



Green & Chercover  
Barristers & Solicitors

# POLICE LAW UPDATE

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## Prepare Early for Interest Arbitration

Interest arbitration is an integral component of the collective bargaining process in policing. In instances where the parties are unable to reach a collective agreement, interest arbitration is the legislative trade-off for the right to strike. Pursuant to the Police Services Act, the interest arbitrator may ultimately determine the contents of the collective agreement between the parties.

When it becomes clear that collective bargaining may be headed towards interest arbitration, members of the bargaining committee may begin to ask themselves the following questions: “what is an arbitration brief, anyway?,” “how can I write a persuasive brief?” and “what information should I include in my brief?”.

The key to having a successful interest arbitration brief is planning well in

advance.

The Association should have a clear idea of how it would justify each bargaining proposal. Outline the reasons for each proposal. For example, is it a matter

of fairness (i.e. bringing the provision into line with comparator police services or equalizing benefits between uniform & civilian members); have there been difficulties with the current provision, either in terms of administrative difficulties or member complaints which would justify changes to the current language?

When dealing with proposals with a monetary consequence, especially salary proposals, it is important to remember the criteria that an arbitrator must consider pursuant to s. 122(5) of the *Police Services Act*.

When addressing these factors, especially the

The *Police Services Act* states that in making a decision or award, the arbitration board shall take into consideration all factors it considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the municipality.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer's ability to attract and retain qualified employees.
6. The interest and welfare of the community served by the police force.

employer's ability to pay, the Association should consider whether it needs the assistance of an expert to analyze the economic data of the municipality or region. Whether or not an expert is within the budget for the interest arbitration, much of the legwork will need to be completed by the Association in terms of information gathering. Statistics from the municipality or region should be compiled. This includes budget information, municipal credit ratings, and any other economic data available from the municipality/region.

There is also a wealth of information from the local newspaper which may be helpful. A file of clippings should be kept which includes articles on issues such as: housing starts/building applications, growth of local

businesses, local employment rates, tax assessment rates, local economic health, etc. Also, information concerning local collective agreement settlements in the public and private sector may be of assistance.

These are just a few tips for gathering information which may ultimately be used in an interest arbitration brief. If this type of information is collected and maintained on an on-going basis, it will certainly make the preparation of the brief much smoother. Additionally, the information will be useful in the collective bargaining process itself, as it will help the Association recognize the strengths and weaknesses of some of its proposals.

## OCCPS Overturns Hearing Officer's Convictions For Deceit

**I**n a recent decision from Hamilton, the Ontario Civilian Commission on Police Services overturned the decision of a Hearing Officer convicting Constable Robert Precious of two counts of deceit. At the same time, it upheld the officer's conviction for insubordination resulting from his failure to respond to an order to answer questions and reduced the penalty imposed from a one-year demotion to second-class constable to the forfeiture of twenty-four hours' pay.

The charges against Constable Precious resulted from notes he took during an investigation of a domestic dispute and subsequent testimony he gave in court. It was alleged that he had made inaccurate notes of what was said during the meeting with the complainant and had misled the court. While a criminal perjury charge was pending, he was ordered by a superior officer to respond to a series of questions about his investigation, but on the advice of counsel did not respond to these questions.

The OCCPS panel overturned the convictions for deceit because the Hearing Officer had failed to analyze the behaviour of Constable Precious or consider whether he met the definition of deceit contained in the Code of Conduct. The panel emphasized that for an officer to be convicted of deceit, there must be clear and convincing evidence of the officer's intent to deceive. A Hearing Officer, the panel emphasized, must analyze the facts of the case against the intention of the officer and make necessary findings of fact and credibility. The Hearing Officer's reasons were "seriously deficient" because they failed to do so, and considered irrelevant matters such as the inconvenience to which the complainant had been subject.

The panel emphasized the importance of finding clear and convincing evidence in order for a conviction to be entered. It stated that "it is not sufficient for the Hearing Officer to merely state that there is clear and convincing evidence. It must exist and be

established.” The Hearing Officer’s reasons, it found, were “weak as opposed to weighty, cogent and reliable”.

It was also argued that the conviction for insubordination should be overturned because the order to answer questions had violated Officer Precious’ *Charter* rights. The panel found that there was no reason to dispute that the order was for the purpose of furthering PSA charges, and therefore it was for a “legitimate public purpose”. Therefore, it found that in this case no violation of *Charter* rights had been established. However, the reasoning in the case suggests that in a different case, if it could be established that the purpose of an order was to further a criminal investigation, an order to answer questions

may violate the *Canadian Charter of Rights and Freedoms*.

In relation to penalty, the Commission found that it was a “significant flaw” in the Hearing Officer’s decision to fail to consider or refer to other cases dealing with similar types of misconduct. It also noted that the Hearing Officer’s penalty had been for all three misconduct convictions. In light of the unblemished record of the officer, the fact that he had failed to respond to the questions on the advice of his lawyer, and because the same penalty had been imposed in a similar case from York Region, the penalty was reduced to the forfeiture of 24 hours’ pay. *Precious and Hamilton Police Service* (November 6, 2001, O.C.C.P.S.) was argued by David Wright of Green & Chercover.

## Pregnancy and Parental Leave: What Does the Law Provide?

**A**s police services hire greater numbers of female officers, and as greater numbers of men wish to take time off to spend time with newborn or newly adopted children, issues of pregnancy and parental leave periods, and the benefits available for these periods, are becoming increasingly important to police associations. Both in bargaining and representing members under the collective agreement, it is invaluable to understand the range of benefits that are available for parents of newborn or newly adopted children.

The term “pregnancy leave” refers to the period of leave that is available to a pregnant employee. “Parental leave” is a period of leave that is given to any parent following the birth of a child or the child coming into the applicant’s care and control. Discrimination against pregnant employees constitutes sex discrimination that is prohibited by the *Human*

*Rights Code* and the *Canadian Charter of Rights and Freedoms*. In dealing with pregnancy-related disputes, therefore, there may be a possibility of alleging discrimination.

The *Employment Standards Act* does not apply to uniform members, although it does automatically apply to civilian members. To ensure that police officers have the same rights to pregnancy and parental leave as other employees, therefore, it is important that collective agreements include the same rights as the legislation. Many collective agreements provide that pregnancy and parental leave will be granted in accordance with the *Employment Standards Act*. The advantage of this approach is that as benefits are changed or extended for employees generally, your members will benefit from the changes immediately and automatically, without having to negotiate changes in the next round of bargaining.

**PREGNANCY LEAVE**

- Under the provincial *Employment Standards Act*, pregnancy leave is generally available for up to 17 weeks.
- It may begin up to 17 weeks before the employee's due date, and must begin by the earlier of the due date or the date the employee gives birth.
- Leave is available if the employee gives birth, has a still-birth, or a miscarriage.

**PARENTAL LEAVE**

- Under the *Employment Standards Act*, parental leave is available for up to 35 weeks if the employee also took pregnancy leave, and up to 37 weeks if the employee did not.
- If the employee took pregnancy leave, the leave must normally begin immediately after the pregnancy leave ends. If the employee did not, the leave may begin within 52 weeks of the birth or the child's arrival.

**ENTITLEMENTS UNDER THE *EMPLOYMENT STANDARDS ACT***

- During a pregnancy or parental leave an employee is entitled to continue to participate in benefit plans and the employer must continue to make its contributions to such plans.
- Following the leave, an employee is entitled to be reinstated to the position he or she most recently held or to a comparable position, unless the employment is ended for reasons unrelated to the leave.

**EMPLOYMENT INSURANCE BENEFITS**

- Under the federal *Employment Insurance Act*, benefits are payable for up to 15 weeks of pregnancy leave and up to 35 weeks of parental leave.
- The 35 weeks of parental leave benefits may be shared between the child's parents.
- A two-week waiting period must be served, but only by one parent.
- Pregnancy benefits may begin up to eight weeks before the due date, and parental benefits are payable until up to 52 weeks after the child is born or placed with the parent for adoption.
- Benefits are currently 55% of average earnings up to a maximum of \$413 per week.

## Dog Handlers Entitled to Travel Expenses, Estoppel not Established

In *Toronto Police Services Board and Toronto Police Association*, February 14, 2002 (P. Knopf), the arbitrator found that the Association was not estopped from bringing its grievance, even though the practice of not paying mileage pursuant to the collective agreement had occurred over a period of more than nine years.

The Canine Unit was established in 1989. Technically the dogs are owned by the Toronto Police Services Board and upon the dog's retirement are sold to the handler for a nominal fee of \$1. Handlers are assigned to a specific dog, so that when the dog is off-duty, it lives in the handler's home as part of the family unit for the purpose of socializing the dog. Each dog in the unit travels to and from work each day with the handler in his or her personal vehicle which is specially equipped for the safe transportation of the dog. The handlers are also required to transport the dog for the purpose of police work such as callbacks, training, demonstrations or for veterinary care.

The Association first became aware that dog handlers were not receiving mileage pursuant to the collective agreement, in late 2000. At that time the Association encouraged members to file claims for mileage and a grievance was filed when the claims were denied. The Employer's defence to the grievance was an estoppel argument, as the facts which gave rise to the grievance arose over the course of the past decade. The Employer argued that it relied on the Association's silence over many years to conclude that it was not relying on its strict rights under the collective agreement.

Since 1991, the Employer prepared and issued "T2200" forms for the members of the Canine Unit for Revenue Canada. These forms stated, "members of the Metropolitan Toronto Police who are employed as police dog handlers, are required as a condition of their duties to transport their assigned police service dog, in their own vehicles, in the above listed circumstances as

well, without reimbursement from the Force, they must also provide and maintain a separate area on their own property, solely for the purpose of housing their assigned police dogs". Providing the T2200 to members of the Canine Unit allowed them to deduct the mileage costs of transporting the service dogs in their own car from their income. The Employer argued that this practice was an open and consistent practice which the Association either knew or ought to have known was in effect, and it could therefore not complain of the failure to pay mileage pursuant to the collective agreement.

The principles of estoppel are set out in *Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association* (1984), 14 L.A.C. (3d) 46 (M.G. Picher) which stated:

The doctrine of estoppel applies when a number of essential elements are established. Firstly, there must be a course of conduct or a statement by one party to a collective agreement to the other which amounts to a representation that it will not insist upon the strict application of its rights under the agreement. The representation must be made and be received as intended to alter the legal relations of the parties. Secondly, the party to whom the representation is made must rely on it, and so change its position in reliance upon the representation that it would suffer prejudice if the representation were withdrawn, with a return to the enforcement of the strict rights of the parties under the agreement. When the foregoing conditions are established a board of arbitration may view either a grieving party or a responding party as estopped from

advancing a condition inconsistent with that which it has previously adopted...

However, in addition, in order for an estoppel to exist, the party making the representation must also act with knowledge and intent. The party cannot be held to have agreed to a situation unless it has acquiesced. In some cases silence over a long period of time may mean that the party has acquiesced to it. However, to rely on silence to support a defence of estoppel, the evidence must show that the silent party knew or understood the effect of the silence.

The arbitrator in this case found that all of the elements of estoppel had been established, except that the silence or inaction of the Association could not be deemed to be knowledge or acquiescence because of the fact that the Employer had consistently asserted to Revenue Canada and members of the Canine Unit that there was no entitlement for compensation for travel expenses. In the circumstances, the Association's failure to notice and/or complain about the situation has been explained by the Employer's repeated assertion that the Canine

Unit members were required to incur personal expense travel costs "without reimbursement from the Force".

It is important to note that estoppel is an equitable principle, so that it can only be invoked to ensure an equitable result. A party which creates a situation that leads the other party to misperceive its rights cannot then use that same situation to avoid its contractual obligations. In this case, the Employer caused the Canine Unit members and the Association to misperceive their rights, although there was no deceit or intention to do so on the part of the Employer. As such, the Employer could not rely on the doctrine of estoppel in the circumstances. The grievance was allowed and there was a declaration that dog handlers are entitled to mileage under the collective agreement. The remedy was left for the parties to agree upon.

*Toronto Police Services and Toronto Police Association (February 14, 2002) was argued by*  
**Barrie Chercover of Green & Chercover.**

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