CITATION: Brisco v. Ontario Civilian Police Commission, 2025 ONSC 488
DIVISIONAL COURT FILE NO.: 169/24
DATE: 20250205

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Matheson, and O'Brien JJ

BETWEEN:	
MICHAEL BRISCO Applicant	*J. Manson and D. Leung,* Counsel for the Applicant
– and –	
ONTARIO CIVILIAN POLICE COMMISSION AND WINDSOR POLICE SERVICE Respondents	*M. Kellythorne and O. Filetti,* Counsel for the Respondent, Ontario Civilian Police Commission *D. Amyot,* Counsel for the Respondent, Windsor Police Service
	HEARD in Toronto: on December 11, 2024

O'BRIEN J.

REASONS FOR DECISION

Overview

[1] The applicant, Michael Brisco, is a police officer of the Windsor Police Service (WPS). He seeks judicial review of a decision of the Ontario Civilian Police Commission, which upheld a hearing officer's finding that he engaged in misconduct for making a donation to what the hearing officer found to be illegal protests in Ottawa and Windsor. Mr. Brisco also seeks judicial review of the Commission's decision upholding the penalty, which required Mr. Brisco to forfeit 80 hours of remuneration.

Background

[2] In January and February 2022, vehicles from across Canada arrived in downtown Ottawa in a protest related to the COVID-19 pandemic that became known as the "Freedom Convoy". In early February, the Prime Minister and Ottawa Chief of Police made statements that the protests were becoming illegal and that the police did not have enough resources to control them. By February 7, 2022, protestors were blockading the Canada-US border crossing at the Ambassador Bridge in Windsor.

[3] At the time of the Freedom Convoy, Mr. Brisco was on an unpaid leave of absence because of his refusal to comply with a mandatory COVID-19 vaccination policy.

[4] On February 8, 2022, after the blockade of the Ambassador Bridge, Mr. Brisco donated $50 to support the Freedom Convoy through a fundraising website. Mr. Brisco made the donation anonymously from his personal computer. A computer hacker obtained and publicized a list of donors to the website. The Ontario Provincial Police received the list and advised the WPS of Mr. Brisco's donation.

[5] Mr. Brisco was then charged with one count of discreditable conduct under the *Code of Conduct*, Ontario Regulation 268/10 under the *Police Services Act*, R.S.O. 1990, c. P.15 (the Act).[1] After a six-day hearing, a hearing officer found Mr. Brisco guilty of discreditable conduct. Following a further hearing, the hearing officer imposed a penalty of forfeiture of 80 hours of remuneration.

[6] Mr. Brisco appealed to the Commission, which dismissed the appeal. The Commission accepted the hearing officer's finding that the protests were "illegal" at the time Mr. Brisco made his donation and declined to interfere with the hearing officer's decision to accept media and police reports about the protests into evidence. The Commission also declined to consider Mr. Brisco's argument that the investigation and prosecution amounted to an abuse of process because the issue was not raised before the hearing officer.

[7] Finally, the Commission agreed that, even though the analysis under *Doré v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395 was not squarely raised before the hearing officer, he ought to have been alive to the need to balance *Charter*[2] values. The Commission itself undertook the *Doré* balancing and concluded any limitation on Mr. Brisco's s. 2(b) *Charter* right to freedom of expression was outweighed by the public interest in enforcing the Act's objectives.

[8] Mr. Brisco seeks judicial review of the Commission's decision. He raises four submissions in this court:

1. That the WPS did not meet its burden of demonstrating on clear and convincing evidence that the Freedom Convoy protests were "illegal", as described in the notice of hearing, at the time of Mr. Brisco's donation;
2. That the Commission unreasonably concluded the limitation on Mr. Brisco's freedom of expression under the *Charter* was proportionate;
3. That the Commission erred in failing to address Mr. Brisco's abuse of process argument; and
4. That the Commission erred in failing to recognize and consider the s. 2(c) *Charter* value of freedom of peaceful assembly.

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[1] On April 1, 2024, the Act was repealed and replaced with the *Community Safety and Policing Act*, S.O. 2019, c.1, Sched. 1. Under s. 216 of the *CSPA*, the Act applies, with necessary modifications, to disciplinary appeals under Part V, such as the appeal that is the subject of this judicial review, that were initiated prior to the coming into force of the *CSPA*.

[2] *Canadian Charter of Rights and Freedoms,1982*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[9] For the following reasons, I would dismiss the application. The Commission did not err in accepting the hearing officer's finding that the protests were "illegal", as described in the notice of hearing. Because Mr. Brisco's challenge to the Commission's *Charter* s. 2(b) balancing rested on his argument that the protests were not "illegal", the second ground of review also fails. I further conclude the Commission's decision not to hear the abuse of process argument for the first time on appeal was reasonable. Finally, the Commission was not required to consider the *Charter* value of freedom of assembly.

Standard of Review

[10] The standard of review for judicial review of a decision of the Commission is the presumptive standard for the review of administrative decision-makers, that is, reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 4 S.C.R. 653, at para. 10. For alleged breaches of procedural fairness, the court will apply the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[11] Mr. Brisco submits that the question of whether an official has the authority to declare a protest illegal attracts a correctness standard because it is a question of general importance. I disagree. Whether the protest was illegal was an assessment of fact in this case. It is specific to the circumstances of this case and does not constitute an issue of general importance. The standard of review on this issue is reasonableness.

[12] The standard of review for whether the Commission failed to recognize the *Charter* value of freedom of assembly is correctness: *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, 492 D.L.R. (4th) 613, at paras. 63, and 69. However, the parties agree the balancing of *Charter* values is reviewable on a reasonableness standard: *Doré*, at paras. 43-54; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, 487 D.L.R. (4th) 631, at para. 60.

Did the Commission err in finding the WPS had shown the protests were illegal on clear and convincing evidence?

[13] Mr. Brisco submits the Commission erred in upholding the finding that the protests were illegal. He says that the protests could not be "illegal" if only a subset of the activity was illegal. He further submits that they could not be declared illegal by a public official not authorized to make that declaration. In Mr. Brisco's submission, a protest could only be illegal if determined to be so by a competent decision-maker under a particular law, such as a finding under the *Criminal Code*, R.S.C. 1985, c. C-46 or a declaration under the *Emergencies Act*, R.S.C. 1985, c.22 (4th Supp). He submits that to the extent the Commission applied a narrower meaning of illegality, such as that some of the activities forming part of the protests were illegal, the notice of hearing did not provide proper notice of the nature of the allegation.

[14] The Commission did not err in upholding the finding of illegality. The evidence before the hearing officer included evidence of illegal activity within the protests, such as that the protests included violence and that a judge in Ottawa had issued a civil injunction ordering truckers to cease blowing their horns. There was no dispute that the Ambassador Bridge had been blockaded. There was evidence before the hearing officer of a connection between the blockade and the Freedom Convoy.

[15] There was also evidence that these were not a few isolated incidents in the context of largely lawful protests. Instead, there were repeated references in the evidence to the protests becoming an "occupation". There was also evidence that the Ottawa police did not have enough resources to control the protests.

[16] I do not agree that the only way to find a protest illegal would be if a different decision-maker had made such a declaration. Because of the significant unlawful acts impeding normal functioning in Ottawa and cross-border traffic from Windsor, it was open to the hearing officer to characterize the protests as "illegal". The Commission did not err in refusing to interfere with the hearing officer's conclusion.

[17] The Commission also reasonably declined to interfere in the hearing officer's decision to admit media reports and public statements into evidence. Section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.122 empowers tribunals like the Commission to admit as evidence documents that would be inadmissible in court, such as those that constitute hearsay. Mr. Brisco did not object to the admissibility of the evidence of illegality from the media reports and public statements before the hearing officer. Indeed, he relied on similar evidence to support his position that the protests were largely legal. The Commission also noted that Mr. Brisco did not point to any specific inaccuracy in the reports that he alleges the hearing officer should not have relied on. In these circumstances, it was reasonable for the Commission to uphold the hearing officer's admission of the documents.

[18] I also reject the submission that Mr. Brisco did not have adequate notice of the allegation against him. Fairness requires that a police officer receive adequate notice of the allegations they will have to defend. In this case, the notice of hearing alleged that Mr. Brisco engaged in discreditable conduct by making "a monetary donation to support the illegal protests and occupations resulting from the Freedom Convoy movement in both Ottawa and Windsor." Mr. Brisco now suggests that, based on this wording, he was only on notice that the protests were illegal in the sense that another decision-maker had declared them to be illegal. But the notice of hearing does not particularize the meaning of "illegal" in that manner. Further, a notice of hearing does not need to specify the precise route to liability: *Barrington v. Institute of Chartered Accountants (Ontario)*, 2011 ONCA 409, 333 D.L.R. (4th) 401, at paras. 46, and 52.

[19] Mr. Brisco received disclosure of the material that the WPS intended to rely on in advance of the hearing. He would have been aware that the WPS intended to prove illegality through public statements and media reports about the protests. He also did not object to a lack of notice either before or during the hearing. In these circumstances, there was no breach of procedural fairness.

Did the Commission err in concluding the limitation on Mr. Brisco's freedom of expression was proportionate?

[20] The crux of Mr. Brisco's submission regarding the Commission's s. 2(b) balancing is that it placed excessive weight on the finding that the protests were illegal. In his submission, if the protests were not shown to be illegal, the Commission's weighing becomes unreasonable.

[21] I agree that the Commission's analysis rests in part on the finding of illegality. The Commission accepted that the professional misconduct finding limited Mr. Brisco's s. 2(b) rights because the donation constituted political expression. However, the Commission found that his

expressive activity undermined the objectives of adequate and effective policing services and maintaining confidence in policing. This was both because the protests were illegal and because, at the time Mr. Brisco donated, the protests had exhausted police resources to control them.

[22] However, as set out above, I would not interfere with the finding of illegality. The Commission appropriately weighed Mr. Brisco's expressive conduct against the illegality of the protests and the fact that they had exhausted police resources to control them. The Commission's weighing of the interference with s. 2(b) rights against the objectives of maintaining policing services and confidence in policing was reasonable.

Did the Commission err in failing to address Mr. Brisco's abuse of process argument?

[23] Mr. Brisco submits the Commission erred in failing to address his argument that the prosecution against him constituted an abuse of process. He argues the investigation into his alleged misconduct was based on illegally obtained evidence that ought never to have been used, specifically his anonymous donation that was revealed by a hacker. In his submission, the Commission erred in its assessment of the test for raising a new issue on appeal.

[24] I disagree that the Commission was required to address the merits of this argument. There is no dispute the Commission cited the correct test for introducing a new issue on appeal. The Commission first referred to *R. v. J.F.*, 2022 SCC 17, 468 D.L.R. (4th) 216, which emphasizes that a new issue will only be dealt with for the first time on appeal in "exceptional circumstances". The Commission then cited the factors to consider as set out in *Gangadeen v. Peel Regional Police Service*, 2023 CanLII 5919 (ON CPC), at para. 39, citing *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at paras. 37-44, namely: (1) the evidentiary record must be sufficient to permit the appellate court to fully, effectively, and fairly determine the issue raised on appeal; (2) the failure to raise the issue at trial must not be due to tactical reasons; and (3) the court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal.

[25] It was reasonable for the Commission to conclude the test was not met because the evidentiary record was insufficient. Mr. Brisco disputes the Commission's comment that the relevant evidence at the hearing was not elicited in the context of an abuse of process argument. He submits that the comment is illogical and does not justify the decision, since the nature of a new issue on appeal is that the evidence will always have been elicited in connection with other issues.

[26] I agree with the WPS' submission that the Commission's comment must be read in context. The statement was made after the Commission noted that certain evidence had only been "touched" upon and immediately before it expressed its concern that the respondent would be significantly prejudiced were the issues to be adjudicated on appeal. It is apparent, when read in context, that Mr. Brisco had not persuaded the Commission that all the necessary evidence was before it.

[27] Abuse of process is a highly fact-based finding. To the extent relevant evidence was elicited before the hearing officer, it was done for a different purpose and was incidental to the central issues. The WPS was not alerted to the need to marshal responding evidence. In these circumstances, it was not unreasonable for the Commission to conclude the WPS would be prejudiced if the abuse of process argument were permitted to proceed on appeal.

[28] I also agree that the Commission did not inject a new element into the test for raising new issues on appeal. The Commission's comment that there was no explanation for why the abuse of process argument was not raised below did not add a new consideration. Instead, the absence of an explanation was relevant to whether the argument was being raised for the first time for tactical reasons, which forms part of the existing test. In any event, the Commission's analysis turned on its finding that there was an insufficient evidentiary record to permit the issue to proceed. Overall, the Commission's comment about the absence of an explanation did not render its analysis unreasonable.

Did the Commission err in failing to recognize and consider the Charter value of freedom of peaceful assembly?

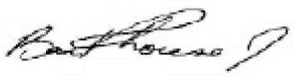
[29] There is no merit to Mr. Brisco's submission that the Commission erred in recognizing and considering the s. 2(c) *Charter* value of freedom of peaceful assembly. Mr. Brisco did not raise s. 2(c) rights before either the hearing officer or before the Commission. Nonetheless, he relies on *Commission scolaire* to say the Commission had an obligation to recognize and consider s. 2(c) in the balancing exercise.

[30] Mr. Brisco does not submit his own s. 2(c) rights were engaged. Instead, he argues that the Commission was required to consider the s. 2(c) rights of the Freedom Convoy protest participants. An administrative decision-maker is not required to consider a *Charter* value that is not relevant for the purpose of its decision: *Commission scolaire*, at para. 66. Here, there was no record before the hearing officer or Commission about the protesters' s. 2(c) rights. Mr. Brisco also does not explain how a finding of professional misconduct against him engages the s. 2(c) rights of non-party protesters. There was no requirement for the Commission to address this issue.

Disposition

[31] The application is dismissed. The parties agreed that there would be no costs of the application, and none are ordered.

O'Brien, J

I agree 

Backhouse, J.

I agree 

Matheson, J

Released: February 5, 2025

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