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Our files / Nos références: 8190060

February 2, 2018

Via e-mail: *Mail.Courrier@fpslreb-crtespf.gc.ca*
Confirmation by courier

Kaylee Langille
Manager, Case Manager Services
Public Service Labour Relations Board
P.O. Box 1525, Station B
Ottawa, Ontario
K1P 5V2

Dear Sir/Madam:

Re: Association des membres de la police montée du Québec Inc.
National Police Federation and Treasury Board of Canada
FPSLREB File Nos. 542-02-12 and 13

Please find enclosed a copy of the Employer's Submissions Regarding Reconsideration & Stay in the above-noted matter. A paper copy of the Employer's Submissions along with the Book of Authorities will be sent to you by courier.

Yours very truly,

Sean F. Kelly

c.c. Christopher Rootham
Marco Gaggino

Encl.

FPSLREB File Nos.: 542-02-12 and 13

FEDERAL PUBLIC SECTOR LABOUR RELATIONS
AND EMPLOYMENT BOARD

B E T W E E N :

NATIONAL POLICE FEDERATION

Applicant and Intervener

- and -

ASSOCIATION DES MEMBRES DE LA POLICE MONTÉE DU QUÉBEC INC

Applicant and Intervener

- and -

TREASURY BOARD OF CANADA

Respondent/Employer

EMPLOYER'S SUBMISSIONS REGARDING RECONSIDERATION & STAY

PART I – OVERVIEW & FACTS

A. Overview

1. A constitutional challenge constitutes an exceptional and compelling reason for the Board to exercise its discretion and review a previously determined bargaining unit description. The Association des membres de la police montée du Québec Inc. (AMPMQ) is contesting the constitutional validity of the very section of the *Federal Public Sector Labour Relations and Employment Board Act* (*Act*) that is the sole basis for the Board's previous bargaining unit determination. As such, a fresh determination of the bargaining unit description is warranted, albeit the outcome of same will inevitably lead to a single national bargaining unit.

2. Furthermore, a stay of the certification process is not warranted on the basis that the AMPMQ has failed to demonstrate, let alone make any submissions: (a) that it would suffer any irreparable harm by proceeding; and/or (b) how the balance of convenience supports such a stay.

B. Facts

3. The National Police Federation (NPF) filed a motion wherein it sought *inter alia* a declaration that the appropriate bargaining unit was a single national unit prescribed under the new section 238.14 of the *Act*. Section 238.14 reads as follows:

238.14 If an application for certification is made under subsection 238.13(1), the Board must determine that the group that consists exclusively of all the employees who are RCMP members and all the employees who are reservists constitute the single, national bargaining unit that is appropriate for collective bargaining.	238.14. Saisie d'une demande d'accréditation conforme au paragraphe 238.13(1), la Commission définit l'unique unité nationale habile à négocier collectivement comme étant le groupe composée exclusivement de l'ensemble des fonctionnaires qui sont des membres de la GRC et des fonctionnaires qui sont des réservistes.

4. Although the AMPMQ continuously informed the Board that it reserved its right to challenge the constitutional validity of section 238.14 of the *Act*, it never formally raised this issue in its response to the NPF's motion. Rather, the AMPMQ submitted that it opposed the motion.

5. In addressing the NPF's motion, the Board noted that section 238.14 gave the Board no latitude to consider another bargaining unit. As such, the Board ordered a single national bargaining unit, as prescribed by Parliament under section 238.14 of the *Act*. In doing so, the Board did not consider the additional reasons for a single national bargaining unit raised by either the NPF or the employer.

6. Having established the bargaining unit, the Board subsequently sought the parties' submissions regarding a number of collateral issues relating to the nature of the applicants' operations and the authority to seek certification. In responding to those Board inquiries (and after the Board had already determined the appropriate bargaining unit), the AMPMQ expressly sought permission to submit that section 238.14 violates section 2d) of the *Canadian Charter of Rights and Freedoms* (*Charter*).

PART II – POINTS IN ISSUE

7. This matter raises the following issues:

   (a) Should the Board exercise its discretion and reconsider its previous decision regarding the bargaining unit description?

   (b) Should the Board stay this certification process pending the outcome of any bargaining unit redetermination?

PART III: SUBMISSIONS OF THE EMPLOYER

A. The *Charter* Argument Should be Considered by the Board (but Rejected)

8. This constitutional challenge constitutes an exceptional and compelling reason for the Board to exercise its discretion and review a previously determined bargaining unit description. Indeed, the AMPMQ is contesting the constitutional validity of the very section of the *Act* that is the sole basis for the Board's previous bargaining unit determination in 2017 FPSLREB 34. That said, should the Board exercise its discretion, the employer's position will be that section 238.14 does not unjustifiably violate section 2d) of the *Charter* and in any event, a single national bargaining unit is still the appropriate bargaining unit on the basis of the criteria set out in the *Act* and/or the Board's jurisprudence.

9. Subsection 43(1) of the *Act* vests the Board with the discretion to review its own decision in exceptional circumstances as follows:

43(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application	43(1) La Commission peut réexaminer, annuler ou modifier ses décisions ou ordonnances ou réentendre toute demande avant de rendre une ordonnance à son sujet.

10. In assessing whether to exercise this discretionary authority, the Board has developed a series of criteria and guidelines. Specifically, it is well established that the Board can review a decision if a party provides some "compelling reason" for same, irrespective of its assessment of the other reconsideration guidelines.[1] For example, in *Melançon*, the Board accurately summarized such principles as follows:[2]

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[1] See for ex. *Canada (Treasury Board) v. Melançon*, 2011 PSLRB 52, Employer's Book of Authorities [EBOA], Tab 3 at paras. 19 and 20; *Gilkinson v. PIPSC,* 2013 PSLRB 141, EBOA, Tab 4, at para 159; *Bouchard v. Lahaie*, 2014 PSLRB 17, EBOA, Tab 5, at para 15; *Davies v. Public Service Alliance of Canada*, 2011 PSLRB 98, EBOA, Tab 6 at para 12.

[2] *Melançon, supra*, EBOA, Tab 3 at paras. 19 and 20.

> The Board has developed detailed criteria to determine whether to agree to review, rescind or amend its decisions. They are based on criteria already established by the Public Service Staff Relations Board ("the former Board") under the *Public Service Staff Relations Act*, which contained a comparable section about reviewing orders or decisions (see *Danyluk et al. at* paragraph 14). According to *Czmola*, the seminal decision of the former Board on this issue is *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 125-02-41 (19851218). In that decision, the former Board wrote the following:
>
> > In the Board's view, section 25 was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing **or where some other compelling reason for review exists**. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.
>
> The purpose of section 43 of the *Act* is not to allow an unsuccessful party to re-argue the merits of its case. Rather, the purpose is to enable the Board to reconsider a decision on the basis of changed circumstances or to permit the presentation of evidence or arguments that could not have been presented in the original proceedings. **The Board could also agree to review a decision for other compelling reasons.** [Our emphasis]

11. In any event, a tribunal should waive any procedural and/or statutory limitations in order to address a constitutional challenge raised by a party.[3]

12. In the case at hand, section 238.14 of the *Act* was clearly determinative in establishing the previous description of the bargaining unit. The Board's bargaining unit description is solely based on the parameters prescribed by Parliament in section 238.14 of the *Act*. The AMPMQ is now contesting the very section which is at the heart of the Board's bargaining unit description. This constitutes an exceptional and compelling reason within the meaning of the Board's jurisprudence

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[3] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, EBOA, Tab 7, at paras 134-35. See for ex. *Gitxsan Health Society (Re)*, 2014 CIRB 748, EBOA, Tab 8 at paras 28-29; and *Dilico Anishinabek Family Care (Re)*,2012 CIRB 655, EBOA, Tab 9 at para 37.

to reconsider a bargaining unit decision pursuant to subsection 43(1) of the *Act*. As such, a fresh determination of the bargaining unit is warranted.

13. Should the Board exercise its discretion in this instance, the employer respectfully requests that a hearing be convened in order to only address this constitutional issue. Should the Board conclude that section 238.14 is not contrary to section 2d) of the *Charter*, the bargaining unit description would be the *status quo*. In the event the Board concludes otherwise, a separate hearing could then be held to determine the appropriate bargaining unit in light of the evidence and the criteria set out under the *Act* and/or the Board's jurisprudence.

B. No Stay Pending any Bargaining Unit Redetermination

14. The AMPMQ has failed to provide any reasons to support its request for a stay of this certification proceeding.

15. As noted by the NPF, the Board must consider the following 3-pronged analysis in order to determine whether to grant a stay in a myriad of circumstances including, but not limited to an application to stay a certification process pending the outcome of a constitutional challenge: [4]

(a) That there exists a serious question to be tried as opposed to a frivolous or vexatious claim;

(b) That it would suffer irreparable harm if a stay is not granted; and

(c) That other factors to be considered in the balance of convenience support the granting of the stay.

16. With respect to the question to be tried, the employer acknowledges that the constitutional validity of the *Act* is a serious issue to be tried.

17. In relation to the question of irreparable harm, the AMPMQ has not provided any evidence let alone any submission regarding this criterion. In any event, the AMPMQ will not lose any representation rights, as it does not represent RCMP officers for the purposes of collective bargaining. Any and all actual (as opposed to speculative) harm caused by proceeding to the next steps of the certification process (if any) can easily be repaired by the Board.

18. Turning to balance of convenience, the maxim "labour relations delayed is labour relations denied" accurately describes the effect of staying this certification process. During this stay period, which could be of significant duration, employees remain unrepresented in their dealings with the employer. The delay could result in a degradation of union support. Moreover, granting a stay could encourage parties to raise constitutional issues as a method to avoid unionization and/or

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[4] *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, EBOA, Tab 10 at pp. 127-29. See also *Siksika Health Services (Re)*, [2017] A.L.R.B.D. No. 85, EBOA, Tab 11 at para 17.

delay a certification process, which is not only contrary to the public interest, but is also contrary to the purpose of the *Act*.[5]

[5] *Ibid* at paras 30-32.

PART IV – ORDER SOUGHT

19. On the basis of the foregoing, the employer respectfully requests that the Board:

(a) convene a hearing;

(b) reconsider its bargaining unit descriptions by assessing whether section 238.14 of the *Act* violates section 2(d) of *Charter*;

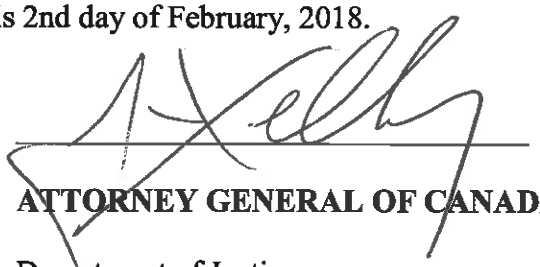
i. In the negative, confirm the single national bargaining unit described by the Board in 2017 FPSLREB 34;

ii. In the affirmative, convene a separate hearing in order to allow the parties to submit evidence and make additional arguments regarding the appropriate bargaining unit.

(c) deny the AMPMQ's request for a stay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED in Ottawa, Ontario, this 2nd day of February, 2018.



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PART V: LIST OF AUTHORITIES

LEGISLATION

1. *Federal Public Sector Labour Relations Act*, 2003, c. 22, s. 2, s. 43 and 238.14.
2. *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

AUTHORITIES

3. *Canada (Treasury Board) v. Melançon*, 2011 PSLRB 52
4. *Gilkinson v. PIPSC,* 2013 PSLRB 141
5. *Bouchard v. Lahaie*, 2014 PSLRB 17
6. *Davies v. Public Service Alliance of Canada*, 2011 PSLRB 98
7. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14*8.*
   Gitxsan Health Society (Re), 2014 CIRB 748
9. *Dilico Anishinabek Family Care (Re)*, 2012 CIRB 655
10. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110
11. *Siksika Helath Services (Re*), [2017] A.L.R.B.D. No. 85