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File: 561-02-47586

Citation: 2024 FPSLREB 139

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

CANADIAN PRISONERS' LABOUR CONFEDERATION AND JEFF EWERT

Complainants

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Canadian Prisoners' Labour Confederation v. Treasury Board (Correctional Service of Canada)

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainants: Ryan White, counsel

For the Respondent: Larissa Volinets Schieven, counsel

Decided on the basis of written submissions, filed November 6, 2023, and January 26 and March 21, 2024.

REASONS FOR DECISION

I. Overview

[1] The Canadian Prisoners' Labour Confederation (CPLC) has made a complaint alleging that officials within the Correctional Service of Canada (CSC) refuse to allow it to organize inmates in correctional facilities for the purposes of collective bargaining. The Treasury Board ("the respondent") asks the Federal Public Sector Labour Relations and Employment Board ("the Board") to dismiss the complaint because an inmate is not an "employee" as that term is defined in the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") because they are not "employed in the public service". The respondent relies upon a long-standing interpretation of the phrase "employed in the public service" that requires an employee to be appointed in accordance with the rules provided for the statute governing the appointment of employees for their employer. In response, the CPLC says that the Board should not follow this interpretation, and alternatively, the exclusion of inmates from the definition of "employee" in the *Act* is unconstitutional. To that, the respondent says that the Board does not have the jurisdiction to decide this constitutional issue once it rules that inmates are not employees.

[2] While the big picture of this complaint is about whether inmates may collectively bargain, the Board's task now is more narrow: to decide whether to depart from the interpretation of "employee" set out approximately 35 years ago by the Supreme Court of Canada, and, if not, to decide whether it has the jurisdiction to hear the CPLC's constitutional argument.

[3] I have concluded that inmates are not employed in the public service and therefore fall outside the scope of the *Act*. The Board remains bound to follow the interpretation of that term set out by the Supreme Court of Canada, and the CPLC has not met its heavy burden to convince me to depart from that binding precedent.

[4] I have also concluded that the Board has the jurisdiction to hear the constitutional argument. The Board has the jurisdiction to hear constitutional challenges to its enabling legislation because it has the jurisdiction to decide questions of law. Since the underlying dispute and remedies sought would fall within the Board's jurisdiction if the constitutional challenge were successful, the Board has the power to hear this constitutional challenge.

[5] My reasons follow.

II. Procedural background

[6] On June 9, 2023, Jeff Ewert and the CPLC made a complaint with the Board alleging a breach of s. 186 of the *Act*. Mr. Ewert is an inmate and the president of the CPLC. For the rest of this decision, I will refer only to the CPLC and not the individual complainant. The complaint alleges that the CPLC wants to organize and become certified as a bargaining agent on behalf of inmates who perform paid work in federal correctional facilities. The complaint also alleges that the CSC has refused to give it permission to do so. Finally, the complaint states that inmates' exclusion from the *Act* (if they are excluded from its ambit) violates ss. 2(d) and 6(2)(b) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (UK); "the *Charter*").

[7] The respondent asked the Board to dismiss this complaint as being outside its jurisdiction because inmates are not employed in the public service. The respondent also says that this finding would deprive the Board of its jurisdiction to hear the CPLC's *Charter* arguments.

[8] On August 9, 2023 the Chairperson of the Board directed that the parties file written submissions about the objection to the Board's jurisdiction, including whether that objection can be determined in writing. The parties filed submissions. Neither party argued that the preliminary objection could not be decided in writing. I was then designated to be a panel of the Board to decide the respondent's preliminary objection.

[9] The Board is authorized to decide any matter without an oral hearing; see the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) at s. 22, and *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68. Having read the parties' submissions, I agree that the preliminary objection can be dealt with in writing. It involves a question of law and can be decided without oral evidence or cross-examination.

[10] Finally, the parties both filed robust and comprehensive submissions addressing this preliminary objection. The parties cited over 100 authorities between them (many were duplicates cited by both parties). I read them all, but I will refer only to the most relevant of them in this decision. As I will explain, I have decided not to rule on some

issues that the parties made submissions about at length because those issues relate to the merits of the CPLC's constitutional challenge, and I do not wish to comment on those issues in this preliminary decision.

III. Issues

[11] This preliminary objection raises two issues:

1) Is being appointed in accordance with the rules provided for by statute still a precondition to being an "employee" for the purposes of the *Act*?

2) If so, does the Board have the jurisdiction to determine whether excluding inmates from its ambit violates ss. 2(d) or 6(2)(b) of the *Charter*?

IV. Being appointed in accordance with the rules provided for by statute is still a precondition to being an "employee" for the purposes of the *Act*

[12] This complaint alleges a breach of s. 186(1) of the *Act*. That provision prohibits interference with or discrimination against an "employee organization." The term "employee organization" is defined as "an organization of employees". As the CPLC admits, this means that to come within the ambit of s. 186 of the *Act*, the organization in question must be composed of "employees".

A. The application of *Econosult*

[13] The term "employee" is defined in the *Act* to mean a "person employed in the public service". This means that the Board must undertake two inquiries when determining whether a person is an "employee". First, the Board must determine whether a person is "employed", in the sense of having an employment relationship as opposed to some other relationship. The essence of an employment relationship is control and dependency, or as the Supreme Court of Canada has described, "… control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker" (see *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para. 23). The CPLC made considerable submissions about the control and dependency of inmates in their working context. As I will explain later, in light of my conclusion about the second inquiry, I have decided not to address this aspect of the test for an employee.

[14] Second, the Board must determine whether the person is employed "in the public service". This involves the Supreme Court of Canada's decision in *Canada*

(Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614 ("*Econosult*").

[15] In *Econosult*, the solicitor general had hired teachers to provide educational programs for inmates at federal penitentiaries. The solicitor general then decided to privatize those educational programs by contracting them out to the private sector, eventually to a company called Econosult. A bargaining agent applied to the Board for a declaration that a group of those teachers at one penitentiary were employed in the public service and were members of the bargaining unit represented by that bargaining agent. The Board agreed, but the Supreme Court of Canada overturned that decision.

[16] The Supreme Court of Canada concluded that the term "employed in the public service" only includes persons who have been appointed in accordance with the statutory rules for appointments to the public service — in that case, the *Public Service Employment Act* (the current version of which has the citation S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"). As that Court put it, "… there is just no place for a species of *de facto* public servant …". To be "employed in the public service", a person must have been appointed in accordance with the statutory rules governing appointments for that particular portion of the federal public administration.

[17] In this case, that portion of the federal public administration is the CSC. The *Corrections and Conditional Release Act* (S.C. 1992, c. 20) defines a "staff member" as "an employee of the Service". More importantly, the *Application to Canadian Penitentiary Service Regulations* (C.R.C., c. 1333) provides that the *PSEA* applies to the appointment of members of the CSC (except the Commissioner of Penitentiaries). This means that the statutory rules governing the appointment of employees to the CSC are found in the *PSEA* and that to be employed in the public service within the CSC, a person must have been appointed in accordance with the rules set out in the *PSEA*, including s. 29 of that Act which gives the Public Service Commission (or a delegate) the exclusive authority to make the appointment.

[18] The Board and Federal Court of Appeal already came to this same conclusion in *Jolivet v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 1 (upheld in 2014 FCA 1). In that case, Mr. Jolivet (an inmate in the CSC's Kent Institution) made a complaint alleging a breach of s. 186 of the *Act* on his own behalf and in his capacity as the interim president of the CPLC. The Board dismissed the complaint because

inmates are not "employed in the public service" as they have not been appointed to CSC in accordance with the *PSEA*. The Board stated:

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> *44 … even if* [inmates] *are considered employed in the common law sense of the word, I cannot find that they are employees within the meaning of subsection 2(1) of the* PSLRA. *Following* Econosult, *it is clear that to be employed in the public service, a person must have been appointed by the PSC to positions created by the Treasury Board. The complainant presented no evidence that he was appointed to a position created by the Treasury Board in the public service; nor does he present any evidence to support his allegation that offenders working within federal penitentiaries are employees in the public service.…*
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> …

[19] The Federal Court of Appeal upheld the Board's decision, stating:

> …
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> *[9] … We find specifically that the principles from the Econosult case upon which the Board relied are binding on the Board and this Court.*
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> *[10] Although the legislation relating to employment in the public service has evolved since the Econosult case was decided, the fundamental principle that employment in the public service is subject to specific legislated formalities remains valid. Inmates participating in work programs organized by the Correctional Service of Canada have not been appointed to a position in the federal public service. As a result, they are not "employees" within the meaning of the Act.*
>
> …

[20] In addition to *Jolivet*, the respondent cited *Guérin v. Canada (Attorney General)*, 2018 FC 94 (upheld in 2019 FCA 272), in which a group of inmates, including Mr. Ewert, challenged a reduction in their remuneration for work performed. The Federal Court concluded that inmates are not employees for the purposes of Part III of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *CLC*"). The Federal Court of Appeal concluded that the Federal Court should not have decided that issue (and instead should have left it for an inspector or referee under the *CLC* to decide) but went on to state that "… participation in a program offered to inmates cannot constitute an appointment to a position in the public service …" (at paragraph 68). The Federal Court of Appeal also concluded that inmates are not employees at common law

because the true purpose of their working programs is rehabilitation, not employment (at paragraph 69).

[21] The respondent also cited eight other decisions applying *Econosult*. In light of the fact that *Jolivet* and *Guérin* apply directly to inmates of federal penitentiaries, it is not necessary for me to outline those other decisions or to discuss them in detail. They all stand for the same proposition as *Econosult*.

B. *Econosult* remains binding on the Board

[22] The CPLC submits that "[t]he logic of *Econosult* as applied in *Jolivet* has the effect of prohibiting prison labourers from unionizing." It remains to be seen whether exclusion from the *Act* prohibits unionizing; however, I have taken that as an acknowledgement that *Econosult* and *Jolivet* mean that inmates are not captured within the meaning of "employee" under the *Act*. Instead, the CPLC submits that the Board should not follow *Econosult* for two reasons: it is inconsistent with *Charter* values, and the Supreme Court of Canada focussed too heavily on the text of the statute and paid insufficient attention to its purpose of protecting union organizing activities.

[23] The CPLC faces a heavy burden to convince the Board not to follow *Econosult*, *Jolivet*, and *Guérin*. In most circumstances, it is unreasonable for an administrative decision maker to not follow a binding precedent; see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 112. This burden is amplified in this case because the Court of Appeal in *Jolivet* stated specifically that the principles from *Econosult* "are **binding** on the Board" [emphasis added]. I have concluded that the CPLC's two submissions for why I should depart from *Econosult* have not met that burden.

1. *Charter* values are not relevant to the statutory definition of "employee"

[24] Turning first to the issue of *Charter* values, I do not propose to examine the merits of the CPLC's *Charter* argument because it will be determined in a later hearing. Instead, I will address this point more simply: *Charter* values are not relevant to the interpretation of the *Act* in this case.

[25] The issue at this stage is one of statutory interpretation — namely, the meaning of the phrase "employed in the public service". *Charter* values are relevant only when a

statute is ambiguous. As the Supreme Court of Canada put it in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 62:

> *62 … to the extent this Court has recognized a "*Charter *values" interpretive principle, such principle can* ***only*** *receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.*
>
> [Emphasis in the original]

[26] I appreciate that in *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at paras. 54 to 57, the Ontario Court of Appeal suggested that administrative tribunals (unlike courts) must always apply *Charter* values when interpreting a statute. However, that result has not been followed outside Ontario. Appellate courts hearing judicial reviews from administrative tribunals in British Columbia (*A.T. v. British Columbia (Mental Health Review Board)*, 2023 BCCA 283 at para. 83), Saskatchewan (*Holtby-York v. Saskatchewan Government Insurance*, 2016 SKCA 95 at para. 24), Manitoba (*Boles v. Director, River East/Transcona*, 2019 MBCA 65 at para. 30), and Nova Scotia (*Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74 at para. 38) have all refused to consider *Charter* values when interpreting a statute unless it is ambiguous. Most importantly, in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para. 25, and *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 76, the Supreme Court of Canada stated that *Charter* values are only used to interpret a statute when the statute is ambiguous. Both of those cases were judicial reviews of administrative decisions.

[27] Ambiguity in a statute does not occur simply because the statute is worded in a technical way or because different people — even different courts or tribunals — have come to differing conclusions on the interpretation of a provision; see *Bell ExpressVu*, at para. 30. Ambiguity in a statute occurs only when there are two differing but equally plausible interpretations of a statute after having considered its text, context, and purpose. A statute that may at first seem ambiguously worded may become unambiguous after considering its context and purpose. To borrow an example from *Pong Marketing and Promotions Inc. v. Ontario Media Development Corporation*, 2018 ONCA 555 at para. 45, a statute may require a form to be filled by 5:00. That is ambiguous on its face, because it may mean 5:00 a.m. or 5:00 p.m. However, before

reverting to *Charter* values or other presumptions of statutory interpretation to resolve that issue, courts and tribunals will first look at the context and purpose of the provision. To continue that hypothetical statute, the heading of the part of the statute containing that rule may read "Items due in the afternoon". That is useful statutory context to interpret the specific section, and the section becomes unambiguous in light of that context.

[28] There is no ambiguity in this case. Even if the phrase "employed in the public service" is not clear on its face, as explained in *Econosult*, the phrase becomes clear when read in light of its broader statutory context including the *PSEA*; see *Econosult*, at 632 to 634. Therefore, *Charter* values are not relevant to the interpretation of that phrase and are not a reason to depart from *Econosult*.

2. *Econosult* applied an appropriate approach to statutory construction

[29] Second, the CPLC argues that the Supreme Court of Canada in *Econosult* relied too heavily on the text of the statute and not enough on one of its purposes — to facilitate collective bargaining. However, the Court in *Econosult* paid close attention to the statute's purpose and concluded at page 632 that this purpose was to create a separate legal regime uniquely for public servants who have been formally appointed as such. The Court did not ignore the statute's purpose; it just placed greater weight on one purpose than another. The Court's decision is entirely consistent with the modern approach to statutory interpretation as it considered the text, context, and purpose of the statute. The approach to statutory interpretation has not shifted so much since *Econosult* was decided to justify departing from that precedent — and certainly has not shifted since *Jolivet* and *Guérin* were decided.

[30] I have concluded that *Econosult*, *Jolivet*, and *Guérin* remain binding on the Board. Inmates are not "employed in the public service" because they have not been formally appointed under a statutory appointment process, in this case, the *PSEA*.

V. The Board's jurisdiction to hear the *Charter* challenge

[31] The CPLC argues that the definition of "employee" in the *Act* is unconstitutionally under-inclusive. While I do not propose to set out the CPLC's argument in full, its argument is similar to that in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, which is that inmates' total exclusion from the *Act* violates s. 2(d) of the *Charter*, just as agricultural workers' exclusion from provincial labour laws

violated the *Charter*. The CPLC also makes a novel argument that the exclusion of inmates from the *Act* violates s. 6(2)(b) of the *Charter*, which (says the CPLC) prohibits discrimination against inmate labourers on the basis of their residence within a province as prisoners. The respondent obviously disagrees with the CPLC on the merits of these arguments.

[32] The respondent makes a preliminary objection to the CPLC's constitutional challenge. It argues that the Board does not have the jurisdiction to hear the CPLC's constitutional challenge because inmates are not employees, and the CPLC is not an employee organization.

A. *Cuddy Chicks* is "on all fours" with this case

[33] The Supreme Court of Canada addressed a very similar objection in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 ("*Cuddy Chicks*"). The Ontario *Labour Relations Act* in force at the time (R.S.O. 1980, c. 228) stated that it did not apply "to a person employed in agriculture". The United Food and Commercial Workers International Union, Local 175 (UFCW), filed an application with the Ontario Labour Relations Board (OLRB) to certify it as the bargaining agent for a bargaining unit composed of employees at the chicken hatchery of Cuddy Chicks Limited. The OLRB concluded that those employees were employed in agriculture. However, the UFCW went further and asked the OLRB to find that the exclusion of agricultural employees from that statute violated s. 2(d) of the *Charter*.

[34] A majority of the OLRB concluded that it had the jurisdiction to rule on that *Charter* issue. Ultimately, the Supreme Court of Canada agreed and concluded at page 14 that "… a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought." The Supreme Court of Canada went on to conclude that those three requirements were met in that case. The Court stated that "[i]t is clear that it [the OLRB] has jurisdiction over the employer and the union" (at page 15), that the OLRB had jurisdiction over the subject matter of the *Charter* because of its power to determine questions of law, and that it had jurisdiction over the remedy sought because it could certify the UFCW as a bargaining agent for that bargaining unit.

[35] The respondent argues that the Board has no jurisdiction over the parties because Mr. Ewert is not an "employee" and the CPLC is not an "employee

organization" and that *Cuddy Chicks* means that the Board does not have jurisdiction. I do not agree. I cannot see any difference between this case and *Cuddy Chicks*. The OLRB had the jurisdiction to rule on the constitutional validity of a part of its constituting legislation that excluded agricultural employees from its scope. The CPLC is just as much a proper party to this application as the UFCW was in *Cuddy Chicks*: it is an organization that represents a group of persons who are expressly excluded from a labour relations statute. I agree with the CPLC that "*Cuddy Chicks* is on all fours with the instant matter."

B. *Conway* does not change that result

[36] The respondent argues that *R. v. Conway*, 2010 SCC 22, supports its position. *Conway* was about whether the Ontario Review Board had the jurisdiction to grant an absolute discharge under s. 24(1) of the *Charter*. The Supreme Court of Canada decided that the Ontario Review Board had the jurisdiction to grant remedies under s. 24(1) of the *Charter* but that it did not have the jurisdiction to grant an absolute discharge because that remedy was inconsistent with the broader statutory scheme and inappropriate in that case.

[37] *Conway* is not helpful to the respondent in this case for two reasons.

1. This case is about s. 52(1) of the *Constitution Act, 1982*, not s. 24(1) of the *Charter*

[38] First, *Conway* was about whether an administrative tribunal was a court of competent jurisdiction, which is a precondition for granting remedies under s. 24(1) of the *Charter* (see para. 18). In its initial complaint, the CPLC sought a declaration that the provisions of the *Act* it says are inconsistent with the *Charter* are of no force or effect to the extent of the inconsistency. An administrative tribunal has no jurisdiction to grant a general declaration of invalidity (see *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 31), so the Board could not grant that remedy.

[39] However, in its reply submissions, the CPLC narrowed its request to the Board treating the definition of "employees" as invalid for the purposes of the matter before it — i.e. the complaint of an unfair labour practice. This is not a s. 24(1) remedy; instead, it involves the application of s. 52(1) of the *Constitution Act, 1982*. Subsection 52(1) provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect. In *Martin*, the Supreme Court of Canada was

clear that an administrative tribunal has the power to decline to apply a provision of its enabling statute in a particular case on the ground that the provision violates the *Charter* so long as the tribunal has the power to determine questions of law (see paras. 33 and 48). As the Court explained in paragraph 65 of *Martin*, "Since the remedy requested arises from s. 52(1) of the *Constitution Act, 1982*, it is not necessary to determine whether the Appeals Tribunal is a 'court of competent jurisdiction' within the meaning of s. 24(1) of the *Charter* …".

[40] The same applies to this case too. The CPLC is seeking a remedy under s. 52(1) of the *Constitution Act, 1982*, not s. 24(1) of the *Charter*. *Martin* is clear that the necessary condition for the Board to apply s. 52(1) of the *Charter* is its power to determine questions of law. The Board has the power to determine questions of law by virtue of the jurisdiction granted to it under s. 12 of the *Act* to "… exercise the powers and perform the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act …". Therefore, the Board has the power to determine the constitutionality of its enabling legislation.

2. This case meets the *Conway* test anyway

[41] Second, in dealing with the question of whether the Ontario Review Board and tribunals more generally are a "court of competent jurisdiction" that may grant remedies under s. 24(1) of the *Charter*, the Supreme Court in *Conway* drew on earlier cases (including *Cuddy Chicks*) that addressed three different aspects of a tribunal's jurisdiction to decide *Charter* issues: whether a tribunal is a court of competent jurisdiction, whether it can apply the *Charter* to the exercise of statutory discretion, and whether it can hear and decide constitutional questions related to its statutory mandate (which was the issue in *Cuddy Chicks*). The Court decided to merge those three aspects into this single test:

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> *[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant* Charter *remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the* Charter *from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the* Charter —

> *and* Charter *remedies — when resolving the matters properly before it.*
>
> *[82] Once the threshold question has been resolved in favour of* Charter *jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).*
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> …

[42] Even if the Board had to apply that test, it is met in this case. As I stated earlier, the Board has the power to determine questions of law. Nothing in the *Act* states that it cannot determine *Charter* issues. Finally, the Board has the jurisdiction to grant at least some of the relief sought in this complaint — namely, a declaration that is commonplace when there has been interference in a union organizing campaign.

[43] The respondent relies on paragraph 78 of *Conway*, which reads:

> *[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to* ***matters properly before them****. And secondly, they must act consistently with the* Charter *and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a* Charter *remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).*
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> [Emphasis added]

[44] The respondent argues that by "properly before them", the Court means that the Board must have jurisdiction over the parties, and since Mr. Ewert is not an employee and the CPLC is not an employee organization, this constitutional question is not properly before the Board. I agree with the CPLC that this use of *Conway* strains its meaning. The Court explicitly did away with earlier cases stating that to be a "court of competent jurisdiction", a body had to have jurisdiction over the parties and the

subject matter of the dispute. Instead, the Court in *Conway* concluded that the jurisdiction to answer questions of law was sufficient.

[45] The Court's use of the phrase "properly before them" must be read in context with its entire decision. One of the cases that the Court considered to be part of the first strand it was merging was *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, in which it concluded that an arbitrator had the power to order a remedy under s. 24(1) of the *Charter*. The issue in *Weber* was whether the dispute over an alleged *Charter* breach fell within the exclusive jurisdiction of an arbitrator or whether courts had concurrent or exclusive jurisdiction over the dispute. The Court adopted the "essential character" test to decide that issue — namely, to decide whether the essential factual character of the dispute fell within the arbitrator's jurisdiction. By "properly before them", the Court was referring to that issue — namely, whether the essential character of the dispute fell within the jurisdiction of a particular tribunal.

[46] The Court in *Conway* made this link explicit in the very next paragraph, when it stated this:

> *[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their* Charter *rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4;* Weber*, at para. 60;* Cooper*, at para. 70;* Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in* Mills*, at p. 891. And* ***a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction*** *(*Weber*;* Regina Police Assn.*;* Quebec (Commission des droits de la personne et des droits de la jeunesse)*;* Quebec (Human Rights Tribunal)*;* Vaughan*;* Okwuobi*. See also* Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).*
>
> [Emphasis added]

[47] The Supreme Court of Canada recently has summarized paragraph 78 of *Conway* in *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paragraph 88 to mean that administrative tribunals with the power to decide questions of law have the authority to resolve constitutional questions linked to matters properly before them and indeed must act consistently with the

Charter when exercising their statutory function. The Court went on to confirm the use of the "essential character" test at paragraph 89 of that case, stating that "Tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction (i.e., where the essential factual character of the matter falls within the tribunal's specialized statutory jurisdiction)."

[48] The requirement that a case be properly before the Board is a screening function to ensure that cases whose essential character falls outside the Board's jurisdiction cannot proceed, despite being accompanied by a constitutional challenge. For example, a case with an essential character that falls within the exclusive jurisdiction of another tribunal would not be properly before the Board. That is not the case here.

[49] In conclusion, to the extent that *Conway* has modified *Cuddy Chicks*, it is not in a way that aids the respondent.

C. Other cases relied upon by the respondent

[50] The respondent relies upon *Latimer v. Canada (Treasury Board) (C.A.)*, [1992] 2 F.C. 361. The *Act* (both then and now) excludes casual employees from the definition of "employee". The Public Service Alliance of Canada negotiated retroactive pay increases for certain employees whom it represented. In *Latimer*, a group of casual employees filed a grievance, alleging that they were entitled to the retroactive increase too. They argued that the statutory provision denying them status as employees was unconstitutional. An adjudicator concluded that he did not have the jurisdiction to hear that *Charter* argument because the result of that argument would have been to call into question the scope of bargaining units in the federal public administration — something that "… can only be addressed through an appropriate application to the Board rather than under the guise of a grievance …".

[51] The Federal Court of Appeal upheld that result on judicial review. Like the adjudicator, the Court of Appeal differentiated between the powers of an adjudicator and the powers of the Board (which at that time was the Public Service Staff Relations Board). The Court of Appeal noted that the Board had the statutory authority to exercise powers that are incidental to the attainment of the objects of the *Act*, while an adjudicator did not have those powers at the time. Therefore, *Latimer* is

distinguishable because it involved the jurisdiction of an adjudicator instead of the Board.

[52] I note that adjudicators now have this same power in light of amendments that came into force in 2014, as discussed in *Kennedy v. Deputy Head (Department of Citizenship and Immigration)*, 2023 FPSLREB 118 at paras. 41 to 51. Therefore, the result in *Latimer* may be different for a Board member adjudicating a grievance today because of this change to the wording of the *Act*.

[53] Additionally, if *Latimer* were not distinguishable, I would not follow it today, for two reasons. First, it was decided before the Supreme Court of Canada reoriented the legal framework for this issue in *Martin* to telescope the inquiry down to whether the tribunal has the jurisdiction to decide questions of law. As I stated earlier, this test is met in this case. Second — and I say this with the utmost respect for the adjudicator and judges who decided *Latimer* — I disagree with the result. I cannot see how the OLRB had jurisdiction over the parties in *Cuddy Chicks* when the employees whom the UFCW sought to represent were expressly excluded from the statute, but an adjudicator did not have jurisdiction over the parties because the employees were expressly excluded from the statute. The Court of Appeal assumed that there was no issue in *Cuddy Chicks* with respect to the OLRB's jurisdiction over the parties, relying on paragraph 15 of *Cuddy Chicks*. However, when the Supreme Court of Canada stated in *Cuddy Chicks* at page 15 that "[i]t is clear that [the OLRB] has jurisdiction over the employer and the union", it was not saying that there was no dispute over that jurisdiction — it was just saying that the answer to that issue was obvious. The jurisdiction over the parties in *Latimer* should have been the same as in *Cuddy Chicks*.

[54] The respondent relied upon *Kimaev v. Ontario (Transportation)*, 2023 FC 475, in support of its argument. That case was about the jurisdiction of the Federal Court to hear a claim against a Minister of the Crown in right of Ontario. The case was about the interpretation of statutes governing the Federal Court and has no bearing on the jurisdiction of a tribunal to hear a *Charter* argument.

VI. Issue of whether inmates are employees outside of the definition in the *Act* is not ripe to be determined yet

[55] The respondent argued in the alternative that the remedy sought by the CPLC exceeds the Board's jurisdiction because s. 78 of the *Corrections and Conditional*

Release Act (which provides for payments to offenders) and s. 750 of the *Criminal Code* (R.S.C., 1985, c. C-46) (which provides that a person convicted of an indictable offence for which they are sentenced to imprisonment for two years or more loses any public employment) bar inmates from employment with the CSC. One of the remedies sought by the CPLC is a declaration that individuals working through any CSC work program available to incarcerated individuals are employees under the *Act*. The respondent says that the Board cannot grant that declaration in light of those two statutes.

[56] The problem with that argument is that the CPLC is seeking five orders, including a declaration of a breach of s. 186 of the *Act*. Even if I were to agree with the respondent, that may not dispose of this matter because the CPLC seeks other remedies that may be within the Board's jurisdiction to grant.

[57] I have decided not to address that remedial issue at this preliminary stage because answering that question in the way proposed by the respondent would not lead me to dismiss this complaint in light of the other remedies sought.

[58] Similarly, both parties made extensive submissions about whether inmates are "employees" at common law, including about the impact of those two statutes. I decided not to answer that question in this decision because the answer may involve facts that the respondent has not yet had the opportunity to test through cross-examination or through leading its own evidence. Section 78 of the *Corrections and Conditional Release Act* and s. 750 of the *Criminal Code* may be relevant to this question as well. Finally, the answer to that question may not dispose of the constitutional issue that the Board has to decide. I expect that the parties have much more to say about whether inmates are employees at common law and whether the protections in s. 2(d) or 6(2)(b) of the *Charter* apply only to employees.

VII. Conclusion

[59] In summary, inmates are not "employees" as that term is defined in the *Act*. However, the Board has the jurisdiction to rule on whether that definition is unconstitutionally underinclusive for the purposes of this complaint.

[60] I want to thank both parties' representatives for the high quality of their submissions. Submissions can be thorough, and they can be clear; the parties' submissions in this case were both.

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

(The Order appears on the next page)

VIII. Order

[62] The respondent's preliminary objection is dismissed.

[63] This complaint will be returned to the Registry of the Board for scheduling in due course.

October 10, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board