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# Police Law Update

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## The Application of Human Rights and other Employment Statutes in the Context of a Collective Agreement

BY MARY BYBERG

In the recent decision, *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, the Supreme Court of Canada explored the application of human rights and other employment related statutes in the context of a collective agreement.

The *Parry Sound* case dealt with a situation in which a probationary employee's employment was terminated following her return to work after taking maternity leave. Her maternity leave had commenced prior to the end of her probationary period. Management's motivation for terminating the employee was that she had gone on maternity leave. The employee claimed she had been wrongfully terminated. However, a provision of the collective agreement stated that a probationary employee could be terminated at the sole discretion of management, and further, that such terminations were not arbitrable. The Union filed a grievance.

The Board of Arbitration found that it had the jurisdiction, by virtue of s. 48(12)(j) of the Ontario *Labour Relations Act, 1995* to interpret and apply human rights and other employment-related statutes with the collective agreement. The case was judicially reviewed, and made its way through the courts. On appeal to the Supreme Court of Canada, the Court found that the parties could not have intended that giving management the right to terminate probationary employees without cause could have included termination on discriminatory grounds, contrary to the Human Rights Code. Instead, the court found that human rights and other employment-related statutes "...establish a floor beneath which an employer and union cannot contract."

The Court also found that there are certain terms and conditions that are implicit in a collective agreement, irrespective of the mutual intentions of the contracting parties and that "...the statutory rights of employees constitute a bundle of rights to which the

parties can add but from which they cannot derogate.” What the court meant was that the Human Rights Code and other employment-related statutes are implicitly a part of the collective agreement. Furthermore, the Court found that arbitrators have the jurisdiction to consider grievances that encompass the violation of statutory rights, even if the grievance cannot be linked to a specific provision in the collective agreement. The Court said any alleged violation of an employment-related statute such as the Human Rights Code constitutes a violation of the collective agreement, and the grievance would therefore fall squarely within an arbitrator’s jurisdiction.

The court went on to look at what might have happened had the parties intended that management could terminate probationary employees for any reason, discriminatory or not. The court said that s. 48(12)(j) of the Ontario *Labour Relations Act, 1995* would have incorporated by reference the Human Rights Code and other employment-related statutes and that the Board of Arbitration would have then had the jurisdiction to examine this complaint under the particular provisions of that Act.

Given that police association labour relations do not fall under the auspices of the *LRA, 1995*, the *Parry Sound* case is good news. The case suggests that a police association could file a grievance for a violation of an employment-related statute, even one not specifically incorporated into the collective agreement. These statutes might include: *Employment Standards Act* (for civilian members, not uniform), *Occupational Health & Safety Act*, *Human Rights Code*, *Workplace Safety and Insurance Act* and the *Police Services Act*. Keep in mind that s. 47 of the *Police Services Act* requires that a board

accommodate the mental or physical disability of a member of a municipal police service in accordance with the *Human Rights Code*. The board must receive evidence from two legally qualified medical practitioners prior to making a decision to discharge or retire a disabled member.

Although police associations might want to include wording in their collective agreements to incorporate by reference the Human Rights Code and other employment related statutes, *Parry Sound* demonstrates that it is not necessary to do so.

If including such wording in the collective agreement is something your association would like to do, ensure provisions are clearly worded and unambiguous.

The other benefit of the *Parry Sound* case is that the duty of fair representation is more easily discharged. An Association can now bring any statutory based human rights or employment-related issue forward through the grievance procedure, with the knowledge that a board of arbitration has the jurisdiction to hear and decide such matters.

With rights to bring things in the grievance process also comes obligations, though. Police Associations must consider not only whether a potential grievance involves a violation of the collective agreement, but also whether there may be a violation of a statute. The Association’s actions in relation to a possible grievance of this type may attract the duty of fair representation, in the same way as a grievance relating to the express provisions of the collective agreement.

Therefore, *Parry Sound* confirms that associations must look at all employment-related statutes as well as the collective agreement.

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# Orders to Answer Questions After *Orr*, *Gregg*, and *Precious*

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BY DAVID WRIGHT

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**C**an a uniform member of a police service refuse to answer questions when directed to do so by a superior officer? What if he or she is under investigation for a criminal offence? What if the officer insists on answering in writing rather than orally? These issues were dealt with by the Ontario Civilian Commission on Police Services (OCCPS) in three cases in recent years. The tribunal's answers are essential to consider when giving advice to members ordered to answer questions about their duties.

Under the Code of Conduct that governs police officers in Ontario, an officer is guilty of insubordination if he or she, "without lawful excuse, disobeys, omits or neglects to carry out any lawful order". The officers in *Orr and York Regional Police Service* (decided by OCCPS on December 18, 2000), *Gregg and Midland Police Service* (decided by OCCPS on October 2, 2001), and *Precious and Hamilton Police Service* (decided by OCCPS on November 6, 2001) were all charged with insubordination after they refused to answer questions put to them by superior officers because of concerns about how the answers may impact upon the criminal process.

The facts of each case are relatively straightforward. While Cst. Orr was under investigation for a criminal offence by an outside police service, he was ordered by an Inspector in

his police service to answer a series of questions prepared by the investigators. He refused, following the advice of his counsel. Cst. Gregg was under investigation for a disciplinary offence, but was also concerned she may be subject to criminal charges. The disciplinary charges were being investigated by an outside police service. She was ordered by the investigator to attend an interview and answer oral questions. On the advice of counsel, she refused to answer this way, but said she would provide written responses to written questions. Cst. Precious was under investigation for a criminal offence as well as disciplinary charges. He refused to give a statement in the criminal investigation. After the criminal brief was submitted to the Crown, he was ordered to answer a series of questions, ostensibly for use in the disciplinary process. On the advice of his lawyer, he refused. All three were convicted of insubordination, and all three convictions were upheld by OCCPS.

The *Orr* and *Precious* cases focused on the issue of whether the order to answer questions while an officer is under investigation for a criminal offence violates the *Canadian Charter of Rights and Freedoms*. In both cases, OCCPS made it clear that such an order does not violate the *Charter* in most circumstances and must therefore be followed, even if the officer is the subject of a criminal investigation. However, in a future case it remains open for an officer to argue that in circumstances where the predominant purpose of the order is to further a criminal

investigation, the order is contrary to the *Charter* and therefore unlawful. These cases, as well as related Supreme Court of Canada authorities, also make it clear that the officer's compelled statement itself, as well as "derivative evidence" obtained by following information given in the statement, cannot be used in the officer's criminal proceedings.

*Gregg* dealt with the issue of whether the result should be any different if the statement is given orally, rather than in writing. OCCPS concluded that it was not: if instructed to answer questions verbally, an officer must do so as this is a lawful order.

All three cases also concluded that the fact that an officer is acting on the advice of counsel will not excuse the conduct in any manner. In *Precious* the fact that the officer was following his lawyer's advice was considered in determining penalty, but his refusal to answer the order occurred before the other cases had been decided. In light of the clear direction on this issue from OCCPS now, however, it is unlikely that this would be considered a mitigating factor in a future case.

In light of this, what advice should association representatives give? First, officers subject to orders to answer questions should be informed that as the law now stands, they are likely to be charged with and found guilty of insubordination if they refuse to follow them. The only possible exception is if the questions are clearly asked for the purpose of supporting a criminal investigation, but even then there is a risk of being convicted of insubordination because the law is unclear in this area. If questions appear to have been asked to further a criminal investigation, an association should evaluate whether to have legal counsel commence a court application for an order that the questions are illegal rather than having the

officer refuse and become subject to disciplinary proceedings.

It is also important that officers protect themselves from the use in any way of their statements in the criminal investigation or litigation process. Thus, officers ordered to answer questions should provide a written statement that clearly indicates the answers are being given only as a result of the compulsion of the order. It should indicate that the officer will object to the use, in criminal proceedings, of both the statement and any evidence obtained as a result of information in the statement (derivative evidence).

More broadly, in our view police associations should advocate for changes to the law in this area. The Code of Conduct is drafted using extremely vague language, and the offences, including insubordination, are defined too broadly.

There should be specific restrictions that limit the manner in which superior officers can use their powers to give orders, prohibiting them from forcing police officers to provide information to be used against them in disciplinary proceedings. The legislation should also be amended to provide the same types of restrictions on the use of compelled statements in disciplinary proceedings that currently apply to criminal proceedings. The use of duty statements in disciplinary proceedings is not consistent with the principles codified in the *Act* that the prosecution must prove its case on clear and convincing evidence, and that an officer cannot be required to give evidence at his or her own disciplinary proceeding. Moreover, the manner in which officers are currently compelled to give statements smacks of abuse of police powers for the purposes of managing the employer-employee relationship.

# *Employment Standards Act*

## Protects Police Officers Against the Use of Lie Detectors

BY TERRI HILBORN

Earlier this year, the Vancouver Police Department uncovered a scandal when one of its officers took a lie detector test in a job interview with another police service and admitted to lying under oath and about possible brutality by other officers.

In Ontario, police services cannot use lie detectors in job interviews. Although

Ontario's *Employment Standards Act (ESA)* does not generally apply to police officers, Part XVI on lie detection devices does. This part of the *Act* defines an "employee" to include a member of a police service and a person who is applying to be a member of a police service.

The key provisions read as follows:

**69. Right to refuse test** – Subject to section 71, an employee has a right not to,

- (a) take a lie detector test;
- (b) be asked to take a lie detector case; or
- (c) be required to take a lie detector test.

**70. (1) Prohibition: testing** – Subject to section 71, no person shall directly, or indirectly, require, request, enable or influence an employee to take a lie detector test.

**(2) Prohibition: disclosure** – No person shall disclose to an employer that an employee has taken a lie detector test or disclose to an employer the results of a lie detector test taken by an employee.

**71. Consent to test by police** – This Part shall not be interpreted to prevent a person from being asked by a police officer to take, consenting to take and taking a lie detector test administered on behalf of a police force in Ontario or by a member of a police force in Ontario in the course of the investigation of an offence.

The provision is clear that, in the context of a job interview, a police service cannot ask an officer to consent to a lie detector test. If an officer is asked to take such a test, we suggest that you advise

them of their right to refuse and file a grievance.

If an officer is asked to take a lie detector test

as part of a disciplinary investigation, the situation may be more complex. Section 71 could be interpreted to permit a police service to ask an officer to submit to a lie detector test as part of an internal investigation of an offence under the *Police Services Act*. On a plain reading of section 71, this situation could be considered “a lie detector test administered on behalf of a police force in Ontario in the course of an investigation of an offence.” However, there are strong arguments against this interpretation.

Firstly, Part XVI of the *ESA* specifically extends protection against lie detector tests to police officers. It would undermine the purpose of this extension to exclude police officers from this protection for disciplinary investigations simply because their employer is a police service. This interpretation of the *ESA* would leave police officers among the only employees that could be asked to take a lie detection test by their employer for disciplinary matters.

Secondly, it could be argued that the word “offence” in section 71 was intended to apply to criminal or quasi-criminal offences only. The Supreme Court of Canada has held that,

for the purposes of *Charter* protection, internal police disciplinary offences are separate and distinct from criminal and quasi-criminal offences. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, the Supreme Court held that there was a substantive difference between public offences involving true penal sanctions and disciplinary matters which are corrective and primarily intended to maintain discipline, professional integrity and professional standards.

There is a similar argument that this distinction between the two types of offences might hold in the *ESA*. That is, section 71 applies to investigations into criminal and quasi-criminal offences, not to internal disciplinary matters.

Depending on the circumstances, if an officer is asked to take a lie detector test as part of a disciplinary investigation, we suggest that he or she be advised of the applicable provisions of the *ESA* and that the police association consider filing a grievance. Pursuant to section 74(1) of the *ESA*, no employer can penalize an employee for exercising their rights under the *Act*.

## Chercover's Notebook

BY BARRIE CHERCOVER

**T**he cost of benefit packages has been increasing at a rate far in excess of inflation for several years and will continue to do so in the future. Associations must turn their minds to these issues in a more sophisticated way than they have in the past. Management wants to avoid increases in benefit cost when there is no increase in staff. The increased costs of their packages therefore result in management take-away proposals in the area of benefits.

Your starting point should be to obtain a complete copy of all benefit contracts with third parties. It is those contracts and not a summary benefit booklet which will set out current coverage levels. Without obtaining that information, you may be bargaining in the dark, whether you are proposing benefit increases or attempting to resist management proposals to reduce coverage or costs.

When management has obtained benefits through a third party insurer, the collective agreement should contain provisions recognizing that no changes can be made to the contract or coverage without the agreement of the association. This is particularly important where municipal PSBs accept coverage obtained by the municipality. The association must protect its members from unilateral changes to the coverage. Without a contractual relationship with the carrier or municipality, your only protection comes through negotiating such a provision into your collective agreement with the PSB.

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