In the Matter of an Arbitration
Pursuant to the *Police Services Act,* R.S.O. 1990

Between:

**TORONTO POLICE SERVICES BOARD**
(the Police Services Board)

- and -

**TORONTO POLICE ASSOCIATION**
(the Association)

**Re: Procedure 15-10 - Use of Force and Equipment**

**AWARD**

Paula Knopf - Arbitrator

**Appearances:**

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| **For the Police Services Board:** | Michael Hines, Counsel<br>Staff Sargeant Joseph Zubek<br>Inspector Gord Jones<br>Michael Hamilton, Student-at-Law |
| **For the Association:** | Roger Aveling, Counsel<br>Joanne Mulcahy, Counsel<br>Mike Abbot, TPA Director |

The hearing of this matter was held in Toronto on February 19, and November 25 and 26, 2010.

The Chief of Police of the City of Toronto issued a 'Procedure' that directs police officers about the discharge of firearms towards the driver of a motor vehicle. One aspect of that Procedure is of great concern to the Association. Therefore, it has launched a grievance alleging that one component of the Procedure is not consistent with their Collective Agreement and/or the law. The Association is seeking a declaration to that effect. Both parties say that the issues arising out of this case could have ramifications upon the safety of police officers, the safety of public and the governance of policing in this province. Therefore, the Police Services Board and the Association both agree that the propriety or legality of this Procedure may have to be determined by way of adjudication. However, while the Association asserts that the dispute can and must be resolved by way of arbitration, the Police Services Board asserts that only a court or the Ontario Civilian Commission on Police Services have jurisdiction to deal with this case. The parties have sought a ruling on the jurisdictional issue. Therefore, this Award deals only with that aspect of this case.

There is no dispute about the basic factual background and context that gives rise to this matter.

The Toronto Police Services Board (or the 'Board') manages Canada's largest municipal police service and has a large number of policies that deal with policing matters. There are also a number of "Routine Orders" that are issued by the Chief of Police (or the 'Chief') and referred to as "Procedures." They include directives about how to operationalize the Board's Policies and the Regulations and they also deal with day to day issues that affect police officers and their responsibilities. The Procedure under scrutiny in this case deals with a police officer's use of a firearm towards the driver or occupant(s) of a motor vehicle. Procedure 15-10 is entitled "Suspect Apprehension Pursuit" (hereinafter referred to as Procedure 15-10). Its terms have evolved and been amended over the years, but the current formulation is set out below with the phrase that the Association is challenging indicated in bold:

Firearms Discharge

The discharging of a firearm at a motor vehicle is an ineffective method of disabling the motor vehicle. Discharging a firearm at a motor vehicle presents a hazard to both the officer and the public. Members are prohibited from discharging a firearm at a motor vehicle for the sole purpose of disabling a vehicle.

Members are prohibited from discharging a firearm at the operator or occupant(s) of a motor vehicle unless there exists an immediate threat of death or grievous bodily harm to the officer(s) and/or members of the public **by means other than the vehicle.**

Members shall be cognizant that disabling the operator of a motor vehicle, thereby disabling the control over that motor vehicle, may also present a hazard to both the officer and the public.

Except while in a motor vehicle, members shall not place themselves in the path of an occupied vehicle with the intention of preventing its escape. Additionally, members should not attempt to disable an occupied vehicle by reaching into it.

The Association strenuously objects to the words that have been emphasized above.

The passion of its opposition is apparent in a notice it issued September 16, 2008:

> Not only does this . . . Procedure 15-10 endanger the lives and safety of police officers in Toronto, it also flies in the face of various provisions of the *Criminal Code* dealing with the use of force.
> Furthermore, it conflicts with the regulations under the *Police Services Act.*

The Association asserts that those words are "inconsistent" with the following statutory and regulatory provisions:

***The Police Services Act, s. 42***

Duties of police officer
42. (1) The duties of a police officer include,
(a) preserving the peace;
(b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
(c) assisting victims of crime;
(d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
(e) laying charges and participating in prosecutions;
(f) executing warrants that are to be executed by police officers and performing related duties;
(g) performing the lawful duties that the chief of police assigns;
(h) in the case of a municipal police force and in the case of an agreement

under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;

(i) completing the prescribed training.

Power to act throughout Ontario

(2) A police officer has authority to act as such throughout Ontario.

Powers and duties of common law constable

(3) A police officer has the powers and duties ascribed to a constable at common law.

***Police Services Act,* R.R.O. 1990, Reg. 926**
***Equipment and Use of Force***

9. A member of a police force shall not draw a handgun, point a firearm at a person or discharge a firearm unless he or she believes, on reasonable grounds, that to do so is necessary to protect against loss of life or serious bodily harm.

***Police Services Act,* O. Reg 546/99**
***Suspect Apprehension Pursuits***

**6.** Every police services board shall establish policies that are consistent with this Regulation about suspect apprehension pursuits.

**7.** (1) Every police force shall establish written procedures that set out the tactics that may be used in its jurisdiction,

(a) as an alternative to suspect apprehension pursuit; and

(b) for following or stopping a fleeing motor vehicle.

(2) Every police force shall establish written procedures that are consistent with this Regulation about suspect apprehension pursuits in its jurisdiction.

**8.** A police officer shall not discharge his or her firearm for the sole purpose of attempting to stop a fleeing motor vehicle.

**Criminal Code of Canada, R.S. 1985, c. C-46**

5. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the

sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

27. Every one is justified in using as much force as is reasonably necessary
(a) to prevent the commission of an offence
(i) for which, if it were committed, the person who committed it might be arrested without warrant, and
(ii) that would be likely to cause immediate and serious injury to the person or property of any one; or
(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

The Association asserts that the wording of Procedure 15-10 presents a “completely unreasonable” and invalid restriction on police officers’ performance of their duties. At this point in these proceedings, where only the question of jurisdiction is being considered, the merits of the Association’s argument will not be examined.

However, the contractual provisions are also necessary to assess the jurisdictional question. The relevant provisions of the contract between the Police Services Board and the Association are:

> Article 3 - Management Rights
>
> 3.01 (a) The Association and its members recognize and acknowledge that, subject to the provisions of the *Police Services Act* and the Regulations thereto, it is the exclusive function of the Board to:
> (i) maintain order and efficiency;
> (ii) discharge, direct, classify, transfer, promote, demote or suspend, or otherwise discipline any member;
> (iii) hire.
>
> (b) If a member claims that the Board has exercised any of the functions outlined in paragraph (a) (ii) in a discriminatory manner or without reasonable cause, then such a claim may be subject of a grievance under the provisions of the grievance procedure outlined in the Collective Agreement or dealt with under the procedures within the exclusive jurisdiction of the Ontario Civilian Commission on Police Services, as prescribed by the *Police Services Act.*
>
> (c) The Board agrees that it will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of the Collective Agreement or the *Police Services Act* of Ontario and the Regulations thereto.

In recent years because of changes to the *Police Services Act*, the Board has moved away from declaring policies that purport to be binding on and require the compliance of individual officers (as it used to do). Instead, the Police Services Board now declares more abstract or general “Policies” that the Chief is expected to operationalize through “Procedures”. These Procedures are regarded as “Orders” from the Chief. This approach is intended to reflect the fact that by statute, the Police Services Board cannot direct the performance of any individual officer. It also allows the Chief alone to discipline individual officers for insubordination or other misconduct as a result of a

failure to follow one of his/her Procedures or Orders.

In 2003, the Police Services Board completed a review of the former Rules of the Toronto Police Service. The Rules had been adopted by the Board as by-laws and had been amended multiple times over the years. Many of the Rules were operational in nature, such as the ones about how to parade officers for duty and/or the colour of ink to be used in memo books. In 2003, the Police Services Board repealed the By-laws. The Chief transferred certain operational reviews into Procedures or Standards of Conduct and the Police Services Board adopted as policy those matters from the prior Rules that fell within its Section 31 responsibilities under the *Police Services Act.*

At the outset of these proceedings, there was some question about whether the Police Services Board had any involvement or responsibility for the issuance of Procedure 15-10. It appears that there is no evidence of involvement by the Police Services Board regarding the development or finalization of its terms. However, while there was some dialogue between the Association and the office of the Chief of Police that resulted in some amendments to the initial draft of the Procedure, no agreement was reached about the final language. Minutes of the Closed meeting of the Toronto Police Services Board held November 20, 2008 reveal that the Chief "advised the Board" that Procedure 15-10 became effective October 1, 2008, and that the Toronto Police Association had filed a policy grievance regarding this matter. Accordingly, since there was no evidence to the contrary, and at the request of the parties, this decision is based upon the premise that the disputed Procedure 15-10 was issued by the Chief.

*The Submissions of the Police Services Board*

The essence of the Board's jurisdictional objection is that since this case concerns the challenge of a "routine order" issued by the Chief of Police, it should not be considered as a matter that is related to or arising out of the collective agreement or as an action of the Police Services Board in its capacity as the signatory to the Collective Agreement. Therefore, it was asserted that the legality of the procedure is outside the scope of an arbitrator's authority. It was stressed that the *Police Services Act* [or the *Act], supra,*

delineates and distinguishes the different roles of a Police Services Board with a Chief of Police. In particular, it was pointed out that while a Board is mandated to "establish policies for the effective management of the police force" [s. 31(1)(c)], the Chief of Police is given the authority to operationalize those policies under s. 41(1), as well as to issue standing orders under the common law.

Counsel for the Police Services Board argued that as a creature of statute, the Board has no authority over the details or directives that are contained in Procedure 15-10 and, consequently, an arbitrator has absolutely no authority to sit in judgment over such matters. Further, it was suggested that as a matter of policy, arbitrators should not involve themselves in issues that could involve the safety of the public or police officers. It was stressed that the operational procedures that are the statutory prerogative of a Chief of Police are far removed from the authority of a labour arbitrator whose jurisdiction is limited to questions regarding whether a collective agreement has been violated.

Counsel for the Police Services Board also argued that Procedure 15-10 cannot be found to be inconsistent with the Collective Agreement because the contract governs only the Board, not the Chief. Further, it was said that the Board could not be held responsible for an operational procedure any more than it could be responsible for a Chief of Police ordering who should be partnered with whom in a patrol car.

The Police Services Board also stressed that the Association has not challenged the Chief's ability or authority to issue Procedure 15-10, nor has it attacked the majority of its terms. Instead, the Association has only taken issue with one phrase. It was said that this indicates that the Association recognizes that the Chief of Police has the authority to issue such a Procedure. Further, it was said that there is no "qualitative difference" between the terms that the Association has accepted and the phrase that it is challenging. Therefore, the Police Services Board argued that this Procedure falls within the scope of day-to-day managerial functions reserved by statute to a chief of police.

The Police Services Board also argued that there is an important distinction between 'operational' and 'policy' issues that is recognized in previous cases, especially those concerning whether an interest arbitrator has the jurisdiction to deal with working conditions. The prime example of such jurisprudence were said to be found in the cases dealing with the number of officers in a patrol car: *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association,* [1974] 5 O.R. (2d) 285 (Div. Ct.); *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association,* (1975) 8 O.R. (2d) 65 (C.A.); and *Durham Regional Police Association and Regional Municipality of Durham Police Association,* unreported decision of P. Knopf, dated July 13, 2007. These cases were cited to support the proposition that a collective agreement and an arbitrator have no authority to limit the statutory authority or responsibilities of a chief of police or police officers, particularly with regard to day-to-day operations. Similarly, it was stressed that while a chief of police possesses both common law and statutory powers, a police services board only has the authority granted to it by statute, as held in *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police,* [1978] 88 D.L.R. (3d) 671 (S.C.C.); and *Pembroke (City) Police Services Board and Kidder,* [1995] 22 O.R. (3d) 662 (O.S.C.).

The principles from these cases were said to dictate that Article 3 of the Collective Agreement must be read as being subject to the *Police Services Act,* and particularly sections 31, 41, Part V and s. 120. Further, it was stressed that the statutory scheme makes it clear that a Police Services Board can only establish "policies" for "effective management", but cannot direct a Chief with respect to "operational decisions", as recognized in *Heritage Custom Jewelers v. Metropolitan Toronto (Municipality) Police Services Board, 2000-01-17 (Ontario Superior Count)* and *Odhavji Estate v. Woodhouse et al. and Metropolitan Toronto Chief of Police,* [2003] 3 S.C.R. 263. Further, it was pointed out that under the statute, a Chief's powers "include" the duty to ensure that members of the police force conduct themselves "in a manner that reflects the needs of the community". It was argued that this means that a Chief of Police is not

confined to the policies that may have been issued by a Board. Therefore, it was said that Procedure 15-10 should be considered as something outside the scope of Board policy and/or arbitral review because it is a routine standing order issued by the Chief who is skilled in safe policing matters.

Anticipating the Association's argument that an arbitrator can and should determine the reasonableness of Procedure 15-10 because a police officer could be disciplined if it is not followed, the Police Services Board stresses that only a chief and provisions of Part V of the *Police Services Act* have any authority over disciplinary matters. While it was acknowledged that a Police Services Board may have had some role in discipline under past versions of policing statutes, it was stressed that the current formulation of the Act [s. 67 and 87] extinguished any role that a Police Services Board could have with regard to the imposition of discipline and/or any appeals. Support for this was said to be found in *Board of Commissioners of the City of Regina v. Regina Police Association Inc. and Greg Shotten,* [2000] I S.C.R. 360; *Praskey v. Metropolitan Toronto Police Services Board,* (1997) 143 D.L.R. (3d) 298 (C.A.); and *Heasman and Whitway v. Durham Regional Police Services Board et al.,* Ontario Court of Appeal C41825, November 29, 2005. The Board traced the history of the language in Article 3, beginning from its insertion by an interest arbitrator decades ago, together with the changing statutory framework in which it has operated. The point was to show that a Police Services Board's authority over operational and discipline related matters has been effectively transferred out of its responsibility and control, despite the continuance of the same language; *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association,* [1979] 23 L.A.C. (2d) 409 (Swan); and *Toronto Police Association v. Toronto Police Commissioners Board,* Ontario Court of Appeal, 26th February, 1981 and [1982] 1 S.C.R. 451; *Constitutional Reference,* [1957] O.R. 28 (C.A.). The Board argued that Part V of the *Police Services Act* now constitutes a complete code and procedure that precludes any authority of a Police Services Board or an arbitrator over matters concerning police discipline. It was said that this means that a chief of police is "exclusively responsible" for a police officer's discipline and/or failure to follow any procedures. Therefore, it was argued that Article 3.01 must be read in

light of this and with an understanding that a police service board no longer has any authority to issue discipline or determine its reasonability or lack thereof. Further, it was said that a Chief now has “original” and exclusive authority to issue procedures that are not, and cannot be, restricted by the terms of a collective agreement. Therefore, it was argued that any appeal or review of disciplinary matters is exclusively vested in the Ontario Civilian Commission on Police Services. Accordingly, it was argued that this arbitrator must decline jurisdiction over this dispute because the Association is asking for the pre-determination of the validity of a procedure so that its members will not face discipline for refusal to comply. It was suggested that the propriety of the Procedure could be determined by the Ontario Civilian Commission on Police Services if and when the need arises in a disciplinary context. It was said that if a police officer was facing discipline for failure to follow the procedure, s/he could raise a defence of “lawful excuse”, asserting that the dictates of the Procedure were unreasonable, invalid or contrary to law, as the Union alleges. Further, it was suggested that the Association could seek declaratory relief and clarification of the legality through a judicial review application to the Ontario Superior Court.

It was also pointed out that the collective bargaining rights in the *Police Services Act* create an important distinction between the Police Services Board and a Chief of Police that affects the bargaining process, the resulting contract and its enforcement. It was stressed that whereas the Association and the Board participate as the “parties” to negotiations, a Chief of Police may only attend “in an advisory capacity”, s. 120 (4). Therefore, the Board argued that a chief is not a party to the contract and may not have any status at an arbitration convened to adjudicate upon its terms. This was said to reflect a Chief’s independence from a Board and his/her different legal status. Therefore, it was argued that his/her procedures are not subject to collective bargaining or arbitral review, nor would an arbitrator have any authority to make a ruling that affected his/her statutory powers.

Counsel for the Police Services Board then referred to previous cases dealing with “police governance”. He “respectfully” argued that the case at hand is distinguishable

from a decision issued by this arbitrator wherein it was found that an arbitrator could adjudicate upon the propriety of a policy that could have disciplinary consequences on police officers, see *Regional Municipality of Waterloo Police Services Board and Waterloo Regional Police Association, (*2000) 135 O.A.C. 85. In that case, the Waterloo Regional Police Services Board had passed a by-law prohibiting police officers from having beards. It tried to justify its by-law on the basis that it fell within its mandate to provide "effective management". Counsel for the Toronto Police Services Board argued that the situation in the *Waterloo Region* case is different than the one at hand because the "no beards" by-law enacted a policy that had been passed by the Police Services Board. Since Procedure 15-10 is not a Board policy and the approach taken to defend the Procedure is so different than the approach that was taken in the other cases, the result in the Waterloo situation was said to be inapplicable to the jurisdictional questions raised in this case regarding Procedure 15-10.

Similarly, it was said that another one of my previous decisions in *Regional Municipality of Durham Police Services Board and Durham Region Police Association,* July 13, 2007, 2007 CanLII 27333, is also distinguishable because it dealt with the "materially different context" of the allocation of resources, which are within the authority of a Police Services Board as opposed to the operational procedures that are controlled by a chief. On the other hand, the Toronto Police Services Board relied upon that same case where it delineates the differences between the powers of a Chief and of a Police Services Board.

The Board also relies upon the following Regulations passed pursuant to the *Police Services Act:*

- Regulation 926, s. 3(1), gives the Chief the power to authorize the carrying of a gun, whereas the Board is only given property and procedural control over the acquisition and disposal of firearms under s. 3.2(1).
- Regulation 421 prohibits a Board from interfering with "the police force's operational decisions and responsibilities or with the day-to-day operation of the police force, including the recruitment and promotion of police officers."

- Regulation 3/99, s. 3, mandates a chief of police to establish "procedures and processes on problem-oriented policing and crime prevention initiatives. . ."
  - s. 12 provides that every chief of police "shall develop and maintain procedures and processes for undertaking and managing general criminal investigations…"
  - s. 29 provides that "every board shall establish policies" with respect to specified areas

Based upon these provisions, the Police Services Board argued that since a Chief of Police has the power and the responsibility to establish procedures regarding the discharge of a firearm, the question of the legality or reasonability of the procedure is not a matter within an arbitrator's concern. While a Police Services Board may require a procedure to be established by a Chief of Police, the specifics of the resulting procedure were said to be the prerogative of that Chief. It was stressed that since a Police Services Board cannot direct the amendment or contents of that procedure or interfere with operational decisions, it cannot be held accountable at arbitration for the alleged "unreasonability" or illegality of that procedure.

It was argued that acceptance of jurisdiction in this case would put the arbitrator into a situation of micromanaging complex and important issues that could have significant impact on the health and safety of the public. However, it was submitted that the statutory and regulatory scheme preclude that result by leaving operational and day-to-day procedural matters strictly within the authority of a Chief of Police.

*The Submissions of the Police Association*

The Association argues that this arbitrator's authority to deal with the challenge to Procedure 15-10 arises under Article 3 of the Collective Agreement. It was said that since the Police Services Board has agreed that its functions under 3.01(a)(ii) shall not be exercised without reasonable cause, an arbitrator should be able to determine whether or not a Procedure 15-10 is "reasonable" before a Police Officer is put in the situation of having to choose whether to comply with it or face disciplinary sanctions.

Counsel for the Association submitted that the analysis of this case must be founded in the current statutory scheme, rather than upon previous case law. Accordingly, the *Police Services Act* and applicable Regulations that are cited above were explained in depth to show the different powers of the Board, the Chief and an arbitrator. It was stressed that under s. 128 of the *Police Services Act,* the Collective Agreement now binds the Police Services Board and the members of the police force which, by definition, includes the Chief of Police. Therefore, it was said that the Chief's powers and responsibilities under s. 41 of the *Act* must be exercised in accordance with the Collective Agreement. In this case, that was said to mean that a Board must comply with the reasonability provision in Article 3.01(b) and the requirement to comply with Ontario law as recognized in Article 3.01(c). Similarly, it was submitted that the Chief of Police's powers under the *Act* are all subject to the Collective Agreement and the Policies set in place by the Police Services Board.

It was submitted that if Procedure 15-10 is unreasonable and/or contrary to law, the Police Services Board cannot abrogate its statutory mandate by taking no responsibility for it. Instead, it was argued that the Police Services Board should be held accountable in an arbitration forum for the content of the Procedure and be told to issue a directive to the Chief to amend it if it is unreasonable or contrary to law.

For purposes of this jurisdictional challenge, the Association argued that all it has to establish is that there is a potential conflict between the Procedure and the Collective Agreement or the statutory laws. In the alternative, it was argued that if the Association can show that a police officer could be acting in accordance with all the regulations, laws and the Criminal Code and yet still be in violation of Procedure 15-10, this places him/her in an untenable position that should be resolved prior to someone having to face that dilemma. It was submitted that the Procedure should not be viewed as an "operational" matter, but instead as a policy that will affect the administration of the Collective Agreement and the police officers' work. The Association asserts that an arbitrator can and should be able to declare that a Procedure is contrary to the Regulations because a Police Services Board has the authority "to direct the chief of

police and monitor his or her performance" s. 31 (1)(e), or to invoke the disciplinary process under Part V of the *Act.*

The Association also argued that the divide between the Police Services Board and a Chief of Police is not as distinct as the Board's counsel has suggested, particularly in the area of labour relations. It was submitted that the interplay between s. 31 and s. 41 of the *Act* should lead to the conclusion that a Chief of Police can make operational procedures provided they are not inconsistent with the objectives and policies of a Police Services Board or a Collective Agreement. It was stressed that the *Act* should not be read to allow the alterations of the terms and provisions of a Collective Agreement. The Association stressed that its position is not an attempt to "micro-manage", but is instead an exercise of its mandate to seek an arbitral ruling that directs the Police Services Board and the Chief to abide by the statutes and the regulations.

The Association relied on the following case law to argue that a Police Services Board can be held responsible and liable for the acts of a Chief of Police, especially in the context of human rights and employment matters: *King v. Toronto Police Services Board* [2009] O.H.R.T.D. No 628; and *Lloyd Washington v. Ontario Human Rights Commission and Toronto Police Services Board et al.,* [2009] H.R.T.O. 217.

The Association also stressed that Regulation 546 governing Suspect Apprehensions and Pursuits requires that the Board establish Policies that are consistent with the Regulation. It was said if the Toronto Police Services Board has no such policy, then it is not in compliance with the Regulation, and if Procedure 15-10 governs the situation, it must also comply with the Regulations. However, the Association alleges that this Procedure conflicts with s. 8 where it provides, "A police officer shall not discharge his or her firearm for the sole purpose of attempting to stop a fleeing motor vehicle." Similarly, it was argued that the Procedure conflicts with the Ontario Ministry of Community Safety and Correctional Services Policies that are contained in the Policing Standards Manual with respect to "Use of Force". Further, the Association asserts that it will be able to establish that Procedure 15-10 conflicts with Regulation 926, s. 9,

where it provides: "A member of a police force shall not draw a handgun, point a firearm or discharge a firearm unless he or she believes, on reasonable grounds, that to do so is necessary to protect against loss of life or serious bodily harm." The stated purpose of this grievance is therefore to ask this arbitrator to direct the Police Services Board to ensure that Procedure 15-10 is not in conflict with the statute, the regulations and the Collective Agreement.

The Association argues that the contractual foundation for this case can be found in Article 3.01 where the Police Services Board promised to maintain order, fulfill its functions without discrimination or unreasonability and to abide by the *Police Services Act and Regulations.* It was submitted that since the Chief of Police is bound by the Collective Agreement, if s/he acts in a manner or establishes a procedure that is contrary to the provisions therein, those matters are arbitrable. Similarly, it was said that if the Chief of Police acts in a way that places the Police Services Board in conflict with the Collective Agreement, an arbitrator should order the Board to direct the Chief to rectify the situation. Further, it was stressed that the Board's response to this grievance was to assert that the Chief of Police's decision to create this Procedure was "well within his rights under Article 3 of the Collective Agreement," (Exhibit 2). This was said to be an admission that his actions are governed by the Collective Agreement.

The Association resists the suggestion that it could challenge the lawfulness or reasonability of Procedure 15-10 in a Part V procedure. It was stressed that it is unfair and improper to subject police officers to the prospect of discipline or even danger when it would be "far better" to resolve this question before they are faced with difficult and challenging situations involving the safety of themselves and the community. Further, while accepting the impact of Part V of the *Act* and its removal of Police Services Board's authority over police discipline matters, the Association argued that the effect of Article 3.01(a)(ii) is to promise that no discipline will be issued without reasonable cause. Therefore, it was said that the Collective Agreement serves as a "Board policy" that directs the Chief not to impose discipline without reasonable cause. Accordingly, it was argued that the possibility of imposing such sanctions can and should be arbitrable.

Further, it was asserted that when a Chief of Police acts contrary to the Police Services Board's promises under the Collective Agreement, those actions are subject to arbitral review: *Durham Regional Police Association and Durham Regional Police Force,* (Albertyn) at CanLII 45580; *Ontario Provincial Police Association and Queen in Right of the Province of Ontario (Ministry of Government Services), Policy Grievance,* decision of L. Trachuk, dated July 6, 2010; and *Toronto (City) Police Services Board v. Toronto Police Association,* [2004] O.J. No. 988; *Toronto Police Services Board and Toronto Police Services Association (Transfer Grievance),* decision of G. Surdykowski, dated October 24, 2010.

The Association argued that the fact that Procedure 15-10 is a Procedure issued by a Chief of Police rather than by the Police Services Board should not create a distinction that removes this case from the result in *Waterloo Regional Police, supra.* Further it was argued that the proper way of dealing with this Procedure would be for an arbitrator to determine the validity and to allow the Ontario Civilian Commission on Police Services to deal with the application of the rule under Part V of the *Act* as suggested in the *Waterloo* case, *supra.* It was asserted that these cases and public policy recognize that it is preferable to assess the validity of workplace rules before someone has to put their own life or the life of others in danger.

Further, the Association rejects the Police Services Board's suggestion that it would be appropriate to take this question to the court for determination, pointing to the situation where the Ontario Superior Court refused jurisdiction over a dispute that was essentially related to police discipline: *Toronto Police Association and Toronto Police Services Board,* [2007] O.J. No. 4156 and 287 D.L.R. (4th) 557. Therefore, the Association argues that where the essential nature of the dispute concerns the Chief's failure to comply with the Police Services Board's contractual and statutory obligations, the matter must be arbitrable.

The Association indicated that the relief it is seeking in this case is a declaration that one specific phrase in Procedure 15-10 is unreasonable, contrary to law and therefore

in violation of Article 3 of the Collective Agreement. It was stressed that it is "extremely important" for the Association to be able to mount its challenge to the Procedure before discipline is imposed and while there is such concern about its effect on safety. The Association is concerned that if jurisdiction is not accepted, its only recourse will be to challenge the Procedure's legality in response to an allegation under Part V of the *Act* or by going to the Court for a declaration. However, since the Association's concern is rooted in their members' working conditions and labour relations rights, it was said that arbitration is the proper forum for the resolution of this issue.

*The Reply Submission of the Police Services Board*

Counsel for the Police Services Board cautioned that debates about the "reasonableness" of a policing procedure are not appropriate in a "paramilitary" organization such as a police force. The arbitrator was warned that neither a Police Services Board nor an arbitrator should be tempted to "take over" the functions of a chief of police. It was said that the Police Services Act should not be read as a "labour relations statute" but, instead as a statute that deals with policing issues with "some labour relations components" that are quite different from the industrial model as was recognized in *Metropolitan Board of Commissioners of Police and Metropolitan Police Association,* decision of O. Shime, September 2, 1986. This was also said to be quite a different statutory structure than the one governing the Ontario Provincial Police, as examined in *Ontario Provincial Police Association and Queen in Right of the Province of Ontario (Ministry of Government Services), Policy Grievance, supra*. Further, it was argued that the only complaints about a Chief of Police's Procedures that would be grievable would be ones that related to a Police Services Board's bargaining powers. Counsel for the Police Services Board dismisses the Association's cases that held a board could be responsible for the actions of a Chief of Police by arguing that the jurisdictional arguments that were presented here were not raised in those situations.

Further, it was submitted that an arbitration hearing would be an inappropriate forum to determine the validity of a Procedure because it is one in which the Chief has no

standing and the Police Services Board, although a party in the hearing, has no control or responsibility over the Procedure. It was stressed that even if Procedure 15-10 is inconsistent with the Act and the Regulations, this does not mean that the Police Services Board is in violation of the Collective Agreement.

The Police Services Board argued that the essential nature of this dispute has nothing to do with any disagreement between the Board and the Association over the application or violation of the Collective Agreement. Pointing to the Association's complaints to the Police Services Board asserting that the Procedure was "unlawful" rather than being contrary to the Collective Agreement (Exhibits 5 and 6), it was argued that the "essential nature of the dispute" is actually an allegation of inconsistency between the actions of the Chief and the statutory scheme governing policing. The Police Services Board reiterated that the proper forum for the determination of statutory compliance would be in the court by way of a Judicial Review application. Reliance was placed upon *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929 and the pending application for Judicial Review filed by Warren Walters against William Blair, Chief of Police of the Toronto Police Service, Ontario Court File No. 189/09, alleging that the Chief's actions violated s. 49(1) of the *Police Services Act* (Exhibit 8).

Counsel for the Police Services Board acknowledged that Association counsel "skillfully" traced the potential areas of conflict between Procedure 15-10 and the statutory scheme, however, it was said that he failed to show any conflict between the parties to the Collective Agreement or with the contract itself.

Further, while it was warranted in Article 3.01 that the Police Services Board would not exercise its powers in a manner that was inconsistent with the Act, it was said that this should not be read as a guaranty that a Chief of Police would comply with this because his/her exercise of the specific powers are not within the control of a Board.

*Supplementary Submissions*

The parties agreed that the Board could file one written submission after the close of the hearing, with the Association having a right of reply.

Counsel for the Police Services Board's supplementary submissions dealt with the "bicameral" nature of the governance model of policing, where a Board has responsibility over policy and financial matters while a chief of police has responsibility over operational matters. This was said to be analogous to the situation in *Faculty Association of the University of British Columbia v. University of British Columbia,* 2010 BCCA 189, wherein the appellate court concluded that an Employer can act independently of a collective agreement in areas that are specifically allocated to it by statute. In response, the Association argued that this case has little or no application because it deals with a different province, legislation, work sector and collective agreement. More fundamentally, it was said that the structure under review in the University context was one of "two solitudes" of distinct governance, whereas s. 31 and 41 of the *Police Services Act* create an overlapping jurisdiction between a chief's authority and that of a police services board in Ontario.

Further, after the hearing closed, a recently issued arbitration decision came to this arbitrator's attention, so I invited counsel for both parties to make submissions regarding its relevance and application: *West Vancouver Police Board and West Vancouver Police Association,* [2010] 195 L.A.C. (4th) 196 (J. Hall). The Police Services Board argued that this case supported its position because the arbitrator declined jurisdiction over a claim for the payment of wages, holding that the "essential nature of the dispute" concerned disciplinary matters and an interpretation of the *Police Act* that did not arise out of the Collective Agreement. In response, the Association argued that the *West Vancouver Police Board* decision may have been "swayed" by the characterization of the claim as an allegation that pay had been withheld "without statutory authority". It was said that in the case at hand, statutory interpretation is only a "secondary" to the interpretation and application of this Collective Agreement.

## The Decision

The governance of police services and the questions surrounding arbitral jurisdiction over police officers are areas of great complexity and importance. The legislation has changed over the years and the jurisprudence is filled with attempts to clarify and delineate the lines of authority and/or appropriate forums for review. This Decision cannot and will not resolve all those issues. All it can do is address the specific question that is raised in this preliminary objection to jurisdiction.

We must start with the Grievance itself. The Grievance alleges that Procedure 15-10 is "inconsistent with the *Police Services Act,* with two regulations thereunder and with the *Criminal Code.* As such, it . . . . is also a violation of the Uniform Collective Agreement." The Association points to the Management Rights provisions of the Collective Agreement wherein the Police Services Board promises not to discipline without reasonable cause and not to exercise any of its functions in a manner inconsistent with the *Police Services Act* and Regulations. In a nutshell, the Association alleges that the implementation of this allegedly "unreasonable and unlawful" Procedure subjects its members to disciplinary sanctions if it is disobeyed, so its validity can and should be determined by arbitration as a matter concerning the application and administration of the parties' Management Rights provision in their Collective Agreement. The Police Services Board says that the essence of this case is a matter of interpretation of the *Criminal Code* as well as the *Police Services Act* and Regulations, not a matter of contract administration or application, nor is it about anything that falls within the authority of the Police Services Board at all.

Some assistance in the analysis can be gained by looking at how the courts and other arbitrators have approached similar problems. First, it must be recognized that an arbitrator called upon to adjudicate the contractual rights of a police services board and a police association in Ontario has to realize that there is a fundamentally different statutory scheme for policing than one encounters in other sectors. While arbitrators

deal with many situations in the public and private sectors, policing has its own set of statutes and jurisprudence. One of the fundamental differences is that the “employer” and “employees” model is not quite adequate to understand the parties respective rights and responsibilities. The Police Services Board and the members of the bargaining unit may have rights and responsibilities under the Collective Agreement, but they also owe other duties to and are answerable to the public. So the traditional master/servant or employer/employee model does not fit easily to the police model. *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association,* (1975) 8 O.R. (2d) 65 (C.A.) instructs that while there may be similarities between the industrial model of employment where there is a common law duty to “serve” an employer, the statutory structure for police officers is different because the duties of a police officer “are owed to the public rather than an employer and in view of the emergent situations which may arise in police work.” Further, there was recognition that a collective agreement could not “entrench or qualify public duties or responsibilities” in a way that would “subject the public interest and public safety, law and order to interests between employer and employee.” Therefore, police contracts must be read subject to the specific duties and responsibilities assigned by the Legislature to a Police Services Board, a chief of police and to police officers.

Further, the Collective Agreement and the parties’ responsibilities must be read in light of the statutory scheme that grants and/or limits their powers. The *Police Services Act* governs the powers of the Police Services Board, the Chief and the police officers, and then forms the context in which their contract must be read.

Section 31 defines the Board’s responsibilities:

> A board is responsible for the provision of adequate and effective police services in the municipality and shall,
>
> (a) appoint the members of the municipal police force;
>
> (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
>
> (c) establish policies for the effective management of the police force;
>
> (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their

submissions into account;

(e) direct the chief of police and monitor his or her performance;

(f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;

(g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);

(h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;

(i) establish guidelines for dealing with complaints under Part V, subject to subsection (1.1);

(j) review the chief of police's administration of the complaints system under Part V and receive regular reports from the chief of police on his or her administration of the complaints system.

. . . . . .

Restriction

(1.1)

(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 specific operational decisions or with respect to the day-to-day operation of the police force.

(6) The board may, by by-law, make rules for the effective management of the police force.

Section 41 provides the duties of a chief of police:

41 (1) The duties of a chief of police include,

(a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);

(b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;

(c) ensuring that the police force provides community-oriented police services;

(d) administering the complaints system in accordance with Part V.

> 41(2) The chief of police reports to the board and shall obey its lawful orders and directions.

Section 41 provides the duties of a police officer, that include:

> (a) preserving the peace;
>
> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention; . . . .
>
> (g) performing the lawful duties that the chief of police assigns

The definition, blending and balancing of the various duties and responsibilities was set out in *Pembroke (City) Police Services Board and Kidder, supra:*

> . . . the office of chief of police and all the duties thereof remain of a very public nature and the manner in which the duties are performed remains a matter of public concern. The rights and obligations of a chief of police to exercise authority according to his or her discretion and judgment are original and derived from statute. They are not delegated in any way by the local police services board or municipal government. They arise and exist independent of any contract.
>
> While a municipal police services board plays a role on behalf of the community it serves, in the setting of objectives and priorities, establishing policies, recruiting, directing and monitoring the performance of the chief of police, and so on as set out in the Act, the board is not the master of the chief of police nor is the chief its servant. The *Police Services Act* has provided specific remedies to address circumstances when a chief of police is either unwilling to take proper direction from a police services board or otherwise incapable of satisfactorily performing the duties of that office. These remedies lie in the disciplinary regime in Part V of the Act, which includes provision for offences described in a code of conduct. This code of conduct, applicable to chiefs of police and other officers, includes such offences as disobeying or failing to carry out lawful orders or duties. This regime of discipline involves the right to a hearing and due process, in the case of a chief of police, before the municipal police services board (see Part V, *Police Services Act* and Reg. 927, R.R.O. 1990).

The different roles have also been addressed by the Court in *Heritage Custom Jewellers v. Metropolitan Toronto (Municipality) Police Services Board, supra,* where it was said:

> 13. The strict statutory division between oversight by the Board on general policy

matters, on the one hand, and the responsibility of the Chief of Police for police procedures and day to day policing operations, on the other, is further reinforced by the following provisions contained in regulations enacted under the *Police Services Act:*

a. O. Reg. 421/97—Section 2 states that Board members "shall not interfere with the police force's operational decisions and responsibilities or with the day-to-day operation of the police force, including the recruitment and promotion of police officers";

b. O. Reg. 123/98, as amended—Section 13(1) states that every chief of police "shall establish policies for the assessment of police officers' work performance";

c. O. Reg. 3/99—Section 12(1) states that every chief of police "shall develop and maintain procedures on and processes for undertaking and managing general criminal investigations and investigations into", inter alia, (o) "proceeds of crime." Section 13(1) states that every chief of police "shall establish procedures and processes in respect of, inter alia, (n) property and evidence control." Section 14(1) states that every chief of police "shall establish procedures and processes in respect of, inter alia, (b) the collection, handling, preservation, documentation and analysis of physical evidence."

14. As the foregoing statutory and regulatory provisions make clear, the Act incorporates a clear legislative intent that insofar as policing policies and procedures are concerned, the powers of the Board are limited to the *setting* of general policies: the Act prescribes a strict division of powers whereby it is the Chief of Police who bears responsibility for implementation and enforcement through specific procedures and day-to-day operations. Moreover, insofar as the setting of general policy is concerned, at present the Act does not require the Board to promulgate policies and procedures on any particular matter, such as the seizure and preservation of property. Rather, the responsibility is expressed in broad general terms, namely, the Board *"may, by by-law, make rules for the effective management of the police force."*

Further, in *Odhavji Estate v. Woodhouse et al. and Metropolitan Toronto Chief of Police, supra,* the Supreme Court of Canada outlined the strong distinction between the roles of a Chief of Police and a Board in the context of deciding liability for alleged police misconduct. The Court concluded:

64 The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm. As discussed earlier, the fact that a chief of police is in a direct supervisory relationship with members of the force gives rise to a certain propinquity between the Chief and the Odhavjis; the close connection between the Chief's inadequate supervision

> and the officers' subsequent failure to cooperate with the SIU establishes a nexus between the Chief and the individuals who are injured as a consequence of the officers' misconduct. The Board, however, is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.
>
> 65 A second factor that distinguishes the Board from the Chief is the absence of a statutory obligation to ensure that members of the police force cooperate with the SIU. As discussed earlier, the express duties of the Chief include ensuring that members of the force comply with s. 113(9) of the *Police Services Act*. Under s. 31(1), the Board is responsible for the provision of adequate and effective police services, but is not under an express obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.

However, it must also be noted that the jurisprudence accepts that a Police Services Board can and should be held responsible and liable for the acts of a chief of police, especially in the context of human rights and employment matters: *King v. Toronto Police Services Board* and *Lloyd Washington v. Ontario Human Rights Commission and Toronto Police Services Board et al, supra.* Further, actions of a chief have been subjected to arbitral review; *Durham Regional Police Association and Durham Regional Police Force,* (Albertyn); *Ontario Provincial Police Association and Queen in Right of the Province of Ontario (Ministry of Government Services), Policy Grievance*; *Toronto (City) Police Services Board v. Toronto Police Association,* [2004] O.J. No. 988; *Toronto Police Services Board and Toronto Police Services Association (Transfer Grievance), supra*.

These cases reveal several important points. First, one cannot equate a Chief of Police with a Police Services Board. Second, their different statutory mandates are critical to the understanding of their powers, their responsibilities and who might have oversight over them and in what forum. In *Regional Municipality of Waterloo Police Services Board and Waterloo Regional Police Association, supra,* the Ontario Divisional Court (as it was then called) grappled with the division of authority on issues relating to employment and governance between a Police Services Board and the disciplinary scheme in the *Police Services Act.* The issue arose in the context of a policy grievance where the arbitrator was asked to declare that a by-law that prohibited officers from having beards was "unreasonable". The Police Services Board objected to the arbitrator's jurisdiction, but this was not accepted by the arbitrator or the Divisional Court. The Court explained:

> [12] Authority over employment issues involving police officers is bifurcated by statute. As noted in *Regina Police Association Inc. and Shotton v. Board of Commissioners of Regina, [supra]*, if the "essential character" of the dispute was disciplinary, the arbitrator had no jurisdiction. If the dispute arose from the interpretation, application or violation of the collective agreement, and the essential character of the dispute was not disciplinary, the arbitrator had jurisdiction.
>
> [13] In our view, the essential character of this dispute was not disciplinary. No individual officer was a party to the grievance. The resolution of the grievance has no disciplinary consequences for any particular officer. Although a police officer may be found guilty of having disobeyed an order to remove a beard, an arbitrator may determine that the policy underlying the order violates the collective agreement. These conclusions do not conflict with each other. The grievance was advanced independently of disciplinary proceedings, and could have been advanced before or after the disciplinary proceedings arising out of a refusal to comply with an order.

The tension or the balance between the roles of a Police Services Board and a Chief and arbitral jurisdiction was also addressed in the *Durham Regional Police Services Board and the Durham Regional Police Association, supra,* in the context of an interest arbitration where there was an objection to the negotiability of a staffing clause that required two police officers in a vehicle during certain shifts:

> [72] The Courts have recognized that there is a limit to the scope of authority of a Police Service Board. In the context of a tort claim against a Board, the court has specified that a Board's responsibility and liability is strictly confined to

> those duties set out in the regulations. Since a Board has no authority over Police procedures and day-to-day operations, a Board cannot be held vicariously liable for the specific actions of its officers. This conclusion was based on what the Court accepted as the "strict statutory division between oversight by a Board on general policy matters . . . . and the responsibility of a Chief of Police for Police procedures and day-to-day policing operations." See *Heritage Custom Jewellers v. Toronto Police Services Board, supra,* at p. 597. This conclusion was confirmed by the Ontario Court of Appeal and the Supreme Court of Canada in *Odhavji Estate v. Woodhouse, supra,* where it was specified that the *PSA* limits a Board to policy decisions and precludes it from making operational decisions. Therefore, it is clear that a Police Service Board cannot interfere with the day-to-day operations or with the authority of a Chief. . . . . .
>
> [79] Similarly, while a Board cannot direct the day-to-day operations or take away a Chief's ability to direct operations, a Board still has the power "to establish the policies and procedures that are necessary to provide adequate and effective Police services." See *Odhavji Estate v. Woodhouse, supra.* The legislation must be taken to have created a harmony between a Board's and the Chief's respective responsibilities. Otherwise, a Board's policies could have no impact on a Police service. The harmony exists because there is an inevitable interface between Board policies and operational decisions. One sees this with the granting of the Board the power to determine objectives and priorities in consultation with the Chief, and yet leaving the Board with the sole power to establish policies for the effective management of the force. The Chief is then charged with the responsibility of administration and oversight "in accordance with the objectives, priorities and policies established by the Board," ss. 31 and 41. One sees this actualized in the course of collective bargaining with items such as shift schedules, vacation provisions and leave of absence policies that are determined by a Board, in consultation with its Chief, and then implemented into collective agreements. A Chief then has to determine day-to-day operations in accordance with these policies and the Board has to budget accordingly. Therefore, the mere fact that a Board's policy may affect operations does not make that policy outside the scope of the Board's authority. Police Service Board policies can and must, by definition, pertain to the effective management of the police force. Therefore, they can affect, without interfering with day-to-day operations. Viewed in this way, there is no conflict between the Board's policy making powers over working conditions and the Chief's powers over operations. There is, in fact, a harmony in our scheme of governance over police services. That scheme allows for collective bargaining and yet preserves the respective authorities of the Boards and Chiefs. That harmony may be strained by budgetary stresses. But the harmony nonetheless exists.

This takes us to the critical issue in determining whether an arbitrator has jurisdiction over this grievance or not. The decision depends upon what is the essential nature of the dispute raised by the grievance. Does the dispute arise explicitly or implicitly from

the interpretation, application, administration or violation of the Collective Agreement? We know from *Weber, supra* that for an arbitrator to have jurisdiction, the essential character of the dispute must relate to a matter that is covered by or arises out of the Collective Agreement. We also know that the Courts have given recognition to a wide scope of jurisdiction for arbitrators in disputes concerning employment related matters in the context of rights governed by collective agreements and employment related statutes. However, we also know from the cases reviewed above that there are specific areas within policing employment where arbitrators do not have any authority, such as discipline, because it has been assigned exclusively to the procedures under Part V of the *Police Services Act.* Therefore, the difficult and threshold question in this case is "what is the essential nature of this dispute?"

The essential nature of a dispute is not always easy to pin down. We must look at and beyond the words of the grievance and examine the scope of the claim and its implications. Counsel for the Association made a very credible argument that the wording of Procedure 15-10 falls within the Police Services Board's Management Rights' functions because Article 3 promises that discipline will not be issued unreasonably and that the Board will not exercise its powers in a way that is inconsistent with the *Police Services Act* and Regulations. Therefore, if the essential nature of this dispute is a question of management rights and contract interpretation, it would appear to be within the scope of arbitral jurisdiction to determine whether a rule is reasonable or not, as was done in *Waterloo Regional Police Services Board, supra,* or to determine whether the Police Services Board has acted within the scope of its statutory mandate.

However, the assessment of the "essential nature of a dispute" demands a close look at the real essence of the issue and the implications of the Association's claim. The real concern of the Association and its members has been very ably articulated. A detailed and powerful explanation was presented to show how one aspect of Procedure 15-10 may contravene the *Police Services Act,* its regulations and the *Criminal Code.* Ultimately, the Association's case will rise or fall on whether those words comply with

the applicable statutes and regulations. If they do, there is no statutory contravention. If the Procedure, as currently drafted, does not comply with any of the applicable laws, there may be many consequences that might include defences available under Part V of the Act. Therefore, the crux of this dispute is whether the phrase in the procedure complies with the law or not. The statutory validity is the primary issue. Contractual compliance would only flow from that determination as a secondary matter. Therefore, it must be concluded that the essential character of the parties' dispute concerns the interpretation of the *Police Services Act* and the *Criminal Code.* The real issue does not arise out of the Collective Agreement or even the employment relationship it governs. The real dispute can only be determined by an analysis of the statutes, an examination of the specific powers of a Chief of Police and an application of the various regulatory edicts pertaining to the use of force and the use of firearms.

Further, it cannot be concluded that this dispute is "an employment matter" arising out of the Collective Agreement. The only employment matters that arise out of the parties' contract are those contained therein. Determining whether this complaint falls within the contract calls for an appreciation of what the contract can and cannot cover. Under Part VIII of the *Act,* the Collective Agreement is a contract between the Association and the Police Services Board. Therefore, while the parties to that contract determine the terms and conditions of employment that are within their respective statutory and bargaining powers to achieve, they cannot and have not determined issues outside of that scope. Further, the Management Rights clause is the provision that the Association relies on in this case. The Board's Management Rights are both prescribed by and limited by the *Act* in s. 31. The Board is a creature of statute. It can only exercise the powers conferred to it. It can "establish policies for the effective management of the police force" s. 31(1.1)(4), but it cannot "direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force." Those operational issues are exclusively mandated to the Chief of Police under s. 41 of the *Act,* and include the authority to establish procedures: see *Heritage Custom Jewelers v. Metropolitan Toronto (Municipality) Police Services Board, supra.* Therefore, the contract between the Toronto Police Services Board and the Association cannot and

does not govern matters that fall within the Chief's operational or day-to-day decision making powers. Therefore, failing some link to a collective agreement provision that the Board has the authority to adopt, there can be no scope of arbitral review over those operational decisions.

Another way to look at this case is to recognize that the essence of the Association's complaint in this case is the provenance or origin of Procedure 15-10. This is a "procedure" issued by the Chief of Police pursuant to his specific statutory powers that are exclusive to the his office. It does affect police officers and their daily working lives. But this Procedure is not a decision issued by or resulting from a policy from the Police Services Board. Nor can it be said to relate to the exercise of any of the Board's functions under the contract. The Procedure is issued as and has the effect of an 'order' from the Chief, directed at the 'on the spot' operational use of force. It is not a policy statement. It is a direct, explicit and practical instruction. It falls outside of the authority of the Police Services Board because of s. 31(1.1)(4); "The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force." Therefore, it is difficult to conclude that the Procedure can be reviewable in the context of an arbitrator's authority to interpret the Collective Agreement. If the party to the Collective Agreement, being the Police Services Board, has no statutory authority over the specific Procedure that is the subject of the grievance, and if it cannot be ordered to direct the Chief of Police with regard to the day to day operations that the Procedure purports to govern, it is impossible to see how arbitration could be an appropriate forum for the determination of the validity of the Procedure. Accepting that an arbitrator is capable of assessing the Procedure against the various statutory provisions that it is said to offend, what remedy could an arbitrator impose? Given that the arbitrator only has authority over the Police Services Board, how can an arbitrator order a Board to require the Chief of Police to amend an operational procedure if s. 31(1.1)(4) prevents that?

Some caution must be noted. These conclusions must not be read as overriding arbitral oversight of matters affecting police officers' employment rights. There are many

aspects of policing that are governed by a Police Services Board's exercise of its functions under s. 31 and that are governed by the management rights clauses of their collective agreements. These are all subject to arbitral scrutiny. Examples of this are cited above. Further, there should be no concern that this decision leaves the chiefs of police immune from review. Police Services Boards and Chiefs of Police still have statutory mandates to fulfill. If they don't, they are subject to sanction. In addition, arbitrators can and must look to the essence of a dispute and the essence of the conduct being complained about. It is possible and critical to look beyond the name of something to determine if it is a "policy", a "procedure" or an "operational" matter. The substance of the matter will inform whether it falls within the scope of arbitral review or not. This can be illustrated by looking at the way this case differs from the situation in the *Waterloo Regional Police Services Board* case, *supra.* That situation dealt with a by-law passed and adopted by the Police Services Board and issued as a policy affecting all police officers' appearance. Therefore, an arbitrator had authority over the Police Services Board, its "no beards policy" and its exercise of its contractual and statutory rights. The difference between that situation and the one at hand is not just who issued the order, policy and/or procedure, or whether it comes from the desk of the Chief or the Police Services Board. If the answer was that simple, this case would not be so complex. The important difference is that Procedure 15-10 in this case falls within the exclusive authority of a Chief of Police and is outside the mandate of a Police Services Board. Further, the essential question of its propriety is a matter of statutory interpretation, unlike in the Waterloo case where statutory compliance was not an issue at all.

There is another reason why this matter is not arbitrable. The Association is asking this arbitrator to analyze Procedure 15-10 against the applicable statutes AND against Article 3's promise that management rights be exercised "reasonably". The application of that contractual promise to this situation is very problematic. Article 3 promises that the functions under 3.01(a)(ii) are subject to the grievance procedure if there is a complaint that they have been exercised without "reasonable cause". The functions in that provision only relate to discharge, direction, classification, promotion, demotion,

suspension or discipline. None of those functions are the exercise of the Chief's power to issue a Procedure or an order. Further, the provision continues by acknowledging that complaints about the functions in Article 3.01(a)(ii) may be the subject of a grievance under the Collective Agreement or within the *exclusive* jurisdiction of the Ontario Civilian Commission on Police Services. This must be seen as a recognition that there is a divide between the oversight or reviewing jurisdictions of an arbitrator and the Commission. Some of the functions are reviewable by arbitration; the other functions fall within the exclusive jurisdiction of the Commission. Therefore, when the Article is read as a whole and read in the context of the *Police Services Act,* it cannot be concluded that its intent is to confer jurisdiction to arbitrators over issues that fall within the exclusive jurisdiction of Ontario Civilian Commission on Police Services.

This is consistent with the approach taken in *Heasman and Whitway v. Durham Regional Police Services Board et al., supra:*

> [13] The appellants are governed by Part V of the *Police Services Act*, which provides a procedure for the investigation and resolution of complaints regarding police officers and for the discipline of police officers through a hearing process. Section 74 under Part V defines when a police officer is guilty of misconduct. There is also a complaint process regarding the conduct of a chief of police. Part VIII of the *Police Services Act*, entitled "Labour Relations", applies to municipal police forces (OPP labour relations are governed by the *Public Service Act*). Section 126 under Part VIII prohibits collective agreements from affecting certain working conditions, including those governed by Part V of the *Act*, *i.e.* the part respecting the handling of complaints regarding the professional conduct of police officers.

It is true that this grievance is not asking this arbitrator to decide a disciplinary matter; quite the opposite. The Association is trying to avoid its members being subjected to discipline or, even worse, being subjected to danger, by having this Procedure adjudicated in the abstract. That is a legitimate goal, and arbitrators often determine the reasonableness or the legality of workplace rules. Therefore, I agree with the Association that the essence of this case is not a disciplinary matter. However, that does not make it necessarily arbitral. This is revealed by Arbitrator Albertyn in the *Durham Regional Police Services Board case, supra,* where he dealt with a

management rights clause and decision of the Chief of Police that is very analogous to the situation at hand. It was summarized as follows:

> 48. . . . what we have in this case is the following: the Police Chief has procedures available to him under the provisions referred to in s.126 of the Act to investigate the conduct of the Grievor. He has chosen not to utilize them. The Employer does not suggest, nor does the Association allege, that the operational review was an investigation by the Police Chief as contemplated under those provisions of the Act. Instead the Police Chief invoked his general authority as a manager under sections of the Act not referred to in s.126 and under his management rights in the collective agreement as the legal foundation for initiating the operational review and for re-assigning the Grievor. Despite this, the Employer argues that the Grievor's remedies lie under Part V of the Act, and not under the collective agreement.
>
> 49. The Association's complaint that the Police Chief has not complied with the Employer's obligations under the management rights Article of the collective agreement is a labour relations issue falling under the collective agreement. Among those obligations is the duty, in Article 5.01(c) of the collective agreement, to "not exercise any of the [managerial] functions set out in this Article in a manner inconsistent with the provisions of the Agreement or the *Police Services Act*". The Association's grievance includes the complaint that, by conducting the operational review and transferring the Grievor, the Police Chief has exercised the Employer's management rights in a manner that is not consistent with the provisions of the Act. This falls within the Employer's contractual obligations under the collective agreement. The Association is therefore entitled to argue that the Police Chief's operational review constitutes a violation of s.68(9) of the Act, and that the violation can be remedied under this grievance, pursuant to the Employer's contractual obligation under Article 5.01 of the collective agreement.
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> 50. This is not to say that any breach of a statutory duty by the Employer will confer jurisdiction on an arbitrator. The Employer's management rights in Article 5.01 are subject to the provisions of the Act. If the Police Chief had invoked the procedures available to him under Part V of the Act, as described, and he erred in some respect, that would not confer jurisdiction on an arbitrator. The procedural defects would properly lie for decision by the Commission and ultimately the Divisional Court because the process would be one that fell squarely within Part V of the Act, over which an arbitrator does not have jurisdiction.

Drawing from the distinctions made in this citation, where a Chief of Police takes an action that can be characterized as an exercise of management rights under the

contract, it may be arbitrable. Further, pursuant to s. 128, a collective agreement can bind a Chief of Police. However, if his/her action invokes a chief's exclusive powers under the statute or falls within another designated authority, it may not be arbitrable. Further, if a chief of police errs in the exercise of his/her powers under Section V of *Act,* that is also not arbitrable. Section V has its own exclusive review mechanism. Therefore, if someone is subjected to discipline as a result of failure to comply with Procedure 15-10, the validity of that Procedure can be scrutinized in the forums prescribed by Section V, but not by an arbitrator.

Nor can Procedure 15-10 be seen as an exercise of the Police Services Board's powers under Article 3.01. The management rights clause does not purport to deal with day to day operational matters. It deals with the rights that fall within s. 119(3) of the *Act;* the remuneration, pensions, sick leave credit gratuities and grievance procedures of the members of the police force and, subject to section 126, their working conditions. Therefore, it cannot be concluded that the propriety of Procedure 15-10 can or should be reviewable in the forum of arbitration because it does not involve a matter of management rights or obligations.

These conclusions are also consistent with the recent decision in *West Vancouver Police Board and West Vancouver Police Association, supra.* That case dealt with the jurisdictional authority of an arbitrator who was asked to decide whether a suspension of pay was arbitrable as a matter of collective agreement administration, or whether it was exclusively within the disciplinary process under British Columbia's equivalent to Part V of the *Police Services Act* in Ontario. Since the claim related to the payment of wages, it would initially appear to be something that arose out of the contract and be arbitrable. However, Arbitrator Hall approached the problem as follows:

> **21** There is no debate over what is being claimed by the grievance: on behalf of Cst. Gillan, the Association seeks pay and allowances "for the period from March 9, 2009 to May 1, 2009" ….. The more challenging question is whether the essential nature of the dispute arises either explicitly or implicitly from the interpretation, application, administration or violation of the Collective Agreement. In the language of *Weber*, for an arbitrator to have jurisdiction, the essential character of the dispute must concern a subject matter that is covered by the

Collective Agreement.

**22** In order to bring itself within this test, the Association advances two general propositions: first, the Collective Agreement applies to suspensions of pay; and second, the Board took itself outside of the *Police Act* by its "*ultra vires* action" of suspending Cst. Gillan's pay. The Association says further that the Board brought itself back within the *Police Act* on May 1, 2009 by invoking its powers under the legislation and providing notice that it had decided to discontinue the pay and allowance of Cst. Gillan. The latter action brought an end to the period of time covered by the grievance.

**23** Two observations can be made regarding these general propositions advanced by the Association. The first concerns entitlement to pay and allowances. The Collective Agreement obviously addresses those subjects, and the relevant Articles are identified in the grievance. However, the extracts from the Collective Agreement provided to me do not include the Articles governing pay and allowances, and it is not self-evident that there would be a continuing entitlement when an officer is suspended under the *Police Act.* Indeed, as the Board submits, an employee absent from work is normally *not* entitled to compensation unless provision is made for paid leave.

**24** My other and even more fundamental observation is that the Association's second general proposition is based on a disputed interpretation of the *Police Act* and, moreover, on the implicit assumption that the Association's interpretation is correct; i.e. that the Board took itself out of the *Police Act* regime when it discontinued Cst. Gillan's pay and allowances. This obviously begs the very issue in dispute -- namely, is the matter subject to the *Police Act* or do the Collective Agreement and *Labour Relations Code* apply?

**31** . . . . .The inescapable conclusion from all of the above submissions by the Association is that the essential character of the parties' dispute concerns the interpretation of the *Police Act*, and the dispute is not "an employment matter" (to use the Association's terminology) unrelated to the disciplinary process established by that legislation.

**32** It is my further view that the British Columbia Legislature has shown its intention to have all matters relating to discipline that is imposed under the *Police Act* and Regulations governed in accordance with that comprehensive scheme. This includes an officer's entitlement to pay and allowances following a suspension from duty under the *Act.* The subject is dealt with explicitly in Sections 56.2 (4), (5), (6), (7) and (9). The present circumstances do not represent a "gap" in the legislation giving rise to arbitral jurisdiction. . . .

**37** . . . . .I have determined that taking jurisdiction to hear Cst. Gillan's grievance for pay and allowances while he was suspended from duty would offend the scheme established by the Legislature under the *Police Act.* The matter is

> inarbitrable, and I decline to proceed further under the Collective Agreement and *Labour Relations Code.*

Similarly, it must be concluded that the essence of the Association's complaint against part of Procedure 51-10 is that it offends the *Criminal Code* and the *Police Services Act* and *Regulations.* The determination of that complaint is a question of statutory interpretation, not contractual interpretation. Arbitrators are capable of statutory interpretation, and are experts at doing so when it involves employment related statutes. However, their authority to do so must be founded directly or inferentially in the application or administration of the collective agreement under which they have been appointed. In the case at hand, while there could be employment related implications from the enforcement of the Procedure 15-10, the essential nature of the dispute that has been referred to this arbitrator is directly related to and dependent upon statutory interpretation, not contractual rights. Further, the Procedure cannot even be seen to be an exercise of the statutory or contractual functions of the Police Services Board because it was issued pursuant to s. 41 (1), not by the Board itself. Indeed, it is outside the scope of the Police Services Board's authority.

This does not leave the Association and its members without a remedy or without a forum to plead its case. It remains open for a police officer to raise "lawful excuse" as a rationale for refusing to follow Procedure 15-10 in a disciplinary proceeding. Alternatively, the Association could ask the Court for a ruling through a Judicial Review reference. While the courts have been very reluctant to accept jurisdiction over employment related matters since *Weber,* they have also been receptive to accepting authority over police matters where the function being scrutinized involves the exercise of statutory powers by a Chief of Police: see *Praskey and Metropolitan Toronto Police Services Board, supra.*

Accordingly, despite the able and compelling submissions of the Association and my sympathy for its desire to subject Procedure 15-10 to statutory scrutiny because of its potential implications upon the safety of police officers and the public, it must be

concluded that arbitration is not the appropriate forum to determine the legality of this Procedure. Therefore, the grievance must be dismissed for want of arbitral jurisdiction.

Dated at Toronto this 1st day of February, 2011.

***"Paula Knopf"***

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Paula Knopf - Arbitrator