CITATION: Christie v. Commissioner of the Ontario Provincial Police, 2022 ONSC 4752
DIVISIONAL COURT FILE NO.: 259/22
DATE: 20220817

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	)	
	)	
J.R. CHRISTIE and KARL WALSH	)	*Bryan Badali*, for the Applicants/Moving Parties
	)	
	)	
Applicants/Moving Parties	)	
	)	
– **and** –	)	
	)	
COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE	)	*Christopher Diana*, for the Respondent/Respondent on the Motion
	)	
	)	
	)	
Respondent/Respondent on the Motion	)	
	)	
	)	**HEARD at Toronto (by videoconference):**
	)	August 17, 2022

MATHESON J. (Orally)

[1] The applicants have brought this motion for an interim stay of a misconduct hearing pending the disposition of their application for judicial review. In that application, they seek to quash an April 11, 2022 decision of the Adjudicator, Superintendent Graeme Turl, who refused to dismiss misconduct proceedings against them. The misconduct proceedings are scheduled to go to a hearing in October and/or November 2022.

[2] I will address the background very briefly.

[3] The applicants were both police officers who became executives on the Ontario Provincial Police Association ("OPPA"). The applicants took leaves of absence from the Ontario Provincial Police ("OPP") to run for those executive offices and those leaves of absence continued when they were elected.

[4] The applicant Christie was first elected in 2008 and rose to the position of President of the OPPA. The applicant Walsh was President at an earlier stage and became Chief Administrative Officer.

[5] In 2014, there was a complaint against the applicants for alleged improper financial dealings. Other people were also implicated in the complaint.

[6] The complaint caused an RCMP investigation. There were then both criminal charges and misconduct charges. The misconduct charges were brought under the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*"). In March 2015, the applicants were removed from their executive positions, and suspended by the OPP, with pay.

[7] In 2019, the applicants were acquitted by a jury in the resulting criminal proceedings.

[8] The misconduct proceedings continued. More specifically, the applicants were charged under the *PSA* with discreditable conduct.

[9] A third person was also the subject of these proceedings, Provincial Police Constable Martin Bain. He had also held an executive position with the OPPA. He was also charged and acquitted in the criminal proceedings. He was also the subject of the misconduct proceedings that are scheduled for the upcoming hearing this fall, along with the applicants.

[10] Superintendent Graeme Turl of the York Regional Police Force was appointed as Adjudicator for the *PSA* hearing in this matter.

[11] The applicants, together with Officer Bain, moved before the Adjudicator to dismiss or stay the misconduct proceedings against them. The main grounds for that motion were as follows:

(1) that they were not police officers at the relevant time because they were on leaves of absence, giving rise to a lack of jurisdiction for the misconduct proceedings; and,

(2) that the misconduct proceedings were an abuse of process.

[12] The Adjudicator dismissed the motion. That is the decision challenged in the application for judicial review. The Adjudicator gave lengthy reasons for decision addressing a myriad of arguments raised by the moving parties and now raised in the application for judicial review.

[13] Very briefly, the Adjudicator found that the moving parties were still police officers for the purposes of the misconduct proceedings and that the misconduct proceedings were not an abuse of process.

[14] Only two of the three moving parties have brought proceedings in this court. The applicants Christie and Walsh commenced the application for judicial review. Officer Bain did not do so.

[15] The applicants seek an interim stay of the misconduct hearing against them. That relief would not result in a stay of the same hearing as against Officer Bain. I address that subject later in these reasons.

[16] The test for an interim stay of proceedings is well established. There is a three-prong test that asks as follows:

(1) whether there is a serious issue to be tried;

(2) whether the failure to grant the interim stay would cause the applicants irreparable harm; and,

(3) whether the balance of convenience favours a stay.

[17] These three factors are not water-tight compartments. Overall, I must decide whether the interests of justice call for the interim stay.

[18] I begin with whether there is a serious issue to be tried in the application for judicial review.

[19] The applicants focus on the first of the two issues they have raised. They focus on the question of whether they can be subjected to misconduct charges for a period of time when they were on leaves of absence. They do not focus on the second issue, specifically whether the misconduct proceedings are an abuse of process. I have therefore focused on the first issue as well.

[20] Before I discuss that issue, I note the respondent submits that the threshold in this motion should be a strong *prima facie* case not a serious issue to be determined. I conclude that the issue of the threshold does not change the outcome of this motion and I have therefore not addressed it. In any event, the respondent submits that the issue of whether the applicants were still police officers during their leaves of absence does not meet the low threshold of whether or not there is a serious issue to be decided in the application for judicial review.

[21] The main issue is whether or not the applicants were police officers under the *PSA* and therefore subject to the disciplinary proceedings in Part V of the *PSA*.

[22] The applicants' argument in short is that once they took positions with the OPPA executive, they were no longer acting police officers. The respondent's position is that the question of whether a police officer acting on behalf of the Police Association is subject to discipline under Part V of the *PSA* has been directly addressed by the Legislature. The Code of Conduct provides for limited exceptions for business conducted on behalf of a police association that do not apply.

[23] There is no question that s. 76(1) of the *PSA* provides for misconduct complaints against a "police officer employed by his or her police force, other than the deputy chief of police". A "police officer" is defined in s. 2 of the *PSA* and includes a person who is "appointed as a police officer".

[24] With respect to their employment, it is not disputed that the applicants were appointed as employees pursuant to Part III of the *Public Service of Ontario Act, 2016*. Those appointments were not revoked or changed during the time of their leaves of absence. Further, there is no issue that the applicants were suspended with pay in 2015 and have been collecting their salary, benefits and accumulating pensionable time since that date. The applicants did not raise any concerns about their employment status at that time and did not allege that the OPP lacked jurisdiction to suspend them.

[25] There is also authority that supports the submission of the respondent that police officers are accountable for misconduct that occurs while off duty.

[26] The Adjudicator considered these and other provisions including the OPPA constitution and bylaw, other authorities and arguments, concluding that the applicants were police officers for the purpose of the misconduct proceedings under the *PSA*.

[27] The applicants submit that the Adjudicator erred in the number of respects including the following:

(1) They submit that the Adjudicator erred in concluding that they were police officers and employed by the OPP during their leaves of absence.

(2) They submit that the Adjudicator erred in interpreting the OPPA bylaws regarding active membership.

(3) They submit that the Adjudicator erred in relying on the fact that the applicants were not required to turn in their weapons or warrant cards and could still perform duties as police officers in an appropriate situation even though on leaves of absence.

(4) They submit that the Adjudicator erred in considering that smaller police associations may only be represented by part-time executive members.

(5) They submit that the Adjudicator erred in his interpretation of what is meant to be an employee under the *PSA*.

(6) They submit that the Adjudicator made a number of other errors in this regard.

[28] The moving party relies heavily on a decision of the Ontario Court of Appeal in *Skof v. Bordeleau,* 2020 ONCA 729. That appeal arose from a decision under Rule 21.01(3) of the *Rules of Civil Procedure*. The appellant was a police officer and the President of the Ottawa Police Association. He was suspended due to criminal charges. He sued the Chief of Police and the Ottawa Police Association in a civil action. The motions judge had granted a motion to dismiss his action on the basis that the issue should be determined under the collective agreement. The motions judge decided, therefore, that the court should decline jurisdiction.

[29] On the appeal, the Court of Appeal decided that the appellant was not subject to the collective agreement and therefore could not bring a grievance with respect to the matters raised

in the civil action. That main finding, which is based on specific collective agreement wording, is not relevant in the case before me. However, the Court of Appeal went on to briefly address another argument posed to the motions judge. That argument questioned whether an application for judicial review was available to the appellant instead of a civil action. The Court of Appeal held that the *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1, permitted a civil action. The court also commented as follows:

> [23] In any event, the appellant's action is not simply an action for judicial review. It is an action for different heads of relief including claims for damages for Charter breaches and for misfeasance in public office. In fact, read generously, the statement of claim appears to call into question whether Bordeleau had authority to use s. 89 to suspend the appellant, given his position. Put another way, it is an arguable question whether the appellant is "a police officer" to whom s. 89 applies. [Emphasis added.]

[30] I have taken this comment into account in considering the merits of the application for judicial review.

[31] There is another issue relevant to the question of whether or not there is a serious issue to be tried. That is the issue of prematurity, since the decision being challenged is an interlocutory decision.

[32] This court would not ordinarily determine an application for judicial review from an interlocutory decision. It is preferrable to let the administrative process run its full course and consider all of the legal issues at the conclusion of the administrative process. However, the court does have the discretion to hear a premature application for judicial review. It will do so only in exceptional circumstances.

[33] The applicants submit that this is one of those rare cases where an application for judicial review of an interlocutory decision should be permitted to proceed. The applicants submit that there is evidence of hardship, prejudice and costs associated with these ongoing proceedings. The arguments before me in this area substantially overlap with the arguments put forward in the applicants' submissions on the issue of irreparable harm. I will therefore refer to them again at that stage of my reasons. In addition, the applicants submit that the full record on the main issue is available at this time and that there would be a general benefit to having the question of law decided, specifically the question of their status during their leaves of absence. They further observe that there has been an acquittal on all the criminal charges.

[34] The responding party submits that there are not the required exceptional circumstances in this case. The respondent notes that the applicants have been suspended with pay throughout the relevant period and continue to be paid, which is relevant to the alleged financial strain of the ongoing proceedings. Further, if the applicants are found to have engaged in discreditable conduct, they can raise the preliminary issues after the proceedings have concluded. If they are not found to have engaged in discreditable conduct, there is no need to address the issues at all.

[35] Although I see a significant issue regarding prematurity, I will proceed on this motion on the basis that the low threshold for a serious question to be tried has been met. I therefore move to the second factor in my consideration – irreparable harm.

[36] The moving party submits that there would be irreparable harm if the misconduct hearings were permitted to go ahead. Their main points are these:

(1) They would be forced to go before a tribunal that could be found after the fact not to have had jurisdiction over them.

(2) They are under financial strain and may not be able to afford the post-misconduct hearing legal steps required to challenge a finding if one is made.

(3) They are exposed to reputational harm if they are found to have engaged in misconduct and that finding is subsequently set aside.

[37] On the subject of irreparable harm, the respondent accepts that there may be significant financial consequences but further submits correctly that this is not normally regarded as irreparable harm. With respect to the issue of the financial strain, the respondent reiterates that these applicants have been suspended with pay and continue to be suspended with pay. The respondent also rightly submits that while being unable to afford counsel is undesirable it is also not uncommon, and the parties may choose to proceed as self-represented parties as people sometimes do. Similarly, there is a possibility of harm to reputation, but it could be vindicated on a successful challenge to such a finding.

[38] I move to the third factor, which is the balance of convenience. The submissions on this factor substantially overlap with the submissions on irreparable harm. I will not repeat all of those submissions. I will simply say that I have taken them into account. They also overlap with the applicants' submission on why their application ought to proceed even though premature.

[39] In addition to those many arguments, the respondent submits that there is a significant public interest in the timely disposition of misconduct allegations regarding the police. There is no question that there has already been a considerable delay and the events at issue that would be the subject of the misconduct hearing took place a long time ago.

[40] Further, the hearing scheduled for this fall addresses not only the charges against the applicants but the charges against Officer Bain. The factual matrix relevant to the charges against all three officers is at least overlapping, if not the same. An interim stay would therefore result in one of two situations. First, the hearing scheduled against Officer Bain could be adjourned pending the determination of the judicial review involving the applicants. This would result in another significant delay, including for an officer who has not sought relief in this court. Alternatively, the hearing against Officer Bain could proceed, resulting in potentially two hearings arising from the same or overlapping factual matrix, giving rise to a myriad of problems associated with parallel proceedings.

[41] I have considered all the factors and submissions in the exercise of my discretion, recognizing that the core question is what serves the overall justice of this case. I recognize that

the applicants have raised an issue that if successful could mean that the hearing against them would not be needed. Yet, there are other countervailing interests, including those that inform the prematurity law and the public interest in a timely disposition of misconduct allegations against the police.

[42] The applicants rely on the possibility that they may not be able to afford counsel at a later stage, if needed. That would be unfortunate, but it is a reality for many people before the courts who may not be getting paid in the meantime. The same can be said for the potential reputational harm that may arise in the course of events such as these. It is not an extraordinary consideration.

[43] Even accepting that there is a serious question to be tried, I am not persuaded to exercise my discretion to grant an interim stay of the misconduct proceedings pending a disposition of this application for judicial review. Costs are awarded to the respondent in the agreed upon amount of $6,000. I wish to repeat my comment made earlier, that I appreciate what I regard as the excellent submissions of counsel on both sides of this case.

MATHESON J.

Date of Oral Reasons for Judgment: August 17, 2022

Date of Written Release: August 19, 2022

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Applicants/Moving Parties

– and –

COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

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ORAL REASONS FOR DECISION

MATHESON J.

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