



# Police Law Update

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## Public Complaints: Classification as About Policy or Conduct

**BY BARRIE CHERCOVER AND DAVID A. WRIGHT**

As many of those active in police associations will know, former Justice Patrick LeSage was asked by the Liberal provincial government to hold hearings and prepare a report on the police complaints system in Ontario. Before writing his report, which was released last April, he received submissions from various groups including police associations, police management, and community groups. Associations will doubtless have much to take issue with in his discussion and recommendations. It is our intention here, however, to focus on one aspect of the public complaints system to which, in our view, associations should pay particular attention.

Under the existing system, when a public complaint is filed, one of the initial determinations that must be made by the Chief or his or her designate, under s. 59 of the *Police Services Act*, is whether the complaint is "about the policies of or services provided by a police force or the conduct of a police officer". The Chief does this on the basis of the complaint itself, without receiving a response from the officer concerned or engaging in any further investigation. While the complainant may ask the Ontario Civilian Commission on Police Services (OCCPS) to review the decision, the officer concerned has no such right.

In our view, this has a number of problems from the point of view of officers. First, police management may classify complaints as being about individual misconduct and thereby subject members to investigations of potential misconduct that should not take place. Management will generally not want their policies and services to be

questioned or investigated, and the section allows them to avoid this by classifying complaints as being about individual conduct.

The second problem is that the decision on the nature of the complaint is made before the officer has had the opportunity to respond. It is trite to state that the actions of officers are governed by many types of policies and directives, and that officers rely on policies for almost every action they take. The response of an officer may reveal that he or she took the action complained about in reliance upon a policy of the force, and that it is therefore clearly not something that should be the subject of an individual misconduct investigation. Determining the nature of the complaint at the outset of the complaint process, with no opportunity for a complaint to be reclassified, does not allow for this to happen.

The third problem is that while a complainant can ask for a review of the decision, the officer investigated has no opportunity to challenge the classification of a complaint as being about misconduct. Thus, an officer has no chance to challenge the Chief's decision at this stage of the process, and will have to be the subject of an investigation and possibly a discipline hearing before the matter is disposed of. Obviously, the prospect of charges and a disciplinary hearing is stressful and can affect an officer's career prospects.

The LeSage report recommends the establishment of a new civilian agency to administer the public complaints system. It recommends that in the new system, this agency determine whether a complaint is about policy, services or conduct of individual officers. While it does not say so specifically, the report suggests that this

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# Policy or Conduct

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should continue to be a determination that should be made at the outset of the complaints process.

In our view, police associations should advocate for a complaint system in which the determination of whether a complaint is about policy or conduct is not irrevocably made at the beginning of the process. Rather, a decision that a complaint is about an officer's conduct should be made after input of the officer, and it should be able to be changed to a complaint about policy if the investigation shows that the officer was acting pursuant to the force's policy.

It appears that the government is set to make changes to the regime of public complaints. Although in many ways associations may be happier with the present system and some proposed changes are unwelcome, it is important that associations lobby to ensure that as much as possible, the new regime is fair to officers who may face discipline. This includes giving them the opportunity to be heard before any decisions affecting them are made, and ensuring that they are not required to face disciplinary investigations or charges as a result of actions consistent with service policies.

## Court Preserves Police Informer Privilege

BY ANGELA POWELL

In a decision released in June 2005, the Federal Court of Appeal upheld a decision protecting police informer privilege. The request for information had been made in the investigation of a complaint filed by a member of the public. The Commissioner refused to disclose information that could reveal the identity of a police informant. The RCMP Public Complaints Commission applied for Judicial Review. The Court agreed that the complaint process provided for in the *Royal Canadian Mounted Police Act (RCMP Act)*, and the duty of the Commissioner to provide material relevant to a complaint are subject to an overriding interest not to compromise police informer privilege.

In this particular case, as a result of information acquired from a confidential police informant, the RCMP and the Ontario Provincial Police force obtained and executed a search warrant on the complainant's property. One of the grounds of the public complaint was that the search warrant had been improperly obtained. The Commission for Public Complaints against the Royal Canadian Mounted Police (Commission) is empowered by the *RCMP Act* as an independent agency, to re-

view and investigate complaints made by the public regarding the conduct of the RCMP.

The Commissioner found no wrongdoing so the complainant asked the Commission to review his complaint. The Commission requested that the RCMP provide it with the Commissioner's report and any other relevant materials. The Commissioner initially refused to produce certain documents to the Commission, and eventually did turn over an edited version of the information, which preserved the confidential identity of the informant. Nevertheless, the Commission applied for judicial review of the Commissioner's original refusal to disclose the documents in full. It sought an order which would require the Commissioner to comply with his statutory obligation to provide **all relevant material**, which it argued included the informant information.

The Federal Court Trial Division found that once the police informer privilege had been established, the Court did not have the power to create a new exception to it. The Commission appealed. The Federal Court of Appeal found that once the application of the police informer privilege had been activated, it could not be balanced against other inter-

ests. The one exception noted by the Court was where there are grounds to believe that the information covered by the privilege would assist in establishing the innocence of an accused. The exception was not at play in this case and as such the Commissioner could not provide information to the Commission which could reveal the name of an informant, or disclose information of the type which could allow the determination of the informant's identity.

This judgment establishes that the investigative powers of an independent commission, whose purpose is to review complaints of the public against police officers, may be constrained by police informer privilege.

It is noteworthy that both federal access to information/privacy legislation and provincial/municipal privacy legislation in Ontario, specifically exempt law enforcement information that would reveal the identity of a confidential source of information from the purview of access requests from members of the public.

The decision is important for police associations because it acknowledges the unique

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# Police Informer Privilege

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nature of police informer privilege. It establishes that once the privilege has been triggered, it trumps virtually all competing interests (with one exception), regardless of their magnitude. It demonstrates a distinction which has been made by the courts between the concept of “crown privilege” and police informer privilege. This decision suggests that de-

spite the obligations which are imposed by statute on the Commissioner to disclose relevant information to the Commission the protection of police informer privilege is paramount.

*Royal Canadian Mounted Police Public Complaints Commission v. Attorney General of Canada* (2005), 256 D.L.R. (4th) 577 (F.C.A.)

## Former RCMP constable awarded \$950,000 for Harassment

**BY TERRI HILBORN**

A British Columbia court has awarded a former RCMP constable \$950,000 in damages for prolonged and persistent harassment by her commanding officer. The court found that the constable was “overly sensitive” and that her commanding officer was motivated by “concern for the proper functioning of his detachment”. Still, the court held that the conduct violated the RCMP harassment policy and caused such severe depression that the constable will likely never work again.

Associations will have to become more attuned to harassment issues in the workplace as members are increasingly coming forward with harassment allegations and judges and arbitrators are increasingly awarding damages to compensate for the impact that harassment can have on an employee.

In this case, the constable joined a 20-member RCMP detachment as a general duty police officer. Over a four year period, her commanding officer was verbally abusive, made derogatory comments about her abilities, was deliberately unhelpful, and blocked her transfer to another unit. He accused her of “screwing the system” by getting pregnant. He told others that he would “get her” when she returned from leave. He advised other officers not to ride with her as she was afraid of the dark and could not “cut the mustard”.

Although the court found that the commanding officer did not intentionally try to harm the constable’s mental health, it found that he was responsible for her suffering through his negligent behaviour. The

court concluded that the commanding officer’s “manner was abrupt, demanding and unfeeling” and that his actions were consistent with a paramilitary command structure, a command style that is “no longer appropriate in the modern RCMP.” The court awarded the constable damages for past wage loss, future wage loss and further damages for pain and suffering. The British Columbia government was vicariously liable for the actions of the commanding officer under provincial laws similar to those in Ontario.

Although harassment allegations raised by members are not always so blatant, Associations must be increasingly aware of the impact harassment can have on their members. In Ontario, where most police officers fall under a collective agreement, the grievance process will generally be the most appropriate forum for raising harassment issues, especially when the collective agreement contains an anti-harassment provision. Arbitrators in Ontario have been willing to award substantial damages for lost wages as well as for pain and suffering where a supervisor’s harassment has been particularly egregious. Associations should also consider proactive action such as anti-harassment training for their own members to ensure they recognize harassment when it occurs and know the appropriate steps to take to prevent it.

*Sulz v. Canada (Attorney General)*, [2006] B.C.J. No. 121 (B.C.S.C.)



# Chercover's Notebook

## To Grieve or not to Grieve:

**BY BARRIE CHERCOVER**

Police and civilian members of police services tend to be reluctant grievors for many reasons. We all recognize those reasons. When members are treated unfairly, they often need encouragement to file grievances. That encouragement should be offered.

When members will not file grievances, the Association may be able to take the matter into its own hands by filing a group and/or policy grievance. The Association is a contracting party to the collective agreement and is entitled to require that it be applied in accordance with its terms. There are many cases where the Association can file a grievance on behalf of all affected members not only to enforce compliance with the agreement and/or fair treatment of members, but to obtain remedies appropriate to the case. The Association may be able to prove the contract breach without the aggrieved member and/or may subpoena the aggrieved member as a witness.

Aggressive enforcement of members' rights will achieve two things in the long run:

1. It will encourage members to stand up for their own rights; and
2. It will lessen or eliminate the negative pressure on members by putting the heat on the Association.

## Judicial Review of Police Arbitrations and Recent Court Decisions

**BY DIJANA SIMONOVIC**

Disputes between Police Associations and Police Services Boards arising from the interpretation, application, administration, or alleged violation of an existing collective agreement are resolved through grievance arbitration. Pursuant to section 128 of the *Police Services Act*, the decisions of the arbitrator are "binding" on the Board and the Members of the police force. However, despite the binding nature of police arbitral decisions, they are not completely immune from scrutiny. The Supreme Court of Canada has held that courts have a constitutional supervisory role over administrative tribunals that cannot be waived. Therefore, either party may still challenge an arbitrator's decision by requesting a court review, referred to as a "judicial review".

Applications for judicial review are not appeals in the traditional sense. An application for judicial review is a specific type of legal proceeding whereby a party invokes the courts' supervisory jurisdiction over an administrative action. The court does not review the facts of a particular case (there is no calling of witnesses or giving evidence) but looks at the arbitrator's decision and determines if it was reasonable in all the circumstances. If the court finds in favour of the plaintiff, it can annul the administrative decision.

While there are occasions where a Police Associations should pursue a judicial review of an arbitrator's decision, Associations need to be aware that the judicial review process may take several months or even years to complete and will add significant costs to the grievance process. Furthermore, Associations should consider the difficulty in having an arbitrator's decision overturned on judicial review.

In assessing an arbitrator's ruling, the reviewing judge will adopt a pragmatic and functional analysis to determine the appropriate standard of review. The purpose of the pragmatic and function analysis is to ascertain the intention of the legislature about the degree of deference the court should accord to the arbitrator. The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question being reviewed. Three standards of review have been recognized – patent unreasonableness, reasonableness and correctness.

For many years the Supreme Court of Canada and the Ontario Court of Appeal have held that where Ontario labour arbitrators are called on to

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# Recent Court Decisions

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interpret provisions of a collective agreement, their decisions are reviewable on a standard of patent unreasonableness. The patent unreasonableness standard is a very high standard. An arbitrator's decision can only be overturned under this standard if she has given the provision a construction that it cannot rationally bear. The Supreme Court has held that this high degree of deference is essential for maintaining the efficiency and effectiveness of the system set up for the resolution of labour relations disputes. According to the Court, the nature of labour disputes requires their speedy resolution by expert tribunals.

Last year, however, in two cases from Alberta, the Supreme Court adopted a standard of reasonableness instead of patent unreasonableness for reviewing decisions of labour arbitrators acting under Alberta's *Labour Relations Code*. Under the standard of reasonableness *simpliciter*, a decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. In *Toronto (City) Police Services Board v. Toronto Police Association*, the Ontario Divisional Court adopted the reasonableness standard of review in an application for judicial review of a decision of an arbitrator under the *Police Services Act*.

However, in August of 2005, the Ontario Court of Appeal issued a decision in *Teamsters Union, Local 938 v. Lakeport Beverages, a Division of Lakeport Brewing Corp.* stating that the standard of review of the arbitrator's decision under the Ontario *Labour Relations Act, 1995* was patent unreasonableness. The Court held:

I conclude that the Supreme Court's decisions in *Voice Construction* and *Lethbridge Community College* do not alter the standard of review applicable to the arbitrator's decision in this case. The standard remains patent unreasonableness. In my view, until we have a clear statement from the Supreme Court of Canada, we should not depart from a highly deferential standard of review of decisions of Ontario labour arbitrators that has served the labour relations community in this province so well for over a quarter of a century.

In light of the recent decision in *Lakeport Beverages*, the question remains what standard of review the courts will apply to decisions of Ontario arbitrators under the *Police Services Act*.

A privative clause is a provision in legislation that purports to make the decision of an arbitrator final and binding, ousting the jurisdiction of the court. In general, the stronger the privative clause, the greater the deference that will be accorded to the arbitrator and correspondingly, the weaker the privative clause the less deference that is owed. Section 128 of the *Police Services Act* provides that agreements, decisions and awards made under this Part bind the board and the members of the police force. The Ontario Superior Court in *Toronto (City)*, found that section 128 is not a particularly strong privative clause. The Court of Appeal in *Lakeport Beverages* was deciding the appropriate standard of review of an arbitrator's decision under the Ontario *Labour Relations Act*. Section 48(1) of the *Labour Relations Act* has historically been considered to be a reasonably strong privative clause as it provides for final and binding arbitration and the *Act* contains no express right of judicial review or appeal. Like the Ontario *Labour Relations Act*, the *Police Services Act* does not contain an express right of judicial review or appeal. However, section 128 of the *Police Services Act* is a weaker privative clause than the one contained in section 48(1) of the Ontario *Labour Relations Act*. Therefore, it may be that the courts will still find section 128 of the *Police Services Act* more akin to the privative clause under the Alberta labour legislation than to the clause in the Ontario *Labour Relations Act* making the standard of review reasonableness *simpliciter*.

In the end, regardless of which standard of review the courts decide to apply to decisions of police arbitrators acting under the *Police Services Act*, whether patent unreasonableness or reasonableness *simpliciter*, both of these standards are high thresholds to meet. In deciding whether to proceed with judicial review of an arbitrator's decision, Police Associations should consider the additional time and cost these proceedings (by virtue of their very nature as court proceedings) will add to the grievance procedure, as well as the high threshold that they must meet in order to succeed in having an arbitrator's decision overturned by the courts.

# G & C Profiles... Terri Hilborn



Terri Hilborn graduated from the Faculty of Law at the University of Toronto in 1998, where she was awarded the Blake Cassels Award in Taxation Law. She obtained a Bachelor of Arts degree in Political Science from the University of Waterloo and a Master of Arts degree in Journalism from the University of Western Ontario.

Prior to law school, Terri worked for a number of years as a research associate for the Ontario Legislature at Queen's Park specializing in health and social policy issues. She also worked as a freelance researcher and writer providing services to unions, government and non-profit organizations.

Terri was called to the bar in 2000 and her practice has focused on union-side labour law, administrative law and civil litigation. She has advocated on behalf of clients before arbitration boards, labour boards, coroners' inquests, other administrative tribunals and the courts.

Terri is a member of the Canadian Association of Labour Lawyers and the Labour Section of the Ontario Bar Association.

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