

Federal Court



Cour fédérale

Date: 20230518

Docket: T-1785-19

Citation: 2023 FC 695

Ottawa, Ontario, May 18, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

DEREK BRASSINGTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Brassington seeks judicial review of the June 27, 2019 decision [Decision] of the Minister of Public Safety and Emergency Preparedness [MPSEP or the Minister], denying his request for indemnification under the Treasury Board’s “Policy on Legal Assistance and Indemnification” [TB Policy].

[2] Mr. Brassington is a former member of the Royal Canadian Mounted Police [RCMP]. He sought Legal Assistance at Public Expense [LAPE] funding to defend criminal charges laid against him for his actions while he was an RCMP officer. The RCMP initially approved LAPE funding for Mr. Brassington. However, his request for further funding was denied through a process that took seven years.

[3] The determinative issue on this application for judicial review is whether Mr. Brassington had a fair process for the consideration of his further request for LAPE funding. I have concluded that he did not. Mr. Brassington did not have a timely consideration of his request, nor did the Minister have the full record of the information Mr. Brassington provided in support of his LAPE request. Finally, the Minister relied upon Mr. Brassington's guilty plea to justify the refusal of LAPE funding. At the time of the request for funding, the criminal proceedings were ongoing and a guilty plea had not been entered.

[4] For the reasons that follow, I am allowing this judicial review.

I. Background

[5] In 2007, Mr. Brassington became a Sergeant with the Integrated Homicide Investigation Team in British Columbia. He was involved in a number of high-profile investigations, including as the Lead Investigator in a high-profile death in police custody at the Vancouver airport and as the Lead Investigator on the "Surrey Six" investigation, concurrently.

[6] In December 2009, the RCMP received information that Mr. Brassington was involved in a relationship with a protected witness, prompting a Code of Conduct investigation.

Mr. Brassington admitted to the relationship.

[7] In February 2010, the Ontario Provincial Police [OPP] began both the Code of Conduct investigation and a criminal investigation into Mr. Brassington's actions.

[8] The relevant dates and events are as follows:

- April 14, 2010, Mr. Brassington was suspended from the RCMP with pay.
- October 2010, the OPP completed their investigations.
- November 2010, the RCMP concluded 66 Code of Conduct allegations were substantiated against Mr. Brassington and proceeded with formal discipline.
- June 23, 2011, Mr. Brassington was charged with one count of breach of trust, three counts of willfully attempting to obstruct justice, and three counts of fraud.
- July 10, 2013, Mr. Brassington retired from the RCMP.

[9] On January 18, 2019, Mr. Brassington pled guilty to breach of trust and obstruction of justice. He was sentenced to two years less a day to be served in the community and to pay \$10,000.00 in restitution.

A. *LAPE Requests*

[10] The TB Policy provides legal assistance and indemnification for Crown servants subject to legal claims that arose in relation to their employment.

[11] Mr. Brassington made his first request for LAPE on April 8, 2010. This request was approved on April 28, 2010, for the initial consultation phase of the criminal proceedings.

[12] In December 2010, following the conclusion of the OPP investigations, Mr. Brassington's LAPE was terminated. Mr. Brassington filed a grievance and on October 20, 2011, LAPE was reinstated retroactive to April 28, 2010, for up to \$10,000.00 for the criminal investigation phase.

[13] In November 2011, Mr. Brassington's legal counsel wrote to the RCMP, advising that Mr. Brassington's trial would likely take six to eight weeks, and that legal fees would exceed \$50,000.00.

[14] On April 4, 2012, Mr. Brassington applied for LAPE for the trial phase of the criminal charges. This is ultimately the request refused by the Minister in the June 2019 Decision.

[15] On May 11, 2012, Mr. Brassington provided additional documentation in support of his LAPE application, including an Early Resolution Memorandum dated October 7, 2011, prepared by Caroline Lirette [Lirette Memorandum], which attached reports from two psychologists. Ms. Lirette was legal counsel for Mr. Brassington during the October 2011 grievance process.

[16] On November 13, 2012, the RCMP Commissioner denied the LAPE request.

[17] On December 19, 2012, Mr. Brassington grieved the RCMP Commissioner's decision, and on June 22, 2014, the Level I Adjudicator denied the grievance.

[18] In November 2014, Mr. Brassington's Level II grievance was referred to the RCMP External Review Committee [ERC]. On October 17, 2016, the ERC concluded the RCMP Commissioner's decision was a breach of Mr. Brassington's procedural fairness rights, and recommended the Level II Adjudicator allow the grievance, reinstate LAPE to December 10, 2010, and authorize LAPE for the trial phase.

[19] On September 8, 2017, the Level II Adjudicator agreed with the ERC's finding that the RCMP Commissioner's decision was unfair, but disagreed on the remedy of approving LAPE for the trial phase. Further, as trial phase costs would exceed the RCMP Commissioner's \$50,000.00 authorization limit, the Level II Adjudicator refused to reinstate the authorization.

The Level II Adjudicator concluded:

Therefore, in order for the Grievor to have his eligibility for LAPE considered afresh for legal services rendered after December 8, 2010, he must submit a statement of account issued by his private counsel, together with any relevant and necessary supporting documentation for presentation to the appropriate approval authority based on the extent of the legal fees incurred to date.

[20] In the Disposition section of the decision, the Level II Adjudicator stated:

In light of the foregoing, I suggest that the Grievor presents a statement of account of the legal expenses issued by his private counsel, together with any relevant and necessary supporting documentation (which may include submissions), to the Director General, Workplace Responsibility Branch, National Headquarters, for presentation to the appropriate approval authority based on the extent of the legal fees incurred after December 8, 2010, to date.

[21] On August 29, 2018, Mr. Brassington submitted invoices for legal services rendered between December 2010 and March 2018, a request for a change of counsel, and a request for pre-approval for legal fees up to \$300,000.00. As the funding request exceeded \$50,000.00, the request had to go to the MPSEP.

[22] On January 30, 2019, the RCMP Commissioner wrote to the MPSEP, requesting a decision on the LAPE request. The RCMP Commissioner summarized the background to the request and stated:

Based on the information before me in relation to this matter, I do not support Sergeant Brassington's request for legal assistance at public expense. In my opinion, the information available in this matter shows that the three basic eligibility criteria at 6.1.5 of the Policy have not been met. It would not be in the public interest to approve this request. Please refer to Appendix "A" for a summary of the evidence revealed during the OPP investigation.

[23] It is unclear if the Appendix "A" referenced to in this letter is the same Appendix "A" attached to the Minister's Decision, as there is no Appendix attached to the RCMP Commissioner's letter in the Certified Tribunal Record [CTR].

B. *Decision Under Review*

[24] The MPSEP's Decision is dated June 27, 2019, but Mr. Brassington was not informed of the Decision until July 30, 2019.

[25] The Decision consists of a form, which provided the MPSEP with two options. The MPSEP selected 'Option A', which states:

I do not approve the request on the basis that Sergeant Brassington does not meet the criteria of Policy of acting in good faith; not acting contrary to the interests of the Crown; and within the scope of his duties as an RCMP member as outlined in Appendix “A.”

[26] Appendix “A” summarizes the TB Policy criteria and Mr. Brassington’s circumstances as follows:

Sergeant Brassington was charged with breach of trust contrary to section 122 of the *Criminal Code* for conducting himself in such a manner that would knowingly compromise witness safety, officer and witness credibility and the admissibility of evidence during the course of the investigation.

He was also charged for willfully attempting to obstruct the course of justice in a judicial proceeding by conducting himself in such a manner that would knowingly compromise witness safety, officer and witness credibility and the admissibility of evidence during the course of a homicide investigation contrary to 139(2) of the *Criminal Code*.

Finally, he was charged with fraud contrary to subsection 380(1) of the *Criminal Code* for having by deceit, falsehood and other fraudulent means, defraud the RCMP of monies by causing the RCMP to incur expenses for flights, hotel rooms, meals, transportation, wages and overtime wages.

On January 18, 2019, he plead guilty to breach of trust and obstruction of justice.

The investigation conducted by the OPP revealed that Sergeant Brassington:

- engaged in unprofessional behaviour in that he initiated a sexual relationship with potential witness “A” and then obtained her statements, evidentiary in nature, for a multiple homicide investigation and an unsolved homicide investigation. He made no notification of his conduct nor did he take any measures to remove himself from having further contacts with her;
- engaged in inappropriate conduct including having a sexual relationship with witness “A”, taking her to an adult entertainment facility and drinking in excess with her and other officers resulting in inappropriate conduct;

- engaged in deceitful and fraudulent activity by facilitating his relationship with witness “A” at the expense of the RCMP, submitting hotel receipts, meals, flights, transportation, wages and overtime when in essence, he was socializing with his girlfriend (witness “A”);
- participated or was aware of breaches to the safe house locations of witness “A” and another witness. He was also aware that witness “A” and the other witness has been provided with an opportunity to spend time alone together and possibility [sic] contaminate their evidence. Furthermore, he was aware that three civilians had attended at the various safe house locations of witness “A” and did not report the breach.
- provided witness “A” with information regarding the status and activity of a potential informant.
- became aware of inappropriate conduct and fraudulent behavior of other RCMP members and did not report their conduct to management.

Sergeant Brassington was a supervisor and one of the lead investigators on the Integrated Homicide Investigation Team. His conduct is a serious and marked departure from the standards expected of a police officer assigned to the care and protection of a witness. By his actions, Sergeant Brassington placed protected witnesses and a potential confidential informant in danger.

Based on the foregoing, I find Sergeant Brassington does not meet the eligibility criteria of the Policy. It would not be in the public interest to approve this request.

[27] The Decision was provided to Mr. Brassington by a letter from the RCMP Commissioner, dated July 30, 2019. The letter summarizes the materials the MPSEP considered, the TB Policy considerations, and repeats the findings in Appendix “A” of the Decision.

II. Amendment to the Style of Cause

[28] The Respondent submits the Attorney General of Canada is the proper Respondent, per *Federal Courts Rules*, SOR/98-106, Rule 303(1). Mr. Brassington consents to this request.

[29] The style of cause is hereby amended, with immediate effect, to name the Attorney General of Canada as the sole Respondent.

III. Issues and Standard of Review

[30] I have determined that the procedural fairness issues are determinative of this judicial review. I will address the following issues:

- A. Was the LAPE consideration process fair?
- B. What is the appropriate remedy?

[31] On procedural fairness issues, the Court must consider whether the process was fair in all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56 [*Canadian Pacific*]). A reviewing Court must ask, “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (*Canadian Pacific* at para 54).

IV. Analysis

A. *Was the LAPE Consideration Process Fair?*

[32] In assessing the fairness of the process in this case, the Court is guided by the factors outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], which were affirmed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 as follows at paragraph 77:

...Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself [citations omitted].

[33] In applying *Baker*, the Court must consider the particular circumstances of the case with reference to a number of factors, including the factual context, the applicable scheme, and the importance of the decision to the affected individual.

[34] The applicable facts are outlined above.

[35] The relevant provisions of the TB Policy are as follows:

3. Context

3.1 Providing legal assistance and indemnification to Crown servants is essential to the protection of the Crown's interest, the fair treatment of its servants, and the effective management of an organization. Crown servants may be subject to legal claims/actions despite the fact that they are acting in good faith, within the scope of their duties or in the course of their employment. It is therefore necessary that they receive appropriate legal representation and be protected from personal liability as long as they are not acting against the interests of the Crown.

...

5. Policy Statement

5.1 Objective

The objectives of this policy are to:

- protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown;
- protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and
- ensure continued and effective public service to Canadians.

5.2 Expected results

The expected results of this policy are that:

- Crown servants' and the Crown's interests are protected from potential or actual liability arising from the acts or omissions of Crown servants occurring while they were acting within the scope of their duties or in the course of their employment, and not acting against the interests of the Crown;
- Crown servants are protected against personal liability through fair and consistent policy application;
- the Crown and Crown servants are appropriately and promptly represented; and

- parliamentary proceedings, commissions of inquiry and inquests have the full collaboration of Crown servants.

6. Policy Requirements

6.1 Approval authorities are responsible for:

6.1.1 Decision making: Making decisions to approve or not approve requests for legal assistance and indemnification from Crown servants, within the scope of authority as set out in Appendix A. Decisions in respect to a request for legal assistance or indemnification are the responsibility of the approval authority for the organization where the incident giving rise to the request first arose.

6.1.2 Timely response: Ensuring timely responses to Crown servants who are requesting legal assistance or indemnification under this policy, and for ensuring that claims or threats of suits are acted upon quickly and that dispute resolution mechanisms are considered, as appropriate.

6.1.3 Eligibility: In making a decision on whether to approve a request for legal assistance or indemnification, ensuring that the Crown servant meets:

- the three basic eligibility criteria as described in 6.1.5; or
- the exceptional circumstances as described in 6.1.8; or
- the two qualifying criteria pertaining to parliamentary proceedings, commissions of inquiry, inquests or other similar proceedings as described in 6.1.9; and
- the requirements set out in Appendix B.

The approval authority may seek the advice of any officials who may have knowledge of the facts, as well as the legal advice of the Department of Justice Canada prior to making this decision. The decision should be made before legal counsel engages with the Crown servant to avoid a potential conflict situation, which would be detrimental to the interests of both the Crown servant and the Crown.

6.1.4 Initial presumption: In assessing the requests of Crown servants, presuming initially that they have met the

basic eligibility criteria as described in 6.1.5 unless or until there is information to the contrary.

6.1.5 Three basic eligibility criteria: In considering Crown servants for legal assistance or indemnification, determining whether the Crown servant:

- acted in good faith;
- did not act against the interests of the Crown; and
- acted within the scope of their duties or course of employment with respect to the acts or omissions giving rise to the request.

...

6.1.8 Exceptional circumstances: Deciding whether to provide legal assistance or indemnification in the situations enumerated in 6.1.6 where the Crown servant does not meet one or more of the three basic eligibility criteria as set out in 6.1.5, provided the approval authority considers that it would be in the public interest to approve the request, after having consulted the Advisory Committee on Legal Assistance and Indemnification.

[36] Appendix A of the TB Policy contains a chart which sets out the approval authority and scope of approval for LAPE requests, depending on who the requestor is and the level of legal assistance sought. For current and former Crown servants, not otherwise specified in the chart, the Deputy Head can approve legal assistance provided by private counsel up to a limit of \$50,000.00. For requests for legal assistance provided by private counsel over \$50,000.00, the approval authority is the Minister in charge of the department.

(1) Level of Procedural Fairness Owed

[37] Mr. Brassington argues he was owed a high degree of procedural fairness considering the criminal charges he was facing. He submits that knowing whether he was going to have LAPE

funding was an important factor for him to be able to instruct his legal counsel. As the criminal charges arose during his service with the RCMP, the possibility of imprisonment posed a unique and significant risk to him. As a former police officer involved in homicide and gang investigation work, he faced the real possibility of imprisonment with inmates who had been incarcerated because of his police work.

[38] According to the Respondent, LAPE requests are determined on a *case-by-case* basis and are subject to the approval authority's discretionary assessment of the eligibility criteria in the TB Policy. As such, the Respondent argues that Mr. Brassington was entitled to a minimal level of procedural fairness. Further, the Respondent argues the fact that Mr. Brassington's interests were purely economic also supports a lower level of procedural fairness.

[39] To assess the procedural fairness obligations of the administrative decision-maker in applying the TB Policy, the language used in the Policy is instructive. The TB Policy notes, “[p]roviding legal assistance and indemnification to Crown servants is essential to the protection of the Crown's interest [and] the fair treatment of its servants” [emphasis added]. The TB Policy also states the administrative decision-maker is responsible for “[e]nsuring timely responses to Crown servants who are requesting legal assistance or indemnification under this policy, and for ensuring that claims or threats of suits are acted upon quickly” [emphasis added].

[40] I acknowledge that the consideration of an application pursuant to the TB Policy involves an exercise of discretion, which suggests a lower level of procedural fairness was owed to Mr. Brassington. However, questions of inordinate delay engage the doctrine of abuse of process,

which “has always focused on the *integrity of the justice system* rather than the interests of particular litigants [emphasis in original]” (*Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 143 [*Abrametz*], citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 43; see also *Ontario v OPSEU*, 2003 SCC 64 at para 12; *IATSE, Stage Local 56 v Société de la Place des Arts de Montréal*, 2004 SCC 2 at para 16).

[41] Receiving a “timely response” to a LAPE application is one of the stated objectives of the TB Policy. The timeliness of the response does not require an in depth consideration of whether the Decision was “made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context” (*Baker* at para 22). Rather, in my view, either a timely response was received, or it was not.

[42] In a similar vein, ensuring the decision-maker had the full record of materials regarding a LAPE application in order to make a fully informed decision is a basic requirement to ensure the fairness of the decision-making process.

[43] In this case, a determination of the level of procedural fairness owed to Mr. Brassington as high or low does not address the procedural failures. The procedural failures were: (1) failure to provide a timely response to the LAPE request; and (2) the failure to ensure the Minister had the full record. As a result of these failures, the process was defective.

[44] In any event, considering that Mr. Brassington was facing criminal charges and a risk of imprisonment, I would have no difficulty concluding that a heightened level of procedural fairness was owed to him.

[45] I will address the procedural failures below.

(2) Was there a Failure to Provide a Timely Response to the LAPE Request?

[46] In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], the Supreme Court held, “[u]nreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly” (at para 162). The three main factors to be considered in assessing whether a delay was unreasonable are the length, the cause, and the impact of the delay (*Blencoe* at para 160).

[47] In *Abrametz* at paragraph 43, the Supreme Court reaffirmed the three-part *Blencoe* test to determine whether a delay that does not affect the fairness of a hearing amounts to abuse of process:

...First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute [citations omitted].

[48] Mr. Brassington’s first phase of LAPE funding was approved in April 2010. After he was criminally charged in June 2011, Mr. Brassington requested LAPE funding for his criminal

trial on April 4, 2012. This request was denied by the RCMP Commissioner in November 2012. The request then went through two levels of grievance adjudication, which included a referral to the ERC. The grievance process took nearly five years, from December 2012 to September 2017.

[49] The Level II grievance decision concluded that the LAPE request needed to be sent to the MPSEP, as it was over the \$50,000.00 authorization approval limit of the RCMP Commissioner. Mr. Brassington submitted additional invoices for legal services in August 2018.

[50] Mr. Brassington filed a *mandamus* application for judicial review on December 19, 2018 in Court Docket T-2162-18, seeking to compel the Minister to make a decision on his LAPE application.

[51] Finally, in January 2019, the LAPE application was put before the MPSEP. The Decision was then issued in June 2019.

[52] Although the LAPE request went through numerous administrative processes, the LAPE request took over seven years to reach the appropriate decision-maker, being the MPSEP. This is despite the fact the initial request in 2012 indicated Mr. Brassington was seeking over \$50,000.00 in LAPE funding, which exceeded the RCMP Commissioner's approval authority. For comparison, it took 20 days from the time Mr. Brassington submitted his first LAPE application for the initial consultation phase in April 2010 for him to receive a decision.

[53] There is no explanation as to why it took seven years for the LAPE application to be put before the appropriate decision-maker. The grievance process, and the delays it caused, may not have been necessary as the RCMP Commissioner was not the appropriate decision-maker in 2012, when the trial funding LAPE application was originally denied.

[54] There is no doubt the seven-year delay in getting the LAPE application before the appropriate decision-maker was inordinate.

[55] Mr. Brassington explains the impact of not knowing if he would have LAPE funding for the criminal trial as follows in his Affidavit:

26. My trial was scheduled to begin in January of 2019. The estimate for trial was approximately six weeks. The prospect of a six week trial with my lawyers unpaid was unthinkable to me. I was terrified that I may never be able to pay them. It was an extremely difficult time and the lack of funding weighed heavily on my decisions in conducting my defence. I was worried that there was no money for expert witnesses to testify about my PTSD and the effects that it had on my decisions during the Surrey Six investigation.

27. I was angry because I had won my grievance and the RCMP was simply not responding to my lawyers. The court proceedings could not wait indefinitely.

...

31. January 7 I instructed my counsel began discussions with Crown about a plea. I was confident that I had valid defences if we went to trial, but the Crown was seeking a lengthy federal jail term if we were unsuccessful. As the father of six children, two of whom were preschool aged, my ultimate goal was to stay out of jail. I was a former homicide detective who had 'flipped' many witnesses and investigated British Columbia's most dangerous gangsters. I had to avoid going to prison.

[56] Perhaps most prejudicial to Mr. Brassington was that the request was not submitted to the MPSEP for approval until after he pled guilty. He pled guilty on January 18, 2019, and the LAPE application was forwarded to the Minister on January 30, 2019. Mr. Brassington did not receive the MPSEP's Decision until July 30, 2019, more than six months after he pled guilty.

[57] Mr. Brassington's circumstances changed while a decision on the LAPE request was pending - namely, he pled guilty to the criminal charges against him. Although the request for LAPE funding for the trial of his criminal proceedings was made some seven years before he pled guilty, part of the justification in denying LAPE funding was his guilty plea. The RCMP Policy Centre request for the Minister's decision on Mr. Brassington's LAPE application, dated January 24, 2019, expressly states: "In the case at hand, since the Member plead guilty, he established that he did not act within the scope of his duties as an RCMP Member."

[58] Had a timely decision been afforded to Mr. Brassington, a "guilty plea" would not have been available to the Minister as a ground for refusal. Nowhere in the TB Policy does it indicate that the decision-maker should await the outcome of the proceedings before making a LAPE funding decision. In fact, perhaps obviously, the TB Policy suggests otherwise and specifically references the importance of a timely decision.

[59] Further, the RCMP Commissioner and the MPSEP's reliance on Mr. Brassington's guilty plea to justify that he did not meet the TB Policy objectives for LAPE funding was itself procedurally unfair. The LAPE funding application that Mr. Brassington had applied for was for the *trial* phase of his criminal proceedings. His guilt or innocence had not been established when

he applied for funding, so using his guilty plea to retroactively deny funding for his criminal trial, and all the associated legal work to reach a plea deal, was unfair. Mr. Brassington could not have known that his decision to plead guilty, which in his view was necessitated at least in part by the lack of LAPE funding, would be a factor considered in denying the LAPE request.

[60] In my view, this process where a decision on legal funding was only made after the outcome of the criminal case, was not a fair process to Mr. Brassington. The delay was contrary to the TB Policy and put Mr. Brassington in legal jeopardy.

(3) Did the Minister have the Full Record?

[61] Mr. Brassington argues the RCMP failed to provide the relevant and probative LAPE documents to the Minister and that this omission was a breach of procedural fairness. He says he relied upon the RCMP to forward to the Minister all of the materials submitted for his LAPE application. The CTR demonstrates that some documents Mr. Brassington submitted in his trial phase LAPE application and that he considered key to understanding the circumstances that gave rise to his behaviour that led to the criminal charges were not included.

[62] The Respondent does not dispute this information was not before the Minister. It argues that it was Mr. Brassington's obligation to provide the information he wanted considered in support of his LAPE application. The Respondent claims the RCMP did not have access to materials Mr. Brassington submitted as part of the grievance process. As such, it submits the MPSEP could only review materials Mr. Brassington directly submitted with his 2018 LAPE application.

[63] A review of the key communications between Mr. Brassington and the RCMP is necessary to put this submission in context.

[64] The Level II grievance decision of September 8, 2017, advised Mr. Brassington to provide information on his change of legal counsel and to provide updated statement of legal fees.

[65] On January 24, 2018, Betty Georgoulas, Claims Analyst, Civil Litigation Analysis Unit, RCMP 'E' Division, emailed Mr. Brassington acknowledging that his change of counsel request had been received. She requested that he submit a LAPE application form with any relevant supporting documentation.

[66] On May 16, 2018, Ms. Georgoulas emailed Mr. Brassington and stated:

Following our discussion earlier, I spoke with my Manager, Karen Aiello. I will look through our file material for the document you indicated Mr. Yates prepared for you back in 2010/11.

...

I will get back to you and let you know one way or another if I locate the document.

[67] The same day, Mr. Brassington responded to Ms. Georgoulas' email, and stated as follows:

Hi Betty; please forward the entire application package, including but not limited to, the written submission which was submitted on my behalf by Norman Yates and ultimately resulted in the October 2016 decision by the Chair of the External Review Committee (Ms Walker) to allow my grievance and and [sic] provide for L.A.P.E.

I am very concerned that your office is treating this as a new or stand alone Application for LAPE when it ought to be treated as a simply a Change Of Counsel Application.

[68] On May 17, 2018, Mr. Brassington received an email in response from Karen Aiello, Regional Manager of Claims, Litigation & Advisory Service, RCMP 'E' and 'M' Divisions [Aiello Email], stating:

...I do wish to let you know that anything that was prepared as part of your grievance may not be in our file.

In an effort to ease you concerns, we are not simply treating this as a new application. The direction on the Grievance decision was as follows:

“...the Grievor presents a statement of account of the legal expenses issued by his private counsel, together with any relevant and necessary supporting documentation (which may include submissions), ... for presentation to the appropriate approval authority based on the extent of the legal fees incurred after December 8, 2010.”

...

This process is not only in relation to fees, but also when a change of counsel is requested or there is a new phase, where the monetary component is above the amount of the Division's authority. The ED6105 we are requesting you to prepare at this time will be for the presentation on the legal fees incurred after December 8, 2010, and for the change of counsel in relation to the criminal matter. The Division no longer has the authority to make any decisions relating to this matter, including the change of counsel.

[69] Mr. Brassington's legal counsel informed Ms. Aiello by letter, delivered via email, dated June 7, 2018, that he adopted and was relying on “the submissions and supporting materials provided with Ms. Lirette's memorandum of 7 October 2011...and attachments” to support

Mr. Brassington's trial LAPE application. The supporting materials provided with the Lirette Memorandum included two psychological reports.

[70] These psychological reports are not in the CTR, and were therefore not before the Minister.

[71] These psychological reports are attached to Mr. Brassington's Affidavit filed in this judicial review Application. Mr. Brassington argues the Minister should have had these professional opinions to understand his state of mind at the relevant time of the criminal proceedings.

[72] In a report dated July 27, 2011, Dr. Randy Mackoff, who treated Mr. Brassington for ten months, states:

In my opinion, from a clinical perspective, as a consequence of spending many hours with gang members and gang associates/affiliates Sgt. Brassington lost his own sense of self and adopted some of the characteristics of the targets of his investigations. Sgt. Brassington developed some empathy for individuals involved in the gang "culture". Hence, his psychological ability to fully disengage from the targets of his investigation was compromised as a consequence of his investigative involvement. In my opinion, his ability to disengage negatively affected his decision making.

At the time that I was treating Sgt. Brassington he was suffering from an Adjustment Disorder with Mixed Anxiety and Depressed Mood. The etiology of this disorder is a psychological response to identifiable stressors that Sgt. Brassington encountered.

[73] In a psychological report dated August 24, 2011, Registered Psychologist C. Paul Peel specifically addressed Mr. Brassington's behavior as follows:

Sgt. Brassington was under considerable general pressure to solve high profile cases. When he commenced the Surrey 6 investigation on 19 October 2007 as the Team Leader and Investigator, he was in a highly vulnerable psychological state, but he was determined and dedicated to prove the capabilities of the RCMP. Under this pressure, Sgt. Brassington took only 7 complete days off in 2009 (out of 38 partial days) as well he incurred a large amount of overtime (approximately 595 hours from February to April 2009). In addition, it was Sgt. Brassington [sic] responsibility to create and maintain superficially sincere relationships with multiple individuals (some difficult / some hostile / some murder suspects) involved in the criminal element (gang culture) by constantly having to adopt a suitable persona. Over time, the accumulative effects of this work had a psychological impact on his emotional and mental well being. It is no surprise that the line between "acting" and reality became blurred so that the negation of his police identity and his enacted compassion for work targets affected his decision making abilities.

[74] Returning to the question of responsibility for providing these materials to the Minister, it is helpful to look to the language of the TB Policy itself. Appendix A to the TB Policy provides as follows:

*Where Treasury Board approval is required, the responsibility for preparation of all documentation related to a submission rests with the organization where the act or omission giving rise to the request first occurred.

[75] Although Appendix A specifically references Treasury Board approval, it stands to reason that the same principles would apply where Ministerial approval is required. Based upon Appendix A to the TB Policy, there can be no doubt that the "organization" with the responsibility to prepare all the documentation related to the submission is the RCMP.

Accordingly, the Respondent's position that Mr. Brassington had sole responsibility for the submission of materials is not reflected in Appendix A.

[76] Second, the Aiello Email (above) stated that the RCMP did not consider Mr. Brassington's 2018 submissions as a new application. Although the materials were prepared for the October 2011 grievance process, Mr. Brassington resubmitted the Lirette Memorandum and its attached psychological reports as part of his 2012 trial phase LAPE application. The materials were sent to Betty Georgoulas on May 11, 2012, *after* the trial phase LAPE application was submitted on April 4, 2012, but before the trial phase grievance process started.

[77] These materials were before the ERC and the Level II Adjudicator. Even though these two decisions were part of the grievance process, the decisions confirm that the Lirette Memorandum and attached psychological reports were submitted for the trial phase LAPE application. The ERC decision notes:

On April 4, 2012, the Grievor requested LAPE for his court appearance and the trial phase of the criminal proceedings against him...On May 11, 2012, the Grievor provided additional information in support of his LAPE request, including his MR's October 2011 ER Memorandum and two psychologists' reports.

[78] Similarly, the Level II grievance decision states:

In an email dated April 4, 2012, the Grievor requested LAPE for the trial phase...On May 12, 2012, the Grievor provided additional documentation in support of his LAPE request: an Early Resolution Memorandum dated October 7, 2011, written by Ms. C.L. from the RCMP Member Representative Directorate and two psychologists' reports dated July 27, 2011, and August 24, 2011.

[79] In my view, the RCMP had the obligation pursuant to the TB Policy to forward to the Minister all the information Mr. Brassington submitted in relation to his LAPE application. In light of the specific direction in the TB Policy stating that where Treasury Board approval is required, the responsibility for preparation of all documentation related to a submission rests with the organization where the act or omission giving rise to the request first occurred; in this case, there is no doubt that the RCMP is that organization.

[80] The failure of the RCMP to forward all the materials Mr. Brassington submitted, as part of his trial phase LAPE application, whether in 2012 or 2018, to the Minister was a breach of procedural fairness.

B. *What is the Appropriate Remedy?*

[81] Mr. Brassington seeks an order directing the Minister to approve his LAPE application. He argues that as the trial phase LAPE application has now been pending for over 11 years, it would be unfair to him for this Court to quash the Decision and send it back for redetermination by the Minister.

[82] A directed verdict is an extraordinary remedy, available where there is only one available outcome or in circumstances of extreme maladministration (*Doyle v Canada (Attorney General)*, 2022 FCA 56 at paras 6-8; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14).

[83] The exceptional nature of the remedy recognizes “administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them” (*D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 17).

[84] While I am sympathetic to Mr. Brassington’s submissions, in these circumstances it is not appropriate for the Court to issue a directed verdict as requested. This judicial review is being granted on procedural fairness grounds and, as such, it is a finding with respect to the fairness of the process and not the reasonableness of the outcome (*Canadian Pacific* at paras 44, 54).

[85] Therefore, Mr. Brassington’s LAPE application, with any supplemental submissions he wishes to make, will be remitted to the Minister for redetermination.

V. Conclusion

[86] The Decision is quashed and will be sent for redetermination. Mr. Brassington will have the opportunity to make further submissions, including the submission of any documentation he believes is relevant to the evaluation of his LAPE application.

[87] Mr. Brassington is entitled to his costs. If the parties cannot agree on costs, they can make submissions on costs within 15 days of the date of this Judgment. Submissions shall not exceed 10 pages.

JUDGMENT IN T-1785-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, with immediate effect, to name the Attorney General of Canada as the sole Respondent;
2. The Decision of the Minister of Public Safety and Emergency Preparedness, dated June 27, 2019, is quashed and remitted for redetermination;
3. Mr. Brassington will be permitted to make further submissions in support of his request for legal assistance at public expense; and
4. Mr. Brassington is entitled to his costs. If the parties cannot agree on costs, they can make submissions on costs within 15 days of the date of this Judgment. Submissions shall not exceed 10 pages.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1785-19

STYLE OF CAUSE: BRASSINGTON v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BC

DATE OF HEARING: JANUARY 23, 2023

JUDGMENT AND REASONS: MCDONALD J.

DATED: MAY 18, 2023

APPEARANCES:

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