

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**The Police Services Board
of the
Treaty Three Police Service**

-and-

Public Service Alliance of Canada

Interest Arbitration

Lorne Slotnick, Arbitrator

Representing the Employer – Donald Shanks and Rachael Paquette

Representing the Union – Gail Lem and Janson LaBond

Hearing – Kenora, Ont., Jan. 18 and 19, 2016.

A W A R D

The parties have appointed me as sole arbitrator to resolve the issues related to the renewal of the their collective agreement covering uniformed officers.

Background facts

Essential to understanding this award is a brief history of the relationship between these parties for the past several years, and in particular the last interest arbitration decision, from late 2012 (*Re Treaty Three Police Service and PSAC* 2012 CanLII 77004 (ON LA) (Slotnick).)

Treaty Three Police Service is a self-administered First Nations police service headquartered in Kenora, Ont. It provides policing services to 23 First Nations communities in the Treaty Three territory, a large area that includes the southern part of Northwestern Ontario west of Thunder Bay. The service is governed by a board representing the 23 communities it serves. It began operations in its current form in August, 2003, and evolved from the Ontario Provincial Police First Nations Policing Program. The parties agree that the OPP is mandated to police any First Nation community that is not part of a First Nations policing agreement, including a small number of communities in the Treaty Three area that have opted out of the Treaty Three Police Service.

Treaty Three Police Service is not a statutory creation, but rather is a creature of a tripartite agreement of the federal government, the Ontario government and Grand Council Treaty #3.

The service is funded by the government of Canada (52%) and the government of Ontario (48%). The officers are appointed by the Commissioner of the OPP, and the Treaty Three Police Services Board is mandated to provide policing that is, in the words of the funding agreement, “professional, dedicated and responsive to the needs and cultures of the Communities they serve...”

The Public Service Alliance of Canada was certified in 2007 by the Canada Industrial Relations Board to represent a bargaining unit of all employees except civilians, inspectors and those above the rank of inspector. (The union local is also known as the Treaty Three Police Officers Union.) However, there is an ongoing issue over whether the federal certification is proper. In a recent decision, the Federal Court of Appeal set aside the federal certification of another First Nations police service, ruling that the labour relations of that police service are provincially regulated (see *Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada*, 2015 FCA 211 (CanLII).) While PSAC has requested leave to appeal this decision to the Supreme Court of Canada, it has also applied for Ontario provincial certification for its First Nations police bargaining units, including the bargaining unit in the case before me now.

There are currently about 80 members of the Treaty Three police bargaining unit. A large majority is of aboriginal descent.

Parity between the Treaty Three Police Service officers and those of the Ontario Provincial Police has long been a goal of the union. The employer has also explicitly agreed that this is a desirable goal.

In the previous round of bargaining, the employer offered parity with OPP salaries. This entailed a significant wage increase – for a first-class constable (3-8 years), from \$77,436 annually to \$83,483, an increase of nearly 8 per cent. The union put this offer to a membership vote without any recommendation in 2012, but it was narrowly defeated, apparently because of issues related to retroactivity and one or two other issues unrelated to pay. When the parties returned to bargaining, the employer withdrew its offer, saying it had no funding for what it had previously offered.

In the resulting arbitration award covering the period from April 1, 2011, to March 31, 2014, I ordered the employer to implement the OPP rates as of the start of the first full pay period in 2013.

But that was not the end of the story with regard to OPP parity. The employer paid the rates that had been ordered, but only for three months, until March 31, 2013. In April 2013, and then two months later, the employer unilaterally rolled back salaries in two stages, to the same level as they were prior to the December, 2012 award that had ordered OPP parity. The employer stated at the time that it simply could not afford the increases that had been ordered, as its two funding sources had refused additional money beyond the 1.5 per cent per year increases they had already committed. The employer also stated that paying the ordered increases would lead to the wind-up of the entire service, and, in fact, announced in July, 2013, an impending complete shutdown. This would have led to the OPP taking over policing in the communities served by the Treaty Three Police Service. However, the shutdown was averted, even though no additional funding

was secured and the union did not agree to any changes in the collective agreement. The union challenged the wage rollbacks through the grievance procedure and unfair labour practice complaints, but these matters have not been adjudicated.

The employer continued to pay the 2009-2012 salary rate until April 1, 2014, when it raised the rates by 1.5 per cent. Another 1.5 per cent increase was provided effective April 1, 2015, bringing the first-class constable annual rate to \$79,777, still significantly behind the \$83,483 that had been ordered to start in 2013.

Then, the week before the hearing of this matter, the employer announced it would retroactively pay the increases that had been ordered in 2012, to the point of the expiry date of the collective agreement at the end of March, 2014. The employer said the cost of this move was roughly half a million dollars.

In addition to the wage rollbacks, the employer also discontinued in 2013 an insured short-term disability plan that is provided for in the collective agreement. The plan was reinstated in March, 2015.

Bargaining history

Against the backdrop of these unilateral wage rollbacks, the parties met in bargaining through 2014, and also participated in mediation in 2015 with the assistance of the Federal Mediation and

Conciliation Service. Several issues were settled, and will be incorporated into the new collective agreement.

The parties have agreed that disputes would not be resolved by any interruption in service, but be settled by arbitration if there is an impasse.

At the hearing, each party provided an extensive brief on the issues, as well as material on the historical and legal context of aboriginal policing. The employer submitted detailed information about the finances of the service. The briefs were supplemented by oral argument.

Parties' Positions

On the major issue remaining – salaries – the employer seeks a four-year agreement with increases of 1.5 per cent in each year, to conform to its funding agreement effective from April, 2014 to March, 2018. That agreement provides money for wage increases of 1.5 per cent annually.

These increases proposed by the employer would produce a first-constable rate of \$82,188 in the final year of the agreement (April 2017 to March 2018). That rate is still roughly \$1,300 less than the 2013 rate ordered in the last arbitration award.

As for the period between the expiry date of the last collective agreement, March 31, 2014, and the date of this award, the employer argues that it simply does not have the money to pay the

rates ordered in the last arbitration award. It has provided two 1.5 per cent increases, in April, 2014 and April, 2015, but says it cannot afford more without compromising the viability of the entire service.

The union seeks a three-year agreement with OPP parity. OPP officers received an increase of 8.55 per cent at the start of 2014, by virtue of a provision in their agreement that their rates must at least match the highest in the province, which in 2014 were at the Toronto Police Service.

With the 8.55 per cent increase, the OPP 2014 rate for a first-class constable was \$90,621. The OPP rates for 2015 and 2016 have not been settled yet, but PSAC is seeking a “me too” provision for the Treaty Three Police Service members effective April 2015 and April 2016.

The employer argues that both levels of government were made aware of the last interest arbitration award but refused any increase in funding. In 2015, the provincial government provided a 4.1 per cent increase, effective at the start of 2014, to the OPP First Nations Constables, who serve 19 First Nations communities that do not use the Treaty Three or similar services. (This increase 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.) Treaty Three Police Service wrote in July 2015, to Yasir Naqvi, the provincial Minister of Community Safety and Correctional Services, requesting the same 4.1 per cent increase. The employer’s brief includes the minister’s reply from December, 2015, stating that “the ministry is not in a position to provide such funds to other First Nation police services at this time.” Similarly, the employer has provided a December, 2015,

letter from a federal official to the chief of the Nishnawbe-Aski Police Service refusing additional funding.

Decision

In reaching my conclusions in this matter, I have been guided by the well-established principle of replication: the task of the arbitrator is to come as close as possible to what the parties would have agreed, had bargaining been successful. Both parties provided case law on the principles to be applied; those cases need not be referred to here.

A few words are in order regarding the employer's argument about its ability to pay. As stated in my previous award between these parties, ability-to-pay arguments have been rejected for decades by arbitrators. These arguments have been dismissed with regard to employers, who, like this one, have no independent ability to raise money through taxation or otherwise and must rely solely on governments for funding. Moreover, arbitrators have said that to allow government underfunding to justify the payment of substandard wages is to ask public sector employees to subsidize the rest of the community.

While I agree with the case law on ability to pay, the situation at hand here presents an exceptional challenge. Having heard the submissions of counsel and reviewed an extensive will-say statement by the service's financial controller, Kristine Gagne, I have concluded that parity with the OPP would place the Treaty Three Police Service in serious jeopardy of being forced to end its entire operation. Unlike in many comparable situations where pay increases are ordered

but funding is frozen, layoffs cannot be used here to absorb the increases. Fewer officers will simply mean less funding, sparking a death spiral that would soon render the employer unable to provide its services. The irony is that if continued OPP parity forced the Treaty Three Police Service to disband, the OPP would take over policing the Treaty Three First Nations communities, probably using OPP First Nations constable rates. But what would be lost would be the distinctive nature of the Treaty Three Police Service, with its philosophy of “policing for the people by the people.”

Using the principle of replication, I cannot accept that the employer would ever agree to a wage scale that would lead to its own demise, nor can I accept that the union, acting rationally, would press for wage increases that would destroy all its members’ jobs.

While the past three years have been difficult in the relationship between these parties, both can agree that a critical cause of the problem is the relative underfunding of services to aboriginal people, which has been repeatedly documented, and which was highlighted most recently by the Canadian Human Rights Tribunal in a decision related to provision of child welfare services to First Nations (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII)). The funding gap for aboriginal policing was discussed in the *Ipperwash Inquiry Report*, 2007, Volume 2, Chapter 10.

In summary, while continued parity with OPP rates is a worthy goal supported by both parties and while the OPP ultimately remains the proper comparator, the union’s proposal here, or any

other salary increase, could well jeopardize the very existence of this organization. Having said that, the employer cannot expect to sustain the unilateral rollback of wages it undertook. I will therefore be ordering that the rates in the previous collective agreement (that is, parity with OPP 2013 rates) be paid, effective April 1, 2014, and will continue for the duration of a four-year agreement.

Order

I make the following orders:

- The parties are directed to enter into a collective agreement, to be in effect from April 1, 2014 to March 31, 2018, and as may be continued by operation of law, that will consist of the previous collective agreement, except as amended by this award.
- Wage scales from the previous collective agreement (including \$83,483 for first-class constable, plus any applicable retention incentive) to be paid for duration of agreement.
- Pay rates to be implemented within two weeks of the date of this award. Pay retroactive to April 1, 2014, is to be provided by June 9, 2016. Individuals eligible for retroactive payments who have left the employ of the service are to be contacted in writing at their last known address within 30 days of this award, and may claim retroactive pay within 60 days of notice being sent.
- Agreed items (Tab 3 of employer brief) to be incorporated into the new agreement. In addition, memorandums of understanding regarding the pension plan and the training committee, as agreed at the hearing, will be added.

- Parties to agree on wording of additional memorandum of understanding providing for continuation of the critical incident team. Failing agreement, the issue may be brought back to me.
- Any issue not addressed in this award is dismissed.
- Unless specified otherwise, 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 between them.

Lorne Slotnick, Arbitrator
February 11, 2016