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

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

BETWEEN

UNION OF CANADIAN INTELLIGENCE OFFICERS

Applicant

and

TREASURY BOARD (CORRECTIONAL SERVICE OF CANADA)

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervenor

Indexed as
Union of Canadian Intelligence Officers v. Treasury Board (Correctional Service of Canada)

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

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Marc Langlois, Union of Canadian Intelligence Officers

For the Respondent: Karl Chemsi, counsel

For the Intervenor: Andrew Raven and Morgan Rowe, counsel for the Public Service Alliance of Canada

Heard at Ottawa, Ontario,
January 29, 2018.

I. Application before the Board

[1] On April 4, 2017, the Union of Canadian Intelligence Officers ("the applicant") applied to the Public Service Labour Relations and Employment Board (PSLREB), seeking certification as the bargaining agent for the bargaining group defined as "all security intelligence officers (AS-5) presently employed by the Correctional Service of Canada", under section 54 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[2] This group had previously been represented by the Public Service Alliance of Canada, the intervenor in this matter, as part of the Program and Administration (PA) Group it represents, until, by virtue of the former Public Service Labour Relations Board's (PSLRB) decision in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 ("the SIO decision"), security and intelligence officers (SIOs) employed by the Correctional Service of Canada were excluded from that group under s. 59(1)(g) of the *PSLRA* as it then was.

[3] At the outset of the hearing, the applicant was asked if it intended to pursue a review of the PSLRB's order, under s. 43 of the *PSLRA*, now the *Federal Public Sector Labour Relations Act* ("the *Act*"). It responded in the negative, and for that reason, no application under that section was included in the file.

[4] 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), received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* 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 *Act*.

II. Summary of the preliminary objection

[5] At the outset of the hearing, the employer raised an objection to the Board's jurisdiction to consider this application. To apply for certification under the *Act*, the bargaining unit's members must meet its definition of "employee". As the members of the proposed group are not employees under that definition, the Board has no jurisdiction to consider or grant the application.

III. Summary of the arguments

A. For the employer

[6] Employees excluded under s. 59(1)(g) of the *Act* are not employees under the definition of "employee" in s. 2(1) as they occupy confidential positions.

[7] Section 54 of the *Act* gives employee organizations the right to apply for certification. A bargaining agent applies for recognition as the exclusive bargaining agent for a group of employees. Under s. 57, the Board may recognize a group of employees as appropriate for collective bargaining purposes if those employees meet the definition of "employee" set out in s. 2(1) of the *Act*. However, in the SIO decision, the PSLRB determined that an SIO position was to be excluded from the PA group because of its confidential nature. The orders the Board issued as a result of that decision excluded all SIOs from membership in the PA group because of the confidential nature of their duties, which makes it impossible for them to meet that definition of "employee".

[8] Nothing has changed since that decision was rendered. The duties performed by the SIOs, their job description, and their role in the employer's organization remains the same. There is nothing new that would alter their employment so as to bring them within that definition of "employee". The decision has not been judicially reviewed, and as a result, the order issued is still in effect.

[9] In 1999, the Public Service Alliance of Canada was confirmed as the bargaining agent for the Correctional Services Group, which at the time included the SIO classification at the AS-05 group and level. In 2012, the PSLRB looked at the essence of the SIO position and concluded that by the nature of its duties and responsibilities, it was in a conflict of interest with all other employees. Thus, the PSLRB excluded the SIOs from the bargaining group on the basis of that conflict of interest and of its responsibility to the employer. That problem would continue to exist no matter which bargaining unit would include the SIOs. Parliament clearly intended that workers in this circumstance be excluded from bargaining collectively.

[10] The *Act* is not ambiguous. Workers employed in confidential positions do not meet the definition of "employee" under the *Act* and are not entitled to apply for certification as a bargaining group. The Board may dismiss this application without a hearing. The applicant has not challenged the SIO decision; nor has the job performed

by the SIOs changed. There is nothing new through which the applicant could establish that the SIOs are employees as of the date of the application and of the hearing.

[11] Furthermore, when there is no challenge to the *Act* under the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (the *Canadian Charter of Rights and Freedoms* or "the *Charter*") and the *Act* is clear, the Board cannot ignore the statutory intent of the legislation (see *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 at para. 27). Nowhere in the application before the Board does the applicant challenge the constitutionality of the *Act*; therefore, *prima facie*, the Board does not have the jurisdiction to consider this application.

[12] The fact that legal counsel employed by the Department of Justice and members of the Royal Canadian Mounted Police can now unionize is due to a change in the *Act* that does not apply to the applicant. It is trying to certify as a bargaining unit workers who have been excluded from collective bargaining by Board order. Unless the legislative changes eliminated the scheme of exclusions, which they did not, those workers cannot benefit from these changes. It remains a fact that excluded employees cannot be unionized.

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

[13] The applicant is not challenging the exclusion order or asking to have it lifted. The request to the Board is that it be made less restrictive. The Supreme Court of Canada, in its decision in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, stated that there should be limited infringement on citizens' rights to organize. The employer's concerns with conflict of interest and confidentiality as part of the SIO role will be mitigated by establishing a separate bargaining unit made up only of SIOs.

[14] At paragraph 81 of the SIO decision, which excluded the SIOs from the PA unit, the PSLRB stripped the SIOs of their *Charter* rights. The applicant assumes that if the Board has the authority to exclude people from collective bargaining, it also has the authority to review its order and its effect. The effect of the Board's order is that the SIOs are left without a working labour relations regime, to which they are entitled under the *Charter*.

[15] The applicant expressly stated that this is not an application to review a Board

order, and therefore, it has not filed any such request under s. 43 of the *Act*. The applicant also expressly stated that this is not a *Charter* challenge of the *Act* and that no notices required in such a case pursuant to the *Federal Courts Act* (R.S.C., 1985, c. F-7) have been served. Furthermore, the applicant does not dispute that the SIOs should be excluded from the PA group.

C. For the intervenor

[16] In the application filed as Exhibit 1, tab 1, at appendix B, the applicant cites s. 2(d) of the *Charter* and minimal impairment under s. 1. The Board may not proceed in the absence of the proper notices having been served under s. 57 of the *Federal Courts Act*.

IV. The respondent's reply to the applicant and intervenor

[17] The applicant referred to the decision in *Mounted Police Association of Ontario*, but that case differs significantly from what is before this Board. That case challenged legislation. In this application and in the applicant's argument to this preliminary objection, it is clear that there is no challenge to the law. As counsel for the intervenor said, if there was, the process could not proceed without the proper notice being served under the *Federal Courts Act*. This is simply an application for certification that raises no *Charter* issues. The applicant is attempting to raise *Charter* issues without challenging the legislation, which cannot be done.

[18] In *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 36, the Supreme Court of Canada ruled that absent a *Charter* challenge, the law must be applied as written, which has since been upheld in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, and *R. v. Rodgers*, 2006 SCC 15. The applicant stated that it had no intent to challenge the legislation or the PSLRB order in its opening and in its comments on the preliminary objection; clearly, the Board has no jurisdiction. The intervenor cannot raise *Charter* issues on behalf of the applicant.

V. The applicant's reply to the intervenor

[19] The applicant is not contesting the law *per se* but its implementation. This is not a *Charter* challenge. The *Mounted Police Association of Ontario* case states that someone's *Charter* rights may be only minimally impaired. The only way to do this is to establish a separate bargaining unit for the SIOs.

VI. Reasons

[20] Counsel for the employer is correct in his assessment that the Board draws its jurisdiction from the *Act*, and when there is no ambiguity or *Charter* challenge, the plain meaning of the statute must be applied (see *Association of Justice Counsel*; *Mossop*; *Bell ExpressVu*; and *Rodgers)*. The applicant repeatedly stated in its oral submissions to the Board that it recognized that the SIOs were properly excluded from the PA bargaining group. It also repeatedly stated that it had no intention of challenging the *Act* under the *Charter*, proof of which was the lack of the required notice to the attorneys general under the *Federal Courts Act*. Finally, the applicant made it clear that it had no intention of seeking a review, under s. 43 of the *Act*, of the Board's order in the SIO decision. For that reason, the applicant filed no request for such a review with its application for certification or at any time after that.

[21] The only matter before me is a simple application for certification by an organization, which as of yet has not been recognized as meeting the requirement in the *Act* of being an employee organization. Before that can happen, it must first be determined whether the Board has jurisdiction to even consider the application. If the group of persons for which certification is sought does not meet the definition of "employee" in the *Act*, then the Board has no jurisdiction to make a determination on the application *ab initio*.

[22] According to s. 54 of the *Act*, to have the right to apply under the *Act*, the employee organization must be composed of a group of employees who meet the definition of "employee" as defined in s. 2(1) of the *Act*, as follows:

> ***Right to apply***
>
> ***54*** *Subject to section 55, an employee organization within the meaning of paragraph (a) of the definition* employee organization *in subsection 2(1) that seeks to be certified as bargaining agent for* ***a group of employees*** *that it considers constitutes a unit that is appropriate for collective bargaining may apply to the Board, in accordance with the regulations, for certification as bargaining agent for the proposed bargaining unit. The Board must notify the employer of the application without delay.*
>
> [Emphasis added]

[23] Section 2(1) of the *Act* defines "employee" as follows:

> **employee**, ***except in Part 2, means a person employed in the public service, other than***
>
> ***(a)*** *a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;*
>
> ***(b)*** *a person locally engaged outside Canada;*
>
> ***(c)*** *a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> ***(d)*** *a person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act*;*
>
> ***(e)*** *a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;*
>
> ***(f)*** *a person employed on a casual basis;*
>
> ***(g)*** *a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;*
>
> ***(h)*** *an employee of the Administrative Tribunals Support Service of Canada who provides any of the following services exclusively to the Board:*
>
> ***(i)*** *mediation and dispute resolution services,*
>
> ***(ii)*** *legal services,*
>
> ***(iii)*** *advisory services relating to the Board's exercise of its powers and performance of its duties and functions;*
>
> ***(i) a person who occupies a managerial or confidential position****; or*
>
> ***(j)*** *a person who is employed under a program designated by the employer as a student employment program.* (fonctionnaire)
>
> [Emphasis added]

[24] Section 2(1) of the *Act* defines 'managerial or confidential position' as follows:

> ***managerial or confidential position*** *means a position declared to be a managerial or confidential position by an order made by the Board under subsection 62(1), section 63, subsection 74(1) or section 75.*

[25] By virtue of the SIO decision, all of the members of the proposed bargaining unit, the SIOs, occupy positions which have been declared to be managerial or confidential; the Board determined that that the occupant of an SIO position should not be included in a bargaining unit for reasons of conflict of interest. Therefore, none of the members of the proposed bargaining unit meets the definition of "employee" as required under s. 54. The applicant's representative acknowledged that the SIOs were properly excluded from the PA bargaining group on this basis.

[26] In making a determination in an application for certification, the legislation is clear – the Board may only certify an employee organization to be the bargaining agent for a group of **employees**. The applicant, however, has applied to be certified as the bargaining agent for a bargaining unit consisting only of persons excluded from collective bargaining, by virtue of an order of the Board. The Board asked the applicant several times whether it is also asking for a review of the Board's order which declares these positions to be managerial or confidential; each time the applicant indicated that it was not challenging the order.

[27] Without an accompanying request under section 43 of the *Act* for the Board to review its order declaring the SIO positions to be managerial or confidential positions, the Board has no jurisdiction to consider an application for certification for this group of persons as they are not employees under the *Act*. The applicant has stated it does not wish to challenge the order declaring their positions to be managerial or confidential and further, it is not seeking to challenge the legislation itself. In these circumstances, the Board will not, on its own motion, review its order declaring the positions in question to be managerial or confidential.

[28] The sections dealing with excluded employees were not amended by the recent legislative changes to the *Act* in 2017. As stated as follows in *Canadian Union of Public Employees v. Treasury Board (Royal Canadian Mounted Police)*, 2017 FPSLREB 36 at para. 90:

> *[90] Furthermore, since that Supreme Court of Canada decision, Parliament has turned its mind to collective bargaining within the RCMP and has amended both the* Act *and the* RCMP Act, *which clearly states Parliament's preference for a single national bargaining group for*

> *members appointed to rank and reservists. While it did make changes related to unionization within the RCMP, s. 57 remained unchanged, clearly indicating Parliament's intention that the certification of bargaining units must be considered in light of the Board's enabling legislation and past practices.*

[29] The *Mounted Police Association of Ontario* decision is not carte blanche for the applicant to bypass all the other legislative requirements, which Parliament clearly turned its mind to in recognizing the right of public servants to bargain collectively in the public sector. If the applicant is of the opinion that these rights are being unduly interfered with, a process exists to challenge this, but it did not elect to avail itself of this process. The respondent's objection is allowed. The Board does not have jurisdiction to deal with these matters in the form in which this application was filed as the proposed bargaining unit will not be composed of employees within the meaning of the *Act*.

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

(The Order appears on the next page)

VII. Order

[31] The application is dismissed.

April 23, 2018.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board