Occupational Health and Safety Tribunal Canada

Date: 2016-07-05
Case No.: 2015-24

Between:

Royal Canadian Mounted Police, Appellant

and

Mounted Police Professional Association of Canada, Applicant

Indexed as: *Royal Canadian Mounted Police* and *Mounted Police Professional Association of Canada*

Matter:	Application for leave to participate in the proceeding as a party or, alternatively, as an intervener
Decision:	The application to be added as a party and granted standing as respondent is dismissed. The application to be granted standing as intervener is granted in part
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. Rae Banwarie, President, Mounted Police Professional Association of Canada
For the Appellant:	Mr. Michel Girard, Counsel, Department of Justice Canada, Labour and Employment Law Group
Citation:	2016 OHSTC 10

REASONS

[1] I am seized with an Application by the Mounted Police Professional Association of Canada ("MPPAC" or "Association") to be added as a party to the appeal filed under subsection 146(1) of the *Canada Labour Code* (the Code) by the Royal Canadian Mounted Police ("RCMP" or "the employer"). The appeal was filed on November 17, 2015 and is against a direction issued on October 21, 2015 by Mr. Bradley Tetarenko, in his capacity as an Official Delegated by the Minister of Labour under the Code (Ministerial Delegate).

Background

[2] The direction sets out four (4) sets of contraventions to the Code identified by the Ministerial Delegate further to his investigation into a situation which resulted in the death by gunshot of RCMP constable David Wynn, and in gunshot wounds to auxiliary constable Derek Bond, in January of 2015. There is no need to go into greater details at this point on the events that led to the issuance of the direction, other than to say that the nature of the violations which Mr. Tetarenko identified relates for the most part to the employer's telecommunication system used by the officers in carrying out their duties and the employer's obligations to implement preventive measures to address hazards associated with such communication system.

[3] On January 26, 2016, the Tribunal's Registrar informed the Association of the appeal and inquired as to whether it would be acting as respondent in the present proceedings. On February 3, 2016, Mr. Rae Banwarie, President of the Association, replied that the Association would act as respondent in this matter.

[4] On February 18, 2016, counsel for the appellant inquired with the Registrar as to the nature of the material that was considered in her decision to invite the Association to act as respondent, including materials demonstrating that the Association is duly authorized to act in this matter, and the rationale supporting such decision.

[5] On February 25, 2016, the Registrar informed the parties of the following:

> *The Registrar's letter was sent following the Tribunal's long standing practice of granting standing as Respondent in appeals under subsection 146(1) of the Canada Labour Code to bargaining agents for the affected employees that wish to oppose an employer's appeal of a delegated officer's direction. In this case, the Registrar contacted the MPPAC under the assumption that it was the bargaining agent. However, it has since been brought to our attention that the MPPAC is not a trade union that has been*

> *certified as the bargaining agent for the employees of the work place concerned by the direction issued on October 21, 2015, which is appealed by Mr. Fader, on behalf of the Royal Canadian Mounted Police. Therefore, the Registrar's letter of January 26, 2016 was sent too soon, that is, before the MPPAC's status could be clarified. In these circumstances, the MPPAC will not automatically be granted standing to act as Respondent in this matter.*
> *The MPPAC may, however, seek leave to participate in this appeal by submitting to the appeals officer a written request to be granted standing in this proceeding either as a party or an intervener, with supporting reasons and submissions describing the MPPAC's legal interest in this matter.*

[6] On March 17, 2016, the Association applied to the Tribunal to be granted standing in the present proceedings, either as a party or an intervener, with its supporting submissions and argument. The appellant replied with its submissions and argument on March 31, 2016.

Submissions of the Applicant

[7] Mr. Banwarie, on behalf of the Association, submits that these proceedings are of direct concern to the Association. He points out that MPPAC Executives attended to the St. Albert Detachment regarding the situation identified in the direction and met with members there and from Stony Plains as well as Spruce Grove and RCMP Headquarters and subdivisions in the Edmonton region.

[8] He stresses that the Association's mandate is to represent RCMP members in all aspects of the employment relationship. The Association's objects and principles are outlined in its constitution as follows:

> **Section 2.01** The objects of the Association shall be:
>
> (a) to act as bargaining agent for members of the RCMP;
>
> (b) to uphold the members' rights and foster good labour relations, and
> improve the wages, benefits and working conditions of members;
>
> *(c) to represent member interests on matters of workplace health, safety and*
> *wellness;* [emphasis added by the Applicant]

> (d) to foster harmonious relations amongst members of the Association, and
> between Association members and other police representative associations, like organizations and their members;
>
> (e) to encourage and foster improvement of the status, training, and
> qualifications of the members, and the professional standing of members
> and the policing profession generally; and
>
> (f) in co-operation with the RCMP, to foster improvements in policing methods
> and the standard of policing.

[9] The Association argues that the interests of justice are best served by permitting it to prepare a response to the employer's appeal and offer the perspective of individuals affected by the direction.

[10] Mr. Banwarie refers to paragraph 146.2(*g*) of the Code. Mr. Tetarenko's direction raises health and safety issues which are directly related to the Association members. As such, Mr. Banwarie submits that the Association's interests are aligned with the interests of its members. For these reasons, the Association should be added as a respondent as provided by paragraph 146.2(g) of the Code.

[11] He also refers to the Tribunal's practice guide which describes a respondent as "any employer, employee or union wanting to oppose the appellant's appeal of a health and safety officer's decision or direction that is of direct concern to the employer, employee or union."

[12] The applicant submits that subsection 47.1(1) of the *Royal Canadian Mounted Police Act* (*RCMP Act*) is also relevant. That provision reads as follows:

> **47.1 (1)** Subject to any rules made under subsection (3) a member or a conduct
> authority may be represented or assisted by any person in any
>
> (a) presentation of a grievance under Part III;
> *(b) proceeding before a board* [emphasis added by the applicant]*;* or
> (c) appeal under subsection 45.11(1) or (3).

[13] The applicant concludes that both paragraphs 146.2(g) of the Code and 47.1(1)(b) of the *RCMP Act* are intended to ensure that all parties are properly heard and represented during administrative proceedings.

[14] Finally, the applicant points out that the federal government has just recently introduced legislation (Bill C-7) that will remedy the prohibition for RCMP members to be represented by a union and that will allow for members to be

certified. However, in the interim period, RCMP members should not be prejudiced and denied the right to have their interests fully and robustly represented.

[15] In conclusion, the association requests that it be granted standing as a respondent or, alternatively, as intervener in this case.

Submissions of the Appellant

[16] Counsel for the appellant submits that currently, RCMP members are not unionized and the Association is not a bargaining agent as defined by subsection 2(1) of the *Public Service Labour Relations Act* (*PSLRA*) or subsection 3(1) of the Code. On May 17, 2016, the *PSLRA* will apply to RCMP members, allowing employee organizations to apply for certification to represent RCMP members as their bargaining agent. Until an employee organization is certified as bargaining agent by the Public Service Labour Relations and Employment Board, RCMP members are non-unionized. Given that the MPPAC is not a union as defined by the Code, it does not meet the requirement for being a respondent in the present appeal under subsection 146(1) of the Code (*Canadian National Railway Company (CN Rail) v. James Poirier and Teamsters Rail Canada Conference*, 2008 LNOHSTC 18 (*Canadian National Railway*).

[17] The appellant further argues that even if the MPPAC was a bargaining agent, Mr. Banwarie has not indicated in his letter that anyone within St. Albert Detachment actually asked the MPPAC to represent them in this matter.

[18] Counsel for the appellant points out that the term “board” as referenced in paragraph 47.1(1)(*b*) of the *RCMP Act* only applies to a "board" as defined in subsection 46(1) of that Act. Further, even if paragraph 47.1(1)(*b*) were to apply, which he submits it does not, it speaks to a member’s right to be represented by a person of their choice and not for an association to seek party status in a proceeding where no member has asked for such representation. As such, paragraph 47.1(1)(*b*) is not applicable to the present situation.

[19] Insofar as paragraph 146.2(g) of the Code is concerned, and the Tribunal’s practice guide that essentially mirrors that provision, the appellant refers to the *Canadian National Railway* case and to the appeals officer’s words stating the following:

> […] Furthermore, the wording of the provision makes it also abundantly clear that an added party is one which is added to the basic or existing parties to the proceeding, in that it must, in the opinion of the Appeals Officer, have substantially the same interest **as one of the parties** (in the French text: "une des parties").

[20] The appellant further submits that it would be inappropriate to allow the MPPAC to act as a “party” or “intervener”. As previously mentioned, the MPPAC is not the certified bargaining agent for RCMP members. There are other

associations, such as the National Police Federation, vying for that position. There may also be others that the employer is not aware of. These organizations are voluntary, private associations of RCMP members organized at the initiative of members. None of the associations has ever been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. Given that the MPPAC is in competing interest with other organizations vying to represent RCMP members as the bargaining agent, it would be inappropriate to allow the MPPAC party or intervener standing.

[21] Counsel for the appellant argues, in the alternative, that should such standing be granted, the MPPAC should not be permitted to call evidence at the appeal and its participatory rights at the appeal should be limited to argument.

Decision

[22] The first question to determine is whether the Association should be allowed to participate as respondent in the present proceedings, with full party status. While the Code does not define precisely who are the parties to an appeal, it specifies at subsection 146(1) that an employer, employee or trade union that feels aggrieved by a direction may appeal it to an appeals officer.

> **146 (1)** An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction in writing to an appeals officer within 30 days after the date of the direction being issued or confirmed in writing.

[23] The question then is who can respond to an appeal being made against a direction issued by the Minister under subsection 145(1), as it is the case here. The Tribunal's practice guide is no doubt guided by the concern that appeal proceedings, given their quasi-judicial character, should be mindful of the rules of natural justice. Indeed, the Code mandates the appeals officer to inquire "into the circumstances" that led to the issuance of the direction by the Ministerial Delegate. This inquiry is not meant to be an adversarial process in the true sense of the word, since its object is not to decide a dispute between two parties but rather to validate a decision made by a government official acting under the Code. However, the appeal process and its outcome may affect the rights of persons who are subject to the Code, i.e. employers, employees and trade unions who are recognized as the employees' legal representatives. It would thus make sense and be consistent with basic rules of natural justice that the primary opponent to an appeal ought to be one of those three entities, who are *a priori* likely to be directly affected by the direction and the decision to come.

[24] It follows that in the present case, the Association being neither an employer nor an employee, would seemingly be added as a "trade union". While those words are defined in subsection 3(1) of the Code for the purpose of Part I (Industrial Relations) as "any organization of employees, or any branch or local thereof, the

purposes of which include the regulation of relations between employers and employees", this definition does not apply to Part II (Occupational Health and Safety), which is relevant in this matter.

[25] The question then is whether the Association has valid ground to claim being directly affected by a direction and a sufficient legal interest to be added as a responding party with full participatory rights. This is where the question of legal representation comes into play in my view. The employer strongly objects to the Association being respondent primarily because it has not been certified as bargaining agent to represent the employees concerned, i.e. RCMP members, and does not enjoy legal representation rights for them.

[26] In my opinion, the employer's position is correct. I echo the appeals officer's comments in *Canadian National Railway*, at paragraph 31:

> [31] […] However, beyond this rationalization, one has, in my opinion, to recognize that if an appeal can be brought, under the legislation, by an employee, an employer or a trade union, it would only be logical that those same parties be seen as capable of responding in an appeal process to challenges to initial decisions or directions favoring them, either directly or through directly designated representatives or representatives acting as such through functions established by the same legislation.
>
> (Underlining added)

[27] First, it is worth noting that while a contravention direction under subsection 145(1) or a danger direction under subsection 145(2) can only be directed at an employer or an employee, subsection 146(1) allows a trade union that feels aggrieved by the direction to appeal it. Surely, that right cannot be exercised by any trade union: it must be the trade union who is vested with the right – and obligations – to represent the employees in that work place. In our labour relations system, such a right is founded in statute and is acquired by the process of certification by the appropriate Labour Board to be recognized as the exclusive representative of employees in an appropriate bargaining unit defined by the Board.

[28] It is therefore my conclusion that, by analogy to the persons who may file an appeal as set out in subsection 146(1), persons who may respond to an appeal challenging a direction issued to an employer under section 145 are an employee whose rights might be directly affected by the outcome of the appeal, and a trade union who is certified to represent those employees and as such becomes their legal representative regarding matters relating to their conditions of employment. Representation rights acquired by certification under the Code or other federal labour statutes also carry with it the statutory duty of fair representation towards members of the bargaining unit, which in my opinion establishes the trade union's legal interest necessary to act as respondent.

[29] As both the appellant and MPPAC point out in their submissions, the Association does not, at the time of the present ruling, currently have bargaining agent status. Bill C-7 is currently pending before Parliament, which if passed, would provide collective bargaining rights to members and reservists of the RCMP and provide for the certification of a trade union or other professional association to be recognized as the exclusive bargaining agent for those employees. Until that recognition materializes by an order of the Public Service Employment and Labour Relations Board, assuming that the Association would seek and obtain certification under this newly enacted process, it does not have the legal basis to be given the status of respondent in the present appeal proceedings.

[30] Consequently, I am of the view that the Association cannot act as respondent in the present appeal.

[31] The second question to determine is whether the Association may be added as a party pursuant to paragraph 146.2(g) of the Code. That provision reads as follows:

> **146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
> **(…)**
> **(g)** make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;

[32] The application of that provision in the current appeal proceeding raises some difficulty for the Association. As the matter goes, and given the nature of the direction, there is one party to the present appeal, the employer. It is clear that the Association does not have the same interest as the employer. While they no doubt both share the same desire to ensure the health and safety of RCMP members in their workplace, their immediate interests in the outcome of the present are opposed. By its appeal, the employer is challenging the validity of the direction, while the Association supports it and has expressed concern that the appellant has not complied with its terms.

[33] Furthermore, the second element of paragraph 146.2(g), which requires that the applicant be potentially affected by the appeals officer's decision, is not met. The Association *per se* is not affected by the direction and cannot be affected by the appeal decision, in the sense that it is not targeted by it nor subject to any of its terms. The direction does not impose any obligation on the Association. Neither could the decision resulting from the appeal.

[34] Finally, as the Association is not vested with representation rights as bargaining agent for the members, its argument to represent their interest and to be affected by the decision, under paragraph 146.2(g), is without proper legal foundation.

[35] Consequently, I conclude that the Association cannot be added as party under paragraph 146.2(g) of the Code.

[36] There remains one question to determine, which is whether as master of my own procedure, I should exercise my discretion to give the Association the opportunity to participate in some way in the present appeal proceedings.

[37] The appeals officer in *Canadian National Railway* canvassed some of the jurisprudence touching on the nature of the interest required for a person or entity to be allowed to intervene in a legal proceeding to which it is not a party. While the Association does not have a sufficiently direct legal interest to participate in the appeal as a party, it is common ground that it has a general and legitimate interest in the issues raised by the direction and the appeal.

[38] In *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General),* (1990) 1 F.C. 74, cited by the appeals officer in *Canadian National Railway* at paragraph 45, the Federal Court states as follows:

> The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties.

[39] As considered by the appeals officer in that same case at paragraph 46, the potential contribution that the applicant could bring to the resolution of the central issues must also be looked at in terms of the assistance it can bring to the decision-maker.

[40] The purpose of the appeal is to determine whether the Ministerial Delegate was correct in issuing the direction to the employer, in the circumstances prevailing at the time of its issuance. The direction under appeal identifies a number of contraventions of the Code, namely related to the radio communications system available to members of the RCMP while on duty. The direction thus touches on operational matters in a policing and law enforcement context. It is worded in general terms and is not limited to a specific and single set of events. While its application purports to be limited to the RCMP's St. Albert Detachment, it is not excluded that the appeal decision may have broader implications for all operations of the RCMP across the country. As the employer puts it, the RCMP plays a unique role as a police organization in protecting public safety in Canada. In the federally-regulated sector, that employer's operations are indeed unique, specialized, complex and multifaceted.

[41] While the Association does not represent members of the RCMP in the legal sense, it is not contested that it provides assistance and representation to members, at their request, in the context of internal administrative procedures under the *RCMP Act*. Although the Association is a voluntary, private organization

established at the initiative of members, the issues before the appeals officer are clearly within the scope of the Association's constitution. It is also not contested that a predecessor Association representing the interests of members was a party to the proceedings before the Courts, up to the Supreme Court of Canada, in the members' longstanding efforts to obtain the legal right to collectively bargain their terms and conditions of employment (*Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1).

[42] I am persuaded that some form of participation by the Association to the present proceedings would serve a useful purpose and assist me, as decision-maker, in the determination of the central issues raised by the appeal. At this time, the sole party to the appeal is the appellant and it would serve the interest of justice that the perspective and insight of the Association on these issues be presented to the appeals officer. However, I am sensitive to the argument of the appellant that the Association may not be the only organization that is considering an application to be certified as bargaining agent should Bill C-7 be passed by Parliament and eventually proclaimed in force. It would be inappropriate to confer on the Association *de facto* unrestricted representation and participatory rights in the appeal proceedings in such a context.

[43] Consequently, for all the reasons stated above, I exercise my discretion to grant the Association limited standing as an intervener in this appeal. The Association may attend the appeal hearing as an intervener and present final written arguments to the appeals officer on the issues raised by the appeal, in response to the appellant's written submissions. The Association may not call evidence nor cross-examine the appellant's witnesses. The timetable for the presentation of such submissions will be determined at the close of the hearing, to be scheduled by the Tribunal in due course. The style of cause is modified to add the Association as an intervener.

Pierre Hamel
Appeals Officer