Court File Nos.:C66995 & C66998

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

CANADIAN BROADCASTING CORPORATION

Appellant

- and -

LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, THE INDEPENDENT POLICE REVIEW DIRECTOR, THE FIRST NATION PUBLIC COMPLAINANTS, THE CHIEF OF POLICE OF THE THUNDER BAY POLICE SERVICE, AND THE RESPONDENT OFFICERS

Respondents
(Respondents on Appeal except The First Nation Public Complainants)

FACTUM OF THE CANADIAN BROADCASTING CORPORATION

Date: August 15, 2019

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Court File No.: DC-18-018-JR

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

CANADIAN BROADCASTING CORPORATION

Appellant

- and -

LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, THE INDEPENDENT POLICE REVIEW DIRECTOR, THE FIRST NATION PUBLIC COMPLAINANTS, THE CHIEF OF POLICE OF THE THUNDER BAY POLICE SERVICE, AND THE RESPONDENT OFFICERS

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FACTUM OF THE CANADIAN BROADCASTING CORPORATION

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PART I – NATURE OF APPEAL

1. These are the written submissions of CBC/Radio-Canada ("**CBC**") in support of its appeal of the decision of the Divisional Court dated January 7, 2019. The Divisional Court dismissed CBC's application for judicial review of the decision of The Honourable Mr. Ferrier ("**Ferrier**") which held that a presumptively open hearing under s. 83(17) of the *Police Services Act*[1] (the "**Hearing**") should be held *in camera* and, in doing so, that the *Dagenais/Mentuck* test had no application.

PART II – OVERVIEW

2. The purpose of the *Police Services Act* (the "***PSA***" or the "**Act**") is to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police.[2] Consistent with this purpose, the Act mandates that all meetings and hearings of a police services board are presumptively open to the public.[3] The constitutional right of members of the public to attend board meetings has been judicially recognized[4], and courts and legislators have repeatedly noted that transparency of the policing system is important to foster public acceptance and understanding.[5]

3. Public scrutiny is particularly important in the case of hearings under s. 83(17) where a board can exercise its discretion to prevent a disciplinary hearing even where the public

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[1] R.S.O. 1990, c. P.15, s. 83(17) [*PSA*], Schedule B.
[2] *Figueiras, infra* note 50 at para 41, Canadian Broadcasting Corporation's Book of Authorities [CBC Book of Authorities], Tab 19.
[3] *PSA, supra* note 1, s. 35, Schedule B.
[4] *Langenfeld, infra* note 51at paras 50-52, CBC Book of Authorities, Tab 20.
[5] See LeSage Report, *infra* note 47 at para 75, CBC Book of Authorities, Tab 47; *Figueiras, infra* note 50 at para 41, Canadian Broadcasting Corporation's Book of Authorities [CBC Book of Authorities], Tab 19.

oversight body has found, as in this case, that there are grounds to believe that police officers committed serious misconduct.

4. Ferrier treated the matter before him as an administrative matter to which openness principles, and therefore the *Dagenais/Mentuck* test, did not apply. This was an error of law.

5. The Divisional Court erred in deferring to Ferrier. The question of whether the *Dagenais/Mentuck* test applies to the exercise of discretion to close a presumptively open hearing is a pure question of law of general importance to the legal system as a whole. The standard of review on such issues is correctness. Even if a reasonableness standard applied, the failure to apply the *Dagenais/Mentuck* test was unreasonable.

6. It is well-established that openness principles apply to tribunals and that a party seeking to close a presumptively open hearing must meet the *Dagenais/Mentuck* test. Both Ferrier and the Divisional Court conflated the issue of the procedural protections that apply to a s. 83(17) hearing with the fundamentally different question of whether openness principles apply. The fact that courts have found that natural justice requirements for a s. 83(17) hearing are met without a full evidentiary hearing does not in any way diminish the importance of openness or oust application of the *Dagenais/Mentuck* test. Section 83(17) hearings are part of a presumptively open system in which there is a great interest in transparency and public scrutiny.

7. Allowing a board to exclude the public without applying the *Dagenais/Mentuck* test results in the constitutional safeguard for openness being side-stepped. It allows a board to exclude

the public even where it is not necessary to do so and even where a lesser measure could afford the same protection. This is unconstitutional.

8. Had Ferrier applied the *Dagenais/Mentuck* test, he would have arrived at a different result. The report of the Office of the Independent Police Review Director ("**OIPRD**") respecting its investigation into the officers' alleged misconduct had been released to the public such that the exclusion of the public was unnecessary, as the public already knew the details of the allegations and of the investigation. Even if necessity could have been established, lesser measures, such as a partial publication ban, would have protected against the alleged harms that Ferrier identified in his decision.

9. The Divisional Court decision should be overturned and Ferrier's decision quashed. This will almost certainly result in the s. 83(17) hearing being open so that the public can scrutinize the board decision respecting whether the complaint against the officers should proceed to a disciplinary hearing despite more than six months having elapsed since the complaint.

PART III – FACTS

A. Stacy Debungee's Death

10. The body of Stacy DeBungee ("**DeBungee**") was discovered in the McIntyre River on the morning of October 19, 2015.

11. Thunder Bay Police Service ("**TBPS**") issued a statement within hours indicating that the death was not suspicious.

12. Shortly after DeBungee's body was found, Rainy Rivers First Nations hired an investigator who prepared a report that raised questions about clues that were not pursued by the Thunder Bay police.

13. On March 18, 2016, the OIPRD received complaints from Brad DeBungee (Stacey's brother) and Chief Leonard of Rainy Rivers First Nation.

14. On April 22, 2016, the OIPRD decided to undertake its own investigation into the TBPS's handling of DeBungee's death. The OIPRD report, which was released to the public, found, among other things, that:

    i. "…there was no basis to affirmatively rule out foul play based on observations made at the scene or event after the autopsy examination";

    ii. the deficiencies in the investigation were "substantial" and deviated "significantly" from what was required providing reasonable and probable grounds to support an allegation of neglect of duty; and

    iii. "…the evidence is clear that an evidence-based proper investigation never took into [DeBungee's] sudden death".[6]

15. The OIPRD report and its substantiation of allegations that DeBungee's death was not investigated adequately by the Thunder Bay police, raised calls for an overhaul of the

[6] See CBC Articles, Affidavit of Corey Groper, sworn October 26, 2018, Appeal Book and Compendium of the Canadian Broadcasting Corporation, February 25, 2019, [CBC Appeal Book], Tab 13, Exhibit "A" at pp. 263 and 268.

Thunder Bay Police Service as well as for a *PSA* disciplinary hearing for the three officers who investigated DeBungee's death.[7]

B. The Section 83(17) Hearing

16. As more than six months had elapsed since the OIPRD started its investigation, it directed the TBPS to bring an extension application under s. 83(17) of the *PSA*.

17. The TBPS Board (the "**Board**") was initially scheduled to hear the extension application on April 6, 2018, but prior to that date, it determined that the Board deciding the extension application would give rise to a reasonable apprehension of bias.

18. The Board brought an application requesting the appointment of a disinterested person under s. 16 of the *Public Officers Act*.[8]

19. On July 25, 2018, Ferrier was appointed to exercise the powers and duties ordinarily imposed on the Board under s. 83(17) of the *PSA*.[9]

20. The Hearing under s. 83(17) of the *PSA* was scheduled to be heard on September 21, 2018. It was to be comprised of written and oral submissions.[10]

21. The purpose of the Hearing is to determine whether it was reasonable to delay the service of notices of disciplinary hearings on three police officers as more than six months had elapsed since the initial complaint.[11] Absent a finding that the delay was reasonable, there

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[7] *Ibid.*
[8] R.S.O. 1990, c. P. 45, s. 16, [*Public Officers Act*], Schedule B.
[9] Decision of The Honourable Lee K. Ferrier, Q.C., CBC Appeal Book, Tab 8 at para. 21.
[10] *Ibid.* at para. 2.
[11] *Ibid.*

will be no disciplinary hearings for the officers despite the OIPRD's finding that there are reasonable grounds to believe that the officers committed serious misconduct.

22. The preliminary issue of whether the Hearing would be open to the public was first raised on July 20, 2018, during a conference call between Ferrier and the parties.[12]

C. Notice to CBC

23. Journalist Gillian Findlay (on behalf of CBC) received notice of the likelihood the Hearing would be closed to the public from Julian Falconer, counsel to the complainant family and First Nation (the "**Complainants**"), at 2:29 pm on Sunday, September 16, 2018, by way of an email. This email was also sent to a representative of the Toronto Star.[13]

24. The email from Mr. Falconer, which was responding to an email from Ferrier, stated:

> The issues of standing of the media and the application of Dagenais will be, of course, for you to determine.
>
> Respectfully, I have been instructed to provide notice of this issue to the media and through this email I am copying representatives of CBC and the Toronto Star on the question of whether the Thunder Bay Police Act hearing set for Friday should be closed to the public.[14]

25. Ms. Findlay emailed Ferrier at 3:59 pm on Sunday, September 16, 2018, and advised that CBC would be interested in becoming involved. Ferrier replied at 7:25 pm that submissions should be provided in writing.[15]

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[12] Position of Thunder Bay Police Service Re: *In Camera* Proceedings, Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "D", CBC Appeal Book, Tab 11, p. 152 at para. 7.
[13] Affidavit of Katarina Germani, sworn September 21, 2018, CBC Appeal Book, Tab 12 at para. 3.
[14] *Ibid.* Exhibit "A" at p. 241.
[15] *Ibid.* at para. 4.

26. Ferrier followed up the next day, Monday, at 7:11 pm and advised of a deadline of 4:30 pm on Wednesday, September 19, 2018. This provided CBC with less than 48 hours to prepare submissions.[16]

27. CBC's submissions were emailed to Ferrier at 3:38 pm on Wednesday, September 19, 2018. The supporting case law was extensive enough that it necessitated a zip folder.[17]

28. The Ferrier decision was sent by the Board to all parties, including CBC, at 9:07 am on September 20, 2018.[18]

D. The Ferrier Decision and CBC Expedited Application for Judicial Review

29. The Ferrier decision makes no mention of the fact that CBC had made submissions opposing *in camera* proceedings. Respecting the application of the *Dagenais/Mentuck* test, Ferrier found as follows:

> The *Dagenais/Mentuck* line of cases have no application to a board meeting where specific statutory provisions apply, where the Board is not a Court, there is not a judicial or quasi-judicial proceeding and the Board is performing an administrative act.[19]

30. Upon receipt of the Ferrier decision, CBC brought an application for a stay pending judicial review (the "**Stay Application**").

31. On learning of CBC's application to Divisional Court, Ferrier adjourned the Hearing pending a decision on the Stay Application. There is currently no date set for the Hearing.

E. The Decision of Justice Pierce on the Stay Application

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[16] *Ibid.* at para. 5.
[17] *Ibid.* at para. 6.
[18] *Ibid.* at para. 7.
[19] Decision of The Honourable Lee K. Ferrier, Q.C., CBC Appeal Book, Tab 8 at para. 31.

32. The Stay Application came before Madam Justice Pierce, a senior judge (appointed in 2001), who is based in Thunder Bay and who served as the Regional Senior Justice for the Northwest Region between 2009 and 2014.

33. Justice Pierce found that there was a serious issue to be tried, that proceeding with the Hearing *in camera* would cause irreparable harm, and that the balance of convenience favoured a stay pending judicial review.[20]

34. In her judgment, Justice Pierce emphasized the importance of the issues in the litigation and the consequential importance of transparency, stating as follows:

> The law does not develop in a vacuum. Critical to the evolution of the law is an understanding of the social and legal context in which a dispute arises. Differing facts may call for a different application of the law.
>
> The issues in this litigation are of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens. The complaint deals with policing related to Indigenous people in the City of Thunder Bay. The question underpinning this case is whether there has been systemic racism in policing Indigenous cases.
>
> This is also of interest to and has been reported on extensively by the press, including the CBC. Allegations of racist policing are the subject of a parallel inquiry conducted by the Honourable Murray Sinclair for the Ontario Civilian Police Commission. The results of that inquiry are still pending.
>
> ***
>
> In my view, on the facts of this case, it is important for the court to consider the extent to which the public can expect openness in administrative decision-making. Because of the complaint underlying this process – that policing practices related to Indigenous citizens in Thunder Bay are racist – it is even *more critical* that every step in the complaint procedure be dealt with transparently.
>
> Each step of the complaint process is a step on the way towards resolution which transparency must attach if the process is to be credible to the

[20] Stay Decision of Madam Justice H.M. Pierce, CBC Appeal Book, Tab 7 at paras. 43, 60 and 66.

> community. Failing to proceed openly will only sow distrust in the complaints procedure. It will do nothing to address the community's question about whether Thunder Bay's approach to policing indigenous matters is racist.[21]

F. The Divisional Court Decision

35. The judicial review application to the Divisional Court was heard on December 6, 2018. Its decision was released on January 7, 2019.[22]

36. The decision states (at paragraph 61) that "Ferrier's nine-page decision shows that he considered the parties' submissions before rendering the Decision". In fact, Ferrier's decision made no mention of CBC's submissions. It is speculative and entirely unreasonable for the Divisional Court to have concluded that Ferrier had considered CBC's submissions.

37. The Divisional Court devoted most of its reasons to the question of the appropriate standard of review of the Ferrier decision. As discussed below, the standard of review analysis was flawed in that it neglected that the question of whether the *Dagenais/Mentuck* test applied was a purely legal question of substantial importance to the legal system as a whole.

38. Having determined, incorrectly, that the appropriate standard of review was "reasonableness", the Divisional Court devoted most of the balance of its reasons to discussion of why the exercise of discretion was reasonable, an issue that was not before it.

39. The Divisional Court gave very short shrift to the question that was before it, which was whether Ferrier erred in failing to apply the *Dagenais/Mentuck* test. On this issue, the

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[21] *Ibid.* at paras. 13-15 and 48-49 [emphasis in original].
[22] Decision of the Honourable Justices Warkentin R.S.J., Aitken and Mulligan J.J., CBC Appeal Book, Tab 4.

Divisional Court appeared to adopt, with very little analysis, Ferrier's finding that the *Dagenais/Mentuck* test did not apply "to a board meeting where specific statutory provisions apply, where the Board is not a Court, there is not a judicial or quasi-judicial proceeding and the Board is performing an administrative act."

PART IV – ISSUES

40. The questions before this Court are:

    a. whether a finding that the *Dagenais/Mentuck* has no application is a legal finding of general application reviewable on a standard of correctness; and

    b. whether the Board, presiding over a presumptively open hearing, had to apply the *Dagenais/Mentuck* in deciding to hold a hearing *in camera*.

PART V – LAW AND ARGUMENT

A. The Applicable Standard of Review is Correctness

41. The question of whether the Board had to apply the *Dagenais/Mentuck* test in deciding to close a presumptively open hearing is a legal question of central importance outside the Board's expertise. Such a question must be reviewed on a standard of correctness.

42. The Divisional Court erred in concluding that Ferrier's Decision was reviewable on a standard of reasonableness. The Court made numerous errors in its analysis of the applicable standard of review, including the following:

i. It mistakenly found that because Board decisions under s. 83(17) are reviewed on a reasonableness standard, this standard should also apply to the question of whether the *Dagenais/Mentuck* applied.

ii. Misapplying *Doré*, it confused the question of the exercise of the discretion to close a presumptively open hearing with the broader legal question of the test to the be applied in exercising that discretion.

iii. Misapplying *Dunsmuir*, it failed to consider that the applicability of the *Dagenais/Mentuck* test is an issue of central importance outside of the Board's expertise.

i. The Standard of Review Applicable to a Board Decision Under s. 83(17) is Irrelevant

43. Throughout its reasons, the Divisional Court confused the question of the standard of review to be applied to the decision not to apply the *Dagenais/Mentuck* test with the standard applicable to the review of Board decisions under s. 83(17).

44. For example, the Divisional Court stated that "[t]here is jurisprudence to effect that the standard of review applicable to a police board's decision regarding an extension hearing is reasonableness".[23] Similarly, after noting that the decisions in capacity hearings before the Inquiries, Complaints and Report Committee ("**ICRC**") of the College of Nurses are reviewed on a standard of reasonableness, the Divisional Court stated that "[ICRC's] role has some similarities to that of the Police board under s. 83(17) of the *PSA* considering

[23] *Ibid.* at para 40.

whether, in all the circumstances, the time period in which to serve a notice of hearing should be extended."[24]

45. It appears that the Divisional Court was engaged in a misguided attempt to follow the guidance from *Dunsmuir* that if the standard of review has already been determined in other cases there is no need to repeat the analysis.[25]

46. The decision under review is not a decision under s. 83(17). The only issue under review is Ferrier's decision that the *Dagenais/Mentuck* did not apply to his decision to close a presumptively open hearing. This is a question of a fundamentally different character than the decision respecting an extension under s. 83(17). At an extension hearing, the Board must exercise its discretion in the face of a specific factual framework. The question of whether the *Dagenais/Mentuck* test applies is a pure question of law of general application.

ii. The Issue Under Review Was Not Whether Discretion Was Properly Exercised

47. Throughout its reasons, the Divisional Court conflated the question of whether the *Dagenais/Mentuck* test applied with the question of whether Ferrier properly exercised his discretion.

48. This conflation is evident by the Divisional Court's reliance on *Doré* to justify a standard of reasonableness. *Doré* stands for the proposition that a reasonableness standard applies to an administrative decision-maker's application of *Charter* protections in *the exercise of its*

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[24] *Ibid.* at paras. 40 and 46. See also para. 47.
[25] *Dunsmuir v. New Brusnwick*, 2008 SCC 9 at para. 62 [*Dunsmuir*], CBC Book of Authorities, Tab 1.

discretion.[26] Having determined that *Doré* applied, the Divisional Court characterized (at para. 54) Ferrier's decision-making process as follows:

> In deciding that the extension application should be heard *in camera,* Ferrier was exercising the discretion given to a police board under its home statute both to establish its own rules and procedures under s. 37 consistent with its mandate under the PSA, and, more specifically, to exercise the discretion granted to it under s. 35(4) of the PSA to hold an *in camera* meeting or hearing. **In exercising that discretion, Ferrier was required to consider the facts and to take into account policy considerations about which a police board is presumed to have a good understanding through its specialized knowledge and experience. These are the hallmarks suggesting a 'reasonableness' standard of review."** [emphasis added].

49. The question of whether the *Dagenais/Mentuck* test applies, however, does not require consideration of facts, or taking into account policy considerations, or exercise of discretion. It is a question of law for which there is only one right answer and for which the Board has no specialized expertise.

50. This is not a case where, as Justice Abella stated in *Doré*, the administrative decision-maker is "in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*."[27] The question of whether the *Dagenais/Mentuck* test applies to a decision to close a s. 83(17) hearing does not involve factual analysis, nor does it lend itself to "a range of reasonable outcomes".[28] The *Dagenais/Mentuck* test either applies or it does not.

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[26] *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 at paras 3, 45, 55, CBC Book of Authorities, Tab 2.
[27] *Ibid.* at para 54 [emphasis added in original].
[28] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para 58., CBC Book of Authorities, Tab 3.

51. The distinction between the exercise of discretion and the application of the *Dagenais/Mentuck* test was noted by this Court in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, where Justice Sharpe wrote:

> In my view, the characterization of the failure to meet the standard as an "error of law" must be read in the context of the issue before the court in *Dagenais, supra* and in light of later cases, especially, *Toronto Star, supra*. *Dagenais* involved the review of an order made under a different test. ***Dagenais* established a new test not available to the judge who made the order under appeal. As I read the quoted passage, Lamer CJC stated that as the judge did not apply the new test, failure to arrive at a result that could be supported under the new test would amount to an error of law.** That, in my view, cannot mean that where the Commissioner **does** apply the *Dagenais* test, he is be (sic) held to a standard of correctness or that that it is open to a reviewing court to substitute its view because it disagrees with the way the Commissioner balanced the competing interests.[29] [emphasis added]

52. Unlike the Commissioner in the *Episcopal* case, Ferrier explicitly declined to apply *Dagenais/Mentuck*. As the above passage suggests, this is an error of law that does not involve consideration or balancing of interests. Nor does it attract any deference.

53. Indeed, as the Supreme Court of Canada noted in *Dagenais*, in the context of reviewing lower court decisions, "[i]f the ban fails to meet this standard [the *Dagenais* test] (which reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful".[30]

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[29] *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20 at para 36 [emphasis added].] [*Episcopal*], CBC Book of Authorities, Tab 4.

[30] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CarswellOnt 112 at para 77, CBC Book of Authorities, Tab 5.

iii. The Applicability of the *Dagenais/Mentuck* Test is a Legal Question of Central Importance Outside the Board's Expertise

54. The Divisional Court concluded that, based on the principles in *Dunsmuir,* deference should be granted to the Ferrier decision as the Board was interpreting and applying common law in relation to the Board's specific statutory expertise.[31]

55. Although in *Dunsmuir* the Supreme Court directed the application of a deferential standard of review in respect of discretionary decisions within a tribunal's mandate and expertise, it also found that where a question of law is of central importance to the legal system and outside the specialized area of expertise of the decision-maker, the correctness standard will always apply.[32]

56. The question of whether the *Dagenais/Mentuck* test applies to a decision to close a presumptively open hearing is not a decision within the Board's mandate or expertise. It also does not require interpretation of sections 35(3) and (4) of the Act. Even if it did, these are general provisions with language virtually identical to that found in other legislation creating a discretion to close presumptively open hearings.[33] Their interpretation does not engage any special expertise on the part of the Board.

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[31] Decision of the Honourable Justices Warkentin R.S.J., Aitken and Mulligan J.J., CBC Appeal Book, Tab 4, at paras 37 and 50.

[32] *Dunsmuir, supra* note 25 at para. 60, CBC Book of Authorities, Tab 1. See also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293 SCC 47 at para. 24 [*Capilano*], CBC Book of Authorities, Tab 6.

[33] See e.g. *Statutory Powers and Procedures Act*, R.S.O. 1990. C. S.22, s. 9(1); *Public Inquiries Act*, R.S.O. 1990, c. P. 45, s. 34(4); *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24, s. 12; *Professional Engineers Act*, R.S.O. 1990, c. P.28, ss. 30(4), (4.1); *Social Work and Social Service Work Act*, 1998, S.O. 1998, c. 31, ss. 8(1), (2); *Veterinarians Act*, R.S.O. 1990, c. V.3, ss. 18.1(1), (2), Schedule B.

57. The question of whether the *Dagenais/Mentuck* test applies to a decision to close a presumptively open hearing is also one of central importance to the legal system. It has potential impact on the administration of justice as a whole and has wide implications for other statutes that empower administrative decision makers with the discretion to close presumptively open hearings. [34]

58. The Ferrier decision ought to have been reviewed on a standard of correctness. However, even on a reasonableness standard, it should have been quashed, as it was unreasonable to reject application of the *Dagenais/Mentuck* test.

B. The Divisional Court Erred in Finding that the Dagenais/Mentuck Does Not Apply

59. The Divisional Court reasons devote very little attention to the central question before it of whether the *Dagenais/Mentuck* test applied. The court mostly limited itself to adopting the explanation advanced by Ferrier, which was that the test did not apply "to a Board meeting where specific statutory provisions apply, where the Board is not a Court, there is not a judicial or quasi-judicial proceeding and the Board is performing an administrative act."[35]

60. These bases for rejecting the application of the *Dagenais/Mentuck* test do not withstand scrutiny. Ferrier and the Divisional Court erred in ignoring the following principles that taken together dictate that the *Dagenais/Mentuck* test must be applied to the discretionary decision to close presumptively open board hearings:

i. Openness Principles Apply to Tribunals

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[34] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras 20-21, CBC Book of Authorities, Tab 7.
[35] Decision of The Honourable Lee K. Ferrier, Q.C., CBC Appeal Book, Tab 8 at para. 31.

ii. Openness Principles Apply to the Board

iii. Specific Statutory Provisions do not Oust the Application of the *Dagenais/Mentuck* Test

iv. Natural Justice Requirements do not Displace Openness

i. Openness Principles Apply to Tribunals

61. This Court has recognized that the *Dagenais/Mentuck* test applies in both the judicial and quasi-judicial contexts.[36]

62. The same rationale informing the open court principle informs openness for tribunals. As Justice Morgan stated in *Toronto Star v. AG Ontario:*

> "The open court principle is one of the hallmarks of a democratic society…[and] is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*." The Supreme Court has declared that this principle includes "guaranteed access to the courts to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press." Counsel for the Toronto Star correctly indicates that this includes the presumptive right to Adjudicative Records, including exhibits entered into evidence, photocopies of all such records, and the ability to disseminate those records by means of broadcast or other publication.
>
> As discussed earlier in these reasons, these principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority…can be effected only if their proceedings are open to the public." This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions…[to] act consistently with the *Charter* and its values." This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying.[37] [emphasis added and footnotes omitted]

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[36] *R v CBC*, 2010 ONCA 726 at paras. 22, 44, CBC Book of Authorities, Tab 8.
[37] *Toronto Star v AG Ontario*, 2018 ONSC 2586 at paras. 54, 55, CBC Book of Authorities, Tab 9.

63. In the same decision Justice Morgan noted that "...it is uncontroversial that 'the "open court" principle' – at least *some* version – 'is a cornerstone of accountability for decision-making tribunals and courts.'"[38]

64. Indeed, although not specifically noted by Justice Morgan, administrative hearings are presumptively open in the absence of express statutory authority to exclude the public.[39]

65. Courts and tribunals have repeatedly noted that administrative tribunals are presumptively open and that the presumption is given effect through application of the *Dagenais/Mentuck* test.

66. In *Southam v. Minister of Employment and Immigration,* the Federal Court noted that:

> "...statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes which result in decisions affecting rights truly constitute part of the 'administration of justice'. The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.[40]

67. In *Lifford Wine Agencies Ltd., v. Ontario (Alcohol & Gaming Commission)*, the Divisional Court quashed a decision of the Alcohol and Gaming Commission to order *in camera* proceedings, stating as follows in relevant part:

> Section 9(1) of the *Statutory Powers Procedure Act* and the common law both strongly favour open hearings. Particularly when involving a hearing before a public body such as in this case. There are strong public policy

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[38] *Ibid* at para. 6.
[39] Sara Blake, *Administrative Law in Canada*, 6th ed., (Toronto, LexisNexis Canada Inc., 2017) at 89, ¶2.257, CBC Book of Authorities, Tab 46; *Vancouver (City)* v. *British Columbia (Assessment Appeal Board, Assessor of Area No. 9 – Vancouver)*, [1996] B.C.J. No. 1062 at para. 51 (B.C.C.A.), CBC Book of Authorities, Tab 10.
[40] *Southam Inc v Minister of Employment and Immigration*, [1987] 3 FC 329 at para. 99, CBC Book of Authorities, Tab 11.

reasons for this. A quote from the judgment of Doherty J.A. in *Toronto Star Newspapers Ltd v. Ontario* [2003 CarswellOnt 3986 (Ont CA)]:

"A publication ban should be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk, and
(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice."

This quote deals with a publication ban, however the same practical test applies in the instant case.

While there were reasons for the Board to be concerned about the presence of counsel in a case where witnesses were excluded, the Board failed to consider that a less restrictive order would address the problems raised by Lifford which would achieve the same result.[41]

68. Courts have repeatedly found that holding disciplinary hearings *in camera* violates s. 2(b) of the *Charter*.[42]

69. In the pre-*Dagenais* decision *Ottawa (City) Commissioners of Police v. Lalande* the District Court dismissed an application to hold a police disciplinary hearing *in camera* stating:

The public has a vital interest in the performance of police officers who are given great powers in order to protect the public. It is obvious that personal and embarrassing matters will or may be divulged during this hearing. I believe the right of the parties, there are two here, the public and the person charged, to a public and open hearing is a safeguard to the proper state of justice.[43]

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[41] *Lifford Wine Agencies Ltd v. Ontario (Alcohol & Gaming Commission)*, 2003 CarsewellOntCarswellOnt 4717, at paras. 3-76, CBC Book of Authorities, Tab 12.
[42] *Southam Inc. v Canada (Attorney General),* [1997] O.J. No. 4533 (Ont. Gen. Div.), CBC Book of Authorities, Tab 13; *Canadian Broadcasting Corp. v The City of Summerside,* [1999] P.E.I.J. No. 3 (PEISCTD), CBC Book of Authorities, Tab 14.
[43] *Ottawa (City) Commissioners of Police v. Lalande,* 1986 CarswellOnt 974 (Dist. Ct.) at para. 6, CBC Book of Authorities, Tab 15.

70. In *Stepanova v. Human Rights Tribunal of Ontario,* the Divisional Court upheld the tribunal's request for anonymization holding that:

> The "open court" principle is a cornerstone of accountability for decision-making tribunals and courts. Publication of legal decisions is but one way in which the court system is open. It is true that there is a greater scope for the protection of the vulnerable through sealing orders or anonymity orders, a development that is reflected in the HRTO's general approach to this issue. But it remains the general principle that the open court principle trumps desires for anonymity, and to overcome this general principle, a litigant must do more than make bald assertions about potential risks for them if their names are published.[44]

71. In *Law Society of Upper Canada v. Roy Francis Dmello*, where a respondent sought to seal a motion record and have the proceeding be held in camera, the LSUC panel rejected the application stating:

> The openness principle is a fundamental aspect of judicial proceedings, including Law Society proceedings. It is recognized at s.9 of the *Statutory Powers Procedure Act* and is an aspect of freedom of expression in s.2(b) of the Charter. Time and again, courts, including the Supreme Court, have stated that it is only in the most exceptional circumstances that courts and public tribunals should limit the public's right to know what goes on in them. See, for example, *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442; *Sierra Club v. Canada*, [2002] 2 S.C.R. 241; and *Toronto Star v. Ontario*, 2005 SCC 41 (CanLII), [2005] 2 S.C.R. 188.[45]

72. Also in *Marakkaparambil v. Ontario (Health and Long-Term Care)*, the Human Rights Tribunal of Ontario emphasized the importance of the constitutionally protected open court principle stating:

> Under Rule 8 of the Tribunal's Rules, oral hearings are fully open to the public unless the panel orders otherwise. The SPPA allows limitations on

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[44] *Stepanova v Human Rights Tribunal of Ontario,* 2017 ONSC 2386 at para. 36 (Div. Ct.), CBC Book of Authorities, Tab 16.

[45] *Law Society of Upper Canada v. Roy Francis Dmello,* 2011 ONLSHP 114 at para. 9, CBC Book of Authorities, Tab 17; see also *Episcopal, supra* note 29 at para. 50, CBC Book of Authorities, Tab 4.

> open hearings only where "...intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public". Open hearings are also a matter of freedom of expression and freedom of the press, protected by s. 2(b) of the *Charter*, and strong reasons must exist to justify infringing these rights: see *Dagenais, supra*, *Mentuck, supra*, and *August, supra*.[46]

ii. Openness Principles Apply to the Board

73. In June 2014, the Honourable Patrick Lesage was retained by the government of the day to advise on a model for resolving public complaints about the police and to ensure that the system is fair, effective and transparent. His report (the "**Lesage Report**") led to amendments to the Act and to the creation of the Office of the Independent Police Review Director.[47]

74. Throughout the Lesage Report, the importance of transparency is emphasized. For example, in endorsing a more stringent "reasonable grounds" test for ordering a disciplinary hearing, which would result in fewer complaints going to hearing, the Lesage Report stated, among other things, that "...if the review of a decision not to order a hearing is transparent, there will be greater understanding and acceptance of the system".[48]

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[46] *Marakkaparambil v. Ontario (Health and Long-Term Care),* 2007 HRTO 24 at para. 48, CBC Book of Authorities, Tab 18.
[47] Honourable Patrick J. LeSage, Q.C., *Report on The Police Complaints System in Ontario* (Toronto, 2005) at 3, 37-38, 60-63, 66, [LeSage Report] CBC Book of Authorities, Tab 47.
[48] *Ibid.* at 75.

75. Consistent with the above, the Lesage Report recommendations included that "[a]ll hearing dates, hearing locations and hearing decisions must be made publicly accessible through a central internet site".[49]

76. The very purpose of the Act was described in *Figueiras v. (York) Police Services Board*, as "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police."[50]

77. The right to attend meetings of a public government body, including specifically Board meetings, has been recognized as a constitutionally protected right.[51]

78. As the purpose of the Act is to ensure transparency and independence, it is not surprising that meetings and hearings before the Board are presumptively open to the public. Section 35(3) of the *PSA* makes this clear in stating as follows:

> **Meetings and hearings** of the board **shall** be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines. [emphasis added]

79. There is nothing in the *PSA* suggesting that openness values are omitted from consideration for *certain* types of hearings or meetings. To the contrary, section 35(3) states categorically that meetings and hearings shall be open to the public, subject only to the Board's discretion to curtail openness under section 35(4). Notably, these sections protect the openness of

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[49] *Ibid.* at 80.

[50] *Figueiras v. (York) Police Services Board*, 2013 ONSC 7419 at para. 41, citing *Endicott v. Ontario (Director, Office of the Independent Police Review)*, 2013 ONSC 7419 at para. 40, CBC Book of Authorities, Tab 19.

[51] *Langenfeld v. TPSB,* 2018 ONSC 3447 at para 53 [*Langenfeld*], CBC Book of Authorities, Tab 20.

board meetings and hearings with virtually identical language as in s. 9 of the *Statutory Power and Procedures Act* (the "**SPPA**").[52]

80. The legislature chose to adopt the language of the SPPA, which has contained virtually the same openness provision since 1971.[53] This shows clearly that the legislature intended for the openness presumption to apply even to board meetings and hearings to which the SPPA does not apply.[54]

81. The rationale for open police board hearings is the same as the rationale underpinning the open court principle. This was recently noted by Justice Copeland of the Superior Court of Justice in the context of her decision in *Lagenfeld* recognizing a constitutional right to attend police board meetings. As she stated:

> As I have outlined above, s. 35 of the *Police Services Act* requires, subject to limited exceptions, that meetings of police services boards be conducted in public. Like other aspects of the municipal governance, this statutory requirement of openness fosters the objective of public confidence in decision making through transparency and accessibility to the public: *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 (CanLII), [2007] 2 S.C.R. 588. This rationale of fostering public confidence in the decision making of an institution of government through transparency and accessibility is similar to the rationale for the open courts principle (it differs only in that the open courts principle has a further basis of ensuring that litigants are treated fairly): *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326.
>
> The right of individuals to attend court proceedings has been held to be protected by s. 2(b) of the *Charter*: *Edmonton Journal*; *CBC v. Canada* (2011). **The reasoning for finding that attendance at court proceedings is protected expression rests primarily on two pillars. The first pillar is that public confidence in the courts, an important institution of democratic government, is fostered by transparency and accessibility. The second pillar is that freedom of expression protects**

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[52] *SPPA*, *supra* note 33, s. 9(1), Schedule B.
[53] *Ibid.*
[54] *PSA, supra* note 1, s. 37, Schedule B.

> **listeners as well as speakers, particularly in the context of members of the public receiving information about the activities of public institutions.**
>
> **I find that the same reasoning applies to the right to attend public meetings of government bodies, such as police services boards. The *Police Services Act* makes public meetings the default for police services boards in order to foster public confidence in the decisions of the boards, by way of transparency and accessibility. Police services boards perform an important democratic function. Thus, I find that the right of members of the public to attend public meetings of police services boards is protected by** s. 2**(b) of the *Charter*.** [55] [emphasis added]

82. Justice Pierce made very similar findings on the Stay Application in this case, highlighting the importance to the community of transparency in the complaints process.[56]

83. The Divisional Court was dismissive of these transparency principles and ignored the openness presumption. This is obvious, for example, when the Divisional Court stated, in rejecting the application of the *Dagenais/Mentuck* test, that "[n]o case law was cited to effect that s. 2(b) of the *Charter* is implicated when employers are investigating on a course of action to deal with allegations of wrongdoing on the part of their employees."[57] In treating the s. 83(17) hearing as a private matter between employer and employee, the Divisional Court ignored the general presumption of openness, the purpose of the Act, the statutory framework, the involvement of the public complainant and the OIPRD, the public importance of the decision under s. 83(17), and the need for public scrutiny to create, in the words of the Lesage Report, "understanding and acceptance of the system."

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[55] *Langenfeld, supra* note 51 at paras 50-52, CBC Book of Authorities, Tab 20; *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326, at pp. 1339-40, CBC Book of Authorities, Tab 21.
[56] Stay Decision of Madam Justice H.M. Pierce, CBC Appeal Book, Tab 7 at paras. 13-15, 48-49.
[57] Decision of The Honourable Lee K. Ferrier, Q.C., CBC Appeal Book, Tab 8 at para. 49.

84. In the circumstances, the characterization of a s. 83(17) hearing as a private matter between employers and employees is entirely misguided.

iii. Specific Statutory Provisions Do Not Oust the Application of the *Dagenais/Mentuck* Test

85. It appears that Ferrier and the Divisional Court were of the view that because s. 35(4) of the Act provides statutory criteria to be considered by the Board in exercising its discretion to close presumptively open hearings or meetings, the *Dagenais/Mentuck* test would have no application. This is clearly wrong.

86. There are numerous examples of statutes that give guidance to courts or tribunals exercising discretion to close presumptively open hearings. For example, s. 487.3 of the *Criminal Code*[58] allows a judge to make an order preventing disclosure of search warrant materials if one or more of listed criteria are met, but in determining whether search warrant materials are properly sealed, courts apply the *Dagenais/Mentuck* test.[59] Similarly s. 135 of the *Courts of Justice Act*[60] provides judges with the discretion to close a hearing where there is a possibility of "serious harm or injustice," but the *Dagenais/Mentuck* test is applied in determining whether to exercise the discretion.

87. In the administrative context, s. 9 of the *SPPA*[61] contains language virtually identical to s. 35(4) of the PSA, which was clearly modelled on s. 9 of the *SPPA*. Similarly, s. 14 of the *Public Inquiries Act* affords the commission discretion to exclude the public to protect

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[58] *Criminal Code of Canada,* R.S.C., 1985, c. C-46, s. 487.3, Schedule B.
[59] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, CBC Book of Authorities, Tab 22.
[60] *CJA, supra* note 33, s. 135, Schedule B.
[61] *SPPA, supra* note 33, s. 9(1), Schedule B.

against specified harms.[62] In both cases, the *Dagenais/Mentuck* is applied in the exercise of discretion to exclude the public from tribunal hearings.[63]

88. The notion that the listing of specific harms that might justify excluding the public ousts application of the *Dagenais/Mentuck* test reflects a fundamental misunderstanding of the test.

89. The *Dagenais/Mentuck* test is intended to be flexible. It applies to ensure that the harm against which a ban or sealing order protects, whatever the harm may be, is serious enough to justify departing from the presumption of openness and that the exclusion of the public, if necessary, is as limited as possible. By its nature, the test is designed to be flexible.

90. Thus although the test was developed in *Dagenais* to protect fair trial interests, it was adapted in *Mentuck* to protect against harm to the administration of justice,[64] and again in *Sierra Club* to protect against harm to commercial interests.[65] As the Supreme Court stated in that case, "...the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances".[66] The fact that a statutory framework highlights specific harms to be balanced against the importance of openness in no way impedes the application of the test.

iv. Natural Justice Requirements Do Not Displace Openness

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[62] *Episcopal, supra* note 29 at para. 30, CBC Book of Authorities, Tab 4.
[63] See e.g. *Episcopal, ibid* at para. 36; *Lifford Wine Agencies Ltd., supra* note 41 at para. 306, CBC Book of Authorities, Tab 12.
[64] *R v. Mentuck,* 2001 SCC 76, CBC Book of Authorities, Tab 23.
[65] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 38, CBC Book of Authorities, Tab 24.
[66] *Ibid.*

91. Both Ferrier and the Divisional Court found that because the decision under s. 83(17) is "administrative," the openness principle cannot apply to it.[67] This was an error.

92. As the Alberta Court of Appeal noted in the *L'Hirondelle v Alberta (Sustainable Resource Development),* "...the distinction between 'administrative' and 'quasi-judicial' tribunals has not been a factor for decades".[68] Courts stopped using the distinction because, as was noted in the leadings case of *Nicholson v. Haldimand*, "the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least."[69]

93. The Board cannot displace the *Dagenais/Mentuck* test by labelling its decision under s. 83(17) with the defunct and ambiguous term "administrative." The fact is that the Board was holding a hearing involving serious issues affecting the respondent officers, the OIPRD, and the First Nations Public Complainants. Nothing about these circumstances suggests a basis for displacing the presumption of openness. On the contrary, the fact that the Board decision could result in the failure to proceed with a disciplinary hearing despite the OIPRD's conclusion that there were grounds to believe that serious misconduct had been committed by the respondent officers creates a heightened interest in public scrutiny.

94. Courts applying the principles set out in *Baker* to s. 83(17) hearings have concluded that complainants, the Director of the OIPRD, and officers have a right to make submissions to

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[67] Decision of the Honourable Justices Warkentin R.S.J., Aitken and Mulligan J.J., CBC Appeal Book, Tab 4, at paras. 39, 60; Decision of The Honourable Lee K. Ferrier, Q.C., CBC Appeal Book, Tab 8 at para. 31.
[68] *L'Hirondelle v Alberta (Sustainable Resource Development),* 2013 ABCA 12 at para. 21, CBC Book of Authorities, Tab 25.
[69] *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311 at para. 23, CBC Book of Authorities, Tab 26.

the Board,[70] and that the Board has an obligation to provide reasons for its decision.[71] While these requirements may be on the lower end of natural justice requirements, there is nothing to suggest that openness principles are ousted. If anything, the fact that there are limited procedural protections weighs in favour of heightened public scrutiny given the public importance of the issues.

95. Stating that the openness principle does not apply because the decision is "procedural" is also misguided. It has never been suggested in any context that openness principles do not apply to procedural decisions. As the high stakes involved in s. 83(17) hearings illustrate, so-called "procedural" decisions can involve matters of great importance to the parties and to the public.

96. Similarly, labelling the hearing as part of the investigative process does not diminish the openness principle. It is well established in the judicial context that the *Dagenais/Mentuck* test applies at "every stage of proceedings".[72] The test should be applied no differently in the context of tribunals. It is also clear, in any event, that the investigation has concluded before a s. 83(17) hearing takes place, as by that time there has been a finding that there are grounds to believe that serious misconduct has occurred.

CONCLUSION

97. Both Ferrier and the Divisional Court failed to appreciate the importance of openness in the circumstances, and misunderstood the role of the *Dagenais/Mentuck* test as its constitutional

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[70] *Office of the Independent Police Review Director v. Regional Municipality of Niagara Police Services Board,* 2016 ONSC 5280 at para. 58, CBC Book of Authorities, Tab 27.

[71] *Figueiras, supra* note 50 at para. 62, CBC Book of Authorities, Tab 19.

[72] *Toronto Star Newspapers Ltd. v. Ontario, supra* note 59 at paras. 29-30, CBC Book of Authorities, Tab 22; *Vancouver Sun (Re),* [2004] 2 SCR 332 at paras. 23-27, 39, CBC Book of Authorities, Tab 28.

safeguard. These are substantial errors that harm the public interest in open hearings generally, and the public interest in the underlying facts in these proceedings in particular.

PART VI – ORDER REQUESTED

98. CBC requests that the decision of the Divisional Court be set aside and that the Ferrier Decision be quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2019.

Ryder Gilliland

Lawyer for the Applicant

Court File Nos.:C66995 & C66998

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

CANADIAN BROADCASTING CORPORATION

Applicant
(Appellant in Appeal)

- and -

LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, THE INDEPENDENT POLICE REVIEW DIRECTOR, THE FIRST NATION PUBLIC COMPLAINANTS, THE CHIEF OF POLICE OF THE THUNDER BAY POLICE SERVICE, AND THE RESPONDENT OFFICERS

Respondents
(Respondents in Appeal except The First Nation Public Complainants)

CERTIFICATE

I, Ryder Gilliland, lawyer for the Appellant, certify that:

1. An order under subrule 61.09(2) (original record and exhibits) is not required.

The estimated time of my oral argument is 1 hour, including reply.

Date: August 15, 2019

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Canadian Broadcasting Corporation

CANADIAN BROADCASTING CORPORATION Applicant (Appellant on Appeal)	and	LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, et. al. Respondents (Respondents on Appeal)	Court File Nos.:C66995 & C66998

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Dunsmuir v. New Brunswick*, 2008 SCC 9
2. *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12
3. *Groia v. Law Society of Upper Canada*, 2018 SCC 27
4. *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20
5. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CarswellOnt 112
6. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47
7. *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53
8. *R v CBC*, 2010 ONCA 726
9. *Toronto Star v AG Ontario*, 2018 ONSC 2586
10. *Vancouver (City)* v. *British Columbia (Assessment Appeal Board, Assessor of Area No. 9 – Vancouver)*, [1996] B.C.J. No. 1062 (B.C.C.A.)
11. *Southam Inc v Minister of Employment and Immigration*, [1987] 3 FC 329
12. *Lifford Wine Agencies Ltd v. Ontario (Alcohol & Gaming Commission)*, 2003 CarswellOnt 4717
13. *Southam Inc. v Canada (Attorney General),* [1997] O.J. No. 4533 (Ont. Gen. Div.)
14. *Canadian Broadcasting Corp. v The City of Summerside,* [1999] P.E.I.J. No. 3 (PEISCTD)
15. *Ottawa (City) Commissioners of Police v. Lalande,* 1986 CarswellOnt 974 (Dist. Ct.)
16. *Stepanova v Human Rights Tribunal of Ontario,* 2017 ONSC 2386 at para. 36 (Div. Ct.)
17. *Law Society of Upper Canada v. Roy Francis Dmello,* 2011 ONLSHP 114

18. *Marakkaparambil v. Ontario (Health and Long-Term Care),* 2007 HRTO 24

19. *Figueiras v. (York) Police Services* Board, 2013 ONSC 7419

20. *Langenfeld v. TPSB* 2018 ONSC 3447

21. *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326

22. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41

23. *R v. Mentuck,* 2001 SCC 76

24. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

25. *L'Hirondelle v Alberta (Sustainable Resource Development),* 2013 ABCA 12

26. *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311

27. *Office of the Independent Police Review Director v Regional Municipality of Niagara Police Services Board*, 2016 ONSC 5280

28. *Vancouver Sun (Re),* [2004] 2 SCR 332

Secondary Sources

29. Sara Blake, *Administrative Law in Canada*, 6th ed., (Toronto, LexisNexis Canada Inc., 2017)

30. Honourable Patrick J. LeSage, Q.C., *Report on The Police Complaints System in Ontario* (Toronto, 2005)

TAB B

SCHEDULE "B"
RELEVANT STATUTES

1. *Police Services Act*, RSO 1990, c P.15
2. *Statutory Powers and Procedures Act*, R.S.O. 1990. C. S.22
3. *Public Officers Act,* R.S.O. 1990, c. P. 45
4. *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24
5. *Professional Engineers Act*, R.S.O. 1990, c. P.28
6. *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sched. 6
7. *Social Work and Social Service Work Act*, 1998, S.O. 1998, c. 31
8. *Veterinarians Act*, R.S.O. 1990, c. V.3
9. *Court of Justice Act*, R.S.O. 1990, C. C. 43
10. *Criminal Code of Canada,* R.S.C., 1985, c. C-46

1. ***Police Services Act*, RSO 1990, c P.15**

Statutory Powers Procedure Act applicable to hearings
22 (3) The Statutory Powers Procedure Act does not apply to the Commission, except to a hearing conducted by the Commission under subsection 23 (1), 25 (4), (4.1) or (5), 39 (5), 47 (5), 69 (8), 77 (7), 87 (2), (3) or (4) or 116 (1). 1997, c. 8, s. 16 (4); 2007, c. 5, s. 6 (3).

Meetings
35 (1) The board shall hold at least four meetings each year.

Quorum
(2) A majority of the members of the board constitutes a quorum.

Proceedings open to the public
(3) Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines.

Exception

(4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

(a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or

(b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public. R.S.O. 1990, c. P.15, s. 35.

37 A board shall establish its own rules and procedures in performing its duties under this Act and, except when conducting a hearing under subsection 65 (9), the Statutory Powers Procedure Act does not apply to a board. 1997, c. 8, s. 24.

83 (17) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing. 2007, c. 5, s. 10.

85 (9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

(a) misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence; or

(b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of. 2007, c. 5, s. 10.

2. ***Public Officers Act*, R.S.O. 1990, c. P. 45**

16. Where by any general or special Act any person or the occupant for the time being of any office is empowered to do or perform any act, matter or thing and such person or the occupant for the time being of such office is disqualified by interest from acting and no other person is by law empowered to do or perform such act, matter or thing, then he or she or any interested person may apply, upon summary motion, to a judge of the Superior Court of Justice, who may appoint some disinterested person to do or perform the act, matter or thing in question. R.S.O. 1990, c. P.45, s. 16; 2006, c. 19, Sched. C, s. 1 (1).

3. *Statutory Powers and Procedures Act*, R.S.O. 1990. C. S.22, s. 9

9 (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public. R.S.O. 1990, c. S.22, s. 9 (1); 1994, c. 27, s. 56 (16).

4. *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6, s. 34

14(1) A commission shall hold a hearing during the public inquiry only if authorized in the order establishing the commission. 2009, c. 33, Sched. 6, s. 14 (1).

14(2) Subject to subsection (3), a commission that is conducting a hearing shall,

(a) give reasonable advance notice to the public of the schedule and location of the hearing;

(b) ensure that the hearing is open to the public, either in person or by electronic means; and

(c) give the public access to the information collected or received in the hearing. 2009, c. 33, Sched. 6, s. 14 (2).

14(3) A commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information if it decides that the public's interest in the public inquiry or the information to be disclosed in the public inquiry is outweighed by the need to prevent the disclosure of information that could reasonably be expected to be injurious to,

(a) the administration of justice;

(b) law enforcement;

(c) national security; or

(d) a person's privacy, security or financial interest. 2009, c. 33, Sched. 6, s. 14 (3).

34(4) All hearings on an inquiry are open to the public except where the person or body conducting the inquiry is of the opinion that,

(a) matters involving public security may be disclosed at the hearing; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the person or body may hold the hearing concerning any such matters in the absence of the public. 2009, c. 33, Sched. 6, s. 34 (4).

5. *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24, s. 12

12. All hearings shall be held in public except where, in the opinion of the Board, it is necessary to hold a hearing that is closed to the public for the reason that a public hearing,

(a) would be prejudicial to the final disposition of the criminal proceedings against the person whose act or omission caused the injury or death; or

(b) would not be in the interests of the victim, or of the dependants of the victim, of an alleged sexual offence or child abuse. R.S.O. 1990, c. C.24, s. 12.

6. *Professional Engineers Act*, R.S.O. 1990, c. P.28, s. 30

30(4) Hearings of the Discipline Committee shall be open to the public, subject to subsection (4.1). 2001, c. 9, Sched. B, s. 11 (46).

30(4.1) The Discipline Committee may order that the public be excluded from all or part of a hearing if the following conditions are satisfied:

1. The person whose conduct is being investigated delivers to the Registrar, before the day fixed for the hearing or part, a written request that the hearing or part be closed.

2. The Discipline Committee is satisfied that,

i. matters involving public security may be disclosed at the hearing or part, or

ii. financial or personal or other matters may be disclosed at the hearing or part, of such a nature that the desirability of avoiding public disclosure of these matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public. 2001, c. 9, Sched. B, s. 11 (46).

7. *Social Work and Social Service Work Act, 1998*, S.O. 1998, c. 31, s. 8

8(1) Subject to subsections (2) and (3), the meetings of the Council shall be open to the public and reasonable notice shall be given to the members of the College and to the public. 1998, c. 31, s. 8 (1).

8(2) The Council may exclude the public, including members of the College, from a meeting or any part of a meeting if it is satisfied that,

(a) financial or personal or other matters may be disclosed of such a nature that the desirability of avoiding public disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that the meetings be open to the public;

(b) a person involved in a civil or criminal proceeding may be prejudiced;

(c) the safety of a person may be jeopardized;

(d) personnel matters or property transactions will be discussed; or

(e) litigation affecting the College will be discussed or instructions will be given to or opinions received from solicitors for the College. 1998, c. 31, s. 8 (2).

8. *Veterinarians Act*, R.S.O. 1990, c. V.3, s. 18.1

18.1(1) A hearing by the Board under section 18 shall, subject to subsection (2), be open to the public.

18.1(2) The Board may make an order that the public be excluded from a hearing or any part of it if the Board is satisfied that,

(a) matters involving public security may be disclosed;

(b) financial or personal or other matters may be disclosed at the hearing of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public;

(c) a person involved in a criminal proceeding or in a civil suit or proceeding may be prejudiced; or

(d) the safety of a person may be jeopardized.

9. *Court of Justice Act*, R.S.O. 1990, c. C.43.

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Public hearings
135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception
(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

Disclosure of information
(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information. R.S.O. 1990, c. C.43, s. 135.

10. *Criminal Code of Canada*, R.S.C., 1985, c. C-46

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

CANADIAN BROADCASTING CORPORATION Applicant	and	LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, et. al. Respondents	Court File Nos.:C66995 & C66998

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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