In the Matter of Part V, Section 83(17)
of the *Police Services Act,* R.S.O. 1990, Chapter-15,
as amended, in the Matter of

THUNDER BAY POLICE SERVICE

and

The Respondent Officers

Decision on *in camera* issue

(the Honourable Lee K. Ferrier, Q.C.)

1. The background to this matter is reviewed in the decision of the Court of Appeal for Ontario in *CBC v. Ferrier* 2019 ONCA 1025 (leave to appeal to the SCC denied October 8, 2020) ("CBC").

2. Following the release of the decision in CBC, counsel for the CBC assisted by giving notice to the general media that I would receive written submissions on the issue until November 18, 2020 with a right of reply by November 25, 2020, extended to November 27, 2020.

3. I have received written submissions from Mr. Ryder L. Gilliland and Ms. Agatha Wong, counsel for the CBC; Mr. Julian M. Falconer and Ms. Molly Churchill, counsel for the First Nation Public Complainants; Ms. Joanne E. Mulcahy, counsel for the Respondent Officers; and Ms. Holly A. Walbourne, counsel for the Chief of Police of the Thunder Bay Police Service. No other submissions were received. The Independent Police Review Director took no position.

4. The principal issue is whether the hearing at the board meeting to determine the extension application should be held in public in light of the decisions of the Court of

Appeal in *Lagenfeld v. Toronto Police Services Board* 2019 ONCA 716 (“Lagenfeld”) and CBC.

5. Section 35(3) of the *Police Services Act* (“PSA”) provides that board meetings and hearings are presumptively open to the public: CBC.

6. Section 35(4) of the PSA bears repeating:

> (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.

7. Although the Court of Appeal confirmed that the Dagenais/ Mentuck test does not apply to this administrative hearing, the Court held that the public's right to attend a Police Services Board meeting is protected by Section 2(b) of the *Charter* and the presumption of an open hearing does apply: Lagenfeld; CBC.

8. Section 2(b) of the *Charter* provides:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

9. As stated by the Court of Appeal in CBC, the question I have to decide is whether the desirability of avoiding disclosure of “intimate financial or personal matters” outweighs the desirability of adhering to the principle that proceedings be open to the public. That

principle, recognized by section 35(4) is considerably fortified by the Section 2(b) *Charter* right recognized by Lagenfeld in relation to Police Services Board meetings.

10. I am accordingly to ask how the *Charter* value at issue will be best protected in view of the statutory objectives. This is a proportionality exercise requiring me to balance the severity of the interference of the *Charter* protection with the statutory objectives.

11. The Court also noted that it is necessary to consider reasonably alternative measures that could avoid the risk of impeding the statutory objectives. The Board is not required to make an "all or nothing" order and it would be open for the Board to make an order banning further publication of the investigative report and/or the names of the Respondent Officers.

12. In my initial decision in this matter, released September 20, 2018,in paragraphs [23] to [29], I set out factors in support of an *in camera* hearing. It is now necessary to consider and apply the *Charter* protection to that reasoning and to undertake the required proportionality exercise.

13. The Court of Appeal has outlined relevant considerations. There are three relevant statutory objectives in section 35.

14. First, meetings of Police Services Boards are presumptively open to the public. The second objective is the protection of "intimate financial or personal matters". The third objective is the public interest in a fair and impartial hearing. As noted by the Court of Appeal in CBC, although the Dagenais/Mentuck test does not apply, the measuring of a proportional response in this case "is bound to take on a similar hue".

15. The Court noted that that “consideration of the Section 35(4) test in light of Section 2(b) and freedom of the press is a highly contextual exercise and framing an appropriate order will very much depend upon the circumstances of each case”.

16. The Court set out factors that I should consider as favouring an open hearing.

17. Firstly, the Court noted that the extension hearing forms one small part of a much larger controversy at hand in the Thunder Bay community. As noted by the court in CBC at para. [69]:

> As the interim injunction judge noted, at paras. 14-15: the question of “whether there has been systemic racism in policing Indigenous cases” in Thunder Bay was a matter “of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens.” At para. 48 of her reasons she observed: “Because of the complaint underlying this process – the policing practices related to Indigenous citizens in Thunder Bay are racist – it is even *more critical* that every step in the complaint procedure be dealt with transparently” (emphasis in original). Similarly, the Divisional Court observed, at para. 25, the context is important and “there is a very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist.” The racial tension between the Indigenous community and the TBPS, the distrust of the Indigenous community towards the TBPS and the current state of administration of criminal justice all point strongly to the need for openness and transparency.

18. Counsel for the CBC points to the decision of the Ontario Court of Appeal in *R v. Toronto Star Newspapers Ltd*. [2003] OJ 4006, a case in which the Crown had sought to seal search warrant materials on grounds that their publication might taint witnesses. Docherty J.A. for the Court, lifted the sealing order stating:

> It is not enough to rely on the general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses. If that general proposition was enough to obtain a sealing order, the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public

> disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information.

19. I also note that it has been over two years since my decision and if the extension application were to be granted, the ultimate discipline hearing would be several more months away. The “tainting” effect, if any, of the publication of the report, it would seem, would diminish with the passage of time if further publication is prohibited.

20. Furthermore, the weight of any concerns about the impact on the efficacy of the proceedings, should the extension be granted, must be measured against Section 2(b) of the *Charter.*

21. In my earlier decision, I identified two additional concerns: first, the investigative report identified officers who had been under investigation but against whom proceedings were not authorized by the Office of Independent Police Review Director (“OIPRD”). Second, the stigma that would arise should the extension application be denied, leaving in the public realm the allegations against the accused officers.

22. These concerns may be dealt with by an appropriate order.

23. The second contextual factor identified by the Court of Appeal is the fact that the investigative report has already been made public. Thus, the protection afforded by section 35(4) has been made illusory.

24. The third factor is the procedure that I considered appropriate for dealing with submissions on the *in camera* issue. As noted by the Court of Appeal, “the decision maker quite properly treated the issue of whether to order a closed hearing as requiring

adversarial submissions". Thus, the procedure lent "a dimension of quasi-judicial legitimacy to the decision".

25. In the circumstances of this case, it would have been inappropriate to make a decision on the *in camera* issue without affording the Parties the opportunity to make full submissions and as found by the Court of Appeal, as well the media and The First Nations Public Complainants. It is to be noted that, although exercising merely an administrative act a decision maker may nevertheless deny a complainant's right to have a complaint go forward, by denying the extension application. That is to say that a complainant's rights may be substantially altered by this administrative decision.

26. The importance of transparency in relation to police discipline cannot be understated. This is the fourth contextual factor referred to by the Court of Appeal:

> The purpose of the *Police Services Act* has been judicially described as being "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police": *Figueiras,* at para. 41. *Figueiras*, at para. 62, also described the statutory framework as being "designed to increase the transparency of and public accountability for the way in which the conduct of the police is dealt with."

27. I have no hesitation in determining that the four factors, especially factors one and four, clearly outweigh the concerns raised in the factors referred to in my initial decision, subject only to one further consideration.

28. The Court of Appeal has made it plain that it is open to the decision maker to make an order banning further publication of the OIPRD investigative report and/or the names of the Respondent Officers.

29. I return to section 35(4). The statutory objective is to avoid disclosure of "intimate personal matters"……"in the interest of any person affected…"

30. In my view, the statutory objective would be met by an order prohibiting publication of the names of, or any identifying information related to, any officer named in the OIPRD report or in any other documentation filed on the extension application.

31. It should be noted that the contents of the report and other documents may be relevant in the context of the delay issue. Put another way, the alleged facts underlying the proposed discipline charges against the Respondent Officers may be relevant on the extension application.

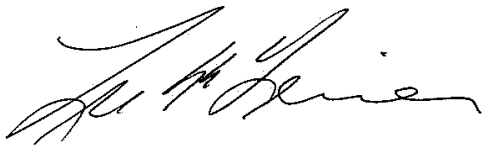
Conclusion

34 The extension application shall be open to the public.

35. Any further publication of the names of, or any identifying information relating to, any officers named in the OIPRD investigative report or in any other documents or reports filed on the extension application, is prohibited.

36. If the OIPRD report or any other document identifying any officers is still accessible on the website of Falconers LLP, the names of the officers and identifying information shall be redacted therefrom.

Dated at Toronto, this 7th day of December, 2020.



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The Hon. Lee K. Ferrier, Q.C.