

**ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES**

**REASONS FOR DECISION**

DURHAM REGIONAL POLICE SENIOR OFFICERS' ASSOCIATION

Applicant

DURHAM REGIONAL POLICE SERVICES BOARD

Respondent

**Presiding Members:**

Murray W. Chitra, Chair  
Hyacinthe Miller, Member

**Appearances:**

Brian Fazackerley, Agent for the Applicant  
Kevin Inwood, Counsel for the Respondent  
Ian B. Johnstone, Counsel for Stan MacLellan

**Hearing Date:** March 31, April 1 and April 2, 2009

On September 15, 2008 the Durham Regional Police Senior Officers' Association (the "Association") filed an application with the Ontario Civilian Commission on Police Services (the "Commission") pursuant to section 116 of the Police Services Act R.S.O. 1990, c. P.15 as amended (the "Act").

At dispute is the status of Mr. Stan MacLellan. He currently occupies the position of Strategic Human Resources Officer ("SHRO") for the Durham Regional Police Service (the "Service") under a personal services contract with the Durham Regional Police Services Board (the "Board").

The Association seeks a declaration that Mr. MacLellan is a "senior officer" and thus a member of their bargaining unit, or a direction to the Board to divest him of day-to-day operational police responsibilities.

**Preliminary Issues:**

At the commencement of this hearing Mr. Johnstone requested two preliminary rulings.

First, Mr. Johnstone asked for standing to represent Mr. MacLellan in his capacity as a witness.

Second, he requested that we adjourn these proceedings so that they could be joined with another application, or in the alternative that we defer our decision until the Commission's ruling on that matter was released.

The other proceeding identified by Mr. Johnstone, was a request for relief brought by the Board in response to the Association's original application. That relief was that the Commission authorize the creation of a new category of senior officers pursuant to section 118(1) of the Act for the purposes of bargaining. That category would include Mr. MacLellan.

**Decision on Motion:**

On the first question we agreed that Mr. Johnstone could represent Mr. MacLellan.

Section 11(1) of the Statutory Powers Procedure Act R.S.O. 1990, c. S. 22 reads:

11(1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal.

We concluded that Mr. Johnstone was entitled to be present at this proceeding, hear all testimony, advise Mr. MacLellan where appropriate and if there were matters arising from his evidence that required clarification, to put questions to him.

However, given that Mr. MacLellan was not a party to this application, we ruled that it was not appropriate for Mr. Johnstone to participate in the cross-examination of other witnesses.

On the second question we declined to adjourn these proceedings or otherwise defer any ruling for the following reasons:

1. As Mr. MacLellan was not a party to this proceeding he did not have the status to request an adjournment;

2. Even if this were not the case, the request was not filed in a timely manner or otherwise in accordance with the Commission's Rules of Practice;
3. This hearing had been scheduled for some time and all of the witnesses were present and the parties ready to proceed; and
4. The parties to the application were advised by Commission Counsel on March 26, 2009 that the Commission would proceed to hear this section 116 application and that the section 118 application would be scheduled in the normal course once the requirements of the Commission Rules had been met.

Finally, we would note that Mr. Johnstone was in essence requesting that the Board's application under section 118 receive precedence over the Association's earlier application under section 116.

In some measure we addressed this question in an earlier motion brought by the Board. On page 4 of our decision on that motion dated February 26, 2009 we held:

The Association, as an affected party, has filed an application with the Commission under section 116 of the Act. It is their right to do so.

Further, the Association is entitled to frame this application and characterize the nature of the dispute as they see fit. In this case, the Association takes the position that a single individual who is currently performing specific functions with the Service must be a member of their bargaining unit.

The Association wishes to proceed to a hearing and submit evidence in furtherance of their position and obtain a final ruling. They are entitled to do so.

The Board, by way of motion seeks to have this Panel rule on a much broader question than the status of one individual. Rather, it is seeking what is in effect a declaration concerning the application of the Act to all individuals employed with police services in Ontario in a situation of potential conflict of interest.

On the face of it, this is a substantial modification of the application before us. It is presented in a factual void without reference to the position in dispute or any other. Further, it is being argued without notice to potentially affected or interested parties. It is not supported by the Association.

Given the above, we are of the view that this motion cannot succeed. We conclude that the Association is entitled to proceed to their hearing and obtain a ruling grounded in fact and based on the application of the law to their particular dispute.

In our view, this logic continues to apply. The Association is entitled to a ruling on its application.

**The Evidence:**

Following our rulings on the above noted matters we proceeded to hear testimony.

The Association called Superintendents Robert Chapman and Jim Lockwood. The Board called Chair Terry Clayton and Mr. Stan MacLellan.

As well, we received several exhibits, written and oral submissions and a number of affidavits. The latter included an affidavit from former Chief Vern White.

The factual background to this application is largely not in dispute. Mr. MacLellan has an impressive background in business administration. For a number of years he was employed by the Ottawa Police Service.

In 2003, Mr. MacLellan joined the Service as Manager of Human Resources. The essential duties of that position were summarized in a job description as follows:

[The Manager] is responsible for recommendations regarding the development, implementation and administration of a comprehensive and integrated human resources function including recruitment & selection, Workplace Safety and Insurance Branch programs, collective bargaining administration, Performance Management systems, payroll, Occupational Health & Safety, legislative requirements, compensation and benefits administration, Career Development, Transfers and Personnel Administration, Pay Equity and Employment Equity issues.

Mr. MacLellan was a civilian member of the Service reporting to an inspector. For bargaining purposes he was a member of the Association. His salary and benefits were determined under the Association's collective agreement with the Board.

In the fall of 2006 the position of Manager was modified. Mr. MacLellan became Director of Human Resources. The duties of that position were essentially the same. They were summarized in the new job description as follows:

- Leading the DRPS Human Resources Unit staff (sworn and civilian) including: Selecting, developing and retaining staff to meet current and future needs;
- Developing, and monitoring of the respective unit budgets;

- Managing the respective HR leaders' performance providing formal and informal feedback as appropriate;
- Develops team goals and objectives, supervising activities of staff to meet Unit and Service goals, and ensuring compliance with policy and procedures.
- Assists the Superintendent in the planning of mid and long-term HR initiatives, and the establishment of HR program priorities
- Provides leadership and guidance to all direct reports including the Manager, Total Compensation, Manager, Employee Health and Wellness, the S/Sgt, Training and Professional Development and Employee Relations Advisor.

Mr. MacLellan remained a civilian member of the Service reporting to a superintendent. He remained a member of the Association. His salary and benefits were unchanged and continued to be determined under the Association's collective agreement with the Board.

In addition to the duties identified above, Mr. MacLellan (both as Manager and Director) was required from time to time by the Chief of Police to assist the Board. This included gathering information to aid the Board in collective bargaining, answering questions about the potential impact of Board bargaining positions, providing advice on job evaluations and assisting in the resolution of grievances.

Other senior officers performed similar functions from time to time, particularly in the area of costing benefits or providing information on past practices to assist the Board in collective bargaining. We heard evidence concerning the potential for conflict of interest inherent in having senior officers perform such functions. As well, we heard testimony about the various strategies adopted by individuals to deal with such concerns.

The evidence before us also disclosed that for a number of years both the Service and Board had been wrestling with organizational change. This is reflected in a number of studies and reviews commissioned from consultants. These included: an Organizational Renewal Report by HayGroup in January of 2000; a Review of Human Resources Department by Garth S. Johns Consulting in September of 2002; a Review of the Executive Limitations on Employment, Compensation and Benefits by Bonni Titgemeyer of the Employers' Choice Inc. in September of 2006; and a Strategic Human Resources Model Concept in January of 2007 also by Bonni Titgemeyer.

The latter Titgemeyer report made two comments about the Human Resources function within the Service that are worth noting. Specifically, at pages 5 and 6:

**Observation #2: At a practical level, there is confusion as to what extent each party (Board, Chief) is responsible for influencing the direction taken with regards to human resources management.**

It is our understanding that the Carver model for the Board was implemented only a few years ago. In our interviews with the various parties, it became clear that there remains [to be] confusion (and perhaps disagreement or apathy), over the extent to which each party (Board, Chief, Human Resources) is responsible for influencing the direction that is taken with regards to human resources management. The comments made by some Board members suggest that they do not have a clear picture of the roles of the Board, Chief and Human Resources Unit and how they relate to collective bargaining. There also appears to be lack of insight, training or clarity as to the types of questions the Board *should* be asking the Chief about human resources practices in order to meet their fiduciary obligations.

**Observation #3: The “conflict of interest” created by the fact that the Director of Human Resources is in one of the bargaining unit[s] remains unresolved in the revised organizational chart.**

There are actually two organizational challenges stemming from the conflict of interest caused by the fact that the Director of Human Resources is a member of the Senior Officers Association bargaining unit.

The more obvious issue is that the Board’s reliance on the Director of Human Resources for gathering internal information for the Board bargaining committee for upcoming bargaining processes (especially with regards to the SOA) creates a risk that they will not have the best information available, due to conflict of interest and alliances. This is exacerbated by the fact that the issues and the percentage increases are interrelated among the bargaining units.

It has been floated as a potential option to have the Director of Human Resources removed from the bargaining unit and employed by the Board instead of the Durham Regional Police Service. This also creates an alternative issue in that by so doing, the employees may have less trust in the Human Resources Unit and key linkages may be lost. While we do not raise concern with regard to the current Director of Human Resources ability to effectively balance the role, it may prove problematic in the longer term.

The month following the release of the report with these observations, Chief White was approached by Mr. Dejeet and Mr. Anderson, two members of the Board. They requested that Mr. MacLellan be assigned to the Board as a

“negotiating aide” for the upcoming round of collective negotiations with the Durham Regional Police Association.

The reasons given were Mr. MacLellan’s expertise, the fact that a number of issues on the bargaining table were difficult and complex and the impending departure of the Board’s Executive Director, who had previously fulfilled the role of negotiating aide.

The Chief’s response to the Board’s request was reflected in his Affidavit. Given its relevance to the current dispute, it is worth quoting at some length:

7. In response to Mr. Dejeet’s and Mr. Anderson’s request to utilize Mr. MacLellan as an aide to the Board during collective bargaining, I informed the Board that I was not prepared to endorse such an initiative. Given the duties the Director of Human Resources performed for the Service, I informed the Board that it would be inappropriate for Mr. MacLellan to engage in collective bargaining on behalf of the Board. Firstly, since Mr. MacLellan was a member of one of the associations that the Board bargained against, namely the SOA, I was of the view that it would be improper for him to act as the Board’s agent in any collective bargaining process.
8. Secondly, given that it was my police leadership philosophy that the individual members make the organization successful, as Chief of Police of the DRPS, I attempted to implement an organizational structure that facilitated the growth and development of all personnel under my supervision. As such, the Director of Human Resources was a key point of contact with the membership. I encouraged the Director of Human Resources to be available and open to the lower ranking officers and civilian personnel so that he could stay abreast of any issues that positively or negatively impacted on the growth, development and success of the personnel within the DRPS.
9. It was my view that the Director of Human Resources would lose the direct link to the membership and would no longer appear to be approachable if he sat in an adversarial role by bargaining against the very individuals he was required to have a kinship with. Therefore, I was opposed to allowing the Director of Human Resources to be utilized by the Board as a bargaining agent during collective bargaining with the DRPA.
10. For the foregoing reasons I advised the Board that I would not permit the Service’s Director of Human Resources to be utilized by the Board during collective bargaining negotiations.

11. Moreover, I advised the Board that its past practice of utilizing individuals within the SOA to assist the Board in its collective bargaining negotiations ought to be revisited. For instance, I was aware that in the past the Board relied heavily on the Director of Finance and Superintendent of Administration to prepare costings of various bargaining proposals. This practice allowed those SOA members to become familiar with the Board's bottom line for negotiations. Given the knowledge those members had about the Board's bottom line, I was of the view that such direct negotiating support for the Board put those members at odds with his or her fellow bargaining unit colleagues during SOA collective bargaining.
12. I informed Mr. Dejeet and Mr. Anderson that going forward the Board should hire staff or a consultant capable of performing the financial analysis so that SOA members did not have to directly assist the Board in its bargaining activities. However, given that the Board was soon to be without an Executive Director and collective bargaining negotiations were looming, I was cognizant that the Board would not be able to recruit, hire and train a staff member or retain a consultant within a time frame that would give such an individual adequate time to be prepared for negotiations. Accordingly, so as not to prejudice the Board during their negotiations with the DRPA, I advised that I would not formally oppose the Board from directly relying on the Director of Finance and Superintendent of Administration to prepare costings of various proposals, provided that the Board would take steps to develop its own internal capacity to perform this work for the 2008 renewal contract and thereafter.
13. Mr. Dejeet acknowledged that since the Board was soon to be without an Executive Director, it would face significant challenges in the upcoming round of collective bargaining and admitted that he was quite concerned about how the Board ought to handle this matter. Knowing the challenges ahead, Mr. Dejeet sought my input as to potential solutions available to the Board to assist it both with the immediate round of negotiations but also with creating a viable capacity within the Board for future rounds of collective bargaining negotiations.
14. I advised Mr. Dejeet that if the Board was intent on utilizing the Director of Human Resources for collective bargaining, the Board ought to directly employ Mr. MacLellan. It was my view that the Board had to engage such an individual on a personal services contract, as leaving the individual within any bargaining unit within the Service would pose obvious conflicts of interest. From the Board's perspective, retaining membership within one of the associations would pose a conflict since his or her remuneration would be

governed by the collective agreement and therefore the individual may be inclined to negotiate an agreement favourable to employees, not the Board. From the individual's perspective, preserving the individual within an association would create a conflict of interest in that the parties could not effectively bargain concerning grievance matters as the individual may become subject to pressure from his or her bargaining unit colleagues.

15. I advised the Board that engaging Mr. MacLellan on a personal services contract could likely be subject to challenge. However, in cautioning about the lawfulness of directly engaging Mr. MacLellan, I advised the Board that many other police services and their boards had engaged individuals who were excluded from their associations, namely, the Toronto Police Service and the Ottawa Police Service, to name a few.
16. On February 28, 2007, I advised the Board of my resignation as Chief of Police of the DRPS.
17. In early March 2007, Mr. Dejeet informed me that the Board was in favour of engaging Mr. MacLellan on a personal services contract in a strategic human resources role as this presented the Board with a viable solution to both its short and long term labour relations needs. Given that the Board was now intent on hiring Mr. MacLellan, I advised the Board that we would have to seek out a solution to the Service's ongoing human resources needs as I was not prepared to allow the Board to hire Mr. MacLellan and leave the Service without its labour relations manager. Moreover, I advised that I would not allow the Board to hire Mr. MacLellan to remedy its collective bargaining woes, only to leave the Service with the cost of having to recruit, hire and train a new Director of Human Resources.
18. After much discussion between the Board and I, it was agreed that the Board would present Mr. MacLellan with the opportunity of employment on [a] personal services contract with the Board where he would take on a strategic labour relations role for the Board with a focus on collective bargaining, yet retain a tactical role with the Service in relation to oversight of the Human Resources Unit.

The Board announced its intent to establish a position, to be known as Strategic Human Resources Officer, on or about March 12, 2007. On April 18, 2007 the Board's Executive Director resigned. On May 1, 2007 Mr. MacLellan signed an agreement with the Board to assume the role of SHRO. There was no formal posting or interview process for the position. His appointment was announced on May 18, 2007.

Mr. MacLellan's agreement with the Board was in the form of a five year personal services contract with termination on six months written notice. This contract provided for a fixed salary with annual increases "equal to the lesser of the DRPA or SOA annually negotiated salary increase". Mr. MacLellan was to be reimbursed for travel related expenses "at the same rate and under the same terms and conditions found in the Senior Officers' Association contract". As well, he was to receive health, life and disability insurance benefits and sick leave entitlements as "afforded the members of the Senior Officers' Association by contract" or any future SOA contracts.

The Board took the position that the SHRO was a confidential "excluded position" and should not be part of any bargaining unit. It requested the Senior Officers' Association's consent. The Association did not agree and expressed this view in a series of letters and at a number of meetings. Notwithstanding this objection, the public announcement of May 18<sup>th</sup> stated that "Effective immediately, Mr. Stan MacLellan will be leaving the Senior Officers' Association ..."

The duties of the SHRO were set out in a job description appended to Mr. MacLellan's contract. The primary functions were generally described as follows:

Under the guidance of the Chief of Police, the Strategic Human Resources Officer leads the Human Resources function within the DRPS. This includes supporting all internal stakeholders (Police Services Board, Chief, management and staff) in all aspects of Human Resources strategic planning; labour issues; senior officer association and police association negotiations; strategic Human Resources policies and administration. Ensures that the DRPS meets current and future human resources requirements through progressive and proactive policies, practices and programs. Provides services as otherwise directed by the Chief of Police or delegate.

The specific components of the job description basically captured most of Mr. MacLellan's former responsibilities as Director of Human Resources.

However, Mr. MacLellan was given a number of new duties to be performed for the Board. These included:

- Supporting the Board's HR needs i.e. contracts with Board employees, developing performance management tools, assisting the Board in the search and selection of police executives. (Indeed, it would appear that one of Mr. MacLellan's first tasks was to support the Board in its search for a replacement for Chief White);
- Preparing Board level responses to grievances; and
- Supporting bargaining i.e. monitor trends, participate in the development of collective bargaining strategy, participate as a

member of the Board's negotiating team for discussions with all three bargaining units

The job description also identified several specific functions that Mr. MacLellan was to perform to support the Board's bargaining process "from start to finish".

Under the above noted arrangement, Mr. MacLellan was a "direct report" to the Chief (akin to a Deputy Chief). In addition, as of September of 2008, Mr. MacLellan had three Service operational units reporting directly to him. They included Strategic Planning, Human Resources and Diversity and Quality Assurance.

He is assigned an office with Service Administration on the same floor where he was located as Director of Human Resources. He was not located with the Board.

**Applicant's Position:**

Mr. Fazackerly, on behalf of the Association, took issue with the changes to Mr. MacLellan's status and role as of May 18, 2007.

He asserted that a Board cannot retain an employee by means of contract to perform both Service operational and Board collective bargaining duties.

In essence, his position is that Mr. MacLellan can be a member of the Association and Service performing operational duties or a Board employee performing policy and collective bargaining functions – but not both.

Mr. Fazackerley acknowledged that from time to time senior officers of the Service have been called upon to assist the Board in collective bargaining and that this has the potential for conflict of interest. However, he asserted that such potential conflicts have been managed by the judgement and professionalism of the individuals involved. He drew our attention to the second Titgemeyer report where the author indicated that she had no reservations about Mr. MacLellan's abilities to effectively "balance" his roles.

Mr. Fazackerley drew to our attention a series of rulings dealing with secretaries to chiefs of police. Typically such individuals have access to sensitive or confidential information and have the status of senior officers. Board of Commissioners of Police for the City of Brockville and Brockville Police Association (14 December, 1990, O.P.A.C.), Brockville Police Association v. Brockville (City) Commissioners of Police [1992] O.J. 15 (Div. Ct.) and Brockville Police Association v. Brockville (City) Commissioners of Police [1995] O.J. No. 1684 (Ont. C.A.)

Mr. Fazackerley noted a number of previous Commission decisions where, he argued, we had found that managerial positions with confidential or sensitive functions were properly members of senior officers associations. Regional Municipality of Niagara Police Services Board and Niagara Regional Police Senior Officers' Association (16 January, 1996, O.C.C.P.S.) and Orillia Police Services Board and Orillia Police Association and Orillia Senior Officers' Association (August, 1993, O.P.C.)

He identified limitations to the Board's power of appointment and termination. This was done in light of the fact that the Board's contract with Mr. MacLellan authorized his termination on six months written notice. Mr. Fazackerley asserted that this offended both the Act and principles of independence inherent in the status of office holder. Re City of Pembroke Police Services Board and Kidder (1995), 22 O.R. (3d) 663 (Div. Ct.) and Re Brown and Waterloo Regional Board of Commissioners of Police (1985), 50 O.R. (2d) 395 (Div. Ct.) and A Reference Under The Constitutional Questions Act [1957] O.R. 28 (Ont.C.A.)

As well, he noted various sections of the Act. These included sections 2, 31, 38, 49, 114, 115, 116, 118, 119 and 126 of the Act. He examined the history of certain of these provisions. This was specifically to refute any assertion that recent amendments to the Act had created "confidentiality exclusions" for any members of a service beyond chief and deputy chief. Durham Regional Police Association and Regional Municipality of Durham Police Services Board (13 July 2007, O.P.A.C., Arbitrator Paula Knopf)

Mr. Fazackerley argued that the labour relations regime for police services was unique and governed exclusively by the provisions of the Act. As such, we should not import concepts or provisions applicable to other employment sectors.

In conclusion, Mr. Fazackerley requested one of two remedies. Either, Mr. MacLellan be returned to membership in the Association or divested of his operational functions.

### **Respondent's Position:**

Mr. Inwood, on behalf of the Board, characterized this case as being one of "necessity".

He argued that the evidence before us disclosed an obvious, inherent and real conflict of interest between Mr. MacLellan's former roles as Manager and Director of Human Resources and his status as Association member. He asserted that the Service's historical methods of managing such conflict had not proved sufficient.

Mr. Inwood argued that the Board's removal of Mr. MacLellan from the Association was necessary to "insulate" him from this inherent conflict and to

permit him to perform his duties both objectively and without undue influence. Further, Mr. MacLellan's elevation to the equivalent rank of Deputy Chief was to permit him to assume a more prominent role on the executive team of the Service and to integrate the human resources functions. This was consistent with prior consultant recommendations.

Mr. Inwood asserted that this arrangement was also driven by the departure of both the Board's Executive Director and the former Chief and the pending round of collective bargaining. That bargaining raised matters on which both the Chief and Board had differences. Further, it focused on matters that were squarely within Mr. MacLellan's unique expertise.

Mr. Inwood argued that Mr. MacLellan remains a member of the Service. He is appointed under section 31(1)(a) of the Act. He reports to the Chief of Police. This is reflected on the Service's organizational chart. His office was not located with the Board. He maintains separate files. The Board does not direct him with respect to operational matters.

Mr. MacLellan serves under a fixed term contract. However, Mr. Inwood argued that this is permitted under both the Act and acknowledged in recent Commission decisions. Chambers and Chatham-Kent Police Services Board (26 February, 2008, O.C.C.P.S.)

He noted that the Commission has yet to conclusively decide whether or not the Act requires the inclusion of all members of a police force below the rank of chief and deputy chief in a bargaining unit. Peel Regional Police Association and Peel Regional Police Services Board (28 January, 2000, O.C.C.P.S.), Regional Municipality of Niagara Police Services Board and Niagara Police Senior Officers' Association supra, Orillia Police Services Board and Orillia Senior Officers' Association supra, and Niagara Regional Police Association and Niagara Regional Police Services Board (21 March, 1997)

However, Mr. Inwood asserted that when section 49(1), 119(3) and 126 are read together in a broad and purposeful manner it is clear that the Act allows for the exclusion of members with potential conflicts of interest from membership in a bargaining unit. Rizzo & Rizzo Shoes Ltd. [1978] 1 S.C.R. 27 (S.C.C.)

He noted that a number of other services have excluded positions and are not in compliance with the Act. He pointed to police services in Ottawa, Niagara, Hamilton, Waterloo, Peel and Toronto.

Mr. Inwood argued that a number of the cases cited by the Applicant were either dated, redundant, fact specific or did not apply to individuals occupying purely civilian positions.

Mr. Inwood also drew our attention to a number of cases from the broader labour relations context to make the point that it is well established that positions with an inherent conflict of interest should be excluded. Bank of Nova Scotia 77 C.L.L.C. 16090 (C.L.R.B.), Bank of Nova Scotia [1978] F.C. 807 (Fed. C.A.) and Corporation of the District of Burnaby [1974] 1 Can. L.R.B.R 1 (B.C.)

Mr. Inwood argued that the Board's special needs for labour relations advice is best served by the type of arrangement in place with Mr. MacLellan. He asserted that as a practical matter contractors or independent consultants do not have the necessary history, knowledge or presence to perform this role effectively.

For the above noted reasons, Mr. Inwood requested that we deny this Application.

**Decision:**

This is an application pursuant to section 116 of the Act. It states:

- 116 (1) If there is a dispute as to whether a person is a member of a police force or a senior officer, any affected party may apply to the Commission to hold a hearing and decide the matter.
- (2) The Commission's decision is final.

This section must be read with the assistance of two definitions.

Section 2 of the Act states that a "member of a police force" means a police officer, and in the case of a municipal police force includes an employee who is not a police officer". Section 114 states that "'senior officer" means a member of a police force who has the rank of inspector or higher or is employed in a supervisory or confidential capacity".

Mr. MacLellan is the Strategic Human Resources Officer of the Durham Regional Police Service. He is not a police officer. Rather, he is a civilian employee of that municipal police service and thus a "member" of it.

The question for us is whether "member" Stan MacLellan is employed in a "supervisory or confidential capacity" and thus has the status of "senior officer" so as to require his assignment to the Durham Regional Police Senior Officers' Association for collective bargaining purposes.

This question, however, must be asked in light of the unique facts of this case. They raise two key points of contention.

Mr. MacLellan was first hired by the Board in 2003 as Manager of Human Resources. In the Fall of 2006 his title was changed to Director of Human Resources. His duties remained essentially the same. For four years, he had the

status of “senior officer” and was part of the Association’s bargaining unit. That changed in May of 2007.

At that time he was given the title of SHRO. He was placed on a five year personal services contract. He retained most of his previous human resources responsibilities, but by way of job descriptions was assigned additional duties specifically directed at supporting the Board. He was removed from the Association bargaining unit.

The Association took issue with two aspects of this change. First, they were of the view that it was not proper for Mr. MacLellan to have been assigned additional duties relating to the Board. They took the position that Mr. MacLellan could either be in charge of the Service’s human resources function, or retained directly to support the Board – but not both. Second, they were of the view that Mr. MacLellan should not have been unilaterally removed from their bargaining unit.

The Board did not agree. They were of the view that there was nothing improper with Mr. MacLellan performing both functions. Rather, operational efficiencies and necessity mandated the combining of these roles. Further, given the nature of Mr. MacLellan’s responsibilities, the Board was of the view that it would be a “conflict of interest” for him to remain a member of the Association. The Board took the position that recent changes to the Act allowed “conflict of interest” exclusions for individuals employed in sensitive roles such as Mr. MacLellan.

We will deal with both of these issues in turn.

The Act assigns distinct roles to both boards and chiefs. A board’s main responsibilities are set out in section 31 of the Act. They include:

- Appointing members of the service;
- Determining policing priorities;
- Establishing policies for the effective management of the service;
- Recruiting and appointing chiefs and deputy chiefs;
- Directing the chief of police and monitoring his or her performance;
- Establishing policies for the disclosure of personal information;
- Establishing policies for the indemnification of member’s legal costs; and
- Establishing guidelines for dealing with public complaints.

In addition to the above, boards have unique responsibilities under Part VIII of the Act for collective bargaining. This includes negotiating collective agreements and ensuring their implementation and enforcement. At the most basic level boards establish broad policy direction and serve as employer of record.

Chiefs of police are responsible for the day to day operation of police services. A chief of police's main responsibilities are found at section 41 of the Act. They include:

- Administering the service and overseeing its operations in accordance with the objectives and priorities set by the board;
- Ensuring that the members of the service carry out their duties in accordance with the act;
- Maintaining discipline;
- Administering the public complaints system;
- Ensuring the proper disclosure of personal information; and
- Reporting to and obeying the lawful directions of the Board.

Essentially, chiefs of police are responsible for the day-to-day management of the service and its employees.

The Act establishes limitations on a board's capacity to intrude on the functions of a chief. For example, section 31(3) and (4) states:

31(3) The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.

(4) The board shall not direct the chief of police with respect to the day-to-day operations of a police force.

The Act also imposes limitations on a chief's capacity to intrude on the functions of a board. One key example is collective bargaining. This is an exclusive board role. A chief's involvement in such matters is narrowly prescribed. Section 120(4) of the Act states:

120(4) The chief of police or, if the parties consent, another person designated by the chief of police may also attend the parties' bargaining sessions in an advisory capacity.

Thus, a board has the authority to order a chief to provide it with information to aid in its bargaining role. As well, a board could order a chief of police to provide advice and attend at bargaining sessions as an advisor. However, a board cannot order any other member of a service to perform these functions.

How a chief complies with board directions is clearly a matter for his or her judgement. A board has no authority to direct the chief as to which member of the service under his or her command must perform the different aspects of the tasks assigned.

It is also self evident that a board may not do indirectly what it cannot do directly. In other words, a board cannot by job description create a position assigning to a

specific “member of the service” the responsibility of supporting exclusive board functions.

On this point we note that some of the duties assigned to Mr. MacLellan by SHRO job description include:

- Supporting Board human resources needs including, contracts and performance management tools for Board staff;
- Assisting the Board in the search for Police executives, including the chief and deputy chiefs of police;
- Preparing Board responses to grievances filed under collective agreements; and
- Participating in the development of Board collective bargaining strategy and serving as a member of the Board’s negotiating team for discussions with all three bargaining units.

To our mind, the first two of the above are exclusively Board functions. The latter two are also Board responsibilities where the Board may call upon the chief for information or advice. Again, how that is to be done is a matter for the chief to determine and not to be prescribed by Board job description.

Leaving this aside, we also share the reservations expressed by Chief White about the advisability of blurring Service operational and Board governance roles. This includes having the SHRO sit as a member of the Board bargaining team while at the same time functioning as an approachable point of contact for the day to day issues of the members of the force.

As well, it does not seem appropriate for the SHRO to have any role in the Board hiring of a new Chief or potentially assisting the Board in developing performance measures for such a position. This is particularly the case, given the fact that on the organization chart the SHRO reports directly to that individual.

To our mind, the mixing and blurring of functions, as in the case of the SHRO’s job description, offend both the spirit and scheme of the Act.

None of this is to suggest that the Board cannot or should not have expert advice or support to practically assist it in the performance of its essential responsibilities. Under section 30(1) of the Act a board may contract. As such, it can retain specialists under a fee for service arrangement.

As well, a board may enter into contracts to hire staff dedicated to performing board functions. As the Commission has stated in Niagara Regional Police Association and Niagara Regional Police Services Board (21 March, 1997, O.C.C.P.S.) at page15:

... a plain and natural reading of section 30, in the context of the general scheme of the Act, permits a board to directly employ individuals to exclusively perform clerical, secretarial and administrative functions relating to the specific duties assigned to it by section 31.

Such staff would not be “members of a police force” and captured by Part VIII of the Act. In other words, they are not required to be assigned to a police service bargaining unit.

This brings us to the second aspect of this application.

Leaving aside the aspects of Mr. MacLellan’s job description relating to board duties, it is argued that recent amendments to section 49 of the Act, read in conjunction with sections 119(3) and 126 permit the exclusion of positions such as the SHRO from assignment to any bargaining unit.

Section 49 of the Act reads:

49(1) A member of a police force shall not engage in 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 in a position of conflict of interest, or is likely to do so;
- (c) that would otherwise constitute full-time employment for another purpose; or
- (d) in which he or she has an advantage derived from employment as a member of a police force.

(2) Clause (1)(d) does not prohibit a member of a police force from performing, in a private capacity, services that have been arranged through the police force.

(3) A member of a police force who proposes to undertake an activity that may contravene subsection (1) or who becomes aware that an activity that he or she has already undertaken may do so shall disclose full particulars of this situation to the chief of police or, in the case of the chief of police, to the board.

(4) The chief of police or the board, as the case may be shall decide whether the member is permitted to engage in the activity and the member shall comply with that direction.

Section 126 is found at Part VIII (Labour Relations) of the Act. It states: "Agreements and awards made under this Part do not affect the working conditions of members of the police force in so far as those working conditions are determined by section 42 to 49 ... of this Act and by the regulations."

Section 119(3) states: "The parties shall bargain in good faith and make every reasonable effort to come to an agreement dealing with remuneration, pensions, sick leave credit gratuities and grievance procedures of members of the police force and, subject to section 126, their working conditions."

It was suggested to us that section 49 imposes upon members a general prohibition against engaging in any activity that might give rise to a conflict of interest and that this is extended by section 119(3) and 126 to the collective bargaining provisions of the Act. This extension by implication prevents membership in a bargaining unit where to do so would give rise to a conflict in the performance an individual's normal duties.

We do not agree.

To our mind section 49 is focused on activities outside of normal police employment, and their potential impact on such employment. We say that for a number of reasons.

First, the head note for section 49 or employment reads "Restrictions on secondary activities". Section 31(7) of the Act states that: "A board may establish guidelines consistent with section 49 for disclosing secondary activities and for deciding whether to permit such activities." To this end section 31(1)(g) requires that a board "receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities)".

Further, section 74(1)(c) of the Act deems it to be a disciplinary offence when an officer "engages in an activity that contravenes subsection 49(1) (secondary activities) without the permission of his or her chief of police or, in the case of a chief of police, without the permission of the board, being aware that the activity may contravene that subsection".

To assist members, the Service has a Directive for secondary activities (HR-02-001). It makes specific reference to sections 31(1)(g) and 31(7). The first section of the Directive is headed "Purpose". It reads:

The credibility and integrity of the Durham Regional Police Service (DRPS) and each member is vitally important to their reputation in the community. Members must ensure that activities conducted outside of regular duty time do not negatively interfere or influence on-duty performance, or place them in a conflict of interest. A sworn police officer is not merely an employee, but is the holder of an office

and must be able to discharge their police duties without bias, influence or interference. The Police Services Act does not prohibit secondary activities, however it places some reasonable restrictions on police service members, and in certain circumstances, requires them to disclose their activities to their chief. While all members are subject to the provisions of the Police Services Act, the purpose of this directive is to provide additional guidance to ensure members remain free of potential bias, civil or criminal liability, influence and interference as they undertake their primary duties of preserving the peace, preventing crimes and other offence, assisting victims, apprehending criminals and protecting life and property.

All of the above strongly suggest that the conflict of interest concerns that are at the heart of section 49 relate to activities conducted outside of normal police work and are not intended to limit access to collective bargaining or participation in a police association.

We are reinforced in this conclusion by the wording of section 117. It is contained in the Labour Relations part of the Act. It states:

117 A member of a police force shall not become or remain a member of a trade union or of an organization that is affiliated directly or indirectly with a trade union, unless membership is required for secondary activities that do not contravene section 49 and the chief of police consents.

Read in conjunction with section 118, this means:

- a member of a police service may not join a trade union;
- members of a police service are entitled to bargain collectively and belong to a police association; and
- an employee of a police service who has received consent to undertake secondary employment under section 49 may become a member of a trade union (if such membership is required for that secondary employment).

Clearly, this is not designed to exclude individuals from membership in the association as part of their primary employment.

Even if this were not the case, we feel that if the Legislature had intended to remove a category or class of individuals from participation in collective bargaining, and thus change fifty years of past practice, it would have done so clearly – and not by implication.

Recent decisions of the Supreme Court of Canada have made it clear that the right to bargain collectively enjoys certain constitutional protection. The extent of

this protection is evolving. Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia (2007) S.C.C. 27 (S.C.C.) and Durham Regional Police Association and the Regional Municipality of Durham Police Services Board supra.

It is not necessary for us to explore the scope of this protection here. Our point being, that if a constitutionally protected right is to be limited or removed then it must be done so explicitly and prescribed by law.

A recent example of this can be found at section 2(2)(vi) of the Ontario Provincial Police Collective Bargaining Act S.O. 2006, c. 35, Sch. B. This provision concerns civilian employees of the Ontario Provincial Police. It reads:

2. The civilian employees' bargaining unit that shall be established if the Association is certified ... as the exclusive bargaining agent for any of the three groups of public servants described in subsection 13(1) and that shall consist of persons who either are instructors at the Ontario Police College or who are under the supervision of the Commissioner of the Ontario Provincial Police or the Chief Firearms Officer for Ontario and who ...

vi. do not have duties or responsibilities that, in the opinion of the Ontario Labour Relations Board, constitute a conflict of interest with their being members of this bargaining unit.

Such a provision does not apply to Mr. MacLellan.

For the above noted reasons, we feel that Mr. MacLellan should remain a senior officer and should be returned to membership in the Association. He had such membership for four years. The core elements of his duties have not changed. He remains a civilian member of the service employed in a supervisory or confidential capacity within the meaning of section 114.

We would also strongly advise that Mr. MacLellan's job description be modified so as to remove any specific responsibilities relating to exclusive Board functions. As noted earlier we are of the view that such duties offend both the intent and spirit of the division of authority contained in the Act.

DATED AT TORONTO THIS 2nd DAY OF JULY, 2009.

Murray Chitra  
Chair, OCCPS