CITATION: Khorsand v. Toronto Police Services Board, 2023 ONSC 1270
DIVISIONAL COURT FILE NO.: 651/21
DATE: 2023/02/27

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Varpio and O'Brien JJ

BETWEEN:	
YAZDAN KHORSAND Applicant	*Glen Chochla*, for the Applicant
– and –	
TORONTO POLICE SERVICES BOARD and TORONTO POLICE CHIEF JAMES RAMER Respondents	*Michele Brady* and *Rali Anguelova*, for the Respondents
	Alexi Wood and *Saad Gaya*, for the Intervenor, the Canadian Civil Liberties Association
	HEARD at Toronto by videoconference: November 21, 2022

H. SACHS J. (O'BRIEN J. CONCURRING)

Overview

[1] The Applicant, Mr. Khorsand, applied for a position as a Special Constable with the Toronto Community Housing Corporation (TCHC). In order to qualify for this position, he was required to pass a background check conducted by the Toronto Police Services Board (TPSB). In conducting its investigation, the TPSB reviews information from a variety of sources, including police records, domestic and international background and security checks, financial information (including credit bureau checks) and driving records. The TPSB conducted a "pre-screen" background investigation on Mr. Khorsand. It determined that because Mr. Khorsand had recently failed a background investigation and that there had been no material change in circumstances since that investigation, there was no need to proceed with another investigation. As a result, TCHC advised the Applicant that he was not able to continue with his candidacy for the position of Special Constable.

[2] Mr. Khorsand requested the reasons why he failed his background check, including copies of the information and documentation relied on by the TPSB in coming to its determination. The Applicant's requests were refused.

[3] The Applicant seeks to judicially review the decision of the TPSB to fail him and the decision of the TPSB not to disclose the information relied upon in making that decision. According to Mr. Khorsand, both of those decisions violated the duty of procedural fairness.

[4] The fundamental issue before this court is whether the decisions at issue are subject to judicial review. According to the Respondents, the decision to fail the Applicant at the background screening phase fell within the private sphere and was not subject to any duty of procedural fairness. In making this submission the Respondents rely on the fact that the power of the TPSB to appoint special constables for TCHC and the power to conduct background investigations in relation to those appointments is the subject of a private contract between the TPSB and TCHC.

[5] For the reasons that follow I find that the decision by TPSB to fail Mr. Khorsand is a decision that is reached by public law and is a decision to which a public law remedy can be applied. Having made this finding, I also conclude that the common law duty of procedural fairness applied to the decision, and that the decision to fail Mr. Khorsand at the pre screening stage of the background check was conducted in a procedurally unfair manner. It should therefore be quashed and remitted back to the TPSB. The Applicant was entitled to notice of the reasons for his failure to pass the background check and was entitled to an opportunity to respond to those reasons.

[6] The Applicant is a racialized individual who has never been charged with or convicted of a criminal offence. Certain communities are more heavily policed than others, resulting in more police interactions and more police records. As the TPSB has recently recognized, systemic racism and discrimination exist across law enforcement institutions and race-based data can be misused by the TPSB. At present, as admitted by the Respondents, the background checks at issue are completely discretionary and entirely unregulated. There is a serious public interest in ensuring that the unregulated use of police records does not result in the perpetuation of systemic discrimination. The right to judicial review and the established principles of procedural fairness provide some protection against such a result.

Factual Background

Mr. Khorsand's Background

[7] Mr. Khorsand immigrated to Canada from Iran in July of 2008. He became a Canadian citizen in 2013. He speaks three languages – English, Persian-Farsi and Afghan-Dari.

[8] He has no criminal record and has never been charged with a criminal offence.

[9] Since 2015, Mr. Khorsand has had a desire to have a career in law enforcement.

[10] In pursuit of that end, Mr. Khorsand earned his Police Foundations Diploma with honours from Trios College in Scarborough, Ontario, which he attended from 2015 to 2016. Trios College named him Student Ambassador Leader of the Year.

[11] In 2018 Mr. Khorsand graduated with honours from the Basic Constable Training Program with the Control Institute. He has completed a number of courses with the Canadian Police Knowledge Network. He has obtained the Ontario Association of Police Certificate, as well as the Stop the Bleed Certificate from the American College of Surgeons. He has volunteered with Crime Stoppers since 2019 and in the same year he founded a community organization to support the homeless. He continues to volunteer as its co-ordinator, and he also volunteers with a number of other programmes.

Successful Application for Special Constable in 2018

[12] In March of 2018 Mr. Khorsand began working for the TCHC as a Special Constable.

[13] His employment with TCHC was conditional on successfully passing a background check conducted by the TPSB. In May of 2018 he was advised that he had passed that background check.

[14] On May 18, 2018 the TPSB appointed him as a Special Constable for a five-year term under s. 53 of the *Police Services Act*, R.S.O. 1990, c.P.15. ("*PSA*"). In June of that year, the Ministry of Community Safety and Correctional Services (now the Ministry of the Solicitor General) approved that appointment, pursuant to s. 53 of the *PSA.*

Employment with Metrolinx from 2018 to 2019

[15] On September 9, 2018 Mr. Khorsand voluntarily left his position with TCHC to take a job with Metrolinx for more pay. He began working at that job in September of 2018.

[16] His employment with Metrolinx was also conditional on him passing a background check and receiving a Special Constable designation.

[17] On February 19, 2018 Mr. Khorsand's employment with Metrolinx was terminated. Because he failed the background check conducted by the Ontario Provincial Police("OPP") the OPP would not recommend him for a Special Constable designation.

Application for Police Constable with the Toronto Police Service in 2019

[18] In April of 2019 Mr. Khorsand applied to join the Toronto Police Service as a Police Constable.

[19] As a result of these proceedings Mr. Khorsand discovered that his application with the Toronto Police Service was unsuccessful because in July of 2019, he failed the requisite background check.

Application for Special Constable with TCHC in 2019

[20] Just prior to applying to join the Toronto Police Service, Mr. Khorsand also applied to rejoin TCHC as a Special Constable.

[21] In December of 2019 he was advised that TCHC would not be able to move forward with his application because he had failed a pre-screen background check conducted by TPSB.

[22] When Mr. Khorsand contacted the TPSB to find out why he failed, he was advised that he was not eligible to have any background check performed on him by the TPSB until July of 2020.

Application for Special Constable with TCHC in 2020

[23] In July of 2020 Mr. Khorsand once again applied for a position as a Special Constable with the TCHC.

[24] In March of 2021 he completed the interview and background assessment administered by TCHC. However, his candidacy was once again subject to a successful background check with TPSB.

[25] In April of that year he was advised that he had failed a pre-screen background check conducted by TPSB.

Outcome of Access to Information Request in 2021

[26] In June of 2021 Mr. Khorsand submitted an Access to Information request to the Toronto Police Service. In July of 2021 he received 66 pages of police records, involving nine interactions with the police.

[27] None of these records disclosed any criminal behavior by Mr. Khorsand. Three of the nine incidents identified Mr. Khorsand as "Persian", "Middle Eastern" or "Brown."

[28] One incident report dated April 22, 2010, described Mr. Khorsand as follows:

> Spotted in the woods with three other Persian males with what appeared to be an assault rifle in hands. The investigation revealed that the assault rifles were actualy (*sic*) a paintball rifles (*sic*). Males cautioned not to play panitball (*sic*) in public as this can cause people to call police for seeing person with guns.

Mr. Khorsand was described as "Middle Eastern", wearing a goatee and multi-coloured camouflage pants. He was 18 at the time.

[29] Another incident, dated July 31, 2015, involved the alleged reckless discharge of a firearm at Trios College, where Mr. Khorsand was a student. Mr. Khorsand phoned the police to inform them that he had found a bullet lodged between two panes of glass in a double panel

window at the location where the shooting had occurred the previous day. In the report of this incident Mr. Khorsand is referred to as "Brown".

[30] The third incident, which is dated June 28, 2016, involved an investigation of an alleged assault causing bodily harm. Mr. Khorsand was identified as a witness to this incident. Again, he was described as "Brown".

[31] Three of the remaining six incidents related to allegations that Mr. Khorsand made against other people while he was employed by TCHC as a Special Constable. Two other incidents related to motor vehicle collisions in 2016 where Mr. Khorsand was not at fault. The last incident involved a complaint that was filed in 2018 concerning an assault with a weapon. The incident was alleged to have occurred a year earlier, and Mr. Khorsand was not identified as the perpetrator, but as a "pedestrian".

Further Requests for Information

[32] Since the disclosed records did not reveal any reason why Mr. Khorsand would have failed a background assessment, Mr. Khorsand's counsel wrote several letters to both the TPSB and the TCHC requesting information that would help him understand why he had failed to pass a background assessment. On August 3, 2021, counsel for the TPS confirmed in writing that it was not going to provide any of the information requested. The next day TCHC advised Mr. Khorsand of the same thing.

Standard of Review

[33] The allegation in this case is that the Applicant was denied procedural fairness when the TBSB failed him at the "pre-screen" stage of his background check. In *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, the Supreme Court of Canada held that on appeals issues of procedural fairness are subject to a correctness standard of review. In *Mission Institution v. Khela,* 2014 SCC 24, [2014] 1 S.C.R. 502, the Supreme Court made the same finding with respect to applications for judicial review that raised issues of procedural fairness. Since *Khela* Ontario courts have been divided – some having applied the correctness standard of review to issues of procedural fairness and some having held that there is no need for a standard of review analysis when it comes to issues of procedural fairness – a decision is either procedurally fair or it is not. In my view, there is little practical difference between these articulations. A reviewing court does not accord deference to decisions that impact procedural fairness.

[34] Before the allegation of lack of procedural fairness can be entertained this court must first determine whether the TPSB decision to fail Mr. Khorsand is a decision that is subject to judicial review.

Is the April 2021 decision of the TPSB that the Applicant failed the "pre-screen" background check subject to judicial review?

The Decision is of Sufficient Public Character to Be Subject to Judicial Review

The Factors for Determining Whether a Decision is of Sufficient Public Character

[35] Section 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c..J. 1. ("*JRPA*") provides that the court has jurisdiction to grant relief in a proceeding "by way of an application for an order in the nature of mandamus, prohibition or certiorari" or in in a proceeding "by way of an action for a declaration or for an injunction in relation to the exercise or proposed or purported exercise of a statutory power."

[36] Section 1 of the *JRPA* defines "statutory power of decision" as a power or right conferred by a statute to make certain types of decisions. Mr. Khorsand concedes that the decision he is seeking to quash is not one that TPSB exercised pursuant to a statute. The *PSA* does not set out a specific power to conduct background investigations. The *Police Record Checks Reform Act*, 2015, c. 30. ("*PRCA*"), which limits the use of non-conviction criminal records in screening decisions does not apply to a screening decision involving a person who is being considered for appointment as a Special Constable.

[37] However, as the Respondents acknowledge, the court's jurisdiction to make an order in the nature of mandamus, prohibition or certiorari is not limited to the exercise of a statutory power of decision (nor are all statutory powers of decision subject to judicial review.). The overarching question in each case is whether the decision is of a sufficiently public character to be which a public law remedy can be applied.

[38] To determine whether a decision falls within the scope of public law, the Court of Appeal and this Court have adopted the factors set out by the Federal Court of Appeal in *Air Canada v. Toronto Port Authority*, 2011 FCA 347,466 N.R. 152, para. 60, see also *Setia v. Appleby College*, 2013 ONCA 753, 118 OR (3d) 481. They are:

- "*The character of the matter for which judicial review is sought*. Is it a private commercial matter, or is it of broader impact to members of the public?"

- "*The nature of the decision-maker and its responsibilities*. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?"

- "*The extent to which a decision is founded in and shaped by law as opposed to private discretion.*" If the decision emanates from a public source of law it is more likely to be found to be public. "Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside the ambit of judicial review."

- "*The body's relationship to other statutory schemes or other parts of government.* If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter."

- "*The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.* For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature. A requirement that policies, by-laws or other matter be approved or reviewed by government may be relevant." (Citations omitted)

- "*The suitability of public law remedies.* If the nature of the matter is such that public law remedies would be useful, the court as more inclined to regard it as public in nature."

- "*The existence of a compulsory power.* The existence of a compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situation where parties consensually submit to jurisdiction."

- "*An exceptional category of cases where the conduct has attained a serious public dimension.* Where a mater has a very serious, exceptional effect on the rights of interests of a broad segment of the public, it may be reviewable. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment." (Citations omitted)

[39] In *Highwood Congregation of Jehovah's Witness (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 SCR 750, at para. 14, the Supreme Court of Canada explained the limits of judicial review:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of sufficient public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review. In making these commercial decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power. Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority. (Citations omitted)

The Application of the Factors to This Case

1. The Character of the Matter For which Judicial Review is Sought

[40] TCHC is one of the Community Partners for whom TPSB performs background investigations. TCHC employs a number of officers in its Community Safety Unit who are appointed as Special Constables. Successful completion of a background investigation is required prior to being appointed. As Special Constables, Community Patrol Officers have the power to make arrests, issue tickets, receive law enforcement training, and engage and interact with the public. Special Constables are also entrusted with confidential information held or accessible to the TPSB and the RCMP, including criminal record information.

[41] On September 13, 2002, the TPSB entered into an agreement with the TCHC (the "MOU"). Pursuant to the MOU, TCHC can only put forward an applicant for an appointment as a Special Constable if the results of a background investigation are satisfactory to TPSB and TCHC. Pursuant to s. 53 of the *PSA*, it is the TPSB that has the power to appoint Special Constables. Pursuant to the MOU it is the TPSB that conducts background checks for Special Constables.

[42] The TPSB has a unit known as the Talent Acquisition Unit that administers its recruitment process for uniform police officers and performs the requisite background checks for those officers. The Talent Acquisition Unit also conducts the background checks for prospective candidates of external community partners such as the TCHC that would require a Special Constable appointment under s. 53 of the *PSA* as part of their employment.

[43] The Talent Acquisition Unit staff consists of twenty-four Toronto Police Service officers and thirty-two retired police officers.

[44] According to the Respondents, in making the decision in question (the pre-screen background check) the Talent Acquisition Unit was fulfilling its duties pursuant to a private agreement with the TCHC. The MOU was created because the TCHC asked the TPSB to conduct their background checks. It was not created by an act of the executive or the legislature; it is simply a private service agreement to assist the TCHC in recruiting Special Constables.

[45] While on the surface, this analysis is an accurate one, it ignores the reality that the MOU expressly provides that it was entered into because of the public nature of the entities involved and the public nature of the duties they perform. It also ignores the fact that it is the TPSB who has the statutory authority to appoint a Special Constable, an appointment it will not make unless it has a background check that it is satisfied with. Thus, if the TCHC wished the employees in its Community Safety Unit to be appointed as Special Constables the only practical way to secure such an appointment was to agree that the TPSB could perform the background investigations that were a mandatory prerequisite for such an appointment.

[46] The preamble to the agreement sets out the nature of the public duties that form the background for the entering into of the MOU. Specifically, it provides as follows:

> WHEREAS the [TPSB] is responsible for the provision of police services and law enforcement in the City of Toronto pursuant to the provisions of the *Police Services Act*…
>
> AND WHEREAS the TCHC is responsible for providing public housing in the City of Toronto.

Thus, the preamble acknowledges that the TCHC has a public duty to provide public housing in the City of Toronto and that the TPSB has the responsibility for law enforcement in the City of Toronto.

[47] The preamble to the agreement also makes it clear that it is driven by the fact that the TPSB has the power to appoint Special Constables under the *PSA*. In this regard it states:

> AND WHEREAS the [TPSB] has the authority pursuant to the [*PSA*] to appoint Special Constables for such purposes and with such powers it sees fit, subject to the approval of the Ministry of the Public Safety and Security….

[48] Section 53 of the *PSA* provides:

> **53**(1) With the Solicitor General's approval, a board may appoint a special constable to act for the period, area and purposes that the board considers expedient.
> …
> (3) The appointment of a special constable may confer on him or her the powers of a police officer, to the extent and for the specific purposes set out in the agreement.

[49] Thus, by having the employees in the TCHC safety unit appointed as Special Constables these officers are able to have the enhanced powers of police officers, which will better enable them to carry out their duties in relation to assuring the security of community housing projects. Public housing is important to the health of a community. So is ensuring that these projects are safe places to live.

[50] This factor militates in favour of the public character of the decision in question.

[51] I do not accept the dissent's characterization of the decision at issue as an employment decision. While a successful background check was a prerequisite for Mr Khorsand's employment with the TCHC, the decision to fail Mr. Khorsand at the background check stage was a separate and distinct decision, which, as this case demonstrates, can have implications for Mr. Khorsand well beyond his specific employment by the TCHC. As a result of his inability to pass a background check, Mr. Khorsand was released from his position with Metrolinx and was unable to obtain a job with the police service.

2. The Nature of the Decision Maker and Its Responsibilities

[52] TPSB is a public body, enabled pursuant to the provisions of the *PSA.* As the Respondents acknowledge, it is required to carry out a number of public responsibilities, including the provision of adequate and effective policing.

[53] According to the Respondents, the decision under review is not related to the Respondents' core responsibilities. Under the MOU, it is TCHC's responsibility to ensure that Special Constables employed by the TCHC carry out their duties and comply with the *PSA.* It is also TCHC's responsibility to recruit, train and deal with any complaints against Special Constables.

[54] As the MOU makes clear, the core responsibility of the TPSB is to provide police services and law enforcement in the City of Toronto. To enable it to fulfill this responsibility it has the power to appoint Special Constables under the *PSA*. Special Constables have enhanced police powers, which in turn allow them to more effectively carry out law enforcement duties in venues like public housing projects. A necessary component of the appointment process is the running of background checks. Thus, the decision in question flows directly from the TPSB's core responsibility to provide law enforcement in the City of Toronto.

[55] This factor also weighs in favour of the public character of the decision under review.

3. The Extent to Which the Decision is Shaped by Law as Opposed to Private Discretion

[56] As noted above, a decision is more likely to be public if it is authorized by or emanates directly from a public source of law, where that public source of law supplies to the criteria upon which the decision is to be made.

[57] In this case, the decision under review emanates directly from TPSB's power to appoint Special Constables. The statute specifies no criteria for the appointment of Special Constables. There is no statutory regulation of background investigations such as the one in this case (they are specifically excluded from the application of the *PCRA*). The MOU specifies no criteria for the conduct of such investigations. The decision is an entirely discretionary one.

[58] This factor would appear to favour viewing the decision as private in nature. However, the discretion that the TBSB exercises in appointing Special Constables is not shaped by contract law or business considerations. It is also a decision that has a potential effect on the human rights of a broad section of the public (as discussed below).

4. TPSB's Relationship to Other Parts of Government

[59] The TPSB is woven into the network of government and is exercising a power as part of that network. It is a statutorily enacted body. It operates within a regulated system that emphasizes adequate and effective police services. It has overarching police accountability through the Solicitor General.

[60] Under s. 53 of the *PSA*, the decision to appoint Special Constables is subject to the approval of the Solicitor General.

[61] This factor favours the public nature of the decision.

5. The Extent to Which the Decision Maker is An Agent of Government.

[62] The Decision in question was made by the Talent Acquisition Unit. The TPSB has set up that unit to recruit uniformed police officers and Special Constables. Thus, the Unit is acting to carry out the public duties of the TPSB. The duty of the TPSB to appoint Special Constables is subject to the approval of the Solicitor General.

[63] Given this structure, the Talent Acquisition Unit, when it made the decision in question, was acting as an agent of the TPSB, which in turn was acting as an agent of government.

6. The Suitability of Public Law Remedies

[64] A decision that has a public interest character that has as its source a statutory power but is not subject to any criteria or controls is one that may be amenable to the use of a public law remedy, particularly the use of *certiorari.*

[65] Absolute discretion may be abused, in a way that affects not only the individual in question, but the public at large. If this is the case, a public law remedy through judicial review may be the only available recourse.

7. The Existence of a Compulsory Power

[66] The existence of a compulsory power over the public at large or a defined group may be an indicator that a decision is public in nature.

[67] In this case the TPSB does not have any compulsory power over Mr. Khorsand as a member of the general public. Nor is Mr. Khorsand a member of a defined group (such as a professional body) that has power over him.

[68] However, if Mr. Khorsand wishes to be a member of a defined group, namely a Special Constable, he cannot do so unless he passes a background investigation with the TPSB. In fact, this is true if he wishes to have any career in law enforcement. The Respondents argue that he can simply choose another career. As discussed below, accepting this argument could have a serious effect on the rights and interests of a broad segment of the public.

[69] This reality is also important to bear in mind when considering the Respondents' argument that Mr. Khorsand consented to having a background check done. If he had not given his consent to a background check, Mr. Khorsand would not be able to have any type of career in law enforcement.

8. Does the Decision Fall into the "Exceptional Category"?

[70] As noted above "Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment." (*Air Canada*, at para. 60)

[71] In considering whether this case falls into the exceptional category it is important to note that Mr. Khorsand is a racialized individual whose race has been documented by the police in the course of their interactions with him. Further, none of these interactions have resulted in him being charged or convicted of a criminal offence.

[72] The Intervenor, the Canadian Civil Liberties Association, submits that, given that marginalized communities are subject to a higher frequency and degree of police interactions, the issue at the centre of these proceedings is a broader public issue that requires court supervision to ensure procedural fairness and natural justice. Without it, the systemic discrimination inherent in the gathering and use of police records will be allowed to proceed unchecked. This is a human rights issue that is of great public interest. Decisions not to hire racialized individuals because they had incidental interactions with the police shakes the public's confidence in the law enforcement system and prevents an authentic representation of the local population within the ranks of the law enforcement services. I agree.

[73] In *R. v. Le*, 2019 SCC 34, [2019] 2 SCR 692, the Supreme Court of Canada made the following comments:

> [90] Members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada.
>
> …
>
> [95] The impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience. Carding takes a toll on a person's physical and mental health. It impacts their ability to pursue employment and education opportunities. (Tulloch Report, at p. 42) Such a practice contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization.
>
> …
>
> [97] We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows

> disproportionate policing of racialized and low-income communities. (Citations omitted)

[74] There is also established literature that over-policing leads to discriminatory effects. The Toronto Police Service recently released a report entitled "Race & Identity Based Data Collection Strategy: Understanding the Use of Force & Strip Searches in 2020" (Report, June 2022) that confirms the role that race and identity play in the collection of information by police. The report recognizes that systemic racism and discrimination exist across law enforcement institutions and that race-based data has indeed been misused by the TPS, permeating through everyday police action.

[75] The data collected by the TPS in the Report confirms that racialized people in Toronto are highly over-represented in police contacts. Individuals the TPS identified as Black were over-represented by 120% in enforcement actions by the Toronto Police Services compared to their actual population. Individuals identified as Indigenous were over-represented by 60%, while individuals identified as Middle Eastern were over-represented by 30%. These differences were not explained by the demographic make-up of the local resident population.

[76] Thus, over-reliance on police record checks can have a disproportionate impact on racialized communities. In this case, Mr. Khorsand's records disclose that his race was mentioned in the documentation on his police interactions, and they disclose nothing that would seem to be of concern when hiring him for a job in law enforcement. This raises serious questions about what information was relied on in coming to the conclusion that he failed his background check and how systemic issues may have informed and affected the TPSB's decision-making on this issue.

[77] As Mr. Khorsand's case illustrates, a police record may be unrelated to any criminal activity. It documents any interaction with law enforcement including conviction, non-conviction, and information given to the police by a third party. They may also be related to job duties that require an individual to contact the police. These interactions may result in what on the face appears to be a fairly extensive police record.

[78] Legislation, both national and provincial, has recognized the stigma associated with police records and the fact that they can lead to significant barriers. In Ontario, the *PCRA* provides that non-conviction information about an individual may only be disclosed in certain limited circumstances.

[79] The decision at issue affects not only Mr. Khorsand's rights. It also affects the public's right to have confidence in the agencies who administer law enforcement in the community and to have those agencies made up of people who are representative of the communities they serve.

Conclusion

[80] For these reasons I find that the decision at issue is of sufficient public character to be subject to judicial review.

Did the TPSB violate the common law duty of procedural fairness when it decided that Mr. Khorsand failed his background check at the pre-screening level?

[81] In this case Mr. Khorsand was given no opportunity to know why he failed the pre-screening or to address the reasons for that failure. Was this a breach of the duty of procedural fairness?

[82] The Supreme Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, states that the degree of procedural fairness required of any administrative decision maker is to be determined by reference to all the circumstances of that decision , which include (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of the procedure made by the administrative decision maker itself (*Baker*, para. 21 and paras. 23-27)

[83] Before dealing with these factors, I will first deal with the Respondents' argument that if the TPSB owed Mr. Khorsand a duty of procedural fairness, Mr Khorsand waived his right to procedural fairness when he signed a waiver on March 30, 2021. That waiver, in part, states:

> I RELEASE, WAIVE AND DISCHARGE the Toronto Police Service, the Toronto Police Services Board and their respective employees, agents, assigns…from any and all liability for the collection, disclosure and use of the information in accordance with this authorization, and from any and all liability for the use of, or reliance upon, information obtained in accordance with this Authorization.

[84] I reject the submission that in signing this waiver Mr. Khorsand waived his right to a duty of procedural fairness. What he waived was his right to hold the TPS and the TPSB liable for the use of his background check. This application does not seek to attach liability to the TPS or the TPSB for the collection, disclosure or use of the information; it seeks no damages. What it seeks is the right to have a decision made in a procedurally fair way, which is a fundamentally different remedy. Nor do I accept the submission that the waiver of the duty of procedural fairness can be implied. It is an important common law right and any waiver of that right must be explicit.

<u>The Nature of the Decision Being Made</u>

[85] The Respondents argue that the decision at issue was only a decision that involved the failure of a pre screen background check. It was not a decision to deny Mr. Khorsand employment. This submission ignores the reality that the inevitable consequence of the decision was to deny Mr. Khorsand employment, not just at the TCHC but for any position requiring a successful TPS background check.

[86] I agree with the Respondents that there is no process specified in how the decision must be made. I also agree with the Respondents that any duty of procedural fairness that applies to police background checks will require some process to protect the integrity of sensitive law enforcement information such as the identity of confidential informants or information that would prejudice ongoing investigations. However, the current practice of refusing to disclose any relevant information cannot be justified based on these concerns.

The Nature of the Statutory Scheme

[87] The statutory scheme gives the TPSB authority to appoint Special Constables, subject to the approval of the Solicitor General. It does not specify any process that must be followed in making these appointments.

[88] There is a statutory scheme in Ontario that limits the use and disclosure of non-criminal and non-conviction records – the *PCRA.* As already indicated, it does not apply to the decision at issue. However, the fact that there is a process in place to limit the use of non-conviction police records in other circumstances is an acknowledgment that the use of such records can have an important impact on the rights of the individuals to whom the records relate. The fact that such records can be considered in the appointment of Special Constables does not mean that there is no common law duty of procedural fairness owed to the individual affected by the use of such records.

The Importance of the Decision to the Individual Affected

[89] The effect of the decision on Mr. Khorsand was to remove his right to pursue his chosen field of employment in law enforcement. I accept that there is no absolute right to work in any particular job/ career (*Tadros v. Peel Police Service)*, 2009 ONCA 442, 97 O.R.(3d) 212 at para. 51).

[90] However, in *C.M. v. York Regional Police*, 2019 ONSC 7220 at paras. 40 – 43, the Divisional Court discusses the importance of a police vulnerable sector check (part of a police records check) on people's lives. It first noted that such checks create a risk to peoples' employment opportunities. It then referred to two decisions (*Kalo v. Winnipeg (City of) on behalf of Winnipeg Police Service*, 2018 MBQB 68, and *Henri v. Canada (Attorney General)*, 2016 FCA 38 (CanLII)) that described a person's interest in such checks as "exceptionally high" and "of enormous personal importance", especially when associated with an application for employment. It then cited *Wallace v. United Grain Growers Ltd.,* 1997 CanLII 332, where the Supreme Court of Canada emphasized how work is one of the "defining features" of most people's lives. Given this, the Divisional Court found that a decision that fails a person on a police records check that is necessary for employment is "situated at the high end of importance under the first and third of the *Baker* factors." (para. 43).

The Legitimate Expectations of the Person Challenging the Decision

[91] I agree that the TPSB did not state that Mr. Khorsand would be subject to any specific duty of procedural fairness. However, this does not mean that he should have expected to be afforded no procedural fairness. As discussed by the Supreme Court of Canada in *Canada*

(Attorney General) v. Mavi, 2011SCC 30 while the content of the duty of procedural fairness may vary with the circumstances, "the general rule is that a duty of fairness applies."(para. 39). As noted in *Baker* at para. 20 "the fact that a decision is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the duty of fairness." At a minimum this duty involves the right to notice of the reasons why a particular decision is being made (the case to be met) and the right to an opportunity to respond to the case being presented. (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.).

[92] In *Suresh*, supra, at para. 122, the Supreme Court dealt with a similar argument to the one being made by the Respondents in this case – namely that to disclose the material relied upon by the Minister in making their decision could violate privilege or undermine public security. In response the Court found that being informed of the case to be met meant providing the person affected by the decision the documents relied upon in making the decision "[s]ubject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents." (see para. 122).

The Choices of Procedure Made by the Decision Maker

[93] As already noted, the decision maker chose to make its decision without satisfying any minimal duty of procedural fairness. In justifying this choice the Respondents submitted that to do otherwise would make it impossible for TPSB to conduct the necessary checks. In addition to the possibility of having to disclose sensitive law enforcement information (which I have already dealt with), the process would become too cumbersome. Added to this submission is the fact that the *PCRA* does not apply to the police record check at issue in this case.

[94] As noted above, the fact that the *PCRA* does not apply to the decision at issue does not mean that the TPSB, who is a public administrative authority making a decision that affects Mr. Khorsand's "rights, privileges and interests", is not subject to the common law principles of procedural fairness (see *J.N. v. The Durham Regional Police Service and The Durham Regional Police Services Board*, 2012 ONCA 428 at para. 18 for the principle that such a decision is subject to the duty of procedural fairness.). The argument about making police records checks too cumbersome if the minimum requirements of procedural fairness are not observed is (as already noted) undermined by the fact that the courts have recognized that such checks can be the subject of judicial review and are subject to the common law duty of procedural fairness (see *J.N. v. Durham*, supra). In the end, any right to procedural fairness will increase the burden on a decision-maker in terms of time and steps that must be taken. However, balanced against that burden is the need to ensure that the decisions made by public authorities that affect the rights of citizens do not lead to unfair results, especially in situations where the risk of unfairness to a particular segment of the population involves a human rights issue.

Conclusion: breach of the duty of procedural fairness

[95] Weighing all of these factors and the circumstances surrounding the decision at issue, I find that the TPSB breached its minimal duty of procedural fairness, which was (1) to give

Mr. Khorsand notice of the reasons why he failed his pre screen background check and copies of the information it was relying on making that decision (subject to a process to protect sensitive law enforcement information) and (2) an opportunity to dispute those reasons and information. Because the decision at issue was a pre screen decision, to comply with its duty of procedural fairness the TPSB must provide Mr. Khorsand with the reasons why he failed his background check and a copy of the information relied upon to justify that failure.

Disposition

[96] For these reasons the decision of the TPSB finding that Mr. Khorsand had failed his background investigation at the pre-screening stage is quashed and the matter is remitted back to the TPSB to be made in a procedurally fair manner in accordance with these reasons.

[97] Since the Applicant's background investigation will be subject to a new process that requires disclosure there is no need to deal with the Applicant's request to quash the TPSB's decision not to disclose information in the previous process.

[98] In accordance with the agreement of the parties, there shall be no order as to costs.

Sachs J.

I agree

O'Brien J.

VARPIO J. (DISSENTING)

[99] I have had the opportunity to review my colleague's thorough reasons and, while I recognize that they address important concerns, I nonetheless disagree with the result at which my colleague has arrived. Specifically, I do not believe that the Toronto Police Services Board ("TPSB")'s decision to fail the applicant at the security clearance stage of his application to be a Special Constable with the Toronto Community Housing Corporation ("TCHC") is a decision that is amenable to public law remedies. Rather, I believe that:

1. The screening stage in an application process is properly characterized as being a part of the employment relationship; and

2. The employment relationship as between the TCHC and its Special Constables is one governed by private law principles whereby public law remedies are not amenable.

[100] Ergo, I would dismiss the application.

FACTS

[101] My colleague has carefully reviewed the facts of this case. I generally accept and adopt her description. However, it is important to note that the factual foundation of this case is, at its root, an employment issue. The applicant did not submit to a security clearance check to volunteer in youth sports. He did not do so because he is a "vulnerable person" as defined in banking or other statutes. He submitted himself to a security check for the purpose of securing employment in law enforcement.

[102] As a policy, the TPSB does not disclose the results of its background investigations. Acting Inspector David Ouellette of the Toronto Police Service is the head of the department's Talent Acquisition Bureau, the branch of the department responsible for background checks. Acting Inspector Ouellette deposed that:

> The Talent Acquisition Unit does not disclose the reasons for the result of a background investigation to a candidate or the information that may have been considered in conducting the background investigation for several reasons.
>
> First, the records reviewed in a background investigation may include information gathered by other police services or agencies. TPS cannot disclose information for which it is not the custodian.
>
> In addition, some of the information or records reviewed in a background investigation may contain highly confidential and sensitive information about third parties.
>
> Finally, disclosing the content of some or all of a background investigation can compromise law enforcement investigative techniques and procedures, which is contrary to the public interest and which can potentially create safety concerns for the applicant, third parties, and law enforcement officers. Additionally, disclosing information about the background investigation can compromise the integrity of the investigative process itself.

[103] There is no evidence before this court contradicting Acting Inspector Ouellette's testimony and I accept his evidence.

ANALYSIS

<u>The Governing Jurisprudence</u>

[104] Judicial review is a public law remedy that applies to public bodies engaged in public decision-making. In *Highwood Congregation of Jehovah's Witness (Judicial Committee)*

v. Wall, 2018 SCC 26, [2018] 1 SCR 750, the Supreme Court of Canada dealt with a situation whereby a Jehovah's Witness member sought judicial review of a decision made by a decision-making body of the Jehovah's Witnesses. In determining that the courts have no jurisdiction over such a decision, Rowe J., for a unanimous court, stated that some decisions made by public institutions are inherently private in nature and therefore are not amenable to public law remedies (at paras. 13 to 15):

> The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 24 and 26; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.
>
> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. **Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review:** *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. **In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.).** Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
>
> Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as certiorari may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. Certiorari is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1: 2252.
> [emphasis added]

[105] In *Highway Congregation*, Rowe J. quoted para. 52 of *Air Canada v. Toronto Port Authority* with approval. Paras. 52 and 53 of *Air Canada v. Toronto Port Authority* provide further grounding for the view that "hiring staff" is not generally amenable to public law remedies:

> Every significant federal tribunal has public powers of decision making. **But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises, hiring support staff, and so on.** In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.
>
> The Supreme Court has recently reaffirmed that relationships that are in essence private in nature are redressed by way of the private law, not public law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. **In that case, a government dismissed one of its employees who was employed under a contract governed by the ordinary laws of contract. The employee brought a judicial review, alleging procedural unfairness. The Supreme Court held that in the circumstances the matter was private in character and so there was no room for the implication of a public law duty of procedural fairness.** [Emphasis added.]

[106] While the framework for judicial review as it existed in *Dunsmuir* has been modified by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, the court's view of employment relationships in *Dunsmuir* remains instructive. Specifically, at paras. 81 and 82 of *Dunsmuir*, the majority of the court considered whether employment relationships are amenable to public law remedies:

> We are of the view that the principles established in *Knight* [*v. Indian Head School Division No.19* [1990] 1 S.C.R. 653] relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. **Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.**

> This conclusion does not detract from the general duty of fairness owed by administrative decision makers. **Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.**
> [emphasis added]

[107] It would appear, then, that public employment relationships are generally governed by the principles of private law. With that stated, there are obvious distinctions to be drawn as between the facts in *Dunsmuir* and facts before this court. In *Dunsmuir*, an employee was dismissed from a public sector position whereas in the case before this court, a prospective employee failed the screening process. Thus, and strictly speaking, the *ratio* in *Dunsmuir* is inapplicable to the applicant. Nonetheless, the *Dunsmuir* passage highlighted above – along with its treatment in subsequent cases - lends credence to the notion that public law remedies are generally inapplicable to employment disputes, even within the public service.

[108] Given this conclusion, it would be an unusual result to have public law remedies apply to the applicant's background check, but not to his actual employment. This concern is highlighted by paragraph 2 of the Memorandum of Understanding ("MOU"), the contract that empowers the TPSB to conduct screening checks on behalf of the TCHC:

> 1. (a) If this Agreement is breached by TCHC and such breach is not rectified to the satisfaction of the Board within thirty (30) days after notice of such breach is given by the Board to the TCHC, the Board may:
>
> (i) Suspend or terminate the appointment of any Special Constable or Special Constables, either individually or collectively as the case may be, subject to the giving of notice as provided by the Act; or
>
> (ii) Terminate this Agreement.
>
> (a) If any Special Constable breaches this Agreement, the Board may suspend or terminate his or her appointment immediately subject to the giving of notice as provided by the Act.

[109] According to this paragraph, if the TCHC were to breach the MOU as regards the screening process, the TPSB would retain the power to terminate a Special Constable hired as a result of that contractual breach. This power exists as a result of the MOU and is thus contractual. Accordingly, the power to terminate in this circumstance would not be amenable to judicial review. In contrast, the applicant's submissions before this court would appear to necessitate that judicial review would be applicable to that decision. This incongruency is inconsistent with the holdings in *Highwood Congregation, Air Canada* and *Dunsmuir.*

[110] Therefore, disputes arising from employment as a Special Constable with TCHC are not amenable to public law remedies as per *Highwood Congregation, Air Canada* and *Dunsmuir*. The applicant has furnished no evidence as to why the general rule is inapplicable and I must follow what I believe to be binding precedent. In my view, the application process governing the hiring of a Special Constable is governed by private law

remedies since the screening process is a part of the employment relationship. The TPSB's decision to fail the applicant at the screening stage is therefore not amenable to judicial review.

Alternative Reasoning

[111] If I am wrong in my view that the aforementioned jurisprudence provides grounds to summarily dismiss the application, I believe that a consideration of the factors described at para. 60 of *Air Canada v. Toronto Port Authority* demonstrates clear that the TPSB's decision to fail the applicant at the background check stage is not amenable to judicial review.

The Character of the Matter

[112] While I agree with my colleague that the nature of the Special Constable's powers are such that her or his duties are inherently public, as noted in the aforementioned jurisprudence, the employment relationship itself is not a public function. Indeed, "hiring staff" is specifically mentioned by the courts as a private, as opposed to public, function.

[113] This factor augurs against the availability of public law remedies.

The Nature of the Decision-Maker and Its Responsibilities

[114] While the decision-maker in this instance is clearly a public body, and while the role being filled is a public one (i.e., that of a Special Constable), the decision to fail the applicant at the "pre-screen" stage is not a matter closely related to the public responsibilities carried out by Special Constables, the TCHC or the TPSB. In fact, the courts have stated that staffing is inherently private in nature. This factor therefore also augurs in favour of private law remedies.

The Extent to Which the Decision is Founded in Law or Discretion

[115] As was conceded by the parties, TPSB's decision was entirely discretionary. As such, it favours viewing the decision as being private in nature. My colleague suggests that the decision may have a "potential effect on the human rights of a broad section of the public". I note that whether the applicant passes a screening test only directly affects the applicant. I will deal with my colleague's concerns with respect to broader human rights later in these reasons, but I find that this factor favours a finding that the decision to fail the applicant is private in nature given its limited scope.

TPSB's Relationship to Other Parts of Government

[116] I agree with my colleague's analysis of this factor.

The Extent to Which the Decision-Maker is an Agent of Government

[117] I agree with my colleague's assessment of this factor.

The Suitability of Public Law Remedies

[118] For the reasons noted earlier in paragraphs 104 to 110 of these dissenting reasons, this factor strongly favours the applicability of private law remedies to the exclusion of public law ones. On this point, I also note Inspector Ouellette's reasons for refusing to disclose the Talent Acquisition Unit's rationale. The applicant provided no evidence to suggest that the Inspector's reasons are illegitimate, and I have no reason to reject Acting Inspector Ouellette's testimony. Ergo, I accept the fact that the background information considered in the "pre-screen" process may contain highly confidential and sensitive information about third parties.

[119] In this vein, I am concerned that the disclosure of the content of the background information – or even requiring the TPSB to state that it refuses to disclose content as a result of investigative concerns – may not only compromise investigative techniques and procedures, but also may endanger confidential informants. McLachlin J. (as she then was), described the importance of informer privilege at para. 8 of *R. v. Leipert* (1997) 1 S.C.R. 281:

> A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. As Cory J.A. (as he then was) stated in *R. v. Hunter* (1987), 57 C.R. (3d) 1 (Ont. C.A.), at pp. 5-6:
>
> > The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the importance of the role of informers in the solution of crimes and the apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they may have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.

[120] A hypothetical example rooted in the facts before this court highlights the concern described in *Leipert*. Suppose, for example, that the applicant failed the OPP's 2019 screening test as a result of confidential information received regarding the applicant's putative criminal activity. Suppose also that this hypothetical criminal activity occurred after the first TCHC 2018 test, but before the OPP screening test. Finally, suppose that very few people know about the criminal activity. It is entirely possible that, given this timing, if the TPSB were required to advise the applicant that it could not tell him why he failed "pre-screening" due to "investigative issues", the applicant could use deductive reasoning to determine not only the nature of the information disclosed, but also the source

of same.[1] This hypothetical situation lends credence to Acting Inspector Ouellette's evidence such that public law remedies are not suitable in this situation because any explanation regarding the applicant's failed background screening could create insoluble problems, some of which could put individuals in danger.

[121] I also note that imposing public law remedies in this situation could well open a floodgate of similar requests. In submissions, counsel for the TPSB indicated that the TPSB would not be able to process the volume of expected requests if public law remedies were applicable in this situation. Further, one wonders whether public law remedies would thus be amenable to all "pre-hiring" situations such that every unsuccessful candidate for a public sector position would have the right to know why they were not hired. Would public law remedies apply to disclosure of poor references? Would public law remedies apply to candidates who did not pass scrutiny at ostensibly confidential vetting stages of an application process, like the Judicial Appointments Advisory Committee? These concerns, coupled with Acting Inspector Ouellette's evidence and the binding jurisprudence, suggest that public law remedies are not suitable in the instant case.

The Existence of a Compulsory Power

[122] I agree with my colleague's assessment of this factor.

Does the Decision Fall into the "Exceptional Category"?

[123] I am not prepared to find that this case falls into the "Exceptional Category". At para. 60 of *Air Canada*, the court described the "exceptional" category of cases:

> *An "exceptional" category of cases where the conduct has attained a serious public dimension.* Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: *Aga Khan*, above, at pages 867 and 873; see also Paul Craig, *"Public Law and Control Over Private Power"* in Michael Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997), at page 196. **This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment:** *Irving Shipbuilding*, above, at paragraphs 61-62.
> [emphasis added]

[124] This passage suggests that the "existence" of fraud, bribery, corruption or a human rights violation can transform a matter from a private affair into a public matter. The term "existence" would seem to presuppose a level of proof that goes beyond simple correlation. Rather, there must be sufficient proof to suggest that a human rights violation in fact exists in order to transform a private matter into a public one.

[125] In the case before this court, as was noted by my colleague, the applicant is a racialized Canadian and the TPSB has admitted publicly that it is concerned with the existence of

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[1] I do not wish these reasons to be seen as suggesting that any such confidential information exists. I am entirely unaware of the reasons for the applicant's failure to pass security clearance.

institutional racism in law enforcement. As such, the court must be alert to possible issues in that regard. This is especially the case given the unusual facts of this case whereby the applicant passed an initial security check, but then subsequently failed another a short time later.

[126] Prior to bringing this application, the applicant made an access to information request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") seeking disclosure of documents examined by the TPSB in making its determination. TPSB disclosed documents related to nine incidents. Documents related to three of those incidents describe the applicant's ethnic background. I hereby take judicial notice pursuant to *R. v. Find* [2001] 1 S.C.R. 863 that police records often, if not regularly, include physical descriptors for individuals. Such descriptors commonly include racial identifiers. Thus, I do not believe that the reference to the applicant's ethnic background in the applicant's police records is such that the court ought to infer – absent other evidence – that racism may have formed any part of the decision to fail the applicant. The existence of racial descriptors in the applicant's police records thus falls short of the level of proof required to find that a human rights violation "exists", as per the definition of the "Exceptional Category". Without sufficient evidence from which it is possible to infer that racism played a role in TPSB's decision to fail the applicant, the facts of this case are such that it does not fall within the "Exceptional Category".

[127] This finding must also be considered in light of the fact that the applicant failed to pursue his *MFIPPA* rights of appeal. Put another way, the applicant has not exhausted those remedies available to him prior to seeking judicial review, which can be fatal to an application for judicial review: *Strickland v. Canada (Attorney General),* 2015 SCC 37 at paras. 37 – 39, and *Lambton Kent District School Board v. Workplace Safety and Insurance Board*, 2013 ONSC 839 at para. 28. Ultimately, if the evidence produced in a possible *MFIPPA* appeal supports a finding of a human rights violation, one would imagine that the applicant could make a claim before the *Human Rights Tribunal*, which has jurisdiction over such matters. The applicant's procedural shortcomings therefore militate against a finding that the decision fits within the "Exceptional Category".

The Balance

[128] All told, when I examine the weight to be attributed to the relevant factors, decisions made at the background stage of a public hiring process for a public agency are not public in nature and thus are not amenable to judicial review. The character of the matter, the nature of the decisions being made and the poor suitability of public law remedies to such decisions lead inexorably to the conclusion that these decisions are not inherently public in nature. Further, there is insufficient evidence to find that the matter before the court falls within the "Exceptional Category". Put another way, being rejected at the screening stage of a hiring process is not a public decision being made by a public body. Rather, it is a private decision regarding an individual's suitability for a position. Absent persuasive evidence that puts the decision into the "Exceptional Category" of the *Air Canada* analysis, such a decision is specific to that individual and is inherently private in nature.

CONCLUSION

[129] Like my colleague, I find the fact set presented before the court to be unusual. The applicant passed a security check, then failed same, all while employed in some form of law enforcement. Intuitively, I want the applicant to know why he failed the screening process and to have the opportunity to address any potential issue that may have caused this change in result. Equally, the applicant is a racialized Canadian and it is certainly important public policy to ensure that racism plays no part in decisions undertaken by public bodies.

[130] With that being stated, however, the TPSB's decision to fail the applicant at the pre-screening stage is not amenable to public law remedies - like judicial review - because:

1. The background check in an application process is properly characterized as being a part of the employment relationship; and

2. The employment relationship as between the TCHC and its Special Constables is not amenable to public law remedies.

[131] For the reasons above, I would dismiss the applicant's application for judicial review.

Varpio J. (Dissenting)

Released: February 27, 2023

CITATION: Khorsand v. Toronto Police Services Board, 2023 ONSC 1270
DIVISIONAL COURT FILE NO.: 651/21
DATE: 2023/02/27

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Varpio and O'Brien JJ

BETWEEN:

YAZDAN KHORSAND

Applicant

– and –

TORONTO POLICE SERVICES BOARD and TORONTO POLICE CHIEF JAMES RAMER

Respondents

REASONS FOR JUDGMENT

SACHS J. (O'BRIEN J. CONCURRING)

VARPIO J. (DISSENTING)

Released: February 27, 2023