

LIMITS TO THE SCOPE OF POLICE COLLECTIVE BARGAINING

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I INTRODUCTION

The purpose of this paper is to consider the limits to the scope of collective bargaining between local boards of police commissioners and police associations. Both the public policy and statutory basis for these limits will be reviewed. While the focus is on Saskatchewan, the author suggests that these limits may be relevant to police in other provinces.

Police associations have been successful in representing the interests of their members in bargaining better financial compensation and working conditions for unionized police officers and, thereby, improving pay and benefits for all police. At times, however, police associations and police boards may stray outside their jurisdiction when negotiating collective agreements or in the exercise of purported rights under those agreements. When this occurs, it not only creates problems for the parties, but also for chiefs of police, who must both administer the collective agreement, as the employer's agent, and exercise their public duties, as a public office-holder and commanding officer of the police service. While the chief of police is the board's agent for certain purposes, the chief also has public duties that are grounded in the common law and statute. Any overlap or conflict between these separate statutory regimes and roles creates difficulties.

II WHAT ARE THE LIMITS?

It is submitted that there are three limitations on the scope of collective bargaining between local boards of police commissioners and police associations:

1. the separate and distinct legislative regimes between applicable police and trade union legislation;
2. the separate jurisdictions and division of authority between the board of police commissioners and the chief of police; and
3. the common law rule against agreements which are void as contrary to public policy.

While set out as three separate limitations, all are grounded in public policy, as expressed in statute and common law. This paper will discuss and examine the policy and the law.

The mere presence of a term in a collective agreement does not make valid the term, if it was beyond the authority of the contracting parties to agree to it. When police boards and police associations negotiate terms of collective agreements that are outside the limits of their jurisdiction, they risk introducing invalid and unenforceable terms. As the Latin maxim *nemo dare potest quod non habet* says, “no one can give what they do not have”.

STATUTORY SCHEMES

Legislation is the expression of public policy. In reconciling questions of jurisdictional boundaries, it may be helpful to first review the two main statutory schemes and the public policy behind and evident from the legislation.

The Police Act, 1990

The Police Act, 1990[1] was enacted in 1991 and came into force on 1 January 1992, replacing *The Police Act* enacted in 1974.[2] Several regulations to the *The Police Act, 1990* were also adopted in 1991.[3] The Act and the Regulations serve several functions, including setting minimum and uniform standards and procedures for municipal police in Saskatchewan. The Act and Regulations address many aspects of policing, including a comprehensive code for receipt of public complaints and discipline of police officers. The Regulations also prescribe uniform clothing and equipment issue and standards, rank structure, recruiting standards and procedures, probation periods, report forms, record retention schedules and filing requirements.

The earlier enactment of *The Police Act* of 1974 was accompanied by other police reforms, including the creation of the Saskatchewan Police Commission and establishment of the Saskatchewan Police College. At the beginning of his second reading speech to introduce Bill 118, which was enacted as *The Police Act,* the Attorney General of Saskatchewan referred to these reforms, stating "Mr. Speaker, this Bill is introduced for the purposes of ensuring a high standard of policing for the present and the future in the Province of Saskatchewan."[4] These reforms, intended to promote professionalism in policing, were achieved by the joint efforts of chiefs of police and

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1 S.S. 1990 – 91, c. P – 15.01

2 S. S. 1973 – 74, c.77

3 *The Municipal Police Clothing and Rank Regulations, 1991*, c. P-15.01, Reg 1
The Municipal Police Training Regulations, 1991, c. P-15.01, Reg 2
The Municipal Police Equipment Regulations, 1991, c. P-15.01, Reg 3
The Municipal Police Discipline Regulations, 1991, c. P-15.01, Reg 4
The Municipal Police Recruiting Regulations, 1991, c. P-15.01, Reg 5
The Municipal Police Report Form and Filing System Regulations, 1991, c. P-15.01, Reg 6
The Municipal Regulations, 1991, c. P-15.01, Reg 7
The Saskatchewan Police College Rules and Regulations

4 *Saskatchewan Hansard* (Legislative Assembly of Saskatchewan Debates and Proceedings), 25 April 1974, at p. 2666

police associations, working closely with then Attorney General, Roy Romanow, Q.C.[5] This consultative approach has continued and is entrenched in legislation.

The Saskatchewan Police Commission was created in 1974. Its statutory mandate is identical to that of the minister responsible for *The Police Act, 1990*.[6] The establishment of the Commission was and is intended to further insulate and separate police from political influence. The Commission has broad authority under the Act, including administrative, legislative, and appellate powers.

Section 12 of *The Police Act, 1990* requires the Saskatchewan Police Commission to consult with local boards of police commissioners, the Saskatchewan Association of Chiefs of Police (SACP)[7] and the Saskatchewan Federation of Police Officers (SFPO)[8],

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[5] Cookson, Arthur G. *From Harrow to Hawk* (Vantage Press, New York, 1978) at page 169:

> "The appointment of a Saskatchewan police commission in 1974, as authorized by the Police Act, will help to clarify problems arising between municipal police forces and their local boards. I was happy to see the Police Act come into force. There is provision for a government-sponsored municipal police college (now functioning). This is something that Chief Jim Kettles and I had struggled so hard for over the years. It has now become a reality, and the present attorney general, the Hon. Roy Romanow, must be given credit for it. I am sure it will prove to be of great benefit in improving and unifying municipal policing throughout the province."

[Arthur Cookson was Chief of Police of the Regina Police Service from 1954 – 71; James Kettles was Chief of Police of the Saskatoon Police Service from 1954 - 77]

Saskatchewan Hansard 25 April 1974, pp. 2666 – 2671, 29 April 1974, pp. 2763 – 2767, and 2 May 1974, pp. 2877 – 2878 (second reading speech of Bill 118 by Hon. Roy Romanow on 25 April 1974 and subsequent debate in the Legislative Assembly)

Also, from conversations of the writer with former Regina Police Service members, including Tom Savage (retired 1990 as Chief of Police) and Ed Swayze (retired 1993 as Deputy Chief), who were members of the Saskatchewan Federation of Police Officers Executive around the time of these reforms.

[6] See sections 18 and 19(1) of *The Police Act, 1990*.

[7] SACP Constitution: The Saskatchewan Association of Chiefs of Police (SACP) represents all municipal chiefs of police in Saskatchewan. The SACP Constitution establishes two different categories of membership. Chiefs and deputy chiefs from municipal police services and the Commanding Officer and Officer-in-Charge of the Criminal Investigation Division of "F" Division of the RCMP are eligible for active membership. Associate membership is offered to other specified positions, including the Executive Director of the Saskatchewan Police Commission, Director of the Saskatchewan Police College and Deputy Minister of Corrections, Public Safety and Policing, and commanding officers of other Saskatchewan law enforcement agencies.

[8] SFPO website: The Saskatchewan Federation of Police Officers (SFPO) is an umbrella organization representing all unionized municipal police officers in Saskatchewan. Eight certified police

before recommending regulations for approval by the minister responsible for the Act. Section 16(4) contains a similar requirement for consultation on appointments to the Public Complaints Commission. The level of consultation and cooperation extends far beyond these legislated requirements. In practice, the Government also consults on proposed amendments to the Act with local boards, the SACP, and the SFPO. These consultations usually involve meetings with representatives of these groups around the table. This consultative approach encourages a full exchange and explanation of positions and improves mutual understanding, often producing a consensus for change.

The goal of achieving uniform and standard levels of policing across the province is also expressed and encouraged through the Saskatchewan Police College, which is located on the University of Regina campus. This location was deliberate to encourage professionalism in training and to build connections with the academic world and general community. The decision to do so was audacious, taking place at a time when anti-establishment sentiment was strong at the University of Regina. The College trains all recruits and provides on-going training for Saskatchewan municipal police. Section 6 of *The Municipal Police Training Regulations, 1991* establishes a Training Advisory Committee consisting of representatives from each major municipal police service, other police services and the SFPO. The Provincial Training Board, which is chaired by the Chairperson of the Saskatchewan Police Commission, discusses training requirements and issues. The Training Board includes representation from all municipal police services, as well as other provincial law enforcement agencies and the RCMP.

These representative committees and the legislative consultative process discussed above serve to bring both management and labour representatives together to work together in common cause to advance the goals of professional policing. These discussions take

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associations from the six major municipal police services are members of the Federation. These police associations also belong to the Canadian Police Association. The motto adopted by the SFPO is "Professionalism in Service". The objectives of the SFPO as outlined in its constitution include advancing police work as a profession, elevating the intellectual and social standards of members of the Federation, and making recommendations to elected representatives of the Legislature and to the Saskatchewan Police Commission.

place outside the framework of collective bargaining, allowing consideration of constituent interests, but emphasizing the public interest as the prime determinant in decision-making.

The Police Act, S.S. 1973 – 74, c. 77 was the first Saskatchewan statute exclusively devoted to policing.[9] Prior to the 1974 *Police Act*, municipal police were governed by a statutory scheme found in the legislation authorizing municipal government. For example, at the time of the formation of the Regina City Policemen's Association in 1944, *The City Act*, R.S.S. 1940, c. 126, allowed city councils to appoint a board of police commissioners and establish a municipal police force. Even then, however, municipal police were constituted as a separate department of the city and police officers were appointed by the board of police commissioners and reported to the chief of police.[10] With each successive statute, the Legislature has reformed and expanded the scope of the legislation governing municipal police. In doing so, it is submitted that it also reduced the scope for collective bargaining between the local boards and police associations. This evolution of legislation reflects the common law origins of police and, in some cases, has restored the common law applicable to police through statutory codification.

The Police Act, 1990 recognizes and mitigates the application of *The Trade Union Act*. Section 86 of *The Police Act, 1990* requires police associations to file copies of collective agreements with the Saskatchewan Police Commission and the Minister responsible for the Act. Section 40(2) provides that *The Police Act, 1990* may override provisions of collective agreements.[11] Section 85 prohibits strikes or lockouts without 120 hours advance notice, notwithstanding section 11 of *The Trade Union Act*.

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9 R.S.S. 1978, c. P 15

10 see ***Bruton v. Regina City Policemen's Association*** [1945] 2 W.W.R. 273 at 284 – 286 (Sask. C.A.)

11 40(2) Except where specifically allowed by this Act, every collective bargaining agreement or contract that provides that:

(a) this Act, any provision of this Act or any direction given pursuant to this Act does not apply;
(b) any benefit or remedy provided by this Act is not available; or
(c) any benefit or remedy provided by this Act is in any way limited or modified;

is null and void and of no effect.
[Some similar provisions are reproduced in the list of other Police Acts appended to this paper]

Section 31(2) of *The Police Act, 1990* deems the board of police commissioners to be the employer of police and the chief and deputy chief to be agents of the board for the purposes of both *The Police Act, 1990* and *The Trade Union Act*.[12] This provision overcomes two legal obstacles. The first clause, which deems the board as employer, reflects the common law position of police as holders of a public office, rather than as mere employees, whose status and duties exist independent of their employer. This deeming ensures that the board and police officers, either alone or collectively, may bargain within the employment relationship.[13] The second clause overcomes a 1945 judgment of the Court of Appeal for Saskatchewan, which held the Saskatchewan Labour Relations Board exceeded its jurisdiction when it found the Chief of Police guilty of an unfair labour practice in refusing to bargain with the newly formed and certified Regina City Policemen's Association, Local 155.[14] Although the Chief of Police had refused to bargain with the newly formed police association, the Court ruled he could not be found guilty of an unfair labour practice, since he was neither the employer nor the employer's agent in law.

Finally, section 60(3) allows for termination of police officers under the collective agreement for reasons outside the statutory criteria of established breaches of discipline, unsuitability or incompetence.[15]

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[12] 31(2) For the purposes of this Act and *The Trade Union Act*:
(a) a board is deemed to be the employer of the personnel of the police service; and
(b) the chief and any person holding the position of deputy chief of police are deemed to be agents of the employer.

[13] ***Bruton v. Regina City Policemen's Association, Local No. 155***, supra at 285 - 286
This judgment of the Saskatchewan Court of Appeal is cited repeatedly in this paper and is, in the writer's opinion, of great significance for its sound statements of the public policy behind modern police governance, as developed in the common law and expressed in legislation.
(Chief M.J. Bruton served as Chief of Police of Regina from 1915 – 1945, the longest term of any Regina chief of police.)

[14] Ibid, at 286

[15] 60(3) Where a collective bargaining agreement provides a procedure for terminating the services of a member for reasons other than those provided in this Part, that procedure shall be used for terminating the services of a member for the reasons provided in the collective bargaining agreement.

The Trade Union Act

The Trade Union Act[16] allows workers to join together in common cause and to advance their common interests by bargaining collectively with employers. Similar legislation exists across Canada. This legislation corrects the imbalance in bargaining strength between most employers and employees and also promotes harmony in industrial relations, to reduce the incidence of work disruptions and ensuing damage to the general economy.

Section 3 of *The Trade Union Act* entitles workers to form a union and bargain collectively with their common employer. Section 11(1)(d) and (m) make it an unfair labour practice for the employer to fail to bargain with a trade union representing employees or "to unilaterally change rates of pay, hours of work or other conditions of employment" outside the collective bargaining process. The Act does not limit the scope of collective bargaining. Section 25(1) of the Act requires that all disputes between employer and employees arising under a collective agreement as to the "meaning, application or alleged violation, including a question as to whether a matter is arbitrable" must be settled by arbitration, after exhausting the grievance procedure.[17]

Generally, in collective bargaining, unions seek to expand the scope of the collective agreement to cover all aspects of employment, while employers seek to limit the scope to maintain as much flexibility as possible in the exercise of 'management rights'.

Section 31 requires copies of all collective agreements be filed with the minister responsible for the Act and those copies be made available by the minister for inspection by any person. (As noted above, s. 86 of *The Police Act, 1990* has a similar requirement

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16 R.S.S. 1978, c. T-17

17 See: ***Saskatoon Board of Police Commissioners and Chief Dave Scott v. Saskatoon City Police Association and Saskatchewan Labour Relations Board*** 2001 SKCA 82, (2001), 213 Sask. R. 224 (Sask. C.A.)

to file with the Saskatchewan Police Commission and minister responsible for that Act.) These filing requirements recognize that, while collective agreements are between two private parties, seeking to advance their individual interests, the agreements are made under public law and have a definite public dimension and interest.

The common law rule against contracting out of the law is codified in section 75, which invalidates any provision of a collective agreement that purports to deprive an employee of any right or benefit provided by *The Trade Union Act*.[18] This provision, while related to this statute only, is an example of the public policy considered in this paper.

Police associations, as the trade unions representing Saskatchewan municipal police are usually known, were formed long before the first *Police Act*. The Regina City Policemen's Association, Local #155 was formed in 1944 under *The Trade Union Act, 1944*. The enactment of this statute followed the 1944 election of the Cooperative Commonwealth Federation (CCF) to Government in Saskatchewan under the leadership of Tommy Douglas, who became Premier.[19] *The Trade Union Act, 1944* was a major reform of that time.[20] The six largest municipal police services have certified police

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[18] 75(1) No agreement, whether heretofore or hereafter entered into, has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Act.

The rule against contracting out of public law is similarly expressed in provisions of *The Labour Standards Act*, in sections 45, 50, 72 and 75 of that Act.

[19] Elections Saskatchewan historical record of General Elections: The CCF was elected on 15 June 1944 with 53.13 % of the popular vote, electing 47 of the 52 members of the Legislature to replace the Liberal Party as Government. The CCF would win re-election in the following four successive general elections to remain in government until 1964, when the Liberal Party returned to power.

[20] Lipset, Seymour Martin ***Agrarian Socialism: the Canadian Commonwealth Federation in Saskatchewan – a study in political sociology*** (University of California Press, Berkeley and Los Angeles, 1944) at page 230:

> "At the first session of the Legislature after the electoral victory in 1944, the government enacted a Trade Union Act, which was drawn up by the unions and is probably the most pro-union legislation in the democratic capitalist world. The whole trend of government labour action is biased in the direction of supporting trade-union organization and demands.
> "The Trade Union Act makes collective bargaining mandatory on the part of the employer. It gives maintenance of membership and the compulsory check-off to any union which is the bargaining agent of the majority of workers voting in a Labour Relations Board election. It outlaws various antilabour practices by employers, and requires them to prove that they did not discharge an employee for union activity, thus placing the burden of proof on the employer rather than on the union. Any employer who consistently violates the orders of the Saskatchewan

associations.[21] Municipal police are heavily unionized, with senior officer associations also certified in the Regina and Saskatoon Police Services. As a result, all police officers in those services below the rank of Deputy Chief of Police are members of a certified police association, as are most civilian employees. The influence of police unionism is, not surprisingly, strong within Saskatchewan's municipal police services.

There is an ongoing debate as to whether unionization of police impedes progress towards professionalization of police. Federal legislation bars unionization of the RCMP.[22] One authority on police culture has argued that unionization has encouraged the "democratization" of police.[23] What seems beyond challenge is that police associations have succeeded in gradually negotiating improved compensation beyond levels obtained by other public sector unions.[24] Arguably, this makes police employment

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> Labour Relations Board may have his plant expropriated by the government. This actually happened in 1946, when the government took over the Prince Albert Box Factory after the owner had persistently refused to abide by the decisions of the Labour Board and had discharged his entire force to by-pass the Board's decision.
> "The effect of Saskatchewan's labour legislation on trade-union organization is strikingly demonstrated by table 39. In the four years of C.C.F. government, trade-union membership increased by 118.5 per cent. In the same period the unions of the entire country increased their membership by only 25 per cent."

[21] Estevan Police Service, Moose Jaw Police Service, Prince Albert Police Service, Regina Police Service, Saskatoon Police Service, and Weyburn Police Service

[22] See: *Delisle v. Canada* [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989

See also, however: *Mounted Police Association of Ontario and B.C. Mounted Police Professional Association v. Canada (Attorney General)* 6 April 2009, 2009 CanLII 15149 (Ont. S.C.) declaring s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 of no force or effect pursuant to s. 52 of the *Constituion Act, 1982.*
(This judgment will likely be appealed, so over-reliance at this stage would be premature.)

[23] Berkley, George E. ***The Democratic Policeman*** (Beacon Press, Boston, 1969) at page 46:
Chapter IV *Police Unionism*
> "A final organizational factor which often promotes democratization in a police force is trade unionism. First, it affords policemen an opportunity to join and participate in an organization of their own. Also unions tend to be structured on an essentially democratic basis with their members taking a direct part in the election of officers and the approval or disapproval of major decisions. Participation in such activities fosters and to some extent may actually require democratic behaviour."

[24] Arbitrator Stevenson interest arbitration award of 14 April 2008 in ***The City of Regina and Regina Middle Management Association*** at page 20:
> "Historically, the police and firefighters have achieved different results in negotiations or on interest arbitration. Both parties recognize that police and fire are distinct from other civic

more attractive and expands the labour market for police employers, who may then require greater entrance requirements which support the goal of professionalization of policing. In doing so, over time, the face of policing changes.

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employees."

Arbitrator Arne Paus-Jenssen interest arbitration award of 31 December 2008 in ***The City of Regina and Regina Professional Fire Fighters Association, IAFF, Local 181*** at page 42, graph H showing "Cumulative Salary Difference Between a Fire Fighter and Police Officer in Regina by Years of Service Excluding Promotions" from 1995 – 2006

Author's note: At the same time, there may be anomalies in benefits. While wage increases have outpaced most other public sector workers, some benefits may lag behind. The Regina Police Association only negotiated a health plan benefit in its most recent collective agreement, effective 1 January 2009. Most other public sector employers have offered comparable or superior health benefits for some time.

III HOW ARE THE LIMITS DETERMINED?

While police collective agreements may contain provisions that offend the rule against illegality, this illegality is unlikely deliberate. There are several possible reasons for the presence of such provisions.

One reason is the negotiation of terms which continue in place after subsequent regulations are adopted, which legislative change removes that subject from the scope of collective bargaining. Unlike legislation, which is periodically reviewed and revised, both employers and unions may be loathe to 'clean up' collective agreements, for fear of inadvertently losing ground.

Second, both boards of police and police associations may simply fail to discern the limited jurisdiction of the board and inadvertently run afoul of the rule against illegality or, in their desire to reach agreement, be reckless in agreeing to suspect terms. Further, police officers and civilian employees are subject to different statutory regimes. Provisions in the collective bargaining agreement that might be objectionable for a police officer might be fully applicable to a civilian employee of the board.

A third and more insidious factor is the politicization of policing.[25] Police associations, in particular, have become more active in politics. While one would like to think it would not occur, there may be an expectation of payback in collective bargaining when police associations support the election of politicians who then direct the employer at the bargaining table.

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[25] The SACP submitted a comprehensive discussion paper to the Saskatchewan Police Commission, in June 2007 in support of its request for provincial regulation of political activity by serving police officers, titled "Without Favour or Affection – Upholding the Principles of Impartiality in Policing: A Discussion Paper on Political Activity by Police from the Saskatchewan Association of Chiefs of Police" May 2007

Also see my paper, co-authored with Jana-Marie Odling, "Police, Politics and the Value of Impartiality", presented to the Canadian Department of the International Municipal Lawyers Association at the IMLA Annual Meeting in Nashville, U.S.A. on 29 October 2007

Fourth, most chiefs of police are products of the police association. As such, they are familiar with and wish to respect the terms of collective agreements. Knowledge of the competing statutory regimes is acquired later in the day. Chiefs of police may be involved in collective bargaining and feel morally compelled to observe the terms of those agreements.

As the following cases will illustrate, the determination of limits to collective bargaining may take place in the courts or before administrative tribunals. Where a grievance is initiated and the respondent wishes to challenge the arbitrability of the issue, that preliminary issue must be submitted to the arbitrator.[26] Where there are competing statutory schemes, the choice of forum must be determined by consideration of both the nature of the dispute and the ambit of the statutory schemes to respect the public policy reflected in the legislation.[27]

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[26] ***Saskatoon Board of Police Commissioners and Chief Dave Scott v. Saskatoon City Police Association and Saskatchewan Labour Relations Board*** 2001 SKCA 82, (2001), 213 Sask. R. 224 (Sask. C.A.)

> "[9] Once there is a finding that there is a dispute between the parties, s. 25 of *The Trade Union Act* is engaged and requires that all differences between the parties to a collective agreement, *including whether a matter is arbitrable* are to be settled by arbitration.
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> "[10] The issue of arbitrability is for an arbitrator to decide, not for the employer or the union to decide. That is the procedure that was followed in the *Regina Police Assn. v. Regina (City) Board of Police Commissioners.*[3] There the Board of Police Commissioners questioned the applicability of the collective agreement and the jurisdiction of the arbitrator to resolve the dispute involving the discipline of a member. The question of jurisdiction was submitted to an arbitrator who found that she did not have jurisdiction under the collective agreement and that the matter should be dealt with under *The Police Act*. That is the procedure that should have been followed here. Arbitrators routinely determine the arbitrability of issues. A failure to refer the dispute to arbitration is an unfair labour practice."
> (per: Vancise, J.A. for the Court)

[27] For a discussion of this subject, see my paper: "Choice of Forum", presented to the Canadian Bar Association conference on "Tribunals, Forums and other forms of Entertainment – Labour/Administrative Law in the New Millenium" on 24 November 2000 in Ottawa, Ontario.

IV WHY ARE THERE LIMITS?

RATIONALE

The rationale for placing limits on collective bargaining is the subordination of private interests to the public interest, as expressed in legislation or as affirmed in the common law. As a leading Saskatchewan labour arbitrator recently observed "Collective bargaining is always a matter of compromise."[28] Legislation, on the other hand, while considerate of competing interests, should reflect public policy decisions of the legislators intended to promote the public interest. This rationale goes back centuries and was well-expressed by English political philosopher John Locke, in his 1690 treatise *On Civil Government*:

> "These are the bounds which the trust that is put in them by society and the law of God and nature have set to the legislative power of every commonwealth, in all forms of government.
> "First, they are to govern by promulgated laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the countryman at plough.
> "Second, these laws ought to be designed for no other end ultimately but the good of the people."

Collective bargaining is an expression of freedom to contract. All contracts are subject to limits imposed by public law. Statutory illegality is concerned with contracts which purport to contract out of the law and is based on the common law rule against contracts which are contrary to public policy.[29] The limits discussed in this paper, therefore, are

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[28] Paus-Jensen, Arne, as Chair in interest arbitration award of 31 December 2008 in ***The City of Regina and Regina Professional Fire Fighters Association, IAFF, Local 181*** at page 68

[29] Fridman, Q.C., G.H.L. ***The Law of Contracts*** 3rd edition (Carswell, Toronto, 1994) at p. 344 - 357:
"2. Statutory illegality
(b) Express and implied propositions
(i) In general
Illegality avoids a contract *ab initio* if the making of the contract is expressly or impliedly prohibited by statute." (p. 349)

"The issue in cases of illegality, therefore, according to cases which adopt and follow this approach, is whether the contract which is at stake falls within or outside the scope of the purpose or policy which is being advanced or promoted by the statute that is alleged to make the contract

just one facet of the rule against illegality. In the case of policing, the Legislature has gone to considerable length to formulate a comprehensive code both for the governance of police and to govern police operations. This regime affords considerable independence and discretion to the chief of police in the exercise of public duties, especially with respect to the operational sphere of policing. It is not open to other parties to advance their private interests by amending that legislative scheme or fettering the proper exercise of police discretion, especially by the chief of police.

While certainly not indifferent to societal interests, there are many influences and considerations which affect police decision-making, not least of which is organizational convenience and culture.[30] And although the statutory scheme and practices of

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illegal and therefore invalid. The policy of the statute is the chief factor that must concern a court where an indirect, or implied prohibition is said to arise with respect to a particular contract, …" (p. 353)

"3. Common-law illegality
(a) The doctrine of public policy
"Public policy, as distinguished from what might be called "political policy", with which it has often been confused, is that principle of law which holds that
> no subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law.

Such a principle is necessarily incident to every state governed by laws." (p. 370)

"4. The consequences of illegality
(a) Voidness of transaction
A contract which is illegal either at common law or under statute is void and unenforceable by either party." (p. 415)

See also: Waddams, S.M. ***The Law of Contracts*** 3rd edition (Canada Law Book, Aurora, Ont., 1993) at chapter 15 "Public Policy"

> "A distinction must be drawn between cases where the court interferes with an agreement as contrary to public policy – the cases of so-called common law illegality – and the cases where the court strikes down an agreement as directly contrary to statute – statutory illegality. In the former group of cases the court may of course take account of statutes, for the public policy of a society is reflected in its statutes, but the reason for striking down the agreement is the court's apprehension of what public policy is. The court itself makes the judgment as to what is public policy and the court itself just strike the necessary balance, in the case of an agreement that is contrary to statute, though of course public policy remains the root reason for intervention, the court does not itself make the judgment of what is public policy, If the legislature has enacted that no one shall sell ungraded apples, the court is precluded from discussing the question of whether an agreement to sell ungraded applies is or is not contrary to 'public policy'." (at paragraph 554)

[30] See: ***Thinking About Police Resources*** edited by Anthony N. Doob (University of Toronto Centre of Criminology, Toronto, 1993)

consultation within the policing world are intended to offer input and promote consensus and acceptance by the diverse police groups, the interests expressed may still be directed towards what is best for police, rather than what is best for society.[31]

> "The reason that the number of police personnel cannot be related to changes in public security, apart from problems of measurement, is that police organizations do not use their personnel rationally, that is, in relation to the requirements of public safety. Personnel are allocated by police managers according to formulas, institutional traditions, tacit understandings, and contract rules, all of which have hardly anything to do with public safety. Indeed, it is fair to say that the major determinants of police allocations are not considerations of community safety, but organizational convenience and worker morale.'
> (Bayley, David "Back from Wonderland, or towards the rational use of police resources", at p. 4)

[31] A recent example may be a joint position document by the Canadian Police Association and the Canadian Association of Chiefs of Police released at a press conference on 24 February 2009 in support of the proposition that "All police officers should be authorized to carry a CEW." (CEW stands for controlled electronic weapon and is marketed and known by the company name "Taser", taken from the once fictional "Thomas A. Swift electric rifle".) This joint press release was provocatively timed to coincide with testimony by RCMP officers at the Commission of Inquiry by Thomas Braidwood, Q.C. into the death of Robert Dziekanski at the Vancouver International Airport. The Canadian Association of Police Boards responded the same day with a media release expressing "serious concerns with this position and cannot support it without considerable further discussion."

JURISDICTION OF THE CHIEF OF POLICE

Although appointed by the board of police commissioners and subject to the general direction, policy, priorities and long-term plans developed by the board for the police service,[32] the Chief of Police retains a great deal of independence.[33] This independence flows from the duties and powers conferred upon the Chief by statute and at common law.[34] The Chief is not simply the agent of the Board. This independence was articulated by the great English jurist Lord Denning, Master of the Rolls, then of the English Court of Appeal:

> I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to

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[32] **Board responsible for police**
31(1) Where a municipality has established a police service pursuant to section 26, the board is responsible:
(a) for the delivery of policing services within the municipality; and
(b) for:
(i) providing general direction, policy and priorities; and
(ii) developing long-term plans;
for the police service.

[33] **Chief of police**
35(1) Where a police service is established pursuant to section 24.1 or 26, the board shall appoint a chief of police.
(2) Subject to the general direction of the board and to this Act and the regulations, the chief is responsible for:
(a) the management, administration and operation of the police service;
(b) the maintenance of law and order in the municipality; and
(c) the maintenance of discipline within the police service.
(3) To carry out the responsibilities imposed on a chief of police by this Act and the regulations, the chief may:
(a) appoint any personnel to positions designated by the board and assign their duties;
(b) delegate to any member or civilian member any authority vested in the chief that, in the opinion of the chief, is required to properly manage the police service; and
(c) make directives necessary to carry out the daily administration and operations of the police service.

[34] Wade, Q.C., H.W.R. & Forsyth ***Administrative Law*** Seventh edition (Oxford University Press 1994) at pp. 152 – 153
" The truth is that a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force. The chain of command therefore terminates at the chief constable, who is in effect an independent authority, and must act free from all political influence, whether national or local."

> post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility of law enforcement lies on him. He is answerable to the law and to the law alone.[35]

The Chief of Police, therefore, may act in either of two capacities: as the agent of the Board as employer in the administration of the collective agreement; or independent of the Board-employer, in the exercise of original jurisdiction at common law and under the statute. In the latter capacity, the chain of command ends with the Chief.[36]

The office of Chief of Police and the duties of that office are of a public nature. The exercise of discretion in the performance of those duties is original and derived from statute. It is not delegated by the Board or arising from contract.[37]

The chief of police, when exercising his authority to appoint, discipline or dismiss police officers under his or her command, is subject to the Act and the Discipline Regulations.

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[35] ***R. v. Metropolitan Police Commissioner; ex parte Blackburn*** [1968] 1 All E.R. 763 at 769 - quoted with approval in ***R. v. Campbell*** [1999] 1 S.C.R. 565, at paragraph 33.

For other Canadian authority to same effect, see: ***R. v. Shirose*** [1991] 1 S.C.R. 565, at paragraph 27 and 29, quoting from ***McCleave v. City of Moncton*** (1902) 32 S.C.R. 106 at 108 – 109.

[36] Wade, Q.C., H.W.R. & Forsyth ***Administrative Law*** Seventh edition (Oxford University Press 1994) at pp. 152-153 and 154

[37] ***Pembroke (City) Police Services Board v. Kidder*** (1995) 22 O.R. (3d) 663
Mitchell v. Moose Jaw Commissioners 26 August 1992 (Sask. Police Commission)
Penkala v. Vanin (1991) 95 Sask.R. 30 at 44 (Sask.Q.B.)
Gartner v. Regina Police Commissioners (1989) 81 Sask.R. 318 (Sask.C.A.)
Brown v. Waterloo Regional Board of Police Commissioners (1983) 43 O.R. (2d) 113 at 121 (Ont.C.A.)
R. v. Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 1 All E.R. 763 at 769, [1968] 2 Q.B. 118 at 136-137 (C.A.)
Bruton v. Regina Policeman's Association [1945] 2 W.W.R. 273 at 286 and 295-296 (Sask.C.A.)

His actions are reviewable under that legislation by independent hearing officers and by the Saskatchewan Police Commission on appeal and superior courts on judicial review. This statutory scheme is exclusive and is not susceptible to amendment through the collective agreement.[38] This sphere of independence is generally understood and accepted. It is suggested, however, that it goes further than discipline.

While the concept of separate jurisdictions is easier to grasp where the jurisdictions are reposed in different persons, such as between the board of police and chief of police, the separate capacities may reside in the same person. The exclusive jurisdiction conferred by statute and its rationale was discussed by Madam Justice Wilson, then of the Ontario Court of Appeal, in her dissenting judgment in *Re Proctor and Sarnia Board of Commissioners of Police*:

> "It is the exclusive responsibility of the board under the Act and Regulations to maintain an efficient police force in the community. The power to appoint and discharge police officers is obviously a key element in the maintenance of such a force. I think it would be quite inconsistent with the concept of an exclusive responsibility to permit the board to bargain collectively in this area. The board should not be permitted to derogate from its statutory duty either by contract with the police association or by delegation of its essential decision-making functions to the chief of police and the Legislature, in my view, has not permitted either. The maintenance of an efficient police force is far too important to be the subject of a diffused or fragmented responsibility or to be used as a quid pro quo at the bargaining table."[39]

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38 ***Regina Police Assn. Inc (Shotton). v, Regina (City) Board of Police Commissioners*** 2000 SCC 14, [2000] 1 S.C.R. 360, 183 D.L.R. (4th) 14, 50 C.C.E.L. (2d) 1, 189 Sask.R. 23
Mitchell v. Moose Jaw Police Commissioners #1 26 August 1992 (Sask. Police Commission)
Penkala v. Vanin (1991) 95 Sask.R. 30 at 44 (Sask.Q.B.)
Gartner v. Regina Police Commissioners, supra at 319-320
see also: Ceyssens, Paul ***Legal Aspects of Policing*** at para. 5.1(a) "Rule Against Opting Out of Statutory Scheme"
and: Wade ***Administrative Law*** Seventh edition (Oxford University Press 1994) at 157

39 (1979) 24 O.R. (2d) 715 at 730, 99 D.L.R. (3d) 356 at 371 per: Wilson, J.A. (upon which the Supreme Court of Canada commented favourably in its unanimous judgment reversing the majority decision, [1980] 2 S.C.R. 727 at 733)

See also, the earlier 1975 judgment of the Ontario Court of Appeal in ***Metropolitan Toronto (Municipality) Commissioners of Police v. Police Assn. (Metropolitan Toronto)*** (1975) 8 O.R. (2d) 65, 57 D.L.R. (3d) 161 (Ont. C.A.)
The Ontario Court of Appeal upheld an interest arbitration award introducing a requirement for two police officers in patrol cars. The majority noted the potential for conflict with the public duties

Similar reasoning was applied in the majority decision of the British Columbia Court of Appeal in its 1985 judgment in *Re Carpenter and Vancouver Police Board,* [40] where the Court dismissed an objection to its jurisdiction on judicial review of a dismissal of a police officer who had also grieved under the collective agreement. The arbitrability of the question of termination was expressly considered and rejected by the Court. That judgment was followed in *Penkala v. Vanin*[41] and in *CUPE and Simpson v. Black Harbour (Village)*[42].

The Court of Appeal for Saskatchewan recognized these separate capacities in its 1989 decision in *Gartner v. Regina Police Commissioners***.** The Court in that case was considering the relationship between the collective bargaining agreement and dismissal proceedings under *The Police Act* R.S.S. 1978, c. P-15, under which the board of police

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created by allowing collective bargaining on working conditions, but ruled the Legislature had addressed that concern by reserving the power to exclude matters from collective bargaining by regulation, stating:

> "It is for the Government to determine when the inevitable conflict between bargaining and policing is intolerable and to eliminate the conflict."
> (at paragraph 4, per: Jessup, J.A.)

In a concurring judgement, Justice Brooke discussed at greater length the concern and the primacy to be accorded to the public duties conferred by law:

> "To concede that the collective agreement would entrench or qualify on public duties and responsibilities would be to subject the public interest and public safety, law and order to interests as between employer and employee and I do not think such a concession was intended by the Legislature….
> [24] The statute must be interpreted so that both these important objects can be given effect to in so far as is possible. 'Working conditions' is an established term in matters relating to employer-employee relationships and the Legislature intended that the police officer should as far as possible have the full benefit thereof. But in the same way as the section making provision for bargaining of working conditions finds itself side by side in a statute which charges specific public duties and responsibilities, the collective agreement must be similarly regarded and made subject to those specific duties and responsibilities."
> (at paragraphs 23 – 24, per: Brooke, J.A., concurring with the majority)

[40] (1985) 18 D.L.R. (4th) 585 at 595-597, 63 B.C.L.R. 310 at 316 (B.C.C.A.); leave to appeal to S.C.C. refused 66 B.C.L.R. xlv.

> "In summary, the *Labour Code* was not designed to deal with matters of police discipline."
> (at B.C.L.R. 321, per: Lambert, J.A.)

[41] ***Penkala v. Vanin*** (1991) 95 Sask.R. 30 at 38 (Sask.Q.B.)

[42] 23 December 1992 Award by Peter Zed, Chairman (New Brunswick)

heard appeals against dismissals. Again, the Court accepted the concept of two separate capacities reposed in the same board.

> "For the purposes of this case, the Board of Police Commissioners has two capacities. In one capacity it is a statutory tribunal with public law obligations as provided in s. 36 of *The Police Act*, R.S.S. 1978, c. P-15. In its other capacity, it is one of two contracting parties to a collective bargaining agreement with private law obligations imposed on it by the agreement and in particular by article 8 (which provides for the establishment in certain situations of a board of arbitration to hear grievance disputes) and Item 5 of the letter of intent which forms part of the collective agreement. In its capacity as a statutory tribunal it is subject to the precepts of public law and in particular to the law relating to the prerogative writ of prohibition. In its capacity as one of the parties to a private contract it is subject to the precepts of private law and in particular the law relating to a breach of contract including the remedies for a breach (e.g., an injunction).
>
> . . .
>
> "In our respectful view the applicant faces an insurmountable stumbling block: One must look to the statute and the statute alone to determine the jurisdiction of a statutory body, or the lack of it, to perform a statutory function or obligation. One may not look to a private agreement entered into by that statutory body: A statutory body does not have the power to "agree" that its jurisdiction is less than what the statute says it is any more than it has the power to "agree" that its jurisdiction is more than what the statute says it is."[43]

The Legislature eliminated some of the potential confusion over these different capacities of boards of police commissioners when it enacted *The Police Act, 1990,* by transferring to the chief of police many of the statutory powers over police officers previously vested in the Board. This change followed a dispute between the chief of police and board of police of the Regina Police Service over the appointment of a deputy chief of police.[44]

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[43] (1989) 81 Sask.R. 318 at 319, (Sask. C.A. per: Bayda, C.J.S. for the Court)

[44] See: ***Regina City Policemen's Association v. Saskatchewan Police Commission*** (1985) 38 Sask. R. 21 (Q.B)
The Court found, at 24 – 25, that, under *The Police Act* as it then read, the board was entitled to make its own appointment of the deputy chief of police, regardless of the wishes of the chief of police. The Act was subsequently changed to restore the common law authority of the chief of police to appoint and promote police officers.

The power to appoint, discipline and dismiss for cause are now conferred upon the chief of police, pursuant to sections 35, 53, 54 and 60 of the Act.

In the exercise of these statutory powers, the chief of police, as a statutory official, is independent of the Board.

> His contention was that inasmuch as the applicant under the provisions of *The City Act* has power to suspend or dismiss members of the police force he falls within the definition "employer's agent" in *The Trade Union Act, 1944*. As to this it is sufficient to say that the applicant in exercising his power to suspend or dismiss does not act on behalf of an employer but under the power conferred on him by statute.[45]

This regime accords with tradition and continues to exist under other police legislation:

> "While the Chief of Police reports to the Board and is obliged to obey its lawful orders and directions, in exercising the powers of discipline the Chief of Police is acting under the *Police Services Act* and the Regulations. That legislation sets out a comprehensive substantive and procedural scheme for the discipline of members that is wholly outside the collective agreement. A dispute over the exercise of those powers does not arise out of the collective agreement within the meaning of *Weber*. If follows that the court's jurisdiction over the plaintiff's claim has not been ousted by the collective agreement."[46]

> Turning then to the provisions of the *Act*, it seems clear that the Legislature intended the commission and the chief of police in any municipality to exercise different functions. When one reads the *Act* it is difficult to avoid the conclusion that the role intended for a commission is that of policy making with overall responsibility for the provision of efficient and adequate police services. The role intended to be played by the chief of police is that of ensuring that the policies and directions of the

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[45] ***Bruton v. Regina Policemen's Association*** [1945] 2 W.W.R. 273 at 286 and 295-296 (Sask.C.A.: per Martin, C.J.S.)
Despite changes to the legislation, ***Bruton*** remains good law in Saskatchewan: ***Penn v. Singbeil*** (1986) 44 Sask.R. 312 at 318-319 (Q.B.); and ***Klein v. Seiferling*** 130 Sask. R. 203 (Q.B.)

[46] ***Praskey v. Toronto (Metropolitan) Services Board*** (1997) 143 D.L.R. (4th) 298, at 302, (Ont. C.A. per curium)

> commission are implemented. In addition, and to assist in the effective implementation of policy, he is charged with the responsibility of discipline within the force in so far as it relates to the conduct and the performance of duty by regular officers (i.e., all officers of the force other than the chief of police). While the commission is charged with overall responsibility for providing police services their power to discipline is restricted to the chief of police alone. It is the chief of police who is empowered to discipline all other members of the force. One of the elements of discipline is the power to dismiss an officer from the force: see s. 38 of the *Municipal Police Disciplinary Regulations,* Alta. Reg. 179/74, as amended [Alta. Reg. 79/78, s. 33]. Accordingly, only the chief of police may discipline a regular member of the force and then only after an investigation and hearing in compliance with the *Act* and the *Regulations*."[47]
>
> "Responsibility for internal discipline has historically been that of the chief officer of the police service."[48]
>
> "Complaints and discipline
> The police are a disciplined force and have always been in charge of their own discipline, including the investigation of complaints, which is the responsibility of the chief constable."[49]

In effect, the board controls positions while the chief controls the people. The failure to distinguish between the board and the chief and their separate jurisdictions is at the heart of some disputes. While the authorities and cases quoted from above mainly concern the chief's jurisdiction over discipline, the separation of authority goes beyond that aspect.

The Court of Appeal for Saskatchewan, in its 2007 judgment in *Regina (City) Police Commissioners v. Saskatchewan Government Insurance,* distinguished between the board of police and chief of police, recognizing the authority of the chief of police as custodian of police records.[50]

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47 ***Re Maguire and Hinton Police Commission*** (1980) 116 (3d) 268 at 274 (Alta. Q.B.)

48 Ceyssens, P. ***Legal Aspects of Policing*** at para. 5.3 "Responsibility for Police Discipline"

49 Wade & Forsyth ***Administrative Law*** Seventh edition (Oxford University Press, 1994) at 157

50 2007 SKCA 106, 286 D.L.R. (4th) 755, [2007] 11 W.W.R. 671, (2007) 304 Sask.R. 117 (Sask. C.A.); reversing 2006 SKQB 186
(the author was counsel for the Board of Police on this appeal)

> [12] Section 35 of The Police Act, 1990 states the mandate of the Chief of Police, subject to general direction from the Board, is to manage, administer and operate the Regina Police Service. In *Sabo v. Saskatoon Board of Police Commissioners et al*, 2004 SKCA 3, (2004), 241 Sask. R. 54, this Court held that the duties and powers of a chief of police are conferred by statute and common law and that a chief of police is not simply the agent of the board. …
>
> [13] Based on the provisions of The Police Act, 1990, the aforementioned Handbook and the case authorities, it is clear that the Board does not have possession or control over the criminal investigation file. That control, by necessity, rests with the Chief of Police for the Regina Police Service. In such a circumstance, it is not the policy of courts to grant orders compelling a person to undertake a course of conduct that is beyond his or her ability to comply with, even where that person fails to adequately disclose his or her limitations, juridical or otherwise, to the Court. Therefore, the order before the Court should be set aside on this ground alone. It is of note that the Board never raised the possession question with the Chamber judge, but did before this Court.

The Court of Queen's Bench for Saskatchewan, in its 2006 judgment in *Regina Police Association (Mitchell) v. Regina (City) Police Commissioners*, upheld an arbitration award declining jurisdiction over a grievance by a police officer who had been transferred while an investigation into allegations of misconduct was underway.

> [6] I have concluded that the arbitration board had no jurisdiction to decide the dispute here in question and it had the right so to decide as it did. The dispute arose from the actions of the Chief of Police acting under s. 35 of *The Police Act, 1990*, S.S. 1990, c. P-15.01. The actions which he took under the Act in responding to an investigation was to transfer an employee which had the effect, not intentional, of depriving that employee of the opportunities to work overtime and to be paid substantial sums for so doing. No right to overtime is found in the Collective Bargaining Agreement. In light of the lack of jurisdiction the arbitration board made no orders and in so doing it construed the governing provisions of the Collective Bargaining Agreement, *The Police Act, 1990,* and *The Trade Union Act,* R.S.S. 1978, c. T-17 correctly.

> [7] The reasoning and the legal research undertaken by the arbitration board was extensive and the decisions made upon the points which are challenged are fully supported by the authorities advanced. [51]

The Court of Queen's Bench, in its 2005 judgment in *Taylor v. Regina Board of Police Commissioners and Vernon Forbes,* struck a claim by a former member against the board of police alleging negligence on the part of the board in failing to prevent alleged harassment and intimidation by a police superintendent that led to the former member's resignation, which was alleged as constructive dismissal.[52] In striking the claim and dismissing the action, the Court distinguished between the separate roles of the board and the chief under *The Police Act, 1990:*

> [32] The plaintiff's claim against the Regina Board of Police Commissioners must be dismissed for a second reason. This Court does not have jurisdiction to involve itself in the external or internal management of the Regina Police Service as the plaintiff's action against the Board of Police Commissioners in effect invites it to do. Paragraph 19 of the plaintiff's claim alleges negligence by the Board of Police Commissioners in failing to have internal policies, education and training in place to prevent workforce harassment, its failure to monitor and reassign staff to prevent them from harassing other staff and failing to prevent injuries from harassment in the workplace. The previously quoted provisions of *The Police Act, 1990* establish that, the Board of Police Commissioners is responsible for the delivery of policing services and for "providing general direction, policy and priorities as well as developing long-term plans for the police service." The day to day management, and operation of the police service is the responsibility of the Chief of Police who may delegate those responsibilities to other members of the force. Insofar as the circumstances of this case are concerned, certain of those management and administrative responsibilities are initially assigned to

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[51] ***Regina Police Association (Mitchell) v. Regina (City)Police Commissioners*** (2006) SKQB 191, 286 Sask. R. 158 (Q.B.); upholding Robert Pelton, Q.C. Award in ***Regina Police Association, Inc. and Rick Mitchell v. Board of Police Commissioners of the Corporation of the City of Regina*** 20 July 2005

The administrative right of a chief of police to reassign members for administrative reasons, including poor performance, was recognized by the Alberta courts in ***Munday v. Calgary (City) Police Commission*** 2003 ABQB 190, 349 A.R. 189 (Alta. Q.B.) and in ***Schuffler v. Calgary (City) Police Commission*** (1995) 169 A.R. 209 (Alta. C.A.)

[52] ***Taylor v. Regina Board of Police Commissioners and Vernon Forbes*** *2005* SKQB 196, 264 Sask. R. 273

> the Chief of Police who delegates some authority and responsibility to subordinate management members of the force including Superintendent Forbes to whom the plaintiff, Staff Sergeant Taylor, reported.
>
> [33] The plaintiff's claim of "negligence" is one in semantic form only. It does not represent, in its essential character, the real substance of the plaintiff's claim against the Regina Board of Police Commissioners. It is the defendant Regina Police Commissioner's management and administration of the police force not "negligence", that is the real substance of the plaintiff's claim. As such the essence of the dispute is beyond the jurisdiction of this Court. The plaintiff has no reasonable chance to succeed.

The Supreme Court of Canada, in its 2000 judgment in *Regina Police Assn. (Shotton) v. Regina (City) Board of Police Commissioners*, upheld an award of an arbitrator who declined jurisdiction with respect to a grievance alleging forced resignation.[53] The Supreme Court held that the determination of proper forum for the resolution of the dispute depended upon the nature of the dispute and the ambit of the collective agreement.

> "The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature."[54]

> "In determining whether the dispute falls within the ambit of the collective agreement, we must bear in mind that the legislature intended that the members of the Regina Police Force be governed by two separate schemes, the collective agreement and The Police Act and Regulations. In determining whether the dispute is arbitrable, we cannot interpret the collective agreement in a manner that would offend the legislative scheme set out in The Police Act and Regulations. The provisions of the collective agreement, therefore, must be interpreted in light of the scheme set out

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53 ***Regina Police Assn. Inc (Shotton). v, Regina (City) Board of Police Commissioners*** 2000 SCC14, [2000] 1 S.C.R. 360, 183 D.L.R. (4th) 14, 50 C.C.E.L. (2d) 1, 189 Sask.R. 23; reversing (1998) 163 D.L.R. (4th) 145, 168 Sask. R. 197, [1999] 2 W.W.R. 1 (Sask. C.A.); 28 August 1997 Fiat of Kyle, J. J.C. Regina Q.B. No. 2252 of 1997, dismissing application to quash arbitration award of Gene Ann Smith, dated 29 July 1997.
(the author was counsel for the Board of Police throughout these proceedings)

54 Ibid. at paragraph 39, per: Bastarache, J. for the Court

in The Police Act and Regulations."[55]

The Supreme Court held that, because the dispute arose in the context of disciplinary action by the chief of police in the exercise of his authority under *The Police Act, 1990*, the arbitrator was correct in declining jurisdiction under the collective agreement.

The Court of Appeal for Saskatchewan, in its 1996 judgment in *Regina (City) Police Commissioners v. Regina (City) Police Association and Saskatchewan Labour Relations Board*,[56] upheld a 1994 ruling by the Saskatchewan Labour Relations Board.[57] The Labour Relations Board had held the police association in violation of section 11(2)(d) of *The Trade Union Act*, as an unfair labour practice, for engaging in strike action without a prior vote, but declined to grant the relief requested to compensate the City of Regina for lost revenue. This application followed job action, where members of the police association stopped issuing traffic tickets as a tactic to pressure the board of police, after collective bargaining had reached an impasse. The decision of the Labour Relations Board includes an excellent analysis of the status of police and the proper exercise of and limits on police discretion. The Board commented that the exercise of police discretion for reasons related to the collective agreement was improper.[58] The Board also noted the

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55 Ibid. at paragraph 30, per: Bastarache, J. for the Court

56 ***Regina (City) Police Commissioners v. Regina (City) Police Association*** (1996) 134 D.L.R. (4th) 313, [1996] 5 W.W.R. 569, (1996) 144 Sask.R. 49 (Sask. C.A.); reversing [1995] 8 W.W.R. 194 (Q.B); leave to appeal to Supreme Court of Canada refused on 5 December 1996

57 ***Regina Board of Police Commissioners v. Regina Police Association, Inc***. 23 C.L.R.B.R. (2d) 161, *95* C.L.L.C. 220 – 014; LRB File No. 159 – 93, 26 July 1994 decision of Beth Bilson, Chair, Saskatchewan Labour Relations Board

58 Ibid. at p. 27

> "The discretion which police officers enjoy due to their role as public officials is not, as these cases indicate, of an absolute or unfettered nature. It is encumbered by the requirement that it be exercised in the interests of public policy which is the reason for its existence. …
> "It is our view, however, that it is not legitimate to add to these considerations the collective bargaining goals being pursued by the Union. The proper exercise of discretion by police officers charged with law enforcement is guided by factors relevant to law enforcement, and cannot include considerations related to collective bargaining issues, or to the objectives being pursued in the course of an industrial dispute. We have concluded that, insofar as the form of industrial action chosen by the Union consisted of directing police officers to take the dispute with the Employer into account when making discretionary decisions, this constituted an illegal form of strike action."

argument of the police association counsel that the proper recourse for failure to enforce the law was discipline by the chief of police, rather than an unfair labour practice application by the board of police. While not determining this question, the Board did note that its acceptance of jurisdiction might preclude other proceedings.[59]

The Ontario Court of Appeal made a similar finding in 2007 in *Toronto Police Association v. Toronto Police Services Board*, where it held that a dispute over an agreement on discipline, related to police officers wearing their police uniforms to a union rally in defiance of an order by the Chief of Police, was a discipline issue to be resolved under the Ontario *Police Services Act*, rather than in the courts as a contractual dispute.[60]

Understanding the separate capacities of the board and chief of police is fundamental. If the Board cannot direct the Chief to do something with respect to operations or employees, then it cannot do so indirectly, including by agreement with the police association through collective bargaining.

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[59] Ibid, at p. 32

> "In the context of this application, we cannot comment on what view a disciplinary board appointed under *The Police Act* might have taken of the conduct which is the subject of the allegations in this application. The Employer has asked us to consider whether the conduct of the Union constituted an unfair labour practice under *The Trade Union Act*, and it is our view that there are facets of conduct of the Union which legitimately raise this question, and which this Board has jurisdiction to consider. This seems to us to be particularly true because, as we have intimated earlier, a determination of whether the conduct of the Union was legal strike activity and therefore enjoyed the protection offered by *The Trade Union Act* might have a significant impact on whether the recourse of disciplinary proceedings against individual police officers under *The Police Act* was a route open to the Employer."

[60] ***Toronto Police Association v. Toronto Police Services Board***, 2007 ONCA 742, (2007) 287 D.L.R. (4th) 557 (Ont. C.A.)

IV DO COLLECTIVE AGREEMENTS GO BEYOND THESE LIMITS?

The author reviewed collective agreements from the five largest Saskatchewan municipal police services. Most provisions in these agreements are unobjectionable. Indeed, all but one of the collective agreements contain some form of provision expressly recognizing the primacy of the statutory regime, albeit to varying degrees.[61] At the same time, a few common issues emerged.

APPOINTMENTS

Most of the agreements contemplate appointments being made by the board of police on recommendation of the chief of police.[62] While this was the regime at one time, changes

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[61] "Estevan Board of Police Commissioners and the Estevan Police Association" - collective agreement for 2007 - 2010: articles 7.07(a) and 7.08(a) exclude discipline under *The Police Act* from grievance
"The Board of Police Commissioners and The Moose Jaw Police Association" collective agreement for 2008 -2010: article 43.1 provides "deemed to be subject …" to rules and regulations

"The Board of Police Commissioners and the Prince Albert Police Association" collective agreement for 2007 - 2010: "except where such rules and regulations contravene existing laws"

"Regina Police Association, Inc. and Regina Board of Police Commissioners" collective agreement for 2007 - 2010: article 8 -"Grievances and Disputes" states "The provisions of this Article are not intended to be utilized in any circumstances where the provisions of the Saskatchewan Police Act and Regulations thereunder apply."

- this is the clearest statement in any of the collective agreements reviewed and is a correct statement of the law.

"Regina City Police Senior Officers' Association and Board of Police Commissioners" collective agreement for 2007 – 2010: article 8 is the same as for the Regina Police Association

[62] Estevan collective agreement: articles 7.01(a) and 7.10(a) state that the chief of police will recommend applicants for employment and for basic police training schools to the employer (board of police)

Moose Jaw collective agreement: article 12.3 "All promotions, reductions in staff and special appointments for police duty shall be made by the Board, on recommendation of the chief,…"

Regina Senior Officers' collective agreement: article 9(a) states "All appointments, promotions and reductions in rank shall be made by the Commission upon the recommendation of the Chief of Police."

Saskatoon Police Association collective agreement: Appendix "A", article B.3 states "Note: All <u>new appointments</u> to the Saskatoon Police Service are to be made by the Board of Police Commissioners."
Saskatoon Senior Officers collective agreement: article 24(a) states "The Chief of Police shall make all recommendations for promotions and appointments to the Board for final decision."

in legislation have restored the power of appointment and promotion to the chief of police.[63] There provisions are essentially anachronisms, at least in relation to the police officer component of the police services.

PROBATION

Most of the agreements provide for a 12 month or one year period of probation, which accords with the statutory probation period.[64] Although there is no conflict, since the statutory period is expressly stated as a "minimum" period, the statutory period would prevail in the event of any conflict.[65]

PROMOTIONS

Similar references are found with respect to promotions.[66] Most of the agreements contain detailed promotion plans designed to balance merit and seniority and to reduce

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[63] S. 35 of *The Police Act, 1990*:

> 35 (2) Subject to the general direction of the board and to this Act and the regulations, the chief is responsible for:
>
> (a) the management, administration and operation of the police service;
>
> (3) To carry out the responsibilities imposed on a chief of police by this Act and the regulations, the chief may:
>
> (a) appoint any personnel to positions designated by the board and assign their duties;

[64] Estevan collective agreement: article7.01(b) – 12 months for new employees
Moose Jaw collective agreement: article 12.1 - 12 months
Prince Albert collective agreement: article 4.03 - one year
Regina Senior Officers collective agreement: article 9(d) – 6 months (assumes promotion from within Service)
Saskatoon Police Association collective agreement: article 47(b): 12 months
Saskatoon Senior Officers collective agreement: article 25: 12 months

[65] *The Municipal Police Recruiting Regulations* s. 10 provides for a minimum period for probation of: six months, after graduation from the Saskatchewan Police College; and not less than one year, including time attending the College, except for an experienced applicant.

[66] Estevan collective agreement: article 7.09(c) refers to the chief of police providing "the Employer with a recommendation regarding the appointment of a member" to a new rank. A Letter of Understanding appended to the collective agreement dated 16 September 2008 proposes a Labour Management Liaison Committee to propose a new promotion process for review by the chief of police and forwarding to the board of police commissioners "for formal approval."

subjectivity from promotions.[67] While laudable, these schemes may conflict with the chief's right to promote. The Regina and Saskatoon collective agreements, while very detailed as to the promotion plans, seem to recognize that the chief of police has the final say in promotions.[68] This may achieve the intent without infringing upon the statute.

Moose Jaw collective agreement: article 12.3 states "All promotions, reductions in staff and special appointments for police duty shall be made by the Board, on recommendation of the chief,…"; articles 22.4(d) and 22.11(a)(ii) refer to the chief filling postings from the ranking of the Promotion Board.

Prince Albert collective agreement: article 4.02 refers to "the chief of police advising the Board of an appointment or promotion", but article 4.03(b) refers to "permanent appointment [being] recommended by the Chief of Police".

Regina Police Association collective agreement: Schedule "A" (which addresses police officers only), article 3(12)(b) gives the Chief the final say on any promotion, consistent with the Act, except limiting the choice to those determined as "qualified" by the Promotion Board:

> "Names of qualified employees will be submitted to the Chief of Police by the Promotion Board. The Chief of Police shall have the prerogative of making the final decision of the candidates submitted by the Promotion Board."

Regina Senior Officers collective agreement: article 9(a) states "All appointments, promotions and reductions in rank shall be made by the Commission upon the recommendation of the Chief of Police."

Saskatoon Police Association collective agreement: article B of Appendix "A"-"Promotion Policy and Procedure" seems contradictory. B.1 states "The Promotion Committee shall make all recommendations for promotions to positions within the scope of the Association to the Chief of Police who shall have final authority for such promotions." But the "note" below B.3 states "All <u>new appointments</u> to the Saskatoon Police Service are to be made by the Board of Police Commissioners."
Saskatoon Senior Officers collective agreement: article 24(a) states "The Chief of Police shall make all recommendations for promotions and appointments to the Board for final decision."

[67] Estevan collective agreement: article 7.09
Moose Jaw collective agreement: articles 22.4(d) and 22.11(a)(ii) refer to the chief filling postings from the ranking of the Promotion Board.
Regina Police Association collective agreement: Schedule "A", articles 2 "Vacancies and New Appointments" and 3 "N.C.O. Promotion Plan"
Saskatoon Police Association collective agreement: Appendix "A" – "Promotion Policy and Procedure"

[68] Regina Association collective agreement: Schedule "A", article 3.12(b), but limits the choice to candidate deemed "qualified" by the Promotion Board constituted under the collective agreement.
Saskatoon Police Association collective agreement: Appendix "A", article B

> - article B of Appendix "A"-"Promotion Policy and Procedure" seems contradictory. B.1 states "The Promotion Committee shall make all recommendations for promotions to positions within the scope of the Association to the Chief of Police who shall have final authority for such promotions." But the "note" below B.3 states "All <u>new appointments</u> to the Saskatoon Police Service are to be made by the Board of Police Commissioners."

Saskatoon Senior Officers collective agreement: article 24(a) states "The Chief of Police shall make all recommendations for promotions and appointments to the Board for final decision."

A related issue is the ability of police collective agreements to limit appointments above entry level to serving members, in effect creating a 'closed shop'. The application of selection criteria established in the collective agreements appears to have this effect and in some cases is expressly stated. The Saskatoon City Police Association collective agreement goes so far as to purport to restrict promotions outside the scope of its bargaining unit, requiring the Chief to consider its members first in appointment of senior officers (ranks of Inspector and Superintendent, who are members of a different certified police association).[69] Again, however, wording of the requirement seems to concede the Chief has the right to make another selection from outside the police service. The question may be asked, could the board of police commissioners, in the absence of the collective agreement, require the chief of police to limit senior officer appointments to serving members? Or does the express power of appointment conferred on the chief of police by s. 35(3)(a) of *The Police Act, 1990* preclude such direction? If it is so precluded, then the board cannot impose such limits indirectly through collective bargaining.

DISCIPLINE & DISMISSAL

While most of the collective agreements contain wording recognizing the exclusive statutory regime over discipline, most collective agreements still contain provisions which purport to govern the chief in the exercise of his authority over discipline, including disciplinary dismissals, to varying degrees.[70] These provisions would likely

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[69] Saskatoon Police Association collective agreement: Appendix "A" – "Promotion Policy and Procedure", article D.2
"2. Members of the Saskatoon Police Service shall receive first consideration for vacancies to the entry level of the commissioned ranks. Appointments to any of the commissioned ranks below the rank of Deputy Chief shall be made from the members of the Saskatoon Police Association. However, upon prior consultation with and approval by the Association, an appointment from other than members of the Association may be made."

[70] Estevan collective agreement: articles 7.07(a) and 7.08(a) expressly acknowledge the primacy of the *Police Act* for discipline; article 6.03(c) provides for dismissal where a member engages in outside employment while on leave of absence; article 7.03(a) provides a right of appeal against dismissal for cause to the Grievance Committee, and also provides for waiver of the notice of dismissal.
Moose Jaw collective agreement: article 45.2 requires the board of police to give reasons for dismissal or discipline to the Police Association and the "member". ("Member" is a term used to describe police officers, distinct from other police employees, usually referred to as civilian employees.)

either be “read down” to apply to civilian members only or be declared void and severable.

Prince Albert collective agreement: article 10(a) states “All matters of discipline shall be dealt with as provided in the rules and regulations governing the Police Force and approved by the Board of Police Commissioners except where such rules and regulations contravene existing laws or the terms of this Agreement.”; article 10(b) provided that an employee may be suspended or dismissed without notice for misconduct, provided “that the employee shall have all rights of appeal in this Agreement.” Article XI “Grievance Procedure” contemplates application to “When a member has been dismissed, suspended, disciplined, demoted or has any other grievance..”.

Regina Police Association collective agreement: article 8(b)(iii) directs the chief of police to advise the member charged with a discipline offence of the penalty being sought “at the time or prior to being notified of such charge”; article 10 “Complaints Against Members” requires that written statements be obtained from all prospective witnesses and provided to the member before the member is required to respond to the allegation and before disciplinary action is taken.

Saskatoon Police Association collective agreement: article 24(b) provides members the right to be accompanied by two Association representatives and legal counsel when being interviewed or charged with a breach of discipline; article 48 “Suspended Members” entitles members to receive full benefits not received while suspended pursuant to *The Police Act* if the suspension does not result in a guilty verdict for the charged offence which resulted in the suspension. While this is consistent with s. 53(12) of *The Police Act*, in as much as this provision conflicted with a decision of a hearing officer under s. 58 or 60 of the Act or s. 26 of the *Discipline Regulations*, it would be void.
Saskatoon Senior Officers collective agreement: article 28(c) provides the same right to senior officers

V SUMMARY

Collective agreements between boards of police and police associations are subject to special limitations as to the scope of items that may be bargained. These special limitations are grounded in public policy. That public policy, as developed in common law and codified in statute and regulations, aims to separate police from partisan political influence and to maintain the impartiality of police and fealty to the law above all.

Provisions of collective agreements that go beyond the jurisdiction of the board are not valid. Three tests may be applicable to determine the validity of a provision:

1. Is this subject addressed in legislation, in particular under *The Police Act* or regulations to that Act?
2. Is this item within the authority of the board or the chief of police? If the board cannot direct the chief to do something, then it cannot do so indirectly by agreement with a third party.
3. Is the provision void as contrary to public policy?

The mere fact that a provision is found within a collective agreement is insufficient to confer it with legitimacy. Police boards, police associations and chiefs of police themselves may be insufficiently acquainted with the separate jurisdictions. Further, over time, changes in legislation may remove areas from collective bargaining, as the statutory regime expands to occupy the field. Awareness of the issue and careful consideration of the limits to collective bargaining in policing is necessary to avoid problems and unnecessary disputes. It is hoped this paper will contribute to that understanding.

Neil Robertson, Q.C.

APPENDIX: POLICE ACTS OF OTHER PROVINCES

ALBERTA

Police Act, R.S.A. 2000, c. P-17

> **Police Officers Collective Bargaining Act**
> **60** None of the matters referred to in sections 16, 20, 31, 37(1), 41 and 43 to 48 shall be the subject of a collective agreement referred to in the *Police Officers Collective Bargaining Act.*
>
> [The cited provisions include powers conferred on the Police Commission and the Chief of Police, including complaints and discipline]

Police Officers Collective Bargaining Act, R.S.A. 2000, c. P-18

BRITISH COLUMBIA

Police Act, R.S.B.C. 1996, c. 367

Fire and Police Services Collective Bargaining Act, R.S.B.C. 1996, c. 142

MANITOBA

Provincial Police Act, C.C.S.M. c. P150

> **Regulation to prevail**
>
> 29(2) Where there is a conflict between a regulation respecting the conduct, duties, suspension and dismissal of members of police forces or respecting any disciplinary code for municipal police forces, made under this Act, and a regulation respecting those matters made under any other Act of the Legislature, or by the council of The City of Winnipeg, any other municipal council or police commission as defined in subsection 26(1), the regulation made under this Act prevails.

NEW BRUNSWICK

Police Act, S.N.B. 1977, c. P-9.2

> **Paramountcy of Police Act**
>
> 33.2 For the purposes of greater certainty, the provisions of this Act and the regulations prevail in the event of a conflict or inconsistency between this Act and the regulations and

*(a)*any other public Act or regulation made under a public Act, including the *Industrial Relations Act* and regulations made under the *Industrial Relations Act*, and
*(b)*any private Act, or municipal charter or by-law made under a private Act or municipal charter.

NEWFOUNDLAND

Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17

Binding on Crown

61 (1) This Act is binding upon the Crown.

(2) Where this Act conflicts with another Act, this Act shall prevail except with respect to the provisions of those Acts referred to in paragraph 60(1)(a.1).

NOVA SCOTIA

Police Act, S.N.S. 2004, c. 31

Act prevails

93 (1) Where there is a conflict between this Act and any other Act, this Act prevails.

(2) Every collective agreement is subject to this Act and the regulations and, where there is a conflict between the agreement and this Act or between the agreement and the regulations, this Act and the regulations prevail.
2004, c. 31, s. 93.

ONTARIO

Police Services Act, R.S.O. 1990, c. P.15

Restriction

126. Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsection 64 (17)) and Part VII of this Act and by the regulations. 1997, c. 8, s. 36.

[The provisions referred to include the prescribed duties and restrictions on police officers, indemnification, complaints and discipline process and special investigations. This section is subject to amendment upon proclamation by S.O. 2007, c.5, s. 11, 14(2) by striking out “Part V (except as provided in subsection

64(17)" and substituting "Part V (except as provided in subsections 66(13) and 76(14))".]

Ontario Provincial Police Collective Bargaining Act, 2006, S.O. 2006, c. 35, Sch. B

Exclusive functions of employer

2(3) Except in relation to matters governed by or under the *Police Services Act*, every collective agreement is deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine employment, appointment, complement, organization, work methods and procedures, kinds and location of equipment, discipline and termination of employment, assignment, classification, job evaluation system, merit system, training and development, appraisal and the principles and standards governing promotion, demotion, transfer, lay-off and reappointment, and that such matters will not be the subject of collective bargaining nor come within the jurisdiction of the Negotiating Committee or an arbitration board. 2006, c. 35, Sched. B, s. 2 (3).

QUEBEC

Police Act, R.S.Q. c. P-13.1

Direction of police force.

83. A municipal police force shall be under the direction and command of a director of police.

PRINCE EDWARD ISLAND

Police Act, R.S.P.E.I. 1988, c. P-11