



# Police Law Update

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We welcome your ideas, suggestions and feedback regarding this newsletter. Please direct your comments to Barrie Chercover or Natasha De Menna. We also welcome your contributions and will happily consider publishing suitable short pieces.

## Smith v. Toronto Police Association

BY GARY HOPKINSON

A recent decision by the Ontario Superior Court of Justice provides another cautionary tale with respect to the governance of police associations and their constitutions. The court gives a clear signal that boards of directors will not be accorded any more authority than they are strictly provided by their constitutions, at least in matters touching on the rights or benefits of individual members.

The case of *Smith v. Toronto Police Association*, [2007] O.J. No. 746 concerned the action of the board of directors of the Toronto Police Association (the "board") in passing a resolution dissolving and temporarily assuming the duties of the Legal Assistance Plan Board established under the TPA constitution. The Plan provided funding for members for criminal or civil proceedings relating to the performance of their duties. The board's resolution indicated that such action was being taken pending the review and amendment of the specific portion of the TPA constitution governing the Plan and the subsequent appointment or election of a new Legal Assistance Plan Board. The issue in the case was solely whether the board had jurisdiction to dissolve the Plan Board without approval of its membership through a constitutional amendment. The case quite specifically did not consider the reasons or motives of the board in passing the resolution. The applicants contended that the board had no constitutional authority to pass the resolution. The board claimed the authority for its actions derived from the discretion provided to it by the constitution to remove any member of its various committees.

The court's decision turned on its consideration of several provisions in the TPA constitution that it found carved out an independent role for the Plan Board in governing the Plan, which included that

- the Plan shall be governed by a Plan Board and the Plan Board is the entity responsible for carrying out the purposes and intent of the Plan;
- the Plan Board is given sole authority to amend the Plan provisions;
- the Plan Board is given sole authority to institute polices and procedures in order to give effect to the purpose and intent of the Plan;
- the Plan Board is the entity granted authority to retain employees or agents on behalf of the Plan;
- the Plan Board is granted the authority to retain legal counsel to provide advice on any matter before it, at the expense of the Plan;

the members of the Plan Board are not appointed by the board but are selected by stewards of the Association according to specified criteria, and serve fixed terms.

Most significantly, the court failed to find any provision in the constitution giving the TPA board the right to dissolve the Plan Board. Indeed, the court observed that the board's stated intention to revise the constitutional provisions regulating the Plan Board in its resolution was an acknowledgment by the board that the structure of the Plan Board under the currently-worded constitution, acted as a fetter to the board's discretion. As a result, the court held that the constitution established the Plan Board as operating independently of the TPA board and clearly insulated the entire scheme of funding of legal assistance for association members from influence outside the Plan Board.

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# Toronto Police Association

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*Smith* is another in a long line of cases which apply a strict interpretation to union and association constitutions in matters which affect the rights of individual members. Especially where issues of individual rights or benefits are involved, the courts have repeatedly ruled that actions of union executives not explicitly authorized by the constitution are *ultra vires*, that is, acting without authority and are *void ab initio*, that is, null from the beginning. Given that a consequence of the application of the *ultra vires* doctrine is that members of association or union executives may be individually liable for any damages arising from their actions – on the basis that an *ultra vires* act is one done beyond the authority of the organization - such issues should not be treated lightly.

*Smith* is a reminder that, for a multiplicity of reasons, police associations should ensure that their constitutions are appropriately drafted to provide no more or no less authority than is intended for their boards and any subsidiary entities. Seeking and following legal advice in order to avoid problems in this respect is preferable to and ultimately more cost-effective than trying to undue problems caused by constitutional provisions that may not accord with the association's intentions or goals.

## The Court of Appeal's Decision in *Watson v. Catney* Bars a Chief from Reviewing the Decision of a Hearing Officer he Appointed

BY RON FRANKLIN

Constable Watson left a store taking several items with him. When an investigation later revealed that the items had not been paid for, he was charged with theft and possession of stolen property and also charged with discreditable conduct under the *Police Services Act*.

The Chief appointed a Superintendent to conduct the disciplinary hearing, which was postponed pending the outcome of the criminal trial.

Watson was acquitted of both criminal charges. That decision was upheld on appeal. The Court concluded that a conviction would not be appropriate in light of the trial judge's finding that Watson did not act in a dishonest or morally reprehensible fashion.

Watson then brought a motion to stay the discipline proceedings. The Hearing Officer considered written and oral submissions on the matter as well as a legal opinion. He eventually decided to stay the proceeding as an abuse of process. He was aware that a criminal acquittal did not necessarily preclude a police officer from being found guilty of a discipline offence but, in Watson's case, concluded that if he were to allow the discipline proceedings to proceed, it would amount to a re-litigation of Watson's credibility, an issue already decided in the criminal proceedings.

The Chief applied to judicially review the decision of the Hearing Officer he had appointed. Watson challenged the Chief's standing to bring such an application and characterized it as amounting to the Chief reviewing his own decision.

The Divisional Court ordered that the hearing proceed. The Court concluded that the Chief played an investigative rather than an adjudicative role in discipline proceedings, that no hearing or decision on the merits had been made with respect to the discipline charges and that the Chief had a *bona fide* interest to ensure that the power he conferred on the hearing officer was exercised properly. The Court concluded that the hearing officer had placed too much significance on the Court's credibility findings and that it would not amount to re-litigation to proceed with the hearing.

Watson appealed. The key issue before the Court of Appeal was whether the Divisional Court had made a mistake in concluding that the

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## *Watson v. Catney*

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Chief had standing to seek judicial review of the Hearing Officer's decision. In a unanimous decision, the Court of Appeal allowed the appeal, set aside the Order of the Divisional Court and reinstated the Hearing Officer's decision.

It found that a Chief plays two roles in discipline proceedings under the PSA. First, he or she plays an investigatory role by initiating an investigation into whether a hearing should be held. Then, if a hearing is warranted, he or she plays an adjudicative role, either by acting as, or appointing a, Hearing Officer. It concluded that the Divisional Court failed to take into account this latter role and so mistakenly concluded that a Chief and the Hearing Officer he or she appoints are not synonymous.

The Court of Appeal also pointed out that the PSA grants a right of appeal to police officers and complainants but not to a Chief and concluded that this distinction made sense in light of a Chief's pervasive role in the discipline process and the principles of fairness and natural justice underlying the PSA. It reasoned that if the Chief were granted standing to review his decision or that of his delegate, "...it could erode confidence – on the part of police generally, those subject to disciplinary proceedings, and the public at large – in the independence and fairness of the discipline process" and "if the Chief cannot challenge the decision of his delegate by way of appeal, he should not be able to mount a similar attack through the vehicle of judicial review [as] such an attack would be allowing that to be done indirectly which cannot be done directly."

The implications of the Court of Appeal's decision in *Watson v. Catney* (2007), 84 O.R. (3d) 374 may be significant. The Court's confirmation of the principle that an administrative decision maker such as the Chief cannot review his or her own decision may be comforting to those who may be subject to discipline under the PSA. On the other hand there is a risk that this decision will become no more than asterisk if the result is that a Chief appoints Hearing Officers who are more concerned to support management's wishes than to adhere to the independence and fairness expected of the discipline process under the PSA.

*Watson v. Catney* (2007), 84 O.R. (3d) 374

## Arbitrator Rules Minimum Staff Deployment Agreements are Valid

BY ANTONY SINGLETON

In the lead up to its latest interest arbitration, the Durham Regional Police Association won a preliminary award confirming that staff deployment can be the subject of collective bargaining. While jurisdictional awards are usually legalistic and dull, the *Durham* case will be of interest to every officer on the road.

### STAFF DEPLOYMENT AGREEMENTS—WHAT THEY ARE, WHY THEY ARE A GOOD THING

Readers will be familiar with the pressures on staff deployment: tight overtime budgets, growing communities, and various special policing initiatives that crop up from time to time, which result in fewer officers being asked to cover the same, or more, ground. To resist these pressures, some Associations have negotiated minimum staff deployment provisions in their collective agreements.

Staff deployment provisions stipulate the minimum number of officers who will patrol a given area at a given time. For example, the Durham agreement divides the region into five geographic sectors and specifies the minimum number of officers who will patrol each sector on each shift. It also specifies the minimum number of two-officer patrol cars that may be deployed on the night shift.

The primary benefit of staff deployment agreements is to officer safety. Officers on the road know from experience that a certain level of staffing is required to police a given area and provide each other with timely and adequate back-up in dangerous situations. Specifying that level of staffing as a minimum requirement in the collective agreement ensures that management are obliged to maintain a safe level of officer deploy-

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# Agreements are Valid

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ment—an obligation that can be enforced through the grievance procedure.

## THE ATTACK ON STAFF DEPLOYMENT AGREEMENTS

From a legal perspective, Associations negotiate staff deployment agreements on the basis that they fall within the meaning of the phrase “working conditions,” which the *Police Services Act* (“PSA”) says can be addressed in collective agreements.

The Durham Board and Police Chief attacked the staff deployment provisions—which had been in their collective agreement in some form or other for over 30 years—with the following argument. The Board, not the Chief, makes collective agreements with the Association. The PSA prohibits the Board from “direct[ing] the Chief... with respect to specific operational decisions or... the day-to-day operation of the Police force.” Staff deployment is an operational matter. Therefore, staff deployment is not an issue that the Board can bargain or an interest arbitrator determine, and the existing provisions in the collective agreement are unenforceable.

The practical result of this argument is to grant the Chief a veto over a negotiated provision in the collective agreement, and the ongoing power to make unilateral decisions about minimum staff deployment. Officers on the road would be stripped of the process by which they influence such decisions (collective bargaining) and complain about them when things go wrong (the grievance procedure).

The argument has wider implications too. Staff deployment provisions do affect the Chief’s operational decisions to some degree, but then so do many other working conditions in the collective agreement (e.g. shift schedules, and vacation and sick-leave provisions that require additional staff to be recalled to work in the event of an operational need). If police management succeeded in removing staff deployment from collective bargaining on the basis that it affects operational matters, you can be sure they’d try to remove other working conditions too.

## THE ATTACK REPELLED

Fortunately, wisdom prevailed in the *Durham* case: the arbitrator, Paula Knopf, rejected the argument in unambiguous terms. She noted that many working conditions affect operational matters, that the PSA provides for collective bargaining of working conditions, and that the Supreme Court of Canada has ruled that the *Charter* protects the process of collective bargaining. She held that

very explicit language would be required to lead to the conclusion that the Regulations and/or some provisions of the PSA take away the process of bargaining over working conditions... Absent a clear directive that staffing and deployment are outside the scope of bargaining, the PSA must be interpreted to continue to allow for the parties to engage in the process of negotiating such “working conditions.”

The *Durham* case is good news for police officers because it confirms their right to bargain for minimum staff deployment provisions, and, given arbitrator Knopf’s reasons, the case presents an obstacle to future attempts by police management to remove other working conditions from the realm of collective bargaining. Associations that currently have deployment provisions in their collective agreements can feel secure that those provisions can’t be vetoed by their Chief; Associations that don’t should consider proposing them in the next round of bargaining.

*Re Durham (Regional Municipality) Police Services Board and Durham Regional Police Association* (2007), 164 L.A.C. (4th) 225 (Knopf).

# G & C Profiles... Simon Blackstone



Simon Blackstone practices labour law on behalf of trade unions and associations. His practice includes appearances before arbitration boards, labour boards and other administrative tribunals.

Simon graduated from the Faculty of Law, Queen's University, where he was awarded the Caroline Engelmann Gottheil Award in Labour Law, Employment Law and Human Rights Law. In addition, Simon was awarded the Baker and McKenzie Award, presented annually for the best course paper in labour law. He was called to the Bar in February, 2002.

Prior to practicing law, Simon was a political organizer, working for progressive elected officials and causes. He holds a Masters of Science (Econ.) from the London School of Economics and a Bachelor of Arts (Hon.) from McMaster University.

He is a member of the Canadian Association of Labour Lawyers. Simon also serves as a member of the Provincial Executive of the Ontario New Democratic Party.

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