

COURT FILE NO.: 07-CV-327141PD2

DATE: 20070227

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN SMITH, ROD LAWRENCE,  
DALE CARTER and DAVID DEVINEY

)  
)  
) *Thomas Curry and Dena Varah, for the*  
) Applicants

)  
)  
) Applicants

- and -

THE TORONTO POLICE ASSOCIATION

)  
)  
) *Charles Wagman, for the Respondent*

)  
)  
) Respondent

) HEARD: February 23, 2007

Pitt J.

[1] On January 25, 2007, the Board of Directors of the Toronto Police Association passed the following resolution:

RESOLUTION OF THE DIRECTORS

OF

TORONTO POLICE ASSOCIATION

Based on the legal advice of Charles Wagman, presented to us on Sunday January 25, 2007 and thereafter concerning the responsibilities of the TPA Board of Directors and the absence of legal status of the Legal Assistance Plan Board.

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WHEREAS the Board of Directors has determined in the circumstances that the Legal Assistance Plan Board be dissolved and the duties of the Legal Assistance Plan Board be assumed on a temporary basis by the Board of Directors of the Toronto Police Association.

BE IT RESOLVED THAT:

1. Effective today's date, the Legal Assistance Plan Board be and the same is hereby dissolved.
2. Effective today's date, all duties and responsibilities of the Legal Assistance Plan Board be performed by the Board of Directors of the Toronto Police Association.
3. The Board of Directors of the Toronto Police Association shall perform the said duties and responsibilities which had been performed by the Legal Assistance Plan Board until such time as the provisions of Regulation No. 7 can be reviewed and amended at a general meeting of the Toronto Police Association and a new Legal Assistance Plan Board be appointed/elected pursuant to a revised Regulation No. 7. [emphasis added.]

The foregoing resolutions are hereby passed by the directors of the corporation as evidenced by their signatures and pursuant to the provisions of The Corporations Act, R.S.O. c. 38, as amended. Motion carried - 6 for - 2 against.

Dated at Toronto this 25<sup>th</sup> day of January, 2007.

[2] This application was brought for:

- (a) An order setting aside the resolution of the Toronto Police Association Board of Directors (the "TPA Board") dated January 25, 2007 purporting to dissolve the Plan Board and assuming the duties of the Legal Assistance Plan (the "Plan") (the January 25, 2007 resolution).
- (b) A declaration that the TPA Board exceeded its authority under the Toronto Police Association Constitution and By-Laws and Regulations, revised March 2004 (the "TPA Constitution") in passing the January 25, 2007 resolution.
- (c) A declaration that the January 25, 2007 resolution is *ultra vires* the TPA Board and is of no force and effect.

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- (d) A declaration that Regulation No. 7 of the TPA Constitution establishes the procedure for election of the Plan Board, which may not be dispensed with except through a vote of the TPA membership.
- (e) An order reinstating the Plan Board to its role in administering the Plan and the Civil Legal Assistance Fund and the Criminal Legal Assistance Fund (together "the fund") in accordance with the Constitution.
- (f) A declaration that the Plan Board's engagement of Walter Jackson and Maria Taylor by contracts dated May 4, 2005 pursuant to subparagraph 5.16 of Regulation No. 7 was a valid exercise of its authority.
- (g) An interim order requiring the TPA Board to return the files and other materials of the Plan Board appropriated by the TPA Board on or about January 26, 2007, to the Plan Board pending a determination of the validity of the January 25, 2007 resolution.
- (h) An interim order returning the Plan board to its role in administering the Plan and the Fund pending a determination of the validity of the January 25, 2007 resolution.
- (i) An order restraining the TPA Board from contacting Professor John McCamus or any other solicitor retained to advise the Plan Board or interfering in any other way with the delivery of any opinions arising from these retainers to the Plan Board.
- (j) An order requiring the deliver up of any and all solicitor and client privileged materials of the Plan Board and restraining the use of the materials by the TPA Board or its advisors.
- (k) An order restraining the TPA Board from holding an election or otherwise making an appointment of a new Plan Board pending a determination of the validity of the January 25, 2007 resolution.

[3] In the interest of expedition, I set out here all the grounds outlined in the record in support of the application:

- (a) The TPA is a non-share capital corporation incorporated in 1956 that has as its purpose the representation of the interests of the members of the Toronto Police Service.
- (b) The TPA Board of Directors are elected by its membership. Presently the TPA Board has 9 directors.

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- (c) The TPA is governed by its Constitution, By-Laws and Regulations. The Constitution is approved by the members of the TPA and amended by them exclusively. The present Constitution was approved of in March, 2004
- (d) The Plan was established by the membership in the Constitution as a means of providing funding for members facing criminal charges and pursuing actions in certain circumstances relating to the performance of their duties, and has existed since 1991.
- (e) The Plan is governed independently by the Plan Board who are elected from among Stewards and Chief Stewards elected every three years by these members. [emphasis added.]
- (f) The Plan and the Plan Board were created and administered pursuant to what is now set out as Regulation No. 7 to the TPA Constitution.
- (g) The members of the TPA approved Regulation No. 7 [formerly Regulation No. 9] at a general meeting in 1991 whereby, *inter alia*, the procedure for election of the Plan Board was established.
- (h) Paragraph 5 of Regulation No. 7 provides that the Plan shall be governed by the Plan Board and shall consist of up to seven members selected by the chief stewards or stewards.
- (i) Subparagraph 5.3 provides that each Plan Board member shall serve for a term of three years.
- (j) Subparagraph 5.11 sets out the authority of the Plan Board:
- The Plan Board is responsible for carrying out the purpose and intent of the Plan. The Plan Board may institute policies and procedures and develop appropriate forms in order to give effect to the purpose and intent of the Plan, and in order to insure that the Plan function is an efficient and effective matter.
- (k) The Plan Board maintains two accounts, separate from the TPA accounts, in order to administer and meet the obligations of the Plan.
- (l) Walter Jackson is retired member of the Toronto Police Service and a member of the TPA who has been employed since 1998 by the Plan Board pursuant to subparagraph 5.16 of Regulation No. 7 as the Manager of the Plan.
- (m) Maria Taylor was employed since September 2000 by the Plan Board pursuant to subparagraph 5.16 of Regulation No. 7 as Assistant Manager of the Plan.

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- (n) Walter Jackson and Maria Taylor were both employed by valid contracts entered into with the Plan Board, to the knowledge of the TPA Board. [emphasis added.]
- (o) Subparagraph 5.17 of Regulation No. 7 provides that the Plan Board may retain a lawyer, at the expense of the Plan, to provide it with an opinion concerning any matter that comes before the Plan Board.
- (p) Pursuant to paragraph 7 of Regulation No. 7, the Plan provisions may be amended only by the Plan Board, upon the approval of the Board of Directors of the TPA and after a vote of the membership in accordance with the TPA Constitution.
- (q) Part X of the TPA Constitution provides that any amendment to the Constitution, By-Laws or Regulations must be passed by two-thirds of the members at a general meeting upon twenty-one days' notice of the proposed amendment.
- (r) There was no general meeting called by the TPA Board proposing any amendments to Regulation No. 7 to the TPA membership.
- (s) On January 25, 2007, the TPA Board purported to pass the impugned resolution.
- (t) On January 26, 2007, the TPA Board purported to declare the contracts entered into between the Plan Board and Walter Jackson and Maria Taylor "null and void".
- (u) In the case of Walter Jackson, the TPA Board purported to end the contract without compensation or notice. The TPA Board had no authority to so declare the contract null and void.
- (v) In the case of Maria Taylor, the TPA Board purported to declare her contract "null and void" and then subsequently purported to "soon be in a position to provide you a formal offer of employment as Executive Assistant to Legal Assistant Plan". The TPA Board had no authority to make this declaration.
- (w) Rules 14 of the *Rules of Civil Procedure* and provisions of the TPA Constitution.

[4] Unfortunately, there is some urgency expressed by both parties to have the issue resolved prior to February 27, 2007, the date fixed by the respondent for elections to the Plan Board.

### THE GROUND RULES

[5] It is my view, and I believe the parties agree that the resolution of this issue must proceed without passing judgment on the propriety or impropriety of the conduct that led to the passing of the January 25, 2007 resolution, for the reasons that:

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- (a) The proceeding is by way of application in circumstances in which it is fair to say the parties implicitly acknowledge that there are no material facts in dispute.
- (b) In these particular circumstances whether the TPA Board had the jurisdiction to pass the impugned January 25, 2007 resolution does not depend on the motivation of the Directors of the TPA Board.

## THE ISSUE

[6] Stripped to its essentials, the issue to be determined, outlined with their usual lucidity by both counsel, is whether traditional notions of corporate law enshrined by statute in s. 283 of the *Corporations Act*, R.S.O. 1990, c. C-38 requiring that "the affairs of every corporation shall be managed by a board of directors however designated," supplemented by certain specific provisions in the Constitution of the TPA Board gives the Board of Directors of the TPA the jurisdiction to dissolve, without the approval of the membership, what was clearly a careful, elaborate attempt made by the members of the TPA Board in their Constitution to carve out an independent role for the Plan Board.

[7] Some of the specific provisions I referred to above are:

- 3.2.11 The Board shall appoint such committees as it may deem necessary in the interests of the Association. Each committee shall elect its own Chair except where a Chair has been appointed. Any member of the various committees may be removed at any time at the discretion of the Board.
- 3.2.17 The Board or its designee shall have a charge of all books, papers, documents and materials pertaining to the business of the Association and all such books, papers, documents and materials shall remain the property of the Association.
- 3.2.18 The Board or its designee shall have care and custody of the funds of the Association and deposit said funds to the credit of the Association in such financial institutions as the Board directs.
- 3.2.19 The Board or its designee shall keep an accurate record of all monies received and disbursed to the satisfaction of the auditors and shall produce same for their inspection at any time. The Board's designee shall provide a financial report to the Board as required and to the members at General Meetings and at each Annual General Meeting.
- 3.2.27 Every member of the Board shall:
  - (a) perform his duties at all times in a manner credible to the Association and in the best interests of the membership;
  - (b) attend all meetings as required by the membership, the Board or the Constitution and By-laws;

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- (c) act as Chair, member or liaison member of such committees as may be assigned in compliance with the Constitution and By-laws and Regulation 7;
- (d) remain knowledgeable about matters pertaining to Association activities;
- (e) assist and advise members where assistance and advice are sought or observed to be needed;
- (f) enter into a confidentiality agreement with the Association;
- (g) perform other duties as may be assigned by the Board.

[8] For the reasons that follow, I find that the TPA Board did not have jurisdiction to dissolve the Plan Board. The resolution of this dispositive issue requires an in depth examination of the TPA Constitution.

[9] There are several provisions in the Constitution that purport to carve out this independent role referred to above for the Plan Board. I refer here to the following provisions of Regulation 7, which as noted in the impugned January 25, 2007 resolution, is the obstacle that the Directors of the TPA Board believe needs to be eliminated by reviewing and amending at a general meeting at a later date:

#### PARA. 1: PURPOSE OF THE PLAN

- 1.1 In appropriate cases, to provide on a "without prejudice" basis, financial assistance benefits to a member of the Plan, when the Member is charged in relation to an act(s) done in the attempted performance in good faith of his or her duties as an employee of the Service and to provide financial assistance to Members(s) who are commencing and prosecuting civil proceedings based on facts which occurred while the Member was discharging his or her duties as an employee of the Service or which arose due to the fact that he or she was an employee of the Service or who was acting on behalf of the Association and who otherwise come within the scope of the plan and in appropriate cases the prosecution of or response to an appeal.

#### PARA. 2: INTENTION OF THE PLAN

- 2.1 A decision by the Plan Board to provide or deny financial assistance benefits of the Plan pursuant to Part II is not based on the alleged or determined innocence or guilt of the Member who has been charged with a criminal offence and shall not be interpreted as such. The Plan Board is concerned only with whether the charges arose out of an attempted performance, in good faith, of a Member's duties as an employee of the Service, based on the information provided at the time of the application.

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A decision to provide or deny financial assistance to a Member in relation to civil matters pursuant to Part III shall be based on the Plan Board's opinion that the issue(s) raised, or to be raised, are of an interest to the Members in general or that the issue(s) raised or to be raised are of such an important nature to the Member who has made the application, that assistance should be provided.

**PARA. 5: BOARD OF ADMINSTRATORS OF THE PLAN**

- 5.1 The Plan shall be governed by a Plan Board. The Plan Board shall consist of five members selected by the Chief Stewards and Stewards of the Association of which at least four Plan Board Members are Chief Stewards or Stewards. The Plan Board must consist of at least one Civilian Member and one Uniform Member. The Chief Stewards and Stewards shall strive to make the membership of the Plan Board representative of the membership of the Association. To be eligible to serve on the Plan Board, a candidate must have attended at least seven of the last twelve General Meetings of the Association.

The Board of Directors of the Association may in its sole discretion after receiving a recommendation to do so from the Plan Board increase the number of the Plan Board members to seven. [emphasis added.]

Should the Board of Directors of the Association increase the number of the members of the Plan Board to seven, the two vacancies so created shall be filled by way of any election among the Stewards and Chief Stewards, one of the new members shall be elected for a one year term and one for a two year term and therefore the Plan Board shall consist of seven Members selected by the Chief Stewards and Stewards of the Association of which at least six Plan Board Members shall be Chief Stewards or Stewards. The seventh Plan Board member may be a Member at large of the Association or a Chief Steward or Steward. The Plan Board must consist of at least one Civilian Member and one Uniform Member but the Chief Stewards and Stewards shall strive to make the membership of the Plan Board representative of the membership of the Association and attempt to have five who are Uniform Members and two who are Civilian Members. To be eligible to serve on the Plan Board, a candidate must have attended at least seven of the last twelve General Meetings of the Association.

- 5.3 Each Plan Board member shall serve for a term of two years and at the first election held after the approval of amendments to the Regulation in 1997 three positions shall become vacant and in the next election two and thereafter in each alternate year three, and then two positions shall become vacant so as to ensure that all of the positions do not become vacant in any one year. Should the number of Plan Board members be increased to seven then three positions shall come open at the next election held during the year after the increase and four the next

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- year and thereafter in each alternate year three and then four positions shall be vacant,
- 5.4 Each Plan Board member is expected to attend the regularly scheduled meetings of the Plan Board. In the event a Plan Board member is absent from three or more consecutive meetings of the Plan Board without prior authorization from the Chair or Vice-Chair, his or her position shall be declared vacant.
- 5.5 In the event that a member resigns from the Plan Board or a position becomes vacant for any reason, the Chief Stewards and Stewards may replace the member for the balance of the term of that member's.
- 5.6 The Plan Board shall select a Chair and a Vice Chair from among its members.
- 5.7 The Chair shall be responsible
- a) to call meetings of the Plan Board, as required; and
  - b) to chair the meetings.
- 5.8 The Plan Board may also appoint a legal advisor as a non-voting member of the Plan Board.
- 5.9 The Director of Legal Services of the Association shall be a non-voting member of the Plan Board and shall act as its Secretary.
- 5.10 Under the Chair's direction, the Director of Legal Services shall be responsible:
- a) to maintain proper records of the Plan;
  - b) to ensure necessary clerical and other assistance is provided to the Plan;
  - c) to provide necessary information to Members; and
  - d) to conduct the day to day affairs of the Plan, subject to the policies and procedures approved by the Plan Board and the provisions of this Regulation.
- 5.11 The Plan Board is responsible for carrying out the purpose and intent of the Plan. The Plan Board may institute policies and procedures and develop appropriate forms in order to give effect to the purpose and intent of the Plan, and in order to insure that the Plan functions in an efficient and effective manner.
- 5.16 The Plan Board shall on behalf of the Plan retain or employ on a full time basis a Manager of the Plan and such other agents or employees as it deems necessary to carry out the objects and intent of the Plan, who shall be paid by the Criminal

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Fund and the Civil Fund in such proportion as the Plan Board in its sole and absolute discretion sees fit.

- 5.17 The Plan Board may retain a lawyer, at the expense of the Plan, to provide it with an opinion concerning any matter that comes before the Plan Board.

#### PARA. 7: AMENDMENTS TO THE PLAN

- 7.1 The Plan provisions may be amended only by the Plan Board, upon approval of the Board of Directors of the Association and after a vote of the Association in accordance with the Constitution. [emphasis added.]

#### PARA. 8: THE LEGAL ASSISTANCE FUND

- 8.1 a) The Uniform members of the Association shall pay, in addition to the dues specified in subsection 2.5.6 of the Constitution and By-laws, a special assessment 0.10% of the bi-weekly rate of pay of a First Class Constable of the Service per pay towards the Criminal Fund and 0.18% of the bi-weekly basic rate of a First Class Constable of the Service per pay towards the Civil Fund, for a total of 0.28% of the bi-weekly basis rate of pay of a First Class Constable of the Service per pay, and the Civilian members of the Association shall pay, towards the Criminal Fund, in addition to the dues specified in subsection 2.5.6 of the Constitution and By-laws, a special assessment of 0.08% of the bi-weekly rate of pay of a forty hour, top grade, class four clerk of the Service per pay. These monies and any reimbursement monies paid by Members for financial assistance under the Plan shall be kept as a distinct account and hereafter referred to as the Legal Assistance Fund (the "Fund") this Fund shall be made up of the Criminal Fund and the Civil Fund and funds collected and reimbursements received shall be paid into each depending on whether or not the collection or reimbursement was in relation to a criminal matter or a civil matter.

#### PARA. 9: THE LEGAL ASSISTANCE FUND

- 9.1 In the event that there are more than sufficient monies in either the Criminal Fund or the Civil Fund to cover the anticipated obligations pursuant to Part II or Part III hereof, the Fund Administrators may recommend to the Plan Board a reduction in the amount otherwise payable by way of Association special assessments or dues, but any reduction in the amount otherwise payable to the Fund must first be approved by the Board of Directors of the Association and the membership at a General Meeting in accordance with the Constitution.
- 9.2 The Chair of the Plan shall be responsible
- a) to meet with the other Fund Administrators as required;

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- b) to ensure proper records of the Fund are maintained;
  - c) to ensure that reports of the financial position of the Fund accurately reflect the current position of the Fund; and
  - d) to ensure proper conduct of the day to day affairs of the Fund, subject to the policies and procedures approved by the Fund Administrators or the Plan Board.
- 9.3 The Fund Administrators may institute policies and procedures in order to give effect to the purpose and intent of the Funds, and in order to ensure that the Fund operates in an efficient and effective manner.

#### PARA. 10: FINANCIAL ASSISTANCE BENEFITS PLAN

- 10.1 The Plan Board has the complete discretion to determine what if any monies are to be paid for legal representation or otherwise under the provisions of this Plan. A Member does not have any right to financial assistance for legal representation in relation to criminal or civil matter or for civilian support. A Member does have the right to apply to the Plan and to have his or her request fairly considered by the Plan Board.
- 10.2 The decision of the Plan Board is final, subject to the discretion of the Plan Board to reconsider its decision. A Member does not have any right to appeal the decision of the Plan Board to the membership of the Association, to the Board of Director of the Association, or otherwise. [emphasis added.]

[10] The purpose and intent of the provisions governing the Plan Board are clearly to insulate the funding of legal assistance for association members from outside influences, in a word, to have it operate independently of the TPA Board.

[11] Nowhere within the four corners of the Constitution can one find a provision giving the TPA Board of Directors the right to dissolve the Plan Board or for that matter, any committee of the TPA Board. The TPA Board's decision to include in the impugned January 25, 2007 resolution the expression of an intention to revise Regulation No. 7, is indicative of the TPA Board's recognition that the structure of the Plan Board would, in some way, fetter the TPA Board's discretion.

[12] Counsel for the TPA Board takes the view that no matter how the Plan Board is described, it is no more than a committee of the TPA, and, therefore, subject to s. 3.2.11 of the Constitution that provides for the removal of any member of the various committees at any time at the discretion of the TPA Board.

[13] I note that the drafters of the Constitution did not classify the TPA Board as a committee, while they established numerous other committees, e.g. the Bargaining Committee, the Chair and Sick Benefits Committee, the Constitution Committee, the Family Assistance Program, the

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Finance Committee, the Grievance Committee, the Job Evaluation Committee, the Medical Committee and the Membership Committee. One such committee, "the Bargaining Committee" is specifically designated as the Agent for the Association in all negotiations with the Police Services Board.

[14] Notably, even under article 3.2.11, while "Any member of the various committees may be removed at any time at the discretion of the Board", there is no provision for the dissolution of a committee. Admittedly, by removing committee members seriatim that object may be achieved, but such conduct must surely be subject to good faith considerations.

[15] In other words, I do not accept the Plan Board can properly be described as a committee of the TPA Board.

[16] That does not, however, end the enquiry, as it may well be possible to clothe a particular committee with the kind of authority that may insulate it from dissolution or some such assault from the TPA Board. For example, in the effort to improve corporate financial ethics in North America in recent years there has been a trend to appointing independent directors or financial officers with the objective, not only of enhancing probity, but also protecting CEO's from their own excesses. It is not too difficult to conceive of a corporate constitution or structure that would severely limit the control of the Board of Directors over such a committee.

[17] The respondent raised a very pragmatic issue of how to handle rogue behavior, whether illegal or merely unethical, on the part of a member or members of the Plan Board.

[18] Under the *Corporations Act* or at common law, the Board of Directors of a corporation, usually acting through the CEO or the CEO in his own right, has not only the right, but also the duty, to remove officers or employees for illegal or unethical conduct or indeed to demand the resignation of other board members for such conduct. Why then, counsel asks, does the President of the TPA Board not have the right to dissolve the Plan Board for conduct the President considers either unethical, illegal, or for that matter, merely contrary to the best interests of the Plan? The answer I believe is that the drafters of the Constitution seem to have anticipated the need for a disciplinary mechanism. They, therefore, enacted certain provisions to deal specifically with discipline.

[19] Section 7.2.1 provides that any member may be penalized for committing any one or more of a long list of violations. Section 7.3.1 provides that any allegation against a member for any of those violations must be submitted in writing to the TPA Board. Then follows a procedural guide giving the offending member an opportunity to respond, providing for penalties and a first appeal to the TPA Board and a second appeal to the special general meeting.

[20] The Constitution further provides for the calling of special general meetings. Section 5.6 provides as follows:

5.6.1. The Board may, at any time, and shall upon a requisition made in writing by fifty or more members, convene a Special General Meeting.

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- 5.6.2. The requisition shall express the object of the meeting proposed to be called and shall be given in writing to the Vice President.
- 5.6.3. The Board shall within seven days give written notice to the member causing the requisition to be given or the member first named in the requisition stating the Board's intention. Where the Board intends to call a Special General Meeting, notice of same shall be given as provided in this Section.
- 5.6.4. Upon the failure of the Board to comply with this Section, the requisitioner or any fifty members may after the expiration of seven days themselves convene a Special General Meeting upon notice being given as provided in this Section. Such meeting shall be as capable of transacting business and of acting on behalf of the Association as if called by the Board.
- 5.6.5. Except as provided in subsection 5.6.6., notice of any Special General Meeting shall be posted on the notice boards of each Unit ten days before the date of the meeting and shall specify any business to be transacted, the place, the date and the time of the meeting.
- 5.6.6. Where, in the opinion of the Board, an issue arises that warrants the immediate attention of the membership, the Board may call a Special General Meeting provided that every reasonable effort is made to notify the membership and not less than 48 hours notification is given.

[21] The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.

[22] There is no basis for the respondent's belief that, without the "power of dissolution", the Directors of the TPA Board would be unable to effectively perform their critical governance functions of protecting the vital interests of the entire Association from rogue conduct.

[23] It is also important to recognize that adherence to the rule of law, and in particular, *Charter* values, infuse the interpretation of Canadian law. Arbitrary use of power is not encouraged in the governance of institutions and particularly those having a significant public interest component.

[24] Of the many submissions of the applicants with which I agree, I refer specifically to the following from the applicants' factum:

51. By becoming a member of an organization, such as a professional association, the member subjects him or herself to the Constitution of the Association. An officer or director, in particular, must uphold the Constitution and make use of the procedures contained therein.

Reference: *Taylor v. Atkinson*, [1984] O.J. No. 399 (H.C.J.) at para. 103.

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52. As stated by the Ontario High Court of Justice [and more recently cited by the Ontario Court of Justice]:

It appears to me that the members of a trade union having expressed their willingness to be bound by the constitution to which they have pledged themselves are entitled to require that the officers of their union adhere to that constitution, and that the officers of their union will conduct their election in strict conformity to the rules and without departure therefrom.

Reference: *Stamos v. Belanger, Hotel Employees and Restaurant Employees International Union v. Belanger*, [1994] O.J. No. 2205 (Gen. Div.) at para. 39.

*Howard et al. v. Farrinton et al.*, [1971] O.J. No. 16923 (H.C.J.),

53. Because the constitution of a professional association forms the contract to which its members are bound, the directors, as representatives and administrators of the professional association, have a special obligation to adhere to its provisions. Failure to do so will render a director's act a nullity. A member of a union has standing to challenge an act of the board that violates the constitution.

Reference: *Stamos v. Belanger; Hotel Employees and Restaurant Employees International Union v. Belanger*, supra.

56. By attempting to dissolve the Plan with the January 25, 2007 resolution, the TPA Board breached the procedure specifically set out in the TPA Constitution, statute and the Rules of Order generally.

57. Firstly, an important independently functioning arm of the TPA, namely the Plan, cannot be dissolved by a resolution passed and voted on by only TPA directors. Resolutions are used with respect to subject matter that is of less importance or of a temporary nature. Moreover, a board cannot pass a resolution for which it has no statutory or constitutional authority.

Reference: *Mackenzie v. Maple Mountain Mining*, [1910] O.J. No. 192 (C.A.) at para. 14.

Hartley R. Nathan, Q.C., *Nathan's Company Meetings Including Rules of Order*, 6<sup>th</sup> ed. (CCH Canadian: Toronto, 2005) at 69-70.

59. Second, the restrictions placed on the authority of the TPA Board are not limited to those of the TPA Constitution. The *Corporations Act* provides that directors of a corporation may pass by-laws that are not contrary to the letters patent or supplementary letters patent to regulate the particular affairs of the company.

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These by-laws are of no force and effect if not confirmed by the membership. The TPA Board did not purport to pass a by-law nor could they have passed a by-law that was contrary to the TPA Constitution.

Reference: *Corporations Act*, R.S.O. 1990, c. C.38, sec. 129 (1)

60. While the board may manage the particulars of the affairs of the company, the board may not by resolution drastically alter fixed policy and, as is the case here, thereby attempt to dissolve a service integral to the membership. The *Corporations Act* affords directors the flexibility to respond to issues that arise in the fact of the corporation. However, as provided by section 129 (2), the corporation's members hold the ultimate control and direction of the corporation.

Reference: *Corporations Act*, R.S.O. 1990, c. C.38, sec. 129 (2)

64. Part X of the TPA Constitution sets out the procedure for amending the TPA Constitution, By-laws, and Regulations. Pursuant to subparagraph 10.1.1, any amendment to Regulation No. 7, or any other Regulation for that matter, requires a two-thirds majority vote of those members present at a General Meeting. Notice must be provided of any proposed change or amendment twenty-one days in advance of the meeting at which the change is to be voted upon.

Reference: TPA Constitution at paras. 10.1.1 and 10.1.2.

[25] The procedure for amending an act is set out in Part X of the TPA Constitution as follows:

## **PART X – AMENDMENTS**

### **Section 1: PROCEDURE**

- 10.1.1 Any General Meeting may amend, repeal or re-enact the Constitution and By-laws and the Regulations attached thereto by a two-thirds majority of the votes of those present and voting subject, however, to the notice having been given as hereinafter set forth. In addition, in order to amend Regulation 9, the proposed amendment must first have been approved by the Board of Administration of the Financial Assistance for Legal Services Plan & Fund and the Board of Directors in accordance with Regulation 7.
- 10.1.2 Notice of any proposed change or amendment to the Constitution and By-laws and the Regulations attached thereto shall be given to the Vice President in writing, at least twenty-one days before the meeting at which such change is to be voted upon. The Vice President shall include such notice of proposed change in the notice calling the said meeting.

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10.1.3 Notwithstanding the provisions in subsection 10.1.1, the Regulations of the Constitution and By-laws may be amended from time to time by the Board providing that such amendments are to increase any or all of the benefits as prescribed in such Regulations.

10.1.4 The Regulations to the Constitution and By-laws may be repealed, amended or re-enacted in the manner provided in subsection 10.1.1, for any reason, and when it is deemed prudent to reduce any or all of the benefits prescribed in such Regulations.

[26] It is my view, expressed with the appropriate caution demanded on such a difficult question, that the January 25, 2007 resolution dissolving the Plan Board is not authorized by, and is contrary to the Association's By-laws or Regulations and is an *ultra vires* act. See *Howard et al. v. Parrinton et al.*, supra, where Stark J. said at para. 8:

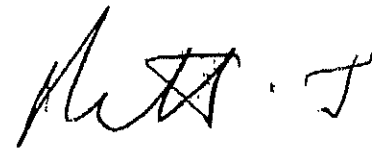
It was contended by the defendants that as a general rule Courts will not interfere with the internal management and internal activities of unions unless there is proof of fraud or *ultra vires* acts. But the Courts have frequently interfered where there have been important departures from the constitution which, in effect, forms the contract which the members of the union make with one another and upon which they are entitled to rely.

#### DISPOSITION

[27] I, therefore, grant the application and all the relief that flows naturally from a finding that the impugned January 25, 2007 resolution was *ultra vires* the TPA Board.

#### COSTS

[28] Subject to any agreement between the parties, brief written submissions on costs are to be made within 60 days of the release of these reasons.



Pitt J.

Released: February 27, 2007

COURT FILE NO.: 07-CV-327141PD2

DATE: 20070227

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN SMITH, ROD LAWRENCE, DALE  
CARTER and DAVID DEVINEY

Applicants

- and -

THE TORONTO POLICE ASSOCIATION

Respondent

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REASONS FOR JUDGMENT

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Pitt J.

Released: February 27, 2007