IN THE MATTER OF AN ARBITRATION

BETWEEN:

THUNDER BAY POLICE ASSOCIATION
(the "Association")

- and -

BOARD OF COMMISSIONERS OF POLICE FOR THE CITY OF THUNDER BAY
(the "Board of Commissioners")

RE GRIEVANCE OF BRIAN SUNDELL

SOLE ARBITRATOR:	Michel G. Picher
APPEARING FOR THE ASSOCIATION:	Barrie Chercover - Counsel Mary Hart - Counsel K. Hobbs - President A. Guerard
APPEARING FOR THE BOARD OF COMMISSIONERS:	Robert C. Edwards - Counsel Peter N. Ward - Counsel

Hearings in this matter were held in Thunder Bay on December 17 & 18, 1987; January 19 & 20; in Toronto on February 26, 1988; in Thunder Bay on January 17,18 & 19; February 7, 8 & 9; and April 18 & 19, 1989.

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AWARD

I THE DISPUTE

This arbitration concerns the claim of Police Sergeant Brian Sundell for the legal costs incurred in defending a criminal prosecution against him which Sergeant Sundell and the Association maintain arose out of the execution of his duties as a member of the Thunder Bay Police Force. Specifically, Sergeant Sundell, along with three other morality squad officers, was charged with conspiring to obstruct justice by interfering with the execution of search warrants against bawdy houses in Thunder Bay. All four were acquitted, although it is not disputed that the officers, including Sergeant Sundell, were involved in "tipping-off" the operators of brothels prior to police raids. The Association submits, however, that the cost incurred by Sergeant Sundell in his criminal defence, which exceed $100,000, are payable by the Board of Commissioners in accordance with the terms of article 14.02 of the collective agreement, which provides as follows:

> 14.02 The Board shall pay any damages or costs awarded against an employee in any civil or criminal proceedings brought against such employee, and which civil or criminal proceedings arose as a result of such employee being an employee of the Board, while in the execution of his duty, and shall pay any costs incurred and not recovered by such employee in any such proceeding, and any such sum required in connection with the settlement of any claim that has or might have given rise to such proceedings.

Alternatively, apart from its position as to the application of the article, the Association maintains that Sergeant Sundell should be indemnified because indemnification was provided to his three co-accused. In that regard it relies on the

language of article 15.03 of the collective agreement concerning the jurisdiction of the arbitrator, which provides, in part, as follows:

> The Arbitration Board shall not alter, add to, subtract from or amend any part of this agreement but it may impose any settlement it feels is just and equitable.

The Board of Commissioners maintains that there has been no violation of the collective agreement in its refusal to pay the costs of Sergeant Sundell's legal defence. Simply put, it asserts that his involvement with the madams and inmates of the brothels, and his admitted involvement in giving advance notice to the bawdy houses prior to raids, was not in the execution of police duty, and consequently any ensuing prosecution is not covered by the terms of article 14.02. Secondly, the Board of Commissioners maintains that there has been no discriminatory treatment of the grievor, stressing that the circumstances of the three co-accused who were paid compensation for their legal defence are distinguishable. It notes that Sergeant Sundell had retired at the time of the acquittal while his three co-accused were still actively employed on the force; the Board of Commissioners submits that the payment of monies to the three co-accused, which coincided with their legal defence costs, was made on a without prejudice basis and in exchange for their resignations from the force. The Board of Commissioners submits that there is no discriminatory treatment of Sergeant Sundell disclosed, and therefore no grounds to invoke such equitable discretion as may vest in the Arbitrator under the terms of article 15 of the collective agreement.

n THE FACTS

A. Background

The facts of this unusual case give a particular perspective of one community and its handling of the issue of prostitution. Some appreciation of the historical

background is important to understanding the full positions of the parties in this arbitration. Thunder Bay is a great lakes port city, located on the fringes of large tracts of forest which have for years been harvested by the pulp and paper industry. Since at least the turn of the century the twin cities of Port Arthur and Fort William, which now comprise Thunder Bay, have been a port of call for sailors employed on the lake freighters as well as a principal point of off-duty leave for wood cutters employed in northwestern Ontario. The evidence discloses that from the early nineteen hundreds to the time of the events giving rise to this grievance the seamen and "bush workers" taking periods of leave at the Lakehead had at their disposal the services of a number of long-established bawdy houses. The preponderance of the evidence before the Arbitrator is that the houses were known to the community in general and, until recent years, were to a degree tolerated by public authorities, including the police and the judiciary. While the record of the earlier years of this aspect of the Lakehead's history appears somewhat obscure, the evidence adduced in this case in relation to recent decades draws a vivid sketch of the workings of brothel-style prostitution in one community.

Constable Keith Hobbs, who is president of the Association, moved to Thunder Bay in 1964 at the age of 12. According to his evidence by the time he was 14 years old he learned, through the schoolyard grapevine, of the existence of at least two bawdy houses, one at 267 Pearl Street and another at 18 Lake Street in the Port Arthur section of the City. As a college student, Constable Hobbs worked part-time delivering pizzas and had occasion to deliver to the two brothels.

Constable Hobbs joined the Thunder Bay Police Force on February 2, 1976. He then learned about two more brothels in Port Arthur, one located on Manitou Street and

another at 236 Ambrose Street. It appears that the latter was a relocation of the Lake Street establishment. Constable Hobbs relates that, as part of his orientation, his training officer drove him past the brothels, pointing them out to him. When he asked why they were not shut down he was told that they were tolerated as part of the community. As Constable Hobbs' partner explained it, the brothels had always been there and always would be.

Constable Hobbs knew from newspaper accounts that the brothels were raided periodically, with the names of inmates and found-ins being reported. As a rookie he became involved in a raid on the Ambrose Street bawdy house under the direction of a Sergeant Baker. Constable Hobbs recalls a feeling of some surprise at the time with respect to the process of the raid. He relates that one person was charged as a found-in. After having coffee with him and the madam in the house, the officers wrote out a ticket and issued it to him. Likewise they gave a summons to the operator. No one was arrested or forced to leave the premises.

According to Constable Hobbs' evidence, which is in keeping with most of the evidence heard, the presence of bawdy houses in Thunder Bay was viewed among the members of the police force as more of a joke than a crime problem. The general attitude of the police was that the brothels were there and that they were pursuing illegal activity, but that police resources could not be devoted to raiding them every day. Consequently they remained in operation, subject to periodic raids.

Constable Hobbs emphasized that in his opinion it would have been possible to shut down the bawdy houses by raiding them every day and by obtaining stiffer sentences, including jail terms, from the judiciary. He relates, however, that during

his years on the force the raids remained only periodic. Found-ins and inmates were summonsed rather than arrested, in keeping with the provisions of the Bail Reform Act of the early 1970s, and that in the criminal courts the pattern was guilty pleas followed by fines. Constable Hobbs recalls one instance in which Provincial Court Judge Walneck was asked for a jail sentence by the Crown Attorney prosecuting the keeper and inmates of a bawdy house. According to Constable Hobbs the judge stated to the Crown Attorney that the bawdy houses had been there for a long time and that the Crown was not going to change them. In Mr. Hobbs' view it was difficult, if not impossible, for the police to take the bawdy houses seriously when the legal system, through restricted manpower resources and the rules governing arrest and sentencing, seemed to dictate a laissez-faire attitude.

Barrister Lee Baig, the lawyer who defended Constable Sundell, gave evidence confirming Constable Hobbs' view of the community's tolerance of bawdy houses. Mr. Baig testified that he recalled the presence of brothels as early as 1968, when he first came to Thunder Bay on a temporary basis. Following his permanent establishment of a law practice in 1973, Mr. Baig defended a number of keepers and inmates of bawdy houses in Thunder Bay. According to Mr. Baig's observations there was a pattern in the way the bawdy houses were policed. They were raided every three to four months with the police charging one person with being the keeper of the bawdy house and one to three other ladies as inmates, with customers occasionally being charged as found-ins. According to Mr. Baig it appeared to him that most adults in the community accepted the brothels and that everyone in the administration of the courts, including lawyers and police, seemed to know about their operations, and were on a relatively friendly basis with the ladies working in them. Mr. Baig recalls only one occasion when sentences of incarceration resulted from police raids on a brothel. This occurred during

the 1970s, and involved the sentencing of a Ms. Joanne Richards to 60 days for being the keeper of a bawdy house and a second lady to 30 days for being an inmate. According to Mr. Baig this event, being the only one of its kind in memory, caused considerable surprise and what he described as a "big furor".

Mr. Baig states that he eventually came to have reason to suspect that the bawdy houses were receiving forewarning of police raids. This he inferred from the fact that his clients who were active in prostitution would call him to ask him when he would be available in Provincial Court, informing him that they were about to get "busted". They explained to him that they wanted the police to arrange a returnable date for their appearance notice that would be convenient for Mr. Baig. Mr. Baig specified that this pattern asserted itself only with respect to the bawdy house on Manitou Street, which retained his services on a regular basis. Typically he would receive a call on Monday from his client asking whether he would be available in court on Friday. The next day he would learn that a raid had taken place and that his client had been issued with a summons to appear on the Friday. According to Mr. Baig, while this model of convenience did not operate every time, it did occur with substantial frequency.

It appears that the community of Thunder Bay was of mixed views about the existence of the bawdy houses. As noted above, their presence in the community was relatively notorious for many years. Ms. Heidi Uhlig, who until 1979 was a Community Development Officer in the Planning Department of the City of Thunder Bay gave evidence with respect to the sociological impact of the bawdy houses. She explained that during the 1970s the City was in the process of developing recommendations for the expenditure of some 1.4 million dollars on a neighbourhood improvement program in

the section of Port Arthur where several of the bawdy houses were located. The community officers assigned to the project had the initial task of obtaining input from the local residents with respect to existing needs and possible improvements. The process involved a number of public meetings, as well as door to door canvassing of the views of the residents affected. According to Ms. Uhlig, during the course of the door to door survey a number of residents expressed serious concern about the continued presence of the bawdy houses in their neighbourhood. She specifically recounted the case of a female resident who confided embarrassment for herself and her children because they lived across the street from one of the brothels. She related to the community workers that she did not know how to explain the situation to her children, and expressed her concern as they were being teased at school for living near a "whorehouse". Ms. Uhlig further related that complaints of that kind made to the City's workers were generally restricted to the private conversations held with residents and were not raised at any of the public meetings. She explained that the problem of the bawdy houses was ultimately viewed by the City's community officers as a police matter which was beyond their mandate.

Two witnesses who had personal knowledge of the operation of the bawdy houses, one of whom is an admitted customer of long standing reflect the other side of the community ledger. The witness who was a client of the bawdy houses is 46 years old and has resided in Thunder Bay since 1951. According to his evidence he was aware of the existence of bawdy houses in the community at least from the 1950s, and had his own first experience at a young age in a brothel on Pacific Avenue in Fort William. This witness, who may fairly be described as a responsible and respected business person, stated that he favours bawdy houses as the safest alternative, accepting the inevitability of the existence of the world's oldest profession. According to his

evidence, the clients of bawdy houses have two concerns: avoiding sexually transmitted disease and avoiding trouble with the police. He maintains that under the bawdy house system which operated in Thunder Bay both concerns were taken care of. The operators of the bawdy houses apparently required their inmates to undergo regular medical examinations as a precaution against sexually transmitted diseases. Secondly, regular customers were always assured that they would have no difficulty with the police because the bawdy house would have advance notice of any impending raid. This was borne out by the witness's own personal experience. He stated that over many years of use of the services of the bawdy houses, neither he nor any of his friends or acquaintances was ever caught or charged as a found-in. As the evidence discloses, it was usually customers who were not regulars who became the unfortunate victims of the raid system. The found-ins usually apprehended were from outside Thunder Bay, and on one occasion included a judge from the United States. The former client explained that it was his frequent practice to call a bawdy house before making use of its services. He recalled one occasion when he was expressly told that he should not come to the house, as a raid was imminent.

On the whole the client-witness described the bawdy houses as a relatively quiet and stable venue for prostitution which, for regular customers, minimized the risks of venereal disease, assured discretion and guaranteed protection from police involvement. He stressed that the bawdy house system also avoided the necessity of dealing with pimps and obviated the physical risks and indiscretions normally associated with street prostitution. Several of the witnesses, including some police officers, asserted that the bawdy houses in Thunder Bay had the indirect effect of providing a form of regulation of prostitution, eliminating the nuisance and hazards of street prostitution which has plagued other municipalities. Whatever the merits of the debate,

the co-existence which evolved between the police and the bawdy houses over many years led to a tacit acceptance of the brothels, much as it was outlined to Constable Hobbs in his rookie year.

The most revealing evidence respecting the extent of the relationship between the bawdy houses in Thunder Bay and the City's police force was provided in the evidence of Ms. Sylvia Ross, a former prostitute and keeper of the bawdy house located at 267 Pearl Street. The arbitrator judges her to be a generally honest and candid witness. She explained that, in keeping with the common practice among prostitutes, Sylvia Ross is an assumed name. It is the name by which she has been generally known in Thunder Bay for many years and under which she was criminally charged and convicted on a number of occasions. Ms. Ross relates that she worked as a prostitute and, in later years as a "madam" or keeper employed by the owner of a brothel, from the early 1970s until March of 1983, when the charges giving rise to this arbitration forced the closing of the business. She first began working in prostitution in Thunder Bay in the early 1970s, although she was then also travelling to work in other locations. Her first sustained period of work was for approximately a year and a half in a bawdy house operated by Ms. Joanne Richards at 18 Lake Street.

Ms. Ross explains that when she began to work in the bawdy house on Lake Street she was given a briefing on how it ran. She was told that the people in Thunder Bay accepted prostitution, including the public at large as well as the police, and that she need not worry about being jailed, as might be the case in a larger city. She was told that police raids would occur on a regular basis every two to four months, and that the bawdy house would receive advance warning of a raid. According to Ms. Ross her subsequent experience bore out the truth of everything she had been

told. Raids took place about every three months. The keeper and inmates of the house always knew when a raid was to take place because they were notified in advance, usually by means of a telephone call from a police officer on duty in the morality division.

After her initial period of work at 18 Lake Street Ms. Ross left Thunder Bay for a couple of years, then returning to work for only a brief period at the same location. Later she transferred to work for the proprietor of the brothel at 267 Pearl Street, Ms. Lucille Simpson. She remained in employment there until the raid of March 26, 1983 which resulted in the conspiracy charges against a number of individuals including herself and Sergeant Sundell.

Ms. Ross was asked to describe the general relationship between the police and bawdy houses in Thunder Bay. She relates that on occasions other than raids, fairly frequently, members of the morality squad would stop by at the bawdy house and visit with the keeper and inmates for periods of time that could extend to an hour or an hour and a half. Their discussions could be about anything, including on occasion, matters relating to police investigations, as for example when the officers were attempting to locate a suspect or trace stolen goods. Just as often, however, the talk was more idle or social than professional.

According to Ms. Ross the general relationship between the prostitutes and the police was friendly and respectful. She elaborated that during a typical week she might see the morality squad officers two or three times, with their visits occurring on any shift, day or night. She explains that while she was working at 267 Pearl Street the frequency and length of visits of the plain clothes morality officers became something

of a problem for the house. Four officers in particular, including Sergeant Sundell, began to spend considerable periods of time there, sometimes consuming alcoholic beverages, as customers came and went. On at least one occasion owner Lucille Simpson complained to Ms. Ross that the four officers were "hanging about too much".

Her evidence respecting police relations discloses that Christmas was something of a special time. As in other businesses, gifts, usually in the form of a bottle of liquor were bestowed by the house upon its regular business associates, including lawyers, doctors, cab drivers and officers of the morality squad. - As Ms. Ross put it, the gifts were given to "people you associated with." There is an amusing and somewhat touching side to the Christmas spirit in the bawdy houses of Thunder Bay. Ms. Ross recounts that while she was at the Pearl Street house, every year at Christmas the madam and prostitutes baked an elaborate candy village to be given as a gift to a local children's hospital. In a gesture of Magdalenean charity, and aware of the possible embarrassment to the hospital, the ladies always kept their identity as gift givers secret, having their Christmas present delivered to the children by officers of the Thunder Bay Police, with no disclosure of its true donors.

Ms. Ross described for the Arbitrator the usual routine of a police raid on the bawdy houses where she worked. While these events could themselves be the subject of a fascinating memoir, it is sufficient for the abbreviated purposes of this award to observe that what transpired would have shocked the expectations of the uninitiated. Ms. Ross explains that the house usually received word from the police prior to a raid, on the afternoon before the night it was to take place. Once one or more clients were in the house, the members of the morality division, who were sometimes no more than two in number, would enter the establishment in possession of a warrant. At least one

officer would go into a bedroom to witness a business transaction at some stage of consummation. The keeper, inmates and found-ins would then assemble in the living room where, over coffee served by the house, appearance notices were made out specifying the identity and charges of the individuals in question, and the date they were summoned to appear in court. According to Ms. Ross on many occasions the found-ins were then sent on their way. When certain officers were in charge of the raid, including Sergeant Sundell, the morality squad officers might remain in the house for a time, consuming alcoholic drinks provided by the management. On other occasions they might leave, in which case business immediately resumed as usual.

One incident related by Ms. Ross perhaps best illustrates the surprising degree of closeness between the bawdy houses and certain members of the morality squad. She recounts that on one occasion, on a cold November night, she had been notified in advance that a raid was to take place. That evening two officers, including Sergeant Sundell, waited in vain in their car outside the house for a customer to arrive. As time passed no one came and the officers, becoming chilly and impatient, decided to spend their waiting time in the comfort of the house. Ms. Ross describes sitting in the company of the two morality officers in the living room of the house as they consumed alcoholic beverages provided by their hostess, superfluously armed with a search warrant, awaiting their prey. When a hapless customer finally arrived at the door the officers scurried into the basement to hide, emerging to execute their warrant and charge him as a found-in once he was engaged with one of the ladies of the house. Having issued appearance notices to all concerned, the officers then told the found-in to leave and remained in the house, socializing with the inmates and consuming more alcoholic drinks. On that occasion, four individuals were charged and all pleaded guilty three days later, receiving fines ranging from $100 to $275.

This remarkably cavalier attitude to bawdy house raids was not without some precedent in the annals of the Thunder Bay Police. Apart from Ms. Ross's own evidence with respect to her personal experience dating back to the early 1970s, the evidence discloses that one particular morality squad officer, since deceased, boasted of a unique method of executing a raid. Mr. Ronald Lester, a Thunder Bay lawyer, testified that on one occasion when he was in criminal court shortly after the conspiracy charges were laid against Sergeant Sundell and the other officers, the deceased officer who was then retired, privately expressed to him his amusement over the publicity which the charges were receiving. Mr. Lester explains that the officer had resigned from the police force under pressure, after he had made statements quoted in the local press in September of 1979 which were openly sympathetic to the continued operation of Thunder Bay's bawdy houses. In a perverse gesture of one-upmanship, the officer related to Mr. Lester that once, years previous, he had phoned the operator of a bawdy house and told her that he was in a hurry to get a raid in the books. He instructed her that in ten minutes she should be at the corner of Pearl and Court Streets with a keeper and two inmates so that he could charge them. According to Mr. Lester, the officer told him that the operator complied, and that the "raid" was carried out in that way.

While the story of the deceased police officer may be subject to doubt insofar as it is heresay, his exploits are indelibly inscribed in the mythology of the Thunder Bay Police Force. Retired Inspector J.K. Higgins, who was a police officer in both Port Arthur and Thunder Bay from 1947 through 1982 gave evidence, which the Arbitrator accepts, respecting the reputation of the deceased officer in question. Inspector Higgins testified that it was commonly known within the force that the

officer had a regular practice of meeting prostitutes by appointment at a street corner and affecting the service of their appearance notices, instead of going through the formality of a raid. Apart from lending some weight to the likelihood of the truth of the deceased officer's statement to Mr. Lester, inspector Higgins' evidence tends to confirm that the enforcement of warrants against the bawdy houses had, over the years, been taken much less than seriously by officers of the Thunder Bay morality division.

It would be misleading to suggest that the degree of fraternization, if not collusion, with the bawdy houses engaged in by some members of the morality squad was typical of most members of the police force, or was necessarily known by them. As the evidence before the Arbitrator discloses, the contrary is true. The evidence of Constable Hobbs is more representative of the knowledge of the general ranks of the Thunder Bay Police Force. He was aware of the location of the bawdy houses, and no doubt of the identity of their occupants and operators. His initial surprise that they were not shut down by more aggressive policies of charges and convictions eventually gave way to a fatalistic acceptance that the bawdy houses were part of a social reality which in all likelihood could not be changed. Perhaps most importantly, however, the evidence of Constable Hobbs, as well as that of other officers with direct experience as members of the morality squad, is of having no knowledge of the brothels being tipped off by police officers prior to raids. Without exception, the evidence of all of the police officers who testified in these proceedings is that such a practice would clearly be improper. It appears that there was an inner circle of morality division officers, including Sergeant Sundell whose closeness to the operators of the bawdy houses exceeded the norm, and whose collusive practices were not known to the rank and file.

Nor should it be concluded that all of the police chiefs of Thunder Bay necessarily turned a blind eye towards the bawdy houses or pursued a policy of indifference with respect to their ongoing operation. The evidence discloses that on at least one occasion, upon the initiative of a newly appointed Chief of Police, an aggressive campaign of prosecution resulted in the complete shutdown of Thunder Bay's bawdy houses for a period of time. In April of 1978 Thomas Robert Keep became Chief of Police for Thunder Bay, a position which he held until his retirement in 1982. It was under Chief Keep that the bawdy houses came to be shut down for a period estimated at approximately six months. Chief Keep has a long record of service as a police officer in Thunder Bay. Originally recruited as a police constable in the Fort William Police Force in 1947, he served as Deputy Chief of that force from 1958 to 1970, when Fort William and Port Arthur were amalgamated into the present City of Thunder Bay. He continued to hold the rank of Deputy Chief of the amalgamated force from that time until his promotion to Chief in 1978.

The evidence of Chief Keep discloses that before the 1970s both the law and the practices of the criminal courts with respect to penalties made it easier to prosecute the operators of bawdy houses to the point of effectively putting them out of business. He relates that this, in **effect,** is what was done to bawdy houses which had previously operated in Fort William. The unchallenged evidence of Chief Keep is that by the time of the amalgamation of Port Arthur and Fort William in 1970 bawdy houses had been entirely eliminated from Fort William. As the record recounted above reflects, however, they continued to do business in the Port Arthur section of Thunder Bay.

Chief Keep relates that the bawdy houses became something of a personal priority for him when he assumed office in 1978. At that time he reorganized the

morality division, giving it jurisdiction over the investigation and prosecution of all sexual offences, as well as an involvement, in conjunction with the RCMP, in drug offences. The division also maintained its established involvement in dealing with gambling, bootlegging and prostitution.

For Chief Keep the ongoing existence of bawdy houses represented a threat to the integrity of the police force. Firstly, in his eyes, the business links and networking underlying their operation, and the movement of prostitutes from one location in Canada to another, represented a level of commitment and sophistication that reflected a form of organized crime. Secondly, Chief Keep saw in the bawdy houses the danger of corruption extending to levels of official authority, including the police. He relates that this came home to him when, as the newly appointed Chief, he was approached by a "go-between" who inquired, on behalf of undisclosed interested parties, what his attitude towards the bawdy houses was going to be.

Chief Keep's answer came swiftly and forcefully in the form of a tightening up of morality squad directives and a campaign of aggressive prosecution against the bawdy houses. Being aware that members of the morality division sometimes visited the bawdy houses for the purpose of obtaining information, and occasionally stayed for periods of time that suggested something more than a business visit, Chief Keep issued orders to the members of the squad that they were not to visit the bawdy houses unless their presence there could be fully justified and, under no circumstances were they to become involved in fraternizing with the operators or inmates of the houses. According to Chief Keep's recollection, Sargeant Sundell was a member of the morality squad at that time.

The initiatives of the Chief had the desired impact. For a time, generally estimated by most witnesses to be for six months in 1979, the bawdy houses were completely shut down. This was partly due to a more aggressive policy of prosecution. It appears that in at least one case an individual was charged with the more serious crime of living off the avails of prostitution, rather than the usual charge of being a keeper or inmate of a bawdy house. However, according to the evidence of Inspector D. MacSween, by 1980, at least two of the houses in Thunder Bay, one located at 267 Pearl Street and the other, moved from 18 Lake Street to 236 Ambrose Street, had resumed normal business. According to Inspector MacSween that was the state of affairs when Chief Keep was succeeded by Police Chief G.F. Ouellette in 1982. He relates that no specific instructions issued from the new chief with respect to the bawdy houses, and the pattern of policing by the morality division continued to be largely characterized by monitoring the bawdy houses, with periodic raids. He explains that the return to the old pattern of policing was in part caused by the acquittal of the person charged with living off the avails of prostitution during the crackdown initiated by Chief Keep. According to Inspector MacSween there emerged a prevailing sense of futility among the police, as reflected in his own opinion that the police alone could not shut down the bawdy houses. Citing the history of Fort William, which had succeeded in eliminating them entirely, he stated his belief that it could only be done if there was a will demonstrated on the part of the courts, and indeed of the community at large, to take the necessary steps to eliminate them. The contrary seemed true however; by way of example, Inspector MacSween recalls at least one public comment by former Mayor Walter Assef, while he was in office, to the effect that he was not personally opposed to the bawdy houses.

B. The Investigation

The evidence concerning the investigation and charges against Sargeant Sundell and three other members of the morality squad is not in dispute and was placed before the Arbitrator in the form of agreed statements of fact. In the summer of 1982 an informer made statements to a police force outside the province to the effect that officers of the Thunder Bay Police Department were being bribed by owners of two bawdy houses in Thunder Bay. The payments were said to be in return for the police advising the owners of impending raids. The Intelligence Branch of the Ontario Provincial Police relayed this information to Chief Gerry Ouellette of the Thunder Bay Police Department. Upon being advised of the allegations he requested that the OPP conduct an independent investigation.

The investigation, which was code named "Project Teacup" commenced on September 6, 1982 under the direction of Inspector J.P. Crozier and Sargeant Chaytor of the OPP. Between October 14, 1982 and March 19, 1983 the investigators conducted a great number of authorized telephone wiretaps. With the addition of Sargeant Campbell to the investigation, physical surveillance commenced in November, with further assistance in that regard being provided by Sargeant O'Brien as of December 7, 1982.

On November 22, 1982, a bawdy house search warrant was issued under section 181 (1) of the Criminal Code pursuant to information provided by Constable Robert McKenzie of the morality division, respecting the premises at 267 Pearl Street. Sargeant Sundell and Constable McKenzie were on duty from 6 p.m. on that day until 2 a.m. on November 23, 1982. The OPP investigation discloses that at 6:30 p.m. and again at 10:43 p.m. Sargeant Sundell telephoned Sylvia Ross, then working as keeper of the bawdy house at 267 Pearl Street, to notify her that a raid was to take place that night.

Sargeant Sundell and Constable McKenzie kept the Pearl Street house under observation for several hours on the evening of the 22nd. The evening being cold, as related above, they decided to wait inside the house. A customer did arrive later and was charged at approximately 2:30 a.m. The OPP investigators were fully aware of this incident when it occurred. They did not, however, press charges against Sargeant Sundell or McKenzie at that time, as there was no evidence of bribery and there was still insufficient evidence to proceed against other police officers believed to be involved.

It does not appear disputed that through the entirety of the OPP investigation no direct evidence of bribery was every found. What the evidence did disclose, as does the testimony in these proceedings, is that certain of the morality division officers and the bawdy houses were involved in a degree of fraternization amounting to collusion and in some cases, a degree of corruption. The events of the evening of November 23, 1982 are perhaps the best indication of how far things had deteriorated. The raid was an obvious sham, the keeper of the bawdy house having been tipped off at least twice in advance by Sargeant Sundell. The evidence further reveals that when the charges were being made out, Constable McKenzie wrote an incorrect name on the charging document given to prostitute Roberta Bell, inscribing her name as Roberta "Beleast". While the error in the name did not change the disposition of the charge, as Ms. Bell pleaded guilty and was fined $150.00, it would appear that it might have had an effect insofar as the traceable police record of Roberta Bell would be concerned. In any event, according to the unchallenged evidence of Ms. Ross, some two hours after the raid on the morning of November 23, 1982, Sargeant Sundell called her and arranged for sexual favours to be performed by Ms. Bell for Constable McKenzie. This was agreed to, with Ms. Ross apparently indicating that it would be "on the house". Following his tour of

duty, Mr. McKenzie attended at 267 Pearl Street and consummated the deal arranged by Sargeant Sundell.

Part of the concern of the Board of Commissioners with respect to the conduct of certain members of the morality division, reflected in the presentation of its case, is what it perceives as the inordinate amount of time which several officers appeared to be spending fraternizing with the operators of the bawdy houses while on duty. In this regard the evidence establishes that on the evening of February 20, 1983, when Sargeant Sundell was on shift along with Constable McKenzie from 6 p.m. to 2 a.m., they spent at least part of that evening at the North Branch Road home of Ms. Lucille Simpson, the owner and operator of the bawdy house at 267 Pearl Street. The Board of Commissioners sought to adduce evidence from which it might be inferred that the officers spent several hours at that location, when they should have been working productively elsewhere. The Association challenges the quality of the evidence relied on. In the Arbitrator's view it is unnecessary for the purposes of this grievance to resolve that aspect of the dispute. Firstly, the claim underlying the grievance bears little or no direct connection to the events of that evening. Insofar as the evidence is admissible by way of "background" pertaining to the general relationship between Sargeant Sundell and the operators of the bawdy houses, that relationship is amply displayed independently by the events related above. In any event, it is not disputed that at 10:52 p.m. that evening Sargeant Sundell did place a telephone call to the police dispatcher from Ms. Simpson's residence, without disclosing his whereabouts.

By further way of background it may be noted that other officers besides the four who were eventually charged with conspiracy to interfere with the execution of search warrants were also involved in spending excessive and unjustified periods of time

in the bawdy houses while on duty. The record discloses that at least two officers, Ron Arthur and Art Campbell, were charged with neglect of duty under the Police Act R.S.O. 1980 c.381, as amended, by reason of having stayed at the Pearl Street and Ambrose Street bawdy houses in January, February and March of 1983, at times when they had other duties to attend to. Both officers pled guilty to these charges.

While the events related in this Award appear readily disclosed, the reality is that exposing the taint of unlawfulness in the relationship between certain police officers and the bawdy houses came only at the substantial expense of a long and exhaustive investigation by the Ontario Provincial Police. Operation Teacup involved obtaining wiretap authorizations in respect of approximately 21 persons. Some 2,000 hours of tape was recorded. The final raids and arrests on the Pearl Street and Ambrose Street houses required a veritable task force of OPP officers from across Ontario, with 19 being assigned to the raid at Pearl Street and 42 to the raid on the Ambrose Street bawdy house. This followed five months of surveillance, which was conducted virtually on a full-time basis. The ensuing trial, which did not commence until October of 1985, spanned some six months.

C The Charges

The culmination of Operation Teacup came in the early hours of March 26, 1983. Following the massive raids, Sargeant Sundell was charged pursuant to the information of Inspector Crozier of the Ontario Provincial Police. The information specifically alleges that:

> ... between the 25th day of October in the year 1982 and at the 19th day of March, 1983, at the City of Thunder

> Bay in the District of Thunder Bay and elsewhere unlawfully did conspire together and with another person or persons unknown to commit an indictable offence, to wit, a wilful attempt to obstruct the course of justice in relation to the investigation and prosecution of criminal offences occurring at a common bawdy house located at 267 Pearl Street, Thunder Bay, Ontario through agreeing to interfere with the execution of warrants to search at the said house contrary to section 423(1) (d) and 127(2) of the Criminal Code of Canada.

Similar charges were brought against Officers Robert McKenzie, Basil Hill and Lorne McMillen, as well as three private citizens: Lucille Simpson, Sylvia Ross and Pascal Vendilotti. The laying of the criminal charges marked the beginning of a long, complex and costly legal process which has extended over a period of seven years, of which this arbitration is hopefully the final installment. The four police officers were immediately suspended from duty pursuant to section 26(1) of Ontario Regulation 791 of the Police Act As that legislation provides, the officers were suspended with full salary and benefits, pending the outcome of the charges against them. As the criminal trial did not reach its conclusion until March 14, 1986, this represented a substantial charge on the public purse. In addition, on or about April 25, 1983 Sargeant Sundell along with Constables McMillen, Hill and McKenzie were separately charged for neglect of duty and discreditable conduct under the Police Act There appears little doubt that the successful prosecution of those charges would have resulted in their dismissal from the force.

The Police Act charges commenced before His Honour Judge Dunlap in November 1983. During those proceedings an issue arose as to the admissability of wire tap evidence and other intercepted communications. Upon a ruling by the Judge that these were inadmissible, the Police Commission obtained an adjournment of the

proceedings and moved for an appeal of the Judge's ruling in the Ontario Divisional Court. In late 1984, the Divisional Court allowed the appeal, ruling that the evidence was admissible. However, in its reasons for judgement, the Court suggested that it would be advisable to postpone the Police Act hearings until the conclusion of the criminal trial. Leave to appeal the Divisional Court's ruling was denied by the Court of Appeal, and the Board of Police Commissioners decided to accede to the suggestion of the Divisional Court to stay the Police Act proceedings pending the outcome of the charges under the Criminal Code. These facts have some bearing on the issue of the comparative treatment of the four officers that forms part of this grievance.

Following the raids of March 26, 1983 charges were laid against the various police officers on the basis of two counts, one relating to activity at the bawdy house located at 236 Ambrose Street and the second count going to the same offences in respect of 267 Pearl Street. In April of 1985, following a preliminary hearing into the charges, Provincial Court Judge Michele discharged all of the accused with respect to the offences relating to 236 Ambrose Street. Along with others, however, the four officers were committed to stand trial with respect to the charge of conspiring to obstruct justice in respect of the execution of search warrants at 267 Pearl Street.

In October of 1985 the criminal trial of the four officers and the civilians charged with conspiracy to obstruct the administration of justice commenced in Thunder Bay before a Supreme Court judge and jury. The trial, which was highly publicized, lasted six months. It concluded on March 14, 1986 when the jury acquitted all of the accused persons, including Sargeant Sundell. While the details of the trial and verdict are not before me, it does not appear disputed that whatever irregularities

were proven, the jury was not persuaded that they were the product of a conspiracy within the meaning of the Criminal Code.

During the period from March of 1983 through March of 1986, events relating to Sargeant Sundell took a separate turn. It is common ground that at the time of the bawdy house charges his residence was also raided and searched by the Ontario Provincial Police. While that raid revealed nothing in respect of Sargeant Sundell's relations with the bawdy houses, the officers conducting the search came upon some prohibited items in Sargeant Sundell's possession. One was a switch blade and another an unregistered 303 calibre Lee Enfield rifle with a shortened barrel. It does not appear disputed that the rifle was in a rusted and inoperative condition, and that both of these objects were more in the nature of collected curiosities than objects that would be put to any use by Sargeant Sundell. Nevertheless, Sargeant Sundell was charged with two counts of possession of a prohibited weapon, contrary to section 88(1) of the Criminal Code of Canada. On or about June 28, 1984 he was convicted on both counts by Provincial Judge Osborne. He appealed that outcome to the District Court of the District of Thunder Bay, not to seek an acquittal, but rather to obtain either an absolute or a conditional discharge.

In a decision dated December 10, 1984 Judge Patrick J. Lesage substituted an unconditional discharge with respect to the conviction for possession of the Lee Enfield rifle, noting that it was only marginally operable and had been virtually forgotten in a drawer in Sargeant Sundell's garage for a period of some 13 years. The judge concluded, however, that Sargeant Sundell's explanation about having forgotten the switchblade in a like manner was less persuasive, although he agreed with the trial judge that there was a violation of the Criminal Code. but not in aggravated

circumstances that created any public danger or menace. On that basis while sustaining the conviction, Judge Lesage reduced the fine for the switchblade offence from $150 to $50.

These events, however minor their criminal significance, nevertheless had a substantial bearing on Sargeant Sundell's job security. Shortly following the grievor's original conviction for the prohibited weapons charges, on July 27, 1984 he was served with notice of separate charges of discreditable conduct flowing from his conviction, pursuant to section 1(a)(vii) of the Code of Offences contained in Regulation 791 under the Police Act.

The hearing of these charges was originally to commence before Police Inspector Collin MacLeod on September 6, 1984. However, several adjournments ensued, and it appears from the record that on December 18, 1984 Sargeant Sundell was remanded to January 22, 1985, at which time a trial date was to be set. Further remands followed, the final being registered on May 5, 1985, at which time Sargeant Sundell's case was remanded to Friday, May 31, 1985 for final disposition. The Police Act charges relating to the weapons convictions were never completed, however. On May 23, 1985 Sargeant Sundell, who for some two years had been eligible for full retirement, sent the following letter to the Board of Commissioners of Police for the City of Thunder Bay:

> Dear Sirs:
>
> Re: Sgt. Brian Sundell
> ---
>
> For reasons of medical necessity, please accept my retirement from the Police Force of the City of Thunder Bay.

Yours truly,

BRIAN SUNDELL, Sgt.

Given the grievor's retirement from the force, the Police Act charges of discreditable conduct for the prohibited weapons convictions became academic and were withdrawn effective May 31, 1985. While the record relating to the other outstanding Police Act charges against Sargeant Sundell for neglect of duty and discreditable conduct relating to the bawdy houses is not before the Arbitrator, it does not appear disputed that those charges, stayed by the Police Commission following the Divisional Court decision in late 1984, also ceased to have any effective application as against Sargeant Sundell.

D. The Settlement

What then was the position of the Police Commission when the jury entered a verdict of acquittal in favour of all four police officers in March of 1986? The record discloses that the Commission was on notice from the Association that it would be claiming full indemnity for all of the officers in respect of their legal expenses incurred in defence of the criminal charges against them. At the point of acquittal, subject of course to any appeal which might be taken by the Crown, officers McKenzie, Hill and McMillen were on the payroll of the force with the apparent right to return to active service. Their status in that regard, however, was subject to the Police Act charges still outstanding against them. Given the publicity surrounding the trial, the prospect of the three officers continuing on the payroll created for the Commission a

situation of obvious embarrassment and concern. The same problem did not operate with respect to Sargeant Sundell, as he had previously taken his retirement.

A full appreciation of the position of the Commission and its bearing on the merits of this grievance requires some mention of the general notoriety of the criminal proceedings against the four officers. The nature of the charges, the publicity surrounding the raid that concluded Operation Teacup, and the lengthy trial which exposed the activities of the morality division to the glare of media publicity over several months exacted a substantial toll on the reputation and credibility of the Thunder Bay Police Force. In addition, the fact that the officers received full pay during their entire period of suspension, or in Sargeant Sundell's case until his retirement, did not escape the notice of the media, which took an ongoing editorial interest in the overall cost of the criminal proceedings to the public purse. It is perhaps an understatement to say that the acquittal of all four officers, which apparently turned on the inability of the Crown to establish beyond a reasonable doubt that there was a "conspiracy" notwithstanding the proof of excessive fraternization and the practice of tip-offs prior to raids, brought great pressure to bear on the Police Commission. The Commission then had the problem of dealing with formal grievances from all four officers for the payment of legal costs which were in excess of $100,000 for each of them. It also faced the prospect of Police Act proceedings against the three officers who were still on the active payroll, the length and cost of which could also be substantial. Not surprisingly, there followed an intensive negotiation between the Board of Commissioners and the three officers who were still on the payroll.

The discussions resulted in the execution of three separate memoranda of agreement, each dated September 25, 1986. The agreements, relating to Officers

McMillen, McKenzie and Hill resulted, in part, in the agreement of the Board of Commissioners to pay the legal costs of each of the three officers, being $100,000, $116,051 and $105,000 respectively. In exchange, the officers agreed to execute irrevocable authorizations and directions to the Thunder Bay Police Association to withdraw their grievances in respect of the indemnity for legal costs. They further executed a full and final release of liability against the Board of Commissioners and agreed to resign from the Thunder Bay Police Force, effective November 1, 1986 for McKenzie and McMillen and September 26, 1986 for Constable Hill. The agreement of the Board of Commissioners to pay the legal costs of the three officers is described within the recitals of the agreement as:

> ... deemed to be no admission of liability whatsoever (and which liability is specifically denied) on the part of the said Board of Commissioners of Police pursuant to Article 14.02 of the Collective Agreement, or otherwise and the settlement was in consideration of the withdrawal of the grievance and other good and valuable consideration;

The settlement of the grievances of the three officers, like all other aspects of this remarkable case, remained the subject of intense public scrutiny and media comment. In an effort to fairly communicate to the public its own concerns and the rationale behind the settlement the Board of Commissioners of Police issued a statement to the media which, in part, contains the following:

> After some three and a half years, Police Act proceedings against former members of the Morality Squad of the Thunder Bay Police Force are finally completed. The three officers pled guilty to neglect of duty, and tendered their resignations. The cost of this procedure was unacceptably high; there are no questions about that. The settlement was designed to prevent spending further money. The law of Ontario compels payment in full of salary and benefits of suspended police officers, until the final level of appeal is exhausted. The action taken by the Police Commission

in settling this matter was intended to finalize these matters once and for all, rather than to allow them to drag on for perhaps another 36 months. The potential cost consequences of pursuing that course of action were staggering. Citizens or other communities in Ontario have found out that lengtRy civil Police Act proceedings can be tremendously expensive. The Police Commission sought to try to cut the taxpayers' losses in a "no win" situation.

The settlement has also generated public comment, about the manner of handling the case. The suggestion has been made that the case was mishandled by the Chief of Police because an outside force (the O.P.P.) was brought in to conduct the investigation. The Commission maintains its previously stated position that the Chief took the only possible course of action. When a Chief of Police receives allegations of serious criminality within his own Police Force, he has no option, legally or morally. Such allegations must be investigated by an impartial Police Force. To do otherwise would jeopardize the integrity of our entire system of justice. Immunity from impartial investigation for privileged persons is the hallmark of totalitarian regimes. Secret internal investigations would themselves smack of attempts to obstruct justice. If people who recommend internal investigation do not believe that the Chief of Police should obey the law, one wonders who they think should obey the law.

In a "ordinary" employment situation, an employee who seriously misconducts himself may simply be terminated for just cause. That process is not possible with police officers, as an elaborate trial-like process must be undertaken. The law, one assumes was written in this fashion to protect the vast majority of police officers who are dedicated professionals. When unacceptable discreditable conduct occurs, the Police Commission as employer would be shirking its duty not to act as any other responsible employer would. The public expects the highest degree of integrity, honesty, and dedication from police officers; the Police Commission apologizes to nobody for expecting that standard to be met. The Police Commission is itself bound to follow the law, in dealing with its employees. Any objective assessment suggests that a change in the law might be warranted.

The costs of settlement are set out below. Certain monies are payable automatically upon the resignation of a police officer, pursuant to the Collective Agreement.

The following funds are to be paid out pursuant to the Settlement Agreement. It is not proposed to identify the lawyers, nor clients by name.

OFFICER #1	
Payable directly to the solicitor for the officer	$ 105,000.00
Payable to the officer on settlement	$4,000.00
Payable to the officer pursuant to Collective Agreement	$ 12.777.38
TOTAL	$121,777.38
OFFICER #2	
Payable directly to the solicitor for the officer	$116,051.00
Payable to the officer on settlement	$0.00
Payable to the officer pursuant to Collective Agreement	$12.161.49
TOTAL	$128,212.49
OFFICER #3	
Payable directly to the solicitor for the officer	$ 100,000.00
Payable to the officer on settlement	$19,205.00
Payable to the officer pursuant to Collective Agreement	$8.977.73
TOTAL	$128,182.73
OVERALL TOTAL	$378,172.60

These payments were agreed to in order to prevent the possibility of several more years of litigation. They were necessary to obtain the resignations of the officers, and thereby avoid paying full salary and benefits during this period. There would have been still a potentially great

> legal cost exposure. However difficult it may be to accept payment of anything in these circumstances, the cost consequences and other consequences of dragging this matter out even longer were contrary to the public interest.

While the above communique relates that the three officers "pled guilty" to neglect of duty, that is not reflected on the face of the agreements and releases executed between the parties and filed in evidence. The essence of the agreements is the withdrawal of the officers' grievances under article 14.02, the payment of their legal defence bills as well as other separation payments and their resignation from the force. The payment of indemnity by the Board of Commissioners is recited as being "... no admission of liability whatsoever ... on the part of the Board of Commissioners of Police pursuant to article 14.02 of the Collective Agreement ...". Conversely, the Board of Commissioners executed a release of liability in favour of each of the officers which expressly states, in part, "... It is understood and agreed that the said payment or promise of payment is deemed to be no admission whatsoever on the part of [the officer] ...".

In the Arbitrator's view not much turns on whether the officers did in fact plead guilty, or may merely be said to have done so implicitly. The overwhelming facts are that they were at obvious peril in the neglect of duty proceedings pending against them, that the Commission wanted an end of the cost and embarrassment of their case and that in consideration of their resignation it paid them substantial sums amounting to full satisfaction of their claims under article 14.02 of the collective agreement.

Nothing was paid to Sergeant Sundell. It is not disputed that his legal defence costs were comparable to those of the three other officers. The Association has therefore advanced this grievance to arbitration, alleging a violation of article 14.02 of the collective agreement and discriminatory treatment of Sergeant Sundell.

III APPLICATION OF ARTICLE 14.02

A. Argument

Several days of hearing were devoted to evidence and argument concerning the interpretation and application of article 14.02, the text of which bears repeating here:

> 14.02 The Board shall pay any damages or costs awarded against an employee in any civil or criminal proceedings brought against such employee, and which civil or criminal proceedings arose as a result of such employee being an employee of the Board, while in the execution of his duty, and shall pay any costs incurred and not recovered by such employee in any such proceeding, and any such sum required in connection with the settlement of any claim that has or might have given rise to such proceedings.

Central to the dispute before me is the meaning of the phrase "... as a result of such employee being an employee of the Board, while in the execution of his duty ..." and its application in this case. Counsel for the Association stresses the importance of appreciating the collective bargaining environment in which police indemnity clauses are negotiated, arguing that the meaning of article 14.02 must be gleaned, at least in part, by comparison with the language of clauses found in the agreements governing other police forces. He also submits that the negotiating history and prior application of

the clause must be carefully looked at to determine its proper application in any given case.

He submits that any indemnification clause found in a collective agreement governing the employment relations of police officers must be construed in the context of the industrial relations or collective bargaining climate in which it is negotiated and operates. In other words, he submits that in appreciating the scope and purpose of the clause regard should be had to the terms of the Police Act, clauses found in the collective agreements of other municipalities and police associations and, lastly, the interpretation of such provisions as reflected in the arbitral awards. Secondly, he argues that regard must be had to the history of the article itself, with particular attention to the positions taken by the parties over the years with respect to attempts to modify its wording. Thirdly, he submits that regard must be had to the manner in which the article has been applied in the past by the parties themselves. He argues that the prior treatment of officers within the force, in respect of their claims under article 14.02, confirms that the discharging of an officer's duty in a manner which would not meet with the approval of his superiors, or indeed the committing of an illegal act which might result in the officer's conviction, has not of itself been viewed as conduct which would disentitle the officer from indemnity under this provision.

Lastly, quite apart from the equitable argument which he raises under article 15.03 of the agreement, counsel for the Association stresses that the application of article 14.02 in the circumstances of the instant case must be considered carefully in light of the entire history of the policing of bawdy houses over the years in the municipality of Thunder Bay. He submits that what may or may not constitute the execution of an officer's duty in a given municipality cannot be assessed without regard

to the directives and signals, subtle or otherwise, which police officers may have received from the statements, actions and omissions of elected officials, the community at large and their superior officers in particular over an extended period of time. In other words, in the context of this case, counsel submits that what he characterizes as the widely known and accepted tolerance of bawdy houses in the Port Arthur section of Thunder Bay, under a succession of mayors and police chiefs, must be taken into account in considering what an officer assigned to the morality division, such as Sergeant Sundell, might reasonably and in good faith have believed to be the acceptable limits of the exercise of his duty in the policing of bawdy houses.

He further submits that in considering the merits of Sergeant Sundell's claim, substantial weight must attach to the fact that he was acquitted of the criminal conspiracy charges brought against him for interfering with the execution of warrants. He argues that it is out of keeping with the intention of the parties for an officer who has been acquitted of the charges brought against him to be denied indemnity under the provisions of article 14.02. Counsel for the Association submits that the overall history of the policing of bawdy houses in Thunder Bay, and the apparent failure of the Board of Commissioners to deal with them as a serious issue, coupled with the eventual acquittal of the grievor of the conspiracy charges against him, amount to a form of estoppel against the Board of Commissioners even if, contrary to the Association's position, the terms of article 14.02 might otherwise be more strictly construed against an officer in the position of Sergeant Sundell.

Counsel for the Board of Commissioners takes a forcefully contrary position with respect to the meaning of article 14.02 of the collective agreement. Firstly he disputes that estoppel has any application in the circumstances of this case. Reviewing

the elements of the doctrine, he maintains that there has been no representation on the part of the employer which can be said to have been intended to affect the legal relations between the Board of Commissioners and police officers, and which the grievor can claim as the basis of any detrimental reliance. He also advances a different interpretation of the cases concerning the prior application of article 14.02 of the collective agreement. He notes that in all but one case put before the Arbitrator the claims of officers were in relation to civil or criminal proceedings arising out of the use of excessive force, with the sole exception being of a constable who was charged under the Highway Traffic Act for running a stop light during the course of his duties. By contrast, he raises the cases of some six officers who either did not claim or were denied indemnity for misconduct which could be characterized as abusive of their duties as policemen or entirely outside their professional obligations. He submits that, in effect, the Association has never put forward a claim on behalf of a member, prior to the claim of Sergeant Sundell, for conduct falling clearly outside an officer's execution of his duty.

Counsel for the Board of Commissioners also disputes the value to be assigned to the negotiating history of the language of article 14.02. Noting that it has been in the collective agreement unchanged since 1972, he submits that the parties have always intended that it should be there to protect an honest officer who commits the kind of error of judgment which, on occasion, may be all but inevitable in the execution of police duties. Citing, among other things, a study by the Law Reform Commission of Canada entitled "Legal Status of the Police", counsel submits that the language of article 14.02 was fashioned in contemplation of the special position of the police as sworn peace officers whose public duties transcend their on-duty hours of work, and devolve from the common law as well as from the provisions of the Police Act

I turn to consider the merits of the parties' position with respect to the interpretation of article 14.02. At issue in the instant case is whether the language of that provision, which requires that an officer be acting in the execution of his duty as a precondition to the protections of the article, would preclude the claim of Sergeant Sundell for indemnification for his legal costs in defence of the charge of conspiracy to obstruct justice of which he was acquitted. Before dealing with the specifics of the provision at hand, I should indicate my agreement with the suggestion that such a provision must be construed carefully, in the very particular context of police service in relation to which it was intended to apply. The concept of indemnification for the members of a police force is rooted in section 24(6) of the Police Act, R.S.O. 1980, c.381 which provides as follows:

> 24. ...
>
> (6) The council of a municipality may, in such cases and to such extent as it thinks fit, pay any damages or costs awarded against a member of the police force maintained by them or any special constable in any civil or criminal proceeding brought against him, any costs incurred and not recovered by him in any such proceeding, and any sum required in connection with the settlement of any claim that has or might have given rise to such proceeding.

While the foregoing description vests a discretion in the municipality to indemnify police officers, article 14.02, like many such provisions found in other collective agreements between municipalities and police forces in Ontario, establishes a contractual obligation on the part of the employer to indemnify an employee whose circumstances fall within the conditions contemplated within the article.

The Association called as witnesses a number of officers who have successfully claimed indemnity under the terms of article 14.02. Not surprisingly, a number of the cases involve charges of assault brought by individuals against the officers because of the treatment they received during the course of their arrest. While these examples have generally involved private prosecutions, they have extended to civil actions. For example, Constable P.J. Girvin was sued civilly for an eye injury which he caused to an arrested driver. The driver, who was stopped, refused to unlock his vehicle or lower his window, whereupon Constable Girvin broke the driver's side window with his flashlight, causing a serious eye injury to the accused. The accused succeeded in obtaining a substantial award of civil damages for the tort of assault as well as legal costs against Constable Girvin, for which the officer received full indemnity under article 14.02 of the collective agreement.

The Association called as witnesses some seven officers, including Constable Girvin, who related their experience with claims of indemnity under article 14.02 of the collective agreement. In the Arbitrator's view it is unnecessary to review the detail of that evidence. Suffice it to say that it reveals a clear, and in my view, predictable pattern. It appears beyond controversy that the article has been available to protect officers who have, in the execution of their duty, either by an excess of zeal or an error of judgment, made themselves liable to a civil action or a criminal prosecution. As noted above, the most common occurrence is a civil action or charge relating to assault based on the alleged excessive use of force by an officer during the course of an investigation or an arrest. It seems clear that even where the officer has been found to have committed a civil or criminal wrong, the Association has not hesitated to process a claim on the officer's behalf and such claims have been paid without controversy by the

Board of Commissioners. This reflects a common recognition by the parties that police work, by its very nature, requires an officer to sometimes function on the borderline between conduct that is lawful and that which is excessive, giving rise to civil or criminal liability. Consequently, generally speaking, the success of a police officer's claim under article 14.02 has not been made to depend on his or her guilt or innocence, acquittal or conviction. The common thread, however, which appears to run through the successful claims is that in virtually all instances the officer has erred in the means applied to achieve the ends of his or her professional duty. That is to say, the successful claim has invariably been in relation to conduct directed towards achieving the ends of law enforcement.

The pattern that emerges from the application of the article gives some insight into the intention of the parties as regards the meaning of the phrase "... while in the execution of his duty...". It seems undisputed that at a minimum the activity of the officer who is pursued civilly or criminally must be seen to be related to accomplishing the duties which the officer is sworn to perform. The rather obvious limitation of the concept of the execution of an officer's duty, and therefore the application of article 14.02, emerges from the treatment by the parties of the plainly extreme case of a former Thunder Bay Police Officer named Lewicki. While working alone on duty at night Constable Lewicki committed a break and enter into private premises for clearly unlawful purposes entirely unrelated to his duties as a police officer. He was subsequently convicted of the break and enter charge, and was serving a prison sentence at that time of this hearing. The Association concedes that in the circumstances of Constable Lewicki there should be no possibility of a successful claim under article 14.02, and indeed none was processed in his case. It appears to be well understood between the parties that a police officer endeavouring knowingly and

deliberately to break the law in a manner unrelated to law enforcement cannot claim the protections of article 14.02 of the collective agreement.

It is fair to say that in their respective arguments counsel for both parties left not a stone unturned in their attempts to assist the Arbitrator to understand the intended meaning of the indemnity provision of their collective agreement. As part of its submission the Association placed before the Arbitrator a compendium of all of the indemnification clauses negotiated on behalf of the police associations in all of the municipalities in Ontario whose collective agreements with their police association contain such a provision. The purpose of that effort is to argue by way of comparison, highlighting the kinds of provisions that the parties to the instant agreement have apparently omitted from the language of their own provision. For example, it is stressed by the Association that such elements as acquittal of a criminal charge or proof of the exercise "in good faith" of an officer's duty have not been made a condition of entitlement to indemnification under this agreement, as they have in others. The suggestion is that the parties intended a broader protection to the employee officer under the terms of the instant agreement.

In the Arbitrator's view that approach to the interpretation of article 14.02 is of decidedly limited value. While an extensive catalogue of things which the parties chose not to say within the language of their collective agreement, as compared with other parties who are similarly situated, may be of some general interest, in the end it is the words which they chose to express their agreement which must be the focus of the adjudicator's attention. To draw the conclusion that by the omission of such words as the "execution in good faith of his duty" the parties must be implied to have intended the protection of employees acting in bad faith or in gross dereliction of their

duty requires a dubious leap of faith which I am not prepared to make. The fact that other parties, or their interest arbitrators, may have gone to great lengths in the wording of other indemnification clauses to tie down all possible eventualities tells us little about the intention of the instant agreement. Moreover, as the cases reviewed below suggest, the wording of such clauses is often driven by the experience of particular cases, the eventualities of which defy reasonable prediction. There are good reasons to hold to simple language in a provision of this kind, and a number of arbitral awards to demonstrate that more elaborate formulations do not necessarily eliminate the possibility of dispute.

Similarly, I am left in substantial doubt that any weight can be ascribed to the positions which either of the parties have taken at the bargaining table since the indemnity provision first came into the collective agreement in 1972. It is clear that since that time the language of indemnity clauses in a number of collective agreements governing police forces in Ontario has changed. A number of arbitration awards, some of which are reviewed below, have emerged, providing interpretation of various words and phrases found within those clauses. It is therefore not surprising to find the parties to a collective agreement such as the one at hand coming to the bargaining table with proposed refinements to their indemnification clauses, if nothing else out of an abundance of caution, to ensure the greatest degree of protection to their own perceived interest. Boards of arbitration must, however, remain extremely cautious not to ascribe undue significance to such gestures in attempting to understand the agreed meaning of pre-existing terms of the parties' collective agreement. The fact that a party may wish to supplement or tighten up the language of a collective agreement provision should not, absent clear language to the contrary, be taken in and of itself as an admission of an existing gap in its content. For example, it appears that following the

charges against Sergeant Sundell and the three other officers, during bargaining, the Board of Commissioners sought to introduce an amendment to article 14.02 which would have limited the protections of that provision to officers acting in the "lawful" execution of their duty. With the greatest respect to the contrary arguments of counsel for the Association, I am not persuaded that the Employer's initiatives in that regard should be fairly construed, ex post facto, as an admission that the prior intention of the provision was to the effect that the deliberate unlawfulness of an employee's actions must be irrelevant in considering his or her entitlement to indemnification. Moreover, to take the approach to interpretation suggested by the Association would, in the long run, have a chilling effect on the ability of parties to come to the bargaining table with proposals for amendments to the language of their collective agreement made freely and on a "without prejudice" basis to their pre-existing rights under the language of their contract. Those familiar with the give and take of collective bargaining know that it is natural for the parties to seek to define and re-define the terms of their agreements in language which clarifies their intention, without necessarily changing its substance. For these reasons I can ascribe no weight to the evidence of efforts on the part of the Board of Commissioners to effect changes in the language of article 14.02 since the time of its inception in 1972. I am satisfied that the provision before me falls to be interpreted on the basis of its language, having regard to the general purpose for which it was intended.

B. Jurisprudence

In the Arbitrator's view, in considering the meaning and application of article 14.02, it is helpful to appreciate the approach taken to similar provisions in other arbitral awards. The indemnity provisions found within the collective agreements

between municipalities and police associations in Ontario have spawned a significant body of jurisprudence. Most of the disputes giving rise to the reported, as well as the unreported, awards arise from factual disagreements in respect of the application of words similar to the phrase "while in the execution of his duty" found in article 14.02 of the instant agreement. The cases referred to the Arbitrator by the parties therefore provide some helpful insights.

In an arbitration between the Waterloo Regional Board of Commissioners of Police and the Waterloo Regional Police Association (award dated July 23, 1983) Arbitrator Weatherill was called upon to decide whether a police constable was entitled to indemnity for legal fees incurred in his defence of charges of neglect of duty tried under Regulation 791/81 under the Police Act The charges were based on allegations of insubordination and disobedience by the officer of an order to shave off a beard. Article 10.05 of the collective agreement then in question provided indemnity for charges arising "... during the legal execution of his/her duty ...". While the arbitrator found that the charge, falling as it did under a provincial statute, was one which would generally come under the indemnity provision, he determined that the grievor's personal appearance was not something which arose out of the execution of his duty. The mere fact of being on duty in a state of dress which attracted discipline did not, in that arbitrator's view, bring the officer's circumstances within the contemplation of the indemnity clause of the collective agreement.

The arbitration between the Corporation of the Town of Wiarton and the Wiarton Police Association, and the award of Arbitrator Dempster dated December 17, 1986, concerned the claim of an officer for indemnity for his legal defence in respect of a charge of attempted theft and theft of confiscated liquor. It also appears that the

constable in question was charged with five major offences under the Police Act While the facts of these prosecutions are not related in the award, it appears from Mr. Dempster's characterization of the issue that the claim was for indemnification relating to legal costs for both the criminal and Police Act charges. The collective agreement in that case provided, under article 22, that an officer is entitled to indemnification for "... any Court or hearing costs of any legal actions brought against any member(s) in relation to his duties". Along with another officer, the grievor in that case had dumped confiscated liquor in a wood, without reporting it and, according to his partner's account, while consuming some of it. The arbitrator found that since the charges laid concerned incidents that took place while the officer was on duty they were in relation to his duties as a police officer, and that he was therefore entitled to his legal costs in respect of both the criminal charges and the disciplinary proceedings brought against him under the Police Act While the rationale for that decision is not elaborated, it does appear that the arbitrator seems to have placed substantial weight on the evidence of the grievor to the effect that he had merely taken it upon himself, along with the other officer, to dump confiscated liquor in an isolated location without filing an occurrence report, and did not consume any. The analysis in the award does not appear to consider the consequence of a possible finding that the officer had stepped outside the course of his duty and proceeded on a "frolic of his own".

In a further case involving the same parties, in an award by Mr. Dempster dated December 17, 1986, the issue was whether a police constable charged with fraud in respect of a report of damage to another constable's car was entitled to indemnity for his legal defence. It appears that an auxiliary officer had reported to the constable that during a break and enter at the police offices in the Town Hall his car had been scratched by vandals. The auxiliary officer's subsequent claim for insurance, supported

in part by the constable's report, was found to be fraudulent. The auxiliary officer pleaded guilty to the charge of fraud and resigned from the force. The criminal charge against the grievor was still pending at the time of the arbitration hearing respecting his claim for indemnification. The grieving officer who had filled out the report based on the information given to him by the auxiliary officer, was found by the arbitrator to have done so in good faith during the course of his investigation of the break and enter. On that basis the grievance was allowed, with the arbitrator concluding there was no evidence before him to suggest other than that the grieving constable faced a criminal charge which did arise out of the execution of his duties. Again, while there is no analysis in respect to the issue of whether the officer had stepped outside his lawful role, it appears implicit from the arbitrator's analysis that he interpreted the indemnification clause within the collective agreement to contemplate, implicitly, protection for an officer who exercises his duty in good faith, notwithstanding that unlawfulness in the form of a fraud might have resulted and, it appears, regardless of the outcome of the subsequent criminal proceedings.

In my view the Wiarton award leaves unresolved the issue of the advisability of determining the merits of an officer's claim for indemnification prior to the conclusion of the criminal proceedings to which the claim relates. The risk of the approach taken in that case is that the arbitrator and the criminal court may make entirely inconsistent findings as to the conduct and good faith of the officer, and the issue of whether the individual was or was not acting within his or her lawful authority. While the issues before the board of arbitration and the criminal court are in a sense different, as the cases next reviewed disclose, the arbitrator's decision may well be influenced by the findings and outcome of the criminal prosecution. It would appear, on balance, that grievances of this kind are best heard and disposed of after the

criminal proceedings have concluded, when the decision of the board of arbitration can be made on the basis of the fullest information.

The kind of gray area with which these cases sometimes deal is well revealed in the award of Arbitrator Swan in a grievance between the Board of Commissioners of Police for the Regional Municipality of Durham and the Durham Regional Police Association, dated November 9, 1983. In that case a police constable was found to be in possession of a .22 calibre silencer, a prohibited weapon whose possession is an offence under section 88 of the Criminal Code. He was an avid gun collector and had become something of the resident expert on guns and ballistics within the force. He was acquitted of the criminal charge against him, with the trial judge finding, in part, that he was "a semi-expert in weapons", and that the possession of the silencer, which was kept without any attempt at subterfuge in his toolbox in the force's armory room indicated that "... it was basically there for the purposes of his employment or training or duties in his instruction work and his training". The trial judge found that the officer then fell within the exception allowing the possession of such a weapon established in section 90(l)(b) of the Criminal Code, as he possessed the silencer for the purpose of his duties or employment. Faced with that evidence, while expressing sympathy for the point-of-view of the Board of Commissioners, the arbitrator felt compelled to draw a conclusion in respect of the employee's claim for indemnification which was at least consistent with the reasoning of the trial judge who acquitted him. In the result, therefore, it was found that the offence with which he was charged was one which, in the terms of the language of the collective agreement, was "... flowing from his police duties ...". On that basis the grievance was allowed.

In a grievance between the Metropolitan Toronto Board of Commissioners of Police and the Metropolitan Toronto Police Association decided by Arbitrator Pamela C. Picher, (award dated November 13, 1985) the issue was whether the costs of a police constable's defence in relation to a charge of common assault arising out of an arrest which he made while off duty fell under the legal indemnification provisions of the collective agreement. Article 23.01 of the agreement provided that indemnification should be available to "... a member charged with and finally acquitted of a criminal or statutory offence, because of acts done in the attempted performance in good faith of his/her duties as a police officer ...". A separate part of the indemnification provision further provided that indemnity could be refused where the actions of the officer from which the charges arose amounted to a "...gross dereliction of duty or deliberate abuse of his/her powers as a police officer". In that case the grieving constable got into an altercation with a taxi driver who, he alleged, deliberately damaged his vehicle while the officer was proceeding through a traffic jam while out of uniform and off duty. The issue in that grievance was essentially whether the off-duty officer was simply provoked into a private altercation when the taxi driver, who was partially impeding his vehicle's progress, opened the door of his taxi, striking the side of the grievor's car, while smirking at him. The officer claimed that he engaged in a struggle with the taxi driver in an effort to arrest and charge him with mischief against private property. The cabbie was in fact subsequently charged with both that offence and common assault. He was convicted on the charge of assault, with the charge of mischief being dismissed. Meanwhile he brought a private prosecution against the police constable for common assault, the result of which was the officer's ultimate acquittal.

The position of the Board of Commissioners in that case was that the grievor was still acting as a private citizen when he engaged in the altercation or,

alternatively, that if he was acting as a police officer he was engaged in a dereliction of duty and a deliberate abuse of his powers. On the evidence both positions were rejected by the arbitrator, who accepted the officer's evidence that he attempted to identify himself to the taxi driver before trying to affect the arrest. She was satisfied that the taxi driver's conduct did involve deliberately inflicting damage on private property which constituted an "arrestable offence" and that the officer in question had the authority to make the arrest. While accepting that the grievor may have acted too hastily in himself attempting to make the arrest, rather than summoning another officer to do so, the arbitrator found that the constable was acting within his discretion as a police officer in the attempted performance and good faith of his duties. It may be noted that in that case the concept of good faith was expressly included in the language of the parties' contractual provision respecting an employee's entitlement to legal indemnification.

The same language fell to be construed in another case involving the Metropolitan Toronto Board of Commissioners of Police and the Metropolitan Toronto Police Association, in an award issued by Arbitrator Swan dated January 12, 1987. That case involved a police constable who disappeared for a period of some two and one half hours while he was on duty and in charge of a police cruiser in the early morning hours of New Year's Day. He finally returned to his division station in the company of a second constable who was obviously inebriated. When asked to submit to a breathalyzer test while still in control of his police cruiser, he declined to provide a breath sample. He was charged under section 234 of the Criminal Code, was tried in Provincial Court and acquitted. The constable related, both at the criminal trial and at the arbitration, that one of his reasons for refusing the breath sample was that he was of the opinion that it was being requested entirely for the purposes of administering

internal police discipline, in respect of charges under the Police Act, rather than for the purposes of any criminal offence. He stated that in his opinion he did not feel that he was required to give a sample in those circumstances and so refused to do so. This appears to have been the reason for his acquittal of the criminal charge by the trial judge.

In the circumstances the arbitrator decided to apply strictly the wording of the indemnification section and, absent any evidence as to what the constable had been doing prior to the refusal of the breath sample, concluded that his care and control of the police cruiser must have been a condition precedent to the laying of the criminal charge against him. The operation of the cruiser was a duty assigned to the officer that night, and there was no evidence before the arbitrator to suggest other than that he had fulfilled that duty in good faith. On that basis the arbitrator felt compelled to conclude that the charges did arise "because of acts done in the attempted performance in good faith of his duties as a police officer ...". It was also found that the lack of evidence concerning the constable's activities fell short of establishing any gross dereliction of duty on his part. In the result, the grievance was allowed. The arbitrator's analysis suggests that if there had been evidence to establish gross misconduct on the officer's part, he would have no right to indemnification notwithstanding his acquittal of the criminal charge. The decision of Arbitrator Swan was subsequently upheld on judicial review: (see, Metropolitan Toronto Board of Commissioners of Police and Metropolitan Police Association (1988), 64 O.R. (2d) 250 (Ont.Div.Ct.).

The most recent arbitral award in this area brought to the Arbitrator's attention is that of Professor Langille, an award dated March 21, 1989 in respect of a

grievance between the Hamilton-Wentworth Police Association and the Hamilton-Wentworth Regional Board of Commissioners of Police. It involves the somewhat notorious case of a number of police officers alleged to have been involved in consuming confiscated alcohol in a secured storage room of the police station while assigned to the vice section of the force. The evidence established that for many years, beginning at a police station since closed, the vice squad evolved a practice of relaxing and "shooting the breeze" at the end of their tour of duty in the middle of the night. While, it seems, initially they might send out for a pizza and consume some of their own beer in these after-hours gatherings, on occasion they dipped into the seized beer being stored for disposal. Over time an inner circle of officers came to be regular participants in the "de-briefing" sessions which came to regularly involve the consumption of confiscated alcohol. There appears to be no doubt that their activities were not approved, and were deliberately concealed from the force in general.

The arbitrator found that the grievor participated in what was estimated to be three of these sessions during his two years of service in the vice section, when he admittedly consumed confiscated beer. Along with five others the grievor was charged with theft under $200 and conspiracy to commit theft under $200 and, following a preliminary hearing, was discharged on both counts. He claimed indemnity under the terms of the collective agreement between the Board of Commissioners and the Association, for the legal costs incurred in his defence of the criminal charge. The operative words in the provision there at hand were the entitlement to indemnity for having been charged with a criminal offence "... because of acts done in the attempted performance of good faith of his duties as a police officer ...".

Professor Langille reasoned that the key to the provision was the good faith of the officer in question. The arbitrator phrased the question in terms of whether the grievor, in involving himself in the after-hours sessions of the vice division was honestly and in good faith trying to do the job which he was assigned. The adjudicator found that the vice section was a special group or culture apart from the mainstream of the force, and that the after hours bull sessions were an integral part of its operation. He accepted that the grievor, being strange to the setting and wanting to the best of his ability to integrate himself into the section by participating in something of an established ritual, was endeavouring to forge bonds of trust that would enhance his work as an officer in the division. While accepting that the conduct was improper, and would have been seen to be so by the grievor, the arbitrator commented: "It was a situation in which the circumstances justified, and had justified for a lot of people over a long time, an impropriety". Given the overall context, and the minimal involvement of the grievor in the activities in question, the arbitrator concluded that the officer was acting in good faith in the attempted performance of his duties by participating in the consumption of the seized alcohol.

In explaining the rationale for his decision, apart from the factors related above, the arbitrator emphasized that other elements lent support to his conclusion. Foremost among these was the fact that a number of other officers who were central to the activities of the inner circle, and who had been much more involved than the grievor, had not been charged. In the absence of any explanation for that omission, the arbitrator found an element of tacit condonation by the force. Secondly, the arbitrator ascribed some weight to the fact that the force chose to proceed by way charges under the Criminal Code, rather than taking disciplinary procedures under the Police Act In his view it was not inappropriate that, having chosen that method of proceeding, the

Board of Commissioners should live with the result of the dismissal of all charges against the officer. On the whole, for all of the reasons reviewed, the arbitrator concluded that the charges against the grievor, which were thrown out at the preliminary hearing and of which he must be deemed acquitted, did arise out of acts which he did in the attempted performance in good faith of his duties, and the grievance was allowed.

A review of the awards in respect of the disputed claims for the indemnification of police officers facing criminal charges and civil litigation reveals a number of recurring themes. Firstly, the awards disclose some acceptance on the part of labour arbitrators that the rights of police officers as employees often involve special considerations which might not obtain in another workplace. Police officers work in a para-military structure that reflects a kind of exclusive and mutually supportive fraternity. Because the very duties of police officers require them to be seen as the enforcers of authority, they are required to safeguard their routines and methods within closed ranks and to work at arm's length from most people. That reality of the job can create a sense of distance from even the most law-abiding citizens. Not surprisingly, therefore, in the exercise of their functions police officers share a certain solitude, as well as other sources of stress that reflect a realm of experience that may not be readily understood by all civilians.

A further theme reflected in the jurisprudence is an understanding that police officers frequently function in relatively undefined, gray areas where the limits of lawful conduct may not be readily discernible or easily measured. They must act, or react, in circumstances that may be unusual by the light of general human experience, and make decisions, often quickly, without the benefit of independent advice.

Additionally, since they are necessarily in contact with crime, they are exposed to the stress of dealing with some of the most unsavory of society's characters, as well as some of life's most unfortunate victims. An appreciation of these various factors has caused boards of arbitration to apply both caution and compassion in the assessment of the conduct of police officers, particularly in relation to defining in a fair and realistic way the ambit of the exercise of an officer's duty. Compassion, however, must be kept in perspective. There is nothing in the awards, or in sound principle, to suggest that a police officer's duty can involve deliberately disregarding the rule of law for the purpose of facilitating criminal activity.

C. Decision

Against the background of the foregoing observations I turn to consider the merits of the claim of Sergeant Sundell to indemnification under article 14.02 of the collective agreement. The first issue before me is whether the charge against him of criminal conspiracy to obstruct justice by interfering with the execution of search warrants, contrary to section 423(l)(d) and 127(2) of the Criminal Code, arose as a result of Sergeant Sundell being an employee of the Board of Commissioners while acting in the execution of his duty.

In my opinion the evidence before me in respect of that issue is clear and categorical. As a peace officer Sergeant Sundell was sworn to uphold and enforce the law. As a member of the morality division of the Thunder Bay Police Force it was part of his duties to observe the activities of bawdy houses, swear informations for the purposes of obtaining search warrants in respect of those premises and to effect the execution of those warrants for the purpose of charging and obtaining the conviction of

the keepers, inmates and found-ins of the houses. In accordance with public policy, the ultimate purpose of these duties was to prevent, or at the least inhibit, the criminal activity of operating a common bawdy house, prohibited by the Criminal Code.

The grievor's activity giving rise to his prosecution was quite different, however. The evidence before me leaves no doubt that Sergeant Sundell knowingly, deliberately and in a manner calculated to conceal his actions, engaged in the practice of providing advance warning of raids to the bawdy house located at 267 Pearl Street in Thunder Bay. The intention of his practice was as obvious as it was successful: to facilitate the ongoing operation of the bawdy house by giving its operator the means of warning away regular customers who might otherwise suffer the cost and embarrassment of facing criminal charges as found-ins.

In resolving this grievance, I must take the law and the facts as I find them. Whatever the merits of the debate for or against prostitution in general and bawdy houses in particular, the Arbitrator cannot avoid the conclusion that the following elements are proved. A bawdy house existed at 267 Pearl Street. Sergeant Sundell was responsible among other things, for obtaining search warrants for the purpose of conducting surprise raids at that location to effect the laying of charges and obtain the ultimate conviction of persons there engaged in activities contrary to the Criminal Code. Regardless of the private views of some, from the perspective of the Code the long term objective of that criminal process was to put an ultimate stop to the criminal activity being prosecuted. Notwithstanding that obligation, Sergeant Sundell admittedly provided surreptitious advance notice to the operators of the bawdy house, thereby frustrating the normal effect of the search warrants and the raids conducted pursuant to them.

It goes without saying that but for the cooperation of Sergeant Sundell and other officers who engaged in the same practice, the business of the bawdy houses would have been made substantially more difficult. As the evidence before me amply discloses, customers who could not know with any certainty whether they were risking criminal charges by frequenting those establishments would, in all likelihood, have minimized if not entirely eliminated their contact with them. The conduct of Sergeant Sundell in tipping off the Pearl Street bawdy house, which I am satisfied was the activity which gave rise to the criminal charge against him, was ultimately antithetical to the purposes of law enforcement. What he did was to assist the long-term successful pursuit of criminal activity by the operators, inmates and customers of the bawdy house. His conduct in no way involved an excess of zeal or an error of judgement made in good faith respecting the means of law enforcement. Nor did it involve the exercise of police discretion in the laying of charges. What the evidence discloses is a perversion of the grievor's duty as a police officer. Far from preventing crime, he became its partner. His actions were calculated to stabilize and facilitate an unlawful enterprise for the purpose of enhancing its success and profitability.

Can it be said that the history of the bawdy houses in Thunder Bay has some bearing on the application of article 14.02 in this case? I stand in some admiration of the resourcefulness of the arguments marshalled on behalf of Sergeant Sundell by counsel for the Association. However I have great difficulty with those arguments, and I am unpersuaded by a number of factors raised by him. The extensive evidence relating to community attitudes regarding bawdy houses and the low priority assigned to them by the police force over the years cannot, in my view, be looked to as a basis to redefine what constitutes the execution of a police officer's duty for the purposes of article

14.02. In Thunder Bay, as in any city, the limits of the law and, by extension, of a police officer's duty, are not to be determined by the musings of the Mayor, however public and controversial they may be. Nor do they take their measure from the general attitude of the community which, at different times and in different segments, may hold views and values which differ substantially from those reflected in the Criminal Code of Canada. Factors of that kind may well have some general bearing on the policies that drive law enforcement, including decisions in relation to resource allocations, and the exercise of police discretion with regard to the frequency of the laying of various kinds of charges. However, they cannot extend to redefine what is lawful or unlawful and the correlative content of a police officer's duty.

Additionally, I am not persuaded that the acquittal of Sergeant Sundell of the conspiracy charge can be said to bring him within the protection of article 14.02. For reasons best known to themselves, and unlike parties to other collective agreements, the Board of Commissioners and the Association have not made acquittal or conviction pre-conditions to a police officer's entitlement to indemnification under the terms of article 14.02. It does not appear disputed that the criminal conviction of a police officer, for example in the case of assault, would not preclude recovery under the article. The purpose and focus of article 14.02 is not whether the officer has been successfully or unsuccessfully prosecuted. It is, rather, whether the criminal proceedings arose as a result of his being a police officer acting in the execution of his duty.

On the basis of the jurisprudence reviewed above, I might well be prepared to conclude that, in a doubtful case, an officer's belief in good faith that he was acting within his duty would bring him within the purview of the article. However no such consideration arises on the evidence before me. In clear distinction from the issue

before Professor Langille in the Hamilton-Wentworth case or that before Arbitrator Pamela Picher in the Metropolitan Toronto award, there is not a jot of direct testimony before me to the effect that the grievor or any officer of the Thunder Bay Police Force entertained a belief in good faith that tipping off the operators of a bawdy house in advance of a raid was any part of the lawful execution of the duty of a police officer. Sergeant Sundell was not called to testify before me. Not one police officer among a substantial number called as witnesses uttered a word in support of the suggestion that tipping off the operators of bawdy houses in advance of raids constitutes proper or lawful conduct on the part of a police officer. On the contrary, each officer who was asked the question responded unflinchingly that it would be clearly improper for an officer to tip off a criminal suspect by giving advance notice of a raid to be conducted pursuant to a search warrant obtained from a justice of the peace. In the Arbitrator's view the truth of that proposition is self-evident.

Nor do I find in the circumstances of this case, notwithstanding the exhaustive evidence advanced by the Association, that the history of the treatment of bawdy houses by the Thunder Bay Police Force, marked as it was by a degree of tolerance which was apparently accepted by the community at large, can have any significant bearing in assessing the application of the language of article 14.02 of the collective agreement to the circumstances at hand. Clearly there was an undeniable aura of tolerance of the bawdy houses by the police and the judiciary that continued over many years. Even in the 1980s the bawdy houses were tolerated to a degree which caused surprise in a recruit such as Constable Hobbs. However there is nothing before me to suggest that any signal of condoning direct tip-offs to the bawdy houses by officers of the morality division was ever communicated, expressly or tacitly, by any officer of responsible rank within the force. Although the evidence does reveal a degree of

laissez-faire, it cannot in my view successfully argued that any member of the Thunder Bay Police Force believed or had reason in good faith to believe that it was part of his or her duties to provide surreptious advance notice of raids to the operators and inmates of the bawdy houses in Thunder Bay. The evidence before me is directly to the contrary.

For these reasons I have no difficulty in coming to the conclusion that, according to its intended meaning, article 14.02, and in particular the phrase "... as a result of such employee being an employee of the Board, while in the execution of his duty ..." has no application to the activity of Sergeant Sundell giving advance warning to the bawdy house on Pearl St. of raids which were about to be conducted in furtherance of search warrants. The charges against him, as outlined in the information of Inspector Crozier, did not relate to anything done by Sergeant Sundell "... in the execution of his duty ...". The frustration of the criminal process effected by a police officer who gives advance warning to persons he knows or has reasonable and probable cause to know are about to commit a criminal offence that will be the object of a police raid is, by any standard, plainly antithetical to the execution of a peace officer's duty and can not be said to arise in any way out of his or her status as an employee of a police force.

For all of the foregoing reasons, I find that the position advanced by counsel for the Board of Commissioners with respect to the normal interpretation and application of article 14.02 to the circumstances of Sergeant Sundell must be accepted. The criminal prosecution against which he was forced to defend himself at great financial cost did not arise as a result of his employment as a police officer acting in

the execution of his duty. On the contrary, it arose as a result of his stepping outside the lawful bounds of his obligations as an employee and his duties as a police officer.

IV DISCRIMINATION AND ARTICLE 15.03

I turn to consider the second issue raised by the grievance, namely the allegation of the Association that the Board of Commissioners discriminated against Sergeant Sundell. It submits that there has been a discriminatory application of the terms of the collective agreement to his claim for the indemnification of his legal defence costs, as compared to those of the three other officers who were charged and acquitted along with him. The Association's counsel submits that the refusal to pay the grievor's claim cannot be justified in light of the preferential treatment of those three officers and argues that the circumstances constitute grounds for the exercise of the Arbitrator's remedial discretion under article 15.03 of the collective agreement. For ease of reference that article bears repeating:

> 15.03 Arbitration
>
> No grievance may be submitted to Arbitration unless the grievance procedure specified in this Agreement has been fully complied with.
>
> The Board of Arbitration shall consist of three members, one to be appointed by each party and the third, which shall be the Chairman, to be appointed by the other two appointees.
>
> If either party cannot make an appointment within thirty (30) calendar days of the completion of the grievance procedure the Attorney General of the Province of Ontario may make such appointment upon the request of the other party. If no agreement is reached on the third member of the Board of Arbitration within five (5) days of the agreement of the last of the

> other two members the Attorney General may appoint the third member upon the request of either party. The parties shall pay the costs of their respective appointees to the Board of Arbitration and will share equally the costs of the Chairman of the Board of Arbitration.
>
> The Arbitration Board shall not alter, add to, subtract from, or amend any part of this Agreement but it may impose any settlement it feels is just and equitable.
>
> [emphasis added]

It may be noted that the instant matter is before me as sole arbitrator upon agreement of the parties, and that no issue is raised in respect of my jurisdiction or the application of article 15.03 generally to this arbitration.

A. Discrimination

It is well settled that, absent some clear indication to the contrary in the language of a collective agreement, its terms are to be administered fairly, and on an equal basis, as among the employees whose rights and protections are established within it. Arbitral awards have acknowledged that it is not open to an employer to provide the benefit of a particular provision of a collective agreement to one group of employees while denying the same treatment to other employees whose circumstances are materially indistinguishable. (see, Re Sudbury General Hospital of the Immaculate Heart of Mary and Ontario Nurses' Assoc (1984), 15 L.A.C. (3d) 40 (M.G. Picher); Re Ottawa Civic Hospital and C.U.P.E. Local 576 (1982), 6 L.A.C. (3d) 109 (McLaren); Re Inglis Ltd. and U.S.W., Local 4487 (1978), 17 L.A.C. (2d) 380 (Beck); Re Kodak Canada Ltd. and International Chemical Workers' Union, Local 159 (1975), 10 L.A.C. (2d) 332

(Betcherman); Re International Chemical Workers' Union and Chemical Developments of Canada Ltd. (1968), 19 L.A.C. 302 (Weatherill).

Counsel for the Board of Commissioners does not take issue with the accepted principles respecting the discriminatory application of the terms of a collective agreement. He submits, however, that the facts in this case do not disclose any discriminatory treatment of Sergeant Sundell. The thrust of his argument is that his circumstances are distinguishable from those of the three other officers who were charged and acquitted along with him. He stresses that for his Own reasons Sergeant Sundell retired from the force during the course of the criminal proceedings against him, thereby avoiding the potential consequences of the disciplinary proceedings which were pending under the Police Act, and which had been stayed following the Divisional Court decision described above. He argues, in other words, that by taking retirement, which he prefers to characterize as resigning, Sergeant Sundell avoided the possibility of being discharged from the force for disciplinary reasons. He submits that in so doing the grievor forfeited the leverage which was retained by the three other officers who would have remained active members of the force following their acquittal. Counsel stresses that those three officers were in a substantially different position from the grievor, to the extent that they could trade their resignations from the force in exchange for the payment of their claims for legal indemnification, even though it was a benefit to which they were not entitled. It is argued, on behalf of the Board of Commissioners, that at the time of the payment of the monies to the three other officers Sergeant Sundell had effectively divested himself of whatever ability he may have had to obtain a similar settlement.

On the surface the argument so framed by the Employer has a certain logical appeal. However, upon close examination of all of the factors which I consider pertinent, I have substantial difficulty with the position of the Board of Commissioners on the issue of discrimination in the treatment of Sergeant Sundell.

Sergeant Sundell was one of four officers covered by the grievance of the Association claiming, for all of them, an entitlement to legal indemnification for their defence of the criminal conspiracy charges. His status in comparison to the other officers must, in my view, be assessed not as at the time of the acquittal, but as at the time of the events which constitute the basis of the charge against him and at the time he filed his grievance. Those events were prior to both his retirement and his acquittal. Viewed from that perspective, Sergeant Sundell's claim for legal indemnification, at the time it was first made, could be no more or less meritorious than those of his co-accused fellow officers. If, as I have concluded above, article 14.02 provided no protection to Sergeant Sundell, it was likewise unavailable to assist the three other officers.

In considering this issue it should be stressed that there is no dispute before me that all four officers had engaged in equally culpable conduct, quite apart from their acquittal of conspiracy. The unrebutted evidence of Ms. Sylvia Ross, moreover, establishes beyond controversy that, like Sergeant Sundell, one of the other three officers did provide her with advance warning of bawdy house raids, thereby frustrating the execution of search warrants and the purpose of the raids themselves. There was nothing in the conduct of any of the officers giving rise to the charges against them which would have materially distinguished them from Sergeant Sundell for the purposes of article 14.02 of the collective agreement. Indeed, no contrary suggestion was argued

before me. While it is unnecessary for the purposes of this award to make a determination on the point, it is perhaps arguable that Constable McKenzie, who on one occasion knowingly accepted sexual favours from a bawdy house, ventured into a degree of dereliction of duty that went beyond the grievor's. Bearing in mind Sergeant Sundell's own involvement in that episode, however, the safest, and perhaps most conclusive observation is that there is not much to choose as among the unfortunate misdeeds of all four of the officers concerned.

What the evidence discloses, therefore, is that four officers, including Sergeant Sundell, were criminally prosecuted as a result of actions which went contrary to their obligations as police officers. From the outset, the Board of Commissioners took a correct position in declining the claims of all four of them for the payment of their legal defence costs. The merit of its position did not change because of external events such as Sergeant Sundell's retirement or the acquittal of the four accused. At the time that the criminal charges were laid, which in my view is the operative time for the purposes of assessing the entitlement of all of the officers under article 14.02, Sergeant Sundell stood on an equal footing with the others in respect of such right as he might have had to claim or be denied indemnification under article 14.02 of the collective agreement. I make that observation in light of the general principle that the merits of any grievance are to be assessed in light of circumstances as they were at the time of the grievance, and not in light of subsequent events. It is equally significant that all of the officers were also made the subject of discipline proceedings by way of charges under the Police Act That was the only route available to the Board of Commissioners to terminate their services. For the reasons recounted above, that disciplinary process was placed in abeyance, following the suggestions of the Divisional Court.

What, then, were the options of the Board of Commissioners following the acquittal of the four officers? Sergeant Sundell was then less of an immediate embarrassment, in the sense that he had retired and could not assert a right to return to work. It cannot be said, however, that the Board of Commissioners had no alternative but to pay off the three other officers by satisfying their claims for indemnification, in return for their resignations. Just as legitimately, it could have proceeded with the disciplinary charges against all three officers for the purpose of securing their removal from the force. The Arbitrator understands the Employer's motives for avoiding further proceedings, including charges under the Police Act, in respect of the three constables who were still active. However, the fact that the Board of Commissioners had options in that regard does, in my view, have some bearing in assessing the relative entitlement of Sergeant Sundell to indemnification, and the issue of alleged discrimination against him.

By his notice of May 23, 1985 Sergeant Sundell retired from the Thunder Bay Police Force. He then had an undisputed right to exercise his election to retire on the basis of his years of service. Whatever view his employer may have had of his motives, the grievor had earned a vested right to retire. It does not appear disputed that he was entitled to exercise that right at his option, without explanation or leave, and without in any way forfeiting such other rights as were vested in him by virtue of the terms of the collective agreement. One of those rights was to pursue his claim in respect of indemnification for the costs incurred for his legal defence of the charges of criminal conspiracy of which he and the three other officers had been acquitted. Another was to be accorded equal treatment in respect of that claim.

When the acquittals were registered the Board of Commissioners was in a position of some obvious embarrassment. Substantial amounts of time and public funds

had been expended without securing the conviction of any of the officers concerned. Additionally, the disclosure of the extent of the fraternization between members of the morality division of the Thunder Bay Police and the operators of the bawdy houses created a public scandal that clearly embarrassed the force. It is not surprising, therefore, that the Employer wished to see the file closed as expeditiously as possible. With that in mind it opted to pay the indemnification claims of the three officers in exchange for what it describes in its press release as their pleas of guilty to the disciplinary charges of dereliction of duty, and their consequent resignations from the force. However, in fact and in law, the three officers who were so compensated were no more entitled to receive indemnification than was Sergeant Sundell. It is true that this bizarre scenario had more than its share of unforseeable events. However, given the extent of the evidence and admissions available for proof before the Arbitrator in the instant case, it appears highly unlikely that the Board of Commissioners could not have secured the disciplinary discharge of the three officers if it had simply proceeded against them under the Police Act, without making any concessions in respect of their claim to indemnification, whether on a "without prejudice" basis or otherwise.

Stripped to its essence, the bargain struck between the Board of Commissioners and the three officers was the payment of their indemnification claims in exchange for a favour. That favour, or concession, was their resignation without the additional cost of prosecuting the charges against them under the Police Act While the deal struck may have had upsides and downsides for all concerned, it was, in the end, a set of individual deals concerning a collective claim in respect of a collective right made under a collective agreement. While arrangements of that kind may seem acceptable to persons who are used to plea bargaining, they do not withstand scrutiny

by the light of established principles of collective bargaining, if they result in the discriminatory treatment of one employee as compared to others of the same class.

Granting to employees preferential treatment in respect of claims under a provision of general application in a collective agreement as a reward for conduct or actions favourable to the employer's interest has consistently been found by boards of arbitration to constitute discrimination that is contrary to an obligation to apply a collective agreement fairly and equally to all employees covered by its terms. It has been found, for example, that when a hospital made a disciplinary complaint to a regulatory body about a nurse, it could not pay wages to nurses who absented themselves from work to testify at the discipline hearings in support of its position, while refusing to pay the same wages to nurses who also absented themselves, under subpoena, to testify in support of the nurse. (See Sudbury General Hospital, above). The extent to which arbitrators enforce the equal application of collective agreements and do not countenance the repayment of "favours" by employers is reflected in the strike cases. For example, in the Ottawa Civic Hospital case, cited above, it was found that the granting of a half day of paid leave solely to employees who did not participate in an unlawful strike was in violation of a non-discrimination clause in the collective agreement.

In my view this issue must be addressed from a position based on fidelity to the collective nature of rights negotiated for employees by a trade union or a professional association, and the cornerstone principle that they must be applied equally and fairly. Suppose, for the purposes of this analysis, that events had unfolded differently. Let us assume that the Board of Commissioners had pressed the disciplinary charges against the three officers, and had paid Sergeant Sundell's indemnity claim in

full, on a without prejudice basis, in exchange for his giving evidence in those proceedings that would have secured the discharge of the three officers. Could the denial of indemnity to the three officers in that circumstance, and the payment in full of Sergeant Sundell's claim in exchange for that favour, be any less a discriminatory denial of the claims of the other three? I think not. The right of indemnity under article 14.02 is a general right which extends to all employees. It must be administered, whether through payment or the denial of payment, on a collective and equal basis, and not as a punishment or reward for favours or concessions made individually. Moreover, in approaching this issue substance must prevail over form. However it might wish to characterize its settlement with the three officers, including the invocation of "without prejudice" protection, the Employer paid to the three officers the moneys they were claiming under article 14.02. It denied the same payment to Sergeant Sundell, without any concession on his part or on the part of the Association that his claim could be treated differently, or that the denial of his claim would be anything but discriminatory.

In the result, therefore, Sergeant Sundell, who was no more or less culpable than the other officers, whose grievance for indemnification was filed jointly with theirs, and whose entitlement, or more precisely disentitlement, to compensation under article 14.02 was the same as theirs, was paid nothing while they received compensation in full for the costs of their legal defence. In the arbitrator's view in these circumstances it is inequitable for the Board of Commissioners to maintain that the same payment should be denied to Sergeant Sundell simply because he had exercised his personal right, earned by many years of service, to take retirement. While his disgrace was equal to that of the other officers, so was his right to be treated equitably under the collective agreement.

Counsel for the Board of Commissioners tried to make much of the fact that Sergeant Sundell's retirement was a device to escape the consequences of the disciplinary charges pending against him, and which might in all likelihood have resulted in his discharge. In this regard he questions the merits of the medical reasons for the retirement cited in the brief letter of May 23, 1985. In my view, without diminishing the understandable feelings of the Employer towards Sergeant Sundell, those considerations must be viewed as irrelevant. In fact the grievor did retire, without any visible objection by his Employer, which to all appearances welcomed his leaving. On the material before me it can only be found that by his years of service Sergeant Sundell had earned a right to retire which, for his own reasons, he chose to exercise. His election to do so cannot, in my view, operate to diminish such other rights as he may have enjoyed under the collective agreement. One of those is clearly the implied obligation of the Board of Commissioners to accord Sergeant Sundell the equal treatment in the application of the terms of the collective agreement.

In my view it is important to stress that in the admittedly hard circumstances of this case the Employer had choices. For its own reasons, the wisdom of which is not for the Arbitrator to comment upon, the Board of Commissioners voluntarily paid the indemnification claims of the three other officers who were jointly acquitted along with Sergeant Sundell. It was under no legal compulsion to do so, and could just as defensibly have adopted a posture of principle, refusing to pay anything to the three employees, while maintaining their suspension from service and pursuing their discharge through the prosecution of the charges of gross dereliction of duty pending under the **Police Act** In my view when the Board of Commissioners made the choice to pay the claims of indemnification of the three officers it could not equitably do so in disregard

of the identical claim then outstanding in the name of Sergeant Sundell. Its denial of his claim is, in substance, discriminatory as compared to its payment of the claims of others, and as such is a violation of his right to be treated equally in the administration of article 14.02 of the collective agreement.

B. Article 15.03

The wording of the final paragraph of article 15.03 of the collective agreement is relatively uncommon, insofar as it purports to vest a degree of equitable discretion in the Arbitrator. For the purposes of this award I do not deem it necessary to analyze at great length the intention of the parties in respect of that provision, nor to attempt to define the limits of an arbitrator's discretion under its terms. Firstly, in my view, the conclusion which I have reached in support of the Association's claim of discriminatory treatment against Sergeant Sundell would stand even if the authority of the arbitration board to "... impose any settlement it feels is just and equitable" did not appear in the collective agreement. For the reasons touched on above, and well reflected in the jurisprudence, I take it to be an implied term of the instant collective agreement that its rights and protections extend equally to all employees who are subject to it. No police officer is to be denied payment of a claim which is made to other officers whose circumstances are indistinguishable, for reasons of arbitrariness, bad faith or discrimination. For the reasons related above I am satisfied that the denial of the claim of Sergeant Sundell, notwithstanding the payment of the claims of the three other officers, is discriminatory and in violation of his right to equal treatment in respect of his claim to indemnity.

Alternatively, quite apart from the operation of any implied term that would prohibit discrimination, I am satisfied that the discretion vested in me by virtue of the language of article 15.03 is sufficient, in the circumstances of this case, to allow me to draw the arbitral conclusion that the equities of Sergeant Sundell's case would justify an order for the payment of his claim for indemnification. My conclusion to that effect does not involve any alteration, addition to, subtraction from or amendment of any part of the collective agreement. As I have found in categorical terms above, neither Sergeant Sundell nor any of the three other officers had any good claim to indemnification under the terms of article 14.02 of the collective agreement. The sole issue is whether it is just and equitable for the grievor to be denied his claim while those of his three co-grievors were fully paid.

In approaching the issue of the application of article 15.03 to this case the terms "just and equitable" must mean that which is just and fair in a relative or comparative sense, and not in an absolute sense. If absolute justice were the standard to apply none of the four officers who knowingly lent assistance to the operation of the bawdy houses should have received any compensation for their criminal defence. However, the issue here to be resolved is whether the claim of Sergeant Sundell can justly be denied, given the preferential treatment of the claims of the three other officers, and the general context in which these events unfolded.

In my view it is appropriate to consider the broadest factual background in considering the exercise of such discretion as I may have under article 15.03. In the case at hand the evidence discloses that all four officers acted in the context of long standing tolerance of bawdy houses by the force. That tolerance had many facets, including the apparent condonation of at least some of its chiefs and senior officers,

and a degree of resignation, if not open acceptance, by elected officials and the local criminal courts. While it would be going too far to say that the Board of Commissioners' past tolerance of the bawdy houses made it complicit in the wrongdoing of the four officers, it is difficult to dismiss out of hand the argument that it did not, over the long term, do all that it should have to discourage the conditions of close fraternization that led to their actions and culminated in their prosecution. In my view, in assessing what is just and equitable in this case, while fully appreciating the contrary efforts of Chief Keep for a brief period, some weight can fairly be ascribed to the dubious impression that was allowed to be perpetuated among the ranks over the years by the Employer's long record of laissez-faire. It may be added that the municipality itself, through its former elected officials, as well as the local judiciary, emerges from the record dressed in something less than shining armour. As counsel for the Association suggests, given its broad brush tolerance of bawdy houses over such a long time, the Employer is not now well situated to draw fine lines of distinction in its treatment of Sergeant Sundell and the three other officers.

At the risk of repetition, the extensive evidence before me concerning the claims under article 14.02 establishes that four officers were affected: all were in active service at the time of the criminal charges brought against them and none had greater or lesser rights than any other to be paid indemnification for the substantial costs of their defence of the criminal charges. As noted above, I fail to see how the grievor's exercise of his right to retire, whatever his motive, can justify any less generous treatment of his claim than was voluntarily accorded to his co-accused officers. In paying the claims of the three officers as it did, in consideration of the withdrawal of their grievances and their resignations, the Board of Commissioners was not dealing with personal rights under individual contracts of employment. Rather, it was disposing of

claims to general rights accruing to a class of employees under the terms of a collective agreement. In such circumstances, given that Sergeant Sundell was no more or less culpable than the officers who received the payments, and enjoyed no greater or lesser rights under article 14.02 of the collective agreement, it is in my view inequitable that the Board of Commissioners denied his claim while paying the sums claimed by the others.

Whatever motives underlie the transaction between the Board of Commissioners and the three officers, and whatever language and form may be given to it, in substance the Employer effectively paid the claims of the three officers made under article 14.02. It was not compelled to pay the claims. The fact that the Board of Commissioners suffered embarrassment because of the public scandal and the final acquittal of the officers, and may have wanted to put a costly and politically sensitive issue behind it can, in my view, have no bearing on a dispassionate assessment of what is just and equitable as regards the claim of Sergeant Sundell. If none of the four officers who was prosecuted was entitled to any indemnification, how can its payment be denied only to one simply because he exercised his earned right to retire? What the Board of Commissioners did may have been practical, politically expedient and, apart from collective bargaining considerations, to some degree understandable. It was not, however, just and equitable insofar as the indemnity claim of Sergeant Sundell is concerned, or his right to equal treatment in the administration of article 14.02 of the collective agreement.

V. CONCLUSION

For the foregoing reasons the grievance is allowed. The Arbitrator orders that the Board of Commissioners pay to Sergeant Sundell, forthwith, all monies relating to the cost of his legal defence of the charge of conspiracy, of which he was acquitted on March 14, 1986. During the course of the hearing it appeared that there might be some dispute between the parties with respect to the amount of the legal fees payable in respect of that prosecution. For the purposes of clarity it should be noted that it was not argued before me that the criminal proceedings in respect of the prohibited weapons charges brought against Sergeant Sundell were in relation to his duties as a police officer or formed any part of his claim to indemnification under article 14.02 of the agreement. In the circumstances the Arbitrator deems it appropriate to remit the matter to the parties to give them the opportunity to discuss the appropriate measure of compensation. I retain jurisdiction in the event of their inability to agree upon the appropriate amount, or in the event of any dispute respecting any other aspect of the interpretation or implementation of this award.

Lastly, in light of the volume and complexity of the facts and submissions presented, I wish to express my gratitude to all four counsel involved for their helpfulness throughout in the presentation of this grievance.

DATED at Toronto this 23rd day of February, 1990.

Michel G. Picher - Arbitrator