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*Federal Public Sector
Labour Relations and
Employment Board Act and
Public Service Labour
Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

NATIONAL POLICE FEDERATION

Applicant

And

ASSOCIATION DES MEMBRES DE LA POLICE MONTÉE DU QUÉBEC

Applicant

And

TREASURY BOARD

Respondent

Indexed as

National Police Federation v. Treasury Board

In the matter of an application for certification under section 54 of the *Public Service Labour Relations Act*

Before: Catherine Ebbs, Stephan Bertrand, and Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the National Police Federation: Christopher Rootham, counsel

For the Association des Membres de la Police Montée du Québec: Marco Gaggino, counsel

For the Respondent: Simon Deneau and Sean Kelly, counsel

Decided on the basis of written submissions filed
December 7, 11, and 20, 2017, and January 4, 5, and 8 and February 2 and 19, 2018.

REASONS FOR DECISION

I. Application before the Board

[1] The Association des Membres de la Police Montée du Québec (“AMPMQ”) and the National Police Federation (“NPF”) have each applied under s. 54 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the former Act”) to be certified as the bargaining agent of the regular members (defined as excluding officers and civilian members) of the Royal Canadian Mounted Police (“RCMP”). The NPF applied on April 18, 2017, to represent the employees who are RCMP regular members and employees who are reservists throughout Canada. The AMPMQ applied on April 5, 2017, to represent only those regular members stationed in the province of Quebec (“Division ‘C’”).

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9; (Bill C-7) “the Amending Act”), received Royal Assent. It changed the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the former Act to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (“the Act”). The Amending Act also established the collective bargaining regime for employees who are regular members and employees who are reservists of the RCMP, following the Supreme Court of Canada’s (SCC) decision in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (“MPO”).

[3] In a previous decision, *National Police Federation v. Treasury Board of Canada*, 2017 FPSLREB 34 (“the consolidation decision”), the Board consolidated the two applications. Following a motion from the NPF, it also made a determination as to the appropriate bargaining unit. The Board declared that the bargaining unit for the purposes of this certification is described as follows:

The group that consists exclusively of all the employees who are RCMP members (excluding officers and civilian members) and all the employees who are reservists constitutes the single, national bargaining unit that is appropriate for collective bargaining.

[4] Following that decision, the Board sought written submissions on the questions of whether each applicant is an “employee organization” within the meaning of the *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Labour Relations Act*

Act, whether each applicant meets the additional requirements for an employee organization as set out in the governing legislative framework, and whether the representative was duly authorized to make the application. The parties each provided submissions on these questions.

[5] In addition to its submissions, the AMPMQ formally requested that the Board decide whether s. 238.14 of the Act, which mandates a single bargaining unit for employees who are RCMP regular members and employees who are reservists, is constitutionally valid and whether the Board should apply it. The AMPMQ asked for a stay of the certification process until the constitutional question is decided. The parties were invited to provide submissions on this question.

[6] For the reasons that follow, the Board has decided to hear the constitutional question and to continue with the certification process. As the NPF is the only applicant that meets the legislative requirements for certification, a vote will be held to determine whether employees who are RCMP regular members and employees who are reservists throughout Canada wish to be represented by the NPF as their bargaining agent. However, the certification proceedings will be stayed immediately after the vote has taken place and before any tallying of the ballots. The Board will reconsider the stay of proceedings after it has heard and determined the constitutional issue and, if necessary, after a review of the decision determining the appropriate bargaining unit.

II. Summary of the submissions

A. For the NPF

[7] In its submissions, the NPF seeks to establish that it fulfils the preliminary requirements to be certified as a bargaining agent for RCMP regular members. The only issue remaining will be determining whether "... a majority of employees in that bargaining unit wish the applicant employee organization to represent them as their bargaining agent ...", as stated in s. 64(1)(a) of the former Act.

[8] As a condition for certification, the bargaining agent must be an employee organization. Section 2(1) of the Act sets out that "employee organization", in paragraph (b) of that definition, means the following:

(b) in respect of employees who are RCMP members or reservists, an organization of those employees that has as one of its purposes the regulation of relations between the

employer and its employees for the purposes of Parts 1, 2 and 2.1

[9] The NPF's by-laws confirm that purpose. In addition, the *Amending Act*, at s. 63(1)(b), provides that the employee organization must meet the following requirements:

63 (1)(b) ... the employee organization — and, in the case of a council of employee organizations, each employee organization forming the council — meets the following requirements:

(i) it has as its primary mandate the representation of employees who are members appointed to a rank, other than officers as defined in subsection 2(1) of the Royal Canadian Mounted Police Act,

(ii) it is not affiliated with a bargaining agent or other association that does not have as its primary mandate the representation of police officers, and

(iii) it is not certified as the bargaining agent for any other group of employees.

[Emphasis in the original]

[10] The NPF submits that it fulfils all those requirements. As stated in its by-laws, its purpose is to represent regular members of the RCMP in their relations with the employer. It is not affiliated with any association or bargaining agent, and it is not certified as a bargaining agent for any other group of employees.

[11] Finally, under s. 64(1)(b) of the *Act*, the person who made the application must have been duly authorized to make it. Brian Sauve, who made the application, is the incorporator of the NPF under the *Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23) and a member of the NPF's initial board of directors, which unanimously resolved to apply for certification as the bargaining agent. Thus, Mr. Sauve was duly authorized.

B. For the AMPMQ

[12] The AMPMQ has requested that the Board hold off deciding whether the three preliminary conditions are met and instead that it determine the constitutional validity of s. 238.14 of the *Act*.

[13] The AMPMQ had already raised the prospect of questioning the constitutional validity of s. 238.14 in May 2017, in response to the NPF's application. Again, in August 2017, the AMPMQ repeated that the *Amending Act* was preventing it from defending its proposed bargaining unit, despite the *MPAO* decision, which, according to the AMPMQ's interpretation, supports the idea that employees should be able to create or belong to the association that they choose.

[14] The AMPMQ submits that it reserved its right to put a constitutional question to the Board, as stated in the consolidation decision. Moreover, it had signaled to the Board its intent to challenge the constitutional validity of the impugned provision before a hearing on the merits of the case, in the event mediation efforts with the NPF failed.

[15] In the consolidation decision, the Board offered its mediation services to help the NPF and the AMPMQ come to an agreement on representing employees who are RCMP regular members and employees who are reservists. Only one session was held. According to the AMPMQ, the mediation did not resolve anything.

[16] The AMPMQ submits that the Board can pronounce on the constitutionality of the new provisions in the *Act* based on SCC decisions in which the Court opined that the authority to interpret legislation includes the authority to consider whether the legislation is constitutional under the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) ("the *Charter*").

[17] The question that the AMPMQ wishes to pose to the Board is the following: Does s. 238.14 of the *Act* infringe s. 2(d) of the *Charter*?

[18] The AMPMQ requests a calendar for submissions from the parties. If the Board decides to proceed to determine the three questions raised in the NPF's submissions, the AMPMQ submits that it also is an employee organization whose main purpose is representing regular members of the RCMP in Quebec, that it is not affiliated with any association or bargaining agent, that it is not certified as a bargaining agent for any other group of employees, and that it has been duly authorized to apply for certification, as evidenced by its affidavit and by-laws.

C. The NPF's reply

[19] The NPF argues that the AMPMQ's request for a determination of the *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Labour Relations Act*

constitutional validity of s. 238.14 amounts to a request for a reconsideration of the consolidation decision, even if it is not couched in those terms. The test for reconsideration is not met, and therefore, there is no reason for the Board to hear the constitutional validity issue.

[20] The Board cannot make a general declaration of invalidity; it can only refuse to apply a provision that it concludes is constitutionally invalid. The opportunity has passed — the issue should have been raised at the moment the Board was considering the definition of the bargaining unit.

[21] If the Board proceeds on the constitutional issue, it should, nevertheless, and for public interest concerns, continue with the NPF's application for certification. The NPF's reasoning is based mainly on the SCC's decision in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110 ("*Metropolitan Stores*"), which found that dealing with a constitutional issue in the context of labour relations did not necessarily entail staying the proceedings in which the constitutional issue arose.

D. The respondent's reply

[22] The respondent, the Treasury Board, replied to the AMPMQ's request on February 2, 2018.

[23] The respondent submits that despite the fact that the Board has already decided the appropriate unit for bargaining (according to the terms of the *Amending Act*), a "... constitutional challenge constitutes an exceptional and compelling reason for the Board to exercise its discretion and review a previously determined bargaining unit description." On that point, it invokes *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, in which the SCC stated that limitations do not apply to constitutional questions.

[24] It also offered as illustration two decisions of the Canada Industrial Relations Board (CIRB) in which the issue was whether the labour dispute came under federal or provincial jurisdiction, in light of a recent SCC decision (see *Hospital Employees' Union v. Gitxsan Health Society*, 2014 CIRB 748; and *Communications, Energy and Paperworkers Union of Canada v. Dilico Anishinabek Family Care*, 2012 CIRB 655).

[25] The respondent also submits that a stay of the certification process should not be granted, as the AMPMQ has not shown what irreparable harm it would suffer should

the stay not be allowed; nor has it demonstrated how the balance of convenience favours such a stay. On the contrary, the balance of convenience would tend to favour not granting the stay, as otherwise, all regular members of the RCMP will be denied the right to be represented, which is contrary to the purposes of the *Act*.

E. The AMPMQ's reply

[26] The AMPMQ replied to both the NPF's and the respondent's submissions on February 19, 2018.

[27] The AMPMQ agrees with the respondent that the Board has the duty to consider the constitutional issue, despite its earlier decision to declare the appropriate bargaining unit under the new legislation. It cites *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association syndicale des employés(es) de production et de services (ASEPS)*, 2017 QCCA 737 ("SEPB"), for the proposition that it is for a labour board, in the first instance, to decide a constitutional issue as it affects the persons that appear before it.

[28] The AMPMQ also argues that a reconsideration of the decision is warranted, as the Board never considered the constitutional aspect, yet it is essential that it do so, to render a proper decision in this matter.

[29] The AMPMQ submits that the Board should stay the certification process. It cites *Canadian Union of Public Employees, Locals 189 and 408 v. Alberta Health Services*, [2009] Alta L.R.B.R. 266 ("the ALRB stay decision"), in which that board found that the loss of opportunity to represent members would cause irreparable harm to the unions, who would cease representing employees under newly adopted legislation, which the unions also challenged under s. 2(d) of the *Charter*.

[30] As to the balance of convenience, staying the process would cause no harm to the NPF, as opposed to irreparable harm to the AMPMQ, and consequently, the balance of convenience clearly favours a stay.

III. Reasons

A. Legislative framework

[31] For applications filed before the *Amending Act* came into force, the certification process, in this case for employees who are RCMP regular members and employees

who are reservists, is governed both by the *Act* and by transitional provisions in the *Amending Act*. Under this legislative framework, the Board must determine whether an applicant is an “employee organization” within the meaning of s. 2(1) of the *Act* and whether it meets the requirements of employee organizations set out in s. 63(1)(b) of the *Amending Act*.

[32] If the applicant meets these conditions, the Board must then determine whether it represents a majority of the employees in the bargaining unit. In this respect, the Board must consider the provisions of *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act* (S.C. 2017, c. 12). When an application for certification was made before June 22, 2017, as is so in these proceedings, s. 16 of that *Act* maintains the provisions of the former *Act* with respect to the requirement for a secret ballot representation vote before certification.

[33] The AMPMQ has questioned the constitutional validity of s. 238.14 of the *Act*, which mandates a single bargaining unit for employees who are RCMP regular members and employees who are reservists. As the AMPMQ’s application for certification was filed under the former *Act*, its certification application is governed in this aspect by the transitional provisions of the *Amending Act*. It is s. 63(1)(a) of those transitional provisions that mandates the single bargaining unit. However, the essence of the question is the same.

B. Should the Board decide the constitutional question?

[34] The AMPMQ did not formally raise the constitutional question before the consolidation decision, but it does so now. As the respondent stated, the Board cannot avoid its responsibility to consider the matter in depth as the decision maker charged by Parliament to decide certification issues in the federal public sector. Contrary to the noted CIRB decisions, in this case, there has been no change in the SCC’s jurisprudence since the Board determined the bargaining unit in October 2017. However, the importance of the constitutional issue is such that the Board finds that there is a compelling reason to decide it.

[35] There are precedents for labour boards deciding the constitutionality of legislation that dictates the composition of bargaining units, as seen notably in *Canadian Union of Public Employees, Locals 189, 408, 3197, 3421, 3671 v. Alberta*

Health Services, [2010] Alta L.R.B.R. 1; and *Québec (Procureur général) c. Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247. There is also jurisprudence stating that it is an error for a labour board to avoid deciding a constitutional issue that directly impacts its proceedings (see *SEPB*).

[36] Although the Board does not have the authority to make a declaration of constitutional invalidity (see *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16), it may, as submitted by the AMPMQ, decide whether the provision breaches the right to freedom of association guaranteed by s. 2(d) of the *Charter*. If the Board decides that the provision that mandates a single bargaining unit breaches the *Charter*, it can declare it inoperative as it applies to the present certification application (see *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54). In that case, further submissions would be received from the parties on the appropriate bargaining unit or units.

C. Should the Board grant a stay?

[37] A stay has also been requested pending the Board's decision on the constitutional issue. Specifically, the AMPMQ has requested that the Board refrain from determining the preliminary questions as to whether the NPF meets the requirements of an employee organization, as set out in the legislation, until the constitutional question is decided.

[38] The test applied by the courts for a stay in a proceeding is well established (see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311) and specifies a serious issue to be tried, irreparable harm to the requesting party if the stay is not granted, and a balance of inconvenience in either granting or not granting the stay. The test in *RJR-MacDonald Inc.* applied specifically to a case in which a *Charter* argument was raised to prevent the implementation of a legislative provision. At the same time, regard must be had for the specific context of labour relations, as was the case in *Metropolitan Stores*.

[39] In *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 125-02-41 (19851113), [1985] C.P.S.S.R.B. No. 255 (QL), the jurisdiction of the former Public Service Staff Relations Board (PSSRB) was challenged in the context of certification applications. The PSSRB decided that it would proceed with the certifications, as doing

so was in the best interests of labour relations. In that case, it reviewed the jurisprudence and made the following observations:

...

21. ... *Far from suggesting that it was improper for the Board to proceed with the application for certification when its jurisdiction had been challenged, the Court of Appeal expressly stated that **the [Ontario Labour Relations] Board could adopt such procedure as appeared to it to be just and convenient.***

22. In Windsor Airline Limousine Services Limited (*supra*), the Ontario Labour Relations Board was asked to adjourn an application for certification in view of a constitutional challenge before the courts... **There can be no more fundamental type of jurisdictional challenge than a constitutional one, yet the Board, relying on Re Cedarvale Tree Services Limited (*supra*), refused to postpone its consideration of the application...**

23. The reason for the view that, even faced with a jurisdictional challenge, labour boards are entitled to proceed with an application for certification would appear to be the one expressed by the Ontario Labour Relations Board in Canada Dry Bottling Company (Kingston) Limited (*supra*), at page 978:

*Delays can often cause serious and irreparable prejudice to the applicant. As Estey, C.J.O. (as he then was) noted in Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild Local 205, OLRB et al (unreported) March 31, 1977 C.A.) **“labour relations delayed are labour relations defeated and denied”.***

24. ... *The Board is satisfied that, **even if the challenge is jurisdictional, it can nevertheless proceed with these applications if it considers that the balance of convenience so dictates...***

...

[Bold emphasis added]

[40] From those texts, it is evident that when determining a stay application, a labour board will consider the totality of the circumstances — including questions of the seriousness of the issue, irreparable harm, and the impact of a delay — and that it will reach a conclusion based on what is just and where the balance of convenience lies. In the present case, the Board is of the view that it is just and convenient to hear the

Federal Public Sector Labour Relations and Employment Board Act and Public Service Labour Relations Act

constitutional matter while not hindering the process allowing the representation of the majority, if not the totality, of employees who are RCMP regular members and employees who are reservists.

[41] The AMPMQ argues that not granting a stay will cause it irreparable damage, as it will lose the opportunity to represent its members, while the NPF will gain the advantage of representation, should the members vote for it.

[42] In the ALRB stay decision, the Alberta Labour Relations Board granted a partial stay, while some unions challenged the legislated bargaining structure. The situation had some similarity to the one in this case in that the legislature had imposed occupational-wide single bargaining units in the health services. Previously, the employees had been represented by different unions at the local level. The board ordered that if bargaining units already existed, then representation by the previous unions would continue, and that the existing collective agreements would continue to apply, pending its decision.

[43] There is a significant difference with respect to this case in that the employees who are RCMP regular members and employees who are reservists are not presently part of any bargaining unit. There cannot be, as in the ALRB stay decision, a loss of opportunity to represent, as representation has not begun. Should the Board determine that the provision at issue violates s. 2(d) of the *Charter*, and should it further recognize the need for a Quebec bargaining unit, the AMPMQ will be in no worse a situation than it is in presently. Should the conditions be met, the Quebec members will be able to vote on representation by the AMPMQ.

[44] The Board is not inclined to grant a complete stay of the certification proceedings. It notes that at this stage of the process, there are three interests to consider, those of the employer, the bargaining agent, and the affected employees. It is cognizant that time is of the essence in labour relations matters. The right of employees who are RCMP regular members and employees who are reservists to be represented by a bargaining agent is a right for which several associations, including the AMPMQ, have long been struggling.

[45] There are some 17 000 members and reservists throughout Canada and about 800 in Quebec. No matter the outcome of the constitutional challenge, a vast majority of them will be unaffected by that decision, but they would definitely be impacted by a

delay in granting them their constitutional right to collective bargaining.

[46] Based on the reasoning in *Metropolitan Stores*, and having regard to all the circumstances, it is clear to the Board that the interests of the majority should prevail and that the certification process should not be unduly delayed. Accordingly, the Board will proceed to determine whether the NPF meets the requirements for an employee organization as set out in the legislation.

[47] Having reviewed the affidavit submitted by Mr. Sauve, together with the NPF's articles of incorporation and by-laws, the Board is satisfied that the NPF has fulfilled the prerequisites for certification. It is an employee organization whose primary mandate is to represent regular members of the RCMP, it has no affiliation to another bargaining agent, and it is not certified to represent any other group of employees. In addition, the NPF also fulfils the requirement stated in the disputed legislation, which is representing all employees who are RCMP regular members and employees who are reservists in a single bargaining unit.

[48] Furthermore, the NPF also fulfils the requirement found at s. 64(1.1)(a) of the former *Act*. That section provides that the Board must order that a secret ballot representation vote be taken among the employees in the unit if it is satisfied, "... on the basis of evidence of membership in the employee organization that, as of the date of the filing of the application, at least 40% of the employees in the unit wish to have the employee organization represent them as their bargaining agent ...". From the evidence received, the Board is satisfied that this condition has been met. Accordingly, a vote will be ordered. The vote entails considerable time and effort and its preparations should be started immediately.

[49] At the same time, because of the uncertainty created by the constitutional issue, which goes to the heart of defining the appropriate bargaining unit, the certification proceedings will be stayed immediately after the vote has taken place, before any tallying of the ballots. The Board will reconsider the stay of proceedings after it has heard and determined the constitutional issue and, if applicable, after a review of the decision determining the appropriate bargaining unit.

[50] The Board will hold a conference call with the parties to schedule the next steps.

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

(The Order appears on the next page)

IV. Order

[52] The certification vote will proceed to determine if the employees who are regular members (defined as excluding officers and civilian members) and employees who are reservists of the Royal Canadian Mounted Police wish to be represented by the National Police Federation.

[53] The certification process will be stayed after the vote has taken place and before the tallying of any ballots.

[54] A hearing will be held on the constitutional issue. A conference call will be organized with the parties, at their earliest convenience and that of the panel of the Board, to schedule that hearing.

April 17, 2018.

**Catherine Ebbs, Stephan Bertrand, and Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board**