**IN THE MATTER OF AN ARBITRATION under the *Police Services Act***

**BETWEEN:**

**BARRIE POLICE SERVICES BOARD**

**(The "Board")**

- and -

**BARRIE POLICE ASSOCIATION**

**(The "Association")**



**AND in the matter of the individual grievance of Const. P. McRae**

**ARBITRATOR:** William A. Marcotte

**APPEARANCES:**

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| **FOR THE BOARD** | G. Christie, counsel<br>D. Jure, Board Chair<br>K. Greenwood, Chief of Police<br>B. Carlson, D/Chief of Police |
| **FOR THE ASSOCIATION:** | G. Hopkinson, counsel<br>C. Alton, Assn. Pres.<br>P. Kellachan, Assn. V.-P.<br>J. Anglin, Assn. Treas. |

Hearing held in Barrie on August 9, 2013.

**AWARD**



On a scheduled date of hearing, May 11, 2011, the parties resolved the Association grievance filed on behalf of Const. Philip McRae by way of a Memorandum of Agreement ("MOA"). Relevant for our purposes, the MOA contains the following:

> 1. PC McRae shall be entitled to receive twenty-eight (28) calendar months of the Article 11.01 premium on the basis set out herein.
>
> 7. Association withdraws the grievance and fully and finally settles all matters in the grievance.
>
> 8. This agreement is strictly confidential and without prejudice or precedent to any other matters.
>
> 9. Arbitrator Marcotte shall remain seized.

The MOA is signed by a representative of the Board and a representative of the Association. The grievor did not sign the MOA.

In a letter dated October 12, 2011, the grievor posted a document on the "Employee Bulletin Board" addressed to the Association's "General Membership" as part of his bid to be elected Association president. Relevant to our purposes, that document contains the following:

> **The grievance of my unlawful removal from CID, which was supported by the general membership, was resolved when the Service offered twenty-eight months back pay, even though I had been removed for a period of twenty-two months. The Association Executive agreed to this resolution despite my wishes to proceed to a hearing to challenge the** HONESTY, INTEGRITY AND CREDIBILITY **of the Service's case. The Service's willingness to offer this monetary resolution, again, only served to validate my position on the grievance.** [Emphasis in original]

In a November 23, 2011 letter from Board counsel to (then) Association counsel, Mr. Christie states:

> **Re: Barrie Police and Constable McRae**
>
> As you are aware, we settled this grievance on the basis of Minutes of Settlement which included a confidentiality provision.
>
> Constable McRae has breached the confidentiality provision in the settlement by disclosing the settlement in an email sent to the members of the Barrie Police Service. Our client takes the position that Constable McRae has breached the settlement and therefore, the Board is relieved of its obligation to pay any money to Constable McRae.

The Board submitted that a "valuable and treasured" method by which parties to a collective agreement solve problems between them is by way of consensually agreed-to memoranda of agreement. Associations, in discharging their statutory role as bargaining agent for their members, make these agreements in the best interest of a grievor and of the bargaining unit as a whole, albeit those interests may not be identical but may overlap. This bargaining agent is sophisticated, its representatives are experienced in labour relations matters and the Association was represented by counsel when the May 11, 2011 MOA was agreed to by the parties. The institutional system of collective bargaining relies very much on parties reaching agreements to resolve their problems and solutions crafted by the parties are preferable to those imposed by arbitration awards. It is well-known in labour relations that the confidentiality of a grievance settlement is a frequently-appearing condition that is "highly prized" because the parties get an agreement which remains confidential versus a public airing of facts and allegations in an arbitration award. In the instant case, confidentiality is important due to the nature of the grievance, the allegations and the individuals involved with the complaint.

The Board's experience with the Association is that it lives up to its agreements and any issue here is not with the Association and how it conducts its affairs. Rather, what has occurred is the grievor, who had political aspirations, disclosed the terms of the settlement of his grievance as well as his disagreement; in effect, publicly stating "a pox on both parties." The grievor's breach of the MOA is egregious, was not a slip of the tongue and done for an alterior motive. On a continuum of the severity of a breach, his is at the highest and most severe. Fortunately for these parties, they are able to maintain their good relationship because of the people involved on both sides which does not, however, mitigate the seriousness of the grievor's breach.

The Board submitted that, as a general proposition, arbitrators have the jurisdiction to make a broad range of orders which intend to preserve the settlement as much as possible. An appropriate order in this case is that the grievor should get no money under paragraph 1 of the MOA, given the serious nature of his breach and the ulterior motive for it. Such an order, moreover, serves a general deterrence aspect; it says to bargaining unit members that if they do not abide by the terms of a grievance settlement, there will be consequences.

In support of its position, the Board submitted *Re Canadian General – Tower Ltd. and U.R.W., Loc. 292,* [1992] O.L.A.A. No. 63, 12 L.A.C. (4th) 153 (Craven); *Re Manitoba (Province) and M.G.E.U.*, [1997], M.G.A.D. No. 84, 68 L.A.C. (4th) 321 (Freedman); *Re Geo Tech Industries v. International Assn. of Machinists & Aerospace Workers, Lodge 456 (Gicas)* [1999], B.C.C.A.A.A. No. 389, 83 L.A.C. (4th) 411 (Somjen); *Re Ontario (Ministry of the Attorney General) and O.P.S.E.U.* [2004] O.G.S.B.A. No. 191, 121 L.A.C. (4th) 382 (Abramsky); *Re Frontenac Youth Services v. Ontario Public Service Employees Union (Bernardes)* [2005], O.L.A.A. No. 624, 83 C.L.A.S. 157 (Chapman), and, *Re Toronto District School Board v.*

*Elementary Teachers' Federation of Ontario (TeacherX)*, [2007] O.L.A.A. No. 202, 161 L.A.C. (4th) 145, 89 C.L.A.S. 340 (E.Newman).



The Association submitted that, notwithstanding the grievor's actions, it remains to be determined whether or not, in fact, a breach of the MOA occurred. In order to make this determination, the intentions of the parties must be ascertained from the language of the MOA in light of its context and of the context of the Agreement itself.

The Association submitted the grievor is not a party to the collective agreement, it is not a signatory of the MOA, nor is there a signature line for him in it. Since the grievor is not a party to the MOA, the doctrine of privity applies to him, i.e., "The doctrine of privity stands for the proposition that a contract cannot generally confer rights or impose obligations under it on any person except he parties to it" *Re London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, [1992] S.C.J. No. 84 (para. 200). Since the grievor did not sign the MOA he is not bound by its terms. Clearly, as known to the Board, the grievor had no participation in the MOA at all. Notwithstanding his lack of participation, the Board could have required his signature to bind him formally to the Agreement. However, the only parties to the MOA are the Board and the Association. Accordingly, the proper interpretation of the confidentiality clause is that it establishes confidentiality between those two parties. The value of that clause to the Board is that the bargaining agent cannot say to the bargaining unit members, "We won", when the matter was not fully determined and both parties "Keep their powder dry" for future purposes.

In the alternative, the Association submitted that the confidentiality clause, importantly, is quite general in its wording and specifies nothing as to what penalty or penalties flow from its breach. There is no mention of the grievor in

the confidentiality clause, no mention of a penalty and no mention of the grievor's actions warranting a particular penalty. Thus, even if one accepts that the MOA is binding on the grievor, then surely it is incumbent on the parties, given the extreme penalty sought by the Board, to write clear language in order to trigger such a penalty. Further, the lack of a specific penalty does not allow for a complete voiding of the Board's financial obligations to the grievor; it is open to the arbitrator to address the damage to the Board in a proportional manner.

In the further alternative, the Association submitted it has not breached the MOA. As problematic as the grievor's actions may be to on-going labour relations, these are two parties who honourably live with their agreements and the actions of the grievor do not constitute a violation of the confidentiality clause.

In support of its position, the Association also submitted *Re Fraser River Pile & Dredge Ltd. V. can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, [1999] S.C.J. No. 48, and, *Re Globe and Mail, a Division of CTV Globemedia Publishing Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 87-M,* [2013] O.L.A.A. No. 273 (Davie).

In reply, the Board submitted the Association, as the bargaining agent, takes carriage of all grievances and binds all the bargaining unit members, as that agent, on deciding whether to settle or go to arbitration of a member's complaint. An employer cannot refuse to agree with an Association unless the grievor signs an agreement because agreements are made between the parties. The lack of a specific penalty for a breach of the confidentiality clause provides the arbitrator with the discretion to decide on an appropriate remedy.

The issue to be determined in this award is whether or not the confidentiality clause of the MOA was breached by way of the grievor's actions on October 12, 2011, when he publicized the content of the MOA.



In *Re Canadian General-Tower, supra,* the union's complaint contending the grievor had been unjustly discharged was settled by way of a written agreement between the parties. A condition of the grievor's return to work was he would do so, "on the basis that the grievor affirms that he is capable of performing the normal requirements of his job" (para. 2). When he did so, the employer took the position that "certain restrictions placed upon him by the Worker's Compensation Board remained in effect" (para. 3) and would not allow him to work. Some 5 weeks later, he did return to his job following an examination by a physician. The union contended the employer breached the parties' agreement by not allowing the grievor to work upon his affirmation that he could perform the requirements of his job, while the employer contended that "it was a condition of settlement that the W.C.B. restrictions would not be in effect when the grievor returned to work, and that the union led the company to understand those restrictions were no longer in effect when the settlement was executed" (para. 4). Relevant for our purposes, arbitrator Craven addressed the matter of an arbitrator's jurisdiction concerning the enforcement of grievance settlement arrived at consensually by the union and the employer, at para. 8, as follows:

> It is generally accepted that boards of arbitration have jurisdiction to enforce settlements reached during the grievance procedure, and that in exercising this jurisdiction an arbitrator is to give effect to the parties' agreement, without going behind the terms of settlement to determine whether it was the "right" result in the circumstances. This latter principle follows not only from the law of contracts, but also from the sound industrial relations policy of encouraging the parties to settle their own disputes…

In interpreting the language of the agreement, specifically the word "affirms" in para. 2, *vis-à-vis* the employer's contention as to a "condition of settlement … that the W.C.B. restrictions would not be in effect when the grievor returned to work" (para. 4), the arbitrator states, at para. 13:

> The words of the agreement are clear on their face. To import a requirement for documentary evidence that the W.C.B. restrictions were lifted or that the grievor had successfully completed the rehabilitation course would be to contradict the plain language of the agreement.



In that case, arbitrator Craven found the grievor had affirmed he was able to return to work on the date of the refusal by the employer and awarded wages from that date until his actual return to work, subject to mitigation.

As can be seen from the *General-Tower* award, there is a well-recognized industrial relations policy which encourages the parties to consensually settle disputes arising under their collective agreement. Moreover, those settlements are enforced by arbitrators in order to give effect to them; "a party will not be allowed to avoid the terms of settlement" *Re Geo Tech Industries, supra,* para. 16. This is so where the settlement is achieved by representatives who have the authority to bind the parties to its terms *Re British Columbia Ferry Corporation and British Columbia Ferry & Marine Workers Union,* [1980] 1 Can LRBR 409 (B.C.L.R.B) p. 419, cited in *Re Geo Tech Industries, supra,* at para. 18. In the instant case, there is no issue the MOA was agreed to by representatives of the Board and the Association who had the necessary authority to bind the parties to its terms, consensually arrived at on May 11, 2011. Under paragraph 9, the parties are agreed that I "remain seized" of my jurisdiction on the matter of the grievance and of the MOA. Accordingly, I have the authority to give effect to the terms of the MOA.

Relevant for our purposes, paragraph 8 states, in part, "This agreement is strictly confidential…". This language clearly and unambiguously indicates the terms of the MOA are to remain exclusively within the purview of the parties' knowledge. There is no suggestion or issue that either of the bargaining parties, the Board or the Association, did not keep the terms of the MOA confidential. Rather, the terms of the MOA were made public by the grievor in his communiqué of October 12, 2011 to the bargaining unit membership. The Association position, however, is that the grievor's actions do not constitute a breach of paragraph 8 because he is not a party to the MOA and did not sign the MOA and, therefore, is not bound by its terms.

As to the notion that the grievor is not bound by the provisions of the MOA, in *Re Fraser River, supra,* the headnote states, at p. 2: "As a general rule the doctrine of privity provides that a contract can neither confer rights nor impose obligations on third parties." Momentarily setting aside the question of whether or not the MOA constitutes a contract to which the doctrine of privity applies, in *Canadian General-Tower* and *Ontario (Ministry of the Attorney General)* no mention is made of whether or not the grievor signed the grievance settlement documents. In *Geo Tech Industries* it would seem the grievor did not sign the settlement documents, however, that matter is not addressed in the award. In the *Toronto District School Board* and *Globe & Mail* awards, the grievor in each case signed the settlement document. In the latter case, the grievor was found to have breached the "non-disclosure" term of the settlement (para. 27). In the former, the employer had signed the document and was found to have breached its terms (para. 28). In the *Manitoba* award the grievor refused to sign the settlement document, as did the grievor in the *Frontenac* award.

In *Re Manitoba, supra,* the grievor was involved with his union representatives in discussions with the employer over the terms of settlement of his discharge grievance. After the union and employer reached agreement on the terms of

settlement, however, the grievor changed his mind and would not sign the agreement. Relevant to our purposes, arbitrator Freedman found, at para. 41, that "[the grievor's] signature on the settlement document was not required for a settlement to be binding." In that regard, he implicitly acknowledges that a union, in its role as the exclusive bargaining agent for its members, can bind a grievor to the terms of a settlement it reaches with an employer even absent the grievor's signature on the settlement agreement. Thus, at para. 42:

> As a matter of principle unions and employers often settle grievances verbally, and often settle grievances in writing, and often confirm in writing settlements reached verbally. So long as the facts clearly demonstrate that the Province and the Union have unconditionally agreed to settle a matter, and so long as no question is then left open expressly or implicitly between them as to whether or not the grievor is to be bound, verbal or written statements between the Union and the Province will bind a grievor.

In that case, the arbitrator found the grievor was bound by the terms of settlement notwithstanding his unwillingness to sign the settlement document.

In *Re Frontenac, supra,* the grievor contended he had been unjustly discharged and in settlement discussions, in which the grievor was included, "the parties discussed the possibility of settling the matter without the grievor being reinstated in employment" (para. 4). Terms of settlement were reached on that basis, which terms were to be "incorporated into a memorandum of settlement…which would be signed by the employer, the union and the grievor" (para. 4). Apparently, while the union had proposed early on that the grievor be re-instated to a different area in the workplace, the employer "was not prepared to contemplate a resolution which would involve the grievor's return to work" (para. 5) and, thus, matters of compensation and the grievor's ability to resign were included in the settlement. The settlement documents were signed by the employer and union, but the grievor told the union representatives he was "unhappy with the settlement reached and did not want to sign the

Memorandum as drafted" (para. 8). Arbitrator Chapman found the settlement was binding on the grievor. Relevant to our purposes, the arbitrator states, at para. 18:

> …it is not disputed that the union, through its representatives, expressed its agreement to the settlement, and maintained that agreement until the employer…communicated its acceptance of the deal by signing the memorandum. In light of this evidence, I am bound to enforce the settlement, even if I had found that the grievor failed to consent to the terms set out in the memorandum of settlement, and in the face of his undisputed refusal to sign it.... It is the union, not the grievor, which is the party to the collective agreement, and the union which therefore has carriage of any grievance filed under its terms.



As can be seen from the *Manitoba* and *Frontenac* awards, because the union is a party to the collective agreement and the bargaining agent for its members, it is the union, and not the member, which has carriage of a grievance that it files on behalf of a member. A union's status as bargaining agent provides it with the authority to file or not a member's grievance and, if filed, pursue it to arbitration, withdraw it, or, resolve it with the employer-party to the collective agreement on consensually agreed-upon terms of settlement. In that the Association in the instant case is the bargaining agent for the grievor, the grievor is therefore bound by the terms of the MOA, *Re Manitoba, supra,* para. 42, notwithstanding he did not sign the MOA. Having so found, the issue as to the application of the doctrine of privity of contract is made moot. Having found the grievor is bound by the terms of the MOA, I find he breached the confidentiality clause at paragraph 8 of the Agreement when he publicized its content on October 10, 2011. This finding gives rise to the issue of remedy.

The Board position is that the nature of the breach of the confidentiality clause is such that the grievor should get no money pursuant to paragraph 1 of the MOA. The Association position is that the confidentiality clause does not specify a penalty for its breach, therefore, it does not follow that the Board's

obligation under paragraph 1 is void. Alternatively, the Association submitted that it is open to the arbitrator to address the damage done to the Board in a proportional matter.



In *Re Ontario (Ministry of the Attorney General) supra,* the grievor breached the confidentiality clause of her settlement document. As to the effect of such a breach, the arbitrator states, at para. 91:

> The breach of a confidentiality provision also causes harm to the grievance settlement process, which is critical to the proper functioning of labour relations and grievance administration. For settlements to work, parties must be sure that all of the terms will be honoured *and enforced.* This is equally true for employers, unions and grievors. A remedy must ensure that confidentiality clauses will be adhered to without being punitive. Deterrence is also a consideration. Each case, naturally, will vary in terms of the appropriate remedy. [Emphasis in original.]

In that case, arbitrator Abramsky rejected remedy of but a declaration the grievor breached the agreement, at para. 92:

> But I am concerned about the message that such a remedy would send – breach a confidentiality agreement and all you get is a declaration. That could easily be interpreted as an ineffective remedy, with no deterrence value.

The arbitrator concluded, at para. 93, that "the appropriate remedy is a declaration combined with a return of the $1,000 payment [to the grievor]".

In *Re Toronto District, supra,* the employer was found to have breached the confidentiality provision of the Memorandum of Settlement of the grievance. On the matter of the importance of a confidentiality clause, arbitrator Newman states, at para. 21:

> The ability to enter into such agreements, with the confidence that the terms of settlement will remain confidential to the parties, is a vital tool in labour relations. Confidentiality provisions must be capable of being used with confidence and vitality, in the essential business of resolving individual rights disputes that characterize the administration of a collective agreement. They must be enforceable. They must be iron clad. They must be worthy of the parties' continued confidence.

The remedy decided upon in that case was a declaration the employer had breached the Memorandum of Settlement. In that case, the employer's representatives had not been made aware, when the memorandum was signed, that "certain details about [the grievor's] circumstances" had been made available on the internet (para. 3). When the employer learned of this, "it took immediate steps to have it deleted" (para. 5).

In *Re Globe & Mail, supra,* the grievor was found to have breached the confidentiality clause in the MOA that resolved her grievances, including a claim of unjust discharge, which clause states, relevant to our purposes, "…the parties agree not to disclose the terms of this settlement, including Appendix A to anyone other than their legal or financial advisors, Manulife and the Grievor's immediate family." In a book she authored, the grievor indicated she had received a sum of money under the MOA but did not indicate that amount. Arbitrator Davie found the grievor had breached her MOA in disclosing that compensation was part of the MOA. By way of remedy, the arbitrator ordered the grievor to pay back the payment she had received from the employer under the MOA, which obligation on the grievor's part was expressly stated at para. 8 of the MOA.

As indicated in the *Ontario* award, determination of an appropriate remedy entails consideration of the circumstances surrounding the breach of a term of a settlement agreement, in particular a breach of the confidentiality clause. In the instant case, the grievor revealed the terms of the MOA in a deliberate

manner. He did so as part of his campaign to be elected president of his Association. His motive for doing so in no way justifies revealing the terms of the MOA. In my view, and I so find, the deliberateness of the grievor's actions and the motive for doing so cannot be condoned to any degree whatsoever. In these circumstances, I find the appropriate remedy is for the grievor to return the money provided to him under paragraph 1 of the MOA. Not only is this remedy warranted, but it serves to act as a deterrent to members of either party who, in the future, may be of the view that a confidentiality clause need not be adhered to or warrant the regard such a clause must have.

I find the grievor is bound by the terms of the May 11, 2011 MOA. I declare the grievor breached the confidentiality clause in the MOA. I find the appropriate remedy in the particular circumstances is for the grievor to return money provided to him by the Board pursuant to paragraph 1 of the MOA.

Dated at Toronto, this 27th day of August, 2013.

"William A. Marcotte"
William A. Marcotte
Arbitrator