**Court File Nos. C66995 and 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 Service Board, the Chief of Police of the Thunder Bay Police Service, the Independent Police Review Director, and the Respondent Officers**

**Respondents**

**– and –**

**The First Nation Public Complainants**

**Respondents**
**(Appellant in C66995)**

**– and –**

**The Attorney General for Ontario**

**Intervenor**

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# APPEAL FACTUM OF THE THUNDER BAY POLICE SERVICE

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October 4th, 2019

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## PART I – NATURE OF APPEAL

1. The Chief of Police of the Thunder Bay Police Service writes these submissions as a response to the CBC/Radio-Canada ("CBC") and the First Nation Public Complainant's appeal of the Divisional Court decision dated January 7, 2019.

2. The Divisional Court dismissed CBC's application for judicial review of the decision of Mr. Ferrier.

3. Mr. Ferrier, exercising the powers and duties of the Thunder Bay Police Services Board ("TBPSB") determined that an Extension Application under Section (83)17 of the Police Services Act was to be held in camera and that the *Dagenais/Mentuck* test had no application.

4. The Divisional Court ruled that the standard of review of reasonableness applied and that Mr. Ferrier's decision was reasonable, and also correct, and therefore the judicial review was dismissed.

5. Mr. Ferrier, in exercising the powers and duties of the Thunder Bay Police Services Board, did not commit any error in finding that the *Dagenais/Mentuck* test did not apply to his decision to hear the Section 83(17) extension application *in camera.*

6. The correct standard of review to apply is one of reasonableness.

7. The issues before this Court should be decided on principles of statutory interpretation and administrative law.

## PART II – STATEMENT OF RELEVANT FACTS

### Overview of the Police Discipline Process

8. The *Police Services Act* ("*PSA*") governs the formal discipline process as it relates to sworn police officers in the province of Ontario. The *Police Services Act* represents a complete procedural code for such matters.

9. The Office of the Independent Police Review Director (OIPRD) is the civilian oversight body for police services in the province of Ontario. As the oversight body, they have the authority to process and accept complaints from members of the public as a result of police conduct as prescribed in Section 56 of the *PSA*.

10. Part V of the *PSA* governs the discipline process as it pertains to sworn members. Specifically, section 83 of the *PSA* outlines the procedure to be followed when the OIPRD undertakes a conduct investigation against a police officer.[1]

11. If the OIPRD returns a finding that a complaint is "substantiated," and if no informal resolution of the complaint is possible, then a formal, public *Police Services Act* hearing ensues.

12. Per the *PSA*, this workplace discipline process, and any subsequent hearing is administered by the Chief of Police.

13. Section 83(17) of the *PSA* provides six (6) months for the Chief of Police to serve an officer with a notice of hearing, outlining the substantiated charges to which the officer must answer.[2] Service of this document initiates the public hearing process against the officer.

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[1] *Police Services Act*, RSO 1990, c.P. 15, Section 83 [*PSA*], Respondent's Factum, Schedule B.
[2] *PSA*, Section 83(17), Respondent's Factum, Schedule B.

14. If a notice of hearing is not served within six months, the Chief of Police must bring an application to the Police Services Board requesting an extension of time for the service of the notice of hearing. [3]

15. The applicable section of the *PSA* defines the role of the Board in determining if a notice of hearing should be served:

> 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.[4]

16. The sole role of the Board is to consider whether the delay in serving the notice was reasonable. It does not review the merits of the case. It does not consider the likelihood that an allegation of misconduct will be proven.[5]

17. The extension application is not a formal hearing. No proceedings have been commenced at the time an extension is brought before the Board, as no originating process has been served. No public allegation of misconduct has been made. No discipline hearing has been scheduled. The public aspect of a *PSA* prosecution does not commence until the extension application has been granted.

**Overview of the OIPRD Complaint**

18. In April of 2016, some six (6) months' after Stacey DeBungee was found deceased, the OIPRD received a complaint alleging misconduct in the police investigation of his death. One allegation made was discrimination as a result of race.

19. This was one of the events that prompted the OIPRD to begin a systemic review into the practices of the Thunder Bay Police Service in relation to missing persons and death investigations of Indigenous persons. The systemic review process as contemplated

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[3] *PSA*, Section 83(17), Respondent's Factum, Schedule B
[4] *PSA*, Section 83(17), Respondent's Factum, Schedule B
[5] *Forestall v. Toronto Police Services Board*, 2007 CanLii 31785 (ONSCDC), at para 44 & 50. [*Forestall*]

under the *PSA* is jurisdictionally separate and distinct from the Debungee OIPRD misconduct complaint.[6]

20. Thereafter the Ontario Civilian Police Commission ("OCPC") commenced a review into the Thunder Bay Police Services Board for similar reasons.

21. While it is inevitable that the OIPRD misconduct complaint into the investigation of Mr. DeBungee's death – and any *PSA* charges that flow from it – will touch upon issues of systemic racism, that is not the principal purpose of the investigation nor of any contemplated discipline hearing under the *PSA*. The focus of a discipline hearing is on proving individual officer misconduct, as demonstrated by the jurisdictional distinction between it and an OIPRD systemic review.

**Procedural History**

Board's Declaration of Conflict

22. For reasons that are confidential to the Board, the confluence of the Debungee misconduct complaint, the OIPRD systemic review and the OCPC investigation compelled the Thunder Bay Police Services Board to declare a conflict with respect to adjudicating the extension application. They did so by filing a Motion in the Superior Court of Justice.

23. On July 25, 2018, the Motion was heard and granted. Counsel for parties to that Application – Mr. Falconer, Ms. Mulcahy, and others – either consented to the application or did not oppose it.

24. As a result, the Honourable Mr. Justice Lee Ferrier, Q.C. (ret'd), was appointed to hear the extension application.[7]

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[6] *PSA*, Section 57 & 58(1)(a)&(b), Respondent's Factum, Schedule B

[7] *Court Order appointing the Honourable Lee Ferrier*, July 25, 2018 in Appellant's Appeal Book and Compendium TAB 11, Exhibit A, pages 90-92. [Appeal Book]

25. The details of the extension application were discussed between Justice Ferrier and counsel for all of the parties.

26. Acting for the complainants, Mr. Falconer took the position that the extension application should not be in heard *in camera*. Counsel for the respondent officer's, Ms. Mulcahy, and counsel for the Chief of Police of TBPS took the position that it should be heard *in camera*. The Office of the Independent Police Review Director (OIPRD) agreed that the matter should be held *in camera* in keeping with the practices of the Thunder Bay Police Services Board.[8]

27. Mr. Ferrier allowed counsel for the complainants until August 26th, 2018 to submit their argument on why it should not be heard *in camera*. All other parties had until September 10, 2018 to respond.

28. On September 16, 2018, Mr. Falconer informed the media that this issue was before Retired Justice Ferrier. Mr. Falconer explicitly indicated that he was providing the media notice of the possibility that the extension application would be heard *in camera*.[9]

29. On the back of this notice, the CBC, through journalist Gillian Findlay, indicated the CBC wished to make submissions regarding the openness of the meeting.[10]

30. Presumably, the CBC provided Mr. Ferrier with their submissions before Wednesday, September 19, 2018 by 4:30pm. The original submissions of the CBC on the *in camera* issue were not served on Counsel for the TBPS.

[8] E-mail Exchange between the parties, Appeal Book, Tab 11, Exhibit B, pages 99-107.
[9] E-mail Exchange between the parties, Appeal Book, Tab 11, Exhibit B, page 121.
[10] E-mail Exchange between the parties, Appeal Book, Tab 11, Exhibit B, page 128.

Mr. Ferrier's In Camera Decision

31. On the morning of September 20, 2018, Mr. Ferrier released his decision on the in-camera issue with respect to the extension application stating that the matter is to be held *in camera.*[11]

32. The *ratio* of his decision is 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, and there is not a judicial or quasi-judicial proceeding and the Board is performing an administrative act."[12]

Stay Application

33. Shortly after the decision of Mr. Ferrier was issued, the CBC, via e-mail, requested a stay of the extension application until the CBC was able to pursue a judicial review of his decision.

34. On September 25th, 2018, Justice Pierce, sitting as the Divisional Court, heard the CBC's motion for an interlocutory injunction. She granted a stay of the extension application until the judicial review could be heard. She released her reasons for judgment in this regard on October 4, 2018.[13]

Divisional Court Decision

35. On December 6, 2018, the Divisional Court, sitting as a panel of three, heard the judicial review brought by CBC.

36. The Divisional Court released its decision on January 7, 2019, concluding that Mr. Ferrier's decision to hold the extension application *in camera* was reasonable.[14]

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[11] *In Camera Decision*, Appeal Book, Tab 8, pages 68-76.
[12] *In Camera Decision*, Appeal Book, Tab 9, page 75, para 31.
[13] *CBC v. Thunder Bay Police Services Board*, 2018 ONSC 5872, Appeal Book, Tab 7, pages 56-67. [*CBC v. TBPS*]
[14] *CBC v. Lee Ferrier*, 2019 ONSC 34 (Div Ct), Appeal Book, Tab 4, pages 23-51. [*CBC v. Ferrier*]

37. On that point, the Divisional Court stated the following:

> 33 One must not lose sight of the reality that the extension application is being determined in the context of possible disciplinary proceedings against the employee. 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 rule undertaken by Ferrier.
>
> [...]
>
> 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 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. (See Coombs v. Toronto (Metropolitan) Police Services Board, [1997] O.J. No. 5260 (Div Ct); Payne v. Peel (Regional Municpality) 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").[15]

38. The Divisional Court concluded that Ferrier's decision to hold the extension application *in camera* was a reasonable one.

## PART III – APPLICANT ISSUES AND LAW

### Issues

39. It is the position of the Chief of Police of the Thunder Bay Police Service that:

    a. The correct standard of review of Mr. Ferrier's decision is reasonableness; and
    b. The *Dageneais/Mentuck* test does not apply to the Board's function to close a hearing

[15] *CBC v. Ferrier*, Appeal Book, Tab 4, pages 36 & 38, paras 33 & 39.

**Issue #1 – Standard of Review is Reasonableness**

40. The appropriate standard of review to be applied to a decision of a Police Services Board, or in this case, Mr. Ferrier exercising the powers and duties of the police services board, is reasonableness.

41. In *Dunsmuir v. New Brunswick* the Supreme Court of Canada recognized that "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its functions with which it will have particular familiarity."[16]

42. The Court in *Dunsmuir* stated that:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.[17]

43. In the *In Camera* Decision of Mr. Ferrier, he was tasked with interpreting the Thunder Bay Police Service Board's home statute, the *Police Services Act*. He was required to determine whether the extension application should be held *in camera* or not by applying Section 35(4) of the *Police Services Act*, in context of the entirety of the statute.

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[16] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para 54, Appellant's Book of Authorities, Tab 1. [*Dunsmuir*]
[17] *Dunsmuir*, at para 55-56, Appellant's Book of Authorities, Tab 1.

44. An administrative decision-makers's interpretation of its home statute is presumed to be a question of statutory interpretation. It is subject to the standard of reasonableness. It is entitled to deference.

45. The issue of applying a different standard to Mr. Ferrier as a result of his status is only being fully raised on this appeal.

46. In both CBC's and the First Nation Public Complainant's facta they raise the issue of whether a different standard of review should be applied to Mr. Ferrier, exercising the powers and duties of the Thunder Bay Police Services Board, because he is a substitute decision maker. This issue was not raised when Mr. Ferrier was appointed, it was not raised when Mr. Ferrier issued his decision to hold the hearing in camera, it was not raised during the hearing of the Stay Application and it was not raised during the Judicial Review stage. It is a new argument, albeit not a novel one.

47. As seen at paragraph 34 of the Divisional Court decision, the only issue raised by CBC and the First Nation Public Complainants was that the correctness standard should apply because constitutional issues were raised.[18]

48. As a result, there is not a sufficient evidentiary record to resolve the issue and the responding parties are somewhat prejudiced as they have not had an opportunity to respond to the issue at the first hearing.

49. However, it is submitted that it does not change the standard of review. Mr. Ferrier was placed in the position of the Thunder Bay Police Services Board to exercise its function and duties. He is exercising administrative functions as a decision-maker appointed as a result of a declared conflict.

50. The standard of review does not change based on his "expertise".

[18] *CBC v. Ferrier*, at para 34, Appeal Book, Tab 4.

51. As stated in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*:

> 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.[19]

52. Thus, Mr. Ferrier is presumed to have all of the capabilities required to perform the task assigned to him. It is not open to an appellant to impugn the tribunal of first instance as a novel issue on appeal.

53. As stated in *Dunsmuir*, and in many cases that followed, a decision will be considered reasonable if it falls within a range of possible, acceptable outcomes in light of the particular factual and legal context; the decision maker weighed evidence before him or her in a transparent and intelligible fashion; and the decision-maker was justified in making the findings he or she did.[20]

54. *Dunsmuir* dictates that reviewing courts should look to the jurisprudence to determine if the degree of deference in any given situation has already been determined prior to the court engaging in their own review.[21]

55. There is a long, established, and incontrovertible line of jurisprudence that addresses the degree of deference afforded to decision-makers of first instance operating within the standard of reasonableness. Indeed, the Divisional Court did review the case law extensively:

> 40 There is jurisprudence to the effect that the standard of review applicable to a police board's decision in regard to an extension application is reasonableness. (See Figueiras 2, at para.28; Niagara Police Services Board, 2016, at para.62; Office of the Independent Police Review Director v. Regional Muncipality of Niagara Police Services Board, 2018 ONSC 4966 (Div Ct) at

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[19] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47, [2016] 2 SCR 293, Appellant's Book of Authorities, Tab *6.*

[20] *Dunsmuir*, at para 62, Appellant's Book of Authorities, Tab 1.

[21] *Dunsmuir,* at para 62, Appellant's Book of Authorities, Tab 1.

para 43, 51 and 59; and Bennett v. Toronto (Metropolitan Police Services Board, [1995] O.J. No. 4816 (Div Ct), at para 2.)

41 That this is the applicable standard of review is supported by the Supreme Court of Canada's decision in Dore c. Quebec (Tribunal des professions), 2012 SCC 12, [2012] 1 S.C.R. 395.[22]

56. In the case of *Forestall*, the Court stated:

> With respect to the merits of the Board's decision, the standard of review is reasonableness, given there is no appeal from the Board's decision; the Board's policy role and experience in overseeing the Chief's applications under s.69(18); the purpose of the *Act*, which is directed at maintaining an efficient police force in the community; and the nature of the question before the Board, which is one of mixed fact and law. The parties agree on this standard of review.[23]

57. In the case of *Episcopal*, cited by the Appellants in their facta, the Court held the standard of review applying to an administrative decision to refuse a publication ban (made pursuant to a rule with very similar wording to Section 35 of the *Police Service Act*) was reasonableness.[24]

58. Similar to Section 35 of the *Police Services Act*, the rule articulated in *Episcopal* permitted the decision-maker to limit openness over proceedings where they were of the opinion that personal matters or other matters were of such a nature that, having regard to the circumstances, the desirability of avoiding disclosure outweighed the desirability of adhering to the general principle that the hearings should be open to the public.[25]

59. The Ontario Court of Appeal held that a discretionary balancing exercise made under this rule attracted a deferential standard of review.[26]

60. Such a deferential standard of review means:

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[22] *CBC v. Ferrier,* at paras 33, 39-41, Appeal Book, Tab 4.
[23] *Forestall v. Toronto Police Services Board*, 2007 CanLii 31785 (Div. Ct.), at para 39 [*Forestall*], OIPRD Book of Authorities, Tab 4.
[24] *Episcopal Corp of Diocese of Alexandria-Cornwall v. Cornwall* (Public Inquiry) 2007 ONCA 100 [*Episcopal*], Apellant's Book of Authorities, Tab 4.
[25] *Episcopal*, at para 37, Appellant's Book of Authorities, Tab 4.
[26] *Episcopal*, at para 37, Appellant's Book of Authorities, Tab 4.

> In its application, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution. In reasonableness review, the reviewing court is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with determining whether the outcome falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute. Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker.[27]

Rebuttal Presumption

61. Respectfully, the Appellant's fail in rebutting the reasonableness presumption.

62. The presumption can be rebutted and replaced with the standard of correctness if there is a question regarding constitutional division of powers, a true question of vires, a question concerning jurisdiction between tribunals, or if there is a question of central importance to the legal system and it is outside of the area of expertise of the decision maker.[28]

63. In the case before this Court, there is no question regarding constitutional division of powers nor is there a true question of vires and finally, there is no issue of competing jurisdictions between tribunals.

64. Furthermore, no question of central importance to the legal system that is outside the expertise of a Police Services Board is apparent in this case.

65. The courts have rejected a liberal application relating to the central importance category.[29]

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[27] *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR, 772, [*Groia*], Appellant's Book of Authorities, Tab 3.
[28] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230 at para 28, [*Canada v. Canada*], Appellant's Book of Authorities, Tab 32
[29] *Canada v. Canada*, at para 42, Appellant's Book of Authorities, Tab 32.

66. The cases cited by the First Nations Public Complainant's in which questions were found to be of central importance to the legal system deal with issues of privilege and questions regarding widespread discrimination.

67. With respect, there is a conflation of the question to be answered here. The open court principle does not apply and the question to be answered in closing a board meeting is not one of central importance to the legal system.

68. Further, both Appellant's cite the case of *Langenfeld*, which was overturned on appeal to the Court of Appeal. The Court of Appeal concluded that the limit placed on freedom of expression by the Toronto Police Service's policy to search all those entering the building was justified under Section 1 of the *Charter*.[30]

69. However, this case is not useful here as it dealt with a policy adopted by the Toronto Police Service to search individuals when coming into Police Board meetings. It does not answer anything with respect to statutory requirements and interpretation.

70. The question to be answered is whether an extension application put before the Police Services Board in an employment disciplinary matter can be closed to the public pursuant to Section 35(4) of the *Police Services Act* without applying the *Dagenais/Mentuck* test. The decision provided in response to this question is to be reviewed on the standard of reasonableness.

71. Despite the suggestion by the Appellants, when a legal test, specifically in relation to the application of the *Charter*, is being called into question, the standard of reasonableness can still apply.

72. In *Dore*, the Supreme Court squarely dealt with the issue:

> [43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision

[30] *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, OIPRD's Book of Authorities, Tab 10.

with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

[46] The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that 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 . . . .(para. 49, citing "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension"

[51] The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

> If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the

necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.[31]

73. Based on the foregoing, it is apparent that the proper standard of review in this case is one of reasonableness.

**Issue #2 – *Dagenais/Mentuck* Test does not apply**

74. It is submitted that this case is properly decided through the application of well-established principles of statutory interpretation and administrative law and that the *Dagenais/Mentuck* test has no application.

Not Judicial or Quasi-Judicial

75. A discretionary decision of this nature, being made by a Police Services Board, cannot be said to be judicial or quasi-judicial in nature.

76. The Divisional Court correctly determined that the decision regarding whether or not to hold a Section 83(17) extension application in camera was not quasi-judicial in nature.

77. Taking into account the four questions relevant to determine whether a proceeding is quasi-judicial, it is clear that this proceeding is not quasi-judicial.

78. First, while a hearing is contemplated in this one instance, a Board is not obligated to hold a hearing.

79. Second, and as will be further discussed below, procedural fairness is minimal in these circumstances.

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[31] *Dore v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 SCR 395, paras 43, 45-46, 51-52, Appellant's Book of Authorities, Tab 2.

80. Third, it is conceded that the decision will affect the rights and obligations of persons and that the adversary process may be involved in some cases.

81. However, it cannot be said that the Police Services Board is an adjudicative body. During the extension application the Board is not tasked with adjudicating anything on the merits, assessing credibility or making any findings of fact. The Board is simply determining reasonableness of delay.

82. The Divisional Court was correct to liken the Board task in dealing with an extension application to those found in the case of *Iacovelli v. College of Nurses of Ontario* and the Supreme Court of Canada case of *Halifax (Regional Muncipality) v. Nova Scotia (Human Rights Commission)*.[32]

83. In *Iacovelli*, the Divisional Court determined that a decision of the Inquiries, Complaints and Report Committee (ICRC) of the College of Nurses, which required a nurse to submit to a physical and mental examination as part of an inquiry into the nurse's ability to practice was reviewable on a standard of reasonableness. The ICRC was not an adjudicative body and was not subject to the *Statutory Powers Procedure Act*. The ICRC did not hold in person hearings, assess credibility or make findings of fact. It was an investigative or screening body whose role was to determine whether a matter should be referred to the Fitness to Practice Committee.[33]

84. In the case of *Halifax v. Nova Scotia*, the Supreme Court described the function of the Human Rights Commission in deciding whether to appoint a board of inquiry as one of screening or administration. Again, the Supreme Court applied the normal practice that discretionary decisions of this nature by administrative tribunals are normally subject to the judicial review standard of reasonableness.[34]

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[32] *Iacovelli v. College of Nurses of Ontario*, 2014 ONSC 7267, 331 O.A.C. 201 (Div Ct); *Halifax (Regional Muncipality) v. Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2012] 1 SCR 364, Respondent's Book of Authorities, Tab1

[33] *Iacovelli*, Respondent's Book of Authorities, Tab 2

[34] *Halifax v. Nova Scotia*, paras 23 & 27 Respondent's Book of Authorities, Tab 2.

The Nature of Police Discipline Proceedings

85. It is settled law that police discipline proceedings are neither criminal nor quasi-criminal in nature. The discipline of officers occurs in the employment context.[35]

86. The Supreme Court of Canada, in the case of *Penner v. Niagara Regional Police Services Board*, stated "the police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them."[36]

87. Such proceedings are purely administrative and procedural in nature and the parties are afforded minimal procedural fairness.[37]

88. The Appellant's continuously raise the issue of transparency.

89. However, the Complainants in any police misconduct allegation investigated by the Office of the Independent Police Review Director are proper parties to the proceedings and thus entitled to participate in the extension application under section 83(17) of the *PSA*.

90. In the case of *Penner*, the court stated "by making the complainant a party, the *PSA* promotes transparency and public accountability."[38]

91. In addition, the case law is clear that the same minimal procedural fairness is owed to both the Respondent Officer's and the Complainants.[39]

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[35] See *R v. Wigglesworth*, [1987] 2 SCR 541, OIPRD Book of Authorities, Tab 1; *Burnham v. Metropolitan Toronto* Police [1987] 2 SCR 572, OIPRD Book of Authorities, Tab 2; *Trumbley v. Fleming* [1987] 2 SCR 577, OIPRD Book of Authorities, Tab 3; *Trimm v. Durham Regional Police Force,* [1987] 2 SCR 582, Respondent Book of Authorities, Tab 3.
[36] *Penner,* at para 54, Appellant's Book of Authorities, Tab 29.
[37] *Forestall*, OIPRD Book of Authorities, Tab 4; *Coombs v. Toronto (Metropolitan) Police Services Board*, [1997] O.J. No. 5260 (Div Ct.) at para 7, 10, [*Coombs*] OIPRD Book of Authorities, Tab 6.
[38] *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 SCR 125, at para 54, Appellant's Book of Authorities, Tab 29.
[39] *Figueiras v. Regional Muncipality of York Police Service Board et al*, 2012 ONSC 7419 (Div. Ct), para 43 [*Figueiras*] Appellant's Book of Authorities, Tab 19.

92. The principles and law as outlined in *Forestall* apply in this case as they would any other. The court applied the factors in *Baker*, the leading case on procedural fairness.

93. As stated in the case of *Baker v. Canada*:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional and social context of the decision.[40]

94. The Divisional Court in *Forestall* applied the factors as outlined in Baker to determine what level of procedural fairness is owed to the parties. After a balancing of all of the factors, the Court determined that "it is apparent that some degree of procedural fairness is required. [...] minimal rights of procedural fairness must be respected."[41]

95. In addition, Section 37 of the *Police Services Act* allows the Board to establish its own rules and procedures in performing its duties under the Act. Except when conducting a hearing under subsection 65(9), which deals with a hearing relating to a complaint of a Chief, the *Statutory Powers Procedure Act* does not apply.[42] This clearly suggests that other proceedings before the Board do not require more than minimal rights of procedural fairness.[43] If such was intended, the legislature would have provided for it rather than simply limiting it to hearings held under one section.

96. It has been stated in case law (*Forestall*) that the *Police Services Act* calls for minimal procedural fairness in extension applications.

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[40] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLii 699 (SCC) at para 28 [*Baker]*, Respondent Book of Authorities, Tab 4
[41] *Forestall,* at para 53, OIPRD Book of Authorities, Tab 4.
[42] *Police Services Act*, Section 37 at Respondent's Factum Schedule B
[43] *Forestall*, at para 46, OIPRD Book of Authorities, Tab 4.

The Section 83(17) Extension application

97. It is the practice in Thunder Bay and throughout Ontario that these applications are held *in camera*.

98. As contemplated in *Baker*, a legitimate expectation may result from an official practice or an assurance that certain procedures will be followed as part of the decision making process. The circumstances affecting procedural fairness will take into account the "promises or regular practices of administrative decision-makers and that it will generally be unfair for them to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights".[44]

99. The Appellant's allude to the issue of "secret" hearings. Respectfully, this is not the case with extension applications.

100. As stated above in the discussion of standing, the Board, or in this case Mr. Ferrier, is simply to determine if the extension should be granted to allow the officers to be served with a notice of hearing.

101. The Board does not determine the merits of the case. Rather, the Board engages in a simple analysis of whether or not the delay was reasonable in the circumstances.[45]

102. It must be emphasized that if a Police Services Board finds the delay to be reasonable in the circumstances, a notice of hearing will be served and disciplinary proceedings will ensue. The notice of hearing and the entirety of the disciplinary process will then be open to the public.

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[44] *Baker*, at para 26, Respondent Book of Authorities, Tab 4
[45] *Forestall*, para 44 and 50, OIPRD Book of Authorities, Tab 4.

103. To suggest that every time a Board wishes to close a meeting they would have to serve notice, invite submissions and engage in the *Dagenais/Mentuck* test would have an absurd result.

104. Rather, as the law supports, when the Board, or in this case Mr. Ferrier, makes a discretionary decision, he does so in light of the *Charter*.

Role of *Charter* Values

105. The Charter cannot be used to subvert clear statutory language.[46]

106. The Supreme Court of Canada dealt with this issue squarely at paragraphs 62 and 66 of *Bell Express Vu*:

> [62] Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter ] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to 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.
>
> [66]To reiterate what was stated in Symes, supra, and Willick, supra, if courts were to interpret all statutes such that they conformed to the Charter , this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on Charter rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the Charter right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to

[46] *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at paras 62-66 [*Bell Express Vu*].

> interpret this sort of enactment in light of Charter principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.[47]

107. Further, when interpreting legislation, *Charter* values are only relevant where courts determine that the provision at issue is genuinely ambiguous.

108. Absent a constitutional challenge to legislation, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result. If this occurred, it would upset the dialogue between legislatures and the judiciary and pre-empt any true *Charter* challenges.[48]

109. When the issue at hand is not one of statutory interpretation but rather a review of an administrative action, the role of the *Charter* is limited.

110. In the recent Ontario Court of Appeal case, *Gehl v. Canada (Attorney General)*, *Charter* values should not be resorted to where a straightforward administrative law approach suffices.[49] As noted in *Gehl*, to do otherwise can pose several problems:

> Furthermore, there is good reason to maintain a modest role for Charter values in judicial reasoning generally and in statutory interpretation specifically. Charter values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective – and value laden – nature of selecting some Charter values from among others, and of assigning relative priority among Charter values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when Charter values are understood as competing with Charter rights.[50]

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[47] *Bell Express Vu*, at para 62 & 66.
[48] *Bell Express Vu*, at para 62 – 66.
[49] *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para 78 [*Gehl*], Respondent Book of Authorities, Tab 5.
[50] *Gehl,* at para 79, Book of Authorities, Tab 5.

Section 35 & 95 of the *Police Services Act*

111. The *Police Services Act* is clear. Sections 35 and Section 95 are a complete answer to the question raised.

112. Section 35 of the *PSA* reads:

> **Meetings**
> 35 (1) The board shall hold at least four meetings each year.
>
> Quorum
> (2) A majority of the members of the board constitutes a quorum.
>
> Proceedings open to the public
> (3) Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines.
>
> Exception
> (4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,
>
> (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
>
> (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public. R.S.O. 1990, c. P.15, s. 35

113. Section 95 of the *PSA* reads:

> **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. 2007, c. 5, s. 10.

114. Mr. Ferrier, exercising the duties and powers of the Thunder Bay Police Services Board, was required to interpret the provisions of the *Police Services Act*, specifically Section 35(4).[51]

115. He did so by looking at the plain wording of the provisions and interpreting, in so far as they needed interpreting, in conjunction with the relevant provisions – as outlined in the remainder of Sections 35, 37, 83(17) and 95.

116. There is no genuine ambiguity in the language of Section 35(4), or any other relevant provision, that would call for the use of *Charter* values as a matter of statutory interpretation.

117. Section 35, clearly states on its face that there is a presumption of open hearings, which can only be departed from once a balancing exercise between disclosure and openness, is satisfied. *Charter* values cannot be used to subvert the clear statutory language in s.35.[52] Indeed, the Appellant pleads no notice of constitutional question claiming that any portion of the *PSA* violates the *Charter.* It is thus presumptively valid legislation, as established principles of statutory interpretation require courts to believe that legislatures do not deliberately enact unconstitutional legislation.

118. When Section 35 is read in conjunction with Section 95, which requires confidentiality of all Part V disciplinary proceedings, it is clear that the legislature contemplated whether extension applications should be held in public.[53]

119. Taking into account Sections 35, 37 and 95 of the *PSA,* a reasonable conclusion – indeed, the only sensible conclusion – is that the legislature considered this issue at the

[51] *PSA*, Section 35(4), Respondent's Factum, Schedule B.
[52] *PSA*, Section 35, Respondent's Factum, Schedule B.
[53] *PSA*, Section 95, Respondent's Factum, Schedule B.

time the *PSA* was drafted and made a conscious choice to maintain confidentiality over extension applications.

120. For this reason, Section 83(17) extension applications cannot be said to be "presumptively open".

121. While it is conceded that Section 35 of the *PSA* contemplates the Police Services Board having open hearings, it is submitted that this is because the Board, as the oversight to the Service, must exercise its function in a transparent fashion.

122. However, the legislature contemplated that there were certain matters that would not be open to the public such as "intimate financial or personal matters or other matters".[54]

123. Additionally, an entire section, Section 95, exists that expressly contemplates the need for the discipline process to remain confidential up to the serving of the notice of hearing on an officer. There is nothing to suggest that this Section of the *Act* should not be followed.

124. Conduct investigations undertaken by the Office of the Independent Police Review Director (OIPRD) are categorically considered to be confidential as outlined in Section 95 of the *PSA*.

125. Those who find themselves engaged in the administrative of the disciplinary process contemplated in the *PSA* shall preserve secrecy with respect to all information they obtain throughout the course of their duties.[55]

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[54] *PSA*, Section 35(4), Respondent's Factum, Schedule B.
[55] *PSA*, Section 95, Respondent's Factum, Schedule B.

126. This applies to the Police Services Board, or any person or entity, which has been ordered to exercise the functions of the Board.

127. The Chief of Police and the Thunder Bay Police Services Board are quite clearly "engaged in the administration of this Part" and as a result "shall preserve secrecy with respect to all information obtained in the course of her or her duties."[56]

128. To conduct this hearing in public would violate the mandatory language of Section 95 of the *PSA*.

129. Pursuant to Section 95, until a notice of hearing is issued under the *PSA*, the matter is to remain confidential. When this provision is read in conjunction with Section 35(4), it is clear that the purpose was to hold extension application's *in camera*. This is the proper interpretation of the legislative intent. There is no ambiguity in the provisions or any words used by the legislation that would cause one to look outside of the *PSA* for guidance. In other words, it is not necessary to override or circumvent these sections and introduce a *Charter* analysis by applying the *Dagenais/Mentuck* test.

130. The Appellant is suggesting to the Court that the clear provisions of the *Police Services Act* be supplemented by applying the *Dagenais/Mentuck* test. They ask that this be done without challenging the constitutionality of Section 35 and Section 95. However, to engage in that type of analysis, would effectively result in rewriting the legislation.

131. It is for the foregoing reasons that the Divisional Court was correct in upholding Mr. Ferrier's decision to hold the extension application in camera.

[56] *PSA*, Section 95, Respondent's Factum, Schedule B.

132. It is only when the legislature does not offer clear statutory guidance on how discretion should be exercised; it is presumed that administrative decision-makers will rely on *Charter* values.[57] It is unnecessary to resort to the *Charter* in this case.

133. This matter is, and was, properly decided through the application of administrative law and statutory interpretation as was done by Mr. Ferrier and again, by the Divisional Court.

Open Court Principle - Compliance

134. The Appellant's argue that the *Dagenais/Mentuck* line of questioning is to be applied in all cases in which a Board chooses to close a hearing.

135. It is submitted that the decision reached by Mr. Ferrier is compliant with the openness principle without engaging in the traditional *Dagenais/Mentuck* test.

136. The Divisional Court correctly pointed out no case law was cited by any party in which the *Dagenais/Mentuck* test was applied in cases other than in judicial or quasi-judicial proceedings.

137. No case law was cited by any party that showed that Section 2 freedom of expression principles outlined in the *Charter* came into play when the issue was one of an employer investigating their employee for wrongdoing.

138. However, despite the inapplicability of the *Dagenais/Mentuck* test in these circumstances, Mr. Ferrier's decision can be said to satisfy the openness principle.

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[57] *Dore*, Applicant's Book of Authorities, Tab 2

139. The only case to consider the application of the open courts principle to administrative tribunal proceedings is the recent decision of *Toronto Star Newspapers Ltd v. Ontario (AG).*[58]

140. While in *Toronto Star*, supra Morgan J held that the constitutional test set out by the Supreme Court of Canada for openness in court cases (*Dagenais / Mentuck* test) applies in the administrative law context, he also found that the test was a flexible one that could be adapted to different contexts:

> The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account (Dore v. Barreau du Quebec [2012] 1 SCR 395 at para 55-56). The particular institution and circumstances of the particular case may require the most stringent application of the Dagenais/Mentuck test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle.[59]

141. It is plainly stated that the decision-maker contemplating the limitation on the openness principle must take the context, and "statutory objectives" of the administrative body into account.

142. Respectfully, this has the same result – Mr. Ferrier has to consider the *Police Services Act* as a whole and must read Section 35 in context, and in light of Section 95, and determine the degree of openness and public access a proceeding of this type requires.

Conclusion

143. The Divisional Court held that it was reasonable for Mr. Ferrier to conclude that the *Dagenais/Mentuck* test does not apply in a situation where the statutory scheme appropriately sets out the balancing exercise to be undertaken in deciding whether a Board meeting, in whole or in part, should be open or closed to the public.

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[58] *Toronto v. AG Ontario* 2018 ONSC 2586 [*Toronto Star*], Applicant's Book of Authorities, Tab 9.
[59] *Toronto Star*, at para 93.

144. The Divisional Court cited a plethora of cases that clearly state that it is not necessary to undertake the *Dagenais/Mentuck* test if the legislation is in line with the *Charter* and when no ambiguity exists in the legislation.

145. The Divisional Court held, in line with the Supreme Court and the Court of Appeal, that when the issue at hand is not one of statutory interpretation but rather it is the review of an administrative action, the role of the *Charter* is limited.

146. The *Police Services Act* is clear. Sections 35 and Section 95 are a complete answer to the question raised.[60]

147. Mr. Ferrier, exercising the duties and powers of the Thunder Bay Police Services Board, was required to interpret the provisions of the *Police Services Act*.

148. He did so by looking at the plain wording of the provisions and interpreting, in so far as they needed interpreting, in conjunction with the relevant provisions – as outlined in the remainder of Section 35, 37, 83(17) and 95.

149. The Divisional Court held that Mr. Ferrier's decision –making process was "transparent" and that his decision was "clear, concise and intelligible".[61]

150. The Divisional Court found that Mr. Ferrier carefully reviewed the statutory framework set out in the *PSA*, along with the relevant jurisprudence dealing with disciplinary proceedings under the *PSA*. The Court found that Mr. Ferrier provided a level of openness above and beyond what he was required to do under the *PSA* by inviting the submissions from all interested parties. [62]

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[61] *CBC v. Ferrier,* at para 62, Appeal Book, Tab 4.
[62] *CBC v. Ferrier,* at para 61, Appeal Book, Tab 4.

151. For all of the foregoing reasons, the Divisional Court did not err in dismissing the judicial review brought by the CBC.

152. The appropriate standard of review of reasonableness was applied by the Divisional Court in reaching its decision.

153. The Divisional Court engaged in the correct analysis and reached the correct conclusion.

**Part IV – Additional Issues**

154. The Chief of Police of TBPS raises no additional issues.

## PART IV – ORDER SOUGHT

155. It is respectfully submitted that the judicial review decision of the Divisional Court should be upheld and this appeal be dismissed.

156. In the alternative, if this Honourable Court allows the appeal, an order remitting the question of whether the s. 83(17) application should be open to the public back to Mr. Ferrier.

**ALL OF THIS RESPECTFULLY SUBMITTED OCTOBER 4TH 2019**

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**Court File Nos. C66995 and 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 Service Board, the Chief of Police of the Thunder Bay Police Service, the Independent Police Review Director, and the Respondent Officers**

**Respondents**

**– and –**

**The First Nation Public Complainants**

**Respondents**
**(Appellant in C66995)**

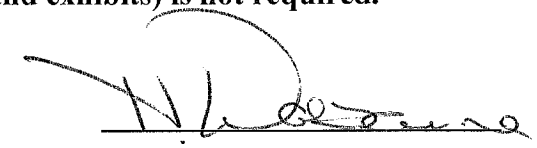
**– and –**

**The Attorney General for Ontario**

**Intervenor**

**CERTIFICATE**

**I estimate that 30 minutes will be needed for my oral argument of the appeal, not including reply. An order under Rule 61.09(2) (original record and exhibits) is not required.**



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# TAB A

## SCHEDULE "A" – LIST OF AUTHORITIES

1. *Forestall v. Toronto Police Services Board*, 2007 CanLii 31785 (ONSCDC)
2. *CBC v. Thunder Bay Police Services Board*, 2018 ONSC 5872
3. *CBC v. Lee Ferrier*, 2019 ONSC 34 (Div Ct)
4. *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190
5. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47, [2016] 2 SCR 293
6. *Episcopal Corp of Diocese of Alexandria-Cornwall v. Cornwall* (Public Inquiry) 2007 ONCA 100
7. *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR, 772,
8. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230
9. *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716
10. *Dore v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 SCR 395
11. *Iacovelli v. College of Nurses of Ontario*, 2014 ONSC 7267, 331 O.A.C. 201 (Div Ct)
12. *Halifax (Regional Muncipality) v. Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2012] 1 SCR 364
13. *R v. Wigglesworth*, [1987] 2 SCR 541
14. *Burnham v. Metropolitan Toronto* Police [1987] 2 SCR 572
15. *Trumbley v. Fleming* [1987] 2 SCR 577
16. *Trimm v. Durham Regional Police Force,* [1987] 2 SCR 582
17. *Coombs v. Toronto (Metropolitan) Police Services Board*, [1997] O.J. No. 5260 (Div Ct.)
18. *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 SCR 125
19. *Figueiras v. Regional Muncipality of York Police Service Board et al*, 2012 ONSC 7419 (Div. Ct)

20. *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLii 699 (SCC)

21. *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42

22. *Gehl v. Canada (Attorney General)*, 2017 ONCA 319

23. *Toronto v. AG Ontario* 2018 ONSC 2586

# TAB B

## SCHEDULE "B" – LIST OF STATUTES

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

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

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

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

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

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

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

**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. 1997, c. 8, s. 24.

**Powers of Independent Police Review Director**
**56** (1) For the purposes of this Part, the Independent Police Review Director may,
(a) establish procedural rules for anything related to the powers, duties or functions of the Independent Police Review Director under this Part;
(b) establish procedural rules and guidelines for the handling by chiefs of police and boards of complaints made by members of the public under this Part; and
(c) provide guidance to assist chiefs of police and boards in the handling of complaints made by members of the public under this Part. 2007, c. 5, s. 10.

**Publicly available**
(2) Procedural rules established by the Independent Police Review Director under clause (1) (a) shall be in writing and shall be made available to the public in a readily accessible manner. 2007, c. 5, s. 10.

**Not a regulation**
(3) A rule or guideline established by the Independent Police Review Director under subsection (1) is not a regulation within the meaning of Part III of the *Legislation Act, 2006*. 2007, c. 5, ss. 10, 13 (3).

**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. 2007, c. 5, s. 10.

**Complaint may be made to Independent Police Review Director**
**58** (1) Any member of the public may make a complaint under this Part to the Independent Police Review Director about,
(a) the policies of or services provided by a police force; or
(b) the conduct of a police officer. 2007, c. 5, s. 10.

**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*. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 13 (6).

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, ss. 10, 13 (7).

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

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

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

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,
(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. 2007, c. 5, s. 10.

**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. 2007, c. 5, s. 10.

**Lee Ferrier et al.**
**Respondents (Respondents on Motion)**

**__-AND-**

**First Nation Public Complainant & CBC**
**Appellants / Moving Party**
**Court No. C66995/C66998**

**ONTARIO COURT OF APPEAL**

PROCEEDING COMMENCED AT TORONTO

# RESPONDENT'S APPEAL FACTUM

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