

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**Canadian Broadcasting Corporation**

Applicant  
(Appellant in Court File No. 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 Court File No. C66995)

– and –

**The Attorney General for Ontario**

Intervenor

**FACTUM OF THE INDEPENDENT POLICE REVIEW DIRECTOR**

**Jean C. H. Lu**  
LSO No. 25834B

**Pamela Stephenson Welch**  
LSO No. 75283B

655 Bay Street, 10th Floor  
Toronto, Ontario M7A 2T4

Tel: (647) 621-4645  
Fax: (416) 325-1874  
Email: [Jean.lu@ontario.ca](mailto:Jean.lu@ontario.ca)  
[Pamela.StephensonWelch@ontario.ca](mailto:Pamela.StephensonWelch@ontario.ca)

Counsel for Respondent, Independent Police  
Review Director

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FACTUM OF THE INDEPENDENT POLICE REVIEW DIRECTOR

**Part I – Overview**

1. Policing in Ontario is founded and dependent on public trust. This public trust is not only enhanced when accountability and transparency is at the core of police oversight, it is also enhanced when there is consistency in the oversight process

across the province. Police services boards, chiefs of police and the Independent Police Review Director (“Director”) each have their own important and distinct role in the police oversight system.

2. Police services boards, comprised entirely of civilians, appoint the police officers in their municipalities. These boards are responsible for recruiting and appointing their chiefs of police, as well as directing and monitoring her or his performance. Boards are also required to establish guidelines for dealing with public complaints. When necessary, these boards determine the reasonableness of investigative delays in the complaints system. The chiefs of police are responsible for the overall administration of the police service and overseeing its operation, including the administration of the complaints process.

*Police Services Act*, R.S.O. 1990 c. P.15 ss. 27(13), 31, 41, 83(17)

3. The position of the Director and the Office of the Independent Police Review Director (“OIPRD”) were created by s. 26.1 of the *Police Services Act*. The OIPRD is an arms-length agency of the Ontario Ministry of the Attorney General, mandated to manage and oversee complaints by members of the public about police officers in Ontario. The public complaints system provides an added layer of public accountability and transparency in the oversight process.

*Police Services Act*, s. 26.1

4. Under the public complaints system, the Director can choose to conduct her own investigation into allegations of misconduct against a police officer. Upon

completion of an investigation, if the Director determines that there are reasonable grounds to believe that misconduct has occurred, and that the misconduct is serious, the Director refers the matter to the chief of police for a disciplinary hearing.

5. For the disciplinary process to commence, a notice of hearing must be served on the identified officers. However, the *Police Services Act* sets out timelines that, if missed, will result in an application before the relevant police services board. In particular, ss. 83(17) and (18) of the *Police Services Act* provide that if more than six months have elapsed since the day on which the OIPRD retained the investigation of the complaints, no notice of hearing shall be served unless the police services board is of the opinion that it was reasonable under the circumstances to delay service of the notices of hearing.

*Police Services Act*, ss. 83(17) and 83(18)

6. In the case at bar, the OIPRD received complaints from Brad DeBungee and Jim Leonard (collectively, the "First Nation Public Complainants") concerning the investigation into the death of Brad DeBungee's brother carried out by the Thunder Bay Police Service ("TBPS"). Following an extensive investigation, the Director found reasonable grounds to believe that three TBPS officers (collectively, the "Respondent Officers") had committed misconduct of a serious nature. The Director referred the matter to the Chief of TBPS so that a disciplinary hearing could be held. However, the duration of the OIPRD investigation exceeded six months. As a result, the Director directed the Chief of the TBPS to bring an Application to the Thunder

Bay Police Services Board ("TBPS Board") to permit the service of notices of hearing on the Respondent Officers ("s. 83(17) application").

Affidavit of Olivia Filetti, sworn November 22, 2018, at para. 7, Appeal Book and Compendium of the Appellants, volume 2, tab 15

7. The only issue for the TBPS Board to determine on the s. 83(17) application is whether the delay in serving the notices of hearing was reasonable. The focus of the TBPS Board's inquiry is the reasonableness of the investigative delay, not the substantive merits of the misconduct. In other words, the focus of the application is on the actions of the OIPRD and not the TBPS or the Respondent Officers.
8. This Appeal focuses on the nature of the s. 83(17) application and whether such a proceeding should be subject to the *Dagenais/Mentuck* test. To date, the Director has not made any submissions on the applicability of the *Dagenais/Mentuck* test to applications brought under s. 83(17) and will not make any on this Appeal. The Director will limit her submissions to the standard of review for decisions made by a substitute decision maker; the nature of s. 83(17) applications; and the role of police services boards under Part V of the *Police Services Act*.

## **Part II – Statement of Facts**

9. The Respondent Director agrees substantially with the facts as outlined by the Appellants with the following additions and corrections.

10. The discipline of police officers arises in the employment context. Under the *Police Services Act* s. 41(1), the chief of police is required to ensure “that members of the police force carry out their duties in accordance with [the *Police Services Act*] and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force” and to administer “the complaints system in accordance with Part V.” Accordingly, the public complaints system was established to enable chiefs of police, as the *de facto* employers of the officers, to discipline their officers.

*Police Services Act*, s. 41(1) and 41(1)(d)

*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, Director's Book of Authorities, tab 1

*Burnham v. Metropolitan Toronto Police Assn*, [1987] 2 S.C.R. 572, at paras. 3-5, Director's Book of Authorities, tab 2

*Trumbley v. Toronto (Metro) Police Force*, [1987] 2 S.C.R. 577, Director's Book of Authorities, tab 3

*Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 53, Joint Book of Authorities of the Appellants, volume II, tab 29

11. Boards are responsible for dealing with s. 83(17) applications. While its responsibilities are similar, boards around the province employ differing mechanisms when considering s. 83(17) applications. Some boards conduct these proceedings entirely in writing. Some permit oral submissions. The Commissioner of the Ontario Provincial Police (OPP), who is also required to make a determination on s. 83(17) applications, consistently undertakes these proceedings *in camera* and in writing. In other words, the manner in which s. 83(17) applications are conducted and considered varies amongst different municipal police services boards. This is

so because each municipal police services board has the jurisdiction to determine the process it wishes to follow.

Affidavit of Olivia Filetti, at para. 7, Appeal Book and Compendium of the Appellants, volume 2, tab 15

12. In accordance with the jurisprudence, the parties to the s. 83(17) application are the Respondent Officers, the Complainant, and the Director. The TBPS Board was originally scheduled to deal with the s. 83(17) application on April 6, 2018. Shortly before that date, the TBPS Board determined that its role in this matter would give rise to a reasonable apprehension of bias. This decision highlighted a gap within the *Police Services Act*. If the police services board of a jurisdiction is not in a position to decide whether an investigative delay is reasonable, there is no other entity empowered by the Act to step in as a substitute decision maker. In this unique circumstance, the only recourse was to seek a remedy under the *Public Officers Act* to appoint an individual to take the place of the TBPS Board to deal with the s. 83(17) application.

*Forestell v. Toronto Police Services Board*, 2007 CanLII 31785 (ON SCDC), Director's Book of Authorities, tab 4

*Figueiras v. York (Regional Municipality) Police Services Board*, 2013 ONSC 7419, [2013] O.J. No. 5911 (Div Ct), Joint Book of Authorities of the Appellants, volume I, tab 19

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

13. On April 27, 2018, the TBPS Board applied to the Superior Court of Justice for the appointment of a disinterested person under s. 16 of the *Public Officers Act*. The Application was granted on July 25, 2018, and the Respondent, the Honourable Lee

K. Ferrier, Q.C. ("Mr. Ferrier"), was appointed to hear the s. 83(17) application in place of the TBPS Board.

*Public Officers Act*, s. 16

14. The issue of whether the s. 83(17) application should be held *in camera* was first raised during a teleconference on July 20, 2018. Through an exchange of emails between July 27, 2018 and August 1, 2018, it was clear that there was no consensus on whether the application should be dealt with *in camera*. At that time, no one had suggested that the media would have an interest in making submissions on that issue.

Affidavit of Olivia Filetti, at para. 11, Appeal Book and Compendium of the Appellants, volume 2, tab 15

15. During a teleconference on August 7, 2018, the parties, except for the Director, indicated that they would provide written submissions on this issue to Mr. Ferrier, who established a timetable for the exchange of written material. Counsel for the First Nation Public Complainants filed their submissions on August 21, 2018. Counsel for the Chief of the TBPS and Counsel for the Respondent Officers filed their submissions on September 10, 2018. Counsel for the First Nation Public Complainants filed their reply submissions on September 14, 2018.

Affidavit of Olivia Filetti, at paras. 11 and 12, Appeal Book and Compendium of the Appellants, volume 2, tab 15

16. Despite the parties having discussed the issue of holding the proceedings *in camera* at the end of July 2018, counsel for the First Nation Public Complainants did not raise the issue of media interest until September 16, 2018. On that date, he sent

an email to Mr. Ferrier, copying the parties as well as representatives from two media outlets indicating that he had alerted representatives of the CBC and the Toronto Star on the question of whether the s. 83(17) application should be closed to the public.

Affidavit of Olivia Filetti, at para. 13, Appeal Book and Compendium of the Appellants, volume 2, tab 15

17. At the request of the CBC, the CBC was permitted to and did make submissions to Mr. Ferrier on September 19, 2018. On September 20, 2018, Mr. Ferrier ruled that the *Dagenais/Mentuck* test did not apply to s. 83(17) applications.

18. On the issue of confidentiality, Mr. Ferrier made the following statements:

Conduct investigations undertaken by the OIPRD are confidential as outlined in Section 95 of the *PSA*.

I am mindful that the report has already been made public by counsel for the complainants.

That is not a reason to therefore open the hearing to the public. It would potentially further confound the proceedings. Also, to do so would permit a party to defeat the effect of Section 35(4) of the *PSA*.

Decision of the Honourable Lee K. Ferrier, Q.C., September 20, 2018, at paras. 21, 40-41, Appeal Book and Compendium of the Appellants, volume 1, tab 8

### Divisional Court Decision

19. The Divisional Court noted that the only issue before it "is whether the Decision of Ferrier 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 Court found that Mr. Ferrier’s conclusions were both reasonable and correct.

*Canadian Broadcasting Corporation v. Ferrier*, 2019 ONSC 34 at paras. 23 and 60, Appeal Book and Compendium of the Appellants, volume 1, tab 4 (“Decision of the Divisional Court”)

20. With respect to the decision-making process, the Divisional Court concluded that Mr. Ferrier had undertaken a process that was transparent and provided reasons that were “clear, concise and intelligible.”

Decision of the Divisional Court, at paras. 61 and 62, Appeal Book and Compendium of the Appellants, tab 4

21. The Divisional Court was well-aware of the high level of distrust between the First Nations community and the TBPS and the public interest generated by this case. The Divisional Court found as follows:

In her decision on the stay application, Pierce J. identified the question underpinning this case as being whether there has been systemic racism in policing of Indigenous peoples. The CBC and the Complainants, in their *facta*, identified the same underlying question. While there is no doubt that the overarching issue to be dealt with in regard to the policing of the Indigenous population of Thunder Bay is whether the TBPS has shown, and continues to show, **racist attitudes and practices toward Indigenous peoples, that is not the specific issue Ferrier needs to address in determining the extension application. The focus of his 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 the 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.

[emphasis added]

Decision of the Divisional Court, at paras. 25-33, Appeal Book and Compendium of the Appellants, tab 4

22. The Appellants had argued that, because the *Charter* value of freedom of expression is engaged, the decision of Mr. Ferrier ought to be reviewed on the standard of correctness. The Divisional Court rejected that argument. The Divisional Court reiterated that the *Dagenais/Mentuck* line of cases all deal with judicial or quasi judicial proceedings and not with preliminary matters in a process concerning disciplinary proceedings in an employment context.

Decision of the Divisional Court, at paras. 48-49, Appeal Book and Compendium of the Appellants, tab 4

23. On the issue of confidentiality, the Court indicated at para. 34 of Decision of the Divisional Court:

Despite being advised that the Report was confidential, the Complainants shared the Report within the First Nations community and with the media. The Report could only have had the effect of reinforcing concerns about systemic racism within the TBPS.

Decision of the Divisional Court, at para. 34, Appeal Book and Compendium of the Appellants, tab 4

24. At para. 66 of the Decision of the Divisional Court, the Court concluded:

Ferrier was aware that the Complainants had been provided a copy of the Report pursuant to s. 68 of the PSA and that the Complainant 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 s. 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.

Decision of the Divisional Court, at para. 66, Appeal Book and Compendium of the Appellants, tab 4

### Part III – Response to Appellant's Issues

25. The Director takes no position on the applicability of the *Dagenais/Mentuck* test to applications brought pursuant to s. 83(17) of the *Police Services Act* and will limit her submissions to the nature of s. 83(17) applications; the role of police services boards under Part V of the *Police Services Act*; and the standard of review for decisions made by a substitute decision maker.

a. Response to the Submissions of the First Nation Public Complainants

i. Standard of Review for Appointee Under the Public Officers Act

26. In paras. 40 – 44 of their factum, the First Nation Public Complainants argued, for the first time on this Appeal, that the Respondent, Mr. Ferrier, should be accorded a lower standard of deference than members of the police services board on the basis that he is a substitute decision maker appointed under the *Public Officers Act*. The Director respectfully submits that the argument defies logic and goes against the purpose of the *Public Officers Act*. The substitute decision maker should be accorded the same level of respect as the original decision maker.

27. The purpose of the *Public Officers Act* s. 16 is to permit the appointment of a substitute decision-maker when the original decision maker “is disqualified by interest from acting and no other person is by law empowered to do or perform such act.” The effect of appointing “some disinterested person” to make the decision would be greatly diminished if the appointee were not accorded the same deference

as the original decision maker. The effect of the First Nation Public Complainants' argument is to lessen the authority and, hence, the respect for the substitute decision maker.

28. The First Nation Public Complaints argue that the substitute decision maker must not only be reasonable, s/he must also be correct in order to withstand judicial review. This is a higher standard than the one required of the original decision maker. Nothing in the *Public Officers Act* suggests that the substitute decision maker is required to be more qualified or make better decisions than the original decision maker.

29. Both the Honourable Patrick LeSage and the Honourable Michael Tulloch in their reviews of the police complaints systems in Ontario, have voiced concerns about the lack of consistency in the qualification of and training for board members. Police services boards consist of the mayor or a municipal council member, another municipal appointee, and a combination of provincial and municipal appointees. In general, police services boards are comprised of non-lawyers.

The Honourable Patrick J. LeSage, Q.C., *Report on The Police Complaints System In Ontario*, April 22, 2005, at pp. 52-53, Joint Book of Authorities of the Appellants, volume III, tab 47

The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, March 31, 2017 ("Tulloch Report"), Director's Book of Authorities, tab 5

*Police Services Act*, s. 27

30. Importantly, the *Police Services Act* does not set out the selection criteria or required qualifications for a board member. A board is required to ensure that its members

undergo any training that the Solicitor General may provide or require. While the regulation allows the Ministry of the Solicitor General to provide or require training requirements, this training is not mandatory. The actual training available to board members varies widely across the province. It would be reasonable inferred that board members across the province have varying degrees of skills and abilities to make decisions on issues such as the reasonableness of investigative delay.

*Police Services Act*, O. Reg 421/97, s. 3

*Police Services Act* ss. 27(13) and 31(5) [s. 27(13) states that a judge, a justice of the peace, a police officer and a person who practices criminal law as a defence counsel may not be a member of a board]

Tulloch Report, at p. 255, Director's Book of Authorities, tab 5

31. Nonetheless, the First Nation Public Complainants argue that "Mr. Ferrier does not have special expertise regarding the administrative scheme established by the PSA." In other words, the First Nation Public Complainants argue that Mr. Ferrier, a retired justice of the Superior Court of Justice sitting in the place of the TBPS Board, does not have the expertise to navigate the *Police Services Act* or to determine the question of the reasonableness of the investigative delay. This argument runs counter to the established case law. The Supreme Court of Canada in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, stated:

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]

*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 33, Joint Book of Authorities of the Appellants, volume I, tab 6

32. The First Nation Public Complainants did not raise concerns about Mr. Ferrier's capability at the time of his appointment. As the substitute decision maker, Mr. Ferrier replaced a board consisting of the mayor who is a former police officer, an optician, a retired teacher, a retired school principal and a former regional director for the Ministry of Education.
33. The Director respectfully submits that the substitute decision maker should be accorded the same level of respect and deference as the original decision maker.

ii. *Nature of the Extension Application*

34. In paragraphs 63-72 of their factum, the First Nation Public Complainants argued that the s. 83(17) proceedings are quasi-judicial in nature, and therefore, the board – and by extension, Mr. Ferrier – is required to apply the *Dagenais/Mentuck* test when exercising the discretion to hold the proceedings *in camera*.

35. Part V of the *Police Services Act* deals with complaints and disciplinary proceedings. The disciplinary proceedings under Part V can arise from public or internal complaints. The *Police Services Act* s. 83(1) specifically states that the *Statutory Powers Procedure Act* applies to disciplinary hearings. As such, all disciplinary hearings are open to the public regardless of whether they stem from a public complaint or an internal complaint.

*Police Services Act*, s. 83(1)

*Statutory Powers Procedure Act*, R.S.O. 1990 c. S. 22, s.9(1)

36. If the chief were not able to serve an officer with a notice of hearing within six months from the date on which the investigation was referred or retained, s. 83(17) requires the chief to bring an application to permit the service of a notice of hearing. This application must be brought both in relation to disciplinary hearings that stem from internal complaints and public complaints. In the case of municipal police officers, s. 83(17) applications are brought before the relevant police services board. In the case of OPP officers, the applications are brought before the OPP Commissioner.

*Police Services Act*, ss. 83(18)(a)-83(18)(c)

37. While s. 83(17) applications can be found under the “Hearings, procedure” section of the *Police Services Act*, these applications are unlike disciplinary hearings. These applications do not determine the merits of the allegations against the officer. In almost all s. 83(17) applications, there is no dispute as to the length of the delay and little dispute as to the causes of the delay. Boards are generally not required to make findings of fact. The purpose of a s. 83(17) application is to determine whether

the delay in serving a notice of hearing was reasonable, so that a disciplinary hearing will be held. In other words, the decision of the board is “purely procedural” as its role is to determine whether the circumstances prior to the service of a notice of hearing reasonably warrant the delay.

*Forestall, supra*, at paras. 44 and 50, Director's Book of Authorities, tab 4

38. Section 83(17) existed in the former *Police Services Act*, as a mechanism by which a police services board, as the employer of a chief of police, could ensure that the chief was effectively dealing with complaint investigations and disciplinary proceedings. When Part V was amended to include the OIPRD and Director, this Part extended to investigations conducted by the OIPRD. In the case of OIPRD investigations, the conduct of the OIPRD is the focus of the s. 83(17) proceedings.
39. If the s. 83(17) application is not granted, no disciplinary hearing will take place. If the s. 83(17) application is granted, the chief of police takes carriage of the disciplinary hearing. It must be underscored that the disciplinary hearing, in which the merits of the allegations are to be tested, is open to the public.
40. The *Police Services Act* s. 37 expressly excludes the application of the *Statutory Powers Procedure Act* from police services board meetings, with the exception of disciplinary hearings involving chiefs and deputy chiefs of police. This suggests that proceedings before boards generally, including s. 83(17) applications, are more informal in nature, attracting fewer or less stringent procedural requirements. Moreover, the *Police Services Act* s. 83(1) does not include s. 83(17) applications

in its list of hearings that must comply with the *Statutory Powers Procedure Act*, suggesting, again, that s. 83(17) applications are more properly viewed as procedural or administrative in nature.

*Police Services Act*, s. 37

41. While the parties have a right to be heard, they do not have the right to an oral hearing, as many boards make their decisions based solely on written material. In the majority of s. 83(17) applications, the chief of police and the officers take opposing positions and are adverse in interest. Therefore, the inclusion of the complainants (who are generally adverse in interest to the officers) and the Director (who investigated the complaint and must explain the investigative delays) does not change the nature of the proceedings from an administrative one to a quasi-judicial one.
42. As stated earlier, an equivalent provision existed under the predecessor to the current *Police Services Act*.<sup>1</sup> Therefore, the Divisional Court has had the opportunity to address issues arising from these applications for over 20 years:
  - *Coombs v. Toronto (Metropolitan) Police Services Board*, [1997] O.J. No. 5260 (Div Ct), Director's Book of Authorities, tab 6;
  - *Forestall*, *supra*, Director's Book of Authorities, tab 4;

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<sup>1</sup> Formerly, s. 69(18)

- *Gough v. Peel Regional Police Service*, [2009] OJ No 1155, 309 D.L.R. (4th) 439 (Ont. C.A.), Director's Book of Authorities, tab 7;
- *Ackerman v. Ontario (Provincial Police)*, 2010 ONSC 910, [2010] O.J. No. 738, Director's Book of Authorities, tab 8;
- *Figueiras, supra*, Joint Book of Authorities of the Appellants, volume I, tab 19;
- *Office of the Independent Police Review Director v. Niagara (Regional Municipality) Police Services Board*, 2016 ONSC 5280, [2016] O.J. No. 5506 Joint Book of Authorities of the Appellants, volume II, tab 27; and
- *Independent Police Review Director v. Niagara (Regional Municipality) Police Services Board*, 2018 ONSC 4966, [2018] O.J. No. 4428, Director's Book of Authorities, tab 9.

43. In assessing the nature of the s. 83(17) proceedings, it may be useful to seek guidance from earlier Divisional Court decisions as to the procedural rights to be accorded to the parties.

44. In *Coombs, supra*, the Court held that there was no obligation on the board to hold a hearing so long as the applicant was permitted to make written submissions.

*Coombs, supra*, at para. 5, Director's Book of Authorities, tab 6

45. In *Forestall, supra*, the Court stated that “minimal rights of procedural fairness must be respected including notice, appropriate disclosure and an opportunity to respond.” Oral hearings are not necessary. The appropriate level of disclosure does not include all of the material relied upon by the Chief of Police in preparing the delay application, any information respecting the prior involvement of the board members, or the investigative brief. It should be noted that the disclosure requirements at the disciplinary hearing stage are far more extensive.

*Forestall, supra*, at paras. 53, 64, 66-68, Director’s Book of Authorities, tab 4

*Police Services Act*, s. 83(5)

*Statutory Powers Procedure Act*, s. 5.4

46. In *Ackerman, supra*, the Court reiterated that the nature of s. 83(17) was procedural and administrative and indicated that the issue of prejudice may be raised at the disciplinary hearing.

*Ackerman, supra*, at paras. 21, 22 and 26, Director’s Book of Authorities, tab 8

47. In all the decisions, the Court has characterized the s. 83(17) decisions as being “not judicial in character.” The process has been described as procedural or administrative in nature although some degree of procedural fairness is required. This is consistent with the sole function of the board at this stage, which is to decide solely whether the delay in serving the notice of hearing was reasonable.

*Forestall, supra*, at para. 46, Director’s Book of Authorities, tab 4

*Coombs, supra*, at para. 10, Director’s Book of Authorities, tab 6

*iii. Section 95 of the Police Services Act and Duty of Confidentiality*

48. In paragraphs 90-93 of their factum, the First Nation Public Complainants argued that the Divisional Court erred in finding that they had breached the confidentiality provisions of the *Police Services Act*. The Director agrees that the *Police Services Act* does not require public complainants to maintain confidentiality with respect to information received through the investigation.
49. Contrary to the assertion of the First Nation Public Complainants, neither Mr. Ferrier nor the Divisional Court found that the First Nation Public Complainants had breached the *Police Services Act* by sharing the OIPRD investigative report. The two references to the sharing of the OIPRD investigative report in the Divisional Court decision accurately pointed out that the First Nation Public Complainants were *instructed* not to disclose the reports.
50. Mr. Ferrier stated that the sharing of the dissemination of the investigative report by the First Nation Public Complainants is not a reason for permitting the s. 83(17) application to be open to the public. The Divisional Court stated that this line of reasoning was open to Mr. Ferrier.
51. It should be noted that, where the matter is proceeding to a disciplinary hearing, the complainant is not, as a matter of right, entitled to receive a copy of the investigative report, although the *Police Services Act* does not prohibit the complainant from

receiving the report. The complainant is only entitled to receive a copy of the investigative report where the complaint is unsubstantiated.

*Police Services Act*, ss. 66(2), 66(3), 68(2) and s. 68(3)

52. As a party to the disciplinary hearing, the complainant would be entitled to receive full disclosure of the evidence from the investigation. In general, the hearing officer would require the complainant to provide an undertaking not to disclose that evidence in order to protect the integrity of the hearing. It is recognized that the confidentiality provisions of the *Police Services Act* are not directed at the public complainants. In the case at bar, the admonishment from the OIPRD that “all information contained in the investigative report is confidential” reflects the need to protect the integrity of the hearing by preventing the widespread dissemination of the report.

*Police Services Act*, s. 83(3)

iv. Social Context of the s. 83(17) Application

53. In paragraphs 87-88 of their factum, the First Nation Public Complainants argued that Mr. Ferrier erred in failing to consider the social context of this s. 83(17) application. In particular, they argue that Mr. Ferrier failed to consider
- The allegations of racism;
  - The broken trust between the Indigenous community in Thunder Bay and the TBPS and the TBPS Board;
  - The concerns that the TBPS Board was failing in its oversight duties; and

- The media coverage related to the above.

54. The Director respectfully submits that the requirement to consider the factors of this nature, in effect, creates different classes of complainants. Whether a complainant is a member of a traditionally disadvantaged group and whether the media has reported on a particular misconduct investigation should not affect the manner in which a board makes its decision. Sadly, there is a number of groups in this province who distrust the police including the LGBTQ community, the black community, persons with mental health problems, and the homeless. If the *Dagenais/Mentuck* test applies to s. 83(17) applications, it should apply without regard as to the personal circumstances of the complainant and without regard as to whether a complainant is capable of providing evidence of media interest.
55. It bears repeating that the purpose of the s. 83(17) application is to examine investigative delay and not the substantive merits of the alleged misconduct. The social context is one element of the public interest that will factor into the reasonableness of the delay.
56. It would be overly onerous to require a board to consider the social context along with other factors for determining whether the *Dagenais/Mentuck* test applies to permit members of the public to attend the s. 83(17) proceedings. Most police services boards are comprised of non-lawyers. The Director respectfully asks this

Honourable Court to provide consistent and straightforward direction to police services boards throughout the province.

*b. Response to submissions of the CBC*

57. In paragraphs 62-72 of its factum, the CBC relies on several decisions in support of the “open court” principle. The Director respectfully submits that those decisions refer to tribunals performing an adjudicative function. As indicated above, the Divisional Court has consistently found that s.83(17) proceedings are administrative or procedural in nature. These proceedings are not judicial or quasi-judicial in nature; these proceedings do not deal with the substantive merits of the misconduct allegations against the identified police officers.
58. In paragraph 81 of its factum, the CBC relies on the decision of *Langenfeld v. Toronto (City) Police Services Board*. This Honourable Court overturned that decision on September 12, 2019 but agreed that the right to attend a public meeting of the Toronto Police Services Board is protected by s. 2 of the *Charter*. Respectfully, the issue before this Court is not whether the CBC has the right to attend a public meeting; the issue is more properly framed as whether the s. 83(17) application was properly closed to the public.

*Langenfeld v. Toronto (City) Police Services Board*, 2018 ONSC 3447, Joint Book of Authorities of the Appellants, volume I, tab 20

*Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, Director's Book of Authorities, tab 10

c. Appropriate Remedy

59. Both the CBC and the First Nation Public Complainants have asked this Honourable Court to quash both the decision of the Divisional Court and the decision of Mr. Ferrier and to substitute a finding that the s. 83(17) application should be opened to the public.
60. Respectfully, if this Honourable Court were to allow the appeals, the appropriate course would be to remit the decision back to Mr. Ferrier for consideration with a direction to apply the *Dagenais/Mentuck* test.


**Part IV – Additional Issues**

61. The Director raises no additional issues.

**Part V – Order Requested**

62. If this Honourable Court allows the appeal, the Director respectfully requests an order remitting the question of whether the s. 83(17) application should be open to the public back to Mr. Ferrier. Otherwise, the Director takes no position as to the appropriate order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of October, 2019.



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**Jean C. H. Lu**  
LSUC No. 25834B

655 Bay Street, 10th Floor  
Toronto, Ontario M7A 2T4  
Tel: (416) 697-4582  
Fax: (416) 325-1874

Counsel for Respondent, Independent  
Police Review Director



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**Pamela Stephenson Welch**  
LSUC No. 75283B

655 Bay Street, 10th Floor  
Toronto, Ontario M7A 2T4  
Tel: (647) 621-4645  
Fax: (416) 325-1874

Counsel for Respondent, Independent  
Police Review Director

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

Canadian Broadcasting Corporation

Applicant  
(Appellant in Court File No. 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 Court File No. C66995)

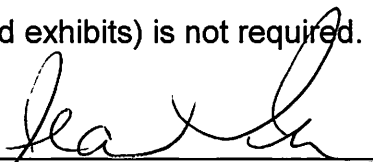
– and –

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.



**Jean C. H. Lu**  
LSO No. 25834B

655 Bay Street, 10th Floor  
Toronto, Ontario M7A 2T4  
Tel: (416) 697-4582  
Fax: (416) 325-1874

Counsel for Respondent, Independent  
Police Review Director

**TAB 1**

## **SCHEDULE “A” – LIST OF AUTHORITIES**

*R. v. Wigglesworth*, [1987] 2 S.C.R. 541

*Burnham v. Metro Toronto Police Assn*, [1987] 2 S.C.R. 572

*Trumbley v. Toronto (Metro) Police Force*, [1987] 2 S.C.R. 577

*Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125

*Forestall v. Toronto Police Services Board*, 2007 CanLII 31785 (ON SCDC)

*Figueiras v. York (Regional Municipality) Police Services Board*, 2013 ONSC 7419, [2013] O.J. No. 5911

The Honourable Patrick J. LeSage, Q.C., *Report on The Police Complaints System In Ontario*, April 22, 2005

The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, March 31, 2017

*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 S.C.R. 293

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

*Gough v. Peel Regional Police Service*, 309 D.L.R. (4th) 439 (Ont. C.A.)

*Ackerman v. Ontario (Provincial Police)*, 2010 ONSC 910, [2010] O.J. No. 738

*Office of the Independent Police Review Director v. Niagara (Regional Municipality) Police Services Board*, 2016 ONSC 5280, [2016] O.J. No. 5506

*Independent Police Review Director v. Niagara (Regional Municipality) Police Services Board*, 2018 ONSC 4966, [2018] O.J. No. 4428

*Langenfeld v. Toronto (City) Police Services Board*, 2018 ONSC 3447

*Langenfeld v. Toronto (City) Police Services Board*, 2019 ONCA 716

# TAB 2

## **Schedule “B” - Legislation**

### **Police Services Act**

R.S.O. 1990, CHAPTER P.15

#### **PART II.1**

### **INDEPENDENT POLICE REVIEW DIRECTOR**

#### **ESTABLISHMENT OF INDEPENDENT POLICE REVIEW DIRECTOR**

#### **Appointment of Independent Police Review Director**

**26.1** (1) There shall be an Independent Police Review Director, who shall be appointed by the Lieutenant Governor in Council, on the recommendation of the Attorney General. 2007, c. 5, s. 8.

#### **PART III**

### **MUNICIPAL POLICE SERVICES BOARDS**

#### **Police services boards**

**27** (1) There shall be a police services board or, as provided in subsection 5 (3), one or more police services boards, for every municipality that maintains a police force. 2002, c. 18, Sched. N, s. 61 (1).

#### **Boards of commissioners of police continued as police services boards**

(2) Every board of commissioners of police constituted or continued under the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, or any other Act and in existence on the 31st day of December, 1990, is continued as a police services board. R.S.O. 1990, c. P.15, s. 27 (2).

#### **Name**

(3) A board shall be known as (*insert name of municipality*) Police Services Board and may also be known as *Commission des services policiers de (insert name of municipality)*. R.S.O. 1990, c. P.15, s. 27 (3).

### **Three-member boards in smaller municipalities**

(4) The board of a municipality whose population according to the last enumeration taken under section 15 of the *Assessment Act* does not exceed 25,000 shall consist of,

- (a) the head of the municipal council or, if the head chooses not to be a member of the board, another member of the council appointed by resolution of the council;
- (b) one person appointed by resolution of the council, who is neither a member of the council nor an employee of the municipality; and
- (c) one person appointed by the Lieutenant Governor in Council. 1997, c. 8, s. 19 (1).

### **Five-member boards in larger municipalities**

(5) The board of a municipality whose population according to the last enumeration taken under section 15 of the *Assessment Act* exceeds 25,000 shall consist of,

- (a) the head of the municipal council or, if the head chooses not to be a member of the board, another member of the council appointed by resolution of the council;
- (b) one member of the council appointed by resolution of the council;
- (c) one person appointed by resolution of the council, who is neither a member of the council nor an employee of the municipality; and
- (d) two persons appointed by the Lieutenant Governor in Council. 1997, c. 8, s. 19 (1); 2002, c. 17, Sched. F, Table.

### **Smaller municipalities, option to expand board**

(6) The council of a municipality to which subsection (4) would otherwise apply may determine, by resolution, that the composition of its board shall be as described in subsection (5). R.S.O. 1990, c. P.15, s. 27 (6).

### **Transition**

(7) A resolution passed under clause 8 (2a) (b) of the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, before the 31st day of December, 1990, shall be deemed to have been passed under subsection (6). R.S.O. 1990, c. P.15, s. 27 (7).

(8) Repealed: 2002, c. 17, Sched. F, Table.

### **Seven-member boards in certain circumstances**

(9) The council of a municipality whose population according to the last enumeration taken under section 15 of the *Assessment Act* exceeds 300,000 may apply to the Lieutenant Governor in Council for an increase in the size of its board; if the Lieutenant Governor in Council approves the application, the board shall consist of,

- (a) the head of the municipal council or, if the head chooses not to be a member of the board, another member of the council appointed by resolution of the council;

- (b) two members of the council appointed by resolution of the council;
- (c) one person appointed by resolution of the council, who is neither a member of the council nor an employee of the municipality; and
- (d) three persons appointed by the Lieutenant Governor in Council. 1997, c. 8, s. 19 (1).

### **Vacancies**

(10) If the position of a member appointed by the Lieutenant Governor in Council becomes vacant, the Solicitor General may appoint a replacement to act until the Lieutenant Governor in Council makes a new appointment. R.S.O. 1990, c. P.15, s. 27 (10).

### **Term of office**

(10.1) The term of office for a member appointed by resolution of a council shall be as set out by the council in his or her appointment, but shall not exceed the term of office of the council that appointed the member. 1997, c. 8, s. 19 (2).

### **Same, and reappointment**

(10.2) A member appointed by resolution of a council may continue to sit after the expiry of his or her term of office until the appointment of his or her successor, and is eligible for reappointment. 1997, c. 8, s. 19 (2).

### **Idem**

(11) If the position of a member who is appointed by a municipal council or holds office by virtue of being the head of a municipal council becomes vacant, the board shall notify the council, which shall forthwith appoint a replacement. R.S.O. 1990, c. P.15, s. 27 (11).

### **Remuneration**

(12) The council shall pay the members of the board who are appointed by the Lieutenant Governor in Council or Solicitor General remuneration that is at least equal to the prescribed amount. R.S.O. 1990, c. P.15, s. 27 (12).

### **Persons who are ineligible to be members of a board**

(13) A judge, a justice of the peace, a police officer and a person who practises criminal law as a defence counsel may not be a member of a board. 1997, c. 8, s. 19 (3).

### **Interpretation of municipal populations where more than one board**

(14) Where there is more than one board in a municipality pursuant to subsection 5 (3), the references in subsections (4), (5) and (9) to the population of a municipality shall be read as references to the population of the part of the municipality that is served by the board that is the subject of the subsection. 2002, c. 18, Sched. N, s. 61 (2).

(15) Repealed: 1997, c. 8, s. 19 (3).

### **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. R.S.O. 1990, c. P.15, s. 31 (1); 1995, c. 4, s. 4 (7); 1997, c. 8, s. 21 (1-3); 1997, c. 17, s. 8; 2007, c. 5, s. 9 (1).

### **Training of board members**

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

### **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.

## **PART IV**

### **POLICE OFFICERS AND OTHER POLICE STAFF**

#### **Chief of Police**

##### **Duties of chief of police**

**41** (1) The duties of a chief of police include,

- (a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);
- (b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;
- (c) ensuring that the police force provides community-oriented police services;
- (d) administering the complaints system in accordance with Part V. R.S.O. 1990, c. P.15, s. 41 (1); 1995, c. 4, s. 4 (8, 9); 1997, c. 8, s. 27.

## **PART V**

### **COMPLAINTS AND DISCIPLINARY PROCEEDINGS**

#### **Review and Investigation of Complaints**

##### **Complaints about police officer's conduct**

##### **Unsubstantiated complaint**

**66** (2) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the complainant, the police officer who is the subject of the complaint and the Independent Police Review Director, in writing, together with a copy of the written report, of the decision and of the complainant's right under subsection 71 (1) to ask the Independent Police Review Director to review the decision within 30 days of receiving the notice. 2007, c. 5, s. 10.

##### **Hearing to be held**

(3) Subject to subsection (4), if at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police believes on reasonable grounds that the police officer's conduct constitutes misconduct as defined in section 80 or

unsatisfactory work performance, he or she shall hold a hearing into the matter. 2007, c. 5, s. 10.

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

### **Unsubstantiated complaint**

**68** (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. 2007, c. 5, s. 10.

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

## **PART V**

### **COMPLAINTS AND DISCIPLINARY PROCEEDINGS**

#### **Hearings**

##### **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.

##### **Parties**

**83** (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.

##### **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.

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

## **Police Services Act**

### **ONTARIO REGULATION 421/97**

#### **MEMBERS OF POLICE SERVICES BOARDS — CODE OF CONDUCT**

**Consolidation Period:** From March 12, 2018 to the e-Laws currency date.  
**Last amendment:** 100/18.

**3.** Board members shall undergo any training that may be provided or required for them by the Minister of Community Safety and Correctional Services.

## **Public Officers Act**

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

16. Where by any general or special Act any person or the occupant for the time being of any office is empowered to do or perform any act, matter or thing and such person or the occupant for the time being of such office is disqualified by interest from acting and no other person is by law empowered to do or perform such act, matter or thing, then he or she or any interested person may apply, upon summary motion, to a judge of the Superior Court of Justice, who may appoint some disinterested person to do or perform the act, matter or thing in question.

## **Statutory Powers Procedure Act**

R.S.O. 1990, CHAPTER S.22

**Consolidation Period:** From November 3, 2015 to the e-Laws currency date

Last amendment: 2015, c. 23, s. 5.

### **Disclosure**

**5.4** (1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

### **Hearings to be public; maintenance of order**

#### **Hearings to be public, exceptions**

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

- (a) matters involving public security may be disclosed; or
- (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public

interest outweighs the desirability of adhering to the principle that hearings be open to the public,

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

**Canadian Broadcasting Corporation**

Applicant  
(Appellant in Court File No. C66998)

– and –

**Lee Ferrier, Q.C., exercising powers and duties  
of the Thunder Bay Police Service Board, et al.**

Respondents

– and –

**The First Nation Public Complainants**

Respondents  
(Appellant in Court File No. C66995)

**The Attorney General for Ontario**

Intervenor

**Court File Nos. C66995 and C66998**

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**COURT OF APPEAL OF ONTARIO**

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**FACTUM OF THE INDEPENDENT POLICE  
REVIEW DIRECTOR**

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**OFFICE OF THE INDEPENDENT  
POLICE REVIEW DIRECTOR**

10th Floor, 655 Bay Street  
Toronto, Ontario M7A 2T4

**Jean C. H. Lu**

LSO No. 25834B  
Telephone No.: (416) 697-4582  
Facsimile No.: (416) 325-1874  
Email: [Jean.lu@ontario.ca](mailto:Jean.lu@ontario.ca)

**Pamela Stephenson Welch**

LSO No. 75283B  
Telephone No.: (647) 621-4645  
Facsimile No.: (416) 325-1874  
Email: [Pamela.StephensonWelch@ontario.ca](mailto:Pamela.StephensonWelch@ontario.ca)