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January 4, 2018

By Email

Federal Public Sector Labour Relations and Employment Board
240 Sparks Street, 6th Floor
P.O. Box 1525, Station "B"
Ottawa, ON K1P 5V2

Attention: Ms. Kaylee Langille, Case Management Officer

Dear Ms. Langille:

Re: Applications for Certification
National Police Federation ("NPF")
Association des Membres de la Police Montée du Québec ("AMPMQ"),
FPSLREB File Nos.: 542-02-13 and 542-02-12
Our File No.: 37664-3

Please find attached Reply Submissions on behalf of the National Police Federation ("NPF") in relation to its Motion filed June 22, 2017 with respect to the above-noted Applications for Certification, and in respect of the direction of the Board dated November 24, 2017.

Yours truly,

Chris Rootham

cc: Service List

FPSLREB File No. 542-02-13

IN THE MATTER OF AN APPLICATION FOR CERTIFICATION UNDER SECTION 54 OF THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*

NATIONAL POLICE FEDERATION

Applicant

-and-

TREASURY BOARD OF CANADA

Respondent

-and-

ASSOCIATION DES MEMBERES DE LA POLICE MONTÉE DU QUEBEC and CANADIAN POLICE ASSOCIATION

Intervenors

REPLY SUBMISSIONS OF THE NATIONAL POLICE FEDERATION (RE: FPSLREB DIRECTION DATED NOVEMBER 24, 2017)

OVERVIEW

1. By order dated November 24, 2017 the Federal Public Sector Labour Relations and Employment Board (the "Board") directed that the Applicant, the National Police Federation ("NPF"), provide written submissions on three issues:

    a. Whether the NPF is an "employee organization";

    b. Whether the NPF is a "police-only" organization; and

    c. Whether the person who signed the application for certification was "duly authorized" to do so.

2. The NPF provided its submissions on these three issues on December 7, 2017.

3. In response, the Association des Membres de la Police Montée du Quebec (« AMPMQ ») has requested that this Board stay the NPF's application for certification pending determination of the constitutional validity of s. 238.14 of the *Federal Public Sector Labour Relations Act* ("*FPSLRA*"). The AMPMQ also provided submissions concerning the three questions above.

4. This reply will address the AMPMQ's request for a stay pending determination of the constitutional validity of s. 238.14 of the *FPSLRA*. The NPF's position is as follows:

    a. The AMPMQ's application for a determination of the constitutional validity of s. 238.14 of the *FPLSRA* is, in effect, a request for reconsideration of the Board's earlier decision of October 11, 2017. The AMPMQ has not demonstrated that it meets this Board's test for reconsideration, and therefore this Board should not hear the AMPMQ's application to determine the constitutional validity of s. 238.14 of the *FPSLRA*.

    b. In the alternative, if the Board is going to hear the AMPMQ's application for a determination of the constitutional validity of s. 238.14 of the *FPSLRA*, the Board should not stay the NPF's application.

THE AMPMQ'S IS ASKING FOR RECONSIDERATION, WITHOUT JUSTIFICATION

Jurisdiction of the Board to hear constitutional issues and grant constitutional remedies

5. At paragraphs 28-31 of its submissions, the AMPMQ sets out the jurisdiction of this Board to hear constitutional issues. The NPF does not object to the jurisdiction of this Board to hear constitutional issues.

6. The AMPMQ's submissions are silent, however, on the specific relief they are seeking in their application. Presumably, the AMPMQ is seeking a declaration of invalidity – i.e. a declaration that s. 238.14 of the *FPSLRA* violates s. 2(d) of the *Charter* and is not saved by s. 1 of the *Charter*. The AMPMQ has ignored s. 63(1) of *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* ("Bill C-7")[1], which governs applications for certification filed prior to June 19, 2017. Both the NPF and the AMPMQ's applications were filed prior to June 19, 2017; therefore, s. 63(1) of Bill C-7 stipulates the appropriate bargaining unit for both applications.

7. Assuming that the AMPMQ intends to challenge the constitutional validity of both statutory provisions, their application is subject to the limits of any administrative tribunal to grant constitutional relief. As Professor Hogg has put it:

> *The Supreme Court of Canada has insisted that the administrative tribunal has no power to make a declaration of invalidity. What the Court seems to mean by this is that a decision by a tribunal that a law is unconstitutional is no more than a decision that the law is inapplicable in the particular case. It is not a binding precedent. According to the*

[1] S.C. 2017, c. 9

Court, only "superior courts" have the power to issue binding declarations of invalidity that will invalidate a law with general effect.[2]

8. The Supreme Court of Canada has explained this principle as follows:

> *We are in substantial agreement with the respondents. On the question of remedies, the appellants correctly point out that the ATQ cannot issue a formal declaration of invalidity. This is not, in our opinion, a reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in Martin,* ***the constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity*** *(para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the Canadian Charter binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."*
>
> *That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the ATQ.* ***If the ATQ finds a breach of the Canadian Charter and concludes that the provision in question is not saved under s. 1, it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force*** *(Martin, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the Canadian Charter. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.*[3]

9. The Supreme Court of Canada has more recently (and more concisely) explained this principle as follows:

> *[t]his Court has held that an administrative tribunal such as the Tribunal does not have jurisdiction to make a general declaration of invalidity. . . .*
>
> *Insofar as the By-law infringed the Quebec Charter, the Tribunal could declare it to be inoperable against him. However, it could not declare it to be "inoperative and invalid" without further clarification, as that would amount to a general declaration of invalidity, which it does not have the jurisdiction to make.*[4]

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[2] P. Hogg, *Constitutional Law of Canada*, 5th ed. vol 1 (Toronto: Thomson Carswell, 2007) at para 40.3(a).
[3] *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 at paras 44-45.
[4] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paras 153-154.

10. As stated above, this Board has the jurisdiction to apply the *Charter*. However, the Board does not have the jurisdiction to grant a general declaration of invalidity; the Board only has the power to disregard an unconstitutional statutory provision in a current proceeding.

AMPMQ's application is for reconsideration, and it does not raise valid grounds for reconsideration

11. This limit on the Board's jurisdiction – that it cannot grant a declaration of invalidity, but can only disregard an unconstitutional provision in a current proceeding – is important because of the stage of this application for certification. On October 11, 2017, the Board made its order determining the appropriate bargaining unit in this case. That order, like all Board orders, is "final."[5] All proceedings concerning the definition of the appropriate bargaining unit are completed.

12. Since the Board does not have the jurisdiction to grant a general declaration of invalidity, the AMPMQ has missed its opportunity to raise constitutional issues in determining the appropriate bargaining unit in this case. If the AMPMQ wanted to rely upon the *Charter* to support its argument in favour of a regional bargaining unit, it had to do so in the course of its submissions at that stage.

13. The only way for the AMPMQ to obtain relief it seeks under the *Charter* at this late stage is in an application for reconsideration under s. 43(1) of the *FPSLRA*. That section permits the Board to "review, rescind or amend any of its orders or decisions." This Board has applied s. 43(1) of the *FPSLRA* sparingly. The Board has been clear that the reconsideration must:

    - *not be a relitigation of the merits of the case;*

[5] *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c 40, s 365, s. 34(1).

- *be based on a material change in circumstances;*
- *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
- *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
- *ensure that there is a compelling reason for reconsideration; and*
- *be used "...judiciously, infrequently and carefully...".*[6]

14. The AMPMQ has not identified any new facts that would justify reconsideration of the Board's decision.

15. The "new argument" in this case involves the *Charter*. However, the AMPMQ had ample opportunity to make this argument before December 19, 2017. The AMPMQ hinted at its *Charter* concerns on May 26, 2017, August 11, 2017, and November 9, 2017, as described in its submissions to the Board. There was nothing preventing the AMPMQ from raising this *Charter* issue properly in the context of the bargaining unit determination that was completed on October 11, 2017. The *Charter* is therefore not a "new argument that could not reasonably have been presented at the original hearing."

16. For these reasons, the AMPMQ has not raised valid grounds for the Board to reconsider its October 11, 2017 decision.

THERE IS NO BASIS TO STAY THE BOARD'S ONGOING PROCESS PENDING A DETERMINATION OF THE AMPMQ'S *CHARTER* ISSUE

17. The AMPMQ has asked for this Board to stay the NPF's application for certification pending a ruling on the *Charter* issue. Even if this Board were to hear the AMPMQ's *Charter*

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[6] *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39 at para 29, affirmed 2009 FCA 376. This passage was recently quoted in *Bialy v. Gordon*, 2016 PSLREB 109 at para 7 and *Bernard v. Canada (National Revenue)*, 2017 FCA 40 at para 13.

application, the AMPMQ has not demonstrated that the NPF's application should be stayed pending that decision.

18. The Supreme Court of Canada has set out the test for whether to stay a labour board proceeding pending a constitutional challenge. The party seeking a stay must demonstrate:

    1. That there exists a serious question to be tried as opposed to a frivolous or vexatious claim;
    2. That it would suffer irreparable harm if a stay is not granted; and
    3. That other factors to be considered in the balance of convenience support the granting of a stay.[7]

19. In *MTS,* the Manitoba *Labour Relations Act* allowed the Manitoba Labour Board (the "MLB") to impose a first collective agreement on the employer and union if the parties could not negotiate an agreement. The union applied to the MLB for a first collective agreement and the employer brought a constitutional challenge to the legislation in the Manitoba Superior Court. The employer then sought a stay of the MLB hearing in the Superior Court, which the Court denied. The employer appealed the decision to the SCC.

20. The SCC ultimately refused to grant the stay based on the balance of convenience test. The Court affirmed the Motions Judge's reasoning that the delay and impact on collective bargaining favoured refusing the stay:

> *It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in*

[7] *Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110 at paras 31-35 ("*MTS*").

> *circumstances where the status quo cannot, practically speaking, be maintained.*
>
> *In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.*[8]

21. Applying the *MTS* test, labour boards have rejected stays pending a certification vote on the basis that conducting a certification vote results in "no specific harm" justifying a stay.[9] The Alberta Labour Relations Board (per Chair Andrew Sims) has also rejected a stay of a decision approving a certification vote flowing from the merger of two bargaining units because "*time is often of the essence in employer/trade union relationships. This is true in representation questions like certification.*"[10]

22. Even where a labour board granted a partial stay pending a constitutional challenge to legislation establishing a particular bargaining unit structure, the board did so only because an existing bargaining agent would lose all bargaining rights.[11] In this case, the AMPMQ does not have any current representation rights; its harm is limited to an opportunity to represent employees, instead of losing existing bargaining rights. This harm is more than outweighed by the harm to all RCMP members caused by continuing delay in obtaining collective bargaining representation.

23. Going through the *MTS* test in this case:

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[8] *Ibid* at para 98.
[9] *Sun West School Division No 207 (Re)*, [2009] SLRBD No 9 at para 22. See also *Ville de Montréal c. Martin*, 2017 QCCS 12 at paras 151-169, where the Quebec Superior Court decided that two arbitrators should not have stayed their proceedings pending a constitutional challenge to their underlying legislative jurisdiction.
[10] *Miscellaneous Teamsters, Local Union 987, Applicant and Alberta Brotherhood of Dairy Employees and Driver Salesmen, Respondent and Northern Alberta Dairy Pool Limited, Respondent.*, [1991] Alta LRBR 159.
[11] *CUPE Locals 189 and 408 (Re),* [2009] Alta LRBR 266 at para 19.

a. AMPMQ has not set out any basis for its constitutional challenge, and therefore has not demonstrated a serious issue that s. 238.14 of the *FPSLRA* is unconstitutional. This is particularly the case in light of the Board's recent decision that a broad, national, all-encompassing bargaining unit is appropriate for a group of civilian RCMP members despite s. 2(d) of the *Charter*, because "*it is necessary to create a single bargaining unit rather than multiple bargaining units, to ensure the protection of the public and to ensure the smooth functioning of this newly created labour relations regime.*" The Board also concluded that the recent Supreme Court jurisprudence on s. 2(d) of the *Charter* did not "*erase the jurisprudence of this Board and its predecessors to prefer larger bargaining groups.*"[12]

b. The AMPMQ has not set out the irreparable harm that it will suffer in the absence of a stay. The AMPMQ does not currently represent any RCMP members for the purposes of collective bargaining, and thus will not "lose" any representation rights in this proceeding. The AMPMQ has not set out any harm it will suffer if the NPF represents RCMP members in Quebec while the constitutional issue is being resolved.

c. The balance of convenience does not favour a stay. To paraphrase Chair Sims (quoted above), time is of the essence in certification applications. It is the practice in labour boards across Canada to conduct a vote immediately upon receiving an application for certification, as it is well-established that delay in certification votes degrades support for the employee organization specifically and also degrades support for collective bargaining generally.[13] There are approximately 17,925 RCMP members

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[12] *Canadian Union of Public Employees v Treasury Board (RCMP)*, 2017 FPSLREB 36 at paras 86 and 89.
[13] Michele Campolieti, Chris Riddel, and Sara Slinn, "Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada", 2007 61(1) ILR Review 32.

affected by the NPF's application for certification, of whom only approximately 850 work in "C" Division (in Quebec). The balance of convenience does not favour holding up collective bargaining for all RCMP members while one employee association tries to carve out less than five percent of the membership into a separate bargaining unit.

REPLY TO AMPMQ'S SUBMISSIONS ON THREE ISSUES PROPERLY AT ISSUE IN THIS MOTION

24. The NPF takes no position on the AMPMQ's submissions on the three issues properly at issue in this motion, namely whether it is an "employee organization", whether it is a "police-only" organization, and whether the signatory of its application has been duly authorized to make that application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Counsel for the Applicant (National Police Federation)

TABLE OF AUTHORITIES

Statutes

1. *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c 40, s 365, s. 34(1)

Case Law

2. *Bernard v. Canada (National Revenue)*, 2017 FCA 40
3. *Bialy v. Gordon*, 2016 PSLREB 109
4. *Canadian Union of Public Employees v Treasury Board (RCMP)*, 2017 FPSLREB 36
5. *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, aff'd 2009 FCA 376
6. *CUPE, Locals 189 and 408 (Re)*, [2009] Alta LRBR 266
7. *Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110
8. *Miscellaneous Teamsters, Local Union 987, Applicant and Alberta Brotherhood of Dairy Employees and Driver Salesmen, Respondent and Northern Alberta Dairy Pool Limited, Respondent.*, [1991] Alta LRBR 159
9. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
10. *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16
11. *Sun West School Division No 207 (Re)*, [2009] SLRBD No 9
12. *Ville de Montréal c. Martin*, 2017 QCCS 12

Secondary Sources

13. P. Hogg, *Constitutional Law of Canada*, 5th ed. vol 1 (Toronto: Thomson Carswell, 2007) at para 40.3(a)
14. Michele Campolieti, Chris Riddel, and Sara Slinn, "Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada", 2007 61(1) ILR Review 32