TORONTO POLICE SERVICE DISCIPLINE HEARING

IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE POLICE SERVICES ACT, RSO 1990,
AND AMENDMENTS THERETO:

AND IN THE MATTER OF THE

THE TORONTO POLICE SERVICE

AND POLICE CONSTABLE ADAM LOURENCO (99971)
POLICE CONSTABLE SCHARNIL PAIS (9706)

CHARGE 2:	Unlawful or Unnecessary exercise of authority Discreditable Conduct Discreditable Conduct
	MOTION
Hearing Officer:	Superintendent P. Lennox Toronto Police Service
Prosecutor:	Ms. S. Wilmot Toronto Police Service
Defence Counsel:	Mr. L. Gridin Ms. J. Mulcahy
Case Number:	27.2014 and 28.2014
Hearing Date:	2016.03.02

MOTION

Finding

Having heard, reviewed and carefully considered the submissions of all of the parties and the factums and exhibits tendered (listed in the Appendix), I find that the police tribunal, which operates under the authority of the *Police Services Act* and in accordance with the *Statutory Powers Procedure Act* does not have the legal jurisdiction to grant status to the Ontario Human Rights Commission as intervenor in a police disciplinary hearing.

The motion is therefore dismissed.

SUPERINTENDENT LENNOX: I wish to thank counsel for all parties to this motion for their arguments and exhibits tendered, all of which have assisted me in reaching my decision. I respect the substantial expertise, time and energy that have gone into the parties' preparation for this motion.

Summary

The Ontario Human Rights Commission (OHRC) has made a motion to be granted "leave to intervene to a non-party as a friend of the court". It asks for leave to assist the Tribunal on the issue of racial profiling by way of written and oral argument, and that it be provided with all materials filed in the matter.

Considering the factors that have been applied by courts (the nature of the case, the issues that will arise, and the likelihood of the applicant being able to make a contribution to the resolution of the matter without causing injustice to the immediate parties), counsel for the OHRC submitted that the OHRC will be able to demonstrate the relevance and usefulness of its intended contributions to the issues raised, its ability to offer a perspective even slightly different from that of the existing parties, and that its intervention will not cause injustice to the immediate parties. No costs will be sought.

All parties seem to agree, as do I, that I have two fundamental questions to answer in my consideration of this motion:

1. I must determine if this Tribunal has the jurisdiction to permit the OHRC intervenor status as described above.
2. If (and only if) I find that this Tribunal has such jurisdiction, I must determine if the OHRC has demonstrated that it meets a test that includes considering the nature of the case, the issues that will arise, and the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.

The summaries that follow are taken from the factums, supported by the submissions (both verbal and documentary) of the parties at the hearing into this motion on March 2, 2016, all of which I considered along with the other submitted documents in the ultimate finding on this motion. The exhibits are listed in the Appendix.

The following synopses are not complete summaries as would appear on transcripts, but are intended to focus on the pertinent arguments of the parties with respect to this Tribunal's authority to grant the motion.

Submissions by Counsel for the Ontario Human Rights Commission

In his factum and submissions before the Tribunal, counsel for the OHRC stated that the OHRC is seeking leave to intervene as a friend of the court to address the issue of racial profiling, which is raised in the complaint against the respondent officers. He pointed out that such leave has been granted by courts and tribunals in the past.

Counsel referred me to the ongoing Toronto matter of Superintendent David (Mark) Fenton, likening Mr. Justice J. Douglas Cunningham's granting of a motion by the Canadian Civil Liberties Association (CCLA) to the OHRC motion before this Tribunal. Mr. Justice Cunningham granted permission for the CCLA to intervene as a friend of the court in the proceeding against Supt. Fenton based on criteria similar to that articulated in the OHRC's motion.

Counsel also offered other examples where courts and tribunals other than police tribunals have permitted several agencies to intervene as a friend of the court.

Counsel asked me to differentiate between a party to the proceedings and a non-party friend of the court. He pointed out that the parties have the right to call evidence and witnesses, but a non-party friend has no such rights, providing assistance only through legal argument. He asked me to reject several elements in the factum of Const. Pais (Exhibit I), which

assert that the OHRC is seeing to add to the record and adduce evidence, and referred me to paragraph 11 of the OHRC factum (Exhibit G) in which the OHRC "expects" that the arguments in its factum will include nine points related to the problem of racial profiling. He also referred me to Canadian Union of Public Employees, Local 394 v. Crozier in Const. Pais' Book of Authorities (Exhibit D, Tab 4), stating that the officers' use of this case to show that a tribunal, absent statutory authority, cannot add a party to a proceeding was not relevant as the OHRC is not seeking to be a party to the proceeding.

Counsel also referred to Ontario Municipal Board and Lynwood Charlton Centre et al (Exhibit P) to respond to the officers' arguments that it is beyond the mandate of the OHRC (articulated in the *Human Rights Code*) to seek to "interfere" with a *PSA* disciplinary hearing (Exhibit I, paragraphs 9, 10 and 95), as the OHRC was granted party status at the Board hearing. He also pointed out that the Commission, under its *Code* mandate, has intervened in a number of other tribunals.

Counsel also suggested that I take a "more lenient approach" in my consideration of the motion, suggesting that it is appropriate to do so "in disputes that were substantially private in nature, but raised issues in the public interest" (Exhibit F, page 8) and in matters that impact the public interest. He also suggested, based on Gough v. Peel Regional Police Service (Exhibit D, Tab 7) that the Tribunal has reasonable latitude in considering motions.

Counsel referred me to section 25.0.1 of the *Statutory Powers Procedure Act (SPPA)*, governing control of process in Tribunals, suggesting that it

gives tribunals the power to determine their own procedures and practice and allowing it to make orders in a proceeding.

Counsel continued his submissions on the appropriateness of the OHRC being granted intervenor status, but, as I mentioned above, I am limiting myself in this finding to submissions on my authority to grant such status.

Submissions by Counsel for the Complainants

In his factum, counsel for the complainants indicated that the complainants support the OHRC's motion to intervene (Exhibit H, Paragraph 2). He took the position that the "application by the intended intervenor is identical in all important respects with the application by the Canadian Civil Liberties Association in *Toronto Police Service v. Fenton*" (Exhibit H, Paragraph 8).

In his submissions to the Tribunal, counsel reiterated the points in his factum, pointing to Fenton as the only case that is "really on point" with respect to this current motion, and said that the principles leading to the decision to admit the CCLA were sound, and although Mr. Justice Cunningham in Fenton did not explicitly state the basis for his jurisdiction, he clearly had the authority to admit the CCLA as doing so was merely a procedural matter. He also drew my attention to a passage in Fenton (Exhibit F, Tab 1, Page 8) in which one of the parties uses *PSA* subsection 83(13) as an authority to appoint a friend of the court, saying that while Mr. Justice Cunningham rejected that argument, I might find it helpful as the OHRC, as an agency independent of the parties, is offering such advice, and accepting it is strictly a procedural matter. Counsel encouraged me to give the Fenton matter "wide credence".

Counsel took the position that the status of “friend of the court” is very different from the status of “party” in rights and effect.

Counsel stated that all of the cases submitted about parties being denied standing are not relevant as the current situation is entirely different. He said that section 25.0.1 of the ***SPPA*** grants tribunals the power to determine their own procedures and practices, and that I have the authority to make direction in any proceeding, including the present motion. He submitted that admitting a friend of the court is merely a procedural matter when the tribunal would like to accept the assistance offered.

Counsel also commented, similarly to counsel for the OHRC, that he rejects comments from other parties’ factums that the OHRC is trying to take over a disciplinary hearing, and that the effect of their presence is tantamount to the officers facing a sixth prosecutor with unlimited resources.

Near the end of the hearing, when counsel were making replies to other submissions, counsel for the complainants provided a clarification of his actions in obtaining and disclosing a copy of the OIPRD investigative report that led to the charges against Const. Lourenco and Const. Pais, as reflected in his factum (Exhibit H, Tab 2). The clarification is to the effect that counsel for the complainants and his co-counsel did due diligence with the OIPRD to ensure that there was nothing in law to prevent making public the report of investigation. They were told that they may release the document, so they believed that there were no restrictions on the exchange of the document with the OHRC or anyone else, or to making it

public. He also clarified his earlier request that counsel for Const. Pais withdraw the concern, objecting to her having placed it before this Tribunal in writing. No requests were made of me for any kind of remedy by any of the parties to this disagreement, and counsel for the respondents asked me to consider it irrelevant. Counsel for Const. Pais responded by indicating that the undertaking of non-disclosure included the report of investigation, and that she had asked the OHRC how they had received it. Ultimately, it was the complainants who informed her of how the release had taken place. The bottom line seems to be that the OHRC is relying on the contents of the investigative report as the basis for its motion for standing, that the investigative report was allegedly provided by the complainants improperly (contrary to the undertaking), and that the other parties did not receive adequate notice about its disclosure to counsel for the complainants.

Submissions by Counsel for Respondent Constable Pais

Again, my summary of submissions is limited to discussion of my authorities as a hearing officer.

Counsel for Const. Pais started her factum by taking the position that there is no statutory authority under the *PSA* to grant standing to the OHRC, and that counsel for the OHRC [in his factum] has not provided me with such authority. She quoted subsection 83(3) of the *PSA* that limits the parties to hearing to the prosecutor, the subject police officer and the complainant. She went on to say that the *PSA* contains no "suggestion" that the OHRC is or could be a party to a disciplinary hearing, and that it was never the intention of the legislature for the OHRC to have such standing. She supported this position by pointing out that in venues where

the legislature wanted such authority to exist, it made provision in the relevant statute. She pointed out that the home statute for the OHRC provides for it to have intervenor status in the Human Rights Tribunal of Ontario (HRTO), but not in *PSA* matters.

She stated that because the police tribunal is not a court and the hearing officer not a judge, the *Rules of Civil Procedure* have no application. She took the position that the decision in Fenton to grant intervenor status to the CCLA was in error for this reason. Later in her submissions, she took the position that, while in Fenton, the CCLA wanted standing based on what was contained in the notice of hearing, the notices of hearing do not cover the issues of interest to the OHRC. She reiterated that *PSA* hearings must adhere to the contents of the notice of hearing.

Counsel submitted that the notices of hearing served on the officers make several allegations each, but that racial profiling is not among them. Her position was that the hearing must define its limits from the notices of hearing and not exceed them, as to do so would impact fairness to the respondent officers.

Counsel took issue with communication and disclosure among other parties and the OIPRD, alleging that this was done in contravention of an undertaking of confidentiality. That communication included the transmission of the OIPRD report of investigation into the matter. She took issue with references to the report of investigation in the OHRC factum, and also to the issuance of a press release by the OHRC on the subject of this motion.

She pointed out that while the complainants have filed a civil suit against the Police Services Board and the officers, no application has been filed with the HRTO, which she submitted is the more appropriate forum for concerns such as racial profiling.

Submissions by Counsel for Respondent Constable Pais Continued

As well as taking the position that granting the motion would contravene the *PSA*, she also felt that the OHRC seeks to add to the record before the hearing, expand the scope of the hearing beyond what is stated on the notices to the respondent officers, to file a factum before witnesses are called, and to file written and oral submissions. This, she said, is extraordinary and without precedent. She said that this will impact the fair treatment of the officers (by adding to the record, adducing evidence and adding new issues) and will have the effect of turning the hearing into a public enquiry rather than a police disciplinary hearing in which the respondent officers face jeopardy.

She took the position that the potential wide-ranging future consequences of the hearing are not relevant, as a hearing under the *PSA* deals with the facts before the hearing officer and not "hypotheticals".

Counsel referred to the court cases brought by the OHRC to support the motion, but said that the cases "are as a result of specific *Rules of Civil Procedure*", which have application only to the superior courts of Ontario, not to police hearing officers, and are irrelevant because the *PSA* has defined the parties to a hearing and does not contain provision for a hearing officer to grant intervenor status. She stated that it would be a jurisdictional error for a hearing officer to rely on the *Rules of Civil*

Procedure, and also that the request of the OHRC that I take a lenient position is a privilege of the courts that does not exist in police tribunals [and therefore not available to me].

She referred to several cases to illustrate that there is nothing inherent in a tribunal's authority that would permit it to grant intervenor status. She also took the position that the *PSA* must be interpreted strictly, so a hearing officer or tribunal may not make orders to add a party or a friend of the court because statutory provision to do so does not exist. Additionally, a hearing officer has "no implicit or inherent or common law powers" (Exhibit I, Paragraph 52), but only those granted by statute.

She pointed to Canadian Union of Public Employees, Local 394 v. Crozier (Exhibit D, Tab 4) to illustrate this point as well, articulating that a tribunal's power is limited to exercising its statutory mandate. She referred during her verbal submissions to other cases to similar effect. Suggesting that the OHRC had told me that I could be guided by precedent even when statutory authority does not exist, she pointed to Torstar Corporation and Southam Incorporated (Exhibit R), which includes an application to intervene as partings under the *Securities Act*, but she pointed out that this Act is very different in terms of the authorities it grants, so relying it would be an error.

Counsel also drew my attention to MacMillan Bloedel Ltd. v. Mullin (Exhibit S), in which standing at a motion for interim logging rights in British Columbia was granted without specific enabling authority, but pointed out that this ruling was made by a judge under the *Court of Appeal Act*, which is not available to me as I am not a judge.

She also referred to the Ontario *Human Rights Code* (Exhibit D, Tab 1), but submitted that the broad functions listed in Section 29 do not give any authority in police tribunals where there is no jurisdiction under the *PSA*. Moreover, Section 34 applies to applications to the HRTO exclusively, and Section 35 articulates the ability of the OHRC to apply to the HRTO and of the HRTO to extend the time permitted for an application, but these sections do not apply to *PSA* matters. Section 36 allows the HRTO broad authority to add parties and Section 37 allows the OHRC to intervene at the HRTO, but again these do not apply to *PSA* hearings, nor do they give the OHRC authority to intervene in *PSA* matters.

Submissions by Counsel for Respondent Constable Pais Continued

Counsel also returned to the Ontario Municipal Board matter of Lynwood Charlton Centre (Exhibit P), and stated that it is not appropriate to rely on this case as it is from an appellate body, not a first-level disciplinary tribunal, and as it is governed by the *Planning Act* (excerpt in Exhibit Q), which differs substantially from the *PSA* and grants different authorities with respect to parties at hearings. She also referred to Penner v. Niagara Regional Police Services Board in the OHRC Book of Authorities (Exhibit F, Tab 14) and Ontario Ministry of Community Safety and Correctional Services v. DeLottinville from PC Pais' Book of Authorities (Exhibit D, Tab 13), pointing out that they are very different matters in the courts, and governed by very different authorities than the *PSA* and also articulate that *PSA* and human rights matters can proceed independently from one another to deal with issues such as racial profiling in the public interest. The status of the complainant as party to the *PSA* hearings safeguards the public interest. She made similar submissions with respect to the

HRTO matter of Maynard and Ontario Human Rights Commission v. Toronto Police Services Board et al (Exhibit X).

Counsel made a number of submissions respecting the appropriateness of the OHRC application ("question two").

Counsel also expressed concerns that having the OHRC act as a friend of the court would be akin to adding a prosecutor to the process, which is unfair to the respondent officers, who are already, in effect, facing five prosecutors (including the Service prosecutor and five complainants).

Submissions by Counsel for Respondent Officer PC Lourenco

In his factum, counsel for Const. Lourenco started by saying that "Constable Lourenco completely agrees with and relies upon all of the submissions made by Constable Pais", and provided supplementary submissions to those made by counsel for Const. Pais. He reiterated the positions that the Tribunal can only grant what it has the legal power to grant, that the motion must be dismissed if that power does not exist, and that the *PSA* does not allow intervention in a *PSA* discipline hearing, "so the Tribunal cannot do what is being asked of it" (Exhibit J, Paragraph 5). The Tribunal, as a creature of statute that derives its power from statutory authority (the *PSA* and *SPPA*) and not from the common law or general enactment, has no jurisdiction to do anything not allowed by statute. He took the position that the OHRC has not provided any jurisdictional basis for what they are seeking because no such authority exists. Further, the *Rules of Civil Procedure* unambiguously state that they apply only to civil proceedings in the Superior Court of Justice or the Court of Appeal, and explicitly state they do not apply if another statute provides a separate

procedure, as is the case here. He referred to Henderson v. College of Physicians & Surgeons (Ontario) (Exhibit D, Tab 3) to reinforce that professional discipline legislation should be strictly complied with and strictly construed by the courts, and that respondents are entitled to have a professional regulator strictly adhere to the express provisions of its legislative mandate (Exhibit J, Paragraph 12).

Counsel pointed to Section 5 of the *SPPA*, which states that parties to a proceeding shall be the persons specified in statute or entitled by law to be parties, and underscored that the Tribunal has no discretionary power to add participants (Exhibit J, Paragraph 16). He reinforced this with subsection 83(3) of the *PSA*, which creates a "closed and exhaustive list of participants" at a hearing specifically (Exhibit J, Paragraphs 17-18). He repeated the earlier point that the fact that other legislation allows broader participation illustrates the intention of the legislators to create strict limits in the *PSA* (Exhibit J, Paragraphs 19-22), and gave particular emphasis to the discretion extended to the OHRC in the context of the HRTO by the Ontario *Human Rights Code* and to the fact that this discretion is not reflected in the *PSA*.

In addition to the lack of express authority, counsel for Const. Lourenco submitted that there is no provision for expanding authorities under the doctrine of "necessary implication", as decisions under that doctrine are appropriate only out of necessity if "failure to imply a power would defeat the legislator's intentions" (Exhibit J, Paragraphs 24-25). A tribunal cannot grant itself powers because they are thought to be desirable. He returned to Canadian Union of Public Employees, Local 394 v. Crozier (Exhibit D, Tab 4) to reinforce this point, and to Great Atlantic & Pacific Co. of Canada v. Ontario Human Rights Commission (Exhibit E) to reinforce the

point that parties cannot be added to proceedings if the power does not exist. He concluded by stating that, in this case, "the powers which the OHRC seeks to imply are not necessary for the Tribunal to function. The inability of a hearing officer to grant the OHRC standing would not sterilize or defeat the purposes of the *PSA*" (Exhibit J, Paragraph 29).

In his verbal submissions, counsel expanded on the concerns raised by counsel for PC Pais in Fenton. He stated that I cannot rely on Fenton because the decision to admit the CCLA was not subjected to adequate analysis and has not yet been subject to appeal, which could impact its validity through a decision either way by the Ontario Civilian Police Commission (OCPC). We can't draw from Fenton that "because he did it, he must have had the authority to do it", and he took the position that Mr. Justice Cunningham did not, in fact, have the authority to do what he did.

Counsel also made points that repeat those made by counsel for Const. Pais, and in the interest of limiting the length and relevance of this finding I have not repeated them here.

Submissions by the Service Prosecutor

In her submissions, counsel for the TPS (prosecutor) indicated that she was in agreement with the legal submissions brought forward by counsel for the respondent officers with respect to the law of jurisdiction[1], and said that she would focus on jurisdiction as she considered it to be the primary issue at hand. In her factum, she supported this by saying that "[t]his

[1] Counsel for TPS later added that her agreement does not include the concerns expressed by counsel for the respondent officers about breaches of undertakings. These concerns are not contained in her factum, and she does not take a position on any alleged impropriety at all, though she indicated that she agreed that disclosure among parties should be confidential.

Application raises the sole issue of whether a Tribunal under Part V of the *Police Services Act* has jurisdiction to grant intervenor status to a non-party" (Exhibit K, Paragraph 4).

Reflecting counsel for the respondent officers, she underscored that this Tribunal, as a creature of statute, derives its power from enabling legislation (the *PSA*), and may make a decision or rule only if authorized by the statute to do so. She invoked Chamberlain v. Surry School District No. 36 (Exhibit O), in which the Supreme Court of Canada outlines that "school boards possess only those powers their statute confers on them … [and that they] must adhere to the processes set out by the Act" (Exhibit O, Paragraph 28) and finds that the school board in question acted illegally in making a decision contrary to its constitutive statute.

Counsel went on to reiterate earlier points about the *SPPA* and *PSA* dictating that parties to a proceeding shall be the persons specified under the relevant statute, and defining who those parties are in police hearings, and that where governing statutes do not grant express authority to add any other party, the tribunal has no authority to do so (Exhibit K, Paragraphs 5-8). She reiterated the point that if the legislature had intended to grant the OHRC entitlement to be heard under *PSA* Part V, it would have done so in the legislation. She also pointed out that the OHRC is a creature of the Ontario *Human Rights Code*, which does not grant the OHRC authority to intervene in tribunals other than the HRTO.

She then referred to Constable Lyn Nottingham v. Peterborough Lakefield Community Police Service (Exhibit D, Tab 2 and distributed at the hearing), in which a similar motion was made by the Independent Police

Review Director, who sought full standing on a motion for production and a motion for a stay of proceedings. The hearing officer, a retired superintendent of police, found that he did not have the authority to grant such standing. (Note that this finding is quoted in the case, in counsel's factum and in the "Analysis and Decision" section of this document, below).

Submissions by the Service Prosecutor Continued

Counsel responded to our "question two" in one paragraph in her factum (as she does later in the second part of her verbal submissions), and then requested that this motion be dismissed.

In her submissions in the Tribunal, counsel for the TPS also took issue with relying on the Fenton matter. She agreed that it is the only past decision that supports this current motion, but pointed out that it is not binding and that while Mr. Justice Cunningham did a full analysis of the request for party status by the CCLA, he did no analysis about the authority to approve an intervenor.

She reiterated other counsels' points that the *PSA* tribunal is a creature of statute without authority to grant the motion, that other cases introduced before me are civil and criminal cases but not held under the *PSA*, and that since I am neither a court nor a judge but an administrative tribunal, I must limit myself to specific authority. She also returned to the OHRC being given specific authority under its governing statute that it does not have in the present case, and underscored the point that Section 25.0.1 of the *SPPA* is limited to my ability to deal with day-to-day issues, not with who can participate in a police tribunal hearing.

She took issue with the submission of counsel for the complainant that the *PSA* provision allowing me to seek legal advice is pertinent, as I am not seeking such advice and the OHRC is offering input that is not legal advice; the advice they offer is consistent with their mandate, but very different from providing independent legal advice.

Counsel reiterated the concerns of counsel for the respondent officers that *PSA* hearings are limited to the scope of the notices of hearing (for unlawful arrest and unnecessary force), and must not go beyond them. She pointed out that Code of Offences to the *PSA* (Schedule in O.Reg 268/10) contains a provision under "Discreditable Conduct" to take disciplinary action against an officer who "fails to treat or protect persons equally without discrimination with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability" (*PSA* Schedule Code of Conduct, O.Reg 268/10, subclause 2(1)(a)(i)). Counsel pointed out that the OIPRD had the option of charging the respondent officers with this offence, but chose not to do so, and also that this is evidence that the *PSA* intends this tribunal to have jurisdiction to consider such matters. She reiterated that in this case the complainants chose to pursue the matter through the *PSA* rather than the HRTO (even though they could have pursued both courses simultaneously), and said that it is inappropriate to distract the Tribunal from dealing with the misconduct of two individual officers. If the complainants had wanted the OHRC to be involved they could have applied to the HRTO, in which the OHRC is entitled to standing. She also clarified that the direction to the TPS from the OHRC did not include a Discreditable Conduct offence under 2(1)(a)(i) of the Code of Conduct.

She submitted that there are issues of procedural fairness in expanding the issue to matters not in the notices of hearing, and also that this Tribunal is capable of dealing with issues of discrimination and violation of the *Code* as needed, and does not require the expertise of an outside agency.

Counsel concluded by stating that we can rest assured that the prosecution will examine all relevant evidence and consider the interests of the public and the complainants.

Response: Counsel for the OHRC

Counsel for the OHRC also made a response to some of the submissions of other parties. With respect to the questions dealing with my authority to grant the motion, counsel took the position that a number of considerations were irrelevant, including whether the OHRC filed an application on this matter with the HRTO, the communication between counsel for the OHRC and the complainants, the press release about this motion issued by the OHRC, the superior resources available to the OHRC as a reason to dismiss the motion, and the allegation that granting this motion would open "floodgates" for similar applications. He also responded to submissions about authorities under the *SPPA* by saying that the other counsel are forgetting that a non-party friend of the court is not a prosecutor, and would not cross-examine or offer evidence like a prosecutor.

Counsel for the OHRC also pointed out that it can be appropriate for the Tribunal to consider racial profiling in non-racial profiling charges,

including Discreditable Conduct charges under the Code of Offences section 2(1)(a)(ix), and disputing an interpretation of TPS counsel's point that racial profiling cannot be considered if it is not on the notice of hearing. He referred to Senior Constable Alexander Krug v. Ottawa Police Service (Exhibit V) in which he submitted that racial profiling is relevant to the notice of hearing. Some discussion then took place among counsel with respect to which points were made by whom; TPS counsel clarified that the Tribunal cannot make a finding under the *Human Rights Code* but only under the *PSA*, and that the Tribunal cannot deviate from the notice of hearing and the charges currently facing the respondent officers.

Counsel for the OHRC countered by saying that racial profiling is relevant to the charges in the notices of hearing and to the allegations of misconduct that are facing the officers, as discrimination does not have to be expressly provided in the notice of hearing.

Counsel also countered concerns raised about the decision in Fenton, saying that jurisdiction was not an "after-thought" in that case. He submitted that the Tribunal in Fenton undertook a thorough analysis of jurisdiction, found that it did not have jurisdiction [to add a party to the proceeding], and then, in an awareness of the case law, decided to add a friend of the court in full knowledge of all the case law discussed by counsel at the current hearing.

Counsel also offered comments on the merits of the motion, beyond the scope of this finding.

Analysis and Decision

A substantial number of arguments and cases have been placed before this Tribunal with respect to this motion. Early in the hearing, I ruled that arguments with respect to my jurisdiction to allow this motion and those with respect to the merits of the OHRC's status as intervenor would be heard together, promising to consider the latter if I found that such jurisdiction did exist. Having found, in fact, that it does not, I have not included arguments about the merits of the OHRC's application for intervenor status (the so-called "second question") in my consideration of this matter, as, absent jurisdiction, they are beyond this decision. That said, as counsel for the OHRC stated early in his submission that the arguments on each question were not mutually exclusive, and while a substantial majority of the cases submitted were found to have more relevance to the second question than the first, I have considered the parties' submissions in their entirety in arriving at my decision.

I feel it necessary to articulate that my finding in this motion is strictly based on the legislation and other evidence that has been presented to me. It has nothing to do with any consideration of the second question (on the appropriateness of granting the motion if there were not legal impediments to my doing so), or with my respect and regard for the OHRC, its expertise and its important role in, and impact on, Ontario society. I was an enthusiastic participant several years ago in the partnership among the Service, its Board and the OHRC that has been called "Project Charter", and was witness to tremendous mutual respect and cooperation among the parties. My finding on the first question (about my jurisdiction to grant this motion) is separate and distinct from any consideration of the second question, which I do not address in this finding except peripherally.

That said, while a substantial amount of legislation and a large number of cases have been brought to my attention with respect to the OHRC motion to intervene as a friend of the court, I must limit my decisions to the legislation under which administrative police tribunals function, and the authorities and discretion provided by that legislation. As was pointed out frequently, police tribunals are not courts and I am not a judge, and my authority in the context of the Tribunal comes entirely from the *Police Services Act* (*PSA*) and the *SPPA*. While I reviewed all of the legislation and cases introduced by the parties to this motion, giving particular attention in all cases to the elements of those sources specifically underscored by the parties, I found that many of the sources were not helpful in this case as they pertained to courts or tribunals that operate under a different set of authorities, and/or involved different circumstances. For example, in W.W. v. X.X (Exhibit F, Tab 4), intervenor status was granted by a court with the consent of both parties. In this case, mutual consent does not exist, and, again, this Tribunal is not a court.

Counsel for the OHRC referred specifically to Ontario Municipal Board and Lynwood Charlton Centre et al (Exhibit P), in which the OHRC was granted standing in a Board hearing, but my reading of that case is that such standing was granted under a set of rules (subsections 34(24.1) and 34 (24.2) of the *Planning Act*, outlined in paragraph 3 of the case) that is different than the ones that bind me. I recognize the point made by counsel for the OHRC that the OHRC has intervened at a number of other tribunals, but I must consider the legislation that regulates *PSA* tribunals exclusively and specifically.

I also gave careful consideration to the use of the phrase “non-party” by counsel for the OHRC in both his factum and in his submissions to the Tribunal. I understand that the OHRC takes the position that it is not asking to be a “party” to the hearing, and that the status they seek does not make it a “party” to this matter. I considered carefully what it means to be a “party” to a hearing. The OHRC is asking to “intervene as a friend of the court for the purpose of providing assistance to the Toronto Police Service Disciplinary Tribunal on the issue of racial profiling by way of written and oral argument … [and] also that it be provided with all materials filed in the matter” (Exhibit F, p. 12). Essentially, however, the OHRC is asking for standing in the disciplinary hearing that will put them into a position to make arguments, which will have an impact on the proceedings of the Tribunal, whether with respect to finding or penalty. However positive this impact may be and recognizing that their intention is to support the public interest and assist the hearing officer in an understanding of the unarguably pernicious and destructive impact of racial profiling, doing so has the potential (and seems to be intended) to add new elements to the hearing and its outcome. Despite OHRC counsel’s position and its use of the phrase “non-party”, I cannot escape the conclusion that the standing being sought by the OHRC would make it a de facto party to the proceeding. This is, again, a request that I do not have the authority under governing legislation to grant.

Analysis and Decision Continued

Also, as counsel for Const. Pais points out (Exhibit I, Paragraph 34), the *PSA* does not provide for a hearing officer granting intervenor status, and I am constrained from deviating from my statutory authority.

In addition, I concur with counsel for Const. Lourenco that I am not justified in invoking the doctrine of "necessary implication" in this case.

When considering any potential authority I may be granted by the *SPPA*, I recalled the comment by counsel for the OHRC about the authority to make orders about procedures and practices in a proceeding in section 25.0.1. I do not consider that the *SPPA*, by this or any other section, gives me the authority to transcend governing legislation, and therefore cannot rely on the *SPPA* to make orders that contravene the *PSA*. I agree with counsel for the TPS that I cannot rely on Section 25.0.1 of the *SPPA* to make such an order, as the authority it grants is limited to dealing with procedural issues that, in my view, do not include granting intervenor status beyond the authority of enabling legislation. I also have not been given any authority to determine that the OHRC has any extraordinary access to venues other than those specified in its enabling legislation, including police tribunals.

In considering the effect of Fenton v. the Toronto Police Service (Exhibit F, Tab 1), I recognize that Mr. Justice Cunningham granted intervenor status as a "friend of the court", but my reading of that case is that he did so relying only on what we are calling the "second question". He denied the application to be a party to the Fenton hearing based on the limitations of the *PSA*, but granted intervenor status as a friend of the court. In doing so, he relied on Pinet v. Penetanguishene Mental Health Centre (Administration) (Exhibit F, Tab 5) which, again, is a finding by a court, and he relied on it for the appropriateness of the CCLA application, not on whether he had the authority to grant it.

Also with respect to Fenton, I remarked, as did counsel for the complainants, that Mr. Justice Cunningham does not state his authorities for admitting the CCLA as a friend of the court. In this case, he seems to have relied entirely on the accepted test to determine the appropriateness and usefulness of the organization to the matter at hand. I do not believe that I have the authority to do so in this matter.

Analysis and Decision Continued

There were subtle differences in the Fenton matter, including that the CCLA was already present, representing parties to the matter, and that, as counsel for the Const. Pais submitted, the CCLA sought standing based on the content of the notice of hearing, but for the reasons I gave above with respect to the term "party" above, I rely instead on the finding of the hearing officer in Nottingham v. the Peterborough Lakefield Community Police Service (Exhibit D, Tab 2), referred to in the respondent's factum (Exhibit K, Paragraph 13) in which the Office of the Independent Police Review Director (OIPRD) sought limited status at the hearing. While I see that the request in the Nottingham motion is not exactly the same as in this motion, I see that counsel for the OIPRD, in her submissions, indicated (as counsel for Const. Pais pointed out in her verbal submissions) that she would like a "*seat at the table to explain and make submissions*", which is similar to the OHRC's current motion. In Nottingham, the Hearing Officer (retired OPP Superintendent M.P.B. Elbers) wrote in his analysis (quoted also in the respondent's factum):

> The OIPRD have been granted extraordinary powers that Police Services do not have. They have standing in other forums. This is one where the legislation has not granted them standing. I do not feel, believe or have been convinced by counsel submissions, that

> because legislation does not exist to allow standing for OIPRD at a Hearing that I should make that exception in this case. I do not believe via the cases that have been submitted to me and that I have reviewed in their entirety, that I have the power to make that exception.

Also in considering the invitation from counsel for the complainants to consider subsection 83(13) of the *PSA* as authority, I agree with Mr. Justice Cunningham that this section refers to advice sought by the hearing officer specifically, and also believe that this seems specific to legal advice. Also, the assistance offered by the OHRC transcends what I understand legal advice to be, which is advice on points of law.

In response to comments from OHRC counsel about the relevance of certain submissions by other parties, I did not consider the absence of a HRTO application in this matter, the communication among counsel regarding this issue, the resources available to the OHRC (which would be a positive factor if I were able to grant this motion), or the assertion that granting this motion would cause a flood of similar motions. I agree with OHRC counsel that these considerations do not bear on this decision.

Similarly, in response to comments from counsel for the complainants about the relevance of some other parties' points, I agree that there is nothing to suggest that the OHRC is trying to "take over" the disciplinary process, or that they would represent a sixth prosecutor.

I also did not consider comments that communication among counsel was inappropriate, as I did not believe it impacted on my consideration of my authorities in this motion, and also as I assume that there is another forum for such issues.

I reviewed the ***Rules*** of the TPS Tribunal, which were adopted on March 1, 2015. Although this motion was filed after that time, the notices of hearing were served at an earlier date. I found nothing in the ***Rules***, however, that would impact this decision.

Analysis and Decision Continued

I am unable to accept the suggestion by counsel for the OHRC that, in the public interest, I take a "lenient approach" in my consideration of the motion. This may be appropriate for a court, but I am firm in the position (that appears frequently in the submitted materials) that I am bound by the legislation from which my authority comes, and I accept the position of counsel for Const. Lourenco that "…there is no jurisdiction to grant the motion that the OHRC has brought. What the OHRC asks this Tribunal to do is unlawful and contrary to the intent of the Legislature" (Exhibit J, Page 14). I note that the *Intercountry Adoption Act* (Exhibit I, Tab A) both gives that tribunal the authority to appoint additional parties *and* to seek independent legal advice, which suggests that the Legislature intended that tribunals under that Act have such authorities. The absence of a similar position in the *PSA* suggests to me that the Legislature did *not* intend that I have such authority. This is further reinforced in Canadian Union of Public Employees, Local 394 v. Crozier (Exhibit D, Tab 4) and Giles and Halton Regional Police Force et al (Exhibit D, Tab 5). Counsel for PC Pais introduced about 29 Ontario acts in which tribunals or their equivalents are empowered to add parties to a matter, further strengthening this position.

I heard the concern of counsel for the OHRC that he believes that the prosecutor may not introduce racial profiling in the matter, based on the statement in the TPS prosecutor's factum that the TPS adopts the officers'

submissions (Exhibit K, Paragraph 15), and that it can be appropriate for the Tribunal to consider racial profiling in non-racial profiling charges. I agree that the Tribunal must consider all elements or aspects of a disciplinary matter introduced before it, but see no reason to doubt that the prosecution will not be fulsome, and I remain confident that the hearing officer ultimately charged with the disciplinary hearing against Consts. Lourenco and Pais will give full and effective consideration to any testimony or other evidence offered with respect to racial profiling, discrimination, or other rights violations, if there are any, in his or her analysis and findings on the case. I agree with OHRC counsel that the HRTO is not the only forum in which allegations of human-rights violations can be raised.

Peter Lennox
Superintendent
Hearing Officer

Appendix – List of Exhibits and Cases

Note that some of the following were given exhibit designations after the hearing.

Exhibit A

Designation – Prosecutor (Ms. Sharon Wilmot)

Exhibit B

Designation – Hearing Officer (Superintendent Peter Lennox)

Exhibit C

Record of the Respondents (PCs Lourenco and Pais)

Exhibit D

Book of Authorities of the Respondents (PCs Lourenco and Pais)

1. Human Rights Code, RSO 1990, ch. 19
2. Peterborough Lakefield Community Police Service v. Constable Nottingham, 2013
3. Henderson v. College of Physicians and Surgeons of Ontario, 2003
4. Canadian Union of Public Employees, Local 394, v. Crozier, 2001
5. Giles and Halton Regional Police Force, 1981
6. Newfoundland Telephone Co. V. Newfoundland (Board of Commissioners of Public Utilities), 1992
7. Gough v. Peel Regional Police Service, 2009
8. Cybulski v. Ontario (Human Rights Commission), 2005
9. French v. Ontario (Alcohol and Gaming Commission), 2003
10. Jane Doe One v. Hamilton Police Services Board, 2007
11. Golomb and College of Physicians and Surgeons of Ontario, 1976
12. Smith v. Murdock, 1987

13. Ontario (Ministry of Community Safety and Correctional Services) v. DeLottinville, 2015
14. Claybourn v. Toronto Police Services Board, 2013

Exhibit E

Book of Authorities of Constable Lourenco

1. Great Atlantic & Pacific Co. of Canada Ltd. And Ontario Human Rights Commission et al, 1993

Exhibit F

Book of Authorities of the Ontario Human Rights Commission

1. Toronto Police Service v. Fenton (unreported), 2014
2. Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada, 1990
3. Bedford v. Canada (Attorney General), 2009
4. W.W. v. X.X., 2013
5. Pinet v. Penetanguishene Mental Health Centre (Administrator), 2006
6. Nassiah v. Regional Municipality of Peel Police Services Board, 2007
7. Peel Law Association v. Peters, 2013
8. Peart v. Peel Regional Police Services Board, 2006
9. R. v. Grant, 2009
10. R. v. Neyazi, 2014
11. R. v. 974649 Ontario Inc., 2001
12. D.F. v. Children's Aid Society of Hamilton, 2009
13. Endicott v. Independent Police Review Director, 2013
14. Penner v. Niagara (Regional Police Services Board), 2013
15. Wall v. Office of the Independent Police Review Director, 2014

16. 1162994 Ontario Ltd. v. Bakker, 2004
17. Oakwell Engineering Ltd. v. Enernorth Industries Inc., 2006
18. Morden, Hon. John W., Independent Civilian Review Into Matters Relating to the G20 Summit, 2012
19. Lesage, Hon. Patrick J., Report on the Police Complaints System in Ontario, 2005

Exhibit G

Motion Record: Motion for Leave to Intervene of the Ontario Human Rights Commission

Exhibit H

Record of the Respondents, B.A., B.A., M.M., and Y.B. to the Ontario Human Rights Commission's Motion for Leave to Intervene

Exhibit I

Factum of the Respondent, Police Constable Scharnil Pais to the Ontario Human Rights Commission's Motion for Leave to Intervene

Includes excerpts from the following:

1. *Aggregate Resources Act*, R.S.O. 1990
2. *Agricultural Tile Drainage Installation Act*, R.S.O. 1990
3. *Ambulance Act*, R.S.O. 1990
4. *Animals for Research Act*, R.S.O. 1990
5. *Bailiffs Act*, R.S.O. 1990
6. *Child and Family Services Act*, R.S.O. 1990
7. *Consumer Protection Act*, S.O. 2002
8. *Employment Standards Act*, S.O. 2000
9. *Environmental Protection Act*, R.S.O. 1990

10. *Grains Act*, R.S.O. 1990
11. *Healing Arts Radiation Protection Act*, R.S.O. 1990
12. *Health Care Consent Act*, S.O. 1996
13. *Health Protection and Promotion Act*, R.S.O. 1990
14. *Highway Traffic Act*, R.S.O 1990
15. *Immunization of School Pupils Act*, R.S.O. 1990
16. *Independent Health Facilities Act*, R.S.O. 1990
17. *Insurance Act*, R.S.O. 1990
18. *Intercountry Adoption Act*, S.O. 1998
19. *Laboratory and Specimen Collection Centre Licensing Act*, R.S.O. 1990
20. *Licence Appeal Tribunal Act*, S.O. 1999
21. *Livestock and Livestock Products Act*, R.S.O. 1990
22. *Livestock Community Sales Act*, R.S.O. 1990
23. *Livestock Medicines Act*, R.S.O. 1990
24. *Ontario Heritage Act*, R.S.O. 1990
25. *Ontario New Home Warranties Plan Act*, R.S.O. 1990
26. *Ontario Water Resources Act*, R.S.O. 1990
27. *Payday Loans Act*, S.O 2008
28. *Pesticides Act*, R.S.O. 1990
29. *Private Hospitals Act*, R.S.O. 1990
30. *Police Services Act*, R.S.O. 1990

Exhibit J

Factum of Constable Lourenco: Response to OHRC Motion for Intervenor Status

Exhibit K

Factum of the Respondent (Toronto Police Service): Response to Non-Party's Motion for Standing

The following cases were introduced by parties at the hearing:

Exhibit L

Regulation 194 to the Courts of Justice Act, R.R.O. 1990: "*Rules of Civil Procedure*"

Exhibit M

Consolidation of Criminal Proceedings Rules for the Superior Court of Justice (Ontario), 2014

Exhibit N

Correspondence: *Workplace Safety and Insurance Appeals Tribunal to Mr. David Little and Ms. Margaret Keys re WSIAT #2008-1371*, dated 2015.02.05, and WSIAT Practice Direction: Who May Attend a Hearing, 2014

Exhibit O

Chamberlain v. Surrey School District No. 36, 2002

Exhibit P

Lynwood Carlton Centre and the City of Hamilton (Ontario Municipal Board), 2012

Exhibit Q

Planning Act, R.S.O. 1990 (excerpt)

Exhibit R

Torstar Corporation and Southam Incorporated (Ontario Securities Commission), 1985

Exhibit S

MacMillan Bloedel Ltd. vs. Mullin, 1985

Exhibit T

Securities Act, R.S.O. 1990 (excerpt)

Exhibit U

Robert Tranchemontagne and Norman Werbeski v. Director of the Ontario Disability Support Program of the Ministry of Community, Family and Children's Services, 2006

Exhibit V

Senior Constable Alexander Krug v. Ottawa Police Service, OCCPS, 2003

Exhibit W

Ramdath v. George Brown College of Applied Arts and Technology, 2012

Exhibit X

Maynard v. Toronto Police Services Board, HRTO, 2012

Exhibit Y

R. v. Gibbons, 2014