Police Law Update

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Ontario Human Rights Code Reform—Bill 107

BY BARRIE CHERCOVER

The *Ontario Human Rights Code* has been in effect since 1962 with few, if any, changes to the process by which Human Rights are enforced in Ontario. Reform to this process has been a matter of discussion for many years and has resulted in the introduction of Bill 107. The Bill has passed second reading and is moving towards a public consultation process, which the government promises to complete in the late summer or early fall 2006. The Police Association of Ontario will participate in the consultation process. It is a safe guess that the government fully intends the bill to become law, and police associations in the Province need to think about the implications of this legislation on associations and their members. This paper will raise a few of these issues for your consideration.

DIRECT ACCESS TRIBUNAL

It is generally viewed that the Ontario Human Rights Commission is not achieving its policy goals to promote, advance and enforce human rights in Ontario, at least in part because it has become bogged down by their involvement in the Complaints process from the receipt of a complaint, its investigation, decisions whether or not to refer the complaint to a tribunal and finally in supporting complainants in tribunal hearings.

The bill proposes a new direct access model for enforcement of human rights before a permanent Human Rights Tribunal. If the bill passes without change, the Commission will no longer play a role in receiving and investigating complaints or in mediating, settling, screening complaints or deciding whether they should be referred to a Tribunal, although the Commission itself would be able to file complaints on allegations of a systemic nature.

Discussions continue with respect to who might be appointed to the Human Rights Tribunal and how the appointments are to be made.

Discussions are also ongoing with respect to the Government's proposal that the Tribunal develop its own rules and practice directions and apply principles of alternative dispute resolution, which is now often the approach taken by all courts and tribunals.

From an association's perspective, the key change is that a complaint is initiated by an application made to a permanent Human Rights Tribunal, which means that your members who become respondents to a complaint will need representation from the outset to respond to the allegations. While the Tribunal may make its own rules about how a complaint proceeds and whether your members are required to attend a hearing in the traditional sense of a trial, Bill 107 reworks who will decide whether a hearing should occur and/or whether a complaint should be dismissed on a preliminary basis and the grounds on which a complaint might be dismissed without a full hearing.

All police associations should consider the adequacy of their legal indemnification provisions to assure that members who face allegations of misconduct before the new Human Rights Tribunal are represented by a person who represents their interests and that their reasonable legal costs will be indemnified for such matters.

FUNDING COMPLAINTS

It isn't clear at this time what government funding will be available to support complaints by members of the public, but the debate on this issue continues, and it is clear that there will be some form of public funding to support complainants. Bill 107 contemplates funding, and some of the lobby groups are pushing aggressively to guarantee

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Bill 107

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funding to support complaints from the outset. Even if the amount of public funding is less than the proponents for guaranteed funding wish, it is probable that there will be more complaints against association members than you have experienced under the current system.

This too points to the necessity of addressing the adequacy of your legal indemnification clauses.

THE ROLE OF THE COURTS

Under the current system there is a right of appeal to the Divisional Court from a tribunal's decision. Under Bill 107 it is currently proposed that the right of appeal be eliminated and replaced with a right of judicial review to be based on a patently unreasonable standard. A strong lobby is being mounted to persuade the Government to broaden the rights of appeal and the standard of review. The final outcome of this debate will be interesting to follow.

MULTIPLE PROCEEDINGS

Bill 107 contains no bar to applications which are or might be made by grievance and arbitration under a collective agreement or in court but does empower the Tribunal to make its own rules to permit applications to be deferred to other proceedings. The Ontario Labour Relations Board has established *jurisprudence* under the *Ontario Labour Relations Act* to avoid duplication of process by deferring applications to a more appropriate forum. There is a lot of discussion whether Bill 107 should be more explicit to either permit or preclude multiple proceedings.

It is at least arguable that duplication of proceedings should be avoided because the costs to the stakeholders of allowing such is enormous. This is an issue that police associations should consider addressing. You don't want your members to face multiple proceedings and you don't want a situation where the Human Rights Tribunal effectively overrules a matter determined in accordance with your collective agreement. The current Bill leaves it open for that to occur.

CONCLUSION

Reform to human rights legislation is important, overdue and inevitable. It will impact on police associations and your members. You should therefore not only watch these developments but play a part in the interests of your members.

Decision Eliminates Financial Penalty for Officers on Pregnancy/Parental Leave

BY DIJANA SIMONOVIC

In a decision released in March 2006 and argued by Ian Fellows of Green & Chercover, arbitrator Surdykowski upheld the reclassification grievance of a York Regional Police Constable who had been off work on pregnancy leave. On the collective agreement language before him, the arbitrator found that although reclassification was postponed until the Constable returned to work, the date of the reclassification for all service and seniority purposes was to be recorded as the date reclassification would normally have taken effect had the Constable not been on pregnancy leave. He also held that while a reclassification could be delayed for just cause, a Board is not entitled to any particular "window" of service during which they will be provided with an opportunity to discover such just cause.

The Association had grieved when the Board failed to reclassify the grievor while she was off work on pregnancy leave from March 31, 2002 to March 31, 2003, citing the collective agreement between the parties and the Ontario *Human Rights Code*. The relevant provision of the collective agreement, article 13.4 (B)(4) provided:

Where a member is entitled to a reclassification during a period of pregnancy and/or parental leave, such reclassification shall be postponed until such date as the member returns to work. For the purposes of salary and benefits, the reclassification shall take effect on the date the member returns to work. For the purposes of service and seniority, the reclassification date shall be recorded as the date it would normally have taken effect had the member worked throughout the leave period.

The Association submitted that the reclassification system under the collective agreement was a wage progression scheme, and in the absence of misconduct or just cause, a Constable was entitled to move up through the four classes (i.e. from Fourth to Third to Second to First-Class). The Association's position was also that the plain meaning and purpose of article 13.4(B)(4) was to ensure that

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Pregnancy/Parental Leave

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there was no adverse effect on service or seniority under the collective agreement for any Constable who takes a parental or pregnancy leave. Although implementation is delayed and there is no salary adjustment during a leave, counsel argued the reclassification date is not altered as a result of the leave and comes into effect retroactively upon the Constable's return to work.

The Board argued that if the Association's position was sustained the grievor would effectively have become a First-Class Constable without spending any time on the job as a Second-Class Constable and that an employee must spend sufficient time in a classification to permit an appropriate performance assessment to be made and cannot be moved into the next higher classification without that and a recommendation from the assessors. In the Board's view, the issue was not a simple matter of a date of progression.

Arbitrator Surdykowski found that on the plain and ordinary reading of article 13.4(B)(4), the article could only mean what the Association said it did. The article specifies that when a Constable's classification date comes up during his/her pregnancy or parental leave, the reclassification that would otherwise have been effective on that date is postponed, not altered, and then only for salary and benefit purposes until the Constable returns to work. When the Constable returns to work, s/he is immediately entitled to the higher salary and benefits of the new higher classification. Salary and benefits are not retroactive. However, the reclassification is recorded as the date it would normally have taken effect had the member worked throughout the leave period for all service and seniority purposes.

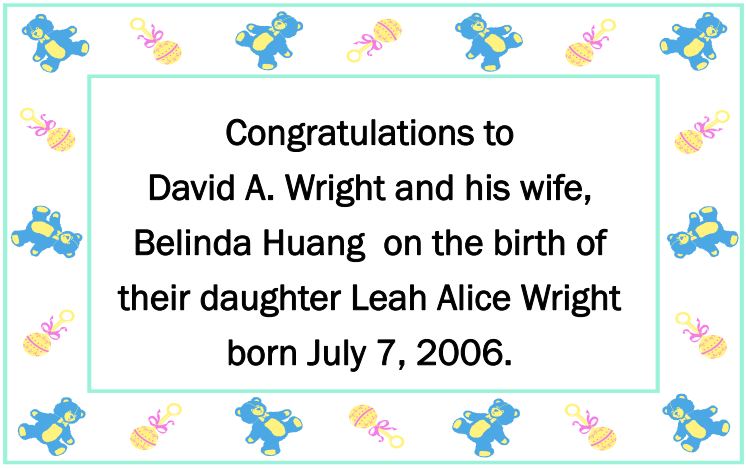
The arbitrator further found that under the collective agreement, service did not necessarily mean active employment and that, in any event, section 52 of the *Employment Standards Act* provided that pregnancy and parental leave shall be included in calculating the length of an employee's service, whether or not the service is active. Although the *Employment Standards Act* does not apply to Police Constables (except for Part XVI), the parties in this case had specifically agreed in their collective agreement that pregnancy and parental leave shall be in accordance with the *Act*.

In respect to the Board's concern, arbitrator Surdykowski found that although he understood the point and utility of having sufficient time to consider performance on the job before moving him or her up to the next classification, the one-year periods specified in the collective agreement for moving from classification to classification are not the same as probationary periods which are used by employers to assess the suitability of new employees. He therefore concluded that the fact that a reclassification may be delayed for just cause did not mean that the Board was entitled any particular opportunity to discover just cause where the collective agreement or legislation provided otherwise. While the arbitrator made reference to the positive evaluations the grievor had received, he explicitly found that the Board did not have to be given an opportunity (or "window") to evaluate a Constable's performance.

In the end, the arbitrator chose not to address the Association's human rights arguments. This decision however appears to turn on the arbitrator's view that the compensation ordered paid to the grievor was sufficient in the circumstances.

Arbitrator Surdykowski's decision is important as it represents the elimination of a financial penalty for Constables who choose to have and/or stay home to care for their children. The arbitrator's ruling also protects the important service and seniority rights of Constables who take pregnancy or parental leave, where their Association has negotiated a provision like the one found in the York collective agreement.

The Regional Municipality of York Police Services Board v. The Regional Municipality of York Police Association (March 6, 2006)(G. Surdykowski)



OCCOPS Rules that Police Authority in Ontario's Courtroom is Limited

BY ANDREA WOBICK

A recent decision of the Ontario Civilian Commission on Police Services (OCCPS) may have police officers thinking twice about taking any action for disruptive behaviour in Ontario's courts.

In 2003, Marlene Penner was in court in front of a Justice of the Peace, to defend a traffic charge. While the officer who issued the ticket gave evidence, her husband, could be heard commenting on the proceeding. The court officer addressed him stating that he could leave if he wished to comment aloud.

After testifying the officer returned to sit with a colleague in the body of the court. Neither was assigned to court security but were in attendance to give evidence. When the accused approached the witness box to give her evidence her husband again made remarks. This time the prosecutor asked the Justice of the Peace to have the man removed from the courtroom. The J.P. merely asked that there not be any further interruptions, but the court officer told the husband to get out of the courtroom.

That prompted one of the officers to lay hands on the man, who pulled away. The two constables therefore arrested him. Unfortunately, chaos erupted and the Justice of the Peace left the courtroom.

Some force was used by the officers to arrest the man, and he was charged with causing a disturbance, breach of probation and resisting arrest. All charges were later withdrawn.

The husband made a citizen's complaint under Part V of the *Police Services Act*. A charge was laid against the officers alleging that they made an unlawful or unnecessary arrest and used unnecessary force. Both officers pled not-guilty to the charges. An experienced outside adjudicator was appointed and dismissed the charges. He found that the essential question was whether the officers had authority to make the arrest. Police officers have a duty under the *Police Services Act* to preserve the peace, regardless of assignment, in any public place. Courts are public places.

Justices of the Peace have the power to deal with contempt under the *Provincial Offences Act*. The Hearing Officer found that it was unclear whether the powers of a Justice of the Peace superseded a police officer's powers, and he did not decide that issue. Instead he ruled that the Police had reasonable and probable grounds to arrest the man because of his escalating disruptive conduct in the courtroom. He also concluded that use of force was necessary in the circumstances when the man resisted arrest.

The citizen appealed, and OCCOPS came to a different conclusion. According to OCCOPS, the key issue was whether police officers' authority to make an arrest is superseded by the power of a Justice of the Peace to exercise control in the courtroom. The officers arrested the complainant during a trial, although the Justice of the Peace had not directed them to do so. OCCOPS found that, absent clear direction from the Court or an obvious threat, the authority of the police is superseded by the Court's power to deal with such matters. As the Justice of the Peace did not direct the police to arrest the complainant this action was found unlawful and unnecessary, and thus any force used in the arrest was unnecessary.

OCCOPS did not make anything of the fact that the officers took no physical action until after the court officer told the citizen to leave the courtroom.

Police officers in this society should not face discipline proceedings while lawyers and tribunals debate whose authority is primary in a courtroom. I hope that a more common sense and practical approach to the issues in this case can be exercised when the officers' appeals are heard.

Even if the officers' appeals are successful and their convictions overturned your members should be warned of the risks that they face in deciding to take action in a courtroom without clear direction from the presiding court official. It is no easy feat to balance an officer's responsibility to preserve the peace, while respecting the court's authority to manage and direct activity in a courtroom. If this OCCOPS decision stands, an officer's job in court facilities will be even more difficult.

Wayne Penner v. Constable Nathan Parker, Constable Paul Koscinski and Niagara Regional Police Service (Hearing Officer: Superintendent Fitches (retired)) June 28, 2004

Wayne Penner v. Constable Nathan Parker, Constable Paul Koscinski and Niagara Regional Police Service (OCCPS - Decision) April 22, 2005

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 was recently re-elected to the Board of Directors of the American Prepaid Legal Services Institute for a three-year term. Barrie has served on the Board for a number of years and is a past president of the organization which is the industry advocate for prepaid legal services in North America.

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.

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