CITATION: Canadian Broadcasting Corporation v. Thunder Bay Police Services Board, 2018 ONSC 5872
DIVISIONAL COURT FILE NO.: DC-18-018-JR
DATE: 2018-10-04

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	
Canadian Broadcasting Corporation	*Mr. R. Gilliland* for the Applicant
	Mr. J. Falconer and Ms. K. Ordyniec for the First Nation Public Complainants
Applicant	
- and -	
Thunder Bay Police Services Board	*Ms. H. Walbourne* for the Thunder Bay Police Service
	Ms. J. Iu and Ms. P. Stephenson Welch for the Independent Police Review Director
	Ms. J. Mulcahy for the Respondent Officers
	The Attorney General for Ontario not appearing
Respondent	
	HEARD: September 25, 2018

Madam Justice H. M. Pierce

Reasons on Motion for Temporary Injunction

Introduction

[1] The Canadian Broadcasting Corporation ("CBC") applies for a temporary injunction enjoining the Thunder Bay Police Services Board ("the Board") in the person of Mr. Lee Ferrier from holding an *in camera* hearing until the CBC's *certiorari* application returnable before the

Divisional Court can be heard. The application is for judicial review of the decision of Mr. Ferrier to proceed in private with an extension hearing.

[2] Mr. Ferrier was appointed by court order pursuant to s. 16 of the *Public Officers Act,* R.S.O. 1990, c. P. 45 to exercise the powers and duties ordinarily imposed on the Board under s. 83(17) of the *Police Services Act*, R.S.O. 1990, c. P. 15, as amended. The appointment was made at the request of the Board.

[3] A hearing was scheduled for September 21, 2018, to determine whether, pursuant to s. 83(17) of the *Police Services Act* as amended, disciplinary charges could be laid against the officers despite the passage of more than six months. This was the extension hearing.

[4] Before Mr. Ferrier could convene the extension hearing, he considered a preliminary issue about whether the hearing should be held in public or *in camera.* The CBC and the First Nations complainants took the position that the hearing should be held in public. However, Mr. Ferrier's reasons make no mention that the CBC made submissions opposing an *in camera* hearing.

[5] The respondent officers and the Thunder Bay Police Service took the position before Mr. Ferrier that the hearing should be held *in camera.* While the Office of the Independent Police Review Director ("the Director") did not file written submissions, he took the position that the hearing should be held *in camera* "in keeping with the established practice of the TBPSB (The Board)."

[6] At the time this motion for a temporary injunction was heard, the hearing scheduled for September 21, 2018, had been cancelled.

Procedural Issues

[7] Undoubtedly because of the haste with which this litigation was commenced, certain procedural issues arose that do not go to the heart of the matter, which was fully argued before me. Accordingly, out of an abundance of caution and on consent, I made orders pursuant to s. 13.03(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, granting intervenor status as a party to the following:

(1) the Independent Police Review Director;

(2) the First Nation public complainants;

(3) Thunder Bay Police Service; and

(4) the Respondent Officers.

[8] All of these parties and the applicant, CBC, were represented by counsel who presented written and oral argument at the motion for a temporary injunction.

[9] Second, the Thunder Bay Police Services Board was established by the *Police Services Act*. It was agreed by all counsel except for Ms. Mulcahy for the respondent officers, that the Board was incorrectly named as the respondent in this litigation. With the exception of Ms. Mulcahy, counsel for the other parties agreed that the title of proceedings should be amended to substitute as the respondent: "Lee Ferrier, Q.C. exercising powers and duties of the Thunder Bay Police Services Board."

[10] The respondent officers submitted that the motion for an interim injunction should fail because the wrong decision-maker had been named. I disagree. Rule 5.04(2) of the *Rules of Civil Procedure* gives the court jurisdiction to correct the name of a party incorrectly named at any stage of a proceeding unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] The respondent officers made full argument on the merits of the case. They did not allege prejudice or seek an adjournment of the interim injunction hearing. In my view, this is a case of misnomer in the face of a clear record of the subsequent appointment of Mr. Ferrier. No party to the litigation was misled by the title of proceedings. By law, Mr. Ferrier was appointed to stand in the shoes of the Board. The CBC advised that Mr. Ferrier had notice of its application.

[12] Accordingly, an order will issue amending the title of proceedings to substitute as the respondent:

> "Lee Ferrier, Q.C., exercising powers and duties of the Thunder Bay Police Services Board"

in lieu of the Board.

Background

[13] The law does not develop in a vacuum. Critical to the evolution of the law is an understanding of the social and legal context in which a dispute arises. Differing facts may call for a different application of the law.

[14] The issues in this litigation are of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens. The complaint deals with policing related to Indigenous people in the City of Thunder Bay. The question underpinning this case is whether there has been systemic racism in policing Indigenous cases.

[15] This issue is also of interest to and has been reported on extensively by the press, including the CBC. Allegations of racist policing are also the subject of a parallel inquiry conducted by the Honourable Murray Sinclair for the Ontario Civilian Police Commission. The results of that inquiry are still pending.

[16] The body of a First Nations man, Stacy DeBungee, was discovered in the McIntyre River at Thunder Bay on the morning of October 19, 2015. Mr. DeBungee was a member of the Rainy River First Nation.

[17] Members of the press, including the CBC, reported on his death. The facts as contained in the factum of the applicant are not contentious. The CBC reported:

i) Thunder Bay Police Service issued a statement within hours indicating that the death was not suspicious.

ii) Shortly after Mr. DeBungee's body was found, Rainy River First Nations hired an investigator who prepared a report that raised questions about clues that were not pursued by the Thunder Bay police.

iii) Similar questions were raised on the CBC's documentary program, *The Fifth Estate.*

iv) The Ontario Independent Police Review Director subsequently conducted an investigation which was publicly reported to have found, among other things, that:

- "...there was no basis to affirmatively rule out foul play based on observations made at the scene or event after the autopsy examination;"
- "...the deficiencies in the investigation were so substantial - and deviated so significantly from what was required as to provide reasonable and probable grounds to support an allegation of neglect of duty;"
- "...the evidence is clear that an evidence – based proper investigation never took place into [DeBungee's] sudden death."

v) As a result of the Director's report indicating that Mr. DeBungee's death was not adequately investigated, there were calls for disciplinary hearings for the three police officers involved and an overhaul of the Thunder Bay Police Service.

[18] The purpose of the extension hearing is to determine whether it is reasonable for the six-month time for charging an officer with a disciplinary offence should be extended.

The CBC's Position

[19] In concluding that the extension hearing should be held *in camera*, Mr. Ferrier stated at para. 31 of his reasons:

> The *Dagenais/Mentuck* line of cases have no application to a board meeting where specific statutory provisions apply, where the Board is not a Court, there is not a

judicial or quasi-judicial proceeding and the Board is performing an administrative act.

[20] The *Dagenais/Mentuck* line of cases consider the value that the courts place on the open courts principle and the uncensored reporting of their proceedings in a constitutional context: see *R. v Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 39. The reasoning began in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, with a consideration of publication bans in criminal proceedings, but that reasoning has been applied to other types of cases, including other adjudicative tribunals.

[21] The CBC submits that the extension hearing constitutes a "hearing" pursuant to s. 83(17) of the *Police Services Act* and is presumptively open to the public when the terms of the Act are properly understood. It contends that Mr. Ferrier was obliged to apply the *Dagenais/Mentuck* test in order to determine whether the open court principle should be applied in this case. It says that his failure to do so was an error of law. The CBC also submits that the public right to know will be lost if the extension hearing is held in private.

The Test for an Interim Injunction

[22] The test for an interim injunction is found *in RJR Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The test is succinctly summarized at *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, 358 C.C.C. (3d) 143, at para. 12:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the application demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[23] The court in *RJR Macdonald* observed that the first branch of the test – whether there is a serious question to be tried – is a low threshold: at para. 49. It does not require the motions judge to engage in a "prolonged examination of the merits:" at para. 50.

Is There a Serious Question to be Tried?

[24] The first issue for the court to determine on an interim injunction is whether there is a serious case to be tried.

[25] The CBC submits that the central issue in its judicial review application is whether Mr. Ferrier committed an error of law in determining that the *Dagenais/Mentuck* line of cases did not apply because of the nature of the extension hearing. In arguing that the Board's meetings and

hearings are presumptively open to the public; the applicant points to s. 35(3) of the *Police Services Act* which states:

> 35(3). Meetings and hearings of the board shall be open to the public, subject to Subsection (4), and notices of them shall be published in the manner that the board determines.

[26] In support of its position that the *Dagenais/Mentuck* line of cases balancing freedom of expression and freedom of the press apply, the CBC cites *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, 2 S.C.R. 188, and *Toronto Star v. AG Ontario,* 2018 ONSC 2586, 291 A.C.W.S. (3d) 650.

[27] In the former case, the Supreme Court of Canada concluded that the *Dagenais/Mentuck* line of cases "applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings:" *Toronto Star Newspapers Ltd. v. Ontario*, at para. 7.

[28] In the latter case, the Superior Court determined that the *Dagenais/Mentuck* analysis is "flexible enough to be adapted by the various adjudicative tribunals to their own particular contexts and needs:" *Toronto Star Newspapers Ltd. v. Ontario*, at para. 134.

[29] The First Nation complainants also seek a stay of the order for an *in camera* hearing. They submit that the case has been traumatic for the complainants, Rainy River First Nation, the Thunder Bay Police Service, the officers, and the community of Thunder Bay. They argue that the trauma will be exacerbated by secret hearings and that secrecy undermines the public trust in the process, even if the decision is made public: "

[30] The complainants say that a case by case analysis is called for under s. 35 of the *Police Services Act,* which describes the Board conducting a hearing on notice and in public.

[31] The complainants submit that Mr. Ferrier has wrongly characterized the process and that his conclusion that he is not subject to the open court principle means that there is a serious case to be tried.

[32] The Director submits that he represents the public interest by virtue of his office's mandate to receive, manage, and oversee all public complaints about the police in Ontario. Respectfully, the public interest in this complaint is broader and more nuanced than the Director's aspirational mandate to operate in the public interest under the *Police Services Act.* It is not a Toronto-centric interest, but stems from the communities these parties inhabit.

[33] Specifically, three other represented parties at this interim injunction hearing have articulated different aspects of the public interest, each from its own perspective: Mr. DeBungee's family, the First Nation to which Mr. DeBungee belonged, and the press, which speaks to the wider community of Thunder Bay and beyond. It is telling that the Director's position is not shared by any of them.

[34] The Director opposes the granting of an interim injunction because it may delay disciplinary proceedings; however, he takes no position on the outcome of the judicial review. This position seems contradictory. If delay is the real objection, it would have been more practical to consent to an interim injunction and expedite a judicial review hearing at Divisional Court.

[35] The Director contends that the nature of the decision made by Mr. Ferrier was administrative and therefore the decision in *Forestall v. Toronto Police Services Board* [2007] 159 A.C.W.S. (3d) 774 (Ont. Div. Ct.), applies; in other words, that an extension hearing under the *Police Services Act* is administrative in nature: at para 44.

[36] The Thunder Bay Police Service contends that the law is settled and that there is no serious issue to be tried. It submits that an extension application is akin to a *pre-enquete* hearing where the open court principle does not apply. It also argues that s. 95 in Part V of the *Police Services Act* contemplates that the entire discipline process is subject to secrecy. Section 95 states:

> 95. Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,
>
> (a) as may be required in connection with the administration of this Act and the regulations;
>
> (b) to his or her counsel;
>
> (c) as may be required for law enforcement purposes; or
>
> (d) with the consent of the person, if any, to whom the information relates.

[37] In this case, the report of the Director has become a public document. Consequently, there is no secrecy to preserve. Regardless, the context of s. 95 limits the obligation to secrecy to police officers in the enumerated exceptions. A plain reading of the section shows that it does not apply to the applicant, the First Nations complainants, and possibly to other parties.

[38] The Thunder Bay Police Service also submits that the extension hearing is essentially an employment issue that is customarily dealt with in private. The Director argues that *in camera* hearings about extension applications are established practice.

[39] Section 35(4) of the *Police Services Act* carves out an exception to meetings and hearings in public where:

> (a) matters involve public security and the desirability of avoiding disclosure outweighs the principle that proceedings should be open to the public; or

(b) intimate financial or personal matters or similar matters may disclosed and the desirability of avoiding disclosure outweighs the principle that proceedings should be open to the public.

[40] The argument that these issues are usually dealt with *in camera* as personnel issues does not fit with the facts of this case nor with the balancing of interests called for by statute. There is no evidence that intimate financial or personal matters may be disclosed on an extension application. Indeed, the report of the Director has already been disclosed to the public.

[41] The officers submit there is no serious issue to be tried because Mr. Ferrier's decision to hold an *in camera* hearing was an administrative act. It submits that, in *Forestall* at para. 46, the Divisional Court rejected the argument that an extension application was a hearing.

[42] The officers also point to s. 37 of the *Police Services Act* that permits a board to establish its own rules and procedures. They submit that the extension hearing is merely a screening process to determine whether it is reasonable to extend the time for discipline proceedings; it is not a judicial function. However, if an extension is refused, discipline charges would not be laid. The discipline proceedings would be at an end.

[43] I have concluded that the applicant has established that there is a serious case to be tried: whether Mr. Ferrier erred in law by refusing to consider the *Dagenais/Mentuck* line of cases when determining whether the extension hearing should be open to the public.

[44] The *Forestall* decision of the Divisional Court turned on the adequacy and the timing of disclosure given to the police officers and the extent of the due process to which they were entitled in an extension hearing. In that case, there were ongoing investigations that might be jeopardized, witnesses that might be compromised and voluminous disclosure, even on an interim basis. None of those considerations apply here.

[45] The *Forestall* court was not asked to weigh the merits of an *in camera* hearing against the claims of the press to cover the proceedings. Thus, the court did not conduct any analysis of the *Dagenais/Mentuck* principles, nor was it asked to do so.

[46] On the other hand, the cases applying the *Dagenais/Mentuck* analysis suggest that the constitutionally-protected claims to freedom of expression and freedom of the press must be carefully weighed. They will be considered on a case by case basis, not only in criminal cases, but at other adjudicative tribunals.

[47] Counsel for the parties spent the better part of a day arguing variously that there was or was not a serious issue to be tried. The care with which each case was prepared, the reams of paper used, and the vigor with which each argument was advanced certainly suggests that there is a serious case to be tried.

[48] In my view, on the facts of this case, it is important for the court to consider the extent to which the public can expect openness in administrative decision-making. Because of the complaint underlying this process - that 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.

[49] Each step of the complaint process is a step on the way towards resolution to which transparency must attach if the process is to be credible to the community. Failing to proceed openly will only sow distrust in the complaints procedure. It will do nothing to address the community's question about whether Thunder Bay's approach to policing indigenous matters is racist.

Will the Applicant Suffer Irreparable Harm if an Interim Injunction is Refused?

[50] The second issue that the court must consider is whether the applicant will suffer irreparable harm if the interim injunction is refused.

[51] The CBC submits that if the extension hearing proceeds *in camera,* the public right to know will be lost, which will constitute irreparable harm. If an interim injunction is not granted and the application proceeds in the absence of the public, then the CBC's application for judicial review will be moot. It argues that a brief delay to determine the manner in which the extension hearing shall proceed is warranted.

[52] The First Nations complainants say that they will be prejudiced by an *in camera* hearing and submit that this case calls for urgent consideration of an expedited hearing pursuant to s. 6 (2) of the *Judicial Review Procedure Act,* R.S.O. 1990, c. J.1, as amended.

[53] The Director submits that the CBC and the First Nations complainants have failed to show irreparable harm. He contends that since all parties have filed briefs, there is a record of the proceedings.

[54] The Director doubts that this case can be heard expeditiously, arguing that if the Divisional Court orders notice be given to the press, there will be a multitude of other interested intervenors. The Director suggests that even if the judicial review is expedited, the decision is likely to remain under reserve for some time, and the delay would be "contrary to the public interest in effective civilian oversight of policing."

[55] I find this submission about delay puzzling in the circumstances. The Director received notice of the complaint about the DeBungee investigation on March 18, 2016. About a month later, on April 22, 2016, the Director agreed to investigate the complaint. On February 15, 2018, almost two years after receiving the complaint, the Director issued his report.

[56] The Thunder Bay Police Service submits that there will be no irreparable harm to the CBC if an interim injunction is not granted because the CBC can proceed in any event with a judicial review. They contend that the process will become public if discipline proceedings are authorized.

[57] On the contrary, Thunder Bay Police Service submits that harm will result if an interim injunction *is* granted because the Director's report contains the names of officers and witnesses whose privacy will be breached. It also suggests that the floodgates will open such that all employment issues will be dealt with in the public realm.

[58] These submissions overlook the fact that the Director's report is already in the public realm, so there is no privacy to breach. It also presumes that the facts of this case will apply to every other employment relationship. This seems highly unlikely given the unique procedural history of this case and the nature of the complaint.

[59] The respondent officers also submit that the applicant has not established that it will suffer irreparable harm if the interim injunction is granted. They argue that Mr. Ferrier is obliged by case law to give reasons that can be judicially reviewed.

[60] I have concluded that the applicant will suffer irreparable harm if an interim injunction is refused. The nature of the process is as much at issue as the substance in this case. If an *in camera* extension hearing proceeds, whether the decision is to grant or refuse an extension, the public right to understand the process will be lost. The community has a right to expect fairness in the processing of the complaint, but how can fairness be assessed if the community is not informed about the process?

[61] I am not persuaded that the Director's concern about delay should be given much weight. The next sittings of the Divisional Court at Thunder Bay take place the week of December 3, 2018. Given the number of counsel with an interest in this case, and having regard to their availability, it is not likely that a special Divisional Court sitting could reasonably be convened before that time. Any benefit in expediting the hearing would be marginal.

Balance of Convenience

[62] Finally, the court is required to assess the balance of convenience, to determine which party would suffer greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits.

[63] The applicant and the First Nations complainants submit that the balance of convenience favours an interim injunction pending a decision on the merits. They have offered to expedite the judicial review in order to overcome objections based on delay. They contend that the error of law should be addressed and that "the light of public scrutiny" be allowed to shine on the proceedings.

[64] The Thunder Bay Police Service and the Director submit that the balance of convenience favours refusing a stay as the *Police Services Act* contemplates a six month period in which notice of a discipline proceeding must be served and proceedings initiated. They argue that the time taken for judicial review will render a further extension for discipline hearings unreasonable and thus the possibility of disciplinary hearings will be lost. The officers argue that theirs is the

greater harm in having this application hanging over their heads for an unreasonable period of time.

[65] It is unfortunate that the parties who express concern about delay did not adopt the officers' suggestion that they consent to an interim injunction and proceed directly to judicial review as a means of expediting the process.

[66] Nevertheless, I conclude that the balance of convenience favours transparency in the circumstances of this case where racist policing is alleged.

[67] An interim injunction will issue staying the extension hearing before Mr. Ferrier pending the hearing of the application for judicial review, which will be placed before the Divisional Court at its sittings at Thunder Bay, commencing December 3, 2018.

[68] Costs of the interim injunction, if sought, are reserved to the panel hearing the judicial review application.

Pierce, J.

Released: October 04, 2018

CITATION: Canadian Broadcasting Corporation v. Thunder Bay Police Services Board, 2018 ONSC 5872
DIVISIONAL COURT FILE NO.: DC-18-018-JR
DATE: 2018-10-04

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

Canadian Broadcasting Corporation

Applicant

- and -

Thunder Bay Police Services Board

Respondent

REASONS ON MOTION FOR TEMPORARY INJUCTION

Pierce J.

Released: October 04, 2018

/ket