Labour Relations Board
Saskatchewan

SASKATOON POLICE ASSOCIATION, Applicant v. SASKATOON BOARD OF POLICE COMMISSIONERS, Respondents

LRB File No.: 068-06; May 11, 2012
Chairperson, Kenneth G. Love, Q.C.; Members: Joan White and Maurice Werezak

For the Applicant: Mr. Gary L. Bainbridge
For the Respondent: Mr. Robert J. Gibbings, Q.C.

Jurisdiction – Board considers if it has jurisdiction with respect to an Unfair Labour Practice Application – Special Constable with Saskatoon Police Service charged with major disciplinary offence under *Police Act*. Hearing scheduled, but before hearing could be completed, Employer and officer reached a settlement agreement. Settlement Agreement negotiated without the assistance of Union. Union not advised of, or aware of, settlement agreement. Union alleges Employer guilty of Unfair Labour Practice for bargaining directly with Employee.

Section 11(1)(c) of *The Trade Union Act* – Union alleges that Employer guilty of unfair labour practice by negotiating a resolution to disciplinary charges against a union member prior to the conclusion of disciplinary hearing without their involvement. Union alleges that Employer should have included Union in any negotiations related to settlement of disciplinary charges against member.

Jurisdiction of Board – Board reviews and considers several decisions regarding the jurisdiction of an arbitrator to deal with matters arising out of disciplinary charges against a police officer and the application of those decisions to a situation where there is a jurisdictional argument as to which statutory scheme should govern the dispute.

Jurisdiction of Board – Board considers statutory context, the essential character of the dispute and the legislative intend regarding the competing legislative schemes.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C. Chairperson: The Saskatoon Police Association (the "Association") is the certified bargaining agent for all members of the

Saskatoon Police Service below the rank of inspector, except for civilian members. The Association filed an application alleging that the Saskatoon Board of Police Commissioners (the "Employer") had committed an unfair labour practice in violation of s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), by negotiating an agreement directly with a member of the bargaining unit, one C.L., whereby C.L. resigned as a special constable with the Saskatoon Police Service. In its reply to the application, the Employer alleges that this Board does not have jurisdiction over the matter as the dispute is, in essence, centered on discipline under the jurisdiction of *The Police Act, 1990*, S.S.

[2] In June 2006, the Association sought disclosure and production from the Employer of "all documents exchanged between the Employer and [C.L.] and her counsel that led to her resignation, including all 'settlement documents'", and C.L.'s payroll records. The Employer refused same, on the same jurisdictional grounds. The Association requested that the Board order production of those documents. In a decision dated November 19, 2008, the Board refused to grant the Association's request.[1]

[3] The Employer requested judicial review of the Board's November 19, 2008 decision. By a decision dated July 9, 2009, The Saskatchewan Court of Queen's Bench granted the Employer's application and quashed the decision of the Board upon its finding that the Board had "erred in asserting jurisdiction over the matter whose essential character was disciplinary and therefore under *The Police Act, 1990* and not *The Trade Union Act.*"[2]

[4] The Association appealed that decision to the Saskatchewan Court of Appeal. The Court of Appeal in its decision dated April 12, 2011, determined that the judicial review application was premature insofar as the Board had not, by its preliminary determination regarding production of documents, made any jurisdictional ruling. The Court allowed the appeal, and restored the Board's decision.

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[1] [2008] CanLII 63620
[2] [2009] SKQB 291 (CanLII)

[5] Following the Court of Appeal decision, the Board convened to hear the Unfair Labour Practice application in Saskatoon on April 11, 2012. For the reasons which follow, we have determined that the Board has no jurisdiction with respect to this matter insofar as the essential character of the dispute between the parties is a matter arising directly from or incidental to the imposition of discipline upon a police officer under *The Police Act.*

Facts:

[6] The facts in this case are not seriously in dispute between the parties. The Association and the Employer co-operated to provide evidence to the Board as to the matters in dispute. The Board heard from two witnesses, including C.L., who testified for the Employer. In addition, through its witness, C.L., the Employer produced a redacted copy of the settlement contract which the Association had sought production of in its earlier application to the Board. The Association advised that for the purposes of the hearing, it was satisfied to accept the redacted document, but would be requesting the Board order production of an un-redacted copy of the document in the event that its application were granted.

[7] At all material times, C.L. was a member of the Saskatoon Police Service as a Special Constable and a member of the Association and the bargaining unit beginning service with the Saskatoon Police Service in 1992. She went on medical leave in 1996 or 1997, returning to work in 1998. She went on medical leave again in 2000 and remained on medical leave until she resigned from her employment in March, 2005.

[8] Under the terms of the Collective Agreement between the Association and the Employer, there are two forms of medical leave. The first is what might be considered as usual sick time, that is a period of time accumulated in accordance with the collective agreement which may be utilized in the event of illness. The second, is a more unique form of medical leave, funded in part by contributions made by all members of the Association, with matching contributions from the Saskatoon Police Commission which may be utilized, upon provision of medical evidence, upon the expiry of any sick

leave entitlements. This second form of medical leave is referred to as "sick bank" entitlements.

[9] Sick bank entitlements, are available to a member to be utilized for a period of 25 years or until they reach 60, whichever shall first occur. Entitlements are subject to provision of satisfactory medical evidence over the course of the entitlement.

[10] In 2004, C.L. was charged with three (3) major breaches of *The Municipal Police Discipline Regulations, 1991*[3]. All charges arose directly or indirectly out of an incident which occurred in 2003. Pursuant to the provisions of *The Police Act, 1990*,[4] ("*the Police Act* "), a hearing was convened in September, 2004 before a hearing officer to inquire into the charges.

[11] Former Sgt. Farion, who was the Vice-President of the Association at the time of these events, testified that the Association wrote to C.L. advising her that the Association would assist her should she wish, but that she would be responsible for carriage of the disciplinary matter herself. If she chose to engage counsel, it would be at her expenses, although, she could make application to the association for payment of some or all of her legal expenses. In her testimony, C.L. did not recall receipt of such letter. Although the letter was not tendered into evidence, we accept the testimony of former Sgt. Farion in that respect.

[12] The Association attended the hearing as an observer. Following commencement of the hearing, C.L. requested an adjournment in order to retain legal counsel. That adjournment was granted. On the date on which the hearing was to resume, C.L. failed to attend, and the matter was further adjourned. The Association had no further involvement after that time with the disciplinary hearing.

[13] At some time during 2005, an approach was made by one of the parties (either the Employer, or counsel for C.L.) regarding a possible settlement of the disciplinary charges. Negotiations occurred between the Employer and C.L. (through

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[3] Saskatchewan Regulations – C. P-15.01, Regulation 4
[4] S.S. 1990-91, c. P-15.01

her then counsel) regarding a potential settlement. A settlement was achieved and documented in an agreement dated March 22, 2005.

[14] In summary, the settlement agreement provided as follows:

1. C.L. would resign her position with the Saskatoon Police Service effective March 24, 2005;

2. The Saskatoon Police Service would pay a retraining allowance to C.L.; and

3. The charges under the *Police Act* would be withdrawn.

[15] On March 29, 2005, the Chief of Police circulated a routine Personnel Order that advised that C.L. had resigned her employment effective March 24, 2005. This announcement caught the Association by surprise, since to the Association's knowledge, C.L. was off work drawing sick bank benefits.

[16] The Association learned that C.L. may have resigned as the result of an agreement negotiated with C.L., through her counsel, by the Employer without the knowledge or involvement of the Association. On June 9, 2005, the Vice-President of the Association made a request of the Employer for the details of the arrangement. The request was refused. The Association made a second formal request for the information. The Association received a written response from counsel for the Employer acknowledging the existence of a "settlement" with C.L. and of "settlement documents", but the Employer refused to provide same because "the terms of the settlement arrived at are confidential", and in relation to disciplinary matters.

[17] The Association then launched this Unfair Labour Practice application. As a part of that application, they made an application for Production of the Settlement Agreement, which was the subject of the Board's decision on November 19, 2008.

Arguments:

[18] Each party filed a written brief of argument, which we have reviewed and found helpful. Counsel on behalf of each party also made oral argument.

Union Arguments

[19] Mr. Bainbridge, counsel on behalf of the Association, argued that the conduct of the Saskatoon Police Service, in negotiating a settlement of the discipline charges against C.L. constituted direct bargaining with an employee, which the Board has on many occasions determined to be a breach of s. 11(1)(c) of the *Act*. In support of its position, he cited *United Food and Commercial Workers, Local 1400 v. Culinar Inc.*[5]

[20] The Union also argued that in a unionized workplace, there is no ability for an employer to contract directly with an individual employee. In support, Mr. Bainbridge cited the Supreme Court of Canada authorities in *Syndicat Catholique des employes de magazines de Quebec v. Cie Paquet Ltee.*[6], *McGavin Toastmaster Ltd. v. Ainscough*[7] and *Isidore Garon ltee v. Tremblay*[8].

[21] Mr. Bainbridge argued that direct negotiation caused damage to and undermined union support in the workplace. Citing *Devilbiss (Canada) Ltd.*[9], he argued that the duty to bargain in good faith as set out in s. 11(1)(c) of the *Act* both "reinforced the obligation of an employer to recognize the bargaining agent" and was intended "to foster rational, informed discussion thereby minimizing the potential for industrial conflict."

[22] Mr. Bainbridge also cited the Board's decision in *Saskatoon Police Association v. Saskatoon Board of Police Commissioners*[10], which was an earlier decision of the Board dealing with an early retirement offer made between these two parties. In that decision, the Board found a breach of s. 11(1)(c) of the *Act*.

[23] On the issue of jurisdiction of the Board, Mr. Bainbridge argued that the Board has jurisdiction in respect of this issue under s. 11(1)(c). He argued that, while the settlement may have been for the purposes of resolving the disciplinary matter, it directly affected C.L.'s terms and conditions of employment, specifically, resignation

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[5] [[1999] Sask. L.R.B.R. 97, LRB File No.: 038-98
[6] [1959] SCR 206
[7] [1976] 1 SCR 718
[8] [2006] 1 SCR 27
[9] [1976] 2 C.L.R.B.R. 101
[10] [1993] SLRBD No. 72

from employment, the termination of her sick pay and benefits under the collective agreement, and severance pay.

[24] Mr. Bainbridge asserted that the decision of the Supreme Court of Canada in *Regina Police Association v. Regina (City) Board of Police Commissioners*[11], was being misinterpreted by counsel for the Saskatoon Police Service as it was limited to the jurisdiction of a collective agreement arbitrator, not the Board. He argued that the present complaint does not arise out of the interpretation, application, administration or violation of the collective agreement, but rather a violation of *The Trade Union Act*. Secondly, the present issue does not relate to discipline, but, rather, to the relationship in the workplace between the Employer and the Association as the certified bargaining agent.

[25] He further argued that there was nothing in *The Police Act* which displaces or excludes the authority of the Board under the *Act*. He pointed specifically to s. 31(2) of *The Police Act* which specifically includes a reference to the *Act* insofar as who is the employer of personnel of the police service and which designates the Chief of Police or a Deputy Chief as agents of the Employer.

[26] He argued that in *Regina Police*, *supra*, the Supreme Court confirmed that *The Police Act, 1990*, ousts the jurisdiction of a collective agreement arbitrator (and presumably the Labour Relations Board) in respect of disciplinary matters, but not in respect of disputes arising out of the ordinary employer-employee relationship – a tribunal under *The Police Act* cannot make a finding of violation of *The Trade Union Act*, or grant remedies for such breaches, and deals with fundamentally different matters. He argued that this was made clear by the Court of Appeal in upholding the decision of the Labour Relations Board that found the Employer acted in violation of s. 11(1)(c) of the *Act* when it refused to refer a grievance to arbitration, maintaining that it was a disciplinary matter.

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[11] [2000] SCC 14, [2000] 1 S.C.R. 360

[27] In addition, Mr. Bainbridge argued that the Board has assumed the required jurisdiction on other occasions. He cited *Regina Police Association v. Regina (City) Board of Police Commissioners*[12] in support.

[28] He also argued that the essential character of the dispute between the parties was not an issue of discipline, but rather relates to the relationship between the employer and the certified bargaining agent in the workplace. He acknowledged that disputes regarding discipline and disputes regarding ordinary employer-employee relationships are governed differently under *The Police Act* and the *Act.* [13]

[29] He argued that the Board was exclusively empowered under the *Act* to grant the remedy sought by the Union. He argued that a hearing officer under *The Police Act* cannot make a cease and desist Order for an Unfair Labour Practice. He argued that it was clear that *The Police Act* and the *Trade Union Act* had completely different purposes. In support, he cited *Brotherhood of Maintenance Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*[14]

[30] Finally, Mr. Bainbridge argued that the Board in its decision in *Re: Robin*[15] had previously determined that even if issues of discipline were being raised, that did not deprive the Board of jurisdiction.

Employer's Arguments

[31] Mr. Gibbings, counsel on behalf of the Employer argued that the present matter is a disciplinary matter in its "essential character", and, as such, the Board is without jurisdiction to determine the matter. He submitted that, notwithstanding that the settlement of the disciplinary matter may have had collateral effects on cessation of collective agreement benefits, it did not change the essential character of the matter from one of discipline to one of employment. In support of this argument, counsel referred to the decision of the Supreme Court of Canada in *Regina Police*, *supra*.

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[12] [2000] SCC 14, [2000] 1 S.C.R. 360
[13] See *Saskatoon (City) Police Force v. Saskatoon (Police Commission) [2004] S.J. No. 9 (Sask. C.A.) at para 19*
[14] [1996] 2 SCR 495
[15] [2010] S.L.R.B.D. 22, LRB File No.: 050-10

[32] Mr. Gibbings argued that, because police officers are agents of the public,[16] *The Police Act* contains a public complaints process with respect to the actions of a member of the police service. That *Act*, he argued, also provides for the conduct of internal disciplinary proceedings without a public complaint.

[33] Any complaint hearing under *The Police Act* is conducted in accordance with the provisions of that *Act.* However, while the hearing is open to "the public, representatives of the local police association and the complainant"[17], the *Act* also provides[18] for the exclusion of, *inter alia*, representatives of the local police association from the hearing.

[34] He argued that when discipline is invoked under *The Police Act*, the member stands alone to face the charges. While the member may be represented by counsel, the police association, while being entitled to be present, is not able to represent the member in these proceedings. In support, he cited the Court of Queen's Bench decision in *Saskatoon (City) Police Association v. Saskatchewan (Police Commission)*[19]

[35] Mr. Gibbings argued that there were strong public policy arguments to separate the discipline regime set out in *The Police Act* from the collective bargaining provisions of the *Act.*

[36] He argued as well that the Supreme Court in *Regina Police Association v. Regina (City) Board of Police Commissioners*[20] determined that *The Police Act* and the Regulations thereunder constitute a "comprehensive code" for the resolution of disciplinary matters involving police officers.

[37] He argued as well that the matter should be determined by the Board considering what was the "essential character" of the dispute between the parties as

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[16] See *Penn v. Singbeil, Saskatoon (City) and Saskatoon Board of Police Commissioners* [1986] 44 Sask. R. 312
[17] See s. 56(9) of *The Police Act*
[18] See s. 56(9.1) of *The Police Act*
[19] [2001] SJ 681, [2001] SKQB 477 (CanLII)
[20] [2000] SCC 14, [2000] 1 S.C.R. 360

described by the Court of Appeal in *Regina Police Association v. Regina (City) Board of Police Commissioners*[21].

[38] He noted that in that decision, the Court found that the resignation of the officer in that instance did not change the essential character of the dispute from one governed by *The Police Act*. Furthermore, he argued that since the member was responsible for and controlled the discipline process, that the member would also be in control of any settlement process. He argued that it would create an absurdity which would be contrary to sound policy reasons, if, upon a settlement occurring, that a second regime under the *Act* were to be engaged.

[39] He acknowledged that the disciplinary process would, in many cases, have an impact upon a member's pay, pension, hours of work, etc., be that by suspension, demotion, or termination. He argued that this would also be the case where, a member accepted discipline imposed by the Chief of Police rather than submit to a hearing under *The Police Act*.

[40] He argued that there was no negotiation of terms of employment between C.L. and the Employer. Rather, there was a settlement of a disciplinary process under *the Police Act*, the conduct of which was the sole responsibility of C.L. He noted that the Association was not engaged in the hearing process and could not compel either C.L. or the Employer to do anything, or to insist that it could in any way represent C.L. during those proceedings.

Analysis and Decision regarding the Jurisdiction of the Board:

[41] The question of the Board's jurisdiction that is at the heart of this matter has no easy answer. In *Quebec (Commission des droits de la personnel et des droits de la jeunesse) v. Quebec (Attorney General)*[22] the Court says at paragraph 7 et seq.[23]:

> *7 There is no easy answer to the question of which of two possible tribunals should decide disputes that arise in the labour context where legislation appears to permit both to do so. As explained in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, three outcomes are possible.*

[21] [2000] SCC 14, [2000] 1 S.C.R. 360 at paragraphs 28 & 29
[22] [2004] SCC 39 (CanLII), [2004] 2 SCR 185
[23] Per McLachlin CJ, and Iacobucci, Major, Binnie, and Fish JJ

> *8 The first possibility is to find jurisdiction over the dispute in both tribunals. This is called the "concurrent" jurisdiction model. On this model, any labour dispute could be brought before either the labour arbitrator or the courts or other tribunals.*
>
> *9 The second possibility is the "overlapping" jurisdiction model. On this model, while labour tribunals consider traditional labour law issues, nothing ousts the jurisdiction of courts or other tribunals over matters that arise in the employment context, but fall outside traditional labour law issues.*
>
> *10 The third possibility is the "exclusive" jurisdiction model. On this model, jurisdiction lies exclusively in either the labour arbitrator or in the alternate tribunal, but not in both.*

[42] At paragraph 15, the Court described the analysis which must be undertaken to determine the appropriate jurisdiction as follows:

> *This question suggests two related steps. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator. The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue. It facilitates a better fit between the tribunal and the dispute and helps "to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties", according to the underlying rationale of Weber, supra; see Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, 2000 SCC 14 (CanLII), [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 39.*

The First Part of the Test

[43] This case deals with a dispute in which the parties are in disagreement as to whether the provisions of *The Police Act and Regulations* govern the dispute or whether the provisions of *The Trade Union Act* provide jurisdiction to the Board to rule as to whether the conduct of the Employer in negotiating a settlement of the pending disciplinary charges against C.L. constitute an Unfair Labour Practice under the s. 11(1)(c) of the *Act*.

[44] The parties to this dispute are in agreement that *The Police Act* constitutes a "comprehensive code" for the resolution of disciplinary matters involving police officers.[24]

[45] This Union's position that it has a limited role in disciplinary matters is supported by the provisions of *The Police Act.* The hearing process is described in section 56 of that *Act*. It provides in part as follows:

> ...
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> *56(7) A member or chief with respect to whom a public complaint is made or who is the subject of internal discipline proceedings is entitled to:*
>
> *(a) appear before the hearing officer; and*
>
> *(b) be represented by legal counsel or an agent.*
>
> *56(9) A hearing pursuant to this part is open to the public, representatives of the local police association and the complainant.*
>
> ...

[46] *The Police Act* makes reference to *The Trade Union Act* with respect to some of its provisions. As noted by counsel for the Union, paragraph 31(2) defines, for the purposes of *The Police Act* and *The Trade Union Act*, who is the employer of personnel of the police service and which also designates the Chief of Police or a Deputy Chief as agents of the Employer. That provision reads as follows:

> *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*

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[24] *Regina Police Association v. Regina (City) Board of Police Commissioners* [2000] SCC 14, [2000] 1 S.C.R. 360

[47] There is also the provision[25] of Part VI of *The Police Act*, which provide for conciliation and arbitration where collective bargaining between a local police association and a police board have reached a point where agreement cannot be achieved. These provisions replace the usual provisions for conciliation and arbitration found in *The Trade Union Act*.

[48] In addition, s. 85 of *The Police Act* specifically excludes the Board's authority under clauses 11(6)(a) and 11(7)(a) of the *Act* regarding the usual provision of strike or lock-out notices prior to commencement of strike action.

[49] Section 40 of *The Police Act* is also important. It provides as follows:

> *40(1) This part does not preclude the taking or continuing of civil or criminal proceedings against a member or chief.*
>
> *(2) Except where specifically allowed by this Act, every collective bargaining agreement or contract that provides that:*
>
> > *(a) this Act, or 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.*

[50] The provision of *The Trade Union Act* relied upon by the Union to clothe the Board with jurisdiction to deal with this dispute is section 11(1)(c), which provides as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
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> ...

[25] Sections 83 & 84

> *(c) to fail or refuse to bargain collectively with the representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*

[51] There is nothing specific in either piece of legislation which confers exclusive jurisdiction to either the Board under the *Act* or to a hearing officer under *The Police Act* in respect of this type of matter.

[52] Based upon our review of the relevant statutory provisions, we conclude that neither *The Police Act* nor *The Trade Union Act* confers exclusive jurisdiction over all matters involving labour relations. Rather, the two acts are designed to operate in tandem, with each *Act* providing jurisdiction to either a hearing officer under *The Police Act* in respect of disciplinary matters or to the Board (or to an arbitrator under a collective agreement negotiated by the parties) regarding other labour relations matters.

[53] Apart from these differences, the statutory scheme under *The Trade Union Act* regarding certification, amendment, including access to the provisions of the *Act* concerning unfair labour practices, continues to be in effect where members of a police association are involved.

[54] However, before a conclusion can be reached regarding our jurisdiction, the second part of the *Quebec (Commission des droits de la personnel et des droits de la jeunesse) v. Quebec (Attorney General)*[26] analysis must be engaged. This second step is to "look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to" a hearing officer under either *The Police Act* or to the Board under *The Trade Union Act.* That is, we are required to assess the "essential character" of the dispute to determine the best "fit" of that dispute within the "statutory schemes governing the parties".[27]

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[26] [2004] SCC 39 (CanLII), [2004] 2 SCR 185

[27] *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 (CanLII), [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 39

An Overview of the Relevant Decisions

[55] The circumstances in *Regina Police*, *supra*, were that, on the eve of being charged with an offence under *The Police Act*, the police officer ("Sgt. Shotton" or "Shotton") resigned. Shortly afterwards, he changed his mind and attempted to withdraw his resignation. However, the Chief of Police refused to accept the withdrawal. The Regina Police Association filed a grievance. At arbitration, the arbitrator ruled that because the central issue in the case was one of discipline, and as the collective agreement expressly stated that all such matters had to proceed pursuant to the steps in *The Police Act* and regulations thereunder, she did not have jurisdiction to hear a grievance relating to the same thing.

[56] At the Supreme Court of Canada, Bastarache, J., on behalf of the Court, stated at paras. 31-32 and 35:

> *As Vancise J.A. outlined extensively in his dissent, both The Police Act and the Regulations specifically address the procedural issues at the investigative, adjudicative and appeal stages of a disciplinary process. The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within The Police Act and the regulations for the resolution of disciplinary matters involving members of the police force. This is reflective of a well-founded public policy that police boards shall have the exclusive responsibility for maintaining an efficient police force in the community. The ability to discipline members of the force is integral to this role. Accordingly, no discretion exists to select another legal mechanism, such as arbitration, to proceed against a police officer in respect of a disciplinary matter: see, e.g., Re Proctor and Sarnia Board of Commissioners of Police, (1979), 99 D.L.R. (3d) 356 (Ont. C.A.), at p. 371 (per Wilson J.A. in dissent), majority reversed, 1980 CanLII 48 (SCC), [1980] 2 S.C.R. 727; P. Ceyssens, Legal Aspects of Policing (loose-leaf), at p. 5-2. Generally, when both parties agree that it is appropriate, a resignation is an acceptable means of resolving a disciplinary dispute. However, where a mutually agreed settlement is impossible, both parties to the dispute must resort to the disciplinary procedures provided under the collective agreement and/or the legislation governing their labour relationship. These procedures are meant to be all-inclusive in order to ensure certainty and fairness when the parties cannot reach a negotiated agreement.*

> *Having examined the ambit of the collective agreement, and of The Police Act and regulations, it is clear that the dispute between Sgt. Shotton and the Employer did not arise, either explicitly or inferentially, from the interpretation of the collective agreement. The essential character of the dispute was disciplinary, and the legislature intended for such disputes to fall within the ambit of The Police Act and Regulations. As a result, I agree with Vancise JA that the arbitrator did not have jurisdiction to hear and decide the matter. ...*
>
> *....*
>
> *In Weber, McLachlin J. emphasized that disputes which either expressly or inferentially arise from the collective agreement should be heard by an arbitrator. As a result, an arbitrator may upon jurisdiction of a dispute even when the factual context of that dispute extends beyond what was expressly provided for in the collective agreement, to include what is inferentially provided. It is whether the subject matter of the dispute expressly or inferentially is governed by the collective agreement that is determinative. As I have stated above, this approach applies equally in determining whether the Commission has jurisdiction to hear the dispute in the case at bar. Therefore, even if The Police Act and Regulations do not expressly provide for the type of disciplinary action that was taken in the case at bar, the action may still arise inferentially from the disciplinary scheme which the legislature has provided.*

[57] With respect to the principle of "essential character", the Bastarache, J. stated, at paras. 28-30:

> *The Union contends that the essential character of the dispute in the case at bar is not disciplinary. ... It contends that the issue in this case is properly characterized as a dispute between the parties over the validity of a resignation. Resignation is a matter that can only arise out of the employment relationship. ...*
>
> *With respect, I disagree with the Union's interpretation of the essential character of the dispute in this case. To determine the essential character of the dispute, we must examine the factual context in which it arises, not its legal characterization. I agree with Vancise J.A. that, in light of the agreed statement of facts, this dispute clearly centres on discipline. The dispute began when Sgt. Shotton was advised that he would be charged with discreditable conduct pursuant to the regulations. He was also told that the Chief of Police intended to initiate disciplinary proceedings with a view to dismissal. Some time later, Sgt. Shotton was informed by the Chief of Police that discipline orders would be signed if the formal discipline proceedings were*

> *successful. It was in this factual context that Sgt. Shotton was given the option of resigning rather than being disciplined. I agree with Vancise J.A. that the informal resolution of this disciplinary matter did not change its essential character.*

[58] At para. 39, Bastarache J. stated in summary:

> *To summarize, the underlying rationale of the decision in Weber, supra, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created adjudicative bodies. 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.*

[59] The Alberta Court of Appeal analyzed *Regina Police (supra)* in *Edmonton Police Association v. Edmonton (City)*[28]. In that case, a constable with the Edmonton Police Service was the subject of a disciplinary complaint. Rather than proceed with the disciplinary complaint, the parties agreed to mediate their dispute. The mediation resulted in a settlement of the complaint against the police officer without the matter going to hearing.

[60] Several years after the complaint was resolved an issue arose over whether or not the settlement agreement had been properly complied with by the Employer. The Police Association filed a grievance. The City then made an application to the Court of Queen's Bench for Alberta seeking a declaration as to whether the matter fell under the grievance provisions of the collective agreement or the disciplinary procedures under the *Police Service* Regulation.

[61] The chambers judge concluded that the provisions of the collective agreement could be engaged based upon her determination that "the issue here was not whether Constable Murdoch should have been disciplined, just whether the City had

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[28] [2007] ABCA 147 (CanLII)

disciplined him the correct way, and that issue was properly made the subject of arbitration".[29]

[62] In *Edmonton Police Association v. Edmonton (City)*[30], the Alberta Court of Appeal reviewed the current state of jurisprudence, including the decision in *Regina Police.* In analyzing that decision, it says at paragraph [15] & [16]:

> [15] In *Regina Police Ass'n Inc. v. Regina (City) Board of Police Commissioners* the Court considered the application of the ***Weber*** rule to police officers. Police employment relations have a dual aspect. Police officers share many of the concerns of every employee: working conditions, rates of pay, hours of work, scheduling, vacation pay, etc. There is however an additional public aspect to police employment relationships. Because of their status as public officers, the special powers that police officers are granted, and the quasi-military nature of police services, they are subject to regulation and discipline in the public interest. The statutes recognize this duality. Ordinary employment disputes are to be dealt with by grievances under the collective agreement. Matters of discipline of police officers acting in their public role are dealt with under the *Police Service Regulation*.
>
> [16] In *Regina Police, supra*, the Court set out at para. 25 the approach to be followed in determining whether a dispute arises out of a collective agreement. Two elements must be considered: the nature of the dispute and the ambit of the collective agreement. The goal is to determine the essential character of the dispute based on the facts surrounding the dispute, and not how the legal issues may be framed. Having considered the collective agreement, the decision-maker is to examine the factual context of the dispute and determine whether its essential character concerns a subject-matter that is covered by the collective agreement. "If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator.": *Regina Police, supra*, at para. 25. The interpretation of one of the parties to the dispute about its essential character does not govern: *Regina Police, supra*, at para. 29.

[63] The Alberta Court of Appeal also referenced a decision of the Ontario Court of Appeal in *Abbot v. Collins*[31]. That case involved two police officers who were

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[29] Edmonton Police Association v. Edmonton (City) @ paragraph [12]
[30] [2007] ABCA 147 (CanLII)
[31] [2003] CanLII 46127

transferred or reassigned. The issue in this case was whether or not the action taken against them was a disquised form of discipline for which the officers claimed compensation by way of court action.

[64] In dismissing the officer's claims, the Court again reviewed the *Regina Police* decision. At paragraphs [28] and [29], the Court says:

> *[28] The respondents also argue that because the appellants did not use the procedures under The Police Services Act, there is no remedy for them through the Act to seek redress. In Weber, the court stated that where an arbitrator is not empowered to grant a remedy, the court of inherent jurisdiction may then take jurisdiction. The court had in mind, for example, the imposition of an injunction in labour matters. In any event, Bastarache J. also dealt with a similar argument raised in the Regina Police Association case, that because the police officer was forced to resign, he was not disciplined under the provisions of the Act and therefore he had no procedural avenue to access the Commission and appeal the decision under the Act.*
>
> *[29] Bastarache J. did not accept this argument. He pointed out that the rationale for the exclusive jurisdiction approach articulated in Weber was that violence would be done to the comprehensive statutory scheme contemplated by the legislature by allowing disputes to be heard in a forum that was not the one specified in the legislative scheme. Consequently, the court in Weber held that disputes which arose both expressly as well as those which arose only inferentially out of a collective agreement, had to go to arbitration. Extrapolating from that approach, Bastarache J. concluded that the legislature had provided a comprehensive scheme regarding discipline within The Police Act and Regulations, which included the investigation and adjudication of discipline matters, and that formalistic interpretations of the Act must be avoided if they would deny the Commission jurisdiction in such cases. As a result, although the chief of police did not follow the correct procedure in disciplining the police officer, the officer's constructive dismissal could be appealed to the police commission. Bastarache J. went on to note that the Commission would have the jurisdiction to determine its own jurisdiction in the case, although he stated that it did have jurisdiction in that case.*

[65] The Ontario Court of Appeal, then, determined that:

> *[30] A similar analysis applies in this case. Section 70(1) of the Police Services Act allows a police officer to appeal to the Commission after receiving notice of the decision made by the*

> *chief of police after a hearing. In this case there was no hearing and no notice. However, giving the Act a liberal interpretation, although the procedure of the Act was not followed, the Commission is not deprived of jurisdiction and an appeal would lie to the Commission. Again, it would be for the Commission to decide its own jurisdiction on the evidence placed before it.*

[66] Based upon that determination the Court dismissed the Officer's claims.

[67] In the *Edmonton Police* case, the Court was unable to determine whether or not the dispute was either exclusively the proper subject of collective bargaining or whether it should be considered as a disciplinary matter, because of the way the grievance had been worded. It granted leave to the parties to choose, to either reformat the grievance or to file an appeal to the Law Enforcement Review Board.

[68] While not directly on point, these cases provide some additional guidance to the Board with respect to its deliberations. None of the cases dealt with the situation here, which is a dispute between two competing statutory regimes. However, they clearly highlight the difficulty of determining who has proper jurisdiction in matters such as this.

[69] The Alberta Court of Appeal also dealt with a conflict between the jurisdiction of a labour arbitrator to consider and decide issues involving the Alberta Human Rights legislation in *Amalgamated Transit Union, Local 583 v. Calgary (City)*[32]. In that decision, the court noted at paragraphs 22 & 23:

> *[22] As the employer rightly points out, and as is apparent from the analysis which follows, the Supreme Court of Canada has adopted a liberal position with respect to the jurisdiction of labour arbitrators over issues relating to conditions of employment, provided those conditions have an express or implicit connection to the collective agreement: Bisaillon v. Concordia University, 2006 SCC 19 (CanLII), 2006 SCC 19 at para. 33. The rationale for this position, as expressed most recently in Bisaillon, is to respect the collective representation system and the dispute resolution mechanisms established by labour relations legislation. In Bisaillon itself, the majority held that to permit a dispute to proceed as a class action in the superior courts would be to deny those principles and, essentially, to defeat*

[32] [2007] ABCA 121 (CanLII)

> *the purpose of the legislature in granting exclusive jurisdiction over workplace disputes to labour arbitrators. It is for this reason that courts, when deciding between the jurisdiction of an arbitrator or a court, often start from a position that seeks to preserve the exclusive jurisdiction of the arbitrator.*
>
> *[23] Cases such as Bisaillon raise legitimate and important concerns. The legislative intent in enacting labour relations regimes and creating arbitration procedures must be respected. In my view, however, it is unwise simply to import the principles developed in cases involving a contest between the courts and arbitration, including the inherent preference for the exclusive jurisdiction of arbitrators often apparent in those cases, into a situation where the court must consider two statutory regimes. In the latter situation there are two legislative intents to consider, not one. If we were to accept exclusive jurisdiction as a starting point, we would run the risk of giving the jurisdictional advantage to one statutory tribunal over another and thereby reducing the efficacy of the second statutory regime. That would be especially problematic where the competing regime involves human rights legislation and all that its quasi-constitutional nature implies.*

[70] In dealing with the question of competition between two competing statutory schemes, the Court says at paragraph 32:

> *When a court is asked to decide which of two competing statutory regimes should govern a dispute, the primary consideration remains the intent of the legislature. In that sense, the approach described in Weber applies; the court must examine the essential nature of the dispute to determine whether the legislature intended it to be governed by, for example, the collective agreement or the competing statutory regime. Of necessity, however, the analysis differs somewhat from that undertaken in Weber and the cases following it, where there is only one statutory regime to consider. Where there are two or more legislative schemes creating two or more tribunals that could potentially govern the dispute, the court must consider to which of the competing regimes the legislature intended to grant jurisdiction. One does not start from the premise that the arbitrator is the preferred forum.*

The Second Part of the Test

[71] This analytical background, then leads us to the determination of the second part of the test outlined in *Quebec (Commission des droits de la personnel et*

des droits de la jeunesse) v. Quebec (Attorney General)[33]. Also, as noted in *Amalgamated Transit Union, Local 583 v. Calgary (City)*[34] we "must consider to which of the competing regimes the legislature intended to grant jurisdiction."

[72] In the Supreme Court of Canada's decision in *Shotton*, *supra,* Mr. Justice Bastarache adopted the reasoning of Mr. Justice Vancise, writing in dissent in the Court of Appeal. In his dissent, Justice Vancise describes the task in defining the "essential character" of the dispute as follows:

> *[65] In my opinion where there are three possible regimes, The Trade Union Act, The Police Act and the courts, it is no answer to say that if a dispute arises in an employment context the grievance procedure contained in the collective agreement is the preferable procedure for resolving disputes. That general proposition should only apply where there is no intervening or mandatory alternative statutory regime such as The Police Act. Indeed, in Weber McLachlin J. makes it clear that the arbitrator derives jurisdiction from the collective bargaining agreement and not from some notion of an exclusive jurisdiction model. She states:*
>
> > *In the majority of cases the nature of the dispute will be clear; either it had to do with a collective agreement or it did not. Some cases however may be less than obvious. The question in each case is whether the dispute in its essential character arises from the interpretation, application, administration or violation of the collective agreement.*
>
> ***Essential Character of the Dispute***
>
> *Having set out the various regimes available in the circumstances the task is to:*
>
> > *1. define "the essential character" of the dispute in the context of the agreed statement of facts;*
> >
> > *2. determine whether the dispute falls within the ambit of or terms of the collective agreement.*
>
> *The fact the dispute arose in the employment context does not in these circumstances, having regard for the exclusive jurisdiction of The Police Act over discipline and dismissal, determine the*

[33] [2004] SCC 39 (CanLII), [2004] 2 SCR 185
[34] [2007] ABCA 121 (CanLII)

> *jurisdiction of the arbitrator under the collective agreement. If it were determinative The Police Act would not apply under any circumstances because all disciplinary matters arise directly or inferentially out of the employment contract of a police officer.*
>
> *[66] To return to the question posed at the beginning of this analysis — how does one characterize the dispute in this case? Is it a dispute which arose out of a disciplinary matter or rather out of the manner in which the resignation was obtained making it an employment issue. The Association argues that it is the latter. Essentially, it is a dispute that involves the validity of the resignation which therefore enables the arbitrator to determine whether or not Sgt. Shotton had the intention to resign or whether he was subject to undue influence by the Chief of Police. The Association's argument is that the disciplinary and dismissal procedures under The Police Act ceased to be relevant the moment the Chief of Police agreed to forego disciplinary action provided Sgt. Shotton would resign. According to the Association, the agreement to resolve the disciplinary matter informally, without resort to the formal discipline process , fundamentally altered the essential character of the dispute.*
>
> *[67] The City contends, on the other hand, that the resignation arose out of the informal resolution of a disciplinary matter. It contends the essential character of the dispute is therefore disciplinary arising in the context of discipline for alleged contravention of the Municipal Police Discipline Regulations. In its opinion all the indicia of a discipline dispute exist:*
>
> > *1. an internal investigation leading to a recommendation for formal charges;*
> > *2. an notice of intention to initiate formal complaints under The Municipal Police Discipline Regulations for discreditable conduct which if proven would lead to dismissal.*
> > *3. an informal resolution of the proposed disciplinary action.*

[73] In *Shotton*, *supra*, Vancise J. carefully considered the agreed statement of facts from which he concluded that the subject matter of the dispute began when discipline was proposed for Sgt. Shotton. The fact pattern in this case is similar. That is, the dispute originated when C.L. was advised that she would be subjected to discipline under *The Police Act.*

[74] In paragraph [70] of Justice Vancise's dissent in *Shotton*, *supra,* he says:

> *[70] In my opinion, the dispute clearly centres around discipline — a violation of The Municipal Police Discipline Regulations and an allegation of corrupt practices which if proven could result in dismissal. The essential character or nature of the dispute is disciplinary. It is incorrect to cast the dispute as a failure to reinstate.* ***The proper characterization of the dispute between the parties as contemplated by the Supreme Court of Canada in Weber is that of a resignation arising out of disciplinary proceedings. The Police Act and the regulations specifically address procedural matters at the investigative, adjudicative and appeal stages and identify specific offences which may form the subject matter with disciplinary proceedings. There is no corresponding procedure in the collective bargaining agreement. It was never intended to and does not apply to circumstances such as these.*** *[Emphasis added]*

[75] The emphasized words in the above quotation are equally apt in this case. In this case, C.L., like Sgt. Shotton, resigned rather than face the prospect of an adverse ruling under the disciplinary procedures. There was no corresponding procedure in the collective bargaining agreement, nor are there any procedures under *The Trade Union Act* which would be applicable. The procedure which was being followed was governed by *The Police Act* and the Regulations thereunder.

[76] Both of the parties to this dispute are in agreement that there is no residual authority over police discipline procedures under *The Trade Union Act* and that *The Police Act* represents a complete code with respect to discipline, as outlined by Mr. Justice Bastarache. Furthermore, the Union acknowledges that it has no representational rights under *The Police Act* and that a member is required to face discipline alone.

[77] Some examples highlight the unsustainability of the Union's position that the Board should take jurisdiction under s. 11(1)(c) of the *Act*. The first example is a situation where rather than having proceeded through the disciplinary hearing process, the matter had been settled informally pursuant to s. 50 or referred to mediation pursuant to s. 54.01[35] of the present *Police Act*. Under the reasoning put forward by the Union in this case, the Union could, ostensibly argue that it was entitled to be present during any such mediation or settlement arising therefrom. Unfortunately, *The Police*

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[35] It is acknowledged that this section of *The Police Act* was not available to the parties when the dispute arose, having been added to *The Police Act* by S.S. 2011, c. 12

Act, makes no provision for any representation by a Union during disciplinary proceedings. In our opinion, it would make no difference that those proceedings were disciplinary procedures under *The Police Act* or were converted, from the adversarial process of discipline, to a mediated process.

[78] A second example would be the resolution of a claim made by an employee under the Workers' Compensation scheme. While Unions will occasionally be involved in appeals by injured workers, such appeals are usually taken, on behalf of an injured worker, by workers advocates. Often during those proceedings, resolutions occur without any reference to negotiations or representation by the member's trade union and, without complaint under s. 11(1)(c).

[79] Thirdly, following the logic of Mr. Justice Vancise in *Shotton, supra*, we can identify two streams of jurisdiction. The one stream is the disciplinary stream under *The Police Act*. The second is the stream flowing from *The Trade Union Act* in respect of other labour relations matters apart from discipline.

[80] These jurisdictional streams are discreet. The Union acknowledges that C.L. was required to navigate on her own through the disciplinary process. They now argue however, that in the event the boat she is in navigating the disciplinary stream stops before reaching the disciplinary rapids, and she is assisted to disembark by the Employer, that the Union is entitled, by virtue of the provisions of *The Trade Union Act,* to ensure that she is safely disembarked.

[81] While this analogy may not be precise in its application, it highlights the lack of jurisdiction of the Board in this case. Section 11(1)(c) was not intended by the legislature to be utilized in the manner suggested by the Union. As in *Shotton*, *supra*, and the cases which follow it, the essential character of this dispute is disciplinary in nature. The legislature did not intend, and did not confer any over-riding or superceding jurisdiction to the Board over discipline under *The Police Act.* That jurisdiction, as in the cases cited above, resided in the hearing process for discipline under *The Police Act.*

[82] Section 11(1)(c), in our opinion, was not intended by the legislature to be utilized in the manner sought by the Union. Clearly, while it still has application to the

non disciplinary provisions of labour relations and collective bargaining involving police officers, it is a stretch to bring its application to involvement in negotiated settlements concerning disciplinary proceedings. Another example, to highlight this lack of logic in the position advanced by the Union would be if an application were filed by the Union because the Employer had failed to attempt to bargain a solution to disciplinary proceedings with them. Under this scenario, the Union, as here, would presumably claim that s.11(1)(c) of the *Act* required the Employer to bargain collectively. Clearly, that is not what the legislature intended in setting up the two streams of jurisdiction where labour relations involving police officers are involved.

[83] If we follow the Union's logic to its final conclusion, the result would be that there would likely be no informal resolution of disciplinary complaints and all complaints would be required to go through the disciplinary process. If the parties to the process (the officer and the Employer) were unable to informally resolve the complaint without reference to negotiations with a third party who was not a party to the process, then, in our opinion, it is unlikely that any informal resolution would be proposed and the matters would be sent for final resolution by a hearing officer.

[84] If in this case, the complaint had not been withdrawn, and the matter proceeded to the hearing officer with an agreed resolution of the process, and a formal Order made, the Union would have no complaint that it was excluded from the process contrary to s. 11(1)(c). The mere absence of a formal Order from the hearing officer resolving the complaint does not, in our opinion, clothe the Board with jurisdiction under s. 11(1)(c) of the *Act.*

[85] In our opinion, the legislature clearly intended that all matters of discipline, including those matters resultant from the disciplinary process should be proceeded with under the provisions of *The Police Act*, not the *Trade Union Act.* Even though it would appear that C.L. may not have a remedy if the Employer reneged on its agreement or failed to comply therewith. As noted by Vancise J. in *Shotton, supra,* the lack of such a remedy does not, in and of itself, change the essential character of the dispute. At paragraph 73 he says:

> *The Association contends that a failure to find the arbitrator had jurisdiction would deprive Sgt. Shotton of a remedy because The Police Act does not permit him to appeal the refusal by the Chief of Police over the withdrawal of his resignation. The Association contends the arbitrator was wrong in concluding that Sgt. Shotton could have access to the statutory mandated appeal procedure. The Association contends that ss. 60 & 61 of The Police Act do not apply in these circumstances because there is no decision of the Chief of Police made pursuant to s. 60 from which to appeal pursuant to s. 61. Similarly they argue there is no appeal to the Saskatchewan Police Commission under s. 69 in these circumstances. If the central issue is one of remedy comfort can be taken from the words of McLachlin J. In Weber, she clearly states that the court retains a residual power to permit actions which do not arise under the Collective Bargaining Agreement. Sgt. Shotton is a public office holder and should he not be able to have access to the appeal provisions under The Police Act he could commence an action for judicial review.*

[86] If the complaint had been formally dealt with by the hearing officer, the result of that process would be subject to a right of appeal, and the Union would be aware of the outcome of the hearing.[36] Here, where the negotiations and ultimate agreement were shrouded in secrecy by a non-disclosure provision, the Union was unable to determine for its other members the result of the disciplinary process nor was the general public entitled to know the result. This, perhaps, is the root of the issue here.

[87] Similarly, if the complaint is dealt with informally under s. 50, a record of the "manner in which the complaint was resolved" is required to be made. That record is to be provided to the persons mentioned in that section, and is arguably a public record which is subject to disclosure.

[88] There is some considerable public policy merit in the result of the process being open and transparent to both the public and the Union. That is one of the characteristics of the disciplinary provisions of *The Police Act* and the Regulations thereunder. Unless otherwise ordered, the proceedings are to be public and the results of the process also public in nature. The result of an aborted process under the

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[36] See s. 59(1.1)(a) of *The Police Act*

disciplinary regulations should not, in our opinion, compromise the public benefit in having the results of the process being known.[37]

[89] This concern has been eliminated, to some extent, by the release to the Union of the redacted version of the agreement. While counsel for the Union requested that we order production of the full un-redacted agreement, we are of the opinion that we have no jurisdiction to do so.

[90] For these reasons, the application is dismissed.

Board Member Werezak dissents with respect to this decision.

DATED at Regina, Saskatchewan, this **11th** day of **May, 2012**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[37] See particularly ss. 56(7) & (9) of *The Police Act*