Court No.: C66995

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CANADIAN BROADCASTING CORPORATION

Applicant
(Respondent in Appeal)

- and -

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

Respondents
(Respondents in Appeal)

- and –

THE FIRST NATION PUBLIC COMPLAINANTS

Respondent
(Appellant)

APPEAL FACTUM OF THE FIRST NATION PUBLIC COMPLAINANTS

August 15, 2019

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PART 1 – FIRST NATION PUBLIC COMPLAINTS APPEAL FROM A DIVISIONAL COURT DECISION

1. The Appellants, the First Nation Public Complainants, are former Chief of Rainy River First Nations, Jim Leonard, and Rainy River First Nations member, Brad DeBungee. Mr. Brad DeBungee is the brother of the late Mr. Stacy DeBungee, a Rainy River First Nations member who was found dead in the McIntyre River in Thunder Bay on October 19, 2015.

2. The First Nation Public Complainants appeal from a decision of the Divisional Court rendered on January 7, 2019. The Divisional Court dismissed a judicial review application and upheld a decision made by the Honourable Lee K. Ferrier ("Mr. Ferrier") who was exercising the powers and duties of the Thunder Bay Police Services Board ("TBPSB") pursuant to his appointment under s. 16 of the *Public Officers Act*, RSO 1990, c P.45.

3. Specifically, the Divisional Court upheld Mr. Ferrier's decision to displace the presumptively open nature of Board proceedings under the *Police Services Act*, RSO 1990, c P.15 ("*PSA*"), and to hold an extension application hearing *in camera*. An extension of time for commencing disciplinary proceedings was sought by the Thunder Bay Police Service ("TBPS"). The outcome of the extension application hearing will determine whether disciplinary proceedings under the *PSA* can be initiated against three officers against whom the Office of the Independent Police Review Director ("OIPRD") determined misconduct allegations were substantiated in relation to their role in the investigation into Mr. DeBungee's death. The OIPRD found that racism may have contributed to the mishandling of the death investigation.

PART II – OVERVIEW

> "*In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy*."
>
> ***Toronto Star Newspapers Ltd. v Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41 at para 1 [*per* Fish J] [Appellants' Book of Authorities [ABA], Tab 22].**

4. The open court principle, access to justice and transparency in the justice system are hallmarks of a free, open and democratic society. The fundamental freedoms protected by s. 2(b) of the *Charter of Rights and Freedoms* are essential to the health of democratic institutions. A high justificatory threshold must be met to authorize secret hearings on issues of public importance.

5. The *PSA* is designed to increase public confidence in the provision of police services, including the processing of complaints against officers. This appeal addresses the issue of when, and on what basis, a municipal police service board may restrict freedom of expression, including freedom of the press, by barring the public's access to statutorily *de facto* open proceedings. This question is relevant to a broad range of administrative decision-makers operating under statutes that provide for presumptively open proceedings, and is of central importance to our legal system

6. The First Nation Public Complainants submit that a decision-maker must apply the *Dagenais/Mentuck* line of cases to determine whether a Board proceeding may be closed pursuant to s. 35(4) of the *PSA*. They submit that Mr. Ferrier erred in law by failing to apply the *Dagenais/Mentuck* line of cases.

7. This appeal also raises the question of what standard of review applies to a "stand-in" administrative decision-maker where the default decision-maker has recused itself due to concerns of a conflict of interest. The First Nation Public Complainants submit that the standard of review in the present case is correctness.

8. Finally, this appeal addresses an issue relating to transparency and freedom of expression: whether complainants are bound to confidentiality in relation to their complaints against officers under the *PSA*. The First Nations Public Complainants submit that the Divisional Court erred in finding that the First Nation Public Complainants breached any confidentiality obligation.

PART III – THE FACTS

A. Overview

9. The death of Mr. DeBungee in October 2015 captured the national public attention. It has spurred two public reports regarding the TBPS and its policing of Indigenous people in Thunder

Bay. The widely reported facts of Mr. DeBungee's death by CBC and other media outlets across the country include *inter alia* the following:

- The body of Mr. DeBungee was discovered in the McIntyre River on the morning of October 19, 2015;
- The TBPS issued a statement within hours of Mr. DeBungee's death, prior to receiving autopsy results, indicating that the death was not suspicious;
- Rainy River First Nations hired an investigator who prepared a report that raised questions about leads not pursued by the TBPS and that Mr. DeBungee's death was not suspicious;
- The investigator felt racism played a role in the TBPS' poor handling of the death investigation; and
- Questions raised by the investigator were published in a documentary by the CBC's *Fifth Estate*.

Affidavit of Corey Groper, sworn October 16, 2018, Exhibit "A" [Tab 13 of the Appeal Book and Compendium ["the ABC"], Vol. 1, pp. 260-296]

10. Since Mr. DeBungee's death, the First Nation Public Complainants have advocated tirelessly for answers, transparency, and accountability. They filed a complaint regarding the police investigation into Mr. DeBungee's death with the OIPRD pursuant to the *PSA*. The OIPRD conducted an investigation and released the report of its findings on February 15, 2018 ("OIPRD Report"). The OIPRD Report substantiated allegations of neglect of duty and discreditable conduct against the Respondent Officers.

11. The OIPRD released its report almost two years after it retained the complaint of the First Nation Public Complainants. During this time the OIPRD was also engaging in a systemic review of the TBPS regarding its policing of Indigenous people in Thunder Bay. The Ontario Civilian Police Commission ("OCPC") commenced a simultaneous systemic investigation into the TBPB's oversight of the TBPS vis-à-vis policing of Indigenous people in Thunder Bay.

12. Pursuant to the provisions of the *PSA*, a notice of hearing could not be served to institute disciplinary proceedings against the Respondent Officers without approval of the Thunder Bay Police Services Board ("TBPSB" or "Board") given that more than six months had elapsed between the OIPRD's retention of the complaint and the release of its investigation findings. Section 83(17) of the *PSA* provides that no notice of hearing could be served unless the TBPSB determined that it was reasonable that no notice of hearing had been served within six months of the OIPRD's retention of the complaint.

***Police Services Act,* RSO 1990, c P.15, ss. 83(17), 83(18)(a)ii [*Police Services Act*]**

13. The TBPSB declared itself in a conflict and unable to act pursuant to its statutory powers and duties under s. 83(17) of the *PSA* to consider the reasonableness of the delay in issuing a notice of hearing. On motion by the TBPSB, Warkentin R.S.J. of the Superior Court of Justice appointed the Honourable Lee K. Ferrier to exercise the powers and duties of the Board to act as a substitute decision-maker for it in the adjudication of the reasonableness of delay under s. 83(17).

Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "A" (Court Order appointing the Honourable Lee K. Ferrier…) [Tab 11A of the ABC, Vol. 1, pp. 89-92]

14. Mr. Ferrier determined that he would receive written submissions from all parties regarding the reasonableness of delay and hold an oral hearing on the matter. The s. 83(17) hearing ("the Extension Hearing") was scheduled for September 21, 2018. Mr. Ferrier decided that he would hold the Extension Hearing *in camera* ("the Ferrier Decision") despite the legislated presumption of openness of all Board hearings.

Decision of The Honourable Lee K. Ferrier, Q.C., September 20, 2018 [The Ferrier Decision] [Tab 8 of the ABC, Vol. 1]
***Police Services Act*, s. 35(3)**

15. The CBC sought judicial review of the Ferrier Decision and also succeeded in having the Extension Hearing stayed pending review by the Divisional Court. The Divisional Court upheld the Ferrier Decision on a reasonableness standard ("the Divisional Court Decision").

> **Notice of Application for Judicial Review [Tab 9 of the ABC, Vol. 1, pp. 82-86]**
> **Order of Justice Pierce, October 4, 2018 [Tab 6 of the ABC, Vol. 1, pp. 54-55]**
> **Decision of Justice Pierce, October 4, 2018 [Decision of Justice Pierce] [Tab 7 of the ABC, Vol. 1, pp. 56-57]**
> **Decision of Honourable Justices Warkentin R.S.J., Aitken and Mulligan J.J., January 7, 2019 [the Divisional Court Decision] [Tab 4 of the ABC, Vol. 1, pp. 23-51]**

16. The Ferrier Decision and that of the Divisional Court on judicial review resulted in decisions to keep a presumptively open hearing, closed.

17. Both the CBC and the First Nation Public Complainants sought, and were granted, leave to appeal the Divisional Court decision to this Honourable Court. The First Nation Public Complainants continue to seek transparency and accountability in all matters relating to the death of Mr. DeBungee and the investigation conducted by the TBPS into his death. Transparency at every stage of *PSA* proceedings, including at the pre-discipline hearing stage of the Extension Hearing, is a minimum requirement to overcome broken trust and foster renewed faith in the TBPS.

B. Background of the OIPRD Complaints

18. Mr. DeBungee's body was found in the McIntyre River in October 2015. A coroner's inquest into the deaths of seven Indigenous youth in Thunder Bay was ongoing. Many of these youth, just like Mr. DeBungee, had been found dead in the waters of Thunder Bay. The investigator hired by the First Nation Public Complainants believed racism played a role in the failure of the TBPS to follow important leads about Mr. DeBungee's death.

> **Affidavit of Corey Groper, sworn October 16, 2018, Exhibit "A" [Tab 13A of the ABC, Vol. 1, at pp. 264, 266-267]**

19. On March 18, 2016, the First Nation Public Complainants filed two complaints with the OIPRD relating to the TBPS' investigation into the death of Mr. DeBungee. One was a complaint

alleging misconduct by officers involved in the investigation into Mr. DeBungee's death. This complaint was retained by the OIPRD on April 22, 2016, eventually resulting in the OIPRD Report. The other complaint raised questions about anti-Indigenous systemic racism within the TBPS more broadly; the OPIRD also retained this complaint and announced terms of reference for its systemic review on November 3, 2016.

Affidavit of Corey Groper, sworn October 16, 2018, Exhibit "A" [Tab 13A of the ABC, Vol. 1, at pp. 290-291]
Divisional Court Decision at paras 13, 28 [Tab 4 of the ABC, Vol. 1, pp. 27, 34]

20. The OIPRD Report was released on February 15, 2018. The OIPRD Report substantiated allegations of neglect of duty and discreditable conduct as against the Respondent Officers (the "Misconduct Allegations"). The release of this report led to the need for the Extension Hearing, which Mr. Ferrier decided would be held *in camera*.

21. The OIPRD's report on its systemic review findings was released after the Divisional Court hearing, but before the release of the Divisional Court's decision. The same is true of the report of a parallel systemic investigation by Senator Murray Sinclair, on behalf of the OCPC into the Board's oversight responsibilities regarding the TBPS and its treatment of Indigenous people in Thunder Bay. As the Divisional Court explained, both reports focus on the "extent to which racism rears its ugly head in policing in Thunder Bay."

Divisional Court Decision at para 32 [Tab 4 of the ABC, Vol. 1, p. 36]

C. Procedural History: The Ferrier Decision

22. The purpose of the s. 83(17) Extension Hearing is to adjudicate the reasonableness of the delay in service of notices of disciplinary hearings on the Respondent Officers beyond six months after the OPIRD retained the First Nation Public Complainant's complaint. An extension hearing would, in the normal course, be conducted by the TBPSB; however, in these circumstances, the

TBPSB declined to exercise its duty, citing a conflict of interest based on the ongoing OCPC systemic review of the TBPSB.

23. Mr. Ferrier was appointed pursuant to s. 16 of the *Public Officers Act* to exercise the powers and duties ordinarily exercised by the TBPSB. Accordingly, Mr. Ferrier was to decide whether the delay was reasonable and proceedings against the Respondent Officers could be initiated.

> **Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "A" (Court Order appointing the Honourable Lee K. Ferrier…) [Tab 11A of the ABC, Vol. 1, pp. 89-92]**
> ***Public Officers Act,* RSO 1990, c P.45, s. 16**

24. Pursuant to s. 35(3) of the *PSA*, all Board proceedings are presumptively open to the public. Despite this presumption, it is evident that a *status quo* has developed of the TBPSB holding s. 83(17) hearings *in camera*, without justification.[1] Subsection 35(4) provides the Board with discretion to close a meeting or hearing if the Board is of the opinion that certain matters may be disclosed and, "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."

> **Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "B" (Relevant email exchanges re whether hearing to be held *in camera*…) [Tab 11B of the ABC, Vol. 1, pp. 97-98, 104-105]**
> ***Police Services Act*, ss. 35(3), 35(4)**

25. The issue as to whether the Extension Hearing would be held *in camera* was first raised on an initial scheduling conference call between the parties on July 20, 2018. By this point, Mr. Ferrier had already determined that the Extension Hearing would be an oral hearing and he would receive both oral and written submissions from the parties. Mr. Ferrier directed the parties to make submissions on the *in camera* issue, which they did. The OIPRD did not make submissions, but stated that the hearing should be held *in camera,* in line with the *status quo* practice.

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[11] [cite to email chain here]

Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "B" (Relevant email exchanges re whether hearing to be held *in camera*…) [Tab 11B of the ABC, Vol. 1, pp. 105, 108, 113]

26. Upon learning of the likelihood that the Extension Hearing would be closed to the public, CBC contacted Mr. Ferrier by email on September 16, 2018, and advised that CBC wished to make submissions. Mr. Ferrier thereafter directed CBC to provide written submissions. At 7:11 pm on September 17, 2018, Mr. Ferrier advised of a deadline of 4:30 pm on September 19, 2018 for CBC's submission and CBC provided submissions at 3:38pm on September 19, 2018.

Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "B" (Relevant email exchanges re whether hearing to be held *in camera*…) [Tab 11B of the ABC, Vol. 1, pp. 128, 132-133]

27. The Ferrier Decision was sent to the parties the following morning at 9:07am. The Decision made no mention whatsoever of CBC's submissions. Mr. Ferrier ruled that the Extension Hearing shall be held *in camera,* maintaining the *status quo* regarding TBPSB practice.

Affidavit of Sajeela Veldhuis, sworn November 8, 2018, Exhibit "B" (Relevant email exchanges re whether hearing to be held in camera…) [Tab 11B of the ABC, Vol. 1, pp. 138]

28. In deciding that the Extension Hearing will be held *in camera*, Mr. Ferrier stated, "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."

Ferrier Decision at para 31 [Tab 8 of the ABC, Vol. 1, p. 75]

29. Mr. Ferrier noted that the Board is in charge of its own procedure. He relied on jurisprudence establishing that procedural fairness does not always require an oral hearing for purposes of adjudicating the reasonableness of delay under s. 83(17). He relied on a decision by the Information and Privacy Commissioner characterizing disciplinary actions against a councilor as an "intimate personal matter." Mr. Ferrier further found it is "conceivable" that having the Extension Hearing open, and thereby making the OIPRD Report public, would taint witnesses and

impact on the efficacy of cross-examination. Additionally, Mr. Ferrier analogized to the swearing of an information or a pre-enquête hearing where a private information is sworn, noting that these are always held *in camera*, without noting that this is due to specific legislative provisions.

Ferrier Decision at paras 22, 8-14, 18, 24-26, 30 [Tab 8 of the ABC, Vol. 1, pp. 70-75]

D. The Procedural History: Stay Application

30. Following receipt of the Ferrier Decision, CBC filed an application for judicial review and brought an application for a stay of the Extension Hearing pending judicial review ("Stay Application"). The Extension Hearing was adjourned by Mr. Ferrier pending a decision on the stay of proceedings.

31. The Stay Application was heard by Madam Justice Helen Pierce, in Thunder Bay, on September 25, 2018. In her reasons for decision, 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 this application for judicial review.

Decision of Justice Pierce [Tab 7 of the ABC, Vol. 1]

32. In granting the Stay Application, Justice Pierce acknowledged the significance that transparency carries in this case. On the facts of this case, Justice Pierce held that "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."

Decision of Justice Pierce at paras 48-49 [Tab 7 of the ABC, Vol. 1, pp. 63-64]

E. Procedural History: Divisional Court Decision

33. The parties on Judicial Review appeared before a panel of Justices Warkentin R.S. J., and Aitken and Mulligan JJ, on December 6, 2018.

34. The CBC and the First Nation Public Complainants took the position that Mr. Ferrier made an error in law in finding that the *Dagenais/Mentuck* line of cases did not apply to a determination of an extension of time under section 83(17) of the *PSA*.

35. In its decision released on January 7, 2019, the Court dismissed the judicial review application finding, *inter alia*:

- Mr. Ferrier's decision is reviewable on a standard of reasonableness and Mr. Ferrier was owed the same level of deference given to a police board when interpreting the *PSA*;
- The public interest does not change the nature of the decision-making process or the nature of the role being undertaken by Mr. Ferrier;
- Mr. Ferrier's determination that 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" is correct;
- The decision to be made on the *PSA* section 83(17) extension application is not judicial or quasi-judicial;
- The Complainants had a duty to keep the information contained in the OIPRD Report confidential, and despite that, shared the report with the First Nations community and with the media.

Divisional Court Decision at paras 37, 54, 60, 49, 27, 66 [Tab 4 of the ABC, Vol. 1, pp. 38, 44, 47, 41-42, 34, 66]

PART IV – ISSUES AND THE LAW

A. Overview of Issues on Appeal

36. The First Nation Public Complainants ask this Honourable Court to consider the following issues arising from the Divisional Court Decision:

(1) Did the Divisional Court err in concluding that the standard of review applicable to the Ferrier Decision was reasonableness?

(2) Did the Divisional Court err in finding that Mr. Ferrier's conclusion that the *Dagenais/Mentuck* line of cases "have no application" to the determination of whether or not a statutorily *de facto* open proceeding should be closed was both reasonable and correct? Specifically, did the Divisional Court err by not finding the following determinations by Ferrier to be incorrect and unreasonable?:

i. That because the TBPSB is not a court, the *Dagenais/Mentuck* test is inapplicable;
ii. That ss. 35(3) and 35(4) of the *PSA* render the *Dagenais/Mentuck* test inapplicable; and
iii. That the decision Mr. Ferrier will make under the *PSA* on the Extension Hearing is not judicial or quasi-judicial.

(3) Did the Divisional Court err in failing to fully appreciate and consider the uniqueness and relevance of the social context and the public interest engaged in the questions before it? Specifically, did such a failure lead the Divisional Court to err by finding that Mr. Ferrier engaged in a reasonable balancing of considerations under section 35(4) of the *Police Services Act* in determining that the leave application hearing could be held *in camera*?

(4) Did the Divisional Court err in finding that the First Nation Public Complainants had a duty to keep the OIPRD Report Confidential?

B. The Standard of Review to Apply to the Ferrier Decision is Correctness

i. Overview on Standard of Review

37. In reviewing the judicial review decision of a lower court, this Honourable Court must determine if the lower correctly applied the appropriate standard of review. This Honourable Court must "step into the shoes of the lower court" and review the original decision according to the appropriate standard.

> ***Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 NR 212 (FCA), at para 18 [ABA, Tab 30]**
> ***Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para 247 [ABA, Tab 31]**

38. The Divisional Court erred by applying the reasonableness standard to the Ferrier Decision. The principles and factors enunciated by the majority of the Supreme Court in *Dunsmuir* indicate that the correctness standard is the appropriate standard of review to apply to Mr. Ferrier's decision to hold the Extension Hearing *in camera*.

> ***Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para 54 [*Dunsmuir*] [ABA, Tab 1]**

39. The majority in *Dunsmuir* explained that the first step in a standard of review analysis is to determine whether the jurisprudence has already determined the appropriate standard for the particular category of question in issue. A second step will be required only where the jurisprudence has not established the appropriate standard; in such a case, the reviewing Court must make a determination based on an analysis of the factors articulated in *Dunsmuir*.

> ***Dunsmuir*, at para 62 [ABA, Tab 1]**

ii. There is No Precedent Determining the Standard of Review of a Decision-Maker Appointed Under the Public Officers Act

40. To date, no party has been able to identify case law dealing with the question of what standard of review is appropriate when a court reviews the decision of a "stand-in" administrative decision-maker empowered by Court order pursuant to the *Public Officers Act*. The First Nation

Public Complainants submit that in such a situation, the rationale justifying application of the deferential reasonableness standard no longer applies.

41. Deference is rooted primarily in respect of legislative choices to assign certain matters to administrative decision-makers and "for the processes and determinations that draw on particular expertise and experiences", as well as for the different roles of courts and administrative bodies within our constitutional system.

***Dunsmuir*, at paras 48-49 [ABA, Tab 1]**

42. The legislature did not choose to assign determinations under s. 83(17) of the *PSA* to Mr. Ferrier. Mr. Ferrier does not have particular expertise in relation to the *PSA*. These key foundations supporting a deferential approach are missing.

43. Case law establishing that decisions made by a Board under the *PSA* are owed deference does not establish that deference is owed to an individual appointed under the *Public Officers Act* to make a decision in place of a board. It is well-established that the reasonableness standard is the presumptive standard of review when an administrative body interprets its "own statute…, closely connected to its function, with which it will have a particular familiarity." Mr. Ferrier does not have a home statute and does not have specialized expertise in this case. The Divisional Court erred in treating case law regarding the standard of review of Board decisions as determinative of the standard of review of the Ferrier Decision.

***Dunsmuir,* at para 58 [ABA, Tab 1]**

44. Consideration of the factors that guide a determination of when reasonableness is appropriate indicates that reasonableness is not appropriate in reviewing the Ferrier Decision. First, there is no privative clause in the *Public Officers Act* or in the *PSA*, nor any equivalent in the Court order appointing Mr. Ferrier. Second, Mr. Ferrier was enabled by Court order and the *Public*

Officers Act to exercise the powers and functions of the Board. Third, as detailed further below, he was dealing with a question of law of central importance to the legal system that was not within any specialized area of expertise of his. Fourth, Mr. Ferrier does not have special expertise regarding the administrative scheme established by the *PSA*. Correctness is thus the appropriate standard of review.

> ***Dunsmuir* at paras 55, 64 [ABA, Tab 1]**

iii. Application of the Dagenais/Mentuck *Line of Cases is a Question of Central Importance to the Legal System*

45. Even if jurisprudence establishing that decisions of the Board are reviewable on a reasonableness standard could be strictly applied to the Ferrier Decision – which the First Nation Complainants submit it cannot – the presumption of reasonableness is rebutted in the present case. The question of when and on what basis an administrative decision-maker may exercise discretion to close a presumptively open proceeding is a question of central importance to the legal system and outside the expertise of Mr. Ferrier and the Board.

> ***Dunsmuir* at paras 55, 60 [ABA, Tab 1]**
> ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230, at paras 27-28 [ABA, Tab 32]**

46. Examples of other questions found to be of central importance to the legal system and requiring application of the correctness standard include whether there has been discrimination on the basis of freedom of religion or conscience; whether a statutory provision allows solicitor-client privilege to be set aside; and the existence and scope of parliamentary privilege. Additionally, constitutional issues are usually subject to correctness "because of the unique role of s. 96 courts as interpreters of the Constitution."

> ***Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para 168 [ABA, Tab 33]**

***Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555, at para 20 [ABA, Tab 7]**
***Chagnon v Syndicat de la function publique et parabulique du Québec,* 2018 SCC 39, [2018] 2 SCR 687, at para 17 [ABA, Tab 34]**
***Dunsmuir,* at para 58 [ABA, Tab 1]**

47. The ability to attend TBPSB meetings and hearings engages freedom of expression, a fundamental freedom protected by s. 2(b) of the *Charter* and lying at the heart of the open court principle. The open court principle has an important impact on constitutional guarantees and on the administration of justice as a whole. It plays a crucial role in fostering healthy democratic institutions. Board proceedings are required by statute to be open to the public, subject to fettered Board discretion to close them. The application of the test developed by the Supreme Court of Canada to govern when the presumption of openness can be rebutted is an issue of central importance to the legal system, including administrative law. Because of its impact on the administration of justice as a whole, a consistent answer is needed to the question of when and how the *Dagenais/Mentuck* test applies to an administrative decision-maker's exercise of discretion to close a presumptively open proceeding. Neither the TBPSB, nor Mr. Ferrier exercising the powers and duties of the TBPSB, has particular expertise regarding applicability of the test. Thus, the Ferrier Decision is reviewable on a correctness standard.

***Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326, 1989 CanLII 20 (SCC), at 1336 [ABA, Tab 21]**
***Vancouver Sun, Re*, 2004 SCC 43, [2004 2 SCR 332, at paras 23-26 [*Vancouver Sun*] [ABA, Tab 28]**
***Langenfeld v TPSB*, 2018 ONSC 3447, at para 9 [*Langenfeld*] [ABA, Tab 20]**
***Police Services Act*, ss. 35(3), 35(4)**
***Charter of Rights and Freedoms*, s. 2(b)**

iv. The Question of Whether an Administrative Decision-Maker Applied the Correct Legal Test is Reviewable on a Correctness Standard

48. Even in situations where a decision-maker is afforded deference, the question of whether the decision-maker identified the correct legal test is reviewable on a standard of correctness. The

question of whether Mr. Ferrier failed to identify the correct test to guide his discretion is, therefore, reviewable on a standard of correctness.

> ***France v. Diab,*** **2014 ONCA 374 (CanLII) at para 203, [ABA, Tab 35]**
> ***Kunabalasingam v. Canada (Citizenship and Immigration),*** **2017 FC 704, at para 17 [ABA, Tab 36]**

v. Conclusion on Standard of Review

49. For the reasons set out above, the First Nation Public Complainants submit that the Divisional Court erred in applying the reasonableness standard to the Ferrier Decision, and that the appropriate standard of review is correctness.

C. The *Dagenais/Mentuck* Line of Cases Must be Applied in Determining whether the Extension Hearing Can be Closed to the Public

i. Overview on Applicability of Dagenais/Mentuck

50. Public access to courts guarantees the integrity of the judicial process by demonstrating that justice is administered in a non-arbitrary manner and in accordance with the rule of law. The open court principle is inextricably linked to freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression.

> ***Vancouver Sun,*** **at paras 23-26 [ABA, Tab 28]**
> ***Toronto Star Newspaper Ltd. v Ontario*****, 2005 SCC 41 at paras 1-2 [ABA, Tab 22]**
> ***R. v. Canadian Broadcasting Corporation,*** **2010 ONCA 726 at paras 23-24 [ABA, Tab 8]**

51. To achieve a balance between freedom of expression and other important rights and interests, the Supreme Court of Canada developed the adaptable *Dagenais/Mentuck* test. The test requires a decision-maker to engage in a balancing exercise. Specifically, an order permitting infringement of the open court principle shall only be made 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 [order] outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) [*Dagenais*] [ABA, Tab 5]*;
***R. v. Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, at para 32 [*Mentuck*] [ABA, Tab 23]**
***Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at para 26 [ABA, Tab 8]**

52. Mr. Ferrier's determination that the *Dagenais/Mentuck* line of cases did not apply to his determination on the openness of the Extension Hearing was incorrect and unreasonable. First, the fact that the Board is not a court does not render *Dagenais/Mentuck* inapplicable. Second, the fact that Board's discretion to have closed hearings is statutorily prescribed does not render *Dagenais/Mentuck* inapplicable. Third, the Extension Hearing decision is a quasi-judicial decision, so the *Dagenais/Mentuck* line of cases must be applied to determine if it can be closed to the public.

ii. The Dagenais/Mentuck *Test Applies to Decisions Made in Fora Other than Courts*

53. The fact that the Board is not a court does not render *Dagenais/Mentuck* inapplicable. This Honourable Court has previously found that a commissioner was correct in applying the *Dagenais/Mentuck* line of cases to the exercise of his discretion in the context of reviewing a publication ban decision over a public inquiry.

***Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, at paras 32, 38, 41, 44, 50 [ABA, Tab 4]**

54. The Human Rights Tribunal of Ontario has described the open court principle as "a cornerstone of accountability for decision-making tribunals". In its recent *Toronto Star* decision, the Superior Court of Justice affirmed that protection of *Charter* guarantees is a fundamental and pervasive obligation, regardless of the adjudicative forum.

***Stepanova v Human Rights Tribunal of Ontario*, 2017 ONSC 2386 at para 36 [ABA, Tab 16]**

***Toronto Star v AG Ontario*, 2018 ONSC 2586 at para 55 [ABA, Tab 9]**
***Human Rights Tribunal of Ontario (Re)*, 2018 CanLII 74211 (ON IPC) at paras 59-60**

55. The openness principle is inextricably linked to the protection of freedom of expression in the *Charter*. The fact that the Board is not a court does not detract from this, nor does the fact that the *Statutory Powers Procedure Act* does not apply to the Board. Indeed, the wording of the relevant provision regarding openness in the *Statutory Powers Procedure Act* is almost identical to the relevant provision in the *PSA*, discussed in more detail further below.

***Langenfeld*, at paras 9, 25 [ABA, Tab 20]**
***Police Services Act*, ss. 35(3), 35(4), 37**
***Statutory Powers Procedure Act,* RSO 1990, c S.22, s. 9(1) [*Statutory Power Procedure Act*]**

56. The question of whether infringement of the fundamental freedoms protected by the open court principle can be justified is a separate question from that of what procedural safeguards are required by natural justice in a given administrative decision. Distinct lines of jurisprudence apply to each question. Mr. Ferrier erred by conflating procedural fairness and the open court principle.

The Ferrier Decision at paras 8-14 [Tab 8 of the ABC, pp. 70-73]

57. Mr. Ferrier's assertion that the *Dagenais/Mentuck* line of cases did not apply to his exercise of discretion to close a presumptively open Board hearing because the Board is not a court was incorrect and unreasonable. The Divisional Court erred in finding otherwise.

iii. The Dagenais/Mentuck *Test Applies to the Exercise of Statutory Discretion*

58. In exercising the discretion afforded to him by s. 35(4) of the *PSA* to close the Extension Hearing, Mr. Ferrier was required to apply the *Dagenais/Mentuck* test.

59. Subsection 35(3) of the *PSA* provides that meetings and hearings of the Board are presumptively open. Subsection 35(4) of the *PSA* grants the Board discretion to exclude the public from a hearing or meeting *in particular circumstances*. Specifically, it may exclude the public

from a hearing if it believes that specific types of information made by 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*."

***Police Services Act*, ss. 35(3), 35(4) [emphasis added]**

60. Unlike the context of *ex parte* situations (the swearing of an information or a pre-enquête hearing) to which Mr. Ferrier made analogy, the Extension Hearing was and is presumptively open to the public pursuant to s. 35(3) of the *PSA*. Any infringement on the openness of the Extension Hearing is an infringement of freedom of expression.

***Langenfeld* at para 9 [ABA, Tab 20]**

61. The Supreme Court has emphasized that the *Dagenais/Mentuck* test is a flexible test that applies to *all discretionary actions* by a trial judge to limit freedom of expression during judicial proceedings, *including discretion that is authorized by statute*. In exercising discretion authorized under the *Criminal Code* to infringe the open court principle, judges must apply the *Dagenais/Mentuck* test. The same must be true of administrative decision-makers exercising statutory discretion to close presumptively open proceedings.

***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, 1996 CanLII 184 (SCC) at paras 69-71 [ABA, Tab 37]**
***Vancouver Sun* at para 31 [ABA, Tab 28]**
***Toronto Star Newspaper Ltd v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41 at paras 8, 28 [ABA, Tab 22]**
***Statutory Powers Procedure Act*, s. 9(1)**

62. Mr. Ferrier's statutorily-authorized discretion to close the Extension Hearing had to be exercised in accordance with the *Charter*. His determination that the *Dagenais/Mentuck* line of cases had no application to the decision before him because he was applying section 35 of the *PSA* was incorrect and unreasonable. The Divisional Court erred in determining that "there is no need for any reference to the *Dagenais/Mentuck* line of cases where the *PSA* statutory scheme, itself, sets out the balancing act to be undertaken and there is no ambiguity in the legislative provisions."

Divisional Court Decision at para 53 [Tab 4 of the ABC, p. 43]

iv. The Extension Hearing is Quasi-Judicial

63. The Extension Hearing is quasi-judicial in nature. The *Dagenais/Mentuck* line of cases therefore needed to be applied to Mr. Ferrier's decision of whether to exercise discretion to hold the hearing *in camera*.

***R. v. Canadian Broadcasting Corporation,* 2010 ONCA 726 at para 22 [ABA, Tab 8]**

64. In *Minister of Natural Resources v Lybrand*, Dickson J articulated four questions relevant to determining whether a proceeding is quasi-judicial:[2]

i. Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that **a hearing is contemplated** before a decision is reached?

ii. Does the decision or order **directly or indirectly affect the rights and obligations** of persons?

iii. Is the **adversary process** involved?

iv. Is there an **obligation to apply substantive rules to many individual cases** rather than, for example, the obligation to implement social and economic policy in a broad sense?

***Minister of National Revenue v. Coopers and Lybrand,* [1979] 1 SCR 495, 1978 CanLII 13 (SCC) at 504 [per Dickson J, for the Court] (emphasis added) [ABA, Tab 38]**
***British Columbia (Attorney General) v British Columbia (Information & Privacy Commissioner),* 2004 BCSC 1597 [ABA, Tab 39]**

65. Application of these factors establish that the Extension Hearing will be quasi-judicial. First, the general context makes it clear that a hearing is contemplated before a decision is made under s. 83(17) of the *PSA* regarding the reasonableness of the delay in serving the Responding Officers with notices of hearing. The record makes it clear that a hearing was initially scheduled for September 21, 2018.

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[2] *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 SCR 495, 1978 CanLII 13 (SCC) at 504 [*per* Dickson J, for the Court] (emphasis added), First Nation Public Complainants' Book of Authorities, Tab 18; see also *British Columbia (Attorney General) v British Columbia (Information & Privacy Commissioner),* 2004 BCSC 1597, First Nation Public Complainants' Book of Authorities, Tab 19.

66. Second, the Extension Hearing affects the rights and obligations of the Respondent Officers and the complainants. The outcome of the Extension Hearing will determine whether the complainants have a right to see their complaint proceed to a hearing. It will also determine whether the Respondent Officers are obligated to participate in a disciplinary hearing.

> ***Endicott v. Independent Police Review Director,*** **2013 ONSC 2046 (CanLII) at para 45 [ABA, Tab 40]; appeal dismissed*: Endicott v Ontario (Independent Police Review Office),* 2014 ONCA 363**
> ***Stewart et al. v Office of the Independent Police Review Director et al.,*** **2014 ONSC 6150 (CanLII) at para 8 [ABA, Tab 41]**

67. Third, the adversary process is involved in the Extension Hearing. The parties to the hearing will have the opportunity to present their positions regarding the reasonableness of the delay in serving notices of hearing, and the decision-maker will adjudicate the reasonableness.

68. Fourth, there is an obligation on Mr. Ferrier, acting in the place of the Board, to apply and consider substantive rules to the facts before him. Adjudicating an application pursuant to section 83(17) of the *PSA* entails a consideration of the particular circumstances of the individual case, and the making of a finding as to reasonableness based on those circumstances. The Extension Hearing does not involve the implementation of social and economic policy in a broad sense.

69. In *Danyluk*, Binnie J discussed the difference between non-judicial decisions and judicial/quasi-judicial decisions in the context of an issue estoppel analysis. A key element in identifying a proceeding or decision as judicial/quasi-judicial is that the decision-maker was exercising adjudicative, as opposed to investigative, functions.[3]

> ***Danyluk v. Ainsworth Technologies Inc.,*** **[2001] 2 SCR 460, 2001 SCC 44, at paras 40-42 [*per* Binnie J, for the Court] [*Danyluk*] [ABA, Tab 42]**
> **See also *Guay v. Lafleur,* [1965] SCR 12, 1964 CanLII 45 (SCC) [ABA, Tab 43]**

[3] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 SCR 460, 2001 SCC 44 (CanLII), at paras 40-42 [*per* Binnie J, for the Court] [*Danyluk*], First Nation Public Complainants' Book of Authorities, Tab 20

70. Mr. Ferrier, acting in place of the Board, will be exercising adjudicative functions at the Extension Hearing: he will be adjudicating the reasonableness of the delay in serving notices of hearing on the Respondent Officers. His function will go beyond that of fact-finding.

71. Additionally, the *Dagenais/Mentuck* test applies to all stages of a proceeding, including the pre-charge or "investigative stage" of criminal proceedings. It must therefore also apply to a pre-charge Board proceeding.

> ***Toronto Star Newspaper Ltd. v Ontario*, 2005 SCC 41 at paras 5, 7, 28-29 [ABA, Tab 22]**
> ***Vancouver Sun* at paras 23-27 [ABA, Tab 28]**

72. For the reasons outlined above, the Divisional Court erred in characterizing Mr. Ferrier's function in the Extension Hearing as "a non-adjudicative administrative function." Similarly, Mr. Ferrier erred in finding that the Extension Hearing is not a judicial or quasi-judicial proceeding and that he would be performing an administrative act at the Extension Hearing. The *Dagenais/Mentuck* lines of cases had to be applied to determine whether it could be closed to the public because the Extension Hearing is quasi-judicial.

> **Divisional Court Decision at paras 51, 56 [Tab 4 of the ABC, pp. 42, 46]**
> **The Ferrier Decision at para 31 [Tab 8 of the ABC, p. 75]**

v. The Only Correct and Reasonable Outcome When the Dagenais/Mentuck *Line of Cases are Applied is that the Extension Hearing Must be Open*

73. The evidence before Mr. Ferrier did not establish that having the Extension Hearing remain open will pose a serious risk to the proper administration of justice. Furthermore, the salutary effects of holding the hearing *in camera* do not outweigh the deleterious effects that closing the proceedings will have on the rights and interests of the parties and the public. The Extension Hearing may not be held *in camera*.

> ***Mentuck* at para 32 [ABA, Tab 23]**

74. Even at the pre-charge stage of proceedings, to establish that infringement of the open court principle is required to prevent a serious risk to the proper administration of justice, something more than a general assertion that publicity could compromise investigative efficacy or taint a potential witness is needed. Mr. Ferrier found it was "conceivable" that having the Extension Hearing open and the OIPRD Report public would taint witnesses and impact on the efficacy of cross-examination. That such a result is "conceivable" does meet the requisite threshold to establish that infringement of the open court principle is required.

> ***Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41, at paras 8-9, 32-42 [ABA, Tab 22]**
> **The Ferrier Decision at paras 24-26 [Tab 8 of the ABC, p. 74]**

75. Mr. Ferrier focused only on the salutary effects of holding the hearing *in camera*. When the deleterious effects of holding the hearing *in camera* are also considered, the conclusion must be drawn that they outweigh any salutary effects.

76. As noted by the Divisional Court, Mr. Ferrier emphasized "the potential impact of an open hearing on the reputation and privacy interests of the Respondent Officers and of the other police officers who had been under scrutiny but whose conduct was not ultimately identified as being worthy of disciplinary action." However, he failed to consider whether the benefits of protecting the reputation and privacy interests of the officers outweighed the harm of closing proceedings.

> **The Divisional Court Decision at para 64 [Tab 4 of the ABC, pp. 48-49]**
> **The Ferrier Decision at paras 27-29 [Tab 8 of the ABC, pp. 74-75]**

77. In *Canadian Broadcasting Corp. v Canada,* the court weighed (1) the privacy rights of officers against whom allegations had not been substantiated and no charges had been laid, against (2) the public interest in the failure of the Toronto Police Service to adequately investigate several officers for wrongful conduct. The court explained the following:

> …the assertion has been made that there may have been a failure at senior levels of one of Canada's largest police services to fully investigate serious allegations

> involving some of their own officers. The possibility that there has been such inaction is also unquestionably of significant public interest.

The court found that the public interest outweighed the deleterious effects of "disadvantage" and "embarrassment."

> ***Canadian Broadcasting Corp. v Canada*, [2007] OJ No. 5436 at paras 28, 31, 32; aff'd: *The Toronto Police Association v. Canadian Broadcasting Corporation Sun Media (Toronto) Corporation*, 2008 ONCA 297; leave denied: *Toronto Police Association v. Canadian Broadcasting Corporation and Sun Media (Toronto) Corporation*, 2008 CanLII 55972 (SCC)**

78. In the present case, the same conclusion must be reached when the public interest in the failure of Thunder Bay Police Service officers to adequately investigate the death of Stacy DeBungee is considered in the context of other similar failures in the same community. Significant weight needs to attach to openness in these circumstances.

79. Contrary to the suggestion of the Divisional Court and Mr. Ferrier, it is not possible to separate the Extension Hearing from the context of the complaint, resulting investigation findings, and public desire for – and interest in – police accountability. As Justice Pierce correctly stated, "[E]ach step of the complaint process is a step on the way towards resolution to which transparency must attached if the process is to be credible to the community. Failing to proceed openly will only sow distrust in the complaints procedure." This would undermine the goal of the *PSA*, which the Supreme Court of Canada has explained is to increase public confidence in the provision of police services, *including the processing of complaints against officers*.

> **Decision of Justice Pierce at para 49 [Tab 7 of the ABC, p. 64]**
> ***Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125 [*Penner*], at para 117 [ABA, Tab 29]**

80. While closing the Extension Hearing will serve the salutary effect of protecting the reputation and privacy interests of the Respondent Officers and of other officers, this is outweighed by the deleterious effect that closing the Hearing will have on freedom of expression, public confidence in the provision of police services, and the health of our democratic institutions.

vi. Conclusion Regarding Applicability of the Dagenais/Mentuck *Line of Cases*

81. Mr. Ferrier and the Divisional Court both erred in finding that the *Dagenais/Mentuck* line of cases was not relevant to Mr. Ferrier's decision to hold the Extension Application *in camera*. As an administrative decision-maker performing a quasi-judicial function, Mr. Ferrier was required to apply the *Dagenais/Mentuck* test to the exercise of discretion authorized by s. 35(4) of the *PSA* to close a presumptively open proceeding. Application of the *Dagenais/Mentuck* test makes it clear that the Extension Hearing must not be held *in camera*. This is the only conclusion that can be reached when the *Dagenais/Mentuck* test is applied.

D. Mr. Ferrier Did Not Engage in a Reasonable Balancing of Considerations under s. 35(4) of the *Police Services Act*

i. Overview re Balancing Under s. 35(4)

82. The Divisional Court erred in finding that Mr. Ferrier engaged in a reasonable balancing of considerations under s. 35(4) of the *PSA* and that his decision to hold the Extension Hearing *in camera* was reasonable. The Court's failure to properly appreciate the relevance of the social context and the public interest engaged in the questions before it led it to these incorrect findings.[4] Mr. Ferrier was required by the wording of s. 35(4) to (1) engage in a balancing exercise while (2) having regard to the context in which the Extension Hearing will take place. His failure to do either led him to an unreasonable and incorrect determination to hold the Extension Hearing *in camera*.

ii. Mr. Ferrier Did Not Balance the Considerations Under s. 35(4)(b) of the PSA

83. Mr. Ferrier did not engage in any balancing analysis at all, rendering his decision both incorrect and unreasonable. The statutory grant of discretion in s. 35(4) of the *PSA* necessitates a

[4] In concert with its error in finding the *Dagenais/Mentuck* line of cases in applicable.

decision-maker to engage in a balancing exercise. The decision-maker must consider (1) the merits of protecting the confidentiality of sensitive information on one side of the scale, *and* (2) the merits of openness of proceedings – such as promotion of *Charter* rights, *Charter* values, and transparency – on the other. It is not sufficient to consider only one side of the scale.

> ***Hamilton (Police Services Board) (Re),*** **2011 CanLII 68459 (ON IPC) at paras 21-23**
> ***Police Services Act*****, s. 35(4)**

84. Mr. Ferrier only considered one side of the scale. His reasons for judgment discuss only the merits of keeping "intimate…personal matters" confidential. His reasons are silent on the merits of "adhering to the principle that proceedings be open to the public." His reasons make no mention of freedom of expression or any of the purposes or values furthered by openness of proceedings. This is a reviewable error regardless of the standard of review applied. Mr. Ferrier was not alive to the constitutional principles and *Charter* rights engaged in the decision before him, and did not properly balance them when considering s. 35(4) of the *PSA*.

> ***Doré v. Barreau du Québec*****, 2012 SCC 12, [2012] 1 SCR 395, at paras 58, 70 [ABA, Tab 1]**
> ***Langenfeld*** **at para 9 [ABA, Tab 20]**

85. Additionally, the Divisional Court and Mr. Ferrier both failed to consider the fact that the *PSA* is designed to increase public confidence in the provision of police services, *including the processing of complaints against officers*. This failure led them to place undue emphasis on the fact that the Extension Hearing is part of the discipline process in an employment context.

> ***Penner*** **at para 117 [ABA, Tab 29]**

86. Even on a reasonableness standard of review, the failure to consider factors pointing to a different conclusion than that reached by the decision-maker is a reversible error. This is true in the present case where consideration of neglected factors can only lead to one reasonable outcome.

> ***Giroux v. Swan River First Nation,*** **2006 FC 285, at para 65 [ABA, Tab 44]**
> ***Groia v. Law Society of Upper Canada,*** **[2018] 1 SCR 772, 2018 SCC 27, at paras 123-125 [ABA, Tab 3]**
> ***Police Services Act*****, s. 35(4)**

iii. Mr. Ferrier Did Not Have "Regard for the Circumstances"

87. Mr. Ferrier was required to have "regard for the circumstances" in balancing considerations under s. 35(4) of the *PSA*. Social context is an important part of the circumstances he was required to consider. The social context in which a decision is made is highly relevant to determining the weight to be attached to the importance of openness of proceedings. Freedom of communication and freedom of expression "depend on their vitality on public access to information of public interest". Social context animates the public interest in proceedings.

> ***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 SCR 188, at para 2 [ABA, Tab 22]**

88. Mr. Ferrier's reasons contain almost no reference to the social context in which he was making his decision. He failed to have "regard to the circumstances" including the fact that the Extension Hearing would be heard in a context characterized by (1) allegations that racism influenced the conduct of the Responding Officers; (2) broken trust between the Indigenous community of Thunder Bay and the TBPS and TBPSB; (3) concerns that the TBPSB was failing in its oversight duties; and (4) media coverage of all matters relating to the TBPS and Indigenous people. These circumstances indicate that greater weight should have been placed on the principle of open proceedings, as Justice Pierce correctly found.

> **Decision of Justice Pierce at paras 17-18, 48-49 [Tab 7 of the ABC, pp. 59, 63-64]**

iv. Conclusion Regarding Balancing of Considerations Under s. 35(4) of the PSA

89. Mr. Ferrier's failure to consider the social context or take judicial notice of societal racism when applying s. 35(4)(b), coupled with his failure to engage in any balancing exercise, is fatal to the Divisional Court's finding that Mr. Ferrier may hold the Extension Hearing *in camera*. The decision to hold the hearing *in camera* was incorrect and unreasonable.

> ***R. v. Williams*, [1998] 1 SCR 1128, 1998 CanLII 782 (SCC) at para 54 [ABA, Tab 45]**

E. The First Nation Public Complainants Did Not have a Duty to Keep the OIPRD Report Confidential

90. The Divisional Court erred in finding that the First Nation Public Complainants and counsel knowingly breached the provisions of the *PSA*. Mr. Ferrier referenced this supposed breach as a consideration in his decision to hold the Extension Hearing *in camera*. The finding of the Divisional Court is highly problematic because no such obligation of confidentiality exists.

91. Section 95 of the *PSA* sets out confidentiality obligations in relation to public complaints against police officers:

> Confidentiality
> 95 *Every person engaged in the administration of this Part* [i.e. Part V, Public Complaints and Disciplinary Proceedings] shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,
> (a) as may be required in connection with the administration of this Act and the regulations;
> (b) to his or her counsel;
> (c) as may be required for law enforcement purposes; or
> (d) with the consent of the person, if any, to whom the information relates.
>
> ***Police Services Act,* s. 95**

92. This provision applies solely to persons engaged in administering Part V of the *PSA*. It does not apply to members of the public, such as the First Nation Public Complainants, who have filed a complaint pursuant to the *PSA* or to their counsel. There is no provision in the *PSA* that requires public complainants to maintain confidentiality in relation to their complaints and the processing thereof.

93. The *Police Services Act* is designed to increase public confidence in policing, including the processing of complaints. The idea that complainants can be held accountable for disclosing

information in OIPRD reports based on confidentiality provisions in the *PSA* that do not apply to them is a perverse conclusion, contrary to the goal of the *PSA* and to the spirit of the OIPRD.

***Penner* at paras 50, 117 [ABA, Tab 29]**

PART V: RELIEF SOUGHT

94. The First Nation Public Complainants respectfully request a finding that they did not breach the confidentiality provisions of the *PSA* or any confidentiality obligation, and an order that:

- The order of the Divisional Court dated January 7, 2019, be set aside;
- The September 20th, 2018, decision of Lee Ferrier, Q.C., exercising powers and duties of the Thunder Bay Police Services Board, be quashed;
- The Extension Hearing be open to the public.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 15th day of August 2019.

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Counsel for the First Nations Public Complainants/Appellants

Court File No. C66995

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CANADIAN BROADCASTING CORPORATION

Applicant
(Respondent on Appeal)

- and –

THE FIRST NATION PUBLIC COMPLAINANTS

Respondent
(Appellant)

- and -

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

Respondents
(Respondents on Appeal)

CERTIFICATE

I, Krystyn Ordyniec, lawyer for the Appellant, the First Nations Public Complainants, certify that:

1. An order under subrule 61.09(2) is not required; and
2. I estimate that 1.0 hour will be required for the Appellant's oral argument, not including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 15th day of August 2019.

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Schedule "A"

1. *Toronto Star Newspaper Ltd. V. Ontario,* [2005] 2 S.C.R
2. *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326
3. *Vancouver Sun v. Attorney General of Canada et al.,* 2004 SCC 43, [2004] 2 S.C.R. 332
4. *Canada Revenue Agency v. Telfer,* 2009 FCA 23, 386 NR 212 (FCA)
5. *Merck Frosst Canada Ltd v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23
6. *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190
7. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31, [2018] 2 SCR 230
8. *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16, [2015] 2 SCR 3
9. *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53, [2016] 2 SCR 555
10. *Chagnon v. Syndicat de la function publique et parabulique du Québec,* 2018 SCC 39, [2018] 2 SCR 687
11. *Langenfeld v. TPSB,* 2018 ONSC 3447
12. *France v. Diab,* 2014 ONCA 374
13. *Kunabalasingam v. Canada (Citizenship and Immigration),* 2017 FC 704
14. *R. v. Canadian Broadcasting Corporation,* 2010 ONCA 726
15. *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 SCR 835, 1994 CanLII 39 (SCC)
16. *R. v. Mentuck,* 2001 SCC 76, [2001] 3 SCR 442
17. *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry,* 2007 ONCA 20
18. *Stepanova v. Human Rights Tribunal of Ontario,* 2017 ONSC 2386
19. *Human Rights Tribunal of Ontario (Re),* 2018 CanLII 74211 (ON IPC)

20. *Toronto Star v. AG Ontario,* 2018 ONSC 2586

21. *Human Rights Tribunal of Ontario (Re),* 2018 CanLII 74211 (ON IPC)

22. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 SCR 480, 1996 CanLII 184 (SCC)

23. *Minister of National Revenue v. Coopers and Lybrand,* [1979] 1 SCR 495, 1978 CanLII 13 (SCC)

24. *British Columbia (Attorney General) v. British Columbia (Information & Privacy Commissioner),* 2004 BCSC 1597

25. *Endicott v. Independent Police Review Director,* 2013 ONSC 2046

26. *Endicott v Ontario (Independent Police Review Office)*, 2014 ONCA 363

27. *Stewart et al. v Office of the Independent Police Review Director et al.,* 2014 ONSC 6150 (CanLII)

28. *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, [2001] 2 SCR 460

29. *Guay v. Lafleur,* [1965] SCR 12, 1964 CanLII 45 (SCC)

30. *Canadian Broadcasting Corp. v Canada,* [2007] OJ No. 5436

31. *The Toronto Police Association v. Canadian Broadcasting Corporation Sun Media (Toronto) Corporation,* 2008 ONCA 297

32. *Toronto Police Association v. Canadian Broadcasting Corporation and Sun Media (Toronto) Corporation*, 2008 CanLII 55972 (SCC)

33. *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19, [2013] 2 SCR 125

34. *Hamilton (Police Services Board) (Re),* 2011 CanLII 68459

35. *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395

36. *Giroux v. Swan River First Nation*, [2006] FCJ No 406 (QL), 2006 FC 285

37. *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772

38. *R. v. Williams,* [1998] 1 SCR 1128, 1998 CanLII 782 (SCC)

Schedule "B"

Canadian Charter of Rights and Freedoms, being Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

[…];

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[…]

Police Services Act, R.S.O. 1990, c. P.15

35 Meetings
[…]

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.

83(17) Six-month limitation period, exception

(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.

Same

(18) The day referred to in subsection (17) is,

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,

[…]

ii. the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5) (c);

[…]

Confidentiality

95 Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,

(a) as may be required in connection with the administration of this Act and the regulations;

(b) to his or her counsel;

(c) as may be required for law enforcement purposes; or

(d) with the consent of the person, if any, to whom the information relates.

Public Officers Act, RSO 1990, c P.45

Procedure when public officer interested in question before him

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).

Statutory Powers Procedure Act, RSO 1990, c S.22

Hearings to be public, exceptions

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).

Courts of Justice Act, R.S.O. 1990, c. C.43

Court of Appeal jurisdiction

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;

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).