COURT OF APPEAL FOR ONTARIO

CITATION: Khorsand v. Toronto Police Services Board, 2024 ONCA 597
DATE: 20240801
DOCKET: COA-23-CV-0665

Fairburn A.C.J.O., Simmons J.A. and Daley J. (*ad hoc*)

BETWEEN

Yazdan Khorsand

Applicant (Respondent)

and

Toronto Police Services Board and Toronto Police Chief James Ramer

Respondents (Appellants)

Michele Brady and Rali Anguelova, for the appellants

Glen Chochla, for the respondent

Sharon Wilmot and Keegan Soles, for the intervener Ontario Association of Chiefs of Police

Jessica Barrow, for the intervener Canadian Association of Chiefs of Police

Saad Gaya, and Abby Deshman, for the intervener Canadian Civil Liberties Association

Nan Padmanathan and Steven Yu, for the intervener Community & Legal Aid Services Program

Robin Nobleman, Gabriel Reznick, Lisa Leinveer and Ryan Peck, for the interveners Mental Health Legal Committee/HIV & AIDS Legal Clinic Ontario/ARCH Disability Law Centre

Sujit Choudhry, Mani Kakkar and Danette Edwards, for the interveners South Asian Legal Clinic of Ontario/Black Legal Action Centre

Heard: March 4, 2024

On appeal from the order of the Divisional Court (Justices Harriet E. Sachs, Michael N. Varpio, dissenting, and Shaun O'Brien), dated February 27, 2023, with reasons reported at 2023 ONSC 1270, 166 O.R. (3d) 424, allowing an application for judicial review.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] The core issue to be determined in this appeal is whether a 2021 security screening decision made by the Toronto Police Service ("TPS"), at the request of the Toronto Community Housing Corporation ("TCHC"), in connection with Yazdan Khorsand's application for employment as a special constable with the TCHC, is amenable to judicial review.

[2] Mr. Khorsand wishes to work in law enforcement. In 2020, he applied for a job as a special constable with the TCHC, a position he previously held before voluntarily leaving for another job. As part of the TCHC application process, Mr. Khorsand was required to pass a background investigation to be conducted by the TPS. In April 2021, Mr. Khorsand was advised that the TCHC was unable to move forward with his application because he "did not pass the pre-screen background check with TPS."

[3] Mr. Khorsand asked both the TPS and the TCHC for information about why he failed the pre-screening process. He also made an access to information request to the TPS pursuant to the *Municipal Freedom of Information and*

Protection of Privacy Act, R.S.O. 1990, c. M. 56 (“MFIPPA”). The disclosed records included reports relating to nine interactions between Mr. Khorsand and the TPS. None of the reports revealed any criminal behaviour on the part of Mr. Khorsand. Three reports described Mr. Khorsand as “Brown”, “Middle Eastern”, or “Persian”.

[4] Mr. Khorsand then brought an application for judicial review, challenging the TPS pre-screening decision and its decision not to disclose reasons or information relied upon in making that decision. Mr. Khorsand alleged those decisions violated the administrative law duty of procedural fairness. In response, the TPS Board and the Toronto Police Chief (the “appellants”), who were named in the application,[1] submitted that the pre-screening decision was made in the context of Mr. Khorsand’s attempt to secure employment with the TCHC and was therefore not of a sufficiently public character to be subject to judicial review.

[5] The Divisional Court decision was split.

[6] The majority concluded that judicial review was available. In their view, the decision to fail Mr. Khorsand at the pre-screening stage, which was made by the TPS as an agent of the TPS Board, was sufficiently public having regard to the factors set out in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3

[1] The application initially named the TPS and the TPS Board. The application was later amended to replace the TPS with the then TPS Chief of Police. Although the Toronto Chief of Police is named in the notice of application, there are no specific allegations made against him.

F.C.R. 605. Among other things, they noted that the TPS Board has the statutory power to appoint special constables and will not make an appointment unless the applicant passes a satisfactory background check. The majority also expressed concern about systemic discrimination in law enforcement institutions and police misuse of race-based data. They found that there is a public interest in ensuring that the unregulated use of police records does not result in the perpetuation of systemic discrimination.

[7] Having concluded that the pre-screening decision was subject to judicial review, the majority held that the TPS Board had breached its “minimal duty of fairness”. In the majority’s view, this duty required: (i) giving Mr. Khorsand notice of the reasons for why he had failed the pre-screening and copies of the information relied on in making that decision, subject to a process to protect sensitive law enforcement information; and (ii) an opportunity to dispute those reasons and information. The majority quashed the pre-screening decision and remitted it back to the TPS Board to be made in a “procedurally fair manner”.

[8] In contrast, the dissent concluded that the pre-screening decision was, at its core, a private decision and therefore not amenable to judicial review. The dissent recognized that even public decision makers may make private decisions. These non-reviewable private decisions include employment-related decisions, and the pre-screening decision was a component of an employment application process.

The dissent also expressed concern about protecting highly confidential and sensitive law enforcement information from disclosure and the possibility that imposing public law remedies in this situation could open a floodgate of similar requests for information to the TPS Board and possibly other public sector actors.

[9] This court granted the appellants leave to appeal. The appellants submit that the majority erred in concluding that the pre-screening decision is judicially reviewable. In the alternative, they submit that if the decision is judicially reviewable, the Divisional Court defined the scope of the duty owed to Mr. Khorsand too generously. They also raise the issue of prematurity, given Mr. Khorsand's failure to pursue an appeal of the MFIPPA decision, although counsel did not press this issue in oral argument.

[10] I would allow the appeal based on the first ground of appeal. As I will outline, the pre-screening decision was made by the TPS at the request of the TCHC as part of its hiring process. In my view, the pre-screening decision is not judicially reviewable because it is not of a sufficiently public character. In light of this conclusion, it is unnecessary to decide the other issues raised.

B. BACKGROUND

(1) Mr. Khorsand's personal and employment history

(a) Mr. Khorsand

[11] Mr. Khorsand immigrated to Canada from Iran in 2008. He self-identifies as a "person of colour."

[12] Mr. Khorsand is now a Canadian citizen. He has no criminal record and has never been charged with a criminal offence.

[13] Mr. Khorsand wishes to work in law enforcement and has taken various courses to that end. In 2018, he graduated with honours from a basic special constable training program. Over time, he has applied for various positions in law enforcement that require successful background checks.

(b) Mr. Khorsand's prior applications for employment and background checks

[14] In 2017, Mr. Khorsand failed a background check conducted by the Ontario Provincial Police ("OPP") in connection with his application for a job as a correctional services officer. He was not provided reasons for that failure.[2]

[2] There is no reference to this failure in the Divisional Court's reasons.

[15] Mr. Khorsand then turned his focus to the TCHC, where he applied to work as a special constable. In February 2018, after conducting all necessary background checks, the TCHC offered him employment as a "Special Constable in Training" for a 12-month probationary period. The offer and his continued employment with the TCHC was subject to conditions including him "becoming eligible for the Special Constable designation within [his] twelve (12) month probationary period." Mr. Khorsand began working for the TCHC in March 2018. In November 2017, he had signed an authorization permitting the TPS to gather and consider his personal information to assess his qualifications and suitability for a special constable appointment. In April 2018, he successfully cleared the TPS background investigation.

[16] In July 2018, after about five months with the TCHC, the TPS Board, with the Solicitor General's approval, appointed Mr. Khorsand as a special constable pursuant to s. 53 of the *Police Services Act*, R.S.O. 1990, c. P. 15 ("PSA"). The record is silent as to whether the TPS Board knew when making the appointment that Mr. Khorsand had previously failed a background check conducted by the OPP. In any event, Mr. Khorsand was appointed for a five-year term on the condition that he remain employed with the TCHC.

[17] This takes us to August/September 2018, when Mr. Khorsand received a job offer from Metrolinx as a transit safety officer and he quit his job with the TCHC.

His employment with Metrolinx was conditional on him attaining a special constable appointment. The OPP were responsible for conducting the necessary security clearance. In February 2019, Metrolinx informed Mr. Khorsand that he would not be recommended for appointment as a special constable because of "concerns" raised in the course of the OPP's security clearance investigation. Accordingly, his employment with Metrolinx was terminated. Mr. Khorsand was not provided with any information about what had given rise to the "concerns".

[18] In April 2019, after being dismissed from Metrolinx, Mr. Khorsand applied to be a police constable with the TPS. He was later notified that his application was unsuccessful and that he could not reapply until July 2020. He was given no reasons for why he was unsuccessful.

[19] In the meantime, in March 2019, Mr. Khorsand applied to rejoin the TCHC as a special constable. He was advised in December 2019 that he "did not pass the pre-screen civilian check" and, therefore, the application would not "move forward".

(c) Mr. Khorsand's employment application giving rise to challenged pre-screening decision

[20] In July 2020, Mr. Khorsand again applied to be a special constable with the TCHC. Once again he signed an authorization allowing the TPS to gather and consider his personal information, including, but not limited to, opinions, reports,

records, documents, academic records and transcripts, employment records, police records, background and security checks, financial records and driving records.

[21] In April 2021, the TCHC asked the TPS to conduct a “pre-screen background check.” The pre-screening process involves checking to see if there has been any recently conducted background investigations. In this case, it was determined that Mr. Khorsand had failed such an investigation in 2019. The results from that investigation were reviewed and it was determined that “no material change in circumstance had occurred since the 2019 background investigation had been completed.” Accordingly, Mr. Khorsand was informed that he “did not pass the pre-screen background check with TPS” and, therefore, his TCHC application could not proceed. As was later explained in a letter from the TPS to counsel for Mr. Khorsand during the course of this litigation, “[k]nowing that [Mr. Khorsand] would again be unsuccessful, [he] failed at the pre-screening stage and did not proceed to the next step of the background investigation process.”

(d) Mr. Khorsand’s requests for information

[22] Having been informed that he failed the pre-screening and that his application could not proceed, Mr. Khorsand set about trying to obtain the records underlying the screening process, and the reasons why he failed. He asked the TPS and the TCHC for more information.

[23] In June 2021, Mr. Khorsand also submitted an access to information request to the TPS pursuant to MFIPPA. In July 2021, Mr. Khorsand was granted "partial access" to responsive records. Specifically, the TPS disclosed 66 pages of TPS records, involving 9 interactions with police. As previously noted, none of the TPS records disclosed any criminal behaviour by Mr. Khorsand and three of the nine incidents identified Mr. Khorsand as "Brown", "Middle Eastern" or "Persian". According to the TPS's cover letter that accompanied the disclosure, the TPS withheld disclosure of certain records on the basis that: (1) their disclosure would constitute an unjustified invasion of another person's privacy (MFIPPA, s. 14(1)(f) and s. 38(b)); and (2) the information had been collected as part of an investigation into a "possible violation of the law" (MFIPPA, s. 14(3)(b)). Some information was also removed because it was not responsive to Mr. Khorsand's request. The letter also contained information about how Mr. Khorsand could pursue an appeal from the disclosure decision should he choose to do so. He never appealed.

[24] Around the same time, Mr. Khorsand's counsel wrote to TPS counsel asking for information, including the reasons Mr. Khorsand had failed the pre-screening and "all documents in the [TPS's] possession or control which formed the basis for the results of Mr. Khorsand's background check." The TPS refused to provide any information that had not already been provided pursuant to the MFIPPA request.

(2) The 2002 memorandum of understanding

[25] It is important to understand the different roles played by the TCHC, the TPS Board, and the TPS in the hiring and appointment of TCHC special constables, as reflected in a 2002 memorandum of understanding between the TPS Board and the TCHC (the "MOU").

[26] The MOU's recitals recognize the respective roles of the TPS Board and the TCHC: the TPS Board is responsible for the provision of police services and law enforcement in the City of Toronto, and the TCHC is responsible for providing public housing in the City of Toronto. The recitals also recognize that the TPS and the TCHC had for many years cooperated "in law enforcement and security matters in relation to the property and operations of TCHC."

[27] To that end, the TCHC has its own security services section that includes what the MOU refers to as "community patrol officers". Those officers perform many of the duties of police officers in relation to TCHC properties, including enforcing various criminal and quasi-criminal statutes while working on TCHC properties. These statutes include the *Criminal Code*, R.S.C. 1985, c. C-46, the *Provincial Offences Act*, R.S.O. 1990, c. P.33, the *Mental Health Act*, R.S.O. 1990, c. M.7, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Trespass to Property Act*, R.S.O. 1990, c. T.21, and the *Liquor Licence Act*, R.S.O. 1990, c. L.19. TCHC community patrol officers are also entrusted with highly sensitive

police information, which may include CPIC and other criminal record information.[3] In order to be entrusted with these responsibilities and privileges, the community patrol officers must first be appointed as special constables. That is where the TPS Board comes in.

[28] The MOU recognizes that it is the TPS Board (with the approval of the Solicitor General) that has the statutory power to appoint special constables, which appointment may confer on the appointee the powers of a police officer "to the extent and for the specific purpose set out in the appointment." At the relevant time, the power to appoint was governed by s. 53 of the PSA.[4] As set out in the MOU, it is up to the TCHC to put a candidate forward to the TPS Board for appointment, but this cannot be done until the TCHC, as the potential employer, has taken certain required steps.

[29] Pursuant to s. 17 of the MOU, the TCHC must conduct for each TCHC applicant, "at its own expense", any background investigations or tests that the TPS Board may require for TPS applicants in order to determine that person's suitability to fulfill the position of a community patrol officer. Then, pursuant to s.

[3] CPIC is a database maintained by the RCMP which contains highly sensitive police records.

[4] The PSA was repealed effective April 1, 2024 and replaced with the *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, Sch. 1. As s. 53 of the PSA was in operation at the time of the decision in dispute in this case, these reasons focus upon that provision.

18, it is up to the TCHC to forward to the TPS Board: (a) the results of the background checks and tests referred to in s. 17; (b) all completed waivers and consent forms signed by the applicant; and (c) written confirmation of the applicant's "successful completion of" training required by the MOU. Pursuant to s. 14 of the MOU, the TCHC cannot put forward an applicant to the TPS Board for appointment unless the applicant: (1) is a full-time employee, which includes those employees on a probationary contract; (2) has successfully completed all TCHC training; and (3) has passed all screening conducted by or on behalf of the TCHC. In addition, pursuant to s. 15, the results of the applicant's background investigation must be satisfactory to the TCHC for an applicant to be put forward for appointment by the TPS Board.

[30] Section 16 of the MOU says that the TPS Board "shall not appoint" a special constable if the results of background investigations or tests are "unsatisfactory to the Board, in its sole and unfettered discretion." Furthermore, s. 13 of the MOU provides that both the TCHC and the TPS Board must be satisfied with the "good character, reputation, and suitability" of each applicant.

[31] In other words, the MOU contemplates that the TCHC, as the employer, is responsible for screening, training, and hiring, all of which happen before any application is made for a special constable appointment by the TPS Board.

[32] As for the role of the TPS, the MOU permits the TPS Board to delegate administrative functions (as opposed to decision making) to the Chief of Police, who may in turn delegate such functions to TPS officers: MOU, s. 4 and s. 6.

[33] While at first blush the MOU may seem somewhat complex, we have a very good example of how it works in practice. That example comes from when Mr. Khorsand succeeded in becoming a TCHC special constable in 2018.

[34] As set out above, in February 2018, the TCHC hired Mr. Khorsand as a "Special Constable in Training" after having satisfied itself that Mr. Khorsand was an appropriate candidate for employment as a TCHC special constable. His employment contract was conditional upon "becoming eligible for the Special Constable designation" within his twelve-month "probationary period." In April 2018, he successfully cleared a TPS background investigation. The TCHC made a request for appointment, and in May 2018, the Chief of Police filed a report with the TPS Board recommending Mr. Khorsand for appointment as a TCHC special constable pursuant to s. 53 of the PSA. The Chief's report noted that an appropriate background investigation was done, there was nothing precluding appointment, and that the TCHC had advised the TPS that Mr. Khorsand had satisfied the appointment criteria set out in the MOU. The Board, with the Solicitor General's approval, then appointed Mr. Khorsand as a special constable for a five-year term with the TCHC.

(3) The nature of a background investigation

[35] TPS Inspector David Ouellette swore an affidavit that the appellants tendered on the application for judicial review. In it, he explained the nature of background investigations conducted by the TPS. He was not cross-examined on his affidavit.

[36] Within the TPS, the Talent Acquisition Unit ("TAU") is the unit that conducts background investigations for candidates of external community partners, such as the TCHC, who require a special constable appointment. The TAU also handles internal recruitment of police constables for the TPS. It is staffed by a host of current and retired police officers with investigative skills.

[37] Insp. Ouellette is responsible for the daily operations and oversight of all investigative files within the TAU. He deposed that a background investigation "is a comprehensive pre-employment screening process to determine an applicant's suitability for a career in law enforcement or other job that involves accessing information contained in confidential records databases." He described a background investigation as a security clearance that ensures that all prospective candidates meet the "level of professionalism, trustworthiness, and integrity that is required for a career in law enforcement."

[38] The background investigation starts with the applicant signing an authorization, permitting the TPS to collect personal information, including

opinions of others, reports, records, documents and all manner of employment, academic, police, financial, driving, and security information and records. In other words, a background investigation is comprehensive in nature, although according to Insp. Ouellette, the TAU does not access or rely on any information obtained through street checks.[5]

[39] The TAU cross-checks the information that it finds against the background investigative questionnaire completed by the applicant, which asks for detailed information about previous employment, education, driving record, criminal history, police contact, drug and alcohol use, and credit history.

[40] The TAU does not disclose the reasons for the result of a background investigation to an applicant or the information considered in conducting the background investigation. As Insp. Ouellette explained, this is for several reasons, including: (1) the records considered in the background investigation may include those of another police service or agency, and the TPS cannot disclose information for which it is not the custodian; (2) the information collected in the context of a

[5] Background investigations are much broader than more typical record checks that are governed by the *Police Record Checks Reform Act, 2015*, S.O. 2015, c. 30 (the "PRCRA"). The PRCRA, which was proclaimed into force on November 1, 2018, governs searches of CPIC and other police databases conducted for the purpose of determining a person's suitability for things such as employment and volunteering. In enacting the PRCRA, the legislature chose to exempt certain types of searches from the Act, including "prescribed" searches. Such "prescribed" exempted searches include searches of CPIC for the purpose of screening a person for a special constable appointment: Exemptions, O. Reg. 347/18, s. 5(1)1(v). (But see ss. 0.2 to 0.4 which impose some "conditions of disclosure" on exempted searches.)

background investigation may include highly confidential and sensitive information about third parties; and (3) disclosing content from a background investigation could jeopardize law enforcement investigative techniques and procedures and the integrity of the investigative process itself, thus creating safety concerns.

[41] According to Insp. Ouellette, in 2019, the TAU conducted more than 2,000 background investigations for internal candidates and candidates for external community partners such as the TCHC. That is an extraordinary number of background investigations. And that figure does not include background investigations conducted by other police services in Ontario.

C. DECISION APPEALED FROM

(1) Majority decision

(a) Application of the *Air Canada* factors

[42] The majority characterized the pre-screening background check that stopped Mr. Khorsand's application to the TCHC from proceeding as a decision of the TPS Board that was sufficiently public to be judicially reviewable pursuant to the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1. In reaching this conclusion, the majority applied the following eight factors from *Air Canada*:

- The character of the matter for which judicial review is sought

- The nature of the decision maker and its responsibilities
- The extent to which a decision is founded in and shaped by law as opposed to private discretion
- The body's relationship to other statutory schemes or other parts of government
- The extent to which a decision maker is an agent of government or is directed, controlled, or significantly influenced by a public entity
- The suitability of public law remedies
- The existence of a compulsory power
- An exceptional category of cases where the conduct has attained a serious public dimension.

[43] The majority concluded that these factors pointed to the pre-screening decision being of a sufficiently public nature to attract a public law remedy.

Public character of the matter

[44] In considering the character of the pre-screening decision, the majority addressed the relevance of the MOU. Although the MOU is a private service agreement, it exists because of the public nature of the entities involved – the TPS Board and the TCHC – and the public nature of the duties they perform, namely the provision and policing of public housing. Significantly, the TPS Board has the statutory authority to appoint special constables (subject to the approval of the Solicitor General pursuant to s. 53 of the PSA), thereby granting special constables enhanced police powers, and the TPS Board will not make an appointment if there

has been an unsatisfactory background investigation. The majority concluded that this factor weighed in favour of the public character of the decision in question.

Public nature of the decision maker

[45] As for the nature of the decision maker and its responsibilities, the majority emphasized that the TPS Board is a public body required to carry out public responsibilities under the PSA. Its core responsibility is to provide policing services to the City of Toronto. To fulfill that responsibility, the TPS Board may appoint special constables and a necessary part of the appointment process is the running of background checks. Accordingly, the pre-screening decision flows directly from the TPS Board's core public responsibility to provide law enforcement. This factor also weighed in favour of the public character of the decision under review.

Decision shaped by law and not discretion

[46] The majority recognized that the decision in question is entirely discretionary: there were no statutory criteria for the appointment of special constables pursuant to s. 53 of the PSA.[6] Although that would appear to favour viewing the decision as private, the majority noted that the TPS Board's discretion

[6] This has changed under the new s. 92 of the *Community Safety and Policing Act*, which includes eligibility criteria for the appointment of special constables.

was not shaped by contract law or business considerations, and the decision has a potential effect on the human rights of a broad sector of the public.

Relationship to other parts of government & extent to which decision maker is an agent of government

[47] The majority concluded that this factor also points to the public nature of the decision. The TPS Board exists under statute, operates within a regulated system, and has overarching accountability through the Solicitor General. According to the majority, the TAU, which made the pre-screening decision, was acting as an agent of the TPS Board and, therefore, of the government when it made the decision in question.

Suitability of public law remedies

[48] In assessing the suitability of public law remedies, the majority again pointed to its concern about systemic discrimination. Specifically, the majority noted that absolute discretion may be abused in a way that affects the public at large and a public law remedy through judicial review may be the only available recourse.

Compulsory power

[49] The majority noted that although the TPS Board does not have any compulsory power over Mr. Khorsand as a member of the general public, and

although Mr. Khorsand is not a member of a defined group, he must pass a background investigation with the TPS Board if he wants to be a special constable. In the majority's view, it "could have a serious effect on the rights and interests of a broad segment of the public" to accept the argument that Mr. Khorsand could just pick another career.

Exceptional category

[50] Finally, the majority found that the matter fits within the "exceptional category" described in *Air Canada*. According to *Air Canada*, 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. Examples include "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": at para. 60.

[51] The majority accepted that this case raises an issue of systemic discrimination:

> 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.
>
> …
>
> The data … confirms that racialized people in Toronto are highly over-represented in police contacts.
>
> …
>
> [O]ver-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.

[52] The majority therefore found that the decision under review affects not only Mr. Khorsand's rights but also affects public confidence in the representativeness of agencies who administer law enforcement. In the words of the majority, "[t]here is a serious public interest in ensuring that the unregulated use of police records does not result in the perpetuation of systemic discrimination."

(b) Nature of duty owed

[53] Having found the matter to be public in nature, the majority turned its attention to the content of the duty of procedural fairness in this case. After considering the factors from *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817, the majority concluded that the Board owed, at a minimum, a duty to provide its reasons for failing Mr. Khorsand along with copies of the information it relied upon in making that determination, "subject to a process to protect sensitive law enforcement information", and an opportunity to dispute those reasons and information.

[54] As for the disposition, the majority quashed the TPS Board's finding that Mr. Khorsand had failed his background investigation at the pre-screening stage and remitted the matter back to the TPS Board to be made in a procedurally fair manner.

(2) Dissent

[55] The dissent disagreed that the matter was judicially reviewable. Relying on case law affirming that hiring decisions by public entities are private in nature, he concluded that the pre-screening decision in this case is part and parcel of the hiring process and thus private in nature. I will discuss this case law later in these reasons.

[56] In the alternative, the dissent went through each of the *Air Canada* factors, concluding that the pre-screening decision was private and thus not judicially reviewable. The dissent saw the employment relationship and, indeed, the act of hiring staff as private in nature. Relying on the evidence of Insp. Ouellette, he strongly disagreed that public law remedies were suitable in this case. He spent

some time explaining how the disclosure of the content of the records, or even having to state that there would be no disclosure of the records, could compromise investigative techniques and procedures and endanger confidential informants. As well, he noted the floodgate that could open if these types of security screening decisions were subjected to judicial review.

[57] Finally, the dissent was not prepared to find that this case fell within the *Air Canada* "exceptional category". He concluded that there was no evidence of racism having played a role in the failed background check in this case. He also took judicial notice of the fact that the three racial descriptors found in the records that were disclosed under MFIPPA reflected common practice in police records. Moreover, Mr. Khorsand had failed to fully pursue his MFIPPA appeal rights, something that could be fatal to judicial review. If the evidence produced in an MFIPPA request revealed a human rights violation, Mr. Khorsand could go before the Human Rights Tribunal of Ontario, which has jurisdiction over such matters.

D. POSITIONS OF THE PARTIES

[58] According to the appellants, the majority erred in their analysis of the *Air Canada* factors, which point away from the availability of judicial review. In their view, this is strictly an employment matter; there is no principled way to separate out the pre-screening decision from the ultimate hiring decision, which is not subject to judicial review. The appellants also emphasize that the entirely

discretionary pre-screening decision arises from a private agreement (the MOU). Furthermore, public law remedies are not suitable, given the difficulty of maintaining the integrity and security of information, records, and individuals, who may include confidential informants, if the Board is required to explain its reasons for failing a person. The appellants also submit that this case does not fall within the "exceptional category" – a potential, unproven human rights violation cannot render an employment-related decision subject to judicial review. If an applicant believes that the outcome of their background investigation resulted from discrimination, the proper forum for raising that claim is the Human Rights Tribunal of Ontario.

[59] In contrast, Mr. Khorsand submits that the majority was right to find that the pre-screening decision is judicially reviewable. He contends that the majority correctly applied the *Air Canada* factors. The decision maker – the TPS Board, as represented by its agent, the TAU – is indisputably a public entity and its decision on the pre-screening emanates from the TPS Board's statutory power to appoint special constables. The decision to fail an individual on a background investigation is not a mere hiring decision; the effect of such a decision is to render it impossible for the individual to pursue a career in law enforcement.

[60] Mr. Khorsand also maintains that public law remedies are entirely suitable in this case and that the redaction of documents for security purposes is not a new

or insurmountable concern. Furthermore, given the caselaw on systemic racial discrimination in Canadian society and the references to Mr. Khorsand's race in his police files, there is sufficient evidence of racial discrimination to say that the "exceptional category" under *Air Canada* is engaged.

[61] This court also had the benefit of submissions from seven interveners, who provided valuable insights into the implications of the Divisional Court's decision. On the one hand, the Canadian Association of Chiefs of Police and the Ontario Association of Chiefs of Police expressed concern about the administrative burden the majority's decision will place on police and stressed the need to safeguard sensitive law enforcement information. On the other hand, the remaining interveners submitted that a failure to uphold the majority's decision will have on a negative impact on a variety of groups, including low-income communities, those living with disabilities, and racialized individuals, because there will be no means to guard against discrimination creeping into the special constable appointment process.

E. THE STANDARD OF REVIEW

[62] As previously noted, I would resolve this appeal on the first issue: whether the pre-screening decision is amenable to judicial review. I agree with the parties that the standard of appellate review on this issue is correctness. Whether the pre-

screening decision is subject to review by the courts is a question of law that engages principles of judicial review that must give rise to a single, correct answer.

F. THE LEGAL FRAMEWORK

(1) *Wall* and the availability of judicial review

[63] The purpose of judicial review is to ensure the legality of state decision making: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13. It is a public law concept that allows s. 96 courts[7] to "engage in surveillance" of administrative decision makers to ensure that they respect the rule of law: *Wall*, at para. 13, citing *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at para. 14, leave to appeal refused, [2007] S.C.C.A. No. 567.

[64] In *Wall*, the Supreme Court confirmed that judicial review is available only where two conditions are met: (1) there is an "exercise of state authority"; and (2) that exercise of state authority is of a "sufficiently public character": para. 14. In setting out these requirements, Rowe J. explained that even public bodies make some decisions that are private in nature and thus not subject to judicial review: at para. 14.

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[7] "Section 96 courts" refers to courts whose judges are appointed pursuant to s. 96 of the *Constitution Act, 1867*.

[65] These two requirements have been helpfully explored in an article by Professor Derek McKee: "The Boundaries of Judicial Review Since *Highwood Congregation of Jehovah's Witnesses v. Wall*" (2021) 47:1 Queen's L.J. 112 ("The Boundaries of Judicial Review"). In this article, Professor McKee reads *Wall* as imposing both an institutional criterion ("identity of the decision maker") and a functional criterion (the decision must be "public" in nature) in determining whether a decision is subject to judicial review. He suggests the following, at p. 117:

> [Rowe J.] appears to set out two requirements. The first is an institutional criterion, related to the identity of the decision maker. Justice Rowe writes that "judicial review is aimed at government decision makers. He is at pains to distinguish decisions made by "public bodies" or "the administrative state" from those made by "private bodies" or "voluntary associations". The second is a functional criterion. Justice Rowe emphasizes that the decision in question must be public as well. He notes that "[e]ven 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." This structure implies a two-part test: the judge must characterize the institution in question and then characterize the function; if either of these is private, judicial review is excluded. [Footnotes omitted; emphasis added.]

[66] In other words, it is not enough that the decision maker is public – the decision in question must also be sufficiently public.

(2) Applicability of the *Air Canada* factors post-*Wall*

[67] Prior to *Wall*, this court applied the *Air Canada* factors in determining whether a decision was subject to judicial review: see *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481. Since *Wall,* legal commentators have expressed different views on whether the *Air Canada* factors have any continuing applicability in determining whether a decision is judicially reviewable outside of the Federal Court's distinctive statutory context, which Rowe J. noted is what the factors "actually dealt with": *Wall*, at para. 21.

[68] For example, Professor Paul Daly has stated that *Wall* gave *Air Canada* a "narrow interpretation" and so "potentially deprived Canadian courts of a very useful set of factors… to perform the difficult task of separating 'public' from 'private' matters": "Right and Wrong on the Scope of Judicial Review: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*" (2018) 31 Can. J. Admin. L. & Prac. 339, at p. 343.

[69] Lawyer Mannu Chowdhury has written that *Wall* could also be interpreted as overturning *Air Canada*: "A Wall Between the 'Public' and the 'Private': A Comment on *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*" (2019) 9:2 Western J. of Leg. Studies 1, at p. 17. Either way, he says, *Air Canada* has been undermined.

[70] Prof. McKee describes *Wall*'s treatment of *Air Canada* as "ambivalent": "The Boundaries of Judicial Review", at p. 130. He explains, at p. 130:

> On the one hand, a generous reading might suggest that Rowe J implicitly endorses the use of the *Air Canada* factors as part of the second step in the public/private analysis… Justice Rowe certainly says nothing that would directly negate such a reading. On the other hand, Rowe J does not explicitly endorse *Air Canada*. In his reference to the case, Rowe J implies that Stratas JA's analysis was limited to determining whether the TPA had been acting as a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*. Such a reading would in principle limit *Air Canada*'s application to the federal courts. [Footnote omitted; emphasis added.]

[71] Lawyer Robert Boissonneault, in his article "*Wall* at Five: A Cautious Defence and a Way Forward", 36 Can. J. Admin. L. & Prac. 199, at p. 216, suggests that the *Air Canada* factors may remain relevant in determining whether the nature of a public body's decision is sufficiently public to be reviewable:

> [T]o the extent that the Court in *Wall* rejected the *Air Canada* test, it did so in the interest of precluding judicial review of private institutions. However, *Air Canada* may still aid in determining whether the decision of a *public* institution is sufficiently public to sustain judicial review. [Emphasis in original.]

[72] Courts have also diverged in their approaches. Some decisions make no mention of the *Air Canada* factors, some employ them as a supplement, especially

in relation to *Wall*'s functional criterion, and others, like the Divisional Court's majority decision below, rely more heavily on them.[8]

[73] In my view, *Wall* does not preclude reference to the *Air Canada* factors in teasing out why, at a minimum, the functional criterion is or is not met when determining whether a decision is public or not. In this regard, I agree with what the British Columbia Court of Appeal had to say in *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207, 25 B.C.L.R. (6th) 169, at para. 42:

> In the end, the [*Air Canada*] factors are merely guidelines in deciding whether a decision made by a public official or tribunal has a sufficiently public character to be amenable to judicial review. Some will be applicable and important in particular contexts while, in those contexts, others may be irrelevant and unhelpful.

[74] In other words, to the extent they have continuing relevance, the *Air Canada* factors do not operate as a strict test or checklist. In my view, they simply play a helpful role in focusing the court's attention and reasoning process, especially when analyzing the second criterion from *Wall*. Indeed, in *Air Canada* itself, Stratas

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[8] For examples of the first category, see: *Bell v. Civil Air Search and Rescue Association*, 2018 MBCA 96, 81 B.L.R. (5th) 1; *Evans v. Norway House Fisherman's Co-Op Ltd et al*, 2020 MBCA 83; *Mathai v. George*, 2019 ABQB 116, 89 Alta. L.R. (6th) 305; and *Sivanadian v. Kanagaratnam*, 2020 ONSC 6760 (Div. Ct.). For examples of the second, see: *Quewezance v. Federation of Sovereign Indigenous Nations*, 2018 SKQB 313, 44 C.P.C. (8th) 189; *Finkle v. NSHA*, 2023 NSSC 426; *Perron v. Health PEI*, 2024 PESC 22. For the third, see: *Sioui v. Huron-Wendat Nation Council*, 2023 FC 1731; *Astro Zodiac Enterprises Ltd. v. Board of Governors of Exhibition Place*, 2022 ONSC 1175 (Div. Ct.).

J.A. acknowledged that "[w]hether or not any one factor or a combination of particular factors tips the balance and makes a matter 'public' depends on the facts of the case and the overall impression registered upon the Court": at para. 60.

[75] This is all subject to one important caveat. *Wall* cautions against using the *Air Canada* factors to transform a private decision into a public one on the basis that a decision impacts or is of significant interest to a broad segment of the public. Rowe J. said the following, at paras. 20-21:

> The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff [v. New Democratic Party*, 2017 ONSC 3578, 28 Admin. L.R. (6th) 294 (Div. Ct.)], at para. 18; *West Toronto United Football Club* [*v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29 (Div. Ct.)], at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.
>
> …
>
> The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body – in the sense that they have some broad import – will be reviewable. The relevant

> inquiry is whether the legality of state decision making is at issue. [Emphasis added.]

[76] This passage makes clear that it is wrong to apply the *Air Canada* factors to transform the decision of a private actor – such as a church, sports club, or other voluntary association – into a public decision. In my view, the passage also cautions against characterizing a decision of a public body as public in function simply because a broad segment of the public may be interested in or impacted by it. For instance, a government decision to enter into a contract to purchase property may be of significant interest to, and have an impact on, a broad segment of a community; however, that would not transform the contractual decision into a public one. In other words, it is important to distinguish between "public" in the generic sense and "public" in the sense that the legality of state decision making is at play.

G. DISCUSSION

[77] I am not persuaded that the pre-screening decision is sufficiently public to render it reviewable. I say this for three principal reasons.

(1) The pre-screening was part and parcel of the TCHC's hiring process

[78] Although *Wall* does not spell out in detail how to determine whether a decision of a public body is sufficiently public, it does suggest some dividing lines between decisions that are private and those that are public. For instance, Rowe

J. gives examples of private decisions by public bodies. Notably, one example he gives, at para. 14, is hiring staff:

> 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. [Emphasis added.]

[79] Rowe J. borrows the example of hiring staff from *Air Canada*, at para. 52. In turn, *Air Canada* built on the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, where the court held that the dismissal of civil servants, employed under contract, should be governed by contract law, not administrative law. As the majority noted in that decision, "in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law": at para. 82.

[80] With respect, I do not agree with the majority below that the "decision to fail Mr. Khorsand at the background check stage was a separate and distinct decision" from the hiring decision. Instead, I see the pre-screening decision as part and parcel of the TCHC's hiring process – a process that is not judicially reviewable.

[81] As previously discussed, ss. 14-15 of the MOU oblige the TCHC – the actual employer of TCHC special constables – to satisfy itself of a community patrol officer applicant's suitability before it can advance that person for appointment as a special constable. Indeed, the TCHC must already have hired the person, trained them, and ensured that "all screening tests" have been conducted "by or on behalf of the TCHC" at its own expense, before it may even put the individual forward "to the Board for appointment as a special constable." Under s. 15 of the MOU, the TCHC "shall not put forward to the Board an applicant for appointment as Special Constable" where the TCHC is not satisfied with "the results of the background investigations." In other words, the pre-screening decision was made by the TAU at the request of the TCHC as part of its hiring process.

[82] The TPS Board had no involvement in the pre-screening stage. Although under s. 16 of the MOU, the TPS Board "shall not appoint" a special constable if the results of the background investigations are "unsatisfactory to the Board", the TPS Board is not confronted with making a s. 53 decision until after the potential candidate has become an employee of the TCHC. Of course, that does not happen until the TCHC has decided that the person is a suitable candidate to work for the TCHC as a special constable. In making that decision, the TCHC will clearly have an eye to whether the individual could achieve special constable status. Nonetheless, the fact remains that it is the TCHC, as an employer, that is making

a hiring decision at a stage before the TPS Board's involvement. In the context of that hiring decision, the TCHC – as the ultimate employer – will want assurances that any candidate for the position has the level of professionalism, trustworthiness, and integrity that is required for that job. Although the TPS Board will also consider those same qualities, should the TCHC ultimately hire the person and put them forward for appointment as a special constable, the original hiring decision is that of the TCHC and is inextricably linked to the TCHC's view on whether the candidate can properly execute their law enforcement responsibilities. That hiring decision is informed by the pre-screening and screening decisions that take place long before the Board is involved in its decision-making capacity.

[83] Therefore, my view contrasts with that of the majority below, which saw the TAU as acting solely "as an agent of the [TPS Board]" in making the pre-screening decision, a decision "emanat[ing] directly from [the TPS Board's] power to appoint Special Constables." Although the TPS Board may delegate administrative functions to the TAU pursuant to the MOU, it may not delegate its decision-making power under s. 53 of the PSA. I do not see the TAU's pre-screening decision as emanating directly from the TPS Board's s. 53 authority. Rather, consistent with the terms of the MOU, the TAU was conducting pre-screening in support of the TCHC's hiring process, a process that preceded the appointment process, and one

that was done by the TPS as part of its operational functions in the context of the TCHC hiring process.

[84] In conclusion, I see the pre-screening decision as a discretionary employment-related decision, which draws it within the private sphere.

(2) The decision's impact on a broad segment of the public does not transform it from a private decision into a public decision

[85] A theme woven through the majority's analysis below is their concern about the potential impact of the pre-screening decision on a large segment of the public.

[86] The majority first flagged this concern in their overview, where they noted that "[t]here is a serious public interest in ensuring that the unregulated use of police records does not result in the perpetuation of systemic discrimination."

[87] They continued weaving their concern about the public impact of the pre-screening throughout their analysis. For instance, even though they acknowledged the discretionary nature of the decision, which pushed it towards being private, they added a "however" – the decision, which is not shaped by contract law or business considerations, has a potential impact on the human rights of a broad section of the public.

[88] When it came to considering the suitability of public law remedies, the majority again noted that "[a]bsolute discretion may be abused" in a way that impacts not only the individuals involved but the "public at large."

[89] The majority also expressed concern about the decision's impact on the public in finding that this matter fell within the "exceptional category" from *Air Canada*. They accepted that "the systemic discrimination inherent in the gathering and use of police records … is a human rights issue that is of great public interest." They also accepted that "[d]ecisions not to hire racialized individuals because they had incidental interactions with the police" could shake "the public's confidence in the law enforcement system and prevent an authentic representation of the local population within the ranks of the law enforcement services."

[90] In my view, these concerns cannot transform a discretionary employment-related decision into a public decision. To do so is inconsistent with *Wall's* instruction that "[s]imply because a decision impacts a broad segment of the public does not mean that it is public."

[91] I wish to be very clear that this is not to ignore the majority's concern about the need to safeguard against systemic discrimination in law enforcement. It is an indisputable fact that, as the Supreme Court has recognized, "[m]embers of racial minorities have disproportionate levels of contact with the police and the criminal justice system" and that carding "impacts [an individual's] ability to pursue

employment and education opportunities": *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 90, 95.

[92] The majority makes specific reference to the problem of carding in discussing their concern about systemic discrimination. However, in raising that issue, the majority did not address the unchallenged and uncontradicted evidence of Insp. Ouellette that, in conducting background checks, the TAU does not access or rely on any information obtained through carding or street checks.

[93] Even so, the majority's concern about systemic discrimination extends beyond carding. The majority talks more broadly about the "systemic discrimination inherent in the gathering and use of police records." Before this court, counsel for the Black Legal Action Centre and the South Asian Legal Clinic of Ontario submitted that the police database used by the TPS is, at its core, "tainted by systemic racial discrimination arising from the over-policing of racialized persons". The interveners ask this court to take judicial notice that police record databases are inherently and irretrievably tainted by racial discrimination and, therefore, any hiring decision based upon the use of that record system is inherently suspect.

[94] In my view, that is an extraordinary proposition and one that would require an evidentiary foundation for support. On the record before this court, there is simply no evidence to support the proposition that the entire TPS police record database is tainted, giving rise to a presumption that the results of any background

investigation based upon those records are inherently suspect: see generally *Le*, at paras. 84-85.

[95] In expressing a concern about racial discrimination, the majority below also relied on the fact that Mr. Khorsand's race was documented in three of the TPS records that were disclosed to him pursuant to MFIPPA. These references, combined with the fact the records disclosed "nothing that would seem to be of concern when hiring him" were enough, in the majority's view, to give rise to "serious questions about what information was relied on in coming to the conclusion that [Mr. Khorsand] failed his background check and how systemic issues may have informed and affected the TPS [Board's] decision-making on this issue."

[96] Although I accept that race-based data can certainly be misused, I question the inference drawn by the majority, namely that there is strong reason to believe there was racial discrimination at play in this case. The majority's inference is built, in part, on the absence of any reason for concern in the disclosed records. This ignores the fact that only partial disclosure of TPS records was provided under MFIPPA, and it is entirely possible that the reason for failing Mr. Khorsand was not based on anything contained in TPS records or the 66 pages of records that were disclosed.

[97] I also question an assumption underlying the majority's inference: that the collection of race-based data is more likely than not nefarious. That is not always the case. Indeed, reliable reports that have examined the collection of race-based data in the police context have concluded that it is not only permissible, but indeed desirable to collect such data. In the *Report of the Independent Police Oversight Review* (Queen's Printer for Ontario, 2017), at p. 245, Justice Tulloch (as he then was) concluded that "[a]cademics and policy makers are now nearly unanimous in their support for the collection of demographic data". Similarly, a recent independent review of the TPS' race-based data collection policies explains that "race-based data collection can provide measurable evidence to address inequities, racism, and discriminatory practices": Dr. Lorne Foster and Dr. Les Jacobs, *Independent Expert Assessment Report: Toronto Police Service Race-Based Data Collection Strategy Phase I* (2022), at p. 3. See also: Ontario Human Rights Commission, *From Impact to Action: Final Report into Anti-Black Racism by the Toronto Police Service* (2023).[9] Clearly, the proper collection of race-based data by police can serve salutary, non-discriminatory goals.

[9] The House of Commons Standing Committee on Public Safety and National Security has also recommended that the Royal Canadian Mounted Police "collect and publicize comprehensive and disaggregated race-based data covering police interactions with the public": *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security* (2021), at p. 72.

[98] Therefore, on the record before this court, it cannot be said that the existence of a human rights violation is evident or that it transforms a discretionary employment-related decision into a public decision.

(3) Public law remedies are not suitable

[99] Finally, I share the opinion of the dissent about the suitability of public remedies.

[100] As previously noted, the dissent was particularly concerned about the protection of sensitive law enforcement information. The majority made clear that the requirement to give reasons and disclose documents to Mr. Khorsand was "subject to a process to protect sensitive law enforcement information." While the majority clearly attempted to address the concern about the protection of sensitive law enforcement information, respectfully, their approach falls short in the sense that the carveout is vague and does not resolve the problems about the suitability of public remedies.

[101] There is a reason that there are sophisticated statutory schemes pertaining to the disclosure of records, such as MFIPPA and the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31. They are well thought out, sophisticated and sensitive statutory schemes that take into account multiple interests. For instance, MFIPPA has 54 sections and is supplemented by two regulations. Its purposes are set out in s. 1 of the Act:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[102] In this case, Mr. Khorsand was granted partial disclosure to TPS records pursuant to his MFIPPA request; he did not appeal from that decision. In refusing to grant full disclosure, the TPS relied on MFIPPA exemptions that go beyond those pertaining to sensitive law enforcement information (ss. 14(1)(f) and s. 38(b)).

[103] The majority ordered disclosure, subject only to an undefined process to protect sensitive law enforcement information. This potentially puts the TPS in a bind. If the basis of the TPS's decision is found in records that were withheld from disclosure based on exemptions unrelated to the protection of sensitive law enforcement information, the TPS may be forced to disclose records not disclosable pursuant to MFIPPA.

[104] I also share the dissent's view that even requiring the TPS to state that it refuses to disclose records because of investigative concerns could be problematic. Not only could such a requirement inadvertently compromise sensitive law enforcement information, but it is also inconsistent with s. 8(3) of MFIPPA, which states that "[a] head may refuse to confirm or deny the existence of a record" covered by the law enforcement exemption.

[105] If a person who is not hired to work with the TCHC as a community patrol officer can now have access to information that far exceeds what they could obtain under MFIPPA, the potential conflict with MFIPPA is obvious.

[106] And, completely separately, affording a public law remedy here could chill the ability to conduct a proper background investigation.

[107] The focus of the majority's reasons below is on the disclosure of pre-existing records contained in police databases, even those over which the police service has no control. It is important to keep in mind though that background investigations can extend well beyond information contained in police databases. Indeed, those applying for a position with TCHC must sign an authorization allowing the TPS to conduct a background investigation that extends well beyond police databases. For instance, in this very case, Mr. Khorsand signed an authorization that permitted any person or organization in receipt of it to provide

disclosure of information about him to the Toronto Police Service, including the conveying of “opinions” that they may have.

[108] This is akin to a more classic job reference check and something that may be recorded in the notes of the person conducting the check. If such notes informed the reason for Mr. Khorsand’s failure, the majority’s reasons dictate that the notes would have to be disclosed. In my view, that would place a chill on receiving honest and objective feedback about a potential TCHC community patrol officer.

[109] This all comes back to the point that an initial background investigation is done for purposes of making a hiring decision, a process that is not susceptible to public law remedies and one that would be rendered vulnerable were it to become susceptible to judicial review.

H. CONCLUSION

[110] For these reasons, I would allow the appeal, quash the order of the Divisional Court, and dismiss the application for judicial review.

[111] No costs were ordered below. No party sought costs before this court, and I would order no costs for this appeal.

Released: “August 1, 2024 JMF”

“Fairburn A.C.J.O.”
“I agree. Janet Simmons J.A.”
“I agree. Daley J. (*ad hoc*)”