

IN THE MATTER OF AN ARBITRATION

EDSC, TRAVAIL
ESDC, LABOUR

JUL 17 2015

BETWEEN:

SFMC
FMCS

Nishnawbe-Aski Police Service Board

-and-

Public Service Alliance of Canada

Interest Arbitration

Lorne Slotnick, Arbitrator

Representing the Employer – Robert Edwards

Representing the Union – Jawara Gairey

Hearing – Thunder Bay, Ont., June 8, 2015

A W A R D

This is an interest arbitration award setting the terms of a collective agreement for the officer unit of the Nishnawbe-Aski Police Service.

Background

The Nishnawbe-Aski Police Service provides police services to 35 First Nations communities across a wide portion of Northern Ontario. It was established in 1994 by the Nishnawbi-Aski Nation, which represents 49 First Nations in the territory covered by Treaty #9 and the Ontario portion of Treaty #5. The area covered spans roughly two-thirds of the land mass of Ontario. The force is headquartered in Thunder Bay, with regional offices in Cochrane and Sioux Lookout. Most of the communities served are accessible only by air for most of the year.

This police force was established to provide effective and culturally appropriate policing to the people of the Nishnawbe-Aski area. Communities have the option of using the force or being policed by Ontario Provincial Police First Nations constables, and 14 of the 49 communities within the Nishnawbe-Aski Nation have chosen to use the OPP First Nations constables. These constables are paid less than regular OPP officers.

The Nishnawbe-Aski Police Service was not established by statute, but rather by tripartite agreement (renewed periodically) among the federal government, Ontario government and Nishnawbe-Aski Nation. Its core funding comes from the federal government (52 per cent) and the provincial government (48 per cent). There is some additional funding tied to specific

programmes, but the Nishnawbe-Aski Nation has no method of raising money for the service, such as taxation. The service is governed by its own police services board (the employer in this case), representing tribal councils from the Nishnawbe-Aski Nation.

The Public Service Alliance of Canada was certified under the *Canada Labour Code* in 2006 to represent officers of the Nishnawbe-Aski Police Service. There are currently approximately 135 employees in the officer bargaining unit. The officers are appointed by the Commissioner of the OPP and have jurisdiction throughout Ontario.

The parties' current collective agreement expired on March 31, 2010. In 2011, the parties agreed to roll over the terms of that collective agreement for an additional year, with the same wage rates and other provisions, but with some lump-sum payments. Bargaining for a renewal collective agreement began in 2011 and in March, 2012, the parties agreed to submit the outstanding issues to arbitration. At least part of the reason for the long delay between the start of bargaining and this interest arbitration relates to an ongoing challenge by the employer to the federal certification of the bargaining unit. That issue is now before the courts. In a November, 2013, decision, the Canada Industrial Relations Board ruled that this employer fell within federal labour jurisdiction (*Nishnawbe-Aski Police Services Board v. PSAC 2013 CIRB 701 (CanLII)*).

Issues and Parties' Arguments

The parties were able to agree on a number of items. The remaining issues are as follows:

- Leave for union business
- Remote/Isolation Pay
- Overtime and Callouts
- Rates of Pay
- Duration of agreement

As is apparent from the list above, most of the outstanding issues are monetary.

It is worth noting here that the parties agreed in early 2015, on a without-prejudice basis, that pay rates would be increased across-the-board by 1.5 per cent effective at the start of 2015, and that pay based on the 1.5 per cent would be provided retroactively to March 31, 2014.

Under the expired collective agreement, the annual pay rate for a 1st Class Constable was \$77,702.

The parties agreed that I should follow the well-established principle of replication, attempting to settle the agreement that the parties would have reached had the bargaining been successful. The principal tool of replication is an examination of correct comparators. Here, the parties differ as to the proper comparators.

The union argues that the proper comparator is the collective agreement between the OPP and the Ontario Provincial Police Association, covering officers (but not OPP First Nations constables). The current annual rate for a First Class Constable under that agreement, after an 8.55 per cent increase in 2014, is \$90,621. That rate is nearly \$12,000 higher than the current salary paid by this employer, even counting the 1.5 per cent increase agreed to, without prejudice, by the parties.

The rate for the OPP First Nations First Class Constable was until recently \$83,482. However, these officers have just received an increase of 4.1 per cent retroactive to January 1, 2014. (This increase was provided by the province of Ontario, and perhaps not coincidentally is equivalent to 48 per cent of the 8.55 per cent that regular OPP officers received in 2014; the federal government, which funds the other 52 per cent of First Nations police budgets, did not make a contribution.)

The union proposes a six-year agreement and seeks parity with the OPP-OPPA rates effective April, 2011, including matching as-yet undetermined future OPP rates until a March 31, 2017 expiry.

The union's argument is largely based on a history of these parties using the OPP as a comparator. The union brief notes that the parties' first collective agreement provided for parity with the OPP, and points to a note to the pay scales in the last collective agreement saying, "the Employer will continue to negotiate with the Governments of Ontario and Canada for full retroactivity back to January 1, 2010 to March 31, 2010 for 2009 rates and for 2010 OPP wage

parity effective April 2010.” This, the union argues, is an employer commitment to the goal of OPP parity.

The union also relies on a 2012 arbitration award involving another First Nations police service, *Re Treaty 3 Police Service and PSAC 2012* CanLII 77004 (ON LA) (Slotnick), in which OPP parity was awarded after the employer offered it, employees narrowly rejected the offer in a vote, and the employer then withdrew the offer.

The union asks that I reject any “ability to pay” argument by the employer, relying on the long line of cases in which arbitrators have not allowed publicly funded employers “to hide behind their own skirts,” (as the arbitrator put it in *Re University of Toronto*, unreported, Feb. 13, 1981, Christie).

The employer does not dispute that parity with the OPP is a worthy goal, but says it is simply impossible to close the large gap in this collective agreement.

With regard to the *Treaty 3 Police Service* case, the employer here argues that its situation is fully distinguishable based on that case’s unique set of facts. In the *Treaty 3* case, the employer offered OPP parity and later retracted the offer, whereas here the employer has never suggested it was able to match OPP rates.

The employer provided detailed financial information showing a deficit of just over \$1-million for the period ending March 31, 2015. While acknowledging the case law that says public

sector employees should not have to accept substandard compensation in order to balance the books, the employer also points out that it has no ability to raise money aside from lobbying the federal and provincial governments to increase funding. It asks me to take notice of the underfunding of First Nations organizations, particularly from the federal government. The entire service, as well as its board members – who may be personally liable, as the police service is a non-profit incorporation – could be vulnerable if the organization is not able to meet its obligations under a collective agreement.

The employer argues that in police interest arbitrations, the major factor in searching for comparators is the size of the service. On this point, there is no comparison between the OPP, with its more than 6,000 officers, and Nishnawbe-Aski, with 135. There are better comparators among the various First Nations police services in Ontario and Manitoba (of which Nishnawbe-Aski Police Service is the largest.) The salary for a First Class Constable in these services ranges from \$75,710 to \$84,953, all well below the OPP rates.

In support of its argument, the employer referred to *Re City of Ottawa and Amalgamated Transit Union, Local 279*, unreported, Oct. 9, 2009, Keller (neither party should expect major breakthroughs); *Re Durham Regional Police Services Board and Durham Regional Police Association* 2007 CanLII 45400 (ON LA) (Knopf); *Re Town of Gananoque Police Services Board and Gananoque Police Association* [2009] O.L.A.A. No. 263 (Simmons) (comparators by size of force); *Re Pembroke Police Services Board and Pembroke Police Association*, unreported Nov. 15, 2010, Marcotte; *Re St. Thomas Police Services Board and St. Thomas Police Association*, unreported, March 4, 2012, Fisher; and *Re West Nipissing Police Services*

Board and West Nipissing Police Association 2012 CanLII 42088 (ON LA) (Schmidt) (catch-up must be a gradual process.)

The employer also submitted excerpts from a 2006 paper prepared for the Ipperwash Inquiry by Don Clairmont, an academic expert on aboriginal policing, titled *Aboriginal Policing in Canada: An Overview of Developments in First Nations*. The following passages from that paper are relevant to the employer's argument that, beyond the relative size of various police services, an additional distinction is that the mandate and funding of First Nations services is uniquely less certain than any "regular" police service, whether OPP or municipal. Mr. Clairmont comments as follows (at page 84 and 94-5):

Perhaps the most vulnerable type of SA [*self-administered*] police service in Canada is the regional police service. There are three in Ontario, namely the Anishnabek Police Service (APS), the Nishnawbe Aski Police Service (NAPS) and the Treaty 3 Police Service (T3PS)...The regional SAs have had to deal with many challenges including ... underresourcing associated with how the service has been conceptualized by government (i.e., as an enhancement, not a replacement of pre-existing police service.)

...

In the NAPS view...the First Nations police service has been in actuality more of a replacement than an enhancement. While generally positive about the collaboration of the OPP, NAPS pointed to their lack of presence in the NAN [*Nishnawbe-Aski Nation*] area and significant delays in accessing the OPP services because of the NAPS detachments' isolation.... the Canadian government through its Aboriginal Policing Directorate, and unlike the Ontario government, has been reluctant to provide funding for support positions, targeting instead more police front-line activity. This does make some sense from the point of view of FNPP [*the federal First Nations Policing Program*], but not if one considers that First Nation policing is indeed a replacement.

In summary, the employer argues that this uncertainty about mandate and funding means the use of regular OPP officers as a comparator is inappropriate.

Decision

Having reviewed the material in the comprehensive briefs filed by each party, I have concluded that in the current circumstances of the employer, the proper comparator in this round of negotiations is the OPP First Nations officers. This does not mean that parity with regular OPP officers is not a worthwhile goal to be considered in future rounds of bargaining, but only that the full “catch-up” is not achievable at this time.

1. Duration of Agreement

Five years, expiring on March 31, 2016.

2. Rates of Pay

OPP First Nations officer rates to be implemented as of January 1, 2014. That is, \$83,482 plus the recently granted 4.1 per cent, totalling \$86,905. All other rates to rise by the same percentage. Retroactivity will include all wages earned, including overtime, since January 1, 2014.

If OPP First Nations officers receive any additional pay increases effective before March 31, 2016, these will be matched.

In addition, in consideration of the lack of pay increases for the first 2 ¾ years of this collective agreement, all employees in the bargaining unit as of April 2013 and still employed in the bargaining unit as of the date of this award will receive a \$500.00 lump sum.

3. *Leave for Union Business*

Union proposal on Article 7 denied.

4. *Remote/Isolation Pay*

In recognition of the difficulties related to postings in fly-in communities, acknowledged by the employer, annual Remote/Isolation pay as set out in Article 14.01 to be increased by 50 per cent for each zone, retroactive to April 1, 2015. The new annual amounts will be \$7,650, \$6,375 and \$4,215 for Zones 1, 2 and 3 respectively.

5. *Overtime and Callouts*

Union proposal on Article 15 denied.

6. *Agreed items*

All items previously agreed will be incorporated into the new collective agreement. This includes an increase in shift premiums, previously agreed but included in the union's list of outstanding issues.

7. *Retroactivity*

All retroactive payments are to be made within 90 days of the date of this award.

Order

The parties are directed to enter into a collective agreement, to be in effect from April 1, 2011 to March 31, 2016, and as may be continued by operation of law, that will consist of the previous collective agreement, except as amended by the parties during their negotiations, and by this award.

All proposed amendments and additions to the collective agreement that have not been agreed or referred to above are hereby dismissed. Unless otherwise specified, all items in the new collective agreement are effective from the date of this award.

I will remain seized of and may deal with all matters in dispute between the parties until a new collective agreement is in effect.

Lorne Slotnick

Lorne Slotnick, Arbitrator

July 16, 2015