Green & Chercover

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Using the Collective Agreement to Protect Association Work

BY TERRI HILBORN

This is the third in a series of articles dealing with police staffing issues

Earlier articles in this series have discussed the increasing trend among police services to move work traditionally done by association members outside the bargaining unit. Traditional association jobs in areas such as communications and court security may now be provided by private companies. Some police services have started to contract out large wiretap projects and payroll administration. Jobs more peripheral to core police services such as maintenance and cleaning work or food services are rarely performed by association members any more.

This is a trend that can weaken police associations. Contracting out reduces job opportunities and job security for association members and weakens an association's bargaining position.

Once jobs are removed from the bargaining unit, it is very difficult to get them back. It is important to take steps to limit this trend. Few police associations have negotiated strong protections against contracting out because this is a relatively new trend in policing. However, we can look at steps taken by employees in sectors which have long faced this problem. Two key protections that have been used to limit employer ability to move jobs out of the bargaining unit are "recognition" or "scope" clauses and articles dealing directly with contracting out.

Recognition Clauses

Recognition or scope clauses are found in all collective agreements. They serve two primary functions. First, the employer should recognize the association as the exclusive bargaining agent for association members. Second, the clause should define the

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The Challenge of Abolishing Mandatory Retirement

BY SIMON BLACKSTONE

Recent statements by Ontario's provincial government have made clear its political commitment to abolish mandatory retirement. As the McGuinty government has characterized it, it wishes to give Ontario workers "the right to choose when they want to retire". While the end of mandatory retirement is a positive development in theory, specific issues within the policing environment make the abolition of mandatory retirement a serious issue for police employees. Since the government has made it clear that it intends to pass legislation on the subject, police associations will have to navigate this political "hot potato" with great care.

The Issue

The abolition of mandatory retirement presents several key challenges for police associations. The government's proposals may:

- Hinder the accommodation of disabled uniform officers;
- Exacerbate shortages of front-

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Recent Cases: *ESA* Provision Found Unconstitutional

BY SUSAN LUFT

Various laws affect the rights of disabled members of a police service. Section 47 of the *Police Services Act* (*PSA*) addresses the issue of accommodation of disabled members of municipal police services and gives police services boards a limited right to discharge or retire disabled members in circumstances defined in the section. Section 47 references and incorporates the *Human Rights Code* provisions on disability. In addition the *Employment Standards Act* (*ESA*) applies to civilian (although not uniform) members and contains relevant provisions.

In a recent case, *Ontario Nurses' Association v. Mount Sinai Hospital* (2004), 69 O.R. (3d) 267, the Ontario Divisional Court found that an exception to *ESA* severance pay entitlement was unconstitutional because it violated employees' equality rights. The decision is significant for police both because it directly affects disabled civilian members and because its reasoning impacts upon all disabled members of police services.

The *ESA* provides for the payment of severance pay to employees whose employment is terminated in various circumstances. Among other requirements, the employee must have been employed for five years or more and the employer must be of a certain size. The Court found that it is an earned benefit that compensates long-serving employees for their past service and for their investment in the employer's business.

Where an individual's employment is terminated for reasons of illness or injury, however, the statutory scheme includes an exception. The version of the *ESA* in force at the time provided that employees terminated in circumstances in which their contract of employment had "become impossible of performance or frustrated" by illness or injury were not entitled to severance pay. The equivalent provision is now found in s. 9 of O. Reg. 288/01. The wording of the provision has been altered slightly to make reference to the *Human Rights Code*.

The *Mount Sinai* case arose when the Ontario Nurses Association filed a grievance following the termination of a nurse for innocent absenteeism. One of the issues at the arbitration was the constitutionality of the exemption. The arbitration board upheld the constitutionality of the section.

On review, the Divisional Court found that the provision was unconstitutional because it breached s. 15(1) of the *Canadian Charter of Rights and Freedoms* by discriminating against individuals on the basis of mental or physical disability. It held that the exception denied these individuals a benefit that compensated employees for past contributions, thereby perpetuating negative stereotypes and devaluing their contributions

The Court therefore found that the exception was of no force or effect. As a result, it held, severance pay was required to be paid to qualifying employees who were terminated in circumstances where their contract of employment could not be performed due to illness or injury. The decision is currently under appeal.

For police associations, the case is significant in various ways. Subject to the effect of s. 47 of the *PSA,* it suggests that eligible civilian members covered by the *ESA* are entitled to severance pay if their employment is terminated because of their health.

While the decision does not directly affect uniform members since they are not covered by the *ESA*, it is another clear indication of the prominence that courts are giving to equality rights for disabled employees. Courts will often not permit employees who leave employment because of disability to be treated differently from those who leave for other reasons.

Police associations should take this into account both in negotiating collective agreements and in representing disabled members. Collective agreement provisions that treat employees who leave employment because of disability differently from those who leave for other non-culpable reasons could also be found to be discriminatory under the *Human Rights Code* and/or the *Charter*. Similarly, it can be argued that any application of s. 47 of the *PSA* that results in disabled officers having different benefits from members whose employment ends for other non-culpable reasons would also be unconstitutional.

Finally, the case is also a reminder for police associations that legislative provisions that treat employees unequally on the basis of disability (or any other protected ground) may be found unconstitutional and struck down. When police employers, rely, for example, on provisions of the Police *Services Act* to justify treating disabled employees differently from others or to refuse to accommodate them, the *Charter* may result in the provision being struck down or modified.

Chercover's Notebook

BY BARRIE CHERCOVER **Changes in Administration—Good or Bad?**

Unions and Associations should never get complacent when things are going well. Times change. Governments change. PSBs change. Chiefs change. Members should be covered by a well thought out collective agreement which defines and underscores compensation benefits and the right to be treated fairly. Such collective agreements can be enforced by grievance and arbitration when necessary.

Many Unions have lived to regret their failure to reduce practices to collective agreement rights when there is a change in management or administration, and they are faced with senior officers or PSBs which have gone sour. It is easier to preserve practices which are recorded in collective agreement language then to preserve practices which developed from the fairness of prior administrations. It is difficult to prevent unilateral management policy or directive changes when those directives are not incorporated into the collective agreement.

Recent Cases:

Saskatchewan Court Broadens Chief's Discretion

BY SIMON BLACKSTONE

In *Saskatoon (City) Police Force v. Saskatoon (Police Commission),* [2004] S.J. No. 9 (QL), the Saskatchewan Court of Appeal ruled that when terminated, probationary police officers do not have access to collective agreement provisions that would allow them to grieve their dismissal. Although the decision was reached on the basis of Saskatchewan legislation, and is not binding elsewhere in the country, it sends a chilling signal regarding the rights of probationary police employees, and may be used by employers to narrow the jurisdiction of arbitrators under police collective agreements. It is most significant for police officers in Ontario because it suggests a trend by the courts to interpret legislation to limit the matters that can be the subject of collective bargaining by police associations.

This case began with the termination for disciplinary reasons of two probationary members of the Saskatoon Police Service. The grievors were accused by the employer, the Saskatoon Board of Police Commissioners, of having committed plagiarism. The employer claimed that this had brought their honesty, credibility and integrity into disrepute, and rendered them "unsuitable" to carry out law enforcement duties. The terminations were grieved by the members' association, the Saskatoon City Police Association. At arbitration, the employer took the position that the arbitrator had no jurisdiction to hear the matter, as the review of any such discipline ought to be done not under the provisions of the collective agreement, but rather under a *Police Act* proceeding.

The Board of Arbitration rejected this argument and took jurisdiction. It found that Saskatchewan's labour relations statute, the Trade Union Act, applied to the grievors and that the dispute arose out of the collective agreement. The employer moved to have the decision set aside, arguing that the arbitration panel had erred in law, and that probationary employees did not have access to any review of termination decisions. The trial level judge upheld the arbitration decision, and the matter was appealed by the employer to the Saskatoon Court of Appeal.

The Saskatchewan legislation, as it stood at the time, gave the Chief the power to dismiss police officers for unsuitability or incompetence, and provided that a collective agreement could affect the exercise of this power. However, it excluded probationary officers from this provision, making the legislation essentially silent on the manner of dismissing probationary constables. The legislation was subsequently amended to include probationary officers in the general provision. The decision involved the older version of the statute.

The Court of Appeal held that it should decide the issue of whether the collective agreement could apply to probationary officers' dismissal by looking to the intention of the Saskatchewan legislature in creating the statutory and regulatory frameworks in question. Put simply, the Court of Appeal evaluated what it thought the legislature had intended the rights of probationary police officers to be, post dismissal. The Court looked to the framework of the Act, which granted to the Chief, and the Chief alone, the power to dismiss other members for unsuitability, but did not on its face grant to anyone the power to dismiss probationary employees for unsuitability. The Court chose to infer that the legislature had intended to grant such powers to the Chief without any ability to challenge the Chief's decision. It cited the subsequent amendments to the Act (which expressly granted such powers) as evidence for such a supposition.

Accordingly, the Court found that the decision of the Board of Arbitration was wrong in law, and that review by an arbitration panel of a disciplinary decision regarding probationary officers was incompatible with the scheme of Saskatchewan's *Police Act* as it stood at the time.

For Ontario police associations, an important lesson of this case is the importance of clear statutory language setting out the subjects that may be covered in collective agreements when changes to the *Police Services Act* are being considered. This case shows that unless new legislation is clear, courts may presume that matters are within the discretion of the Chief and cannot be affected by collective agreements.

Lobbying government to ensure that any new legislation clearly gives police the right to bargain collectively with employers regarding all or most of their terms and conditions of employment should be an important priority. Police officers should have the same rights as other employees to bargain restrictions on management discretion, and it is essential that legislation clearly reflect this principle so that the courts do not whittle away bargaining rights.

The Challenge of Abolishing Mandatory Retirement

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line officers;

- Disrupt ongoing efforts to facilitate early retirements;
- Lead to the erosion of pension benefits, both public and private.

Central to many police associations' concerns regarding the abolition of mandatory retirement are how increased numbers of older officers would affect disabled and rehabilitating officers. The duty on employers and employee associations to accommodate disabled employees requires that they be given accommodated duties unless to do so would create undue hardship. This placement may be either on a temporary or permanent basis, and the accommodated position must be a position consistent with their medical restrictions.

The process of "civilianization" complicates the accommodation process. A range of services previously provided by uniformed officers, such as radio dispatch or evidence control, are now performed by civilian employees. Civilianization has already presented significant challenges for the accommodation of injured or ailing police officers within existing uniform bargaining units. Should mandatory retirement within the policing sector be abolished, these ailing or injured officers would likely be forced to compete with older officers for the non-frontline positions. This could make accommodation of disabled or older officers and civilians even more difficult than it already is.

The greatest skill shortage in Ontario policing remains the provision of frontline services. It is also possible that the abolition of mandatory retirement will stave off new hires that would otherwise take place and slow the entry of young persons into policing, thereby worsening the skill shortage.

Ironically, the abolition of mandatory retirement may also result in a negative pressure on older officers to remain in employment after they would normally be entitled to enjoy retirement benefits. If the hiring of younger officers is delayed in response to the abolition of mandatory retirement, the loyalty and devotion to public service of Ontario's police employees could function as pressure on older officers to remain in active service.

For many years, police employers and associations have been engaged in efforts to facilitate early retirement programmes for those who were interested in moving on to other opportunities. The abolition of mandatory retirement in policing may discourage those efforts.

The proposed government reforms may also have a negative impact on the pension rights of employees. While a number of jurisdictions in Canada have a simple service threshold for the fully pensioned retirement of police personnel (24 years' service within the RCMP, 25 years' service in Alberta), retirement thresholds in Ontario are determined by a combination of years of age and years of service.

In Ontario, in order to retire on an unreduced pension, police officers must obtain an 85 factor. For civilian employees, a 90 factor must be reached. As such, the mandatory retirement threshold of 65 is not necessarily the functioning retirement age for many police employees, but rather the schedule of their retirement is governed by their age and service. Police associations should be vigilant and press government if they wish to retain the existing OMERS qualification thresholds.

Police associations must also be careful to stress to the government that the choice offered to employees to extend their working life should not be used as a lever to reduce or deny access to private or public pension benefits. The end of mandatory retirement should not result in further deferring pension benefits that Ontarians have already earned.

Strategy

The likely abolition of mandatory retirement presents a serious challenge to police associations. Regardless of the impetus behind the proposed reforms, some changes are undoubtedly forthcoming. We are presently in the consultation stage – a crucial moment in the determination of future government policy. Police associations should act now to ensure that their views are known to government representatives, both elected officials and civil servants, to ensure that the forthcoming changes reflect the unique policing environment.

In general, government is receptive to the representations made by police associations. Further, there is an understanding in some levels of government that some workplaces ought to be treated individually within any new framework. This is also an issue where police associations might consider working with other organizations representing employees who may have similar interests and perspectives.

Several key points are essential to the successful lobbying of any level of government. First and foremost, any organization must have a clear position on a set of issues before contacting government representatives. Second, an organization must ascertain how it can best be heard by government. For smaller associations, local Members of Provincial Parliament will always be receptive to overtures from local groups, but for larger associations it may be worthwhile to contact the Solicitor General and seek a larger audience. Third, one must always approach a lobby effort having considered the weight and emphasis to place on the issue at hand. Failure to keep the relative priority of the issue in perspective may lead to damaged relations with government, which no police association can afford, as the next lobby is likely just around the corner.

In conclusion, the abolition of mandatory retirement represents a significant challenge to police associations. Without tailoring to the police community, an across-the-board abolition could create significant difficulties related to labour market issues, accommodation, pension and benefits issues and hinder early retirement initiatives. Police associations should attempt to make their views known to government prior to the introduction of legislation, and should do so carefully because of the complexities of this issue.

Protect Association Work

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scope of the bargaining unit. That means setting out which employees of the police service are members of the bargaining unit and what work falls within it. The bargaining unit should be defined as comprehensively as possible. On the other hand, any exclusion from the bargaining unit should be precisely and narrowly defined.

In most Ontario police services, there are civilian, uniform, and senior officers' bargaining units. The recognition clause in uniform agreements should refer to all uniform employees with the exception of those ranks covered in the senior officers' agreement. In civilian agreements, the recognition clause should ideally define the bargaining unit as "all employees" of the police service except uniform officers. Unless the collective agreement states otherwise, arbitrators have held that the phrase "all employees" includes both full and part-time employees, permanent and temporary employees as well as casual and probationary employees.

Bargaining units that include all employees provide strong protection for those currently employed by the police service as well as new employees. This is because they are generally interpreted to prevent the police service from employing people to do such work except in accordance with the terms of the collective agreement.

However, scope clauses do not prevent the police service from contracting work out to non-employees who are not under its direction or supervision. To prevent this, a collective agreement must not only define who is in the bargaining unit, but what work is done by bargaining unit members, and must limit the ability of management to have this work done by outside contractors. In the absence of any specific language to the contrary, arbitrators will generally allow management to contract out bargaining unit work.

Protection against contracting out can be achieved through the scope or recognition clause. For example, some recognition clauses state that all the jobs presently covered by the collective agreement shall remain in the bargaining unit for the duration of the collective agreement. This type of clause is strengthened if the collective agreement includes job classifications and descriptions. Otherwise, a specific contracting out clause is required.

Contracting-Out Provisions

Specific clauses that limit a police service's right to remove work from association members by contracting out are relatively rare. However, as the contracting out trend has accelerated, a few associations have been able to set some limits on the police service's ability to direct work out of the bargaining unit.

The strongest type of contracting out clause is one that prohibits the practice entirely. It is not surprising that this type of clause is rare, though some firefighters' associations and industrial unions have negotiated clauses which state that no work customarily done by an employee covered by the collective agreement shall be performed by a person who is not an employee.

More common are clauses which limit contracting out by restricting how and when it can be done or by providing for advance notice to or consultation with the association. Such clauses might prohibit the police service from laying off any employee as a result of contracting out current work or services. This type of provision is only a first step and provides protection for current members. However, in the long run, it may still lead to a weakening of the Association through attrition if the employer begins to contract out certain positions as older members retire or leave the service.

It should also be noted that such clauses may also protect bargaining unit work from being moved between uniform and civilian bargaining units. However, human rights and other issues may affect how they are applied. Issues of movement of work between bargaining units will be dealt with in a future article.

The need to protect the work of members is a new phenomenon for police associations. However, it is clear that associations must look at recognition clauses and contracting out provisions to preserve bargaining unit work over the long term. Police services boards will certainly resist attempts to limit the flexibility and perceived cost savings that come from contracting out. However, it is important to put these matters on the negotiating agenda. Limiting this trend not only strengthens associations; the entire community benefits when both core policing services and supporting work are provided by fairly compensated members who are accountable to the police service, not outside contractors.

G & C Profiles... Barrie Chercover

Certified Specialist in Labour Law in accordance with Rules 3.03 (1)(g) and 3.05(2) of the Law Society's Rules of Professional Conduct.

Barrie Chercover was born in Port Arthur, Ontario and attended University at Lakehead University and the University of Toronto and Osgoode Hall Law School. He was called to the Bar in 1970.

Barrie has been in partnership with Maurice Green since 1989 and was a founding partner of Green & Chercover in August 1997. From 1975 - 1989 he was a partner in the firm of MacLean and Chercover.

He has an extensive background and litigation practice in labour and employment law. He has appeared before labour tribunals, arbitrators, professional discipline adjudicators and a variety of administrative tribunals, as well as the courts. Barrie has represented unions and employees in almost every field of practice and has worked extensively representing unions in the broadcast industry, the automobile and auto parts industry, the transportation industry, and construction industry and has also represented professions such as police officers and teachers on an ongoing basis for over 30 years. His practice is well grounded in both Provincial and Federal jurisdictions.

Barrie's background has included virtually every aspect of labour and employment law. He has litigated both interest and rights disputes for private and public sector unions, as well as for industrial and construction unions and for professional associations, and also represents the same client groups in collective bargaining and on policy and legislative development and on judicial inquiries . His background includes pension and benefits law, human rights, constitutional law, workers' compensation, pay and employment equity, and professional governance and discipline, including the public review of citizens' complaints against police.

Barrie is also a long-time member, and has served on the Board of Directors and is a past president of the American Prepaid Legal Services Institute.

When not litigating, Barrie can be found on the tennis courts or catering to the varied needs of his family and cats. He also enjoys reading, music and travel.