

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THUNDER BAY POLICE SERVICES BOARD

Applicant

- and -

**OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR, CHIEF OF POLICE OF
THE THUNDER BAY POLICE SERVICE, BRAD DEBUNGEE, JIM LEONARD, SHAWN
HARRISON, SHAWN WHIPPLE, SUSAN KAUCHARIK, AND THE ONTARIO CIVILIAN
POLICE COMMISSION**

Respondents

**FACTUM OF THE RESPONDENT,
THE INDEPENDENT POLICE REVIEW DIRECTOR**

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PART I – OVERVIEW

1. The Respondent, the Independent Police Review Director (“Director”)¹ supports the Thunder Bay Police Services Board’s (“TBPS Board”) request for the appointment of a disinterested person under section 16 of the *Public Officer’s Act* (“POA”) in the unique circumstances of this case.
2. The Director’s focus generally, and on this Application, is to enhance public confidence in the police complaints process. When a member of the public makes a complaint to the Director, there is an expectation that their complaint will progress through the system and be dealt with impartially and in a manner that promotes transparency and accountability.
3. Here, the Director investigated a public complaint concerning the police investigation into Stacy DeBungee’s death. The Director determined there are reasonable grounds to believe misconduct occurred. In order for the process to move forward, the *Police Services Act* requires the TBPS Board to decide whether it will grant approval to serve a Notice of Hearing on the Respondent Officers – something that is required any time a complaint investigated by the Director takes longer than six months (the “Delay Application”). However, the TBPS Board has determined it cannot decide this matter in this case because doing so would give rise to a reasonable apprehension of bias. Unfortunately, the *Police Services Act* identifies no alternative decision-maker that can stand in the TBPS Board’s place.

¹ In his Notice of Application and materials, the Applicant names and references the “Office of the Independent Police Review Director” as opposed to the statutory entity, the Independent Police Review Director (the “Director”).

4. Unless another decision-maker steps into the TBPS Board's shoes, the public complaint process will come to a screeching halt and everyone – the complainants, Mr. DeBungee's family, the Respondent Officers and the Thunder Bay community at large – will remain in perpetual limbo because the public complaints system will have failed.

5. The situations in which a police services board cannot perform its statutory decision-making function are rare, but they can arise. When they do, as in this case, Ontario's *Public Officers Act* provides a complete statutory solution and allows the public complaints process to proceed as intended. The Director believes this is an appropriate solution that will help maintain the integrity of Ontario's public complaints system for police. The Director respectfully urges this Honourable Court to grant the TBPS Board's application and appoint a disinterested person to decide the Delay Application.

PART II – STATEMENT OF THE FACTS

(a) The DeBungee investigation and findings

6. On October 19, 2015, the body of an Indigenous male was found in Thunder Bay's McIntyre River.

Applicant's Amended Application Record, Tab H, OIPRD Complaint Form (received March 18, 2016), at 72

7. The Thunder Bay Police Service ("TBPS") attended the scene. Three hours after the discovery of the unidentified male, TBPS issued a press release indicating that it was not a "suspicious death." Approximately 25 hours after the discovery, TBPS released another

statement identifying the male as Stacy DeBungee and categorizing his death as “non-criminal.”

Applicant's Amended Application Record, Tab H, OIPRD Complaint Form (received March 18, 2016), at 73-74

8. On March 18, 2016, a complaint (“DeBungee Complaint”) was filed with the Office of the Independent Police Review Director (“OIPRD”) by Mr. Brad DeBungee and Chief Jim Leonard. This complaint raised allegations of misconduct by TBPS officers in conducting Mr. DeBungee’s death investigation – specifically, that the determination that the death was “non-criminal” was made without the appropriate police investigation. The DeBungee Complaint also highlighted issues of a systemic nature: “a troubling and almost universal belief that the [TBPS] have not taken the necessary steps to address [death] cases because the deceased are First Nations.” The OIPRD retained the complaint on April 22, 2016 and completed its investigation approximately 22 months later, on February 15, 2018.

Applicant's Amended Application Record, Tab H, OIPRD Complaint Form (received March 18, 2016), at 69-75; Tab H, Notice of Application Pursuant to section 83(17) of the *PSA*, at 60

9. The OIPRD investigation identified Detective Shawn Harrison, Detective Constable Shawn Whipple, and Acting Inspector Susan Kaucharik as the Respondent Officers. The investigation also identified eleven deficiencies in the investigation by members of the TBPS. One such deficiency was the premature conclusion as to the cause of Mr. DeBungee’s death. The investigation found that there was no basis to affirmatively rule out foul play. The premature conclusion resulted in the failure to take appropriate investigative steps such as formally interviewing relevant witnesses. The Director concluded that the deficiencies in the investigation were so significant as to amount to serious misconduct. As such, the complaint of Neglect of Duty against the Respondent Officers was substantiated.

10. Further, the Director concluded that Detective Harrison and Detective Constable Whipple failed to treat or protect Mr. DeBungee and his family equally and without discrimination based on their Indigenous status. The allegations of Discreditable Conduct against Detective Harrison and Detective Constable Whipple were also substantiated.

Applicant's Amended Application Record, Tab 4, Affidavit of Joylyn Dysievick, Exhibit B, at 316-317

(b) Ontario's police public complaints system

11. A number of actors are involved in ensuring a transparent and accountable public complaints system for police in Ontario. The police services board, the chief of police, the OCPC, and the Director each have their own important and distinct role to play:

12. The *police services board* ("Board") is the first level of oversight for policing in Ontario. These boards establish guidelines for dealing with public complaints. When necessary, these boards determine the reasonableness of investigative delays. The chief of police is responsible for the administration of the complaints process, which includes both internal and public complaints.

Police Services Act, R.S.O. 1990, c. P.15, ("PSA") ss. 31(1)(i), 41(1)(d) and 83(17)

13. The OCPC is an independent, quasi-judicial oversight agency with the statutory authority under the PSA to engage in a range of activities, including hearing appeals of police disciplinary decisions.

PSA, ss. 22(1) and 87

14. The *Director* is the statutory actor responsible for receiving, managing and overseeing all complaints about police officers in Ontario. The Director also has the power to examine and review systemic issues that are revealed by public complaints. The position and mandate of the Director came into force in 2009, through the *Independent Police Review Act, 2007* S.O. 2007 c. 8, which created a new civilian oversight system for complaints about police conduct in Ontario. The OIPRD opened its doors on October 19, 2009.

Independent Police Review Act, 2007 S.O. 2007 c. 8, Part II.1

PSA, s. 57 (A systemic review goes beyond the immediate issues raised by a given complaint and looks at the underlying causes to determine whether there are systemic issues within a police service. The purpose of a systemic review is not to assign individual fault, but to determine whether systemic failings have occurred, and to make recommendations that address those failings, with the goal of restoring and enhancing public confidence in policing)

15. The Director's decisions concerning complaints are made independently of the police, the government and the public. One of the OIPRD's goals is to provide an objective, impartial process for the investigation of public complaints about the conduct of police officers in Ontario (as well as about the policies and services of a police service). Through its work, the OIPRD endeavours to promote fairness, accountability and public confidence in the public complaints system.

PSA, ss. 26.1(1) and 26.2

16. With certain exceptions, all members of the public may make a complaint to the Director about: (a) the policies or services provided by a police force; or (b) the conduct of a police officer. Conduct complaints relate to allegations about the conduct of one or more individual police officers. Conduct complaints are allegations that, if proven, could result in disciplinary actions against an officer. These disciplinary actions can range from a reprimand to the dismissal of the officer.

PSA, ss. 58 (1) and (2) (certain individuals and entities are not permitted to make a complaint, e.g. a member of a police service if the complaint is about another member of the same police service)

PSA, ss. 84(1), 85(1) and (85(7)

17. Under the *PSA*, complaints are presumptively screened “in” unless the Director exercises his legislative discretion to screen “out” a complaint. When a policy or service complaint is screened in, the Director refers the complaint to the chief of police who is legislatively tasked to deal with those complaints.

PSA, s. 60 (a complaint can be screened out if the complaint is: (i) frivolous, vexatious or made in bad faith; (ii) better dealt with under another Act or law; (iii) not in the public interest to be dealt with, having regard to all the circumstances; (iv) made over six months from the incident complained about; and (v) made by someone who was not affected by a police policy, service or conduct.

PSA, ss. 61(2) and 63(1)

18. When a conduct complaint is screened in, the Director has three options in terms of how the complaint is investigated: (1) the Director can refer the complaint to the chief of police of the police service from which the complaint originated; (2) the Director can refer the complaint to the chief of police of a different police service; or (3) the Director can retain the complaint for the OIPRD to investigate itself.

PSA, s. 61(5)

i. The role of the Director and Chief of Police in a retained investigation

19. Once the Director has decided to retain a conduct complaint, the investigation is assigned to an OIPRD investigator. The *PSA* establishes a six-month time period – but not a limitation period – for the completion of the OIPRD’s investigation.

PSA, ss. 68(1), 83(17) and 83(18)

Izzett v. Toronto Police Service, 2010 ONSC 2262 (Div. Ct.), at para. 17, Director's Book of Authorities, Tab 1 ("The initial six-month time limit for the investigation is designed to encourage a speedy resolution of the matter under investigation")

20. Upon completion of the investigation, the Director must determine whether there is sufficient evidence to believe on reasonable grounds that misconduct, as defined in the Code of Conduct that binds police officers, has occurred. If the Director determines that the misconduct is serious, the Director refers the matter to the chief of police so that a mandatory disciplinary hearing can be held. A disciplinary hearing is the *PSA*-prescribed adjudicative process that determines whether the identified officers did in fact, commit the misconduct alleged.

PSA, ss. 68(3), 68(5) and 80

PSA, Code of Conduct O Reg 268/10

21. A Notice of Hearing must be served on the identified officer(s) for the disciplinary hearing process to commence. In the event the Director's investigation does not conclude within six months and a disciplinary hearing is required, the Director can direct the chief of police to bring a Delay Application before the Board. Regardless of whether the investigation was conducted by the OIPRD (retained complaints) or by the police service (referred complaints), the chief of police and not the Director is the applicant in section 83(17) proceedings, even though the Director can make submissions on the reasonableness of the delay in a retained investigation.

PSA, s. 83(17) ("If six months have elapsed since the day described in section (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.")

PSA, s. 68(3) (where the Director believes on reasonable grounds that the conduct of the police officer constitutes misconduct, the matter shall be referred to the chief of police)

PSA, s. 68(5) (once the Director has referred a matter to the chief of police, the chief shall hold a hearing. If the investigation has taken more than 6 months, then the chief has to bring an 83(17) application before the board)

22. The purpose of the Delay Application is to seek the Board's approval to serve a Notice of Hearing on the identified officer(s) past the statutory six-month mark. In a Delay Application, the Director, police officers potentially subject to a misconduct hearing and the complainant are provided the opportunity to make submissions concerning the reasonableness of the investigative delay.

23. Once permission has been granted to serve a Notice of Hearing, the chief of police takes carriage of the disciplinary hearing. The chief appoints a hearing officer and a prosecutor. At the hearing, the public complainant is a party to the proceedings. If the hearing officer finds that misconduct has been proved, the chief of police imposes discipline.

PSA, ss. 82(1), 84, and 85

PSA, s. 83(3) (The Director is not a party to the disciplinary hearing)

(c) The approach to delay applications

i. The Board plays a gatekeeping function

24. In deciding the Delay Application, the Board exercises its supervisory responsibilities over the chief of police to ensure that investigative delays are not unreasonable. In coming to its decision, the Board's focus is exclusively on the issue of the reasonableness of the delay as a whole.

25. Importantly, in a Delay Application, the Board "does not determine the merits of the allegations against the officers." The decision of the Board is "purely procedural" whereby

their role is to determine whether the circumstances prior to the service of a Notice of hearing reasonably warrant the delay.

Forestall v. Toronto Police Services Board, [2007] O.J. No. 3059 (Div. Ct.), at para. 44 (“*Forestall*”), Director’s Book of Authorities, Tab 2

26. In deciding on the reasonableness of the delay, the Board can weigh relevant factors such as the complexity of the investigation and the public interest in seeing serious police misconduct adjudicated. However, the Board should not consider the issue of prejudice as it relates to the officers. The issue of prejudice, if it exists, can be properly and fairly dealt with at a disciplinary hearing, where a proper evidentiary record would exist.

Forestall, *supra* at paras. 84 and 89-91

27. If a determination is made by the Board that the delay in serving the Notice of Hearing was reasonable, then the disciplinary hearing can move forward.

ii. The Thunder Bay Police Services Board has declined to exercise its statutory decision-making function because it is concerned that there is a reasonable apprehension of bias

28. Pressing policing issues involving the TBPS and the TBPS Board have been brought to light. The ongoing OIPRD Systemic Review of the TBPS and the investigation into the TBPS Board by the OCPC were initiated because of serious concerns around whether police services delivered to Indigenous Peoples in Thunder Bay are delivered differently based on “racist attitudes and/or stereotypical preconceptions about the Indigenous community” and the TBPS Board’s “ability to address matters raised by Indigenous leaders relating to a recent series of deaths of Indigenous youth and the quality of the investigations into these deaths conducted by the Thunder Bay Police Service.”

29. In the TBPS Board's view, the current context surrounding the Delay Application creates a reasonable apprehension of bias in the Board not being able to decide the Delay Application fairly. This bias is exacerbated by the nature of the Delay Application itself – specifically, the parties that are involved in the Delay Application. As such, the TBPS Board has advised that it will not hear and decide the Delay Application.

30. As the TBPS Board explains, the alleged misconduct in the DeBungee death investigation was the catalyst for the conduct complaint to the Director. This conduct complaint then led to the OIPRD's Systemic Review and the OCPC's Investigation. With the TBPS Board and TBPS currently under this scrutiny, the TBPS Board is concerned that a reasonable person may believe that they would decide the Delay Application – the subject of which is the DeBungee Complaint arising from the DeBungee death investigation – not fairly on its merits, but on the basis of irrelevant factors and a desire to minimize further scrutiny.

Applicant's Factum at paras. 64-65:

"The Board cannot decide a Delay Application, brought by the OIPRD at a time when the OCPC is not only investigating allegations of systemic racism at the TBPSB level, but is also considering the OIPRD's findings in its review."

"The Board cannot decide a Delay Application related to a specific investigation that triggered, at least in part, both the OIPRD and OCPC reviews, which are ongoing."

31. The TBPS Board is also concerned that the Director is a party to the Delay Application while the Director is simultaneously engaged in his Systemic Review. The TBPS Board believes that this particular context would create a concern in an objective observer's mind: the TBPS Board cannot impartially decide whether the Director's investigative delay was reasonable while it is being scrutinized by that same Director for its own actions.

32. In explaining its rationale, the TBPS Board highlights two specific facts:
- the OIPRD's Systemic Review Terms of Reference reveals the association between the DeBungee Complaint and the Systemic Review: the systemic review "will...be informed...by the findings of an ongoing OIPRD conduct investigation into the Thunder Bay Police Service's handling of an investigation into the death of Stacey DeBungee."; and,
 - the association between the OCPC investigation and the Systemic Review has also been a source of concern for the Board: the OCPC's Terms of Reference emphasize that the OCPC's Investigation will refer to the OIPRD's Systemic Review, and the OCPC's Investigation was extended specifically so that the independent Investigator can consider the findings of the Systemic Review prior to releasing his final report.

Applicant's Factum at paras. 28 to 34 and 65

Applicant's Amended Application Record, Tab J, News Announcement and Terms of Reference for the OIPRD's Systemic Review (dated November 3, 2016), at 227; Tab P, OCPC Terms of Reference, at 250; and Tab R, OCPC Letter Extending Deadline for Final Report (dated December 15, 2017), at 280

33. In the TBPS Board's view, the nature of the potential bias at issue attaches to the TBPS Board as a whole, and not its individual members. Put another way, the TBPS Board as a statutory entity is not in a position to make the Delay Application decision. As a result, the TBPS Board has declined to exercise its statutory mandate to deal with the Delay Application arising out of the DeBungee Complaint.

34. This decision has a significant impact on the ability of the DeBungee Complaint to progress through the public complaints system. The allegations underlying this complaint are serious, as is evidenced by the decision of the Director to refer the matter to a disciplinary hearing. The next step in the public complaints process is the determination of the Delay

Application. The *PSA* itself does not provide for an alternative mechanism by which the Delay Application can be determined. In the absence of someone deciding the Delay Application, the DeBungee Complaint is at a complete standstill, leaving the various complainants, the Respondent Officers, the TBPS and the Thunder Bay community without any resolution.

35. Fortunately, the TBPS Board's rationale for not being in a position to deal with this Delay Application is time-limited: the two independent investigations connected to the DeBungee Complaint will be completed in the near future. The OIPRD Systemic Review is expected to be completed at the end of June 2018, while the OCPC investigation is required to be completed on August 31, 2018. Therefore, the Board's request for an alternative decision-maker for the DeBungee Complaint Delay Application is exceptional and premised on unique facts that will no longer be a factor in just a matter of months.

Applicant's Amended Application Record, Tab R, OCPC's letter indicating extension of time for OCPC investigation, at 280

PART III – ISSUES AND THE LAW

(a) A remedy under section 16 of the *Public Officers Act* is necessary and appropriate

i. Administrative bodies and impartiality

36. Administrative bodies which perform a decision-making role must exercise their authority in an impartial manner and be seen to be acting impartially.

R v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.), at para.120 ("*R.D.S.*"), Director's Book of Authorities, Tab 3

37. It is always open to a member of an administrative body to raise the issue of bias on his or her own.

S.E.I.U., Local 204 v. Ontario Realty Corp., [1997] O.J. No. 3569 (Ont. Gen. Div.) ("*Johnson*"), Director's Book of Authorities, Tab 4 (In this case, the Vice-Chair of the Ontario Labour Relations Board raised the issue of possible bias)

38. While allegations of a reasonable apprehension of bias are typically brought against individual adjudicators, there are instances where such allegations are raised against the administrative body as a whole.

Jogendra v. Human Rights Tribunal of Ontario, 2011 HRT0 322, at para. 76, Director's Book of Authorities, Tab 5

Johnson, supra at para. 38 ("Given Vice-Chair Whitaker's comments that the other O.L.R.B. vice-chairs share the same personal knowledge he possessed regarding the termination process, it seems clear that a reasonable apprehension of bias exists as regards them. This applies equally to the O.L.R.B. chair and alternative chair.")

39. In exceptional cases, courts have used the doctrine of necessity to enable a person who would otherwise be disqualified to render the decision. However, it is not appropriate to resort to the doctrine of necessity where there are available alternatives. One such alternative is an application under section 16 of the *POA*.

Milne v. Saskatchewan (Joint Chiropractic Professional Review Committee), 1992 CarswellSask 294 (C.A.), at para. 22, Director's Book of Authorities, Tab 6

Gardner v. Ontario Civilian Commission on Police Services, [2004] O.J. No. 2968 (Div. Ct.), at paras. 24, 26, Director's Book of Authorities, Tab 7 ("We agree that despite the fact that all members of the Commission participated in and were tainted by all meetings, the doctrine [of necessity] has no application, because there are available alternatives.")

ii. The procedure for obtaining relief under section 16 of the *Public Officers Act*

40. Section 16 of the *POA* provides a remedy when legally empowered persons are disqualified from performing their statutory function. Rather than deny someone the statutory

right to have their matter acted on at all, the legislature has provided a safety valve: a mechanism whereby the Court may confer temporary jurisdiction on someone else.

Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126 (S.C.J.), at para. 32 ("*Boucher*"), Director's Book of Authorities, Tab 8

41. Section 16 of the *POA* provides as follows:

Where by any general or special Act any person or 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 party 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*.

Public Officers Act, R.S.O. 1990, c. P.45, section 16 [emphasis added]

42. Section 16 of the *POA* creates a two-step procedure. *If* disqualification occurs, *then* an application "upon summary motion" can be made to a judge for the appointment of someone else who is impartial or "disinterested".

Jogendra v. Human Rights Tribunal of Ontario, 2011 ONSC 3307 (S.C.J.), at para. 44 ("*Jogendra*, SCJ"), Director's Book of Authorities, Tab 9

43. In their factum and affidavit, the TBPS Board has articulated its reasons for being disqualified to hear and determine the Delay Application: the subject of the Delay Application, the DeBungee Complaint, has driven the decisions of the Director and the OCPC to initiate investigations that have resulted in a heightened scrutiny of the TBPS Board. Given the TBPS Board's position and rationale, the Director submits that there is a disqualifying interest for the purposes of the *POA*.

44. Under the *POA*, any "interested party" can bring an application to have the Court appoint a disinterested person. In this case, the TBPS Board has initiated this Application.

While the *POA* does not require the consent of other parties to the matter at issue, the Director, the Chief of Police of TBPS and the Respondent Officers have all consented to the relief sought. Mr. DeBungee and Chief Leonard, while not consenting to this Application, are not opposing it.

Boucher, supra at para. 25 (“...there is nothing in the language of section 16 that requires that an application under this section be consensual.”)

iii. The test under section 16 of the *Public Officers Act* is met

(1) Is the TBPS Board empowered, by any general or special Act, to hear and decide the Delay Application?

45. The TBPS Board is a statutory creature whose authority comes entirely from the *PSA*. In the public complaints system, one of the TBPS Board’s statutory functions is to deal with Delay Applications. This power is explicitly granted to the TBPS Board by section 83(17) of the *PSA*.

Johnson, supra at para. 28 (The Superior Court found that the *Labour Relations Act* clearly empowered the Vice-Chair to hear and decide the union’s application)

PSA, s. 83(17) (If six months have elapsed since the day described in section (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*) [emphasis added]

(2) Is the TBPS Board disqualified by interest from deciding the Delay Application?

46. A disqualifying “interest” under section 16 of the *POA* “encompasses more than mere pecuniary interest in the outcome of a proceeding.” Disqualification can also occur on the basis of a reasonable apprehension of bias: that a “reasonable, right-minded and properly informed” person would think that the TBPS Board would be influenced in an inappropriate manner by the current independent investigations into the TBPS and the TBPS Board itself.

Johnson, supra at paras. 30-31

Roberts v. R, 2003 SCC 45 at para. 60, Director's Book of Authorities, Tab 10 ("In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion...is the reasonable apprehension of bias.")

47. The reasonable person must be informed and appreciate the relevant circumstances in order to understand whether there is a bias concern. Here, the Board has identified the relevant context that gives rise to its disqualifying interest: the TBPS Board is in a situation where it has to decide the merits of the Delay Application arising from the very misconduct investigation that prompted the Director's Systemic Review and OCPC's independent investigation, all happening against the backdrop of concerns about systemic racism and the relationship between the police and Indigenous Peoples in Thunder Bay. A reasonable person might well ask: how can the TBPS Board impartially decide a matter that is so intertwined with public, independent assessments of its own performance and the performance of the police service it is responsible for governing?

R.D.S., supra at para. 111 ("...the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold...To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.")

48. In the Director's view, given this context, a reasonable person would rightly be concerned that the TBPS Board may be unable to decide the Delay Application impartially. As indicated in its materials, the "Board is unanimously of the view that no matter what action it would take [with respect to the Delay Application], it could be criticized as acting out of a bias or interest." Put another way, the TBPS Board is not "unconnected to the cause" and may reasonably be perceived as having its own interest in the outcome of the Delay Application.

Applicant's Amended Application Record, Tab 2, Affidavit of John Hannam, at 14

Jogendra, SCJ, supra at para. 66 ("The evidence must create real concern that justice can only be served if the usual decision maker's powers are, for that case and in those remarkable circumstances, removed and vested in some other qualified person who is unconnected to the cause, the usual decision making authority and the person who makes allegations of wrongdoing against it.")

49. If the TBPS Board were to grant the TBPS Chief of Police permission to serve the Notice of Hearing, then the reasonable person may believe that the TBPS Board was influenced in an inappropriate manner by the current independent investigations. Specifically, that the TBPS Board did not make its decision based on the merits of the Delay Application and the reasonableness of the delay, but rather, in an effort to present itself in a positive light in the eyes of the independent investigations.

50. On the other hand, if the TBPS Board does not grant the chief of police permission to serve the Notice of Hearing, the reasonable person may believe that the TBPS Board's decision was not merit-based, but an attempt to prove that the ongoing independent investigations do not affect it.

51. The TBPS Board has put forward its strong view that it is disqualified by interest from deciding the Delay Application in this unique context. The Director understands the TBPS Board's concerns that the relationship between the two independent investigations and the subject of the Delay Application could raise questions around impartiality. The Director's focus in this Application is to support steps that will allow the public complaints system to function and process the matters within it. The Director submits that the TBPS Board has met the second part of the test under section 16 of the *POA*.

Office of the Independent Police Review Director v. Regional Municipality of Niagara Police Services Board, 2016 ONSC 5280 (Div. Ct.), at para. 45, Director's Book of Authorities, Tab 11 ("In our view, however, the Director's duties and functions have a distinct public interest character. Although the Director receives and investigates complaints made by members of the

public and is to do so independently, it must operate the public interest to ensure such complaints are properly investigated and processed. The public accountability of the conduct of the police depends on the Director's powers to do so")

(3) Is there another person who is qualified by law to hear and decide the matter?

52. This Delay Application has highlighted a statutory gap that leaves the public complaints system paralyzed and without a necessary decision-maker.

53. When the TBPS Board realized there could be an issue if it dealt with the Delay Application, it reached out to both the OCPC and the Director for assistance.

54. The Director, in a letter dated March 21, 2018, advised counsel for the TBPS Board that he did not have the statutory authority to hear the Delay Application or require that another entity hear it.

Applicant's Amended Application Record, Tab X, Letter from the TBPS Board (dated March 29, 2018), at 295

55. Similarly, the OCPC, in letters dated March 15 and March 16, 2018, advised the TBPS Board that it does not have the jurisdiction to hear and decide the Delay Application.

Applicant's Amended Application Record, Tab T, Letter from OCPC (dated March 15, 2018), at 286; Tab V, Letter from OCPC (dated March 16, 2018), at 291

56. There is no other person or entity who has the statutory authority to hear and decide the Delay Application. The *PSA* is a complete code that provides no alternative decision-maker to step in when the Board is unable to fulfill its statutory mandate. The appointment of a disinterested person under the *POA* is the only mechanism to ensure the Delay Application

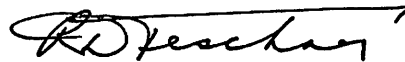
can be decided on its merits – a necessary step to maintain public confidence in the police oversight system.

Johnson, supra at paras. 41 and 43 (The Vice-chair found that the Labour Relations had a disqualifying interest. In addition, the Minister of Labour declined to appoint an independent adjudicator to hear the matter. Therefore, the Superior Court concluded that the appointment of a disinterested person was appropriate in the circumstances)

PART IV – ORDER REQUESTED

57. The Director respectfully requests an order granting the TBPS Board's Application.

All of which is respectfully submitted this 1st day of June, 2018.



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SCHEDULE “A” – LIST OF AUTHORITIES

1. *Izzett v. Toronto Police Service*, 2010 ONSC 2262 (Div. Ct.)
2. *Forestall v. Toronto Police Services Board*, [2007] O.J. No. 3059 (Div. Ct.)
3. *R v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.)
4. *S.E.I.U., Local 204 v. Ontario Realty Corp.*, [1997] O.J. No. 3569 (Ont. Gen. Div.)
5. *Jogendra v. Human Rights Tribunal of Ontario*, 2011 HRTO 322
6. *Milne v. Saskatchewan (Joint Chiropractic Professional Review Committee)*, 1992 CarswellSask 294 (C.A.)
7. *Gardner v. Ontario Civilian Commission on Police Services*, [2004] O.J. No. 2968 (Div. Ct.)
8. *Boucher v. Public Accountants Council for the Province of Ontario*, [2000] O.J. No. 3126 (S.C.J.)
9. *Jogendra v. Human Rights Tribunal of Ontario*, 2011 ONSC 3307 (S.C.J.)
10. *Roberts v. R*, 2003 SCC 45
11. *Office of the Independent Police Review Director v. Regional Municipality of Niagara Police Services Board*, 2016 ONSC 5280 (Div. Ct.)

SCHEDULE “B” – LEGISLATION

Independent Police Review Act, 2007, S.O. 2007, c. 5 - Bill 103

Part II.1 [Section 8 of the Bill; Sections 26.1 to 26.9 of the *Police Services Act*]

The Bill adds a new Part II.1 (Independent Police Review Director) to the *Police Services Act*. This Part provides for the appointment of the Independent Police Review Director and the establishment of his or her office, including the appointment of employees and the creation of regional offices. (Section 26.1) The Part creates a duty for the Independent Police Review Director to file an annual report with the Attorney General and to make that report public. The functions of the Independent Police Review Director are set out in this Part, specifically, to manage complaints made by members of the public in accordance with Part V of the *Police Services Act*, and to exercise such powers and perform such duties as may be prescribed by regulation under the *Police Services Act*. (Section 26.2) Each chief of police must designate a senior officer to serve as a liaison with the Independent Police Review Director. (Section 26.3)

Part II.1 also provides for the powers of the Independent Police Review Director on conducting investigations relating to public complaints. The Independent Police Review Director may appoint investigators, who may be employees or otherwise. (Sections 26.4 to 26.9)

POLICE SERVICES ACT
R.S.O. 1990, CHAPTER P.15

PART II
ONTARIO CIVILIAN POLICE COMMISSION

Powers and duties of Commission

22 (1) The Commission's powers and duties include,

- (a) if the Solicitor General advises the Commission that a board or municipal police force is not complying with prescribed standards of police services,

Note: On November 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 22 (1) (a) of the Act is amended by adding "or standards established under the *Police Record Checks Reform Act, 2015*" at the end of the portion before subclause (i). (See: 2015, c. 30, s. 26 (2))

- (i) directing the board or police force to comply, and
 - (ii) if the Commission considers it appropriate, taking measures in accordance with subsection 23 (1);
- (b) conducting investigations with respect to appointing officials under the *Interprovincial Policing Act, 2009* under section 25;
- (c) conducting investigations with respect to municipal police matters under section 25;
- (d) conducting inquiries into matters relating to crime and law enforcement under section 26;
- (e) conducting inquiries, on its own motion, in respect of a complaint or complaints made about the policies of or services provided by a police force or about the conduct of a police officer and the disposition of such complaint or complaints by a chief of police or board;
- (e.1) REPEALED: 2007, c. 5, s. 6 (1).
- (e.2) making recommendations with respect to the policies of or services provided by a police force by sending the recommendations, with any supporting documents, to the Solicitor General, the chief of police, the association, if any, and, in the case of a municipal police force, the board;
- (f) hearing and disposing of matters referred to it by boards and appealed to it by police officers and complainants in accordance with Part V. R.S.O. 1990, c. P.15, s. 22 (1); 1995, c. 4, s. 4 (3); 1997, c. 8, s. 16 (1-3); 2007, c. 5, s. 6 (1, 2); 2009, c. 30, s. 44.

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.

Functions of the Independent Police Review Director

26.2 The functions of the Independent Police Review Director are,

- (a) to manage complaints made to him or her by members of the public in accordance with Part V and the regulations; and
- (b) to exercise such powers and perform such duties of the Independent Police Review Director as may be prescribed under paragraph 4.1 of subsection 135 (1). 2007, c. 5, s. 8.

PART III MUNICIPAL POLICE SERVICES BOARDS

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).

Restriction

(1.1) Guidelines in respect of complaints made by members of the public under Part V shall not be established by the board unless they are consistent with,

- (a) any procedural rules or guidelines for the handling of public complaints established under clause 56 (1) (b) by the Independent Police Review Director; and
- (b) any procedure, condition or requirement made by regulation under paragraph 26.4 of subsection 135 (1). 2007, c. 5, s. 9 (2).

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

PUBLIC COMPLAINTS MADE TO THE INDEPENDENT POLICE REVIEW DIRECTOR

Review of systemic issues

57 In addition to his or her other functions under this Act, the Independent Police Review Director may examine and review issues of a systemic nature that are the subject of, or that give rise to, complaints made by members of the public under this Part and may make recommendations respecting such issues to the Solicitor General, the Attorney General, chiefs of police, boards, or any other person or body. 2007, c. 5, s. 10.

Complaint may be made to Independent Police Review Director

58. (1) Any member of the public may make a complaint under this Part to the Independent Police Review Director about,

- (a) the policies of or services provided by a police force; or
- (b) the conduct of a police officer. 2007, c. 5, s. 10.

Prohibition

(2) Despite subsection (1), the following persons cannot make a complaint to the Independent Police Review Director:

- 1. The Solicitor General.
- 2. An employee in the office of the Independent Police Review Director.
- 3. A member or employee of the Commission.
- 4. A member or auxiliary member of a police force, if that police force or another member of that police force is the subject of the complaint.
- 5. REPEALED: 2009, c. 33, Sched. 2, s. 60 (1).
- 6. A member or employee of a board, if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
- 7. A person selected by the council of a municipality to advise another municipality's board under subsection 6.1 (2), if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
- 8. A delegate to a community policing advisory committee established under subsection 5.1 (4), if the community policing advisory committee advises the detachment commander of the Ontario Provincial Police detachment that is, or a member of which is, the subject of the complaint. 2007, c. 5, s. 10; 2009, c. 33, Sched. 2, s. 60 (1).

Power of Independent Police Review Director to refuse

60. (1) The Independent Police Review Director may, in accordance with this section, decide not to deal with a complaint made to him or her by a member of the public under this Part. 2007, c. 5, s. 10.

Limitation, six months

(2) The Independent Police Review Director may decide not to deal with a complaint made by a member of the public if the complaint is made more than six months after the facts on which it is based occurred. 2007, c. 5, s. 10.

Same

(3) In making a determination under subsection (2), the Independent Police Review Director shall consider,

- (a) whether the complainant is a minor or is under a disability within the meaning of the *Accessibility for Ontarians with Disabilities Act, 2005*;
- (b) whether the complainant is or was subject to criminal proceedings in respect of the events underlying the complaint; and
- (c) whether, having regard to all the circumstances, it is in the public interest for the complaint to be dealt with. 2007, c. 5, s. 10.

Frivolous, vexatious, etc.

(4) The Independent Police Review Director may decide not to deal with a complaint made by a member of the public if, in his or her opinion, one of the following applies:

- 1. The complaint is frivolous or vexatious or made in bad faith.
- 2. The complaint could be more appropriately dealt with, in whole or in part, under another Act or other law.
- 3. Having regard to all the circumstances, dealing with the complaint is not in the public interest. 2007, c. 5, s. 10.

Not affected by policy or service

(5) The Independent Police Review Director may decide not to deal with a complaint made by a member of the public about a policy of or service provided by a police force if the policy or service did not have a direct effect on the complainant. 2007, c. 5, s. 10.

Not affected by conduct

(6) The Independent Police Review Director may decide not to deal with a complaint made by a member of the public about the conduct of a police officer if the complainant is not one of the following:

- 1. A person at whom the conduct was directed.
- 2. A person who saw or heard the conduct or its effects as a result of being physically present at the time and place that the conduct or its effects occurred.
- 3. A person who,
 - i. was in a personal relationship with a person described in paragraph 1 at the time that the conduct occurred, and
 - ii. suffered loss, damage, distress, danger or inconvenience as a result of the conduct.
- 4. A person who has knowledge of the conduct, or has in his or her possession or under his or her control anything relating to the conduct, if, in the Independent Police Review Director's opinion, the knowledge or thing constitutes compelling evidence that the conduct complained of is misconduct as defined in section 80 or unsatisfactory work

performance and the evidence would likely be admissible in a court proceeding. 2007, c. 5, s. 10.

Notice

(7) If the Independent Police Review Director decides not to deal with a complaint, other than a complaint described in subsection (9), in accordance with this section, he or she shall notify the complainant and the chief of police of the police force to which the matter relates in writing of the decision, with reasons, and in the case of the chief of police, shall also give notice of the substance of the complaint. 2009, c. 30, s. 53 (1).

Same

(8) On receipt of a notice under subsection (7) relating to a complaint about the conduct of a police officer other than the chief of police, the chief of police shall promptly notify the police officer who is the subject of the complaint in writing of the substance of the complaint, and of the Independent Police Review Director's decision not to deal with the complaint, with reasons. 2007, c. 5, s. 10.

Complaints referred, retained

61. (1) This section applies to every complaint made to the Independent Police Review Director by a member of the public under this Part, unless the Independent Police Review Director has decided not to deal with the complaint in accordance with section 60. 2007, c. 5, s. 10.

Complaints about municipal force policies

(2) A complaint about the policies of or services provided by a municipal police force shall be referred by the Independent Police Review Director to the municipal chief of police and dealt with under section 63. 2007, c. 5, s. 10.

Complaints about officer other than chief

(5) A complaint about the conduct of a police officer, other than a chief of police, deputy chief of police or a police officer appointed under the *Interprovincial Policing Act, 2009*, shall be,

- (a) referred by the Independent Police Review Director to the chief of police of the police force to which the complaint relates and dealt with under section 66;
- (b) referred by the Independent Police Review Director to the chief of police of a police force other than the police force to which the complaint relates and dealt with under section 67; or
- (c) retained by the Independent Police Review Director and dealt with under section 68. 2009, c. 30, s. 54.

REVIEW AND INVESTIGATION OF COMPLAINTS

Complaints about municipal force policies

63 (1) The chief of police shall review every complaint that is referred to him or her by the Independent Police Review Director under subsection 61 (2) and shall take any action, or no action, in response to the complaint as he or she considers appropriate. 2007, c. 5, s. 10.

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

68. (1) The Independent Police Review Director shall cause every complaint retained by him or her under clause 61 (5) (c) to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10.

Unsubstantiated complaint

(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.

Same

(4) If the Independent Police Review Director is of the opinion that the conduct of the police officer constitutes misconduct or unsatisfactory work performance that is not of a serious nature, he or she, in referring the matter to the chief of police under subsection (3), shall so indicate. 2007, c. 5, s. 10.

Chief of police to hold hearing

(5) Subject to subsection (6), the chief of police shall hold a hearing into a matter referred to him or her under subsection (3) by the Independent Police Review Director. 2007, c. 5, s. 10.

Informal resolution

(6) If on the review of the written report the chief of police is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the chief of police may resolve the matter informally without holding a hearing if the police officer and the complainant consent to the proposed resolution. 2007, c. 5, s. 10.

MISCONDUCT

Misconduct

80. (1) A police officer is guilty of misconduct if he or she,

- (a) commits an offence described in a prescribed code of conduct;
- (b) contravenes section 46 (political activity);
- (c) engages in an activity that contravenes subsection 49 (1) (secondary activities) without the permission of his or her chief of police or, in the case of a municipal chief of police, without the permission of the board, being aware that the activity may contravene that subsection;
- (d) contravenes subsection 55 (5) (resignation during emergency);
- (e) commits an offence described in subsection 79 (1) or (2) (offences, complaints);
- (f) contravenes section 81 (inducing misconduct, withholding services);
- (g) contravenes section 117 (trade union membership);
- (h) deals with personal property, other than money or a firearm, in a manner that is not consistent with section 132;
- (i) deals with money in a manner that is not consistent with section 133;
- (j) deals with a firearm in a manner that is not consistent with section 134;
- (k) contravenes a regulation made under paragraph 15 (equipment), 16 (use of force), 17 (standards of dress, police uniforms), 20 (police pursuits) or 21 (records) of subsection 135 (1). 2007, c. 5, s. 10.

Off-duty conduct

(2) A police officer shall not be found guilty of misconduct under subsection (1) if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force. 2007, c. 5, s. 10.

HEARINGS

Prosecutor at hearing

82 (1) The chief of police shall designate to be the prosecutor at a hearing held under subsection 66 (3), 68 (5) or 76 (9),

- (a) a police officer from any police force of a rank equal to or higher than that of the police officer who is the subject of the hearing; or
- (b) a person authorized under the *Law Society Act* to be a prosecutor at the hearing. 2007, c. 5, ss. 10, 13 (4).

Hearings, procedure

83. (1) A hearing held under subsection 66 (3), 68 (5), 69 (8), 76 (9) or 77 (7) shall be conducted in accordance with the *Statutory Powers Procedure Act*. 2007, c. 5, s. 10.

Application of this section

(2) Subsections (3), (4), (5), (6), (11), (12), (13), (14), (15) and (16) apply to any hearing held under this Part. 2007, c. 5, s. 10.

Parties

(3) The parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant. 2007, c. 5, s. 10.

Notice and right to representation

(4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the *Law Society Act* to represent the party. 2007, c. 5, s. 13 (6).

Examination of evidence

(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence. 2007, c. 5, s. 10.

Police officer not required to give evidence

(6) The police officer who is the subject of the hearing shall not be required to give evidence at the hearing. 2007, c. 5, s. 10.

Non-compellability

(7) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under this Part, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of documents

(8) No document prepared as the result of a complaint made under this Part is admissible in a civil proceeding, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of statements

(9) No statement made during an attempt at informal resolution of a complaint under this Part is admissible in a civil proceeding, including a proceeding under subsection 66 (10), 69 (12), 76 (12) or 77 (9), or a hearing under this Part, except with the consent of the person who made the statement. 2007, c. 5, s. 10.

Recording of evidence

(10) The oral evidence given at the hearing shall be recorded and copies of transcripts shall be provided on the same terms as in the Superior Court of Justice. 2007, c. 5, s. 10.

Release of exhibits

(11) Within a reasonable time after the matter has been finally determined, documents and things put in evidence at the hearing shall, on request, be released to the person who produced them. 2007, c. 5, s. 10.

No communication without notice

(12) Subject to subsection (13), the person conducting the hearing shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person, unless the parties receive notice and have an opportunity to participate. 2007, c. 5, ss. 10, 13 (7).

Exception

(13) The person conducting the hearing may seek legal advice from an advisor independent of the parties, and in that case the nature of the advice shall be communicated to them so that they may make submissions as to the law. 2007, c. 5, s. 10.

If Crown Attorney consulted

(14) If a Crown Attorney has been consulted, the person conducting the hearing may proceed to deal with the part of the complaint that, in his or her opinion, constitutes misconduct as defined in section 80 or unsatisfactory work performance, unless the Crown Attorney directs otherwise. 2007, c. 5, s. 10.

Hearing to continue

(15) If the police officer who is the subject of the hearing is charged with an offence under a law of Canada or of a province or territory in connection with the conduct that was the subject of the complaint, the hearing shall continue unless the Crown Attorney advises the chief of police or board, as the case may be, that it should be stayed until the conclusion of the proceedings dealing with the offence. 2007, c. 5, s. 10.

Photography at hearing

(16) Subsections 136 (1), (2) and (3) of the *Courts of Justice Act* (photography at court hearing) apply with necessary modifications to the hearing and a person who contravenes subsection 136 (1), (2) or (3) of the *Courts of Justice Act*, as it is made to apply by this subsection, is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. 2007, c. 5, s. 10.

Six-month limitation period, exception

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

Same

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

- (a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,
 - (i) the day on which the chief of police received the complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) or (b), or
 - (ii) the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5) (c);
- (b) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a chief of police or deputy chief of police, the day on which the board received the complaint referred to it by the Independent Police Review Director under subsection 61 (8); or
- (c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be. 2007, c. 5, s. 10.

Findings and disposition

84. (1) If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(2) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the board, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the board shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(3) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the Commission, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the Commission shall, subject to subsection (4), direct the board in writing to take such action described in section 85 as the Commission specifies. 2007, c. 5, s. 10.

Notice needed

(4) The Commission shall not direct the board to impose the penalties of dismissal or demotion unless the notice of hearing or a subsequent notice served on the chief of police or deputy chief of police indicated that they might be imposed if the complaint were proved on clear and convincing evidence. 2007, c. 5, s. 10

Powers at conclusion of hearing by chief of police, board or Commission

85 (1) Subject to subsection (4), the chief of police may, under subsection 84 (1),

- (a) dismiss the police officer from the police force;
- (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
- (c) demote the police officer, specifying the manner and period of the demotion;
- (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
- (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be;
- (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be; or
- (g) impose on the police officer any combination of penalties described in clauses (c), (d), (e) and (f). 2007, c. 5, s. 10.

Same

(2) Subject to subsection (4), the board may, under subsection 84 (2),

- (a) dismiss the chief of police or deputy chief of police from the police force;
- (b) direct that the chief of police or deputy chief of police be dismissed in seven days unless he or she resigns before that time;
- (c) demote the chief of police or deputy chief of police, specifying the manner and period of the demotion;
- (d) suspend the chief of police or deputy chief of police without pay for a period not exceeding 30 days or 240 hours, as the case may be;
- (e) direct that the chief of police or deputy chief of police forfeit not more than three days or 24 hours pay, as the case may be;
- (f) direct that the chief of police or deputy chief of police forfeit not more than 20 days or 160 hours off, as the case may be;
- (g) impose on the chief of police or deputy chief of police any combination of penalties described in clauses (c), (d), (e) and (f). 2007, c. 5, s. 10.

Same

(3) The board shall promptly take any action that the Commission directs it to take under subsection 84 (3). 2007, c. 5, s. 10.

Notice needed

(4) The chief of police or board, as the case may be, shall not impose the penalties of dismissal or demotion under subsection (1) or (2) unless the notice of hearing or a subsequent notice served on the chief of police, deputy chief of police or other police officer indicated that they might be imposed if the complaint were proved on clear and convincing evidence. 2007, c. 5, s. 10.

Calculation of penalties

(5) Penalties imposed under clauses (1) (d), (e) and (f) and (2) (d), (e) and (f) shall be calculated in terms of days if the chief of police, deputy chief of police or other police officer normally works eight hours a day or less and in terms of hours if he or she normally works more than eight hours a day. 2007, c. 5, s. 10.

Same

(6) If a penalty is imposed under clause (1) (e) or (2) (e), the chief of police, deputy chief of police or other police officer, as the case may be, may elect to satisfy the penalty by working without pay or by applying the penalty to his or her vacation or overtime credits or entitlements. 2007, c. 5, s. 10.

Additional powers

(7) In addition to or instead of a penalty described in subsection (1) or (2), the chief of police or board, as the case may be, may under subsection 84 (1) or (2),

- (a) reprimand the chief of police, deputy chief of police or other police officer;
- (b) direct that the chief of police, deputy chief of police or other police officer undergo specified counselling, treatment or training;
- (c) direct that the chief of police, deputy chief of police or other police officer participate in a specified program or activity;
- (d) take any combination of actions described in clauses (a), (b) and (c). 2007, c. 5, s. 10.

Notice of decision

(8) The chief of police or board, as the case may be, shall promptly give written notice of any penalty imposed or action taken under subsection (1), (2), (3) or (7), with reasons,

- (a) to the chief of police, deputy chief of police or other police officer who is the subject of the complaint;
- (b) in the case of a penalty imposed or action taken by a municipal chief of police, to the board; and
- (c) in the case of a penalty imposed or action taken in respect of a complaint made by a member of the public, to the complainant. 2007, c. 5, s. 10.

Employment record

(9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

- (a) misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence; or
- (b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of. 2007, c. 5, s. 10.

Restriction on employment

(10) No person who is dismissed under section 84, or who resigns following a direction under section 84, may be employed as a member of a police force unless five years have passed since the dismissal or resignation. 2007, c. 5, s. 10; 2009, c. 33, Sched. 2, s. 60 (2).

Appeal to Commission

87 (1) A police officer or complainant, if any, may, within 30 days of receiving notice of the decision made after a hearing held under subsection 66 (3), 68 (5) or 76 (9) by the chief of police or under subsection 69 (8) or 77 (7) by the board, appeal the decision to the Commission by serving on the Commission a written notice stating the grounds on which the appeal is based. 2007, c. 5, s. 10.

Commission to hold hearing

(2) The Commission shall hold a hearing upon receiving a notice under subsection (1) from a police officer. 2007, c. 5, s. 10.

Same

(3) The Commission shall hold a hearing upon receiving a notice under subsection (1) from a complainant if the appeal is from the finding that misconduct or unsatisfactory work performance was not proved on clear and convincing evidence. 2007, c. 5, s. 10.

Commission may hold hearing

(4) The Commission may hold a hearing, if it considers it appropriate, upon receiving a notice under subsection (1) from a complainant with respect to an appeal other than an appeal described in subsection (3). 2007, c. 5, s. 10.

Appeal on the record

(5) A hearing held under this section shall be an appeal on the record, but the Commission may receive new or additional evidence as it considers just. 2007, c. 5, s. 10.

Solicitor General may be heard

(6) The Solicitor General is entitled to be heard, by counsel or otherwise, on the argument of the appeal. 2007, c. 5, s. 10.

Independent Police Review Director may be heard

(7) The Independent Police Review Director is entitled to be heard, by counsel or otherwise, on the argument of the appeal of a decision made in respect of a complaint made by a member of the public. 2007, c. 5, s. 10.

Powers of Commission

(8) After holding a hearing on an appeal, the Commission may,

- (a) confirm, vary or revoke the decision being appealed;
- (b) substitute its own decision for that of the chief of police or the board, as the case may be;

- (c) in the case of an appeal from a decision of a chief of police, order a new hearing before the chief of police under subsection 66 (3), 68 (5) or 76 (9), as the case may be; or
- (d) in the case of an appeal from a decision of a board, order a new hearing before the board under subsection 69 (8) or 77 (7), as the case may be. 2007, c. 5, s. 10.

POLICE SERVICES ACT

O. Reg. 268/10: GENERAL

PART VII CODE OF CONDUCT

Code of conduct

30. (1) Any conduct described in the code of conduct, set out in the Schedule, constitutes misconduct for the purpose of section 80 of the Act. O. Reg. 268/10, s. 30 (1).

(2) The code of conduct applies to all police officers, except that subclauses 2 (1) (c) (iii), (ix) and (x) of the code do not apply to a police officer appointed under the *Interprovincial Policing Act, 2009*. O. Reg. 268/10, s. 30 (2).

SCHEDULE CODE OF CONDUCT

1. In this code of conduct,

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage; (“état matrimonial”)

“record” means any record of information, however recorded, whether in printed form, on film, by electronic means or otherwise, and includes correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy of the record. (“document”)

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

(a) DISCREDITABLE CONDUCT, in that he or she,

(i) fails to treat or protect persons equally without discrimination with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(ii) uses profane, abusive or insulting language that relates to a person’s race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability,

(iii) is guilty of oppressive or tyrannical conduct towards an inferior in rank,

(iv) uses profane, abusive or insulting language to any other member of a police force,

- (v) uses profane, abusive or insulting language or is otherwise uncivil to a member of the public,
 - (vi) wilfully or negligently makes any false complaint or statement against any member of a police force,
 - (vii) assaults any other member of a police force,
 - (viii) withholds or suppresses a complaint or report against a member of a police force or about the policies of or services provided by the police force of which the officer is a member,
 - (ix) is guilty of a criminal offence that is an indictable offence or an offence punishable upon summary conviction,
 - (x) contravenes any provision of the Act or the regulations, or
 - (xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force of which the officer is a member;
- (b) INSUBORDINATION, in that he or she,
- (i) is insubordinate by word, act or demeanour, or
 - (ii) without lawful excuse, disobeys, omits or neglects to carry out any lawful order;
- (c) NEGLECT OF DUTY, in that he or she,
- (i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as,
 - (A) a member of the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or
 - (B) a police officer appointed under the *Interprovincial Policing Act, 2009*,
 - (ii) fails to comply with any provision of Ontario Regulation 267/10 (Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit) made under the Act,

Note: On June 30, 2018, the day section 42 of Schedule 4 to the *Safer Ontario Act, 2018* comes into force, subclause 2 (1) (c) (ii) of the Schedule to the Regulation is revoked and the following substituted: (See: O. Reg. 371/18, s. 2)

- (ii) fails to comply with any provision of the *Ontario Special Investigations Unit Act, 2018*,
- (ii.1) failed to comply with any provision of Ontario Regulation 267/10 (Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit) before its revocation by the *Ontario Special Investigations Unit Act, 2018*,
- (iii) fails to work in accordance with orders, or leaves an area, detachment, detail or other place of duty, without due permission or sufficient cause,
- (iv) by carelessness or neglect permits a prisoner to escape,
- (v) fails, when knowing where an offender is to be found, to report him or her or to make due exertions for bringing the offender to justice,
- (vi) fails to report a matter that it is his or her duty to report,

- (vii) fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant,
 - (viii) omits to make any necessary entry in a record,
 - (ix) feigns or exaggerates sickness or injury to evade duty,
 - (x) is absent without leave from or late for any duty, without reasonable excuse, or
 - (xi) is improperly dressed, dirty or untidy in person, clothing or equipment while on duty;
- (d) DECEIT, in that he or she,
- (i) knowingly makes or signs a false statement in a record,
 - (ii) wilfully or negligently makes a false, misleading or inaccurate statement pertaining to official duties, or
 - (iii) without lawful excuse, destroys or mutilates a record or alters or erases an entry in a record;
- (e) BREACH OF CONFIDENCE, in that he or she,
- (i) divulges any matter which it is his or her duty to keep secret,
 - (ii) gives notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of the warrant or service of the summons,
 - (iii) without proper authority, communicates to the media or to any unauthorized person any matter connected with,
- (A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or
 - (B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the *Interprovincial Policing Act, 2009*, or
- (iv) without proper authority, shows to any person not a member of the police force described in sub-subclause (iii) (A) or (B), as the case may be, or to any unauthorized member of that police force any record that is the property of that police force;
- (f) CORRUPT PRACTICE, in that he or she,
- (i) offers or takes a bribe,
 - (ii) fails to account for or to make a prompt, true return of money or property received in an official capacity,
 - (iii) directly or indirectly solicits or receives a gratuity or present without the consent of,
- (A) the chief of police, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or
 - (B) the person who appointed the police officer under Part II or III of the *Interprovincial Policing Act, 2009*,

- (iv) places himself or herself under a pecuniary or other obligation to a licensee if a member of the following police force may have to report or give evidence concerning the granting or refusing of a licence to the licensee:
 - (A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or
 - (B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the *Interprovincial Policing Act, 2009*, or
 - (v) improperly uses his or her character and position as a member of a police force for private advantage;
- (g) UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY, in that he or she,
 - (i) without good and sufficient cause makes an unlawful or unnecessary arrest,
 - (i.1) without good and sufficient cause makes an unlawful or unnecessary physical or psychological detention,
 - (ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty, or
 - (iii) collects or attempts to collect identifying information about an individual from the individual in the circumstances to which Ontario Regulation 58/16 (Collection of Identifying Information in Certain Circumstances – Prohibition and Duties) made under the Act applies, other than as permitted by that regulation;
- (h) DAMAGE TO CLOTHING OR EQUIPMENT, in that he or she,
 - (i) wilfully or carelessly causes loss or damage to any article of clothing or equipment, or to any record or other property of,
 - (A) the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or
 - (B) the police force with which the officer is working on a joint forces operation or investigation, if the officer is appointed as a police officer under the *Interprovincial Policing Act, 2009*, or
 - (ii) fails to report loss or damage, however caused, as soon as practicable; or
- (i) CONSUMING DRUGS OR ALCOHOL IN A MANNER PREJUDICIAL TO DUTY, in that he or she,
 - (i) is unfit for duty, while on duty, through consumption of drugs or alcohol,
 - (ii) is unfit for duty when he or she reports for duty, through consumption of drugs or alcohol,
 - (iii) except with the consent of a superior officer or in the discharge of duty, consumes or receives alcohol from any other person while on duty, or
 - (iv) except in the discharge of duty, demands, persuades or attempts to persuade another person to give or purchase or obtain for a member of a police force any alcohol or illegal drugs while on duty.

(2) A police officer does not commit misconduct under subclause (1) (e) (iii) if he or she engages in the described activity in his or her capacity as an authorized representative of an association, as defined in section 2 of the Act.

(3) A police officer does not commit misconduct under subclause (1) (f) (iii) if he or she engages in the described activity in his or her capacity as an authorized representative of an association, as defined in section 2 of the Act, or of a work-related professional organization.

3. Any chief of police or other police officer also commits misconduct if he or she conspires in, abets or is knowingly an accessory to any misconduct described in section 2.

**PUBLIC OFFICERS ACT,
R.S.O. 1990, CHAPTER P.45**

Procedure when public officer interested in question before him

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. R.S.O. 1990, c. P.45, s. 16; 2006, c. 19, Sched. C, s. 1 (1).

THUNDER BAY POLICE SERVICES
BOARD

- and -

OFFICE OF THE INDEPENDENT POLICE
REVIEW DIRECTOR, ET. AL.

Applicant

Respondents

Court File No.: CV-18-186

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF THE RESPONDENT,
THE INDEPENDENT POLICE
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