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Police Law Update

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Victory for Police Employees in Divisional Court

BY DAVID WRIGHT

The Ontario Divisional Court has found that a Police Services Board cannot require its employees to disclose or obtain approval for secondary activities that do not fall within the list specifically included in s. 49(1) of the *Police Services Act*. The Court refused to overturn an award by Arbitrator Richard McLaren which declared a Toronto Police Service rule invalid. The arbitrator found that the rule, which required members to disclose all paid secondary activities and receive approval for them from the Chief of Police, was inconsistent with the *Police Services Act*.

Section 49 of the *Police Services Act* contains a set of provisions restricting police officers' secondary activities. It provides that there are four types of activities in which a member of a police force, either civilian or uniform, cannot engage without the approval of the Chief of Police. The section covers any activity:

- (a) that interferes with or influences adversely the performance of his or her duties as a member of a police force, or is likely to do so;
- (b) that places him or her in a position of conflict of interest, or is likely to do so;
- (c) that would otherwise constitute full-time employment for another person; or
- (d) in which he or she has an advantage derived from employment as a member of a police force.

Under s. 49, if a member is proposing to engage in one of these types of activities, or becomes aware that an activity in which he or she is already involved falls into one of these categories, the member must disclose this to the Chief. The member then is bound by the decision of the Chief about whether he or she can engage in that activity. In addition, a Police Services Board has the power (under s. 31(7) of the legislation) to establish guidelines

consistent with s. 49 for disclosing secondary activities and deciding whether to permit them.

The Toronto Police Association case resulted from a Rule passed by the Toronto Police Services Board. Under that rule, a member was required to disclose and obtain permission for any paid secondary activity, whether it fell into the categories in s. 49 or not. The grievor, a civilian communication and electronics technician, also engaged in self-employment as a residential and commercial alarm installer. He did not disclose this employment to the Chief, and was given a written reprimand. The Association grieved, arguing that the Service's rule was contrary to s. 49. The Police Service argued that the rule was a guideline consistent with s. 49 and was therefore valid as an exercise of its powers under s. 31 (7).

In the arbitration, which was argued by Toronto Police Association lawyer Roger Aveling, the arbitrator found that the rule was not consistent with s. 49, because it attempted to restrict activities that were not covered by that section. Arbitrator McLaren allowed the grievance and declared that Rule 6 was of no force or effect.

The Toronto Police Services Board applied for judicial review of the arbitral decision. In the Divisional Court, the Toronto Police Association was represented by Barrie Chercover and David Wright of Green & Chercover. The three-member panel of the Court unanimously agreed with the Association's position, and found that the arbitrator's decision was correct. It held that

“s. 49 implicitly authorizes police officers to engage in secondary activity provided it is not the type of activity set out in... s. 49(1)”. The Court determined that the rule that required disclosure of all paid secondary activity was inconsistent with s. 49 and could not be applied.

The Divisional Court's decision makes it clear that Police Services Boards or Chiefs of Police cannot require members to disclose or obtain approval for any activities unless they fall under s. 49 (1), and that the member should make the decision about whether it falls within these categories. The decision upholds the principle that police employees are entitled to make their own decisions about how they will spend their off-duty time unless it interferes with their duties, places them in a conflict of interest, or would be full-time work. It is a victory for the rights of police officers and civilian employees of police services to spend their free time as they wish without improper interference from their employers.

In those forces in which management has attempted to require this, Associations should immediately file a policy grievance challenging the rule or policy. A policy grievance allows an Association to challenge an employer's rule or practice when there is no individual member facing discipline. In this way, improper Police Service rules like the one that formerly applied in Toronto can be wiped out across the province.

The employer has now applied for leave to appeal to the Ontario Court of Appeal. A panel of the Court of Appeal will now decide whether that court will hear the case.

Police Staffing Issues:

Part I How to Protect Bargaining Unit Work

BY MARY BYBERG AND BARRIE CHERCOVER

This is the first in a series of articles that will deal with police staffing issues. The series will discuss concerns that impact on the staffing of police services in Ontario and affect both civilian and uniform members.

Workplaces are constantly changing. The changes occur for a myriad of reasons such as technological advances, external competitive pressures and production needs. Employers are therefore continually reorganizing their work forces. As a result, unions must face the issue of constant change in the work force as soon as it becomes the bargaining agent for the employees. Industrial trade unions have faced these challenges to protect and sometimes expand bargaining units in a variety of ways. Almost invariably the words of the collective agreement will determine whether a change desired by management can be accomplished or not.

Police associations, with a few exceptions, have not addressed these issues in collective bargaining, but police services boards are increasingly exploring reorganization of the ways in which police services are delivered to the public. The civilianization of traditional police jobs is one example of such workplace reorganization. Court security is another. The time is long past that police associations

should turn their minds to protection, expansion and preservation of their bargaining unit work.

The delivery of police services includes both core and peripheral jobs. Those who work for a police service require uniforms, equipment and various tools to do their jobs. Offices and buildings have to be cleaned and maintained, heated or cooled. Are food services provided? Are the vehicles maintained and repaired within the police service or outside? Can traditional police functions be partially downloaded to private security firms to be paid by those benefitting from the service rather than by the public?

Can specific projects, whether large or small, be staffed by agencies or persons hired on a project-by-project basis outside the scope of the collective agreement or bargaining unit? Can payroll and benefits administration be re-assigned to the municipality? Should the entire communications area be handled by an outside agency?

In this constantly changing work world, association representatives need to be aware of the current state of the law and what they might do to capture all of the work within the bargaining unit. The work should be protected so that it will always be performed by bargaining unit members and so that the

bargaining unit will be expanded to absorb any new jobs related to the delivery of police services.

Understanding that the words of the collective agreement will determine whether management can assign or contract work to employees or organizations outside of the bargaining unit is the starting point. The second step is to be certain that the collective agreement is about both people and jobs. People come and go in the workplace. If the collective agreement is only about people, the job may disappear when the people move on. When the collective agreement is about jobs and the incumbent goes, the job stays and should then be filled by another member of the bargaining unit.

Unions have addressed the constant changes in the workplace with a variety of collective agreement protections, none of which on their own would accomplish what is needed to protect the bargaining unit. These contract clauses include recognition clauses, seniority protection clauses, clauses which incorporate job classifications and descriptions into the collective agreement, clauses to preserve existing conditions, clauses to absorb changes and to incorporate new jobs into the bargaining unit, clauses to restrict management's rights to assign work historically or normally done by members of the bargaining unit to persons or organizations

outside the bargaining unit, and finally, clauses to prevent or restrict management's rights to contract work out.

Bargaining unit members do not own their work or their jobs. Restrictions on restructuring the work or the jobs, assigning the work to persons outside the bargaining unit and contracting the work out must be accomplished through the collective bargaining process with language that is clear and explicit.

If bargaining unit work is lost through contracting out or some other device, it will be difficult, if not impossible, to reclaim the work. As a result, these kinds of language protections should become a priority in collective bargaining. The language employed must be chosen carefully. Ambiguous, vague or unclear language may offer inadequate protection and will inevitably lead to litigation which often does no more than to expose the ambiguity or vagueness.

This is intended as an introductory article to identify the need for police associations to take action to protect bargaining unit work. Subsequent papers in this series will go into more detail about the issues and challenges police associations will face related to the staffing of police services in Ontario.

Supreme Court Opens Door for Lawsuits Against Public Officials

BY TERRI HILBORN

A recent decision by the Supreme Court of Canada has been heralded as opening the door to a new era of litigation against police officers and other public officials. However, the Court's decision in *Odhavji Estate v. Woodhouse*, put a number of important limitations on the public's ability to seek damages against public officials for willfully breaching their duties. Still, the *Odhavji Estate* case will undoubtedly lead to an increase in litigation against public officials. Police officers should be aware of the type of acts or omissions that could attract liability for damages and police associations may want to reconsider the legal indemnity provisions in their collective agreements to ensure that their members are well protected.

Facts of the Case

In 1997 Manish Odhavji was fatally shot by police officers of the Metropolitan Toronto Police Service during the course of a bank robbery. The Special Investigations Unit (SIU) began an investigation immediately. Mr. Odhavji's family alleged that the police officers involved deliberately failed to cooperate with the SIU by not complying with certain requests. The family further alleged that the lack of a thorough investigation into the shooting caused them to suffer mental distress, anger, depression and anxiety. The family sought a total of \$8 million in damages. They alleged the tort of "misfeasance in public office" against the police officers and the chief of police. They also alleged negligence by the chief of police,

police services board and province for failing to force the police officers to fulfill their duty under the *Police Service Act* to fully cooperate with the SIU in the conduct of its investigations.

The defendants brought a motion to strike out the claim arguing that the facts alleged by the plaintiffs, even if proven, did not amount to a legal cause of action. The Court did not make a decision about whether or not the police officers were liable. The only issue before the Court was the family's right to bring this claim at all.

What is misfeasance in public office ?

In a unanimous decision, the Supreme Court held that the actions in misfeasance in a public office and the action in negligence against the chief should be allowed to proceed. The claims against the police services board and province were dismissed.

The Court was clear that proving a claim of misfeasance in public office would take more than merely demonstrating that a public official failed to discharge his or her duties. In order to maintain such a claim the plaintiff must prove three elements. First, the public official must have engaged in deliberate, unlawful conduct in the exercise of his or her public functions. Second, the plaintiffs must demonstrate that the public official was aware that the conduct was unlawful and that it was likely to injure the plaintiffs. Third, the plaintiffs must demonstrate that the alleged misconduct legally caused them to suffer

damages, in this case anxiety and depression, that are serious enough to warrant compensation.

The Court held that the alleged refusal of the police officers to comply with their statutory duty to cooperate with the SIU can amount to “unlawful conduct”. However, merely neglecting their duty is not enough. The plaintiff must show that the officers knew their obligation under the law and willfully refused to comply. The Court held that misfeasance in public office cannot be claimed against public officials who inadvertently fail to discharge their duties. Nor can public officials who fail to discharge their duties because of budgetary cuts or other factors beyond their control be successfully sued on this basis. Instead, it applies to officials who can discharge their public obligations yet willfully refuse to do so knowing their refusal will likely cause harm to the plaintiff.

The Court also noted that if the statutory duty imposed on a police officer violated his or her constitutional right not to self-incriminate, an officer’s refusal to comply could not amount to misfeasance in public office. Although this was not argued before the Court, it is a defence to consider in lawsuits of this sort where the police officer is the subject of the SIU investigation.

Indemnification issues

Section 50(3) of the *Police Services Act* permits collective agreement provisions for the indemnification for the legal costs of police officers, except for the legal costs of a member who is found guilty of a criminal offence. A number of police associations have negotiated extensive legal indemnification provisions that provide wide protection to their members who are named in

civil actions. In negotiating such a provision, police associations may want to consider:

A clause providing for reasonable and necessary legal indemnification to members who are defendants in civil actions because of acts done in the course of their employment as police officers *regardless of the outcome*;

A clause providing members involved in a matter which may entitle them to legal indemnification with funds for a retainer or interim payment of legal costs until it is determined whether or not indemnification is appropriate. These provisions may require the officer to repay the funds if it is ultimately determined there was no right to indemnification;

Avoiding clauses which provide for legal indemnification only where the officer was acting in “good faith”. Language of this type may add a complicated screening process with no guarantee of consistent outcomes;

A clause which provides members with legal indemnification for independent legal counsel if the member makes such a request, even where the Chief or Board are joined in the action and offer to defend the action on behalf of the member as well as themselves.

Whether or not the Court’s decision in *Odhavji Estate* will make it easier to successfully sue public officials remains to be seen. However, the publicity surrounding the case will likely increase the number of lawsuits, raising the prospect of increased legal fees for police officers.

Strong legal indemnification provisions will give police officers and police associations an important level of protection as the effects of this decision are realized.

Chercover's Notebook

The time when a member approaches his or her association to file a grievance is not usually the time to worry whether or not the grievance will succeed, although there are occasions where filing a grievance will not be helpful for your members. On the other hand, all associations should take into account the likelihood of success before referring a grievance to arbitration. It may indeed be a major factor in determining whether or not to proceed to arbitration.

At the filing stage the grievance signals a member complaint. While it is not always the case, this may well result in dialogue, discussion and resolution in favour of the member, even where the grievance itself would not have succeeded in arbitration.

The issue to consider before filing a grievance is whether formalizing the member complaint in all the circumstances of the particular case, can in any way be harmful to the member. If not, you have nothing to lose in filing a grievance and in discussing it with management. You may solve problems this way even though you would never have taken a weak grievance to hearing.

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