

Application pursuant to Section 83(17)
of the *Police Services Act*, R.S.O. 1990, Chapter-15,
as amended

Thunder Bay Police Service

Applicant

and

The Respondent Officers

Respondents

Decision on the Extension Application

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

Virtual Hearing: February 10, 2021

Appearances:

Holly Walbourne, for the Applicant, the Chief of Police of the Thunder Bay Police Service

Pamela Stephenson Welch and Miriam Saksznajder, for the Independent Police Review Director

Julian N. Falconer, Mary (Molly) Churchill and Natalie Posala, for Brad DeBungee and Chief Jim Leonard

Joanne E. Mulcahy, for the Respondent Officers

Introduction

1. On March 7, 2018, the Independent Police Review Director wrote to Chief J.P. Levesque of the Thunder Bay Police Service ("TBPS") outlining the background to this application. Much of what follows to paragraph 22 below is taken from that letter.

2. On March 18, 2016, the Office of the Independent Police Review Director ("OIPRD") had received Complaints from Mr. Brad DeBungee and Chief Jim Leonard ("Complainants") in relation to an investigation carried out by the TBPS into the death of

Stacy DeBungee, the brother of Brad DeBungee. Both Complainants requested an investigation into the conduct of the officers involved in the investigation. They also requested that the OIPRD conduct a systemic review into the TBPS, focusing on its relationship with Indigenous people and allegations of systemic racism.

3. On April 22, 2016, the Director decided to retain the investigation of these complaints and carry out a single investigation into both conduct complaints. As a result, the OIPRD conducted an extensive investigation. The investigation is fully described in the Investigative Report of the Director.

4. The OIPRD examined the initial investigation carried out by the TBPS into the death of Mr. Stacy DeBungee. It found serious deficiencies in how this investigation was conducted by TBPS officers. These deficiencies are grouped into two categories: neglect of duty (failure to carry out a proper investigation) and discreditable conduct (discriminatory conduct relating to the deceased's Indigenous status.)

5. On February 15, 2018, the Director issued a 126-page Investigative Report. He concluded that there was sufficient evidence to believe, on reasonable grounds, that TBPS officers had committed misconduct of a serious nature, namely:

- Officer #1 – neglect of duty and discreditable conduct
- Officer #2 – neglect of duty and discreditable conduct
- Officer #3 – neglect of duty

6. It is important to stress that the allegations against the officers are just that – allegations which have not been tested by cross-examination and have not been established in a disciplinary hearing.

Background

7. The public Complaints filed by Mr. Brad DeBungee (Complainant #1) and Chief Jim Leonard (Complainant #2) stemmed from a death investigation conducted by TBPS officers.

8. On October 19, 2015, TBPS officers were called to the McIntyre River to investigate the death of an Indigenous man found in the river. Within about three hours of the discovery of the body by a passer-by, the TBPS issued a press release which included a statement that “[a]n initial investigation does not indicate a suspicious death.” On the following day, the TBPS issued a second press release identifying the deceased and stating that the death was deemed “non-criminal.” The autopsy concluded that the cause of death was “drowning with alcohol intoxication as a contributing factor.” The decision to treat the death as “non-criminal” was made without any real investigation into how the deceased ended up in the river. This decision informed the manner in which the officers dealt with this incident.

9. The formal autopsy report was released on January 29, 2016, confirming the initial opinion as to the cause of death. During the intervening period, the TBPS did very little to investigate how the deceased came to be drowned – for example, whether he fell into the river or was pushed or otherwise the subject of criminal intervention.

10. Several weeks after the death, the family of Stacy DeBungee hired a private investigator, a retired police officer (referred to as Civilian Witness 7 in the Investigative Report), to investigate the death. Civilian Witness 7 identified serious alleged deficiencies in the TBPS investigation to date that were outlined in the Complaints to the OIPRD. The Complaints, together with other circumstances documented in the Investigative Report,

led to the reassignment of the investigation to other TBPS officers. Later, Chief Levesque also asked the OPP to review the initial investigation.

11. The allegations of misconduct and the focus of the OIPRD investigation relate to the actions and/or inaction of the TBPS during the period from the date Stacy DeBungee's death in October 2015 to the time of the reassignment of the investigation in approximately March 2016. In the original investigation, Officer #1 was the lead investigator, and Officer #2 was a second investigator. Officer #3 was their supervisor.

12. Some of the deficiencies in the initial investigation were identified by Civilian Witness 7. Some of the deficiencies were identified by the OPP during its review. The OIPRD investigation, which was far more extensive, for example, in examining witnesses and which was designed to determine whether misconduct had occurred, yielded additional evidence of deficiencies, and their seriousness. The Director concluded that the deficiencies were so significant as to amount to misconduct. They stemmed, in part, from a misconception of the nature of the sudden death investigation. The sudden death should have been treated as a potential homicide – and investigated as such. It was not. There was no basis to affirmatively rule out foul play based on observations made at the scene or even after the autopsy examination.

13. Eleven deficiencies identified in the Investigative Report commencing at page 104 included the following:

- Prematurely concluding that the death was non-criminal when the evidence did not support the conclusion that foul play had been excluded.
- Failure to provide adequate or any direction to the Forensic Identification Unit, which resulted in a failure to adequately document and photograph the scene so as to record the position of the body, where found, and the area in close proximity to it.

- Authorizing media releases that described the death as not suspicious and “deemed non-criminal” prior to the autopsy and prior to the evidence supporting that conclusion.
- Failure to formally interview persons who had been with the deceased shortly before his death.
- Failure to conduct formal follow-up interviews with several witnesses at the scene.
- Failure to review, on an ongoing basis, supplementary occurrence reports in the investigative file.

14. These failures figured prominently in the Director’s finding that the two investigators were in neglect of their duties. The absence of appropriate supervision by Officer #3 was the basis of a finding of neglect of duty by that officer.

15. With respect to the allegation of discreditable conduct, the officers were alleged to have failed to treat or protect persons equally without discrimination. Both Officer #1 and Officer #2 denied allegations of racial bias and differential treatment based on race. Nonetheless, the Director concluded that it could reasonably be inferred based on the totality of evidence that the investigating officers failed to treat or protect the deceased and his family equally and without discrimination based on their Indigenous status.

16. Accordingly, the Director found that allegations of discreditable conduct were substantiated against those two officers.

The Systemic Review

17. On March 18, 2016, the Complainants made their Complaints to the OIPRD. Attached to the Complaints was a 147-page appendix prepared by their lawyers,

Falconers LLP. The appendix outlined not only allegations of misconduct with respect to the investigation into the death of Stacy DeBungee, but also issues of a systemic nature.

18. At the time of Stacy DeBungee's death, a Coroner's Inquest into the deaths of seven Indigenous youths in the City of Thunder Bay had been ongoing. Five of the seven youths had been found deceased in bodies of water in or near Thunder Bay. The Complainants in this matter alleged that the TBPS failed to properly investigate the deaths of these youths before concluding that no foul play had been involved. The Complainants further alleged that the failure or refusal to investigate was influenced by the race of the deceased.

19. In support of the Complaints, lawyers for the Complainants provided the OIPRD with the report prepared by Civilian Witness 7 and evidence from the ongoing Inquest. The Complainants pointed to what they alleged to be a common theme – the premature conclusion that no foul play was involved, without reasonable investigations into the circumstances of the deaths.

20. As indicated, in addition to requesting the OIPRD to retain the investigation of the conduct complaints, the Complainants asked the OIPRD to undertake a systemic review pursuant to its authority under the *Police Services Act* s. 57 and further requested the OIPRD to reassign the DeBungee death investigation to another police service.

21. In addition to retaining the conduct complaints, the Director decided that the OIPRD would undertake a systemic review of the relationship between the TBPS and the Indigenous people.

22. "The systemic review represented an enormous task and responsibility." It was still ongoing in March, 2018 and was not completed for many months thereafter. The systemic

review was designed, among other things, to enable the Director to make recommendations to enhance policing in Thunder Bay and to enhance the relationship between the TBPS and the communities it serves, including the Indigenous people who interact with it.

Delay

23. Section 83(17) and (18) of the *Police Services Act* (“PSA”), provide:

(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.

(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 of 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 the 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.

24. The following summarizes some relevant dates:

- March 18, 2016 – Complaint filed with the OIPRD.
- April 22, 2016 – OIPRD retains investigation of the Complaints.
- February 15, 2018 – Investigative Report delivered to TBPS and the Complainants.
- March 7, 2018 – OIPRD letter with particulars of steps taken in the course of the investigation, in effect explaining the reasons for the delay.
- March 7, 2018 – TBPS launches extension application by Notice of even date.
- April 6, 2018 – date scheduled by the TBPSB to deal with the application.
- April 27, 2018 – following a determination by the Board that it was conflicted, application launched in the Superior Court of Justice for an appointment of a person to carry out the duties and responsibilities of the Board.
- July 25, 2018 – aforesaid application granted, appointing me in place of the Board, all parties consenting except the Complainants, they taking no position.
- September 21, 2018 – date agreed by parties for oral submissions on the application.

25. In the meantime, in August and September, 2018 written submissions were delivered on the extension application. As well, the question arose as to whether the application was to be held *in camera*. Following written submissions on that issue, I held that the application was to be held *in camera*.

26. The Canadian Broadcasting Corporation moved in the Divisional Court for Judicial Review of that decision. The Complainants supported the Judicial Review application. Thus, the extension application did not proceed on September 21, 2018.

27. There then followed the progression of the *in camera* issue through interim and ultimate determination in the Divisional Court and interim and ultimate determination in the Court of Appeal for Ontario.

28. The Court of Appeal directed me to revisit the *in camera* issue, to take account of section 2 (b) of the *Charter*, which was held to be applicable in *Lagenfeld*, a Court of Appeal decision decided after my decision on the *in camera* issue.

29. Ultimately, I decided in view of Section 2 (b) that, subject to non-publication of the names of or identifying information concerning any officers named in the Investigative Report, the matter would be heard in public.

30. The time for a Judicial Review of that decision expired on January 9, 2021 and the date of February 10, 2021 was the first date available to all counsel for the hearing of this application.

31. Thus, in summary, the 6-month period in Section 83 (17) began on April 22, 2016.

32. The Investigative Report was completed and delivered to the Complainants and the TBPS on February 15, 2018, some 22 months from the commencement of the 6-month period, exceeding that limit by 16 months.

33. At the direction of the OIPRD, the extension application was launched March 7, 2018. The TBPSB scheduled April 6, 2018 for this application, but recused itself, necessitating the appointment under the *Public Officers Act*.

34. From the 6th of April, 2018 through to my appointment on July 25, 2018, bearing in mind the extensive written materials which were necessary to file on the application, the number of counsel involved from whom it was necessary to obtain consent to dates and consent to the person to be appointed under the *Public Officers Act*, the TBPS moved reasonably expeditiously throughout.

35. Furthermore, from the time of my appointment until January, 2021, the matter had comprised within it, legal issues which made their way through the various court appearances as expeditiously as reasonably possible in the circumstances.

36. The 126-page OIPRD Investigative Report, and letter from the Director dated March 7, 2018 contain detailed information concerning the steps taken during the investigation concluding with the direction to the Chief of the TBPS.

37. The six-month period in Section 83 (17) is not a formal statutory limitation period in the traditional sense. Rather, the Section 83 (17) guideline permits a police services board to proceed with service of the Notice beyond the six-month period if it decides that the delay was reasonable in the circumstances.

Ackerman v Ontario Provincial Police, 2010 ONSC 910 (CanLII) at para 21

38. Put another way, Section 83 (17) does not create a limitation period, but rather a presumptive period subject to a consideration of the reasonableness of the delay in the circumstances.

Wall v Independent Police Review Director, 2013 ONSC 3312 (CanLII) at para 35

39. In determining the reasonableness of the delay, a board is to consider the causes of the delay as a whole and in light of all of the circumstances. To do otherwise, and

instead focus on a mere timeline of events is an unreasonably narrow and mechanistic approach that disregards the public interest in ensuring police accountability.

Office of the Independent Police Review Director v Regional Municipality of Niagara Police Services Board, 2016 ONSC 5280 (CanLII) at para 72

40. “It [is] for the board to evaluate the complexity of the investigation, the potential prejudice to the applicants, and the public interest in seeing serious police misconduct adjudicated, among other factors.”

Forestall v. Toronto Police Services Board, 2012 ONSC 2893 (Div.Ct.) at para. [84].

41. That said, a large portion of the delay in this case is because of the particular circumstances that developed. The delay in total to this point, from April 22, 2016, is close to 5 years. However, almost 3 years of that time has been occasioned by the particular and somewhat unusual circumstances – beginning with the (quite justified) recusal of the TBPSB, followed by the necessitated appointment under the *Public Officers Act*, and the *in camera* issue which wended its way through the Courts from September 2018 to January 2021.

42. None of the parties have submitted that the litigation delay since September 21, 2018 should be factored in.

43. The OIPRD submits that the delay following service of the notice of the extension application on April 6th, 2018 ought not to be considered. The relevant time period is from the retention by the Director until the launch of the extension application.

44. I need not determine that question. In my view the delay from March 7th, 2018 to September 21st, 2018 was clearly reasonable, bearing in mind the steps needed to be taken as above described. I note that with as many as six counsel acting in the matter,

in late June 2018 the earliest date when they were all available for the hearing of the extension application was September 21st, 2018 .

45. The essential question here is whether the delay while the matter was in the hands of the OIPRD was reasonable in the circumstances.

The OIPRD Investigation and Report

46. The Complainants filed a 147-page Addendum to their Complaints. The Investigative Report of the Director is 126 pages and his letter in support of serving a Notice of Hearing is a further 16 pages.

47. The Director sets out the various factors he says contributed to the delay:

- (a) the many interviews which had to be conducted: in addition to the two Complainants, 31 witnesses were interviewed being 7 civilian witnesses, 13 officer witnesses and 11 Respondent officers;
- (b) notably there were 8 Respondent officers who were “under investigation” who ultimately were not identified for disciplinary action;
- (c) the O.P.P. review eventually but initially not taken up by the O.P.P. was an appropriate step;
- (d) extensive materials had to be reviewed, including the lengthy materials provide by the Complainants;
- (e) the public interest in proceeding with both the conduct investigation and the systemic review concurrently and assigning the same investigators to be part of a larger group dealing with the systemic issue. The Director details the complexities on page 5, 6 and 7 of his letter of March 7, 2018;

- (f) the detail and extent required of the investigative report;
- (g) the reality that the OIPRD's resources are not unlimited, even though extensive resources were devoted to the conduct investigation and systemic review. The workload of the two investigators is detailed in the Director's letter; and,
- (h) the obvious need to assign out of town investigators, having regard to the nature of the issues under consideration.

48. The details lying behind the above factors are contained in the Investigative Report and the Director's letter of March 7, 2018.

49. The Respondent Officers in detailed written and oral submissions, vigorously oppose the extension application. In doing so they point to many steps taken or not taken which they say reflect a dilatory investigation fraught with delay.

50. The Respondents point to the purpose of section 83(17) – to prevent unreasonable delay and ensure an expeditious disciplinary process: *Gough v. Peel R.P.S.* [2010] O.J. No. 2917 (Div.Ct.)

51. What follows is a summary of the major time periods concerning the efficacy of the progress in dealing with the Complaints:

- 1) the matter was retained by the OIPRD on April 22, 2016 and an investigator then assigned.
- 2) administrative steps were taken; an investigative plan was developed; the coroner's inquest into the death of Stacy DeBungee which had been ongoing, was completed on June 28, 2016; the assigned investigator of the OIPRD had to withdraw due to ill health; Evelyn Wayne (very experienced in-house

investigator) and David Sandler (senior criminal lawyer with broad experience in police matters) were assigned as investigators.

Meanwhile, although administrative steps had been taken, no investigative steps were taken during the first 5 ½ months. Only at that point did OIPRD request the complete investigative file from the TBPS. (The TPBS had not initially produced the entire file.) The entire file was provided by the TBPS within 12 days. Five days later, 6 months had passed.

- 3) From then through to the end of May 2017, (7 months) matters proceeded reasonably promptly. During this period, the O.P.P. was requested by OIPRD to conduct an investigation, which contributed to the delay. Initially, the O.P.P. demurred but eventually agreed. Its investigation took about 3½ months (February to May, 2017). The O.P.P. review report was delivered to the OIPRD, 2 months later on July 21, 2017.
- 4) The last interview was conducted on May 29, 2019, when the OIPRD interviewed the private investigator. The OIPRD report was not released until 8½ months later.

52. Nevertheless, on January 19, 2018, the OIPRD indicated that it had begun the “final review of the draft investigative report”. This would indicate that a draft report had been previously reviewed and had reached its full extent by then. It is apparent that it was in preparation over a lengthy period. The Director explains the steps taken to prepare the Investigative Report:

“Once the interview process had been completed by the investigators, extensive time was required to prepare the Investigative Report. All interviews had to be summarized, based on the audio tapes or transcripts of those

interviews, incorporated into the Investigative Report, together with a detailed analysis of the evidence, including the responsibility of each Respondent Officer, with particular emphasis of course on those against whom the complaints were substantiated. Fact checking, editing, anonymizing of civilian witnesses, review of relevant statutory authority and jurisprudence also took place.”

53. It is also to be noted that the complaints were not only against two named officers. Rather, the complaints were also made against other unnamed officers, adding to the broad ranging nature of the investigation and report.

54. The report was completed on February 15, 2018, indicating that a disciplinary hearing would be sought. On March 7, 2018 the Director wrote to the Chief of the TBPS explaining the delay and instructing the Chief to seek an extension under section 83(17). The application was commenced on March 7, 2018.

55. Thus, a period of 22 months passed after the OIPRD retained the investigation, some 16 months beyond the 6-month period stipulated in the legislation.

56. It is arguable that the decision to have the same investigators conduct the systemic review and to do so concurrently with the conduct investigation was a factor in the delay. However, the matters informed each other.

57. In my view that decision was one reasonably taken in the circumstances and any delay caused thereby was reasonable in all the circumstances.

58. The initial 5½ month delay raises questions, but is explained to some extent by the administrative steps taken and the withdrawal of the initial investigator due to ill health. That said, considering the nature and breadth of the complaints, it is reasonable to conclude that even without that factor, the matter could not reasonably have been completed within 6 months.

59. Without question, the Respondent Officers have a right to have had the matter dealt with expeditiously. Nevertheless, as in all extension applications, the assessment of reasonableness of delay is conducted with regard to the surrounding circumstances. Those circumstances are reviewed in the Director's letter.

60. Of particular significance in this case is the fact that, as noted by the Ontario Court of Appeal, the extension hearing forms one small part of a much larger controversy.

61. The Court pointed to the surrounding societal circumstances in the context of transparency:

"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 Page: 29 TBPS and the current state of

administration of criminal justice all point strongly to the need for openness and transparency.”

Canadian Broadcasting Corporation v. Ferrier 2019 ONCA 1025.

62. Those societal circumstances are equally relevant on the merits of this extension application.

63. The surrounding circumstances include the public interest in seeing serious police misconduct adjudicated:

Forestall para. 84

64. Considering the delay as a whole and the causes of the delay and in light of all the circumstances, the delay here was reasonable.

65. The application is granted. Notices of Hearing may be served on the Respondent Officers.

Dated at Toronto, this 17th day of February, 2021.



The Honourable Lee K. Ferrier, Q.C.