Canada Industrial Relations Board Conseil canadien des relations industrielles

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# Reasons for decision

Canadian Prisoners' Labour Confederation,

*complainant,*

*and*

Correctional Service Canada; Treasury Board of Canada Secretariat; CORCAN,

*respondents*.

Board File: 30709-C
Neutral Citation: 2015 CIRB **779**
June 12, 2015

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Gaétan Ménard and Robert Monette, Members.

These reasons for decision were written by Mr. Robert Monette.

## I. Nature of the Complaint

[1] This is a complaint filed with the Board on October 17, 2014, wherein the Canadian Prisoners' Labour Confederation (the complainant) alleges that Correctional Service Canada, the Treasury Board of Canada Secretariat (the Treasury Board) and CORCAN (Corcan), an agency of Correctional Service Canada, (the respondents) have collectively violated section 94(1)(*a*) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) by denying permission to the complainant to engage in labour organizing activities of certain prisoners within the correctional institutions.

[2] The complainant alleges that the inmates who, as part of their rehabilitation program, perform paid work for the respondents, have thereby entered in an employment relationship with the respondents collectively and that the respondents' refusal to allow labour organizing activities with these prisoners constitutes an unfair labour practice prohibited by the *Code*.

[3] Given the nature of the complaint and the identity of the parties to the proceeding, the Board specifically directed the parties to limit their submissions, at this stage of the process, to the preliminary issue of the Board's jurisdiction over the subject matter of the complaint, which issue will first be determined by the Board before progressing the matter further, if needed.

**II. Facts and Preliminary Issue**

[4] The complainant asserts that it is a trade union, as contemplated by the *Code*, which intends to represent working prisoners and bargain collectively their working conditions and pay with the respondents, by using the certification and collective bargaining regimes provided for by the *Code*.

[5] The work performed by inmates is undertaken on a voluntary basis for an agency of Correctional Service Canada named Corcan, which the complainant added by amending the original list of respondents. The tasks are varied and include maintenance and kitchen work within the detention facilities, as well as the production of goods and services used in the correctional facilities or sold by Corcan to other institutions and government departments. Remuneration is paid by the Treasury Board to each working prisoner for the time spent working, at a modest rate of pay below minimum wage standard. The revenues generated by the sales effected by Corcan support the costs of the operations.

[6] Corcan is described as a special operating agency (SOA) that operates under the direction of Correctional Service Canada and the Treasury Board, set up in that fashion since 1992 to manage prison labour, prison services and production of goods. It was not created by statute or by royal charter and, according to the submissions, it does not constitute an independent legal entity from Correctional Service Canada.

[7] The work performed by the prisoners is considered part of their rehabilitation program and is monitored as such by the detention officers.

[8] The preliminary jurisdiction issue is raised by the office of the Attorney General of Canada, who filed the response for all the respondents. The response states that the inmates who participate in work activities directed by the respondents are not "employees" within the meaning of the *Code*, and that, alternatively, if ever they are considered to be in an employment relationship, they would be employees of Correctional Service Canada and its agency, hence employees of her Majesty in right of Canada and, therefore, excluded from the application of the *Code* by the operation of section 6 thereof.

[9] It is to be noted that in early 2012, the complainant filed a similar complaint with the Public Service Labour Relations Board (PSLRB), since renamed Public Service Labour Relations and Employment Board (PSLREB). The complaint was dismissed on January 3, 2013, when the PSLRB ruled that the prisoners could not be considered as "employees" under the *Public Service Labour Relations Act* (PSLRA) as they were not appointed to a position, a key requirement to be an "employee" under the PSLRA (see *Jolivet* v. *Treasury Board* (*Correctional Service of Canada*), 2013 PSLRB 1). An application for judicial review of the original decision was dismissed by the Federal Court of Appeal on January 7, 2014 (*Jolivet* v. *Treasury Board* (*Correctional Service of Canada*), 2014 FCA 1) on the basis that employment in the public service requires an appointment to a position, that inmates performing work activities directed by Correctional Service Canada have not been so appointed and that, as a result, they are not "employees" within the meaning of the PSLRA.

**III. Positions of the Parties**

**A. The Complainant**

[10] The complainant submits that its union activity performed at federal correctional facilities as here is an activity that is protected from interference by the provisions of the *Code*, notably section 94(1)(*a*), and that the Board has jurisdiction to hear the merits of its complaint.

[11] The complainant stresses that the relationship between the inmates and the respondents as regards paid work is equivalent to a traditional employer-employee relationship as contemplated by the *Code*, including a hiring process completed with opportunities for remuneration improvements and transfers to other types of work, subject to supervision and reports on performance.

[12] It submits that the *Jolivet*, *supra*, decisions are not determinative of the matter under this *Code*. It argues that if prisoners are not to be considered as "employees" under the PSLRA, in accordance with these decisions, their work and employment relationship with the respondents make it that they ought to be considered "employees" of the respondents for the purposes of the *Code*.

[13] The complainant argues that Corcan is a special operating agency (SOA) established in 1992 to manage the prison work performed by inmates, such that it qualifies and should be considered as a corporation as described at section 5(1) of the *Code* and, therefore, be

governed by the *Code* as an employer. It suggests that a hearing dedicated to the Corcan structure and administration would be appropriate.

[14] The complainant also suggests that the Supreme Court decision in *Canada Labour Relations Board et al.* v. *Yellowknife*, [1977] 2 S.C.R. 729, at page 731, constitutes authority and reasoning that should be applied by the Board to resolve any doubt or existing ambiguity between the application of the PSLRA and the *Code*, which should favour inclusion and protection under the *Code*'s collective bargaining regime, rather than exclusion.

**B. The Respondents**

[15] The respondents submit that Correctional Service Canada is responsible to create rehabilitation programs to help offenders reintegrate society. The work activity that is administered by its special operating agency Corcan is part of the correctional process; it does not constitute employment and the participating inmates do not become "employees" under the *Code*.

[16] The respondents submit that there is accordingly no employee-employer relationship between inmates and any of the respondents, such that the *Code* does not apply, and that the Board is without jurisdiction to deal with the complaint other than to dismiss it summarily, without holding a hearing.

[17] The respondents further submit that the complainant has failed to establish that Corcan, an internal agency developed and managed by Correctional Service Canada, is a corporation or that it might be subject to the *Code* under the scope of its section 5(1). They submit that the agency is not a crown corporation, that it has not been created by statute and that it operates directly under Correctional Service Canada as a department and as part of the government itself.

[18] It is submitted that Corcan is part of the correctional department organization, set up in a non-legislative approach and with no independent status from Correction Service Canada. According to the respondents, if there exists any employment relationship of the working inmates with any or all of the respondents, the inmates would at best be employees of Correction Service Canada and/or its internal agency Corcan and thus employees of her Majesty in right of Canada, excluded from the *Code* pursuant to its section 6. There is, according to the respondents, no ambiguity and no doubt to be resolved, as section 6 clearly

directs that the *Code* does not apply in the present circumstances and the complaint should be dismissed immediately.

**IV. Analysis and Decision**

[19] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine the preliminary jurisdiction issue without an oral hearing.

[20] The complaint alleges that section 94(1)(*a*) of the *Code* was violated by the respondents. The provision makes it an unfair practice for an employer to unduly interfere with activities of a trade union relating to the representation of employees. The key words in the present context are "employer" and "employee"; the section reads as follows:

> 94. (1) No employer or person acting on behalf of an employer shall
>
> (*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[21] The first issue to be examined at this preliminary stage concerns the status of the respondents under the legislation. Even if, for the purpose of argument, we were to assume that the prisoners have an employment relationship with the respondents, could the Board find that section 94(1)(*a*) applies to the respondents as "employers" within the meaning of the *Code* and order a remedy in case a violation was found to have occurred?

[22] After examining all the submissions and material on file, the Board is of the view, for the reasons detailed below, that the respondents are excluded from coverage of the *Code* by virtue of section 6 thereof; at best, any potential employment relationship the prisoners might have with Treasury Board, Correctional Service Canada or with its agency Corcan, would necessarily constitute employment by her Majesty in right of Canada such that the Board is without jurisdiction to entertain the complaint further or to consider any remedy directed at the respondents.

[23] The scope of the *Code*'s application is detailed at sections 4, 5 and 6 as follows:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

> 5. (1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.
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> (2) The Governor in Council may, pursuant to subsection (1), exclude from the operation of this Part only those corporations in respect of which a minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or to approve some or all of the terms and conditions of employment of persons employed therein.
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> (3) Where the Governor in Council excludes any corporation from the operation of this Part, the Governor in Council shall, by order, add the name of that corporation to Schedule IV or V to the *Financial Administration Act*.
>
> 5.1 This Part applies in respect of any Canadian carrier, as defined in section 2 of the *Telecommunications Act*, that is an agent of Her Majesty in right of a province and in respect of the employees of the carrier.
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> 6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada.

[24] The complaint was originally directed at Treasury Board and Correctional Service Canada as respondents; however, upon filing its reply dated November 24, 2014, the complainant identified Corcan as a corporation that administers the prison work programs and sought to amend the complaint by adding Corcan as an additional respondent, without overly clarifying which of the respondents might be the “employer” of the working inmates otherwise than as a group.

[25] The evidence offered by the complainant does not establish that Corcan is a corporation; it rather establishes that it was created in 1992 by Treasury Board as a departmental special operating agency of Correctional Service Canada to manage the prison corporation; its name is a registered trademark but there is no charter or act of incorporation that is provided in support of the complainant’s allegation.

[26] The *Code* is first intended to cover private federal undertakings as is apparent from the combination of sections 4 and 6 above. However, as contemplated in section 6, it also exceptionally extends to corporations that perform functions for the Government of Canada as described in section 5(1) of the *Code*.

[27] As demonstrated in a decision of the Canada Labour Relations Board (CLRB) (the predecessor of this Board), *Royal Canadian Mounted Police* (1986), 67 di 27; and 14 CLRBR (NS) 46 (CLRB no. 587) (RCMP 1986), section 5(1) of the *Code* (then section 109.1) causes federal crown corporations to be exceptionally covered by the *Code*, but only corporations and

then only crown corporations. The CLRB found that the Royal Canadian Mounted Police (RCMP) was not constituted as a corporation, let alone a crown corporation, and accordingly concluded that it had no jurisdiction over the entity, even if it at the time it was also excluded from the public service staff legislation (PSLRA now PSLREA).

[28] It must be noted that the Supreme Court of Canada recently determined in *Mounted Police Association of Ontario* v. *Canada* (Attorney General), 2015 SCC 1, that the statutory provisions excluding RCMP officers from coverage by the PSLREA amount to an invalid infringement of their constitutional rights and must be removed within the year. This is a decision that might lead RCMP officers to no longer be excluded from the scope of the PSLREA in the near future.

[29] However, at the time of the RCMP 1986 CLRB decision, the RCMP officers were found not to be covered by any of the public or private legislation governing union certification. The CLRB nonetheless confirmed that there exists no statutory residual jurisdiction for the Board to intervene so as to overcome what is otherwise an absence of applicable labour legislation; the jurisdiction of the Board is defined by statute and cannot be extended merely because it would seem expedient. The present Board is of the same view that it cannot extend its jurisdiction on account that the PSLREA does not apply to the working prisoners, as confirmed in *Jolivet*, *supra*. The non-applicability of the PSLREA does not extend the scope of the *Code* when it otherwise does not apply.

[30] A crown corporation can only be created by statute or by royal charter, as was pointed out by the CLRB in the RCMP 1986 decision, at page 48; it was not the case for the RCMP then and, according to the evidence, it also is not the case now for Corcan. Section 5(1) does not, therefore, give the Board jurisdiction over Corcan's activities, as Corcan does not qualify as one such corporation.

[31] It is the Board's view that the first two respondents are departments of the government, while Corcan is itself an internal agency of Correctional Service Canada with no distinct or separate corporate status, such that none of the respondents are subject to the *Code*'s application by reason of its section 6. In the Board's opinion, any potential employment of the working prisoners is necessarily employment by her Majesty in right of Canada, to which the *Code* does not apply.

[32] The Board is therefore without authority to examine the merits of the complaint and, accordingly, hereby closes its file.

[33] This is a unanimous decision of the Board.

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Graham J. Clarke
Vice-Chairperson

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Gaétan Ménard
Member

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Robert Monette
Member