Court File No.: C66995 & C66998

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CANADIAN BROADCASTING CORPORATION

Applicant
(Appellant in C66998)

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 in C66995)

FACTUM OF THE RESPONDENT OFFICERS

Joanne E. Mulcahy
Barrister
90 Richmond Street East
Suite 301
Toronto, ON M5C 1P1

Tel: 416-860-9393
Fax: 416-860-9396
Email: jmulcahy@bellnet.ca

Counsel for the Respondent Officers

PART I- OVERVIEW

1. It is important to recognize the context in which this appeal arises. It arises with respect to section 83(17) of the Police Services Act which provides:

"If six months have elapsed since the day described in subsection 18 [the day on which the complaint was retained by the Independent Police Review Director] no notice of hearing shall be served unless the board, in the case of a municipal police officer.., is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing."

2. 83(17) involves the Board carrying out an administrative/ procedural function at a meeting; one that is a screening function focused on whether to extend the time for service of a notice of hearing and not on the merits of the case. The function is not judicial/ quasi judicial nor is it in the context of the adjudication of rights. It is a non-adjudicative or preliminary decision performed at a pre-hearing or screening stage. It is at the discretion of the Board who can establish their own rules and procedures.

3. This is the context in which the Divisional Court correctly and reasonably held that:

a. the standard of review on the application for judicial review was reasonableness where Mr. Ferrier Q.C, exercising the powers and duties of the Thunder Bay Police Services Board ("TBPSB"), was deciding ..... an extension application under s.83(17) of the Police Services Act R.S.O. 1990.c. P. 15 would be heard in camera. A s. 83(17) extension application is "administrative and procedural in nature. It is a screening function focused in part on the nature, breadth, length, complexity and efficiency of the investigation undertaken by the IPRD. The function is not judicial or quasi-judicial".

b. Ferrier's conclusion that "[t]he 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" was reasonable and correct.

c. Ferrier's decision to hold the extension application hearing in camera was a reasonable outcome of his balancing the considerations under s. 35(4)(b) of the PSA when that section is considered within the overall scheme of the PSA and, more particularly, within Part V of the legislation.

PART II- STATEMENT OF FACTS

CHRONOLOGY OF EVENTS

4. On March 18, 2016, the OIPRD received a complaint from Brad DeBungee and Chief Jim Leonard [First Nation Public Complainants] (the "Complainants") alleging misconduct against TBPS officers in relation to the investigation into the death of Stacy DeBungee. The Complainants had also requested that the OIPRD conduct a systemic review into TBPS and its relationship with the First

Nations people. [Divisional Court Decision, Tab 4, para 12]

5. On April 22, 2016, the OIPRD retained the complaint for investigation under s. 68 of the PSA. This investigation was not into systemic review but whether officers had committed misconduct under the PSA. On November 3, 2016, the OIPRD released its terms of reference for the systemic review into the TBPS policing of the First Nations people. [Divisional Court Decision, Tab 4, para 13]

6. On February 15, 2018, the OIPRD Director wrote to the Complainants, care of their counsel indicating that the OIPRD had completed their investigation into the complaint and had found evidence of misconduct as defined by the PSA against the Respondent Officers. He advised that a final report had been completed and would be forwarded to the TBPS Chief for adjudication by an outside Hearing Officer and Prosecutor. He provided to the Complainants a copy of the report and wrote:

" This report is provided to you in accordance with the legislative requirements of notification pursuant to section 68 of the Police Services Act. **Please note that all information contained in the report of investigation is confidential and shall not be communicated to any other person without the consent of the person(s) to whom the information relates**, nor is the confidential information contained in the report admissible in a civil proceeding pursuant to section 26.1(11) and 83(8) of the Police Services Act." [Divisional Ct, Tab 4, para 14, 66; Letters from McNeilly of Feb 15/18 to DeBungee and Leonard, Tab 14, p. 340, 342]

7. Notwithstanding that direction by the OIPRD Director as to the confidentiality of the investigative report, the Complainants and their counsel provided the confidential investigative report to the media and to members of the public, posted the confidential investigative report on the Complainants' counsel's firm website, held press conferences and issued press statements attacking the officers. [Divisional Court Decision, para 66; Tab 11E, p. 162, 175; Ferrier Decision Tab 8, para 40, 41]

8. TBPS released a March 5, 2018 press release in response to the Complainants' and their counsel's release of the confidential investigative report to the media and to the public without the consent of any person referred to in the report indicated. [Tab 14, p. 344-345]

9. Since the delay was more than 6 months, the OIPRD directed the TBPS Chief to make an application to TBPSB pursuant to s. 83(17) of the PSA for permission of the Board to serve the Respondent Officers beyond the 6 months time period with respect to notices of hearing. The Chief did

so including the 126 page investigative report of unproven allegations as per OIPRD's direction. The application included materials which purported to include summaries of named and unnamed witnesses, unsworn and untested materials, hearsay, speculation, confidential information. The systemic review is not part of the s. 83(17) application. [Divisional Ct. Decision, Tab 4, para 14; Tab 11D, p. 155, Tab 11E, p. 161-162]

10. The Board was to have heard the s. 83(17) application on April 6, 2018. CBC was aware since March 16, 2018 that the s. 83(17) application would be addressed at a closed session of the Board. CBC did nothing about this.[Divisional Court Decision, Tab 4, para 15; Affidavit of Groper, March 16/18, Tab 13, p. 281]

11. Prior to April 6, 2018, the Board determined they had a conflict of interest and reasonable apprehension of bias arising from the outstanding OIPRD systemic review investigation.[Div.Ct. para 15]

12. On April 27, 2018, the Board filed a notice of application with the Superior Court of Justice requesting the appointment of a disinterested person under s. 16 of the Public Officers Act, R.S.O. 1990, c. P. 45. to hear the application under s. 83(17) of the PSA. On July 25, 2018, Regional Senior Justice Warkentin issued an order appointing the Honourable Lee K. Ferrier Q.C. to exercise the powers and duties ordinarily imposed on the Thunder Bay Police Services Board pursuant to s. 83(17) of the PSA. The Order set out that the appointment was on consent of the OIPRD, TBPS and the Respondent Officers and that **the Complainants did not take a position on the order.**

[Divisional Court Decision, Tab 4, para 16; Tab 11D, p. 152, Order of Appointment, Tab 11A; Ferrier Decision Tab 8]

13. The meeting to address s. 83(17) application was scheduled to be before Ferrier on September 21, 2018. Pursuant to jurisprudence, the parties with respect to the s. 83(17) matter at the Board meeting would be the Chief, the OIPRD, the Respondent Officers and the Complainants. It would not have been a " secret hearing". The Complainants were served with materials, provided an investigative report that they were not statutorily entitled to, given every opportunity to make written and oral submissions and given an opportunity to attend the s. 83(17) application if they chose. Transparency was evident through the OIPRD conducting the investigation, the appointment of a disinterested person and both the OIPRD and Complainants having standing to make and receive submissions.

14. On a conference call with Ferrier on July 20, 2018, it was discussed that while some police services boards accept written submissions only, it has been TBPSB practice to accept both written and oral submissions. On the back of that longstanding practice, all parties agreed they wished this practice to continue. It was discussed whether the extension application was to be held in camera. All parties save the Complainants' counsel indicated it was normal practice that the application was heard in camera. The Complainants' counsel not being familiar with the procedure took no position. At that time they did not express their disagreement. [Tab 11D, p. 152, Tab 11B, p.95-96]

15. On July 27, 2018, Ferrier sought the views of the parties as to whether the extension application on September 21, 2018 should be in camera in view of the wording of ss. 35(3) and (4) of the PSA. He referred to the earlier conference call in which he had been advised that the general practice in Ontario was for any hearings regarding extension applications to be conducted in camera. Counsel for all parties except the Complainants advised Ferrier of their agreement that the hearing be held in camera.

Divisional Court , Tab 4, para 17; Tab 11B, p. 98; Tab 11B, p. 99; Tab 11B, p, 104; Tab 11B, p.105; Tab 11B, p. 106

16. On August 1, 2018, Ferrier provided a timeline for written submissions on whether the September 21, 2018 hearing should be held in camera. The Complainants, TBPS, and the Respondent Officers filed written submissions. On September 16, 2018, after having received notice from the Complainants' counsel that the extension hearing likely would be held in camera, CBC advised Ferrier of its interest in being heard. Ferrier afforded CBC the opportunity of making written submissions. CBC did so. CBC did not provide their submissions to the Respondent Officers, TBPS or OIPRD.

Divisional Court Decision, Tab 4, para 18; Tab 11C, D. E, F, Tab 14(1); Tab 11B, p. 121; Tab 14, para 3,5,6,7,8; Tab 11B, p. 139; 11B, p. 128, 129, 132, 134,139

DECISION OF MR. FERRIER ON SEPTEMBER 20, 2018

17. Ferrier released his decision on September 20, 2018 to the parties and to CBC and held that the extension application would be held in camera. The Divisional Court held:

"After considering the written submissions of the parties, Ferrier decided that the extension application would be determined in camera. He reasoned as follows:

*Forestall v. Toronto Police Services Board, [2007] O.J. No. 3059, 2007 CanLII 31785 (Div. Ct.) is a leading authority on the nature of extension applications under s. 83(17) of the PSA. Forestall stands for the proposition that the determination of an extension application is an administrative or procedural function; it is not a judicial or quasi-judicial function. The Statutory Powers Procedure Act, R.S.O. 1990, c. S. 22 does not apply to such a determination under s. 83(17) of the PSA. Although some degree of procedural fairness is required due to the importance of the decision, particularly for the officers under scrutiny, no oral hearing is necessarily required.

*Part V of the PSA dealing with complaints and disciplinary proceedings in regard to police officers is essentially dealing with employment-related matters. Such matters fall within the category of "intimate ... personal matters" referred to in s. 35(4)(b) of the PSA (Toronto Police Services Board, Order MO-1186, Feb. 2, 1999 (ON IPC) and Ottawa Police Services Board, Order M-380, Aug. 26, 1994 (ON IPC)). Although meetings and hearings conducted by police boards shall be open to the public under s. 35(3) of the PSA, this is subject to the exceptions stipulated in s. 35(4) of the PSA which gives a police board the discretion to exclude the public from all or part of a meeting or hearing if it is of the opinion that intimate personal 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 (such as the Respondent Officers) outweighs the desirability of adhering to the principle that proceedings be open to the public.

*The Statutory Power Procedures Act does not apply to a hearing or board meeting during which an extension application is decided (PSA, s. 37).

*A police board shall establish its own rules and procedures in performing its duties under the PSA (PSA, s. 37).

*The Report of the IPRD referred to 33 witnesses including the Complainants, the Respondent Officers, other officers initially identified as responding officers, other officer witnesses, and other civilian witnesses. Publication of the Report could taint the evidence of witnesses, render ineffective an order excluding witnesses, and impact on the efficacy of cross-examinations. Officers initially identified as responding officers but against whom the IPRD had not authorized disciplinary proceedings, might suffer unfairly from the stigma attached with their conduct having been investigated by the IPRD. If the Report were made public but the extension application denied, the Respondent Officers would be left with a negative stigma attaching to them.

*An extension application precedes the commencement of proceedings. It is part of the investigative or pre-charge stage -- not part of the subsequent proceedings. In analogous situations, investigative or pre-charge processes are not open to the public.

*"The Dagenais/Mentuck line of cases has 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." [Tab 4, para 22]

EVENTS SUBSEQUENT TO FERRIER'S DECISION

18. Later the same day, at CBC's request, Ferrier adjourned the extension application scheduled for the following day to allow CBC time to seek a stay of the hearing while it brought an application for judicial review. On October 4, 2018, an interim injunction was issued by Justice Pierce staying the

extension hearing pending the hearing of the application for judicial review. The interim injunction decision on the low threshold of a serious issue to be tried erroneously conflated the process to serve the notice of hearing concerning allegations of misconduct under s. 83(17) with the separate issues engaged in the ongoing systemic review being conducted by the OIPRD. [para 19, 31, 32]

DECISION OF THE DIVISIONAL COURT

19. CBC's judicial review application was heard by the Divisional Court (Regional Senior Justice Warkentin, Justice Aitken and Justice Mulligan) in Thunder Bay on December 6, 2018. The only issue advanced on the judicial review by CBC was whether Ferrier's Decision should be quashed due to his making an error of law by not applying the Dagenais/Mentuck test to the question of whether the extension application should be heard in camera. The Divisional Court released their 28 page decision on January 7, 2019 and dismissed the judicial review application. [para 2, 23, 53,60, 67,68]

A. The Legislative Framework and Statutory Interpretation

20. The Divisional Court considered statutory interpretation and the legislative framework under the PSA including s. 35(3), 35(4), 37, 57, 83(17), 83(18), 85(9) and 95 of the PSA.[para 20, 21, 52]

B. The Dagenais/ Mentuck Test

21. The Court set out at paragraph 24 the Dagenais/ Mentuck test.

C. The Social Context

22. The Divisional Court considered in detail the social context in which the issue arose. [para 25-33]

23. The Divisional Court held at para 29:

"The public, and particularly the First Nations community in Thunder Bay, has a strong interest in the circumstances surrounding the death of Stacy DeBungee and in the TBPS's investigation of his death. There is a strong public interest in seeing that, if police misconduct is found in regard to that investigation, those responsible for that misconduct are held to account. There can be no question that Ferrier was well aware of the high degree of public interest in the outcome of the extension application hearing at the time he determined that the hearing would be held in camera."

24. The Divisional Court held at para 32 that the focus of Ferrier's analysis:

" will be the reasonableness of the delay of more than two years between the IPRD's retention of the DeBungee complaint and the issuance of a notice of disciplinary hearing to the Respondent officers. No

doubt allegations regarding racism will be considered peripherally at the extension application hearing; however, such allegations will not be the prime focus of the hearing. The extent to which racism rears its ugly head in policing in Thunder Bay is the focus of the two separate reports, one by the IPRD and one by Senator Murray Sinclair, issued after the hearing of this judicial review application."

25. Further they held at paragraph 33:

"One must not lose sight of the reality that the extension application is being determined in the context of possible disciplinary proceedings against employees. Ferrier did not err in situating the issue before him in that context, despite the high level of public interest in the outcome of any such disciplinary proceedings. We reject the submissions of the CBC and the Complainants that the level of public interest in this matter should mandate what legal test should be applied in the circumstances. We reject the argument that the level of public interest changes the nature of the decision-making process or the nature of the role being undertaken by Ferrier."

D. The Standard of Review of Reasonableness

26. The Divisional Court held that Ferrier's decision was reviewable on a standard of reasonableness consistent with Dunsmuir v. New Brunswick 2008 SCC 9. [para 37-57]

27. They found that there is ample case law that the function undertaken by the Board or Ferrier exercising the powers and duties of the Board when determining an extension application under s. 83(17) is administrative and procedural in nature. It is a screening function focussed in part on the nature, length, complexity and efficiency of the investigation undertaken by the OIPRD. There is no adjudication of rights as it does not consider the merits of the case. The function is not judicial nor quasi judicial. [para 38, 39, 40, 42]

28. The Divisional Court held that the applicable standard of review of reasonableness is supported by Dore v. Quebec (Tribunal des professions) 2012 SCC 12: "even when a court is reviewing a disciplinary body's application of Charter protections in the exercise of its discretion, the standard of review is reasonableness." Accordingly, the Divisional Court held that:

"If reasonableness is the standard of review when a court is judicially reviewing an adjudicated administrative decision where Charter values are implicated, it must also be the appropriate standard of review where the court is assessing how a decision-maker, exercising a non-adjudicative administrative function, has dealt with Charter values." [para 41,42,50,51]

29. As stated in Penner v NRPSB 2013 SCC 19 by making the complainant a party, the PSA promotes transparency and public accountability. However the complainants have no right to any

particular remedy flowing from the investigation undertaken by the OIPRD. [para 44]

30. The Divisional Court noted that the significance of a tribunal's decision being non-adjudicative or preliminary and performed at a pre-hearing, investigative or screening stage has been considered high in the determination of the appropriate standard of review. The normal practice is that discretionary decisions of this nature by administrative tribunals are subject to a standard of review of reasonableness. [para 45-47]

31. The Divisional Court held:

"Placing reliance on the Dagenais/ Mentuck line of cases, counsel for the CBC and the Complainants argue that, because the Charter value of freedom of expression is implicated if proceedings are held in camera, that Ferrier's decision would be reviewable on a standard of correctness. We reject this submission. [para 48-57]

32. They noted that the Dagenais cases all deal with judicial or quasi judicial proceedings which was not involved in CBC's judicial review: instead it was a preliminary matter in a process concerning disciplinary action within an employment context. [para 49]

33. The Divisional Court noted that no case law was cited by CBC to the effect that section 2b of Charter dealing with freedom of expression is implicated when employers are investigating or deciding on a course of action to deal with allegations of wrongdoing on the part of their employees. [para 49]

34. Further, the Divisional Court held at para 49 that:

"the "open court" principle espoused in the Dagenais/Mentuck line of cases is applicable to a different category of decision-making than that to be engaged in by Ferrier under s. 83(17) of the PSA. (See Toronto Star v. AG Ont., 2018 ONSC 2586, 142 O.R. (3d) 266, at paras. 40, and 61-63; and In the Matter of Application Brought by the Toronto Star and the Criminal Lawyers' Association, a decision of the Ontario Judicial Council, dated October 14/15, at para. 129, where this point was fully articulated.)"

35. The Divisional Court held that there is no need for any reference to the Dagenais line of cases when the PSA statutory scheme sets out the balancing exercise to be undertaken when deciding whether any particular board meeting is to be open to the public and when there is no ambiguity in the legislative provisions [s. 35(3) and (4) of the PSA] citing numerous cases. [para 51-53]

36. The Divisional Court held at para 54:

"In deciding that the extension application would 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 all hallmarks suggesting a "reasonableness" standard of review."

37. The Divisional Court held that Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry 2007 ONCA 20 could be distinguished because it was decided before Dore which is the leading authority on the issue of the appropriate standard of review of discretionary administrative decisions made by an adjudicator within his mandate which is reasonableness. Further, the correct legal test for the Commissioner to apply was not really in issue in Episcopal. Thirdly, the purpose of the public inquiry in Episcopal was very different from that of an extension application before a police services board. Fourthly, courts have held that Dagenais line of cases apply to judicial and quasi judicial matters of which the public inquiry in Episcopal is one unlike the s. 83(17) extension application which was an administrative, procedural matter that does not rise to the level of judicial or quasi-judicial decision-making. In any event, the Court of Appeal held in Episcopal that the discretionary balancing exercise with respect to a publication ban under the now repealed Public Inquiries Act, R.S.O. 1990, c. P. 41 attracted a deferential standard of review of reasonableness. [para 55-57]

E. No Error of Law in Ferrier finding that Dagenais/ Mentuck had no application

38. The Divisional Court held that Ferrier's finding was reasonable and correct that:

"[t]he 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" [para 60, 49, 52,53, 56, 63, 67]

39. They noted that the Dagenais cases all dealt with judicial or quasi judicial proceedings which was not what was involved in CBC's judicial review of Ferrier's decision: instead Ferrier's decision was a preliminary matter in a process concerning disciplinary action within an employment context. [para 49]

40. The Divisional Court held at para 49 that:

"the "open court" principle espoused in the Dagenais/Mentuck line of cases is applicable to a different

category of decision-making than that to be engaged in by Ferrier under s. 83(17) of the PSA. (See Toronto Star v. AG Ontario, 2018 ONSC 2586, 142 O.R. (3d) 266, at paras. 40, and 61-63; and In the Matter of Application Brought by the Toronto Star and the Criminal Lawyers' Association, a decision of the Ontario Judicial Council, dated October 14/15, at para. 129, where this point was fully articulated.)"

41. Further the Divisional Court citing numerous cases held that there is no need for any reference to the Dagenais line of cases when the PSA statutory scheme sets out the balancing exercise to be undertaken into whether any particular board meeting is to be open to the public and when there is no ambiguity in the legislative provisions [s. 35(3) and (4) of the PSA.] [para 52-54]

F. Ferrier's Decision to hold the extension application hearing in camera was reasonable

42. The Divisional Court held at para 67 that Ferrier's decision to hold the extension application hearing in camera was a reasonable outcome of his balancing the considerations under s. 35(4)(b) of the PSA when that section is considered within the overall scheme of the PSA and within Part V of the PSA.

43. The Divisional Court held that the decision- making process undertaken by Ferrier was transparent. He had considered the parties' submissions prior to rendering his decision on this preliminary procedural matter. The reasons of Ferrier were clear, concise, intelligible.[para 61, 62]

44. It is irrelevant that the decision made no reference to the fact that CBC made submissions. Ferrier received their submissions. He provided to them a copy of his decision. Their submissions were directed to the application of Dagenais. He held that it did not apply. In any event, their submissions mirrored those of the Complainants.

45. The Divisional Court found at paragraph 63:

"Ferrier provided justification for his exercise of discretion to hear the extension application in camera. He reviewed the statutory framework set out in the PSA and relevant jurisprudence dealing with complaints and disciplinary proceedings under Part V of that legislation. He summarized the circumstances in which the issue had arisen and the essential nature of the proceedings -- namely disciplinary proceedings in an employment context. Ferrier provided several reasons why, in his opinion, the dangers inherent in making an extension application hearing open to the public overrode any benefit that would flow from doing so. He came to this conclusion in the context of his having already decided that he would hold a hearing on the matter and would receive both oral and written submissions from all interested parties. Thus, Ferrier was already providing a level of openness and transparency that he was not obliged to do under the PSA."

46. The Divisional Court held at paragraph 64 that:

"Ferrier reviewed 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. In doing so, Ferrier was cognizant of the fact that, not only the Board, but other police boards across Ontario, since 1992, have been conducting board meetings or hearings, in which extension applications are decided under s. 83(17) of the PSA in camera. This regular practice of police boards, including the Board in Thunder Bay, established legitimate expectations on the part of the Respondent Officers, and other implicated officers, as to how misconduct allegations would be processed. This impacted the duty of fairness owed to the Respondent Officers. This was one circumstance that Ferrier was asked to take into account. (See Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 26.)"

47. The Divisional Court held:

"It is clear from the Decision that Ferrier gave considerable thought to the important public interest in seeing that any police misconduct resulted in appropriate disciplinary action. He was concerned that any disciplinary hearing that might result from a successful extension application not be prejudiced through the tainting of witnesses or the undermining of cross-examinations. In this regard, not only did Ferrier have the public interest in mind, but also he was mindful of the Complainants' interest in seeing justice done. The closing lines of the Decision make that abundantly clear:
I also wish to say to the complainants and to the indigenous community which are closely watching this proceeding that it is critical to maintain the integrity of the proceedings in case the Extension is granted. That concern is at the heart of this decision." [para 29, 65]

48. The Divisional Court noted at paragraph 66:

"Ferrier was aware that the Complainants had been provided a copy of the Report pursuant to s. 68 of the PSA and that the Complainants had been specifically advised that: "... all information contained in the report of investigation is confidential and shall not be communicated to any other person without the consent of the person(s) to whom the information relates, nor is the confidential information contained in the report of investigation admissible in a civil proceeding pursuant to sections 26.1(11) and 83(8) of the Police Services Act". Ferrier noted that, despite this instruction, the Complainants' counsel had made the Report public. Ferrier concluded that this was not a reason to open the extension application hearing to the public. In his view, to do so would permit a party to defeat the effect of s. 35(4) of the PSA. This line of reasoning was open to Ferrier."

PART III-ISSUES AND THE LAW

A. THERE IS NO ERROR CONCERNING STANDARD OF REVIEW

49. The Divisional Court engaged in a fulsome analysis concerning the standard of review applicable to Ferrier's decision and came to the conclusion it was reasonableness. [paras 34 to 57].

50. The standard of review of reasonableness was settled by the Supreme Court of Canada back in 2012 in Doré v. Québec (Tribunal des professions).

51. On this appeal, CBC asserts that 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 whole." This was not even an argument that CBC made to the Divisional Court. Instead CBC had asserted:

"- para 34: The CBC and the Complainants argue that Ferrier's determination that the Dagenais/Mentuck line of cases does not apply to the hearing of the extension application is reviewable on a standard of correctness because it raises constitutional issues.

- para 48- Placing reliance on the Dagenais/Mentuck line of cases, counsel for the CBC and the Complainants argue that, because the Charter value of freedom of expression is implicated if proceedings are held in camera, Ferrier's Decision is reviewable on a standard of correctness."

52. There was no error in the Divisional Court considering that Board decisions under s. 83(17) are reviewed on a reasonableness standard and that that standard should also apply to the question of whether the Dagenais test applied. [para 47, 48, 49, 50, 51, 52, 53, 54, 56]

53. CBC's submission that the standard of review applicable to s. 83(17) is not relevant to the standard of review for the question of whether the Dagenais test applies is wrong. A determination of the standard of review cannot be made in a vacuum. The Divisional Court held at para 45: " The significance of a tribunal's decision being non-adjudicative or preliminary and performed at a pre-hearing, investigative, or screening stage has been considered high in the determination of the appropriate standard of review." CBC's submission is made without consideration of the Supreme Court of Canada's decision in Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10, at para. 40. The Divisional Court held: "The Supreme Court reiterated the normal practice that discretionary decisions of this nature by administrative tribunals are normally subject to judicial review on a reasonableness standard (paras. 23 and 27)." The nature of the s. 83(17) extension application was relevant to both the applicable standard of review and to the question of whether the Dagenais line of cases applied to a screening, administrative, procedural, non-adjudicative stage.

McLean v. BC (Securities Comm.), 2013 SCC 67, para 21,38,40,71; Edmonton v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, paras. 21,22. 33; Halifax (Regional Municipality) v. NS (HRC), para. 3, 19, 24, 26, 27, 40,42,47, 50,51; Dunsmuir v. NB; Doré; Iacovelli v. College of Nurses of Ontario, 2014 ONSC 7267,(Div. Ct.),para 32-36,51

54. CBC asserts that the question of whether the Dagenais test applies is a pure question of law of

general application and that s. 83(17) decisions are not relevant. Section 83(17) decisions are relevant because you need to look at the function undertaken by the Board to make a determination of the standard of review. [see Dunsmuir] [Divisional Court- para 45, 46, 47, 49, 50, 51]

55. At the Divisional Court, CBC asserted that because the Charter value of freedom of expression is " implicated" if proceedings are held in camera that Ferrier's decision was reviewable on a standard of correctness. The Divisional Court rejected that argument relying upon Dore. [para 48, 50, 51, 56]

56. CBC's submission that the question of whether Dagenais test applies does not require a consideration of facts or policy or exercise of discretion and that it is a question of law for which there is only one right answer is wrong as is evident from the Divisional Court's decision. [para 45, 49].

57. CBC is making submissions in a factual vacuum without a real consideration of the nature of the function involved in a s. 83(17) application. The factual and statutory context emphasizes that s. 83(17) is neither a judicial process nor a quasi judicial process so that Dagenais test does not apply. It does involve as Justice Abella held in Dore the administrative decision maker being in the best position to consider the impact of the relevant Charter value on the specific facts of the case.

58. Contrary to CBC's submissions, it is in the discretion of the Board whether to close the meeting in addressing a s.83(17) application. It involves the Board interpreting his home statute which usually occasions judicial deference. Whether the Board made an error of law in not applying Dagenais does not turn the standard of review into correctness. Even if there was an error of law (which is not accepted), it does not mean that the standard of review becomes correctness.

59. CBC is in error in asserting that the question of whether the Dagenais test applies does not require an interpretation of ss. 35(3) and (4) of the PSA. That is contrary to jurisprudence which requires a consideration of the context/ function to determine whether the Dagenais test applies. It is also contrary to the authorities as noted by the Divisional Court at para 53:

"This is the balancing exercise to be done by a police board or, in this case, Ferrier, when deciding whether a board meeting or hearing should be open to the public or held in camera. There is no need for any reference to the Dagenais/Mentuck line of cases when the PSA statutory scheme, itself, sets out the

balancing act to be undertaken and there is no ambiguity in the legislative provisions. As Iacobucci J. stated in Bell ExpressVu Ltd., at para. 62:

[T]o the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
See also R. v. Rodgers, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 18; R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211, at paras. 87-91; Gehl v. Canada (Attorney General), 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 78-83; and Ontario Medical Association v. Ontario (Information and Privacy Commissioner), 2018 ONCA 673, at para. 20.

60. CBC asserts that even if the question of whether Dagenais applied to the decision to close the meeting requires an interpretation of ss. 35(3) and (4) of the PSA, there are general provisions with identical language in other legislation. That submission fails to take into account the context of those other provisions which are with respect to judicial or quasi- judicial tribunals to which the SPPA applies.

61. CBC asserts that the language in the PSA is similar or identical to language used in many Acts and yet that is not accurate nor of any assistance since the functions in which those other tribunals were engaged in were not administrative, screening, or procedural which is what s. 83(17) is about.

62. The context in which those other Acts apply does not compare in any way to the screening function before the Board, to a Board where the SPPA does not apply, to a Board which can make their own rules and procedures, to a Board where no witnesses testify, to a Board where there is no viva voce evidence, to a Board where there is no opportunity to cross-examine witnesses, to a Board where the rules of evidence do not apply and to a Board where minimal disclosure is provided. [para 49, 56]

63. CBC's claim that the question of whether the Dagenais test applies in this context to be a matter of central importance to the legal system and that it has the 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 is without merit. It fails to take into account that the context in which those other statutes apply does not compare in any way to the screening function before the Board. The question of whether Ferrier erred in not applying the Dagenais test in his discretion to address the s. 83(17) screening application in camera was in the context of a statute which

provided to him the discretion in deciding whether to close a meeting/ hearing (s. 35), a statute which indicated that the SPPA did not apply and which granted him the ability to establish his own rules and procedures (s. 37), a statute which indicated that he had a duty to preserve secrecy when engaged in s. 83(17) application (s. 95). This case involved a matter unique to the administrative function in s.83(17) that Ferrier was to carry out and was specific to the unique provisions under the PSA. It involves a question of statutory interpretation that does not have wide implications to any other statutes. It would not be a matter that is of central importance to the legal system. The limited application of the issues in this case is highlighted by the fact that section 83(17) is a very unique provision in the PSA and but for certain transitional provisions s. 83(17) will be largely removed from the future PSA.

64. CBC relies on Alberta Information and Privacy Commissioner v. University of Calgary 2016 SCC 53. However, the Court at para 21 held:

" In Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 2 S.C.R. 135, Rothstein J., writing for the Court, [page572] discussed how a question of statutory interpretation that does not have wide implications on other statutes would not be of central importance to the legal system as a whole and would thus attract a reasonableness standard. Paragraph 60 of National Railway reads as follows:
This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the [Canada Transportation Act, S.C. 1996, c. 10 ("CTA")]. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the CTA and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme..."

65. Clearly in this case, the question of statutory interpretation does not have wide implication to other statutes and would not be of central importance to the legal system as a whole. As such it would attract a reasonableness standard. It does not have precedential value outside of the issues arising under the PSA. The other statutes that the CBC relies upon are in the context of the nature of adjudicative hearings or judicial or quasi- judicial hearings while this is not.

B. NO ERROR IN STANDARD OF REVIEW OF REASONABLENESS APPLYING TO THE DECISION OF FERRIER EXERCISING POWERS AND DUTIES OF THE BOARD

66. The Complainants raise for the first time on the appeal that the Divisional Court erred in finding

that the reasonableness standard applied to a decision made by a " stand in administrative decision maker empowered by Court order pursuant to the Public Officers Act" who was appointed to fulfill the functions of a Board. They claim that Ferrier would be without the same expertise as a Board (or that he did not have particular expertise in relation to the PSA). There is no merit to any such argument:

a. Ferrier was appointed by the Superior Court as a disinterested person or tribunal to exercise the powers and duties ordinarily imposed on the Thunder Bay Police Services Board pursuant to s. 83(17) of the PSA, such appointment made pursuant to s. 16 of the Public Officers Act, R.S.O. 1990, c. P. 45.

b. The appointment of Ferrier was made on notice to the Complainants with a full opportunity to respond and to object and yet they took no position. They were actively involved in his appointment. They did not oppose his appointment. At no time did they question his expertise.

c. Ferrier is deemed to have the same expertise as the Board as per his appointment under the Public Officers Act.

d. The Complainants' submission is irreconcilable with s. 16 of the Public Officers Act which provides:

"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."**

e. It is settled law that the Divisional Court did not err in treating Ferrier as interchangeable with the Board for the purposes of standard of review. The same level of deference would be afforded to Ferrier as to the Board. The Supreme Court of Canada held in City of Edmonton v. Edmonton East (Capilano) Shopping Centres Ltd.[2016] S.C.J. No. 47 at paragraph 33:

" The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: "... in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93; see also *Canada (Minister of Citizenship and Immigration v Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.). at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. **However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: "**... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir,* at para. 68). As this Court has often remarked, courts "may not be as well qualified as a given agency to provide interpretations of that

agency's constitutive statute that make sense given the broad policy context within which that agency must work" (*McLean,* at para. 31, quoting *National Corn Growers Assn. v. Canada (Canadian Import Tribunal),* [1990] 2 S.C.R. 1324 (S.C.C.), at p.1336, per Wilson J.).(Emphasis Added)

f. Contrary to the Complainants' submission, there is no evidence on the record that Ferrier did not have particular expertise in relation to the PSA.

g. The Complainants did not make this argument at the Divisional Court even though standard of review was in issue.

h. It would be unseemly for the Court of Appeal to become the forum where cases are required to be filed showing that Ferrier was familiar with the PSA as a jurist and as an adjudicator under the 94 to the PSA.

I. Ferrier raised the issue of whether the s. 83(17) application would be open or closed; he invited and received submissions; he issued a decision wherein he engaged in a proper legal analysis of the law and facts and as the Divisional Court found:

"[67] Ultimately, Ferrier's decision to hold the extension application hearing in camera was a reasonable outcome of his balancing the considerations under s. 35(4)(b) of the PSA when that section is considered within the overall scheme of the PSA and, more particularly, within Part V of the legislation."

j. Deference is accorded to the tribunal itself as institution and not to the particular individual.

k. There was a presumption of deference and reasonableness in the standard of review and it was up to the Complainants to displace that presumption at the Divisional Court and they failed to do that.

l. It would have been up to the Complainants to show that Ferrier did not have familiarity with the PSA as opposed to Respondent counsel on an appeal.

67. Case law regarding the proper standard of review to be applied to a police services board is determinative of the issue of standard of review to apply to Ferrier's decision. [Dunsmuir para 54, 62;Forestall v. Toronto PSB (2007), 228 O.A.C. 202 (Div. Ct.); Doré; Edmonton v. Edmonton East (Capilano) Shopping Centres; Halifax (Reg. Municipality) v. NS (HRC)

68. To accept the Complainants' submission on deference would be illogical as it would mean that deference would be accorded to a biased or conflicted board member but would not apply to a disinterested person (appointed by the Superior Court either on consent or without opposition) even though they would both be empowered to perform the same act, matter, thing or question.

69. The submission that because there is no privative clause in the Public Officers Act or PSA or in the court order appointing Ferrier means that correctness is the appropriate standard of review cannot be accepted. Firstly, as indicated in Forestall, the standard of review is reasonableness which is supported

by the fact that there is no appeal from the Board's decision. Nor is there any right of appeal in the Public Officers Act. The lack of privative clause in the court order appointing Ferrier is irrelevant since the Complainants put on record they were taking no position with respect to his appointment.

70. The fact that the Court order appointed Ferrier to issue the powers and duties ordinarily imposed on the Board pursuant to s. 83(17) highlights that the same standard of review would apply to Ferrier as the Board as it would apply to the Board otherwise.

71. The Divisional Court held at para 54:

"In deciding that the extension application would 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 all hallmarks suggesting a "reasonableness" standard of review."

C. THE DIVISIONAL COURT DID NOT ERR IN FINDING THAT THE CONCLUSION WAS REASONABLE 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"

I. RESPONSE TO CBC'S SUBMISSIONS

72. The Divisional Court committed no error in law in holding at paragraph 60 that:

"In the Decision, Ferrier, at para. 31, found that: "[t]he 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". For the reasons set out above, we find that not only is this conclusion reasonable but it is also correct." [para 2, 23, 24, 29-33, 39, 42- 49, 52- 56]

73. Ferrier had not erred in treating s. 83(17) matters as administrative matters to which the Dagenais test did not apply. As the Divisional Court held at para 39:

"There is ample case law standing for the proposition that the function being undertaken by a police board, or in this case by Ferrier exercising the powers and duties of the Board, when determining an extension application under s. 83(17) of the PSA, is administrative and procedural in nature. It is a screening function focussed in part on the nature, breadth, length, complexity, and efficiency of the investigation undertaken by the IPRD. The function is not judicial or quasi-judicial. (See Coombs v. Toronto (Metropolitan) Police Services Board, [1997] O.J. No. 5260 (Div. Ct.), ; Payne v. Peel (Regional

Municipality) Police Services Board (2003), 168 O.A.C. 69 (Div. Ct.); Forestall v. Toronto Police Services Board (2007), 228 O.A.C. 202 (Div. Ct.); Ackerman v. Ontario Provincial Police, 2010 ONSC 910, 259 O.A.C. 163 (Div. Ct.); and Figueiras v. (York) Police Services Board, 2013 ONSC 7419 (Div. Ct.) ("Figueiras 2")."

Divisional Court Decision, Tab 4, para 39, 42, 45, 49, 56, 32, 33
Bennett v. Toronto (Metropolitan PSB) [1995] O.J. No. 4816 (Div. Ct.) para. 2; Forestall(leave to appeal dismissed) para 9, 34, 35, 44, 46, 47, 50, 52, 53, 64, 66, 67, 68, 76, 81, 84, 91; Coombs v. Toronto (Metropolitan) PSB [1997] O.J. No. 5260 (Div. Ct.), para 5, 10; Ackerman v. OPP, 2010 ONSC 910, 259 O.A.C. 163 (Div. Ct.); para 11, 16, 20, 21, 22, 26, 29 Figueiras v. (York) PSB, 2013 ONSC 7419 (Div. Ct.) para 2, 36; OIPRD v. Niagara PSB [2016] OJ NO. 5506 (Div.Ct.) (leave to appeal dismissed- para 31, 36;Vancouver Sun 2004 SCC 43- para 22-31;Toronto Star Newspapers Ltd. v. Ontario 2005 SCC 41- para 4,5, 7, 8, 30;Toronto Star v. AG Ontario 2018 ONSC 2586- para 40, 61-63, 92
In the Matter of Application Brought by the Toronto Star and the CLA(Ont. Judicial Council- Oct 14/ 2015) at para. 121, 128, 129, 130, Footnote 37;Iacovelli v College of Nurses of Ontario [2014] O.J.No. 6087 (Div.Ct.)

74. CBC's assertion that is it well-established that where seeking to close a presumptively open hearing one must meet the Dagenais test disregards the nature of the meeting/ process and procedural function involved in s. 83(17). The Divisional Court squarely dealt with this at para 49:

"The Dagenais/Mentuck line of cases all deal with judicial or quasi-judicial proceedings. (See Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 22-31; and Toronto Star Newspapers Ltd., at paras. 4, 5, 7, 8, and 30.) That is not what we are dealing with here. We are dealing with preliminary matters in a process concerning disciplinary action within an employment context. No case law was cited to the effect that s. 2(b) of the Charter dealing with freedom of expression is implicated when employers are investigating or deciding on a course of action to deal with allegations of wrongdoing on the part of their employees. In other words, the "open court" principle espoused in the Dagenais/Mentuck line of cases is applicable to a different category of decision-making than that to be engaged in by Ferrier under s. 83(17) of the PSA. (See Toronto Star v. AG Ontario, 2018 ONSC 2586, 142 O.R. (3d) 266, at paras. 40, and 61-63; and In the Matter of Application Brought by the Toronto Star and the Criminal Lawyers' Association, a decision of the Ontario Judicial Council, dated October 14, 2015, at para. 129, where this point was fully articulated.)

75. The Divisional Court did not erroneously conflate the issue of the minimal procedural protections that apply to s. 83(17) with the question of whether openness applied. CBC fails to recognize the need to understand the context of the decision under s. 83(17), the nature of the function or the category of decision maker or category of question, the nature of the proceedings. The nature of proceedings/ decision informs whether Dagenais applies.

Divisional Court Decision- para 38- 41, 45- 47, 49- 57, 60, 63;Dunsmuir; para 62; Iacovelli v College of Nurses of Ontario ; Halifax (Regional Municipality) v. NS (Human Rights Commission) ; Dagenais v. CBC [1994] 3 S.C.R. 835; Toronto Star[2018]para 40, 61-63; Application Brought by Toronto Star and CLA,(Ont. Judicial Council- Oct 14/15)

76. CBC's claim that allowing the Board to exclude the public without applying Dagenais results in the constitutional safeguard for openness being side-stepped is hyperbole. There are specific statutory

provisions providing direction with respect to closing a meeting/ hearing. There is no ambiguity in those provisions requiring reference to Dagenais. There was no constitutional challenge to s. 35 of PSA. CBC is seeking to re-write s. 35 of PSA. [para 53; Bell ExpressVu Ltd. Partnership v. Rex [2002] 2 S.C.R. 559, para 62]

77. CBC is incorrect that the Divisional Court appeared to adopt with very little analysis Ferrier's finding. [para 3, 30- 33, 39, 42- 49, 52- 54, 56, 59- 67]

78. CBC's argument that this Court has recognized that Dagenais applies in both judicial and quasi-judicial context does not mean that the Divisional Court erred in finding that the Dagenais test does not apply to s. 83(17) when all of the jurisprudence is clear that s. 83(17) is neither judicial nor quasi-judicial. As the Divisional Court indicated " that is not what we're dealing with here." [para 39 and 49]

79. CBC makes reference to Toronto Star v. AG Ontario 2018 ONSC 2586 and yet the Superior Court makes it clear that CBC is over-extending Dagenais without regard to the function in question. The Court in Toronto Star v. AG Ontario pointed out that:" Openness to the public is the " authentic hallmark of judicial **as distinct from administrative procedure**". Toronto Star [2018], para 40, 61-63, 92; Application Brought by Toronto Star and CLA, (Ont. Judicial Council -Oct 14/15) para 121, 128, 129, 130, Footnote 37;Divisional Court Decision, para 49

80. The reliance on statutes and cases concerning judicial and quasi-judicial tribunals as support for the purported error of the Divisional Court in finding that Dagenais did not apply emphasizes that there was no error by the Divisional Court. As the Divisional Court noted at para 39 there is ample case law standing for the proposition that the function being undertaken by a police board when determining an extension application under s. 83(17) of the PSA is administrative and procedural. It is a screening function focused in part on the nature, breadth, length and complexity and efficiency of the investigation undertaken by the OIPRD. The function is not judicial or quasi-judicial.

81. CBC's submission that courts have repeatedly found that holding a disciplinary hearing in camera violates s. 2 (b) of the Charter does not mean there was any error by the Divisional Court since s. 83(17) is not a disciplinary hearing.

82. CBC's reliance on cases involving adjudicative tribunals where s. 9(1) of SPPA applies is not

supportive that there was any error by Ferrier in holding that Dagenais test had no application to this case. Section 37 of the PSA explicitly states that the SPPA does not apply to Board meetings .

In the Matter of an Application brought by the Toronto Star and CLA (Ont. Judicial Council -Oct 14/15)

83. The reference to Figueiras v. Regional Municipality of York PSB that the very purpose of the PSA is to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police does not assist because the Complainants fully participated in the process as did the OIPRD. As indicated by the Supreme Court in Penner transparency is evident in the involvement of the Complainants; however it is still an employment process. The Divisional Court addressed this point throughout its decision. [para 44, 63,65]

84. The assertion that there is nothing in the PSA that suggests that openness values are omitted from consideration for certain types of hearings or meetings disregards the provisions in ss. 35 (4), 37, 85(9) and 95 which indicates that the board has duties of secrecy.

85. There was no error when the Divisional Court held at para 49 that no case law was cited to the effect that s. 2 (b) of the Charter was implicated when employers are investigating or deciding on a course of action to deal with allegations of wrongdoing on the part of their employees.

86. CBC submitted, without regard to the Divisional Court reasons, that the Divisional Court treated s. 83(17) as a private matter between employer and employee and 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. The Divisional Court did not indicate it was a private matter. There was no error in indicating that it was a matter between employer and employee. The Supreme Court held in Penner:

"The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the PSA promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong." (Para 54)

87. The assertion that the Divisional Court ignored the general presumption of openness is baseless.

(paras 2, 20, 49, 52, 53, 65). The Divisional Court did not ignore the purpose of the Act. (paras 1,33, 39, 46,49, 52,56). The Divisional Court did not ignore the statutory framework. (paras 20, 21, 32, 33, 39, 42, 46, 49, 52, 53, 54, 56, 61, 63, 66.) The Divisional Court did not ignore the involvement of the Complainants and the OIPRD. The Divisional Court explicitly addressed their involvement. (paras 6, 7, 9- 12, 44, 61, 63, 65, 66.) It is fallacious that the Divisional Court did not consider the public importance of the decision under s. 83(17) and the need for public scrutiny. (paras 29, 32, 33, 44, 63 and 65.)

88. CBC's assertion that the discretion to depart from openness principles in s. 35(4) of the PSA must be exercised in accordance with Charter values and the Dagenais test must be applied is inconsistent with principles of statutory interpretation since s. 35(4) is not ambiguous. The Dagenais test cannot be read into s. 35(4). There was no error at para 52 and 53 of the Divisional Court decision. Reference should be made to Bell ExpressVu Limited Partnership v. Rex referred to therein.

89. The Supreme Court of Canada also held in R v. Gomboc [2010] 3 SCR 211, para 87,88, 91:

" it is only to be used where there is genuine ambiguity (Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559). It cannot be used as a freewheeling deus ex machina to subvert clear statutory language, or to circumvent the need for direct Charter scrutiny with its attendant calibrated evidentiary and justificatory requirements."

90. The Court of Appeal has indicated that deference should be accorded to the administrative decision maker when exercising discretion and that Charter values have no role where the statutory interpretation is unambiguous. Accordingly Charter values have no role to play in the exercise of discretion under s. 35. [Gehl v. Canada (AG) 2017 ONCA 319, para 78;Ont Medical Assoc v. Ont (Information and Privacy Commr) 2018 ONCA 673, para 20]

91. Exercising discretion in s. 35(4) in accordance with the Charter does not mean that the Dagenais test applies. [Toronto Star [2018]; Application brought by Toronto Star/ CLA (Ont. Judicial Council- Oct 14/15)]

92. The Divisional Court specifically addressed that there is a difference between s. 14 of the Public Inquiries Act and s. 83(17) at para 56. The Public Inquiries Act, 2009, as noted by the Divisional Court involved a quasi-judicial procedure involving witnesses being compelled to give evidence under oath or affirmation, the production of documentation specified by the Commission and procedures akin to those

seen in a court room. None of which applies to a Police Services Board meeting.

93. CBC's reference to other statutory provisions for the assertion that similar language is found in those statutes that creates a presumption of openness for administrative proceedings is irrelevant because the language in those statutes is different; none of those statutes have a s. 37 provision; all of those statutes allow for the application of the SPPA which does not apply at the Board meeting; none of them are in the context of a s. 83(17) screening function which is neither judicial nor quasi-juridical.[para 49, 56]

94. CBC's claim that the distinction between administrative and quasi-judicial has not been a factor for decades is not correct with respect to the application of Dagenais. It is clear that the jurisprudence regarding the application of Dagenais specifically has considered whether the proceedings are judicial or quasi-judicial. In fact the authorities provided by CBC at the Divisional Court address the distinction of function as judicial, quasi-judicial versus administrative. The cases that CBC provided where Dagenais analysis applied were to court proceedings, criminal proceedings, judicial proceedings or quasi- judicial proceedings or court orders or judicial processes. None applied to administrative functions. It is wrong to indicate that the court has stopped using these distinctions. [Vancouver Sun 2004 SCC 43; Toronto Star v. Ont. [2005] 2 SCR 188; Dagenais; Toronto Star [2018] para 40, 94; Application Brought by Toronto Star and CLA (Ont. Judicial Council, Oct 14/15) para 121, 128, 129, 130, Footnote 37]

95. The reliance on L'Hirondelle v. Alberta Sustainable Resource Developments 2013 ABCA 12 is misplaced because that case addressed entitlement to judicial review and not the application of the Dagenais test. It was in the context of the distinction between administrative and quasi- judicial tribunals. The issue in this case was the distinction between judicial and quasi-judicial proceedings versus administrative functions. There is no suggestion that the Board is a tribunal.

96. CBC asserts that labeling the decision under s. 83(17) as administrative is defunct and ambiguous. As the Divisional Court held, there is ample case law describing the function as administrative and procedural.(para 39). The assertion that the label of administrative decision is defunct disregards the Supreme Court of Canada's decision in Halifax Regional Municipality v. NS HRC where the function of the Nova Scotia Human Rights Commission in deciding whether to appoint a board of

inquiry was described as screening and **"administrative".** (para 47)

97. CBC indicates that the Board was holding a hearing involving serious issues affecting the Respondent officers, the OIPRD and the Complainants. That misses the point that the s. 83(17) application to be addressed by the Board was with respect to the issue of whether the delay in serving the notices of hearing was reasonable. The Board's decision does not determine the merits of the allegations against the officers. [Forestall- para 44]

98. CBC submitted that the fact that the Board's decision could result in the failure to proceed with the 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 but that ignores the fact that s. 83(17) recognizes that there is a statutory mandatory time period for service (6 months) of a notice of hearing in every single PSA matter. No heightened public scrutiny is created by the fact of s. 83(17). This is a long-standing provision. In addition, as the Divisional Court noted, the complainant has no right to any particular remedy. [para 44]

99. It makes no sense that because there are minimal procedural rights of fairness accorded to police officers in s. 83(17) that there would be heightened public scrutiny given the public importance of the issue. It makes no sense that an officer in order to respond to a s. 83(17) application has no entitlement to disclosure other than the report filed with the Board (they have no entitlement to the underlying documents, statements, evidence or witnesses in support of that application) and yet somehow those minimal procedural fairness rights weigh in favor of heightened public scrutiny.

100. CBC asserts that it has never been suggested in any context that the openness principle does not apply to procedural decisions and yet in the Toronto Star case [2018] the Court specifically noted that **"openness to the public is the authentic hallmark of judicial as distinct from administrative procedure"**. Reference should also be made to the Judicial Council case to that effect.

101. CBC's submission is without merit that because a procedural decision can involve matters of great importance to the parties that Dagenais test would apply. The parties are present at the s. 83(17)

application and are not excluded in any way.

102. It is fallacious to assert that there were substantial errors in the Divisional Court decision and that it harms the public interest in open hearings generally. The decision of the Divisional Court was very specific to s. 83(17) which is governed by ss. 35, 37, 85 and s. 95 of the PSA.

103. It is fallacious to assert that the purported errors harm the public interest in the "underlying facts" in these proceedings. The underlying facts are not addressed in s. 83(17). The issue in s. 83(17) is whether the delay in service of the notice of hearing was reasonable. It is not about the merits of the allegation. CBC is conflating s. 83(17) with the systemic reviews and conflating s. 83(17) with the disciplinary hearing. [para 32 and 33] [Forestall]

II. RESPONSE TO THE COMPLAINANTS' SUBMISSIONS

104. There was no error in Ferrier holding that the Board is not a court. It is not a court. He did not find that Dagenais inapplicable only on this basis. The fact that the Board is not a court is of relevance in the analysis that Dagenais does not apply.[Toronto Star [2018]; Application brought by Toronto Star and CLA (Ont. Judicial Council- Oct 14/15; Vancouver Sun [2004] S.C.R. 332, para 4, 23- 27, 31, 34;Toronto Star v. Ont. [2005] 2 SCR 188, para 5, 7, 8, 24, 26,28,29,30

105. The fact that the SPPA does not apply to the Board is significant as it means that the functions carried out by the Board are further away from any judicial or quasi judicial function. It also is of significance because s. 37 of the PSA provides that the Board can makes its own rules and procedures.

106. The submission that the Dagenais test applies to all discretionary actions by a trial judge does not lend support that Dagenais must apply to an administrative procedural decision of a Board. As noted by the Judicial Council, there is no support for this proposition in "pre-hearing administrative procedures of a professional disciplinary body". The Court in Toronto Star [2018] pointed out that "openness to the public is the authentic hallmark of judicial **as distinct from administrative procedure**."

107. Notwithstanding the plethora of authority that have repeatedly indicated that the s. 83(17) application is not quasi- judicial in nature, the Complainants wrongly submit to the Court of Appeal that it is quasi judicial ignoring the Divisional Court precedents for over 20 years including Forestall (for

which the Court of Appeal dismissed leave to appeal). The Complainants even though well aware of these authorities as referred to in the Divisional Court decision actually make not a single reference to any of these authorities in their factum. That cannot be of assistance to the Court of Appeal in this appeal where it is long settled that s. 83(17) is not quasi- judicial.[para 39]

108. The Complainants' argument that the s.83(17) application is quasi-judicial does not raise any error of law. It is settled law that it is not quasi-judicial. The Complainants refer to Minister of National Revenue v. Coopers and Lybrand [1979] 1 SCR 495 as being relevant to the question of whether the application is quasi-judicial. That would not assist the Court at all when the Divisional Court in Forestall applied the Supreme Court of Canada's subsequent test in Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817 and determined that the s. 83(17) application is not quasi-judicial but rather administrative/ procedural. Other cases prior to Forestall and since Forestall have held the same.

109. The Complainants ignore Forestall and all of these precedents and seek to apply Coopers Lybrand to argue that s. 83(17) is a quasi-judicial proceeding. The Court of Appeal should not and does not need to engage in this analysis because of the plethora of authority that s. 83(17) is not quasi-judicial. However, if the Court is persuaded to consider the questions set out Coopers Lybrand, it still does not support that s. 83(17) is quasi-judicial.

- 1. Is there anything in the language which suggests that a hearing is contemplated?

Reference should be made to Forestall which highlights that there is nothing in the language of the PSA to suggest that a hearing is contemplated in s. 83(17): administrative, purely procedural[para 44]; not judicial in character[para 46];policy level[para 47]; not judicial type hearing[para 53]; oral hearing not required[para 68].

-2. Does the decision directly affect rights?

Forestall (para 44, 50) indicates that s. 83(17) does not determine the merits. The Divisional Court also pointed out at para 44 in this case that the complainants have no right to any particular remedy flowing from the investigation undertaken by the OIPRD.

- 3. Is an adversary process involved?

Forestall notes at para 47 that the Board is acting at a policy level. Both Forestall, and s. 37 of the PSA make it clear that the SPPA does not apply, there is no cross-examination, there is a limited ability to

challenge assertions made in the application since there is no right to disclosure of the materials used by the OIPRD or Chief to create their application.

- 4. Is there an obligation to apply substantive rules to many individual cases rather than policy?

There is no substantive rules in play. It is a discretionary opinion of the Board. The Divisional Court in Forestall noted that the matter applies policy (para 47), is procedural and not substantive (para 44) and involves the discretionary opinion of the Board on a limited issue unlike at a disciplinary hearing where the allegations would be adjudicated (para 84). The Divisional Court has made it clear that the matter is procedural and not substantive. [Bennett para. 2; Coombs para 5, 10; Ackerman, para 21]

110. The Complainants assert that Ferrier was exercising adjudicative functions in s. 83(17) and yet that submission is wrong based on the Supreme Court of Canada's decision of Halifax (Regional Municipality) v. NS (HRC), another case relied upon by the Divisional Court at para 47:

"Similarly, in Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), the Supreme Court of Canada described the function of the Nova Scotia Human Rights Commission in deciding whether to appoint a board of inquiry as one of screening and administration, **not one of adjudication on the merits."**

111. There was no error by the Divisional Court characterizing Ferrier's function as non-adjudicative administrative function since it was based on precedent none of which the Complainants have made reference to. [[Halifax (Regional Municipality) v. NS (HRC); Toronto Star [2018]; Application brought by Toronto Star and CLA (Ont. Judicial Council-Oct 14/15;Iacovelli; Coombs; Bennett; Forestall; Ackerman; Figueiras]

E. NO ERROR WITH RESPECT TO SOCIAL CONTEXT

112. The Divisional Court considered at length and in detail the social context and public interest in which the issue arose in the judicial review. It is baseless for the Complainants to assert that the Divisional Court failed to properly appreciate the relevance. [para 25-33, 65]

113. What also highlights how there is no error is when one looks at the record before Ferrier. The Complainants made minimal submissions regarding social context and public interest to Ferrier. Arguments are being advanced on the appeal that were not advanced to Ferrier. In their submissions to Ferrier there is not a single reference to the actual words of "social context" by the Complainants. A judicial review is supposed to be about reviewing the record before the Board. It is not about deciding the matter anew. It is not about continually re-framing one's argument. The Complainants' limited

submissions on social context to Ferrier do not then reveal any error. [Tab 11C; Tab 11F]

114. The Complainants' submissions also conflate the context relevant to the systemic review with the s. 83(17) application which was only to address whether the delay in service of the notice of hearing was reasonable in the circumstances.

115. Ferrier's decision does not support the Complainants' assertion that he did not engage in any balancing analysis at all. The Divisional Court held that his decision was transparent, clear, concise, intelligible and provided justification for the exercise of discretion to hear the extension application in camera. The Divisional Court provided fulsome reasons why Ferrier's decision was a reasonable outcome of his balancing the considerations under s. 35(4)(b) when that section is considered within the overall scheme of the PSA. As the Divisional Court held at para 29, he was well aware of the high degree of public interest in the outcome of the extension application hearing at the time he determined that the hearing would be held in camera. They noted at paragraph 65:

"It is clear from the Decision that Ferrier gave considerable thought to the important public interest in seeing that any police misconduct resulted in appropriate disciplinary action. He was concerned that any disciplinary hearing that might result from a successful extension application not be prejudiced through the tainting of witnesses or the undermining of cross-examinations. In this regard, not only did Ferrier have the public interest in mind, but also he was mindful of the Complainants' interest in seeing justice done. The closing lines of the Decision make that abundantly clear:
I also wish to say to the complainants and to the indigenous community which are closely watching this proceeding that it is critical to maintain the integrity of the proceedings in case the Extension is granted. That concern is at the heart of this decision."

116. The Complainants' submission is without merit that Ferrier's failure to consider the social context is fatal to the Divisional Court's finding that Ferrier may hold the extension hearing in camera when the Complainants made none of these arguments to Ferrier. Or that his purported failure to take judicial notice of societal racism was fatal to his decision when that argument was never made to him.

F. THERE WAS NO ERROR IN THE DIVISIONAL COURT FINDING THAT A LINE OF REASONING WAS OPEN TO FERRIER

117. The OIPRD Director had written to the Complainants on February 15, 2018 when he provided to them a confidential investigative report that they were not even statutorily entitled to:

" This report is provided to you in accordance with the legislative requirements of notification pursuant to section 68 of the Police Services Act. Please note that all information contained in the report of investigation is confidential and shall not be communicated to any other person without the consent of the person(s) to whom the information relates, nor is the confidential information contained in the report admissible in a civil proceeding pursuant to section 26.1(11) and 83(8) of the Police Services Act."

118. The Complainants assert that the Divisional Court erred in finding that the Complainants and their counsel knowingly breached the provisions of the PSA. The Divisional Court did not make that finding. Instead the Divisional Court noted at para 66:

"Ferrier was aware that the Complainants had been provided a copy of the Report pursuant to s. 68 of the PSA and that the Complainants had been specifically advised that: "... all information contained in the report of investigation is confidential and shall not be communicated to any other person without the consent of the person(s) to whom the information relates, nor is the confidential information contained in the report of investigation admissible in a civil proceeding pursuant to sections 26.1(11) and 83(8) of the Police Services Act". Ferrier noted that, despite this instruction, the Complainants' counsel had made the Report public. Ferrier concluded that this was not a reason to open the extension application hearing to the public. In his view, to do so would permit a party to defeat the effect of s. 35(4) of the PSA. This line of reasoning was open to Ferrier."

119. There is no error. The Divisional Court's finding is accurate. It was based on the uncontradicted record before Ferrier of the instructions that the Complainants received on February 15, 2018.

120. Neither the Divisional Court nor Ferrier made any reference to s. 95 of the PSA in this line of reasoning. All that they did was refer to an instruction that the OIPRD had provided to the Complainants which they chose not to follow. There was nothing unreasonable in Ferrier's finding.

121. Notwithstanding that an argument can be made that s. 95 of the PSA applies to the Complainants, the Court of Appeal is not the place for that argument since neither Ferrier nor the Divisional Court made any finding that the Complainants breached s. 95. Nor did the instruction that the Complainants received from the OIPRD make reference to s. 95. [Lochner v. Toronto PSB [2014] O.J. No. 2017 (Sup.Ct.) para 13;Andrushko v. Ont. [2011] O.J. No. 3693 (Div.Ct.), para 17,18,22,29,30;Penner v. NRPSB, para 50, 114;Respondent Compendium, Factum of Respondent Officers, para 71]

122. The Complainants argued before Ferrier and the Divisional Court that the s. 83(17) application should be open because the investigative report was public. Well they made it public; not the OIPRD, TBPS, Respondents, Board nor any one else referred to in the investigative report. As the Divisional Court indicated referring to Ferrier's decision, that despite the instruction they received, the

Complainants' counsel had made the report public. This was not a reason to open the extension application hearing to the public because to do so would permit a party to defeat the effect of s. 35(4).

123. As the OIPRD notes, the confidential investigative report that the Complainants received was not even one that they are statutorily entitled to under s. 68(3) of the PSA. It is one that they would have to provide an undertaking in order to receive a copy at a disciplinary hearing. It made sense that the OIPRD would give them the instruction they did in light of the confidential information contained therein.

Re Daryl Bennett 2014 ONCPC 2504,para 99, 100, 334;R v. Mills (1999) 139 C.C.C.(3d) 321 (S.C.C.);para 108; R v. Lucas (1996) 104 C.C.C.(3d) 550 (Sask.C.A.); R v. Altunamaz (Ont.Sup.Ct-1999); para 6-7; Ont. Judicial Council-2015, para 154

124. It is apparent the absence of any concern by the Complainants regarding the integrity of the disciplinary process and a fair hearing and yet the integrity of the disciplinary process and a fair hearing is of importance in the PSA. [Penner]. The OIPRD's instruction to the Complainants is consistent with the need to protect the integrity of the disciplinary process and ensure a fair hearing.

G. SEEKING A REMEDY WHICH THE COURT SHOULD NOT RENDER

125. The relief sought by CBC on the judicial review was that the decision be quashed and remitted back to Ferrier to apply the Dagenais test. CBC did not seek to have the Divisional Court rule that the s. 83(17) application be open to the public. The Court of Appeal is not the place for the Complainants to argue that the Dagenais test mandates that the extension application not be heard in camera. If it is held that Ferrier was required to apply the Dagenais test, the matter should be remitted to him to carry out his functions under the PSA and apply the Dagenais test. [Figueiras v. YRPSB para 75-76]

PART IV- NATURE OF THE ORDER REQUESTED

126. It is respectfully requested that the appeals be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

JOANNE MULCAHY
COUNSEL FOR THE RESPONDENT OFFICERS

Court File Nos.: C66995 & C66998

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CANADIAN BROADCASTING CORPORATION

Applicant
(Appellant in C66998)

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 in C66995)

CERTIFICATE

I estimate that 1 hour will be needed for my oral argument of the appeal, not including reply. An order under Rule 61.09(2) (original records and exhibits) is not required.

JOANNE E. MULCAHY
Barrister
90 Richmond Street East, Suite 301
Toronto ON M5C 1P1

Tel: 416-860-9393
Fax: 416-860-9396
Email: jmulcahy@bellnet.ca

Counsel for the Respondent, the Respondent Officers

SCHEDULE A- LIST OF AUTHORITIES REFERRED TO

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835

R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442

Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559

Dunsmuir v. New Brunswick 2008 SCC 9

Dore v. Quebec (Tribunal des professions) 2012 SCC 12

Alberta Information and Privacy Commissioner v. University of Calgary 2016 SCC 53.

Penner v Niagara Regional Police Services Board 2013 SCC 19

Toronto Star v. AG Ontario, 2018 ONSC 2586, 142 O.R. (3d) 266, at paras. 40, and 61-63;

In the Matter of Application Brought by the Toronto Star and the Criminal Lawyers' Association, a decision of the Ontario Judicial Council, dated October 14, 2015

Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry 2007 ONCA 20

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Coombs v. Toronto (Metropolitan) Police Services Board, [1997] O.J. No. 5260 (Div. Ct.);

Payne v. Peel (Regional Municipality) Police Services Board (2003), 168 O.A.C. 69 (Div. Ct.);

Forestall v. Toronto Police Services Board (2007), 228 O.A.C. 202 (Div. Ct.);

Ackerman v. Ontario Provincial Police, 2010 ONSC 910, 259 O.A.C. 163 (Div. Ct.);

Figueiras v. (York) Police Services Board, 2013 ONSC 7419 (Div. Ct.)

Bennett v. Toronto (Metropolitan Police Services Board) [1995] O.J. No. 4816 (Div. Ct.)
OIPRD v. Niagara (Regional Municipality) PSB [2016] OJ NO. 5506 (Div.Ct.) (leave to appeal dismissed- para 31, 36

Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188.

R. v. Rodgers, 2006 SCC 15, [2006] 1 S.C.R. 554,

R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211,

Gehl v. Canada (Attorney General), 2017 ONCA 319, 138 O.R. (3d) 52

Ontario Medical Association v. Ontario (Information and Privacy Commissioner), 2018 ONCA 673

Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10

McLean v. BC (Securities Commission), 2013 SCC 67;

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47

Iacovelli v. College of Nurses of Ontario, 2014 ONSC 7267, 331 O.A.C. 201 (Div. Ct.)

Minister of National Revenue v. Coopers and Lybrand [1979] 1 SCR 495

Lochner v. Toronto (City) PSB [2014] O.J. No. 2017 (Sup.Ct.) para 13;

Andrushko v. Ontario [2011] O.J. No. 3693 (Div.Ct.), para 17,18,22,29,30;

Re Daryl Bennett 2014 ONCPC 2504,para 99, 100, 334;

R v. Mills (1999) 139 C.C.C.(3d) 321 (S.C.C.);para 108;

R v. Lucas (1996) 104 C.C.C.(3d) 550 (Sask.C.A.);

R v. Altunamaz (Ont.Sup.Ct-1999); para 6-7;

St. Amand v. Tisi [2018] O.J.No. 613 (C.A.)

Schedule B - Relevant Statutory Provisions

Police Services Act, R.S.O. 1990, c. P.15, s. 83

Ontario Statutes

R.S.O. 1990, c. P.15, s. 83

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > HEARINGS

Notice

Current Version: Effective 19-10-2009

SECTION *83*

Hearings, procedure

83. (1) A hearing held under subsection 66 (3), 68 (5), 69 (8), 76 (9) or 77 (7) shall be conducted in accordance with the Statutory Powers Procedure Act.

Application of this section

(2) Subsections (3), (4), (5), (6), (11), (12), (13), (14), (15) and (16) apply to any hearing held under this Part.

Parties

(3) The parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant.

Notice and right to representation

(4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the Law Society Act to represent the party.

Examination of evidence

(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence.

Police officer not required to give evidence

(6) The police officer who is the subject of the hearing shall not be required to give evidence at the hearing.

Non-compellability

(7) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under this Part, except at a hearing held under this Part.

Inadmissibility of documents

(8) No document prepared as the result of a complaint made under this Part is admissible in a civil proceeding, except at a hearing held under this Part.

Inadmissibility of statements

(9) No statement made during an attempt at informal resolution of a complaint under this Part is admissible in a civil proceeding, including a proceeding under subsection 66 (10), 69 (12), 76 (12) or 77 (9), or a hearing under this Part, except with the consent of the person who made the statement.

Recording of evidence

(10) The oral evidence given at the hearing shall be recorded and copies of transcripts shall be provided on the same terms as in the Superior Court of Justice.

Release of exhibits

(11) Within a reasonable time after the matter has been finally determined, documents and things put in evidence at the hearing shall, on request, be released to the person who produced them.

No communication without notice

(12) Subject to subsection (13), the person conducting the hearing shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person, unless the parties receive notice and have an opportunity to participate.

Exception

(13) The person conducting the hearing may seek legal advice from an advisor independent of the parties, and in that case the nature of the advice shall be communicated to them so that they may make submissions as to the law.

If Crown Attorney consulted

(14) If a Crown Attorney has been consulted, the person conducting the hearing may proceed to deal with the part of the complaint that, in his or her opinion, constitutes misconduct as defined in section 80 or unsatisfactory work performance, unless the Crown Attorney directs otherwise.

Hearing to continue

(15) If the police officer who is the subject of the hearing is charged with an offence under a law of Canada or of a province or territory in connection with the conduct that was the subject of the complaint, the hearing shall continue unless the Crown Attorney advises the chief of police or board, as the case may be, that it should be stayed until the conclusion of the proceedings dealing with the offence.

Photography at hearing

(16) Subsections 136 (1), (2) and (3) of the Courts of Justice Act (photography at court hearing) apply with necessary modifications to the hearing and a person who contravenes subsection 136 (1), (2) or (3) of the Courts of Justice Act, as it is made to apply by this subsection, is guilty of an offence and on conviction is liable to a fine of not more than $2,000.

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.

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,

(i) the day on which the chief of police received the complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) or (b), or

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

(b) 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 chief of police or deputy chief of police, the day on which the board received the complaint referred to it by the Independent Police Review Director under subsection 61 (8); or

(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 31

Ontario Statutes

R.S.O. 1990, c. P.15, s. 31

Ontario Statutes > Police Services Act > PART III MUNICIPAL POLICE SERVICES BOARDS

Notice

Current Version: Effective 19-10-2009

SECTION *31*

Responsibilities of boards

31. (1) A board is responsible for the provision of adequate and effective police services in the municipality and shall,

(a) appoint the members of the municipal police force;

(b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;

(c) establish policies for the effective management of the police force;

(d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;

(e) direct the chief of police and monitor his or her performance;

(f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;

(g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);

(h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;

(i) establish guidelines for dealing with complaints under Part V, subject to subsection (1.1);

(j) review the chief of police's administration of the complaints system under Part V and receive regular reports from the chief of police on his or her administration of the complaints system.

Restriction

(1.1) Guidelines in respect of complaints made by members of the public under Part V shall not be established by the board unless they are consistent with,

(a) any procedural rules or guidelines for the handling of public complaints established under clause 56 (1)
(b) by the Independent Police Review Director; and

(b) any procedure, condition or requirement made by regulation under paragraph 26.4 of subsection 135 (1).

Members of police force under board's jurisdiction

(2) The members of the police force, whether they were appointed by the board or not, are under the board's jurisdiction.

Restriction

(3) The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.

Idem

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

Training of board members

(5) The board shall ensure that its members undergo any training that the Solicitor General may provide or require.

Rules re management of police force

(6) The board may, by by-law, make rules for the effective management of the police force.

Guidelines re secondary activities

(7) The board may establish guidelines consistent with section 49 for disclosing secondary activities and for deciding whether to permit such activities.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 35

Ontario Statutes

R.S.O. 1990, c. P.15, s. 35

Ontario Statutes > Police Services Act > PART III MUNICIPAL POLICE SERVICES BOARDS

Notice

Current Version: Effective 31-12-1991

SECTION *35*

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.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 37

Ontario Statutes

R.S.O. 1990, c. P.15, s. 37

Ontario Statutes > Police Services Act > PART III MUNICIPAL POLICE SERVICES BOARDS

Notice

Current Version: Effective 27-11-1997

SECTION *37*

Rules and procedures

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.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 57

Ontario Statutes

R.S.O. 1990, c. P.15, s. 57

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > PUBLIC COMPLAINTS MADE TO THE INDEPENDENT POLICE REVIEW DIRECTOR

Notice

Current Version: Effective 19-10-2009

SECTION 57

Review of systemic issues

57. In addition to his or her other functions under this Act, the Independent Police Review Director may examine and review issues of a systemic nature that are the subject of, or that give rise to, complaints made by members of the public under this Part and may make recommendations respecting such issues to the Solicitor General, the Attorney General, chiefs of police, boards, or any other person or body.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 61

Ontario Statutes

R.S.O. 1990, c. P.15, s. 61

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > PUBLIC COMPLAINTS MADE TO THE INDEPENDENT POLICE REVIEW DIRECTOR

Notice

Current Version: Effective 05-07-2010

SECTION 61

Complaints referred, retained

61. (1) This section applies to every complaint made to the Independent Police Review Director by a member of the public under this Part, unless the Independent Police Review Director has decided not to deal with the complaint in accordance with section 60.

Complaints about municipal force policies

(2) A complaint about the policies of or services provided by a municipal police force shall be referred by the Independent Police Review Director to the municipal chief of police and dealt with under section 63.

Complaints about local O.P.P. policies

(3) A complaint about the local policies, established under clause 10 (9) (c), of an Ontario Provincial Police detachment that is providing police services pursuant to an agreement entered into under section 10 shall be referred by the Independent Police Review Director to the detachment commander and dealt with under section 64.

Complaints about provincial O.P.P. policies, services

(4) A complaint about the provincial policies of the Ontario Provincial Police or about services provided by the Ontario Provincial Police, other than those services provided pursuant to an agreement under section 10, shall be referred by the Independent Police Review Director to the Commissioner and dealt with under section 65.

Complaints about officer other than chief

(5) A complaint about the conduct of a police officer, other than a chief of police, deputy chief of police or a police officer appointed under the Interprovincial Policing Act, 2009, shall be,

(a) referred by the Independent Police Review Director to the chief of police of the police force to which the complaint relates and dealt with under section 66;

(b) referred by the Independent Police Review Director to the chief of police of a police force other than the police force to which the complaint relates and dealt with under section 67; or

(c) retained by the Independent Police Review Director and dealt with under section 68.

Same, officer appointed under the Interprovincial Policing Act, 2009

(5.1) A complaint about the conduct of a police officer appointed under the Interprovincial Policing Act, 2009 shall be,

(a) referred by the Independent Police Review Director to any chief of police and dealt with under section 68.1; or

(b) retained by the Independent Police Review Director and dealt with under section 68.2.

Same

(6) In exercising his or her discretion under subsection (5) or (5.1), the Independent Police Review Director shall consider the nature of the complaint and the public interest.

Same

(7) The Independent Police Review Director may, in referring a complaint to a chief of police under subsection (5) or (5.1), direct the chief of police to deal with the complaint as the Independent Police Review Director specifies.

Complaints about municipal chief, municipal deputy chief

(8) A complaint about the conduct of a municipal chief of police or a municipal deputy chief of police shall be referred by the Independent Police Review Director to the board and dealt with under section 69.

Complaints about Commissioner, deputy Commissioner

(9) A complaint about the conduct of the Commissioner or a deputy Commissioner shall be referred by the Independent Police Review Director to the Solicitor General and dealt with under section 70.

Cost of complaints process

(10) If the Independent Police Review Director refers a complaint under clause (5) (b) to a chief of police of a police force other than the police force to which the complaint relates, the police force to which the complaint relates shall pay the costs of the investigation incurred by the police force to which the matter is referred.

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 68

Ontario Statutes

R.S.O. 1990, c. P.15, s. 68

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > REVIEW AND INVESTIGATION OF COMPLAINTS

Notice

Current Version: Effective 19-10-2009

SECTION *68*

Complaints about police officer's conduct, Independent Police Review Director investigation

68. (1) The Independent Police Review Director shall cause every complaint retained by him or her under clause 61 (5) (c) to be investigated and the investigation to be reported on in a written report.

Unsubstantiated complaint

(2) If at the conclusion of the investigation the Independent Police Review Director is of the opinion that the complaint is unsubstantiated, he or she shall report that opinion in writing to the chief of police of the police force to which the complaint relates and the chief of police shall take no action in response to the complaint and shall notify the complainant and the police officer who is the subject of the complaint in writing of the decision, together with a copy of the written report.

Matter referred to chief of police

(3) If at the conclusion of the investigation the Independent Police Review Director believes on reasonable grounds that the conduct of the police officer who is the subject of the complaint constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall refer the matter, together with the written report, to the chief of police of the police force to which the complaint relates.

Same

(4) If the Independent Police Review Director is of the opinion that the conduct of the police officer constitutes misconduct or unsatisfactory work performance that is not of a serious nature, he or she, in referring the matter to the chief of police under subsection (3), shall so indicate.

Chief of police to hold hearing

(5) Subject to subsection (6), the chief of police shall hold a hearing into a matter referred to him or her under subsection (3) by the Independent Police Review Director.

Informal resolution

(6) If on the review of the written report the chief of police is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the chief of police may resolve the matter informally without holding a hearing if the police officer and the complainant consent to the proposed resolution.

Same

(7) Subsections 66 (8), (9), (10), (11), (12) and (13) apply, with necessary modifications, in relation to an informal resolution under subsection (6).

End of Document

Police Services Act, R.S.O. 1990, c. P.15, s. 85

Ontario Statutes

R.S.O. 1990, c. P.15, s. 85

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > HEARINGS

Notice

Current Version: Effective 15-12-2009

SECTION *85*

Powers at conclusion of hearing by chief of police, board or Commission

85. (1) Subject to subsection (4), the chief of police may, under subsection 84 (1),

(a) dismiss the police officer from the police force;

(b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;

(c) demote the police officer, specifying the manner and period of the demotion;

(d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;

(e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be;

(f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be; or

(g) impose on the police officer any combination of penalties described in clauses (c), (d), (e) and (f).

Same

(2) Subject to subsection (4), the board may, under subsection 84 (2),

(a) dismiss the chief of police or deputy chief of police from the police force;

(b) direct that the chief of police or deputy chief of police be dismissed in seven days unless he or she resigns before that time;

(c) demote the chief of police or deputy chief of police, specifying the manner and period of the demotion;

(d) suspend the chief of police or deputy chief of police without pay for a period not exceeding 30 days or 240 hours, as the case may be;

(e) direct that the chief of police or deputy chief of police forfeit not more than three days or 24 hours pay, as the case may be;

(f) direct that the chief of police or deputy chief of police forfeit not more than 20 days or 160 hours off, as the case may be;

(g) impose on the chief of police or deputy chief of police any combination of penalties described in clauses (c), (d), (e) and (f).

Same

(3) The board shall promptly take any action that the Commission directs it to take under subsection 84 (3).

Notice needed

(4) The chief of police or board, as the case may be, shall not impose the penalties of dismissal or demotion under subsection (1) or (2) unless the notice of hearing or a subsequent notice served on the chief of police, deputy chief of police or other police officer indicated that they might be imposed if the complaint were proved on clear and convincing evidence.

Calculation of penalties

(5) Penalties imposed under clauses (1) (d), (e) and (f) and (2) (d), (e) and (f) shall be calculated in terms of days if the chief of police, deputy chief of police or other police officer normally works eight hours a day or less and in terms of hours if he or she normally works more than eight hours a day.

Same

(6) If a penalty is imposed under clause (1) (e) or (2) (e), the chief of police, deputy chief of police or other police officer, as the case may be, may elect to satisfy the penalty by working without pay or by applying the penalty to his or her vacation or overtime credits or entitlements.

Additional powers

(7) In addition to or instead of a penalty described in subsection (1) or (2), the chief of police or board, as the case may be, may under subsection 84 (1) or (2),

(a) reprimand the chief of police, deputy chief of police or other police officer;

(b) direct that the chief of police, deputy chief of police or other police officer undergo specified counselling, treatment or training;

(c) direct that the chief of police, deputy chief of police or other police officer participate in a specified program or activity;

(d) take any combination of actions described in clauses (a), (b) and (c).

Notice of decision

(8) The chief of police or board, as the case may be, shall promptly give written notice of any penalty imposed or action taken under subsection (1), (2), (3) or (7), with reasons,

(a) to the chief of police, deputy chief of police or other police officer who is the subject of the complaint;

(b) in the case of a penalty imposed or action taken by a municipal chief of police, to the board; and

(c) in the case of a penalty imposed or action taken in respect of a complaint made by a member of the public, to the complainant.

Employment record

(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.

Restriction on employment

(10) No person who is dismissed under section 84, or who resigns following a direction under section 84, may be employed as a member of a police force unless five years have passed since the dismissal or resignation.

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Police Services Act, R.S.O. 1990, c. P.15, s. 95

Ontario Statutes

R.S.O. 1990, c. P.15, s. 95

Ontario Statutes > Police Services Act > PART V COMPLAINTS AND DISCIPLINARY PROCEEDINGS > GENERAL MATTERS

Notice

Current Version: Effective 19-10-2009

SECTION *95*

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.

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Public Officers Act, R.S.O. 1990, c. P.45, s. 16

Ontario Statutes

R.S.O. 1990, c. P.45, s. 16

Ontario Statutes > Public Officers Act

Notice

Current Version: Effective 22-06-2006

SECTION 16

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.

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Court File No.: C66995 & C66998

CANADIAN BROADCASTING CORPORATION

Applicant (Appellant in C66998)

LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES OF THE THUNDER BAY POLICE SERVICES BOARD, et. al.
Respondents (Respondents in Appeal)
THE FIRST NATION PUBLIC COMPLAINANTS
Respondent (Appellant in C66995)

COURT OF APPEAL FOR ONTARIO
PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF THE RESPONDENT OFFICERS

Joanne E. Mulcahy
Barrister
90 Richmond Street East
Suite 301
Toronto ON M5C 1P1

Tel: 416-860-9393
Fax: 416-860-9396
Email: jmulcahy@bellnet.ca

Counsel for the Respondent Officers