IN THE MATTER OF THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15

IN THE MATTER proceedings under Part V of the Police Services Act,

R.S.O. 1990, c.P. 15, as amended

J.R. CHRISTIE, MARTIN BAIN and KARL WALSH

Applicants

and

ONTARIO PROVINCIAL POLICE

Respondent

Defence Motion relating to an Abuse of process and loss of jurisdiction

Counsel for the Applicants:	Pamela MACHADO	Marco SCIARRA
Counsel for the Respondent:	Christopher DIANA	
Hearing Officer:	Superintendent (Ret) Graeme Turl	
Motion Date:	February 23, 2022	

BACKGROUND:

The Applicants, James Christie, Martin Bain and Karl Walsh, are members of the Ontario Provincial Police and were previously the President, Vice-President and Chief Administrative Officer (CAO) respectively, of the Ontario Provincial Police Association, until on or about March 2015 at which time they were removed from their Executive positions on the O.P.P.A. and suspended by the O.P.P..

An internal complaint was submitted to the O.P.P. in relation to perceived misconduct/criminality by Christie, Bain and Walsh in relation to some financial transactions/practices along with other persons of interest. The matter was investigated by the Royal Canadian Mounted Police (R.C.M.P.) at the request of the O.P.P. resulting in Fraud Over and Theft Over charges being laid against Christie, Bain and Walsh and two other individuals. The Theft Over charge was withdrawn and all parties had a jury trial in Superior Court on the Fraud Over $5000.00 charge. In November of 2019 all accused parties were found not guilty.

As a result of this matter the Applicants were subsequently charged under the *Police Services* Act in June, 2019. Each of the Applicants were charged with one count of Discreditable Conduct and in June 2021 each of the Applicants count of Discreditable Conduct was amended and served upon them.

To: Detective Sergeant J.R. (Jim) CHRISTIE, #8455

YOU ARE ALLEGED TO HAVE COMMITTED DISCREDITABLE CONDUCT in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

It is alleged that between January 2013 and March 2015 while you were a sworn member of the Ontario Provincial Police (O.P.P.) and a member of the executive of the Ontario Provincial Police Association (O.P.P.A.) you misused your position in the O.P.P.A. effectively committing misconduct as a sworn member of the O.P.P.. The totality of your actions and communications, in consort with PC Martin Bain, PC Karl Walsh and others, demonstrated a breach of trust toward the O.P.P.A. and O.P.P.A. members in an effort to personally benefit and profit from your actions. You concealed your personal interests from the OPPA Board of Directors and O.P.P.A. members to further your personal financial gain and used your executive position within the O.P.P.A. to direct O.P.P.A. financial resources toward entities in which you

held a personal financial interest. Your actions, as a serving member of the O.P.P. at the time of this misconduct were discreditable.

R.C.M.P. INVESTIGATION

In October 2014 the O.P.P. received information regarding possible criminal activity and or misconduct by members of the O.P.P.A. executive. As a result, the O.P.P. requested the assistance of the R.C.M.P. to conduct an investigation into the allegations.

- At the conclusion of the R.C.M.P. investigation, you as the President, of the O.P.P.A., and serving O.P.P. officer, were arrested on June 16,2016 and the following criminal charges were initiated against you, PC Bain, PC Walsh and others:
    - Fraud Over $5000.00 contrary to section 380 of the Criminal Code of Canada.
    - Laundering Proceeds of Crime contrary to section 462.31 of the Criminal Code of Canada.

To: Provincial Constable Martin BAIN, #7159

YOU ARE ALLEGED TO HAVE COMMITTED DISCREDITABLE CONDUCT in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

It is alleged that between January 2013 and March 2015 while you were a sworn member of the Ontario Provincial Police (O.P.P.) and a member of the executive of the Ontario Provincial Police Association (O.P.P.A.) you misused your position in the O.P.P.A. effectively committing misconduct as a sworn member of the O.P.P.. The totality of your actions and communications, in consort with PC Karl Walsh, Sgt. James Christie and others, demonstrated a breach of trust toward the O.P.P.A. and O.P.P.A. members in an effort to personally benefit and profit from your actions. You concealed your personal interests from the OPPA Board of Directors and O.P.P.A. members to further your personal financial gain and used your executive position within the O.P.P.A. to direct O.P.P.A. financial resources toward entities in which you held a personal financial interest. Your actions, as a serving member of the O.P.P. at the time of this misconduct were discreditable.

R.C.M.P. INVESTIGATION

In October 2014 the O.P.P. received information regarding possible criminal activity and or misconduct by members of the O.P.P.A. executive. As a result, the O.P.P. requested the assistance of the R.C.M.P. to conduct an investigation into the allegations.

- At the conclusion of the R.C.M.P. investigation, you as the Vice - President, of the O.P.P.A., and serving O.P.P. officer, were arrested on June 15,2016 and the following criminal charges were initiated against you, PC Walsh, Sgt. Christie and others:
    - Fraud Over $5000.00 contrary to section 380 of the Criminal Code of Canada.
    - Laundering Proceeds of Crime contrary to section 462.31 of the Criminal Code of Canada.

To: Provincial Constable K.J. (Karl) WALSH, #8920

YOU ARE ALLEGED TO HAVE COMMITTED DISCREDITABLE CONDUCT in that you did act in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Ontario Provincial Police, contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

PARTICULARS OF ALLEGATIONS:

It is alleged that between January 2013 and March 2015 while you were a sworn member of the Ontario Provincial Police (O.P.P.) and a member of the executive of the Ontario Provincial Police Association (O.P.P.A.) you misused your position in the O.P.P.A. effectively committing misconduct as a sworn member of the O.P.P.. The totality of your actions and communications, in consort with PC Martin Bain, Sgt. James Christie and others, demonstrated a breach of trust toward the O.P.P.A. and O.P.P.A. members in an effort to personally benefit and profit from your actions. You concealed your personal interests from the OPPA Board of Directors and O.P.P.A. members to further your personal financial gain and used your executive position within the O.P.P.A. to direct O.P.P.A. financial resources toward entities in which you held a personal financial interest. Your actions, as a serving member of the O.P.P. at the time of this misconduct were discreditable.

R.C.M.P. INVESTIGATION

In October 2014 the O.P.P. received information regarding possible criminal activity and or misconduct by members of the O.P.P.A. executive. As a result, the O.P.P. requested the assistance of the R.C.M.P. to conduct an investigation into the allegations.

- At the conclusion of the R.C.M.P. investigation, you as the Chief Administration Officer of the O.P.P.A., and serving O.P.P. officer, were arrested on June 14,2016 and the following criminal charges were initiated against you, PC Bain, Sgt. Christie and others:
    - Fraud Over $5000.00 contrary to section 380 of the Criminal Code of Canada.
    - Laundering Proceeds of Crime contrary to section 462.31 of the Criminal Code of Canada.

The alleged misconduct is outlined within each of the Applicants Notice of Hearing extensively following the above identified initial charge and particulars of allegations.

PART ONE: OVERVIEW

Defence counsel have brought a motion forward in this matter seeking a stay of proceedings on this matter on two grounds. Firstly, the applicants alleged that they were not "police officers" for the purposes of Part V of the *Police Services Act* (*P.S.A.*) due to their leave of absence (LOA) from the Ontario Provincial Police (O.P.P.) to the Ontario Provincial Police Association (O.P.P.A.), resulting in a loss of jurisdiction for a misconduct hearing to be held. Secondly, it is alleged that there has been an abuse of process throughout the matter and accordingly each of the applicants Notice of Hearing (NOH) should be stayed.

The Applicants' overview of the motion, as stated in their factum, is provided below for clarity and accuracy:

This motion is for:

a) an order that the proceedings against the Applicants be dismissed or stayed, on the basis of an abuse of process, in the serving of a Notice of Hearing absent the requisite jurisdiction to do so. Hence, the Tribunal lacks the statutorily mandated jurisdiction to hear this matter.

1. The Applicants are alleged to have committed discreditable conduct contrary to Section 2(1)(a)(xi) of the Code of Conduct contained in the Schedule to Ontario Reg. 268/10, as amended.

2. It is alleged that between January 2013 and March 2015 the Applicants misused their position in the Ontario Provincial Police Association [hereinafter "O.P.P.A."] by breaching the trust owed toward the O.P.P.A. in an effort to personally benefit and profit from their actions.

3. It is further alleged the Applicants at the same time were sworn serving members of the Ontario Provincial Police [hereinafter "O.P.P.."] and that their actions as part of the Executive of the O.P.P.A. brought discredit on the reputation of the O.P.P. thereby making the Applicants subject of discipline under the *Police Services Act* [hereinafter "*P.S.A.*"].

4. It is the position of the Applicants that while employed by the O.P.P.A., they were not acting in the course of their duties as OPP, thereby removing them from the jurisdiction of the *P.S.A.*.

5. It is further the position of the Applicants that the disciplinary proceedings brought by the O.P.P. against the Applicants without statutory jurisdiction and as such are abusive to the Tribunal's process as the principle is articulated in the relevant jurisprudence.

6. The Applicants apply for a declaration that this Tribunal lacks the jurisdiction to hear this matter and therefore must dismiss the Notice of Hearing and that the proceedings commenced by the O.P.P. amount to an abuse of the Tribunal's process.

PART TWO: ISSUES

The Applicants have identified several issues that need to be resolved in relation to the motion.

1. Are the Applicants, as employees of the O.P.P.A., "police officers" as defined by section 2 of the *P.S.A.*?
2. If it is determined that the Applicants are not "police officers", does the Tribunal have jurisdiction as prescribed by statute to adjudicate this matter?
3. If it is determined that the Tribunal does not have jurisdiction, the NOH's need to be dismissed therefore, would the initial commencement and continuation of the proceedings constitute an abuse of process?
4. If it is determined to be an abuse of process is there an appropriate remedy for the Applicants?

Counsel for the Applicants, Ms. Machado and Mr. Sciarra, advise that although the Applicants are technically "Police Officers" as a result of their LOA to the O.P.P.A. where they become Executive members, they no longer fall under the jurisdiction of the *P.S.A.* but within the jurisdiction of the Corporations Act, the Not-for-Profit Corporations Act and/or the Business Corporations Act.

The Applicants, upon receiving their LOA from the O.P.P., cease to be employees of the O.P.P. and became employees of the O.P.P.A. until such time that the LOA is terminated and the Applicants return to the O.P.P. in an active member status and position.

Counsel further advises that as the Applicants are no longer serving members of the O.P.P. during their LOA to the O.P.P.A., the Commissioner cannot initiate discipline or discipline the Applicants should any identified misconduct be alleged as it relates to their duties within the O.P.P.A., only the O.P.P.A. can do so under the legislation identified within the various Corporations Act's and a complaint/issue is to be dealt with, in house as identified by the O.P.P.A. By-Laws and Policies.

Additionally, as stated within their factum at paragraph 81:

> 81. Once it was established in the Ontario Superior Court of Justice that the matter was not criminal, and the Applicants were all acquitted of the charges, the O.P.P.A. was duty-bound, as a corporation, to abide by its own Constitution, and follow any appropriate civil procedures/remedies to address these allegations of misconduct. Instead, it abdicated its responsibilities, and now attempts to abuse the disciplinary process by claiming the OPP has some jurisdiction, as an outside third party at best, to lay charges against the O.P.P.A.'s own Directors.

Counsel also identified section 80(2) of the *P.S.A.* which states:

> (2) A police officer shall not be found guilty of misconduct under subsection (1) if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force. 2007, c. 5, s. 10

Counsel stipulates that as the Applicants were acting in their capacities as elected/appointed officials of the O.P.P.A., they were not within the occupational requirements for a police officer, nor were their actions reflective of the O.P.P. due to them being on a LOA and employed by the O.P.P.A. not the O.P.P..

To further reflect that the Applicants were not acting in their capacity as police officers, Counsel advise that throughout the documentation identified within the ITO for the Criminal matter they were described only by their first and last names and identifying their roles within the O.P.P.A. Additionally, all relevant emails communications utilized during that investigation originates from Corporation email addresses or personal emails, not O.P.P. emails.

At no time throughout the R.C.M.P. investigation or in any documentation utilized in the investigation or Criminal proceedings, which the Applicants were acquitted on, were their ranks or position within the O.P.P. a factor as it was only their positions within the O.P.P.A.: President, Vice-President and CAO that were taken into consideration.

Counsel advises that none of the Applicants were performing any of the essential Duties of a Police Officer, as outlined in Section 42 of the *P.S.A*., at the time of the allegations in their roles as members of the O.P.P.A. executive. The alleged violations identified within the NOH do not pertain to the Code of Conduct pursuant to the *P.S.A*. but are only relevant to the internal O.P.P.A. Constitution and By-Laws along with the governing corporate legislation. The distinction between the Duties of the Police Officer under the *P.S.A.* are separate and distinct from the duties prescribed to the Executive Board Members of the O.P.P.A. both in form and substance.

Defence stipulates that as a result of the information provided to the Tribunal, in response to the initial questions that required answering, the Applicants were <u>not</u> "Police Officers" as defined in Section 2 of the *P.S.A.*. Since the Applicants do not meet the definition of "Police Officers" under the P.S.A. while employed by the O.P.P.A., the NOH's must be dismissed as the Tribunal does <u>not</u> have jurisdiction.

As a result of the want of jurisdiction, the Applicants then request that the Tribunal considers the abusiveness in the conduct of the O.P.P. with the proceeding of this matter.

Defence contends that the investigation of the Applicants by the O.P.P. amounts to an abuse of process for the following reasons:

1. It violates the doctrine of *res judicata*;
2. It was conducted in the face of clear conflicts of interest;
3. It ignored the O.P.P.A. 's internal disciplinary policies; and
4. It is vexatious in its attempt to thwart the appropriate remuneration/indemnification of the Applicants for their years of service.

As it pertains to *res judicata,* Counsel contends that the specific allegations outlined in the NOH have been fully examined and adjudicated by the Ontario Superior Court of Justice where the Applicants were acquitted.

Defence contend that a second attempt to discipline the Applicants engages the principle of *res judicata*, as a competent body has already adjudicated the matter and rendered its decision and enhances the

abuse of process. Counsel identifies the case of *Penner v. Niagara (Regional Police Services Board),* [2013] S.C.J. No, 19 at paras. 88,89,91, 114 for review as it relates to *res judicata* and its relation to abuse of process.

As it pertains to a conflict of interest, the Applicants advise that by virtue of their position as members of the O.P.P.A. executive, if there was no separation from their former duties as a police officer they would not be able to fulfil their duties towards the O.P.P.A.. They contend that by virtue of their executive role within the O.P.P.A., should their conduct be subject to discipline under the *P.S.A.* they could not fulfil their duties as it would put them in a position of conflict of interest.

The Applicants note that there would have been several instances where discussions were had between themselves and the O.P.P. Commissioner, there would be the potential for a NOH to be initiated for discreditable conduct or insubordination due to topics raised, positions taken, language used etc. when affairs between the O.P.P. and O.P.P.A. were bridged.

The Applicants contend that the *P.S.A.* is silent on the jurisdiction to apply discipline to a private or not-for-profit organization, such as the O.P.P.A. , as it is clearly outside of its legislative authority. Additionally, there is nothing within the Business Corporations Act that allows for a Board of Directors to abdicate its responsibilities and authorities to a policing organization, outside of criminal wrongdoing allegations. Therefore, once the Applicants were exonerated of their Criminal charges, the jurisdiction of the R.C.M.P. ceased and this Tribunal has no jurisdiction to proceed under Part V of the *P.S.A.*.

Defence advise that the Business Corporations Act and the Not-for-Profit Corporations Act clearly outline that director of these corporations shall manage or supervise the management of the business and affairs of the corporation, which would include internal affair matters.

Further, the Applicants allege that O.P.P. members themselves, as shareholders of the O.P.P.A. , are in direct conflict of interest not only by investigating the matter but also by laying disciplinary charges against the Applicants. They also contend that by having Inspector Charles Young participate in the drafting of the NOH's is a conflict of interest due to his animus and dislike for the O.P.P.A., along with a previous allegation that led to him being disciplined as a result of a complaint from the O.P.P.A. .

The Applicants, further advise that while in their duties as executives of the O.P.P.A. , they did not maintain duty books or attend annual training nor were they held accountable for not doing so for the simple

reason that they were not serving members of the O.P.P. during their LOA to the O.P.P.A. hence, the *P.S.A.* does not apply to them in this context.

As it pertains to their position within the O.P.P.A. , the Applicants could only be removed from their positions pursuant to the Business Corporations Act and the application of its applicable constitution and by-laws.

Additionally, the O.P.P.A., wrongfully and illegitimately terminated the Applicants positions with the assistance of a third party, the O.P.P., in utilizing improper means to address corporate allegations of misconduct, further compounding the O.P.P.'s conflict of interest. (The Applicants identified the various standards of care for Directors and Officers and Legal Indemnification as it relates to the Business Corporations Act, Not-for-Profit Corporations Act and the O.P.P.A. By-laws within their factum.)

The Applicants submit that the matter was referred to the O.P.P. as a way for the O.P.P.A. to deny any request for legal indemnification, which was denied and that this too is a clear conflict of interest and a further attempt at obtaining a *P.S.A.* conviction to act as judgement by a court or other competent authority as stipulated within the Business Corporations Act.

The Applicants maintain that the only legal course of action in addressing allegations of misconduct against them is within the documents of the O.P.P.A. and applicable governance legislation, not through the *P.S.A.*.

Since the Tribunal, the Prosecutor and Counsel for the O.P.P.A. have determined that the O.P.P.A. is an independent third party that cannot be compelled, the O.P.P. do not have jurisdiction over an independent entity.

The O.P.P. do not independently list the positions of the O.P.P.A. executive within its Transfer Policy nor in its Expression of Interest forms, resulting in further consideration that as a separate entity from the O.P.P., the Applicants when working with the O.P.P.A. with a LOA on a separate contract they do not fall within the jurisdiction of the O.P.P. and Part V of the *P.S.A.*.

Additionally, the Applicants do not fall under the collective agreement that otherwise governs all employees of the O.P.P., as there are express provisions addressing the status of members who become executives of the O.P.P.A. while on their LOA.

The Applicants submit that there is no comparable case within the *Police Services Act* where an Executive of any Association has been charged under Part V for acts completed in the course of their Association duties.

The Applicants state that there has been recognition that charges cannot be brought under he *P.S.A.* following a criminal charge of conviction following a personal situation.

An example of this is the Adrian Woolley matter, who while serving as the Peel Regional Police Association President, was charged with Impaired driving and stunt driving by the O.P.P.. Peel Regional Police issued a statement confirming that "*As president of the union, he does not perform any police-related duties. He is elected to the position and is on a "leave of absence" from the police service while he serves his term as president.".* Further, Peel Regional Police confirmed that due to Woolley being paid by the Union and not the Service, that is the reason why he was not suspended.

In addition, this concept was legally accepted by the Court of Appeal in the matter of Skof v. Bordeleau (*Charles Bordeleau and Ottawa Police Services Board and Matthew Skof., 2021 CanLII 42368 (SCC).)* The Court of Appeal goes further to state that it would be arguable whether the appellant in this case, Matt Skoff, President of the Ottawa Police Association, is a "police officer" to whom section 89 of the *P.S.A.* (Suspension) even applies.

Abuse of Process Re: Disclosure Request:

The Applicants submit that they requested additional disclosure on or about September 20, 2021, currently in the possession of the O.P.P.A.: all notes taken by O.P.P.A. Directors and Staff, and minutes, including in-camera, from O.P.P.A. Board Meetings, and any discussions relating to the Applicants. After lengthy discussions back and forth between the Prosecution, Defence and the O.P.P.A., the Prosecution agreed that the documents may be relevant however they were in the possession of the O.P.P.A. and he could not compel them to disclose the information.

The Applicants, however, submit that once the O.P.P.A. provided disclosure of its internal communications, documents, records etc., pertaining to the allegations of Board misconduct by the Applicants, any privilege possessed was waived.

The Prosecution, Counsel for the O.P.P.A. and the Tribunal determined that the O.P.P.A. were a separate entity and therefore the Applicants would need to do a third-party records application. The Applicants further concede that the O.P.P.A. and the O.P.P. are in fact distinct and separate entities. The Applicants

suggest that the Tribunals decision is prejudicial to the Applicants, as it pertains to the requested documents/disclosure from the O.P.P.A. despite the Prosecution agreeing that the material could be relevant.

Additionally, other disclosure that was ordered by the Tribunal for production has not been produced by the Respondents, is further evidence of abuse that is present in this matter, adding prejudice to the Applicants ability to make a full and fair defence.

The Applicants believe that the Tribunal cannot accept a NOH with allegations pertaining to misconduct from a third-party entity for which it questions the relevance of the very disclosure concerning the foundation of the allegations.

The Applicants believe that without having the relevant documentation and communications regarding the allegations as set in the NOH the Applicants are unable to make a full defence. They submit that the reason the O.P.P. do not have them is because they are not the charging body; the O.P.P.A. are. This means that this matter is inappropriately before the Tribunal, as the O.P.P.A. do not have authority to issue a Part V notice. Further, this is not a Part V matter, it is a corporate governance matter that needs to be addressed within the Business Corporations Act, Policies and Procedures, as well as the Constitution of the O.P.P.A., along with the ongoing civil proceeding in Superior Court.

The Applicants state that the O.P.P. Commissioner has no authority over them, and that he along with the Professional Standards Investigators, are abusing their authority when they attempt to subvert the already prescribed authorities and process for discipline within the Business Corporations Act and O.P.P.A. By-Laws.

These authorities provide the ability to terminate, hire, promote or discipline its own staff and employees however the only authority under the P.S.A. is for the Commissioner to terminate an employee. Similarly, the Applicant President, has the full authority to terminate any of the employees or staff with the O.P.P.A. as per their governing authorities.

When the O.P.P.A. used the O.P.P. to abdicate its authorities to manage its internal affairs, it was an abuse of process. Should the proceedings continue that are founded within the NOH, it will be a further continuance of an abuse of process.

The Applicants state that they were suspended on or about March 13, 2015, and on May 4, 2015 documents were submitted by the O.P.P.A. to the O.P.P. advising that the Applicants no longer held

executive positions and were returning to the O.P.P. requiring two new positions and salary costs reallocated. The applicants ceased to be employees of the O.P.P.A..

PART III: THE LAW

The Applicants advise that as per the Supreme Court of Canada in R. v. Regan., [2002] at page 299; a stay of proceedings will only be appropriate where two criteria are fulfilled:

> g) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome.
>
> h) no other remedy is reasonably capable of removing that prejudice.

Additionally, in R. v. Nixon, [2011] SCJ 34 at 36, the Supreme Court identified two categories of abuse of process caught by s. 8 of the *Charter:*

1. Prosecutorial conduct affecting the fairness of the trial; and
2. Prosecutorial conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process"

An abuse of process can be a part of a denial of natural justice. A court is entitled to prohibit abuse of that tribunal's process in cases of unfairness, or oppression caused, or contributed to, by delay resulting in a denial of natural justice (Blencoe v. BC (Human Rights Commission)., 2000 SCC 44 (CanLii) at paragraph 111. The Applicants contend that there is no requirement in law that the ability to hold a fair hearing must be compromised to make out an abuse of process. Blencoe states:

> *"I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay."*

They also refer to R. v. Babos [2014] SCJ 16 at 32 which states:

> *32. The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:*

1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);

2) There must be no alternative remedy capable of redressing the prejudice; and

3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

During the Criminal trial, Justice K.J. Campbell, in his charge to the jury specifically addresses the legal status of the O.P.P.A., confirming that all parities agreed it is a corporation pursuant to the Ontario (Business) Corporations Act. Justice Campbell further acknowledged that an officer or director of a corporation, and as a matter of law, such officers or directors occupy positions of trust and owe a fiduciary duty of loyalty to their corporation. At no time, during his address, did he acknowledge that the Applicants owed their duty to the O.P.P. nor does he refer to them as employees of the O.P.P..

Additionally, Justice Campbell summarized the issue for the jury to decide as a “why these events took place, for what reason did these events happen?”. In the end the jury, clearly believed the Applicants, who believed they were acting in the best interests of the O.P.P.A..

The Applicants believe that the statements made by employees of the O.P.P.A. against them during the investigation were of mistrust and suspicion within the O.P.P.A., none of which met the threshold for a criminal offence of Fraud or Theft. These were the comments of disgruntled employees airing their grievances.

The Applicants have a stigma associated to the events of the investigation, their reputations, personal and professional lives have been ruined. To continue with the Tribunal would only serve to be a further abuse of process.

The Applicants referred to *Peel Regional Police Service and Detective Robert Crane, Abuse of Motion II*; which identifies:

The public would not expect any type of trial, inquiry, or administrative tribunal to proceed when the very foundation of the accusation is flawed. There is no doubt that the principles of natural

justice and the duty of fairness are part of every administrative proceeding; to hold a hearing given these circumstances would be oppressive to the Applicant in the clearest of cases. I can think of no other remedy applicable given this set of circumstances, than to stay or dismiss the proceedings if an abuse of process is established. In fact, the Respondent submitted:

> *…the law is clear that the Hearing Officer must consider whether an abuse of process has taken place before this matter can proceed. If the Hearing Officer agrees that the fairness of the hearing has been compromised; and the abuse has caused a significant prejudice to the hearing, so much so that it would bring the justice system to disrepute, the charges must be stayed and the matter must be dismissed.*

The Applicants submit that the very foundation of this ongoing accusation, the NOH, is flawed and that it would violate the conscience of the community, fundamental justice and fair play should the proceeding continue.

In the matter of *The Toronto Police Service and Constable Paul Ramos and Constable Manpreet Kharbar and Mr. Keith Ryan., June 27th, 2018., at para 31 and 34;* Justice Cunningham states and expressed a position that is relevant to this matter:

i. *"It is a balancing act and clearly it must be found that the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted."; and*

ii. *"There would be significant damage to the public interest if these proceedings were to continue, damage that clearly outweighs any harm to the public by having the proceedings halted. Enough is enough."*

The alleged misconduct occurred within the operation of a corporation that is governed by the Business Corporations Act and its own Constitution and By-Laws. The public would not expect that these transactions would occupy the public resources of the disciplinary proceedings under Part V of the *P.S.A.*.

In the matter of *Constable Jeffery Gateman and London Police Service., 1998 CanLII 27142 (ON CPC)* at para 90, the Ontario Civilian Police Commission (OCPC) stated that:

> "From the point of view of the officer there is the need to ensure that any employment related concerns are dealt with in a fair and consistent manner. From the point of view of the public, there is a concern to see that police officers are held accountable for any employment related misconduct – particularly where a member of the public is concerned or there is some suggestion of abuse of public office."

This comment is significant in that it emphasises employment related misconduct. The conduct concerned in this matter is not related to the employment of the Applicants with the O.P.P. only the O.P.P.A..

The O.C.P.C., further, in Constable Chad Power and the London Police Service., 2013 ONCPC 14 (CanLII) at para 65, referenced in Horton at page 6; notes that in administrative law "abuse of process is fundamentally about protecting people from unfair treatment by administrative agencies."

In the case of *Constable Joseph Cardi and Peel Regional Police Service., OCPC #13-10 2013 ONCPC 10 (CanLII)* O.C.P.C. were clear in stating that if there is any doubt about the relevance of a particular piece of evidence, that doubt must be resolved in favour of disclosure. Additionally, it stated:

> "…. Withholding only spawns needless litigation, and in a case like this needless appeals. And if material disclosed turns out to have no useful purpose in the hearing room, its use can be readily curtailed, and no harm is occasioned by having disclosed generously. The consequences of over-disclosure are so negligible, that the default perception about prosecutors who fight to withhold disclosure is that they have something to hide."

The failure of the O.P.P.A. to disclose any minutes of Board meetings that discussed the allegations within the NOH, only functions to confirm the lack of jurisdiction and that evidence of misfeasance or incompetence is potentially present within those documents.

The O.C.P.C. has confirmed (*The Ontario Provincial Police and Provincial Constable Bryan Horton #9842., Superintendent Chris Perkins dated August 12, 2016, at page 5, referencing Kane v. Board of Governors of U.B.C. [1980] 1 SCR 1105 at para 94, referenced in Horton at page 7)* that the securing a conviction using evidence that was obtained through an investigative process which amounts to an abuse of process functions to bring the police disciplinary system into disrepute.

The courts have found that hearings require a high level of procedural fairness and any breach of the common law duty of fairness renders a decision void. As referenced in Horton by Supt. Perkins:

> Tobiass also speaks to the fact that "shabby treatment" alone does not satisfy the criterion for a stay of proceedings: "A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent – a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings." (at para. 96). *(The Ontario Provincial Police and Provincial Constable Bryan Horton #9842., Superintendent Chris Perkins dated August 12, 2016 at page 50, referencing Kane v. Board of Governors of U.B.C. [1980] 1 SCR 1105at page 51, referencing Tobiass at para 96).*

The Applicants submit that the abuse of process in this case warrants a stay of proceedings after everything that has been identified and applying all the principles articulated within case law cited, no other remedy is applicable.

Overall, the O.P.P.A. have used the O.P.P. to control the corporate conduct of its own employees, now resulting in the O.P.P. using Part V of the *P.S.A.* to address conduct which is within the O.P.P.A. 's purview. The abuse in this case manifests itself in the form of violations of the doctrine of *res judicata*, circumvention of legislative authority, vexatiousness, undisclosed evidence, and clear conflict of interest.

RESPONDENTS:

OVERVIEW:

With respect to the Applicants assertation that they are not police officers as a result of their employment with the O.P.P.A., the Respondent asserts that they were police officers before joining the O.P.P.A. , they were police officers while serving with the O.P.P.A. and they are police officers now. The legislative, jurisprudence and facts support this conclusion. The respondent states that the applicants cannot escape accountability for misconduct by being off duty and cannot avoid accountability for misconduct whether on a secondment or leave of absence.

Additionally, the Respondent states there is a very high bar in order to meet the legal test to quash a proceeding as an abuse of process. The facts in support of this the Applicants motion do not come close to amounting to an abuse of process.

The Respondent states that on or about March 4, 2015, an Information to Obtain (ITO) was filed, regarding a criminal investigation against the Applicants, with the Superior Court of Justice resulting in a number of Judicial Authorizations were granted. The basis of the information provided to the R.C.M.P. investigators was received from a number of O.P.P.A. employees.

On or about March 13, 2015, the Applicants were suspended, with pay, from their employment with the O.P.P. pending completion of he ongoing criminal investigation along with the related misconduct proceeding pursuant to Part V of the *P.S.A.*.

On January 2, 2018, the Applicants were charged with a number of criminal offences and after a lengthy trial, on November 27, 2019, each of the Applicants were acquitted by a jury. Following delays caused by COVID-19, along with the appointment to the Bench of Constable Walsh's counsel, this matter is scheduled to proceed on October 17, 2022.

PART III - ISSUES AND LAW:

The Respondent submits that the Applicants never ceased being "police officers" and there are no jurisdictional impediments to continuing with this proceeding. The Respondent refers to section 76(1) *P.S.A.* regarding the Chief of Police making a complaint under this section regarding the conduct of a police officer employed by his/her force, causing the complaint to be investigated. Further, the definition of "police officer" under section 2(1) of the *P.S.A.*, states:

> "police officer" means a chief of police or any other police officer, including a person who is appointed as a police officer under the Interprovincial Policing Act, 2009, but does not include a special constable, a First Nations Constable, a municipal law enforcement officer or an auxiliary member of a police force; ("agent de police").

The Respondent states that we need to consider the legislative purpose, as established by the Ontario Court of Appel, (*Ontario (Civilian Commission on Police Services) v. Browne, 2001 CanLII 3051 (ON) CA, at paras. 66-67)*. This states that the legislative purpose of the *P.S.A.* is to "demonstrably increase public confidence in the provision of police services, including the processing of complaints".

Additionally, as noted by the General Division of the Ontario court in *Trumbley v Toronto (Metro) Police Force, [1986] OJ No 650, at para. 66 R v Finlayson, [1996] OJ No 1423 at para. 9,:*

> *"*Police officers, whether on duty or not, but especially on duty, must be seen by the general public to be honest persons untainted with any stain of impropriety especially when it comes to matters of criminal acts of moral turpitude".

The jurisprudence supports a broad application of Part V of the *P.S.A.*, in such that officers are accountable for their actions off duty and that it is not a prerequisite that they are engaged in work or carrying out official duties. This is only sensible as the actions of an officer on or off duty can reflect badly on the service to which they are attached. As such the O.C.P.C. wrote in *Horton and Ontario Provincial Police, 2015 ONCPC 16, at para. 23 Dave DeBoer and Ontario Provincial Police, 2017 CanLII 40693 (ON CPC), at paras. 21-28;*

> "It is well settled that a police officer is held to a higher standard of conduct than a member of the public not only while being on duty but also when off-duty. That is so by reason of the office held, the powers granted and the need to maintain the public trust in and respect for the police service".

The Respondent further stipulates that the Applicants were initially sworn in as police officers and there is no doubt that they are currently police officers, though suspended. The question of whether or not their LOA to the O.P.P.A. means that they were not police officers during that period of time. This can be considered in the following jurisprudence from the O.C.P.C. in *Harrison v. Ottawa Police Service, 2022 ONCPC 01, paras. 12-20:*

> 18. This interpretation is further supported by a purposive approach to the PSA. Part V of the PSA sets out the process for addressing public and internal complaints of police officer misconduct. An essential purpose of the PSA is to ensure public confidence in policing (see Martin v. Ontario Civilian Police Commission, 2020 ONSC 1116 (CanLII) at para. 78). It holds police officers, who are granted extraordinary powers, to a high level of accountability. It also establishes procedural protections for police officers who are alleged to have committed misconduct.

The Respondent stipulates that the mere fact that Applicants weren't engaged in police duties and therefore not subject to Part V of the *P.S.A.* is irrelevant. As noted above, the officers are accountable for their conduct off-duty, whether it is done while on vacation or on a LOA.

The Applicants further rely on section 80(2) of the *P.S.A.* where it indicates that an officer shall not be guilty if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police service. It is the latter point that is crucial to this analysis as the conduct damages the reputation of the police service, whether it is done off-duty, on-duty or on a secondment to another organization.

The Applicants further state that they were not employed by the O.P.P. during the time in question and that they should only therefore be accountable to the O.P.P.A.

It is not in dispute that the Applicants were appointed as Crown employees pursuant to Part III of the *Public Service of Ontario Act, 2016.* Those appointments have not been revoked or changed during their time with the O.P.P.A.. With this fact, it is also indisputable that the Applicants remained employees of the O.P.P. during their leave of absence. The MOU between the O.P.P.A. and the Crown clearly articulates that relationship as the Crown is referred to as the "Employer". It also authorizes seven "employees" to be given paid leave of absences to assume full-time duties with the O.P.P.A. There is also the discussion regarding salaries and benefits that the O.P.P.A. is expected to reimburse the Crown for, which is also set out within the collective agreement between the Crown as employer and the O.P.P.A.. This does not change any of the employment statuses of the Applicants.

The Respondent points out the irony that had the Applicants not been employed by the O.P.P. then they would not have had the benefit of section 89 of the *P.S.A.* which allowed them to continue to be paid

while suspended. As noted, they were suspended with pay on or about March 13, 2015, and have been collecting their salary, benefits and accumulating pensionable time since that date.

The Applicants also referred to *Skof v. Bordeleau*, where Skof was the President of the Ottawa Police Association, charged with a criminal offence. Skof was subsequently suspended pursuant to s. 89 *P.S.A.* and a civil suit was launched against Chief Bordeleau. The matter went to the Court of Appeal, finding that this was not simply a matter related to an argument over the collective agreement, but that it related to a matter of discipline pursuant to the *P.S.A.*. The Court of Appeal allowed the civil action to proceed and found that it was an "arguable question" as to whether or not the Skof was a "police officer" for the purposes of section 89. (*Skof v. Bordeleau, 2020 ONCA 729, at paras.17-19, 23-24*)

It is also important to note that the collective agreements between the O.P.P. and the Ottawa Police Service differ in that the Ottawa Police Service contains a provision stating:

> 21. An employee will not be subject to discipline by the employer, under this Agreement, for activities related to his/her duties on behalf of the Association during the period of such leave.

No such provision exists between the O.P.P., the Crown and the O.P.P.A..

The Applicants also reference an incident where the President of the Peel Regional Police Association President was charged with a criminal offence (Impaired driving offence) whereby it was referenced that he was not suspended because he was the President of the Association. However, it is important to note that Constable Woolley was held accountable to Part V of the *P.S.A.* for his misconduct and plead guilty to Discreditable Conduct as prescribed in section 2 (1)(a)(ix) of the Code of Conduct. The Adjudicator in this matter wrote:

> 36. Constable Woolley's misconduct involves a serious incident that resulted in a Criminal Code conviction. Constable Woolley holds a position of trust to the public as a police officer which is in effect at all times whether on or off duty. As President of the Peel Regional Police Association, Constable Woolley is in a leadership position where members of the Peel Regional Police have entrusted him and look to him for guidance. Constable Woolley abused that trust that comes as a result of the powers that he is entrusted with.
>
> *Peel Regional Police Service v. Adrian Woolley, Jan. 24, 2020, paras. 36-37*

Although the matter of jurisdiction was not argued, the Adjudicators decision reflects the importance of accountability of members of a police service to the public.

The Applicants also referred to older jurisprudence on this issue: *Gloucester Police Force and Tremblay, 1983 CanLII 1736 (ONSC) (Div. Ct.), at p. 2; reversing Constable Dennis Tremblay and the Gloucester Police Force, 1982 CanLII 3351 (ON CPC).* However, considering the age of the case, the different statutory context and that it did not deal with a jurisdictional issue, the case has limited context. Essentially, the President of the Gloucester Police Association was found guilty of providing confidential documents to the Ontario Police Commission. This conviction was overturned by the Ontario Police Commission and was taken to Divisional Court who overturned the Commissions decision and restored the conviction.

The Respondent points out that the Code of Conduct within the *P.S.A.* does provide limited exception for business conducted on behalf of a police association. These exceptions are:

1. Breach of Confidence for communicating information to the media without proper authority; and
2. Corrupt Practice involving soliciting or receiving gratuity or present without the authorisation of the Chief of Police/Commissioner.

Neither of these exceptions apply to the Applicants. The fact that there is already identified exceptions within the legislation is compelling, as these are specific situations in which Associations would not be subject to misconduct allegations. It would not be appropriate to carve out more exceptions when the legislative scheme is already clear.

Abuse of Process:

The Applicants have alleged an abuse of process on the grounds of *res judicata,* conflict of interest and disclosure concerns. It is the Respondents position that there has not been an abuse of process in this matter, either considered collectively or independently.

The leading case on abuse of process is the *Blencoe* decision from the Supreme Court of Canada. The court provided some helpful guidance on abuse of process, generally. Abuse of process is a common law principle invoked primarily to stay proceedings, where allowing them to continue would be seen as oppressive. There is a “heavy burden” to stay a proceeding for an abuse of process. The court in Blencoe wrote:

> *120. In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux-Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive. [Emphasis added.] Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 (CanLII), [2000] 2 SCR 307, at paras. 116-120*

In order for the consideration of an abuse of process, the above test must be met. The Respondent does not believe that this has been met, that the evidentiary record does not give rise to an abuse of process nor does it justify in quashing the NOH as remedy.

In relation to the *res judicata,* the Applicants believe that the allegations as set out within the NOH have already been appropriately dealt with by way of acquittal in criminal court. The Respondent states that the Applicants have not provided any specific case authority to support their motion, instead relying upon on the general principles of *Penner,* which is a completely different case and context.

The current matters before the Tribunal are pursuant to Part V of the *P.S.A.* and Code of Conduct. These are different from the previous matter before a Criminal Court. These are different proceedings, different contexts, different allegations and different burdens of proof.

The Ontario Court of Appeal affirmed Divisional Court's findings, in *Watson v. Peel Police Service,* where a criminal acquittal does not preclude a subsequent misconduct hearing:

> [*19] The Divisional Court also rejected the hearing officer's conclusion that allowing the discipline hearing to proceed would amount to re-litigation of P.C. Watson's acquittal. The court reasoned [at para. 21]:*
>
> > *To allow the disciplinary hearing to proceed does not bring the criminal acquittal into question. The criminal trial and the disciplinary hearing, while focused on the same factual*

matrix, are separate inquires, with distinct purposes and governed by different burdens of proof. Discreditable conduct is set out in section 2(1) of the Code of Conduct set out in Part V of O. Reg. 123/98 to the Police Services Act. It includes "acting in a manner likely to bring discredit upon the reputation of the police force". This is very different from the essential elements that constitute 17 the criminal offences of theft and possession of stolen property. As this Court stated in Gillen v. College of Physicians and Surgeons of Ontario, 1989 CanLII 4363 (ON SC), [1989] O.J. No. 470 (Div. Ct.), there is "no authority or logic for the proposition that a criminal acquittal is in disciplinary proceedings evidence or proof that the gravamen of the criminal charge was unfounded or untrue".

Watson v. Peel Police Service, 2007 ONCA 41, paras. 19-20, 31

Ontario Public Service Employees Union (Wild) v Ontario(Community Safety and Correctional Services, 2015 CanLII 36169 (ON GSB), paras. 16-25.

Additionally, the Ontario Court of Appeal also noted in *Rizzo v. Hanover Insurance Co., 1993 CanLII 8561 (OC CA) at p. 7,:*

> *Eminent Canadian, British and American text writers are unanimous in the view that evidence of a verdict of acquittal in a criminal trial is inadmissible in a subsequent civil trial as proof that the party did not commit the offence: see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (Markham: Butterworths, 1992), at p. 1045; …*

The Applicants are also concerned about a conflict of interest, in relation to Inspector Charles Young and his involvement in this matter, along with his apparent dislike of Constable Walsh, based on a conversation had with retired Commissioner Chris Lewis. There are many points of response in relation to this matter (within the factum), some of which are:

- The criminal investigation was initiated by complaints made by other members/employees of the O.P.P.A.;
- No evidence that Insp. Young had any involvement in the complaint;
- There is no inference that can reasonably be drawn, or evidence, that any animus from Insp. Young towards Constable Walsh had any impact on the prosecution of this matter;
- No evidence of any disciplinary action taken against Insp. Young.

The NOH's are based on the initiation of a criminal investigation and evidence found therefrom, none of which included Insp. Young.

As it pertains to the Applicants concern regarding not being provided disclosure as requested being part of the abuse of process, the requested documents are in the possession of the O.P.P.A.. It has already been determined by the Tribunal that the O.P.P.A. are a third party to the prosecution. The prosecution does not have copies of, or access to these documents, if they even exist. Further, it is unknown if they would be subject to solicitor-client or other privilege.

The Respondent submit that the motion should be dismissed.

ANALYSIS

To start, I would like to thank both the Applicants and the Respondents for the significant amount of material provided for my review and analysis. Although not all of it will be mentioned or quoted, that does not mean that it did not assist me in my review and decision.

There are two issues to determine, which are:

1. Were the Applicants "police officers" while seconded or on a LOA to the O.P.P.A. from the O.P.P. and are they accountable under the *P.S.A.*; and
2. Has there been an abuse of process in relation to this matter regarding the Applicants, in that there is a conflict of interest, bias, disclosure concerns and that the principle of *Res Judicata* is in motion in this matter.

To begin, all parties acknowledge that the Applicants were "police officers" while employed with the O.P.P. and currently while under suspension, while no longer with the O.P.P.A.. However, it is the contention of the Applicants that while on a LOA from the O.P.P. to the O.P.P.A., they essentially ceased to be employees of the O.P.P. and became employees of the O.P.P.A. and accountable only to the Association's By-Laws, constitution and applicable legislative corporations' acts and not to Part V of the *P.S.A.*.

As has been already noted within the *P.S.A.*, s. 2(1) defines a member of a police force and a police officer as follows:

- "member of a police force" means an employee of the police force or a person who is appointed as a police officer under the Interprovincial Policing Act, 2009; ("membre d'un corps de police")
- "police officer" means a chief of police or any other police officer, including a person who is appointed as a police officer under the Interprovincial Policing Act, 2009, but does not include a special constable, a First Nations Constable, a municipal law enforcement officer or an auxiliary member of a police force; ("agent de police").

In reviewing the O.P.P.A. Constitution and By-Laws I note the following definitions/stipulations:

By-Law No. 2 – Membership:

1. CLASSES OF MEMBERSHIP

   There shall be four classes of membership, namely, Active Member, Life Member, Honorary Member and Honorary Branch Member.

   (a) ACTIVE MEMBERS

   Active Members of the Corporation include:

   (i) Uniform Members: Any uniform member of the Ontario Provincial Police up to and including the rank of Sergeant Major shall be eligible to become an Active Member of the Corporation and may continue as such until his/her retirement from regular police duties, or his/her promotion to a commissioned rank, and

   (ii) Civilian Member: Any person who is an instructor or staff at the Ontario Police College, or is under the supervision of either the Commissioner of the Ontario Provincial Police, or the Chief Firearms Officer of Ontario, save and except for those persons who are ineligible to become members of the civilian employees bargaining unit as set out in the Public Service of Ontario Act, S.O. 2006 c. 35 Schedule A, as amended.

   (iii) Any Uniform or Civilian Member, as described above, who is on an authorized leave of absence and who is engaged in full-time duties with the Corporation.

Additionally, Section 3 states:

2. RIGHT TO HOLD OFFICE

> Only active members who are not fixed term civilian employees or casual part-time police employees have a right to hold the office of President or Director of the Corporation. (SBM 2012)

It is then my understanding that active members of the O.P.P.A. must be gainfully employed by the O.P.P. as either a uniform member or civilian member and any uniform/civilian member currently on secondment of LOA to the Corporation (O.P.P.A.). Additionally, only those who are active members of the O.P.P.A., have the ability to hold the offices of President or Director of the O.P.P. . This would apply to two of the Applicants, James Christie and Martin Bain in their positions as President and Vice-President respectively, as is defined within the stipulations of By-Laws and Constitution of the O.P.P.A..

This was also identified within the Hansel LLP report, provided by the Applicants and noted within their factum at paragraph 57.

As for the position of Chief Administrative Officer, there is no set definition as to where they come from and standing as an active member. However, under ARTICLE 12 LEAVE-OF-ABSENCE FOR ASSOCIATION BUSINESS, section 12.03 it states:

> 12.03 A leave-of-absence with pay shall be granted to seven (7) employees to assume full-time duties as members of the Board of Directors and President of the Association. *An additional leave of absence with pay shall be granted for one (1) employee to assume the full time duties of the position of Chief Administrative Officer of the Association in the event that this position is filled by an employee from a position in the Uniform or Civilian bargaining unit.* (emphasis added) Their salaries will be determined by the Association in consultation with the Employer and paid by the Government of Ontario as advised from time to time by the Association. Pension and benefits plans shall be calculated based on the salary of the Board of Directors, President, and Chief Administrative Officer, and all other benefits applicable to the employees placed on leave shall apply. The Association will reimburse the Government of Ontario the difference between the salary, pension contributions and premiums for their insurance and benefits plans of the Board of Directors, President and Chief Administrative Officer of the Association and their OPP rank/classification salary, pension contributions and premiums for their insurance and benefit plans.

This in my view, then identifies to me that then CAO, Karl Walsh in this matter, is an employee of the O.P.P. and is therefore an active member of the O.P.P.A..

As members of the O.P.P., they are split between Uniform and Civilian and in this matter each of the Applicants would be classified as uniform members and would fit within the definition of member of police force.

It would then identify that in order to be an active member of the O.P.P.A., one would have to be employed by the O.P.P., even when on a LOA or secondment to the O.P.P.A. as per their own By-Laws and Constitution. The fact that salary etc. are discussed as a separate entity and process between the Association and the Crown does not take away the fact of their initial employment is with the O.P.P..

It then needs to be determined whether or not the Applicants are no longer "police officers" when seconded to the O.P.P.A.. I agree that the Applicants are technically not on active duty as police officers when working with the O.P.P.A., however they have not given up their rights and ability to be one. They, to my knowledge, have not turned in their police identification which would still identify them as a Constable or Detective, as the case may be. This would then give them the opportunity, which when presented would allow them to uphold their oath and position as a police officer. In fact, I would certainly expect the Applicants, should a situation present itself, to put themselves "on duty" and perform their duties of a police officer. If they did not, that would create further misconduct possibilities.

Additionally, the Applicants arguments as to not being a "police officer" when performing their duties as President, Vic-President or CAO seems to only reflect those organizations that are big enough to financially support a full time Executive position(s) within an Association. Those organizations that are represented by "part-time" Association Executives would be left in financial limbo if one accepts their argument. Would a part-time executive member of an Association, cease to be an employee of the service, when called to act as President/ Vice-President/Secretary etc. while on duty as a uniform or civilian member? No, they would not. Not all Associations have the ability, financially and staffing wise to do so.

There is no clarification or exemption within the *P.S.A.* identifying or suggesting that while performing the duties of an Association representative, the individual ceases to be accountable to the police service and the code of conduct. The only two exemptions were identified by the Respondent within the Discreditable Conduct offence section.

There is significant leeway given during discussions between Service Management and Association Executives and representatives, whether it be during bargaining and or the normal daily workings required by Associations. Speaking from previous experience as both a Junior ranks Association Director and Senior ranks Executive member, I can state with conviction that this does occur, from various discussions I've had previously while in those positions. There is no legal status or exemption provided Association Executive within the Act while dealing with management and a balance needs to be struck between the two groups of representatives to work professionally.

The Applicants were all on a LOA from the O.P.P. and the process followed the Collective Agreement and associated MOU's in relation to pay and benefits etc.; however, nothing within these documents speaks to any cessation of employment with the O.P.P. on a LOA. Article 8.02 of the Collective Agreement deals with Cessation of Employment and a member going on a LOA to the O.P.P.A. from the O.P.P. to fulfill an executive member position is not included.

The Applicants brought up the *Skof v. Bordeleau* case and The Court of Appeal who went as far to state that it remains arguable whether the appellant in that case, Matt Skof, President of the Ottawa Police Association, is a "police officer" to whom section 89 of the Police Services Act even applies. As we know section 89 of the *P.S.A.* deals specifically with administrative suspension where the primary purpose is not to punish but to remove members from duty for reasons related to the protection of the public and the police service. In this case, from all of the documentation provided, as near as can be determined the Applicants ceased to be on a LOA with the O.P.P.A. (terminated by the O.P.P.A.) as of on or about March 13, 2015 and were also suspended from duty by the O.P.P. on or about March 13, 2015. This would mean that the Applicants were fully returned to the O.P.P. in their assigned ranks and positions and therefore are "police officers" then it is within the rights of the O.P.P. to suspend.

In relation to the Woolley matter brought up by the Applicants, where the President of the Peel Regional Police Association, when charged with a criminal offence the Peel Regional Police did not suspend and stated that "he did not perform any police related duties" as to a reason why he was not suspended. This is their right as a policing organization since section 89(1) states "……**may** suspend him or her from duty with pay" as it is not an absolute of "shall" and each Service has the option taking all factors into consideration.

At one point, during the motion discussion the Applicants counsel, commented that in the Woolley matter, he "…consciously and voluntarily chose to allow the *P.S.A.* proceeding to occur following a finding

of guilt in the criminal court". I have been unable to verify this through any of the material provided. Whether this was a Freudian slip in words or an intentional comment, I find it difficult to comprehend that Woolley had a choice in the matter as to whether the proceedings would be able to take place, except through counsel providing motions/appeals in relation to jurisdiction.

In relation to the first issues brought forward in the motion by the Applicants, as to whether they are "police officers as defined by section 2 of the *P.S.A.*, it is my firm belief that in all the circumstances provided to me that the Applicants were and are "police officers" as defined within the *P.S.A.* and therefore are accountable under Part V.

Therefore, the question as to whether this Tribunal has jurisdiction to adjudicate this matter, the answer is that it does.

Abuse of Process:

The motion by the Applicants has identified that they believe an abuse of process has taken place since the beginning of the incident.

To begin, lets consider the length of time it has taken to even get where we are with this Tribunal. The Applicants were suspended on or about March 13, 2015, pending completion of the ongoing criminal investigation against them as well as the related misconduct proceedings pursuant to Rule V of the *P.S.A.*. They were charged criminally with a number of charges on January 02, 2018 and acquitted on November 27, 2019. On or about this time misconduct proceedings under Part V commenced. In March 2020, COVID-19 was identified, and a pandemic declared, essentially shutting down all facets of systems and process' until it was either safe to do so or other methods/process' were identified. The Tribunal managed to move forward, in August of 2018 and I was delegated as the Hearing Officer. At this time only one of the Applicants had counsel, Justice Paul Cooper, who was appointed to the Bench effective June 03, 2021, requiring new counsel to be brought in and up to date. On July 7, 2021, counsel for the other two Applicants was retained, requiring the appropriate time to received and review disclosure for this matter. The matter has since been moving forward and dates for trial have been set for October 2022. The COVID delay is not something that could be anticipated or worked around as it essentially brought the world to a sudden stop with sloth-like forward motion. The other significant delay was the required time for new counsel to become familiar with the case and ensure that they had all the necessary disclosure to ensure a full, frank and fair Hearing.

As identified by the Applicants, within *Blencoe v. B.C. (Human Rights Commission)., 2000 SCC 44 (CanLII)*, at para. 115, it identifies delay as a possible outcome for an abuse of process:

> "I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay."

In consideration of the above as it pertains to this matter, the identified delays have not been shown to be unacceptable to the point of being oppressive and tainting this proceeding. Where it is agreed that an inordinate delay can be attributed to an abuse of process, I do not find that the delays as they exist are inordinate.

When considering the proposed conflict of interest brought up by the Applicants as to the O.P.P. being involved in the investigation; I do not perceive any issues. The initial "concerns" were made by Director(s) and civilian employees of the O.P.P.A. and brought to the attention of the O.P.P. due to concerns of potential criminality. The O.P.P., rightly so in this case, brought in the R.C.M.P. to conduct the investigation to ensure no bias or conflict would manifest itself during the investigation. When any matter of perceived criminality is identified, natural process suggests that it be brought to the attention of the appropriate police service of jurisdiction. The police service, in this case the O.P.P., then reached out to seek the assistance of the R.C.M.P. due to where the complaints originated and who they were relating to. This is not an absolute requirement as there are many instances where police services investigate the criminal conduct of its own members with their own investigations, however in this case it was appropriate to do so.

The identified conflict brought up by the Applicants between Insp. Charles Young and one of the Applicants, Karl Walsh, in my view is not one that holds any merit as part of an abuse of process claim. The conflict is essentially perceived and one that has no evidence or corroboration attached to it and holds no weight.

The Applicants motion identifies the doctrine of *Res Judicata*, whereby the current charges outlined within the NOH have been already dealt with within Ontario Superior Court, and any further attempt to continue

a Hearing would be an abuse of process. In reviewing all the information provided by both the Applicants and Respondents, I find that the following points were informative and relevant:

1. *Penner v. Niagara (Regional Police Services Board), [2013] S.C.J. No. 19; p. 88-89, p.91*;

   88. The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the "twin principles ... that there should be an end to litigation and ... that the same party shall not be harassed twice for the same cause" (Carl Zeiss Stiftung, at p. 946; K. R. Handley, Spencer Bower and Handley: Res Judicata (4th ed. 2009), at p. 4; Donald J. Lange, The Doctrine of Res Judicata in Canada (3rd ed. 2010), at pp. 4-7).

   89. These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative, and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see EnerNorth Industries Inc., Re, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; Handley, at p. 4; Lange, at p. 7). However, it is clear that the overarching goal underlying both principles is to protect the fairness and integrity of the justice system by preventing duplicative proceedings. In other words, these principles are not competing values, but are fundamentally linked.(emphasis added) As this Court recently recognized in Figliola, the ultimate goal of issue estoppel is not achieved by simply balancing fairness and finality, but in seeking to protect the "fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them" (para. 36 (emphasis added)).

   91. As a species of res judicata, issue estoppel is conceptually related to the doctrines of cause of action Penner v. Niagara (Regional Police Services Board) Page 23 of 29 estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle -- they are "not merely ... technical rule[s]" but rather, "g[o] to the heart of a system of civil justice that strives for the truth of the matter [and] recognizes that perfection is an unattainable goal and finality is a practical necessity" (Revane v. Homersham, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

2. *Trumbley v Toronto (Metro) Police Force, [1986] OJ No 650, p.70-71*

   70. In Re Bridges et al. and Halton Regional Police Force, January 6, 1984, Judge Colter, in the course of discipline proceedings under the Police Act, was required to rule on a motion based on s. 11(h) of the Charter (the double jeopardy provision) to quash charges under s. 1(a)(vii) of the Code

of Offences in Reg. 791. The two constables in question had previously been convicted, in a provincial court, of assault causing bodily harm contrary to the Criminal Code. These convictions were the bases of the charge under s. 1(a)(vii) of the Code of Offences. In the course of his ruling Judge Colter said: The whole thrust of s. 11(h) is that a person must not be punished twice for the same offence. The ultimate "punishment" provided for in s. 20 of Reg. 791 under the Police Act is dismissal. I have no difficulty in finding that, if the offence which was the subject of the conviction was of sufficient gravity to justify dismissal, such "punishment" would not be in violation of s. 11(h) despite the prior provincial court conviction and punishment. I am satisfied that the sentence of dismissal is not a "punishment" in the same sense in which the word "punished" is used in s. 11(h). Dismissal in such a situation is not designed to "punish" the member (although it may well have that incidental effect) -- there is no deliberate element of retribution or of reformation as there is in punishment under the Criminal Code. Rather, the force simply seeks to rid itself of an undesirable member and the "punishment" of dismissal is the only measure by which it can accomplish this.

71. He concluded his ruling as follows: At first glance that appears to be a very narrow and legalistic approach, not in keeping with a "broad and generous" interpretation of the Charter. However, a closer look at the relevant provisions of the Police Act indicates that certain types of conduct are proscribed and are characterized as "offences" which are made the subject of "punishment", but although the language is similar, or even identical to that in the Criminal Code the intentions and objectives are very different. The Shorter Oxford Dictionary defines "offence" as "a breach of law, duty, propriety or etiquette; a transgression, sin, wrong, misdemeanor or misdeed". It is thus seen that, in every-day life, conduct constituting an "offence" may run the gamut from an illegal act to rude behaviour. I accept the rationale set out in the excerpt from Spencer, Bower and Turner, The Doctrine of Res Judicata, 2nd ed. (1969) [at p. 279], quoted in Re Pelissero and Loree [(1982), 140 D.L.R. (3d) 676 at p. 677 (Ont. Div. Ct.)]: " 'Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession.' "

The application to quash is accordingly denied.

3. *Watson v. Peel Police Service, 2007 ONCA 41, paras. 19*

[19] The Divisional Court also rejected the hearing officer's conclusion that allowing the discipline hearing to proceed would amount to re-litigation of P.C. Watson's acquittal. The court reasoned [at para. 21]:

> *To allow the disciplinary hearing to proceed does not bring the criminal acquittal into question. The criminal trial and the disciplinary hearing, while focused on the same factual matrix, are separate inquires, with distinct purposes and governed by different burdens of proof. Discreditable conduct is set out in section 2(1) of the Code of Conduct set out in Part V of O. Reg. 123/98 to the Police Services Act. It includes "acting in a manner likely to bring discredit upon the reputation of the police force". This is very different from the essential elements that constitute 17 the criminal offences of theft and possession of stolen property. As this Court stated in Gillen v. College of Physicians and Surgeons of Ontario, 1989 CanLII 4363 (ON SC), [1989] O.J. No. 470 (Div. Ct.), there is "no authority or logic for the proposition that a criminal acquittal is in disciplinary proceedings evidence or proof that the gravamen of the criminal charge was unfounded or untrue".*

Through the initial investigation, misconduct was identified as taking place along with alleged criminal offences. The Applicants are police officers and were at the time of the alleged misconduct, and as a result are held to a higher standard, and charged accordingly under he *P.S.A.*. As noted above from *Trumbley v Toronto (Metro) Police Force, [1986] OJ No 650 "for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession"* should the allegation be founded. This is not a second attempt, as noted by the Applicants, to discipline them [para 131 of Applicants Motion], this is a normal course of action held in this profession when misconduct is identified. As was noted by the Applicants in their book of authorities, *Constable Jeffery Gateman and London Police Service., 1998 CanLII 27142 (ON CPC):*

> "From the point of view of the public, there is a concern to see that police officers are held accountable for any employment related misconduct – particularly where a member of the public is concerned or there is some suggestion of abuse of public office."

In *OPSEU (Wild) v. The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services) 2015 CanLII 36169 (ON GSB),* para.21-28, in particular para. 23, which states:

> [23] In the Sault Area Hospital case, supra, arbitrator Etherington said the following at paragraph 35: 35. In addition, there is no danger of inconsistent findings bringing the administration of justice into disrepute because of the different burdens of proof being used in two different proceedings. For the Crown to succeed in obtaining a conviction for assault contrary to s.266 of the Criminal Code the trial judge has to be satisfied that all elements of the act requirement and the mens rea (an intention to apply force without consent) have been proven beyond a reasonable doubt. In a civil trial or arbitration hearing the employer need only prove misconduct amounting to patient abuse which constitutes just cause for discharge or discipline on the balance of probabilities. It is not required to prove the mental and physical requirements for a specific criminal offense.

It is imperative that we hold our people accountable but are also seen to hold our people accountable, that is how we maintain public trust. This is not a situation where the doctrine of *Res Judicata* is in effect.

The Applicants further concern regarding the lack of disclosure provided when requested through the Prosecution has already been addressed prior to this motion. It was identified that the information the Applicants requested, if it existed, was in the possession of the O.P.P.A. not the O.P.P.

Through review and discussion, the Tribunal determined that the O.P.P.A. were a third party in this matter and that the O.P.P. could not disclose information requested it didn't have unless the O.P.P.A. chose to provide it. The O.P.P.A. retained counsel during this discussion/review and advised that the Applicants would need to make a third-party application to get this requested information. The Tribunal directed that, if the information did exist, a third-party application would need to be undertaken with specifics as opposed to general terms of description of items sought.

The Applicants further sought to identify further concerns regarding an abuse of process due to the O.P.P.A. not allowing for "legal indemnification" for the Applicants in relation to their criminal matter. The Applicants, as required, made application for legal indemnification to the O.P.P.A. Board, however, their request was denied. The Applicants pointed out the requirements within the O.P.P.A. Collective Agreement, Business Corporations Act and the Not-for-Profit Corporations Act which identify the requirements for legal indemnification. This is not a matter for this Tribunal to determine and rule upon as it needs to be dealt with via other process'.

The Applicants in their motion made considerable comment as to the application of the Business Corporations Act, Not-for-Profit Corporations Act and the Corporations Act and that the O.P.P.A. are accountable to these Acts, as was also identified within the Hansel LLP report.

It is interesting to note, that the Hansel LLP report, found that the O.P.P.A. By-Laws and Constitution to be deficient in its organizational governance structure with very little accountability on the positions of the President and CAO to the Board and or membership. It additionally determined that significant amendments would be required to bring them up to standard.

As identified by the Applicants in relation to the deficiencies of the O.P.P.A., paragraph 51 of their motion noted:

> 51. Ultimately the conclusion rendered by Hansell LLP is relevant, as it highlights the impact of the deficiencies of the OPPA's corporate governance structure, on this specific matter:
>
> > There are a number of things that could have been done differently, but had it not been for the fact that virtually every aspect of the OPPA's governance failed, much of what has happened may not have happened and it may not have been necessary for four members of Staff to take their concerns to the police.

Although, I can agree with their conclusion after reviewing their report, however the optimum phrase in their comment "…much of what has happened may not have happened…" had things been done differently, is irrelevant due to the apparent lack of accountability, deficiencies in governance and the identified authoritarian atmosphere within the O.P.P.A., as it did occur. One cannot argue on the merits of the proverbial "what if" but instead must make a determination from the actual situation and events as they took place.

The O.P.P.A., as with other Association's, are governed through their internal By-Laws and Constitution in order to run the inner workings including the relationships between the corporation, shareholders, directors and officers etc.. It is important to note that under the Corporations Act, the passing of By-Laws is a "may" not a "shall" as there is no legal requirement for a corporation to pass its own By-Laws as many of these requirements/directions are covered under the Corporations Act.

The Business Corporations Act, the Not-for-Profit Corporations Act and Corporations Act do have their various disciplinary sections or removal of directors' sections, but not all have a penalty section. The O.P.P.A. did, from what I understand, remove the Applicants from their elected/appointed positions and rescinded their LOA from the O.P.P., which would be allowable under these Acts in relation to removal of Directors.

I do not see these Acts working in conflict with the *P.S.A.* as the *P.S.A.* only applies to those who are "police officers" under the Act, which it has been determined the Applicants are and were at the time. When taken into consideration there could be many instances where similar situations could take place with other professional bodies where the individual would still be accountable to their applicable professional regulations, such as physicians, surgeons, teachers, and pilots.

With all of the information provided to me, it is important that I take into consideration the various case law decisions provided to me by both counsels in relation to abuse of process. All these provide direction that for a stay of proceedings to take place for an abuse of process it needs to show in the clearest of cases how it is an abuse and that for an abuse of process to have taken place, the proceedings must be unfair to the point that they are contrary to the interests of justice.

I did review *R. v. Babos [2014] SCJ 16*; at par. 32; which identifies a three part test for the determination of a stay of proceedings due to an abuse of process:

> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
>
> 2) There must be no alternative remedy capable of redressing the prejudice; and
>
> 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

In consideration of the first point, I am unable to determine that there has been any prejudice to the Applicants rights, that will be manifested, perpetuated, or aggravated through the conduct of this Hearing. As I am unable to identify or determine that a prejudice has taken place then the second point becomes null and void, I then need to reflect on the third requirement.

I do not have any uncertainty in this mater as to whether a stay is warranted. I do not believe, as the facts have been presented to me and from the documentation provided that the integrity of the justice system is in peril and bring disrepute to the proceedings or that a continuation would be an affront to the public interest.

I do not believe that it has been shown in the clearest of cases and that the proceedings have been unfair to the Applicants. Yes, there has been some delay due to the on-going pandemic, however it is moving ahead now that processes have been developed to permit it to do so in the safest of manner for all involved. This was uncharted territory for everyone, no matter what the circumstances. The pandemic is not a factor that could be foreseen and one that requires some latitude as to delay.

I do not see that the Applicants have been given "shabby" treatment from those involved, as associated with this proceeding. Any concerns they have in relation to how they perceive to have been and are treated by the O.P.P.A. is not one that can be addressed by this Tribunal.

Despite the submissions of the Applicants, they were still police officers, while on a LOA to the O.P.P.A. and are still accountable under the *Police Services Act* for their actions should they not conform to the Code of Conduct as set out in the NOH. Certain exceptions are given within the Code of Conduct for the purposes of Association duties however one cannot give a broad exemption simply because they are Association Executives. They too are required to be professional in all aspects of their duties and responsibilities.

The allegations brought against the Applicants as it relates to the misconduct identified within the Code of Conduct are such that, if proven could certainly affect the reputation of the O.P.P.. The O.P.P.A.'s actions, although a third-party, under certain circumstances as all uniform members of the O.P.P. are active members of the O.P.P.A. hold a position of public trust and are held to a higher standard, therefore are accountable for their actions.

As a result of my findings, the motion by the Applicants for a stay of proceedings due to loss of jurisdiction and an abuse of process is denied.

Date electronically delivered: April 11, 2022

Graeme Turl
Superintendent (R),
York Regional Police
Adjudicator