch president had been fully detached for a period of 10 years.

[152] The situation with respect to the Toronto branch president is not as clear-cut. Until October of 2011, the position had been fully detached for some significant period of time. The new branch president sought to have the same arrangements as the previous presidents, which was not to work in uniform and to be on permanent full-time union leave with pay. Ms. Durocher, who had been appointed the director of passenger operations for the greater Toronto area in October of 2011, based on her experience was of the view that leave for union business should be granted solely in accordance with the provisions of the collective agreement.

[153] The issue was escalated and ultimately resolved, at least, on paper in an email exchange between the parties in the following manner. Mr. Weber was expected to be in uniform to perform his duties as a border services officer when not conducting approved union activities. However, if he had received approval in advance for union leave at the beginning of his shift, he was not expected to report in uniform. It was also recognized that there may be entire days where leave had been approved, during which time he would not be required to be in uniform.

[154] Despite the written understanding, the documentary evidence indicates that Mr. Weber was deployed full-time for union business subsequent to October 2011 as he was invariably granted union business leave, code 6400, as indicated on the respondent's personal leave status report. I therefore conclude as a matter of fact that the Toronto branch president was also fully deployed.

[155] I was not provided with any evidence of circumstances where the respondent, either by the exercise of managerial prerogative or through informal consultation with the union, had sought to change the fully deployed status of any of the national executive positions or the Branch Presidents of the four locals that had been fully detached. As noted, those positions had been fully detached for periods ranging from 25 to 7 years, with most being fully detached for at least 10 years, other than with respect to Toronto, which in my view was more form than substance.

[156] I also conclude that at the time of notice to bargain 11 branch presidents were granted varying amounts of part-time leave with pay for union business and were partially detached. Approximately 7 branch presidents were not fully or partially

detached but were granted leave for union business in accordance with the provisions of the collective agreement. I conclude as well that the amount of leave granted to those branch presidents who were partially detached varied from two days per week to one hour per day depending on the size of the local.

[157] Clearly, the situation was different with respect to the officers of the union who were neither national vice-presidents nor the branch presidents in Toronto, Montreal, Vancouver or Headquarters. This is evidenced by the difficulty some of those local branch presidents were experiencing in obtaining leave with pay to perform representational duties over and above the leave provided in the collective agreement that led to the union tabling a demand in collective bargaining seeking consistency for all branch presidents in the granting of leave with pay for union business. The evidence is clear that the proposal was not intended to alter the agreements or practices already in place for the other union officers.

[158] The evidence also discloses that Mr. Fortin was involved in reaching agreements at the regional level for 7.5 hours of leave with pay per week over and above the entitlements in the collective agreement for the three branch presidents in the Atlantic Region. Mr. Fortin acknowledged that the branch president positions in the Eastern Townships and Lacolle, Quebec, had been changed by management from fully detached to non-detached. The new local presidents did not want to lose their entitlement to benefits that accrued from performing the full duties of their positions.

[159] Mr. Bolduc testified that the status of the branch presidents for Montigny, Quebec, changed from being fully detached as a result of a management decision. He also stated that in 2008 when the local president for the Eastern Townships sought more time to perform his union duties under the provisions of the collective agreement, he denied the request.

[160] Mr. McMahon testified that in 2008 he received a direction to review the arrangements for union leave with local presidents under his jurisdiction. Consequently, the arrangement with respect to the local president in Windsor was changed, and the hours for union business over and above those provided in the collective agreement were reduced from 37.5 to 22 hours per week.

[161] I conclude as a matter of fact based on this evidence that management did exercise from time to time its managerial prerogative to modify its practice of granting

leave for union business over above the provisions in the collective agreement for the positions of local branch presidents other than for the four large branch offices in Montreal, Toronto, Vancouver and Headquarters, for the equal opportunities representative and for the first, second, third and fourth national vice-presidents.

A. Law

[162] Section 107 of the *Public Service Labour Relations Act* provides as follows:

> ***107.*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > (a) *if the process for the resolution of a dispute is arbitration, an arbitration award is rendered; or*
> >
> > (b) *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[163] The Federal Court of Appeal, in *The Queen in right of Canada as represented by Treasury Board v. Canada Air Traffic Control Association,* [1982] 2 F.C. 80, set out the purpose of the predecessor section as follows:

. . .

> *. . . after the notice to bargain, the employer-employee relationship existing immediately prior to the notice, in so far as terms or conditions of employment are concerned, should be preserved. One of the incidents in that relationship, though not embodied in the collective agreement, was the mutual understanding that the right of the employer to require overtime work within the limits specified in the collective agreement, had been modified to permit the employees to refuse to do so. While that might not have been a right or privilege which could have been enforced as part of the collective agreement it certainly was one which existed or, in the words of the section, was "in force" when the freeze imposed by section 51 came in to play.*

. . .

[164] The provisions of section 107 of the current *Public Service Labour Relations Act* are, for all intents and purposes, identical to the provisions found in section 51 of the *Public Service Staff Relations Act*.

[165] Labour relations boards have struggled to determine the appropriate approach in interpreting the purpose of freeze provisions contained in labour relations legislation.

[166] George Adams, in his text Canadian Labour Law, in the second edition at page 10-91, describes the different approaches as follows:

. . .

> *. . . statutory freezes have at least two possible included purposes. One is represented by the "business as before" analysis where the emphasis is on the maintenance of the key terms of employment until these matters are bargained…. The "business as before" view, however, is not concerned with the freeze of the status quo* per se *but rather with changes out of the pattern of the past. This view asserts that business and workplace life must continue…. The other and contrary viewpoint is represented by a literal status quo approach to the freeze. This perception of the freeze sees it as a more significant prelude to bargaining and ascribes greater weight to the collective bargaining process. By making changes subject to the agreement of the parties, this approach provides for "an equal partnership" at least at the commencement of collective bargaining relationships and during the initial stages of bargaining after a relationships formation. The difficulty with this approach is its failure to accommodate necessary and inevitable changes or the artificially high price for change that may be exacted in such circumstances.*

[167] The leading case on the business-as-before approach is that of *Spar Aerospace Products Ltd.*, a decision of the Ontario Labour Relations Board in which that board stated that the legislative intention of the statutory freeze was to maintain the prior pattern of the employment relationship in its entirety. That board stated in part at p. 68:

. . .

> *The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the*

> *circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union.*
>
> . . .

[168] The former Board has also adopted the "business as before" approach.

[169] Of note, Deputy Chairman Chodos articulated the approach, in *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-02-186 (19910724). The case dealt with a complaint alleging that the employer had breached section 52 of the *Public Service Staff Relations Act* ("the former Act") by rescinding a policy following notice to bargain. The said policy provided that the employer would allow for the provision of leave for at least one air traffic controller per day notwithstanding that overtime would thereby be required in order to meet operational needs.

[170] The primary issue in the case was whether there was a term and condition in existence prior to the freeze that provided for leave of at least one controller per day even if overtime was required. On the basis of the evidence, the adjudicator concluded that there was an understanding to the effect that overtime could be utilized to cover off leave for one shift per day, provided that overtime funds were available. Adjudicator Chodos stated:

> . . .
>
> *In my view, this contingency was as much part of the terms and conditions caught by the section 52 freeze period as any understanding that overtime would be approved to cover off daily leave requests.*
>
> *It is not disputed between the parties that the employer, prior to the commencement of the freeze period, could unilaterally revoke any policy concerning the approval of overtime. Mr. Barnacle submitted that it was therefore unnecessary for the employer to express this proviso. He goes on to argue that financial constraints cannot be relied upon as a basis for avoiding the effects of section 52. However, when the employer expressly stated, as I so find, that there was this contingency, then that must be considered part of the terms and conditions of employment. I do not believe that it is open to the bargaining agent to "cherry pick" under section 52, that is to choose which aspects of an understanding with*

> *local management it likes for purposes of section 52, and to ignore the rest.*
>
> . . .

[171] Deputy Chairman Chodos referred to Mr. Justice Urie's judgment in *The Queen in right of Canada as represented by the Treasury Board v. Canadian Air Traffic Control Association* as follows ". . . the apparent purpose of section 51 … is that, after the notice to bargain, the employer/employee relationship existing immediately prior to the notice insofar as terms or conditions of employment are concerned, should be preserved. His Lordship was referring not only to some aspects of the employer/employee relationship, but rather its totality." In my view, this is an example of the application of the business-as-usual test.

[172] As observed by Adams in his text at page 10-81, the Ontario Labour Relations Board, in *Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers v. Simpsons Limited*, 85 CLLC 16,035, concluded that the business-as-before test was effective in assessing the employee privileges frozen by section 79 (now section 86) of the *Ontario Labour Relations Act* but less effective at addressing first-time events. To respond to those situations, that Board expressly articulated the "reasonable expectations" approach.

[173] That Board reasoned as follows:

> . . .
>
> *The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employers operation is relevant to assess the impact of the freeze. There are also "first-time" events and it is with respect to that category that the "business as before" formulation is not always helpful in measuring the scope of employees' privileges.*
>
> . . .

[174] The Board decided that in addressing the category of first-time events that instead of concentrating on "business as before" to focus on the "reasonable expectation of employees."

[175] The Board stated:

. . .

> *The "reasonable expectations" approach clearly incorporates the "practice" of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, "benefits," to use a term often found in the jurisprudence) in the specific circumstances of that employer. The "reasonable expectations" test though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would "reasonably expect" such an occurrence during the freeze. . . .*

[176] The Board reasoned that layoffs were consonant with the reasonable expectation approach as few workforces are entirely static, and employers are generally expected to respond to changing economic conditions, and in this sense, it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs even where layoffs are resorted to for the first time during the freeze period.

[177] The former Board, in the particular circumstances of the case in *Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016), determined that the appropriate interpretation of section 52 to follow was the one adopted by the Ontario Labour Relations Board in the 1978 *Spar Aerospace* and the 1985 *Simpsons* decisions.

[178] In that case, the complainant alleged that the actions of the National Capital Commission in engaging in large-scale privatization and contracting out constituted a fundamental alteration of terms and conditions of employment of its employees in the bargaining unit, contrary to section 52 of the *Act*.

[179] The bargaining agent argued that the former Board should adopt the concept of a static freeze and that once the freeze is triggered there is a partnership between the employer, bargaining agent and employees such that there can be no revision of the terms and conditions of employment without the partnership looking at it.

[180] The former Board found that the complainant had failed to meet its onus of proof. The former Board was not convinced that, on the evidence submitted, the respondent's actions and decisions did not conform to the normal business practices of the Commission.

[181] The former Board stated:

> *The Board has decided that in this particular case the appropriate interpretation of section 52 to follow is the one adopted by the Ontario Labour Relations Board in the 1978 Spar Aerospace (supra) and the Simpsons (supra) decisions where it addressed a similar statutory provision. This interpretation was also recognized by the Canada Labour Relations Board in Québec Aviation Limitée (1985), 62 di 41 where it stated that the primary focus of that Board when looking at such complaints is an objective one. That is, the Board will review the employer's normal business practices and will attempt to determine, through the evidence, whether the changes complained of are part of the employer's normal practices, or whether they do not conform to those practiced previously.*
>
> [Emphasis added]

[182] The former Board concluded:

> *In the Board's view, the employees do not have a right of ownership over their jobs and the freeze does not require the employer to maintain a static workforce. The employees did not have a right not to be laid off because the evidence . . . did establish that the NCC had resorted to lay-offs in the past. Moreover, the Board agrees with Mr. Harnden's argument that there is no evidence that the NCC has voluntarily relinquished its right to contract out. Thus the Board finds that in the circumstances of this case the existing jobs and employment of the employees were not frozen by the triggering of section 52 of the Act.*

[183] The decision was judicially reviewed in the Federal Court of Appeal. In *Public Service Alliance of Canada v. National Capital Commission*, [1996] F.C.J. No. 57 (C.A.)(QL), dismissing the application stated as follows:

> . . .
>
> *The Public Service Staff Relations Board adopted an interpretation of section 52 of the Public Service Staff Relations Act which incorporates the "normal business practice" or "business as usual" test accepted by the Ontario*

> *Labour Relations Board and others in such cases as Spar Aerospace Products Limited, Simpsons Limited, AES Data Limited, and The Ottawa Public Library Board. This test goes farther than this Court found it necessary to go in CATCA and includes in the statutory freeze not only express and implied terms of employment, informal agreements and established employer policies (CATCA dealt with a settled policy regarding voluntary overtime) but also the employees' reasonable expectations as to the employer's conduct. We do not find it necessary to express an opinion as to whether the Board was correct to apply this test since it is clear that it is the most favourable to the position of the applicant and that the Board's conclusion was one which was open to it on the evidence. Indeed, the applicant did not dispute that the employer had never given up its right to contract out work or to lay off employees; rather, it was the massive scale of the layoffs coupled with the proposed "privatisation" of many of the NCC's operations which were said to be offensive to the statute. Those were submissions which the Board carefully considered and rejected, and its conclusions, relating as they do to an area which is central to the Board's experience and expertise and requires a nice appreciation and balancing of the competing interests at play, are entitled to a high degree of curial deference. . . .*
>
> . . .

[184] In the present matter, the respondent argues that the practice of granting leave with pay for union business was a series of individual arrangements not captured by section 107 and that the practice varied from region to region from time to time and from employee to employee, and at best, these were a patchwork of individual arrangements. Accordingly, the complaint should be dismissed because the alleged agreement does not fall within the scope of the protection afforded in section 107.

[185] In the alternative, under the business-as-usual/reasonable expectations test, the CBSA's authority to opt out of granting this type of leave was carried into the freeze period.

[186] The jurisprudence establishes that a term or condition of employment referred to in section 107 can take the form of an agreement or unilateral exercise of management authority. I conclude that the practice of granting union leave over and above the provisions in the collective agreement was the exercise of management authority but nevertheless was a term or condition of employment capable of being embodied in the collective agreement.

[187] Section 107 in my view does not distinguish between those terms and conditions of employment applicable to every employee in the bargaining unit and those terms and conditions of employment that may apply to a small group of employees in the bargaining unit. The Board's jurisprudence supports taking a broad approach to the freeze established by section 107 which should not be unduly limited on the basis of the number of affected employees.

[188] In my view, the evidence does not support the conclusion that the practice of granting union leave with pay over and above the provisions in the collective agreement was a patchwork of individual arrangements not falling within the scope of the protection of section 107. There has been a consistent practice over a significant period of time with respect to the granting of union leave with pay to the national executive, the local branch presidents in Toronto, Vancouver, Montreal and Headquarters, as well as the other local branch presidents, who were partially detached. This practice in my view is prima facie captured by section 107.

[189] I am not persuaded that section 107 or the Federal Court of Appeal decision in CATCA no.1 require a literal status quo approach to the freeze or a static freeze. I agree with Deputy Chairman Chodos' reasoning in CATCA No. 2 based on Mr. Justice Urie's reasoning in CATCA no.1 that the employer-employee relationship in its totality should be preserved, in other words that the prior pattern of the employment relationship should be maintained.

[190] Accordingly, I propose to adopt the business-as-before approach and determine the pattern established by the employer in granting, rescinding or modifying union leave with pay before the freeze occurred.

[191] I concluded on the facts that, at the time notice to bargain was given in February 2011, the four vice-presidents, the equal-opportunities representative, as well as the branch presidents for Toronto, Vancouver, Montreal and Headquarters, had been fully detached for a significant period of time. There was no evidence that management ever sought to repudiate these arrangements.

[192] Applying the business-as-before principle to these specific positions, I conclude that there was no business practice of the employer illustrative of a pattern of rescission or modification of the leave for union business arrangements that could be carried into the freeze period.

[193] I also concluded on the facts that at the time notice to bargain was given 11 branch presidents had been granted varying amounts of time of leave for union business over and above that provided in the collective agreement, which varied depending on the size of the local.

[194] Unlike the situation with respect to the four vice-presidents, the equal-opportunities representative and the branch presidents for Toronto, Vancouver, Montreal and Headquarters, there was evidence that management did exercise its prerogative from time to time by rescinding or modifying the amount of union leave granted to other branch presidents. Applying the business-as-before principle to these partially detached positions, I conclude that there was a pattern or business practice of the employer in which the employer rescinded or modified the amount of leave, which practice could be carried into the freeze period.

[195] The employer urged that the Board should apply the "reasonable expectations" test adopted by the Ontario Labour Relations Board in *Simpsons Ltd.* and referred to in the predecessor Board's case in *Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016), arguing that the reasonable expectation of employees on this type of leave would be that during periods of serious economic downturn and significant budget cuts this discretionary practice could be brought to an end by the respondent after notice to bargain had been given as it was utilizing its customary latitude to respond to extraordinary circumstances.

[196] It is apparent from the discussion recited from Adams and the extracts from *Simpsons Ltd.* that the Ontario board articulated the reasonable expectations approach in circumstances where it had difficulty in applying the "business as before" formulation such as in circumstances where changes could not be measured against a pattern and in first-time events that occurred after the freeze period.

[197] In the National Capital Commission ("the NCC") case, the union was not able to point to any term or condition of employment or practice that could be the subject matter of a provision of a collective agreement that the employer contravened after notice to bargain had been given. There was no evidence that the NCC had voluntarily relinquished its right to contract out. There was evidence that the NCC had resorted to layoffs in the past. There was no term or condition of employment or practice that

could be made the subject of the collective agreement that was frozen by the triggering of the *Act*.

[198] In my view, the case was decided primarily on the business-as-before principle.

[199] The present matter is not a case involving first-time events or circumstances that would warrant departing from the "business as before" approach as there is clearly a pattern upon which the changes can be measured.

[200] I conclude therefore that CBSA's decision to terminate the union leave practice or agreement with respect to the detached employees, namely four vice presidents, the equal-opportunities representative and the local branch Presidents in Toronto, Montreal, Vancouver and Headquarters is contrary to the statutory freeze in section 107 of the *PSLRA*.

[201] I also conclude that the CBSA's decision to terminate the union leave practice or agreement with respect to those branch presidents who were partially detached is not contrary to the statutory freeze in section 107 of the *PSLRA*.

[202] I also conclude, based on the evidence of Mr. Fortin, that as of August 15, 2012, the bargaining agent covered the costs associated with the pay of the detached employees and as such suffered a direct monetary loss as a consequence of the breach by the CBSA of the statutory freeze in section 107 of the *PSLRA*.

[203] I acknowledge the importance and significance of the impact on the Agency of the cost-cutting exercises mandated by the strategic round of review; however, under the freeze provisions of the *Act,* the implementation of this initiative must wait until the expiration of the freeze period or in the interim, with the consent of the bargaining agent.

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

(The Order appears on the next page)

VII. Order

[205] I declare that the respondent contravened section 107 of the *PSLRA* in terminating the union leave arrangements only for those employees who were fully detached, namely the four vice-presidents, the equal-opportunities officer and the Branch presidents in Montreal, Toronto, Vancouver and Headquarters ("the detached employees").

[206] I order the respondent to continue to respect the union leave arrangements for the duration of the statutory freeze to the terminal date specified in section 107 of the *PSLRA* for the detached employees.

[207] I order the respondent to pay damages to the bargaining agent equal to the monies that would otherwise have been payable from August 15, 2012 to the date of this award to the detached employees had the arrangements not been terminated.

[208] I remain seized of this matter for a period of sixty (60) days from the date of this award in the event that the parties encounter any difficulties in its implementation.

April 23, 2013.

David Olsen,
a panel of the Public Service
Labour Relations Board