

ONTARIO
SUPERIOR COURT OF JUSTICE
-DIVISIONAL COURT-

CANADIAN BROADCASTING CORPORATION

Applicant

-and-

THUNDER BAY POLICE SERVICES BOARD

Respondent

MEMORANDUM OF FACT AND LAW
OF THE FIRST NATION PUBLIC COMPLAINANTS

September 24, 2018

FALCONERS LLP

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AND TO: Thunder Bay Police Services Board
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AND TO: Office of the Independent Police Review Director
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AND TO: Shawn Harrison; Shawn Whipple; Susan Kaucharik
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AND TO: This Honourable Court

PART I - SUMMARY

1. This is a response by the DeBungee Family and former Rainy River First Nations Chief Jim Leonard (hereinafter collectively referred to as the “First Nation Public Complainants”) to the Application commenced by the Applicant, Canadian Broadcasting Corporation (“CBC”), for a stay of the Hearing (as defined below).
2. The First Nation Public Complainants support the stay and the position as set out by the CBC in its Memorandum of Fact and Law dated September 23, 2018.
3. The sole issue to be decided at this time is whether it is appropriate to grant a short stay of the Hearing (as defined below) in order to allow the judicial review of the Decision commenced by CBC to be heard on its merits.
4. The Honourable Mr. Ferrier was appointed to fulfil the statutory role and duties of the Thunder Bay Police Services Board in hearing an application under section 83(17) of the *Police Services Act* (the “Hearing”). The Hearing will determine whether disciplinary proceedings can be commenced under the *Police Services Act* (the “PSA”) despite the passage of more than six months as set out in the *PSA*.
5. On September 20, 2018, Mr. Ferrier directed that the Hearing would be heard *in camera* after receiving written submissions on the issue from counsel (the “Decision”).
6. Pursuant to section 35 of the *PSA* as well as the fundamental common law principle of openness and transparency, the Hearing is presumptively open to the public.
7. In reaching the Decision, Mr. Ferrier found that the *Dagenais/Mentuck* line of cases did not apply in these circumstances.
8. Mr. Ferrier committed an error of law when he decided that the *Dagenais/Mentuck* authorities do not apply to the Hearing. This error caused him to exercise his discretion

without giving proper regard and consideration to the values of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

9. It is therefore appropriate to stay these proceedings pending the hearing of CBC’s Application for judicial review to quash the Decision. Such a stay will permit the judicial review to proceed on its merits.

PART II – BACKGROUND

Procedural Matters

10. On or about March 29, 2018, by way of correspondence from its counsel, the Thunder Bay Police Services Board (“TBPSB”) declared that it cannot fulfill its statutory obligations to determine extension issues around officers whom the Ontario Independent Police Review Director (“OIPRD”) identified as warranting being charged.
11. The TBPSB took the position that the Board would not hear any motion to extend the time to serve notice of hearing on the named officers on the basis that the TBPSB believed that it was in a conflict of interest.
12. Given its serious concerns with the actions of the TBPSB, on April 26, 2018, Chief Robin McGinnis on behalf of Rainy River First Nations wrote to Linda Lamoureux¹, Executive Chair of the Ontario Civilian Police Commission (the “OCPC”), to request the immediate appointment of an administrator (attached hereto as Appendix “A”). On the same day, Thunder Bay Police Service (“TBPS”) Chief J.P. Levesque announced his retirement.

¹ Letter from RRFNs Chief Robin McGinnis, April 26, 2018

13. By way of letter dated May 2, 2018² (attached hereto as Appendix “B”), the OCPC declined to appoint an administrator and stated the following:
- a. The TBPSB commenced an Application in the Superior Court of Justice for the appointment of a person/tribunal to exercise the powers ordinarily imposed on the TBPSB;
 - b. The OCPC declined the request of counsel for the TBPSB that it accept jurisdiction over the section 83(17) Application;
 - c. The OCPC commenced an investigation into the TBPSB to inquire into the manner in which it provides police oversight, with the report being available on or before August 31, 2018;
 - d. The OCPC investigation, led by Senator Murray Sinclair, was ongoing as of the date of the letter, so the OCPC was not in a position to consider whether it would be appropriate to appoint an administrator for the TBPSB.
14. To date, the OCPC has not yet released its report into the TBPSB. In fact, on August 27, 2018³, Ms. Lamoureux wrote to advise that Senator Sinclair required an extension and the report is expected by “the fall”, with an anticipated public release date “by the end of the year” (attached hereto as Appendix “C”).
15. At no time did the First Nation Public Complainants oppose the appointment proceedings as a result of the TBPSB’s refusal to exercise its statutory responsibility of police oversight pursuant to the *PSA*, given that they did not want to create unnecessary litigation in a

² Letter from Linda Lamoureux, Executive Chair Safety, Licensing Appeals and Standards Tribunals Ontario, May 2, 2018

³ Letter from Linda Lamoureux, Executive Chair Safety, Licensing Appeals and Standards Tribunals Ontario, August 27, 2018

proceeding already fraught with difficulty due to the position of the TBPSB in its complete failure to act.

Public Interest in these Proceedings

16. The Applicant, CBC, along with other media outlets across the country, has reported extensively on the proceedings to date.
17. The public interest in the Hearing and the circumstances surrounding the death of Stacy DeBungee cannot be overstated. The story of Stacy DeBungee and the OIPRD's investigation of the TBPS was broadcasted on the CBC documentary program "The 5th Estate" on November 11, 2016.
18. Once again, the story of Stacy DeBungee led CBC's "The National" in March of 2018, following the release of the OIPRD Investigative Report on the investigation into his death.
19. As outlined in the Applicant's submissions and attached at Schedule "D" of the Applicant's submissions, the facts of both the OIPRD Investigative Report as well as the circumstances surrounding Stacy DeBungee's death have been widely reported. This has in turn fostered even more significant public interest in the matter.

The *in camera* Issue

20. At no time did the First Nation Public Complainants agree that the Hearing should be held *in camera*. The issue was first raised on a conference call on July 20, 2018, whereby counsel advised that the First Nation Public Complainants did not agree that the Hearing should be held *in camera*.
21. Shortly thereafter, Mr. Ferrier, by way of email dated July 27, 2018, requested the parties' position on the *in camera* issue.

22. On the same day, counsel for both the TBPS and the Respondent Officers provided that it is “practice across the province” that delay applications are held *in camera*. On that basis, the OIPRD agreed to keep with established practice.
23. On August 1, 2018, the First Nation Public Complainants submitted to Mr. Ferrier that they did not agree with the TBPS and Respondent Officers, and the Hearing should be open to the public.
24. As a result, Mr. Ferrier directed the parties to make submissions in writing. The deadline for the First Nation Public Complainants’ submissions was August 21, 2018, with the parties’ responses to be submitted by September 10, 2018. In the event of reply, the deadline was September 14, 2018. The OIPRD declined to make any written submissions on the matter.
25. As an interested party, CBC was directed by Mr. Ferrier that it had until September 19, 2018, to prepare and provide submissions on the issue. CBC met this deadline.
26. Mr. Ferrier’s decision was sent at 9:07 am on September 20, 2018, and did not make any reference to CBC’s submissions opposing *in camera* proceedings.

PART II – ISSUES

27. The sole issue to be decided at this time in the proceeding is whether it is appropriate to grant a short stay of the Hearing in order to permit the court to hear the judicial review of the Decision commenced by CBC on its merits.

PART III – SUBMISSIONS

28. To determine whether a stay of proceedings is appropriate, courts consider the test articulated in *RJR Macdonald v Canada (Attorney General)*. This test calls on the court to consider the following:

At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant 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.⁴

Serious Issue to be Tried

29. The primary issue on CBC’s judicial review application is whether Mr. Ferrier committed an error of law in finding that the *Dagenais/Mentuck* line of cases did not apply to the Hearing.

30. Specifically, at paragraph 31 of the Decision, Mr. Ferrier stated the following:

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.

31. It is well established that the principles and analytical approach articulated in *Dagenais/Mentuck* apply to all discretionary decisions that affect the openness of proceedings.⁵ Whether it arises from common law, statute or rules of court, discretion must be exercised in accordance with the *Canadian Charter of Rights and Freedoms* (the “Charter”).⁶

⁴ R v Canadian Broadcasting Corp., 2018 SCC 5 (CanLII) at para 12

⁵ *Canadian Broadcasting Corp. v The Queen*, 2011 SCC 3 at para 13

⁶ *Vancouver Sun (Re)*, 2004 SCC 43 at para 31

32. Mr. Ferrier's finding with respect to *Dagenais/Mentuck* represents an error of law. As described below, there is a serious issue to be tried with respect to that error. Additionally, any decision that makes a finding as to the applicability of the open court principle in certain circumstances will have broad implications for future decisions and is inherently a serious issue.
33. The reasons cited by Mr. Ferrier in electing not to apply *Dagenais/Mentuck* will now be addressed.

Statutory Provisions Apply

34. Mr. Ferrier cited the fact that specific statutory provisions apply as one of his reasons for disregarding the *Dagenais/Mentuck* line of authorities. However, regardless of the applicability of specific statutory provisions, Mr. Ferrier was making a discretionary decision in ordering that the Hearing would proceed *in camera*. His discretion to make that decision in these circumstances derives from the provisions of the *PSA*. The Supreme Court of Canada has held that discretion must always be exercised in accordance with the *Charter*:

Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais, supra; Mentuck, supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (CanLII)). (emphasis added)⁷

⁷ *Vancouver Sun (Re)*, 2004 SCC 43 at para 31

Section 35 of the Police Services Act

35. In addition to the obligation arising from the common law to properly consider *Dagenais/Mentuck* and the openness principle, section 35 of the *PSA* provides yet another basis for that obligation.
36. Subsection 35(3) of the *PSA* provides that board hearings are presumptively open to the public: “Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4) [...].”
37. Subsection 35(4) of the *PSA* gives a board discretion to exclude the public from a hearing or meeting under certain circumstances. Specifically, the *PSA* provides that:

The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

- (a) matters involving public security may be disclosed and, **having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public;** or
 - (b) intimate financial or personal matters or other matters may be disclosed of such a nature, **having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.** R.S.O. 1990, c. P.15, s. 35.
38. The discretion afforded to Mr. Ferrier must be exercised in accordance with *Charter* values and with regard to the *Dagenais/Mentuck* authorities.
39. As is evident from the language of section 35, where a board is considering excluding the public from a meeting or hearing, it has an express statutory obligation to properly consider the openness principle and conduct a balancing of the interests of the affected parties with

the desirability of adhering to that principle. That obligation equally applies to Mr. Ferrier in the position of the board.

40. The language of section 35 on its face, which calls for an application of the openness principle and *Dagenais*, is directly at odds with the reasoning of Mr. Ferrier who found that the *Dagenais/Mentuck* authorities did not apply to his decision. The *Dagenais/Mentuck* authorities do apply to the Decision, by way of common law as well as statute. By failing to properly turn his mind to the exercise of discretion contemplated by subsection 35(4), Mr. Ferrier fell into error. This is an error that must be reviewed.

Secrecy

41. There is nothing in the *PSA* that suggests that a public complainant who receives an OIPRD report is bound to secrecy with respect to the details of the report. It has been alleged that section 95 applies to OIPRD reports. This is not accepted.
42. Based on the plain interpretation of section 95, it is quite clear to whom the *PSA* applies. Specifically, the section provides that “every person **engaged in the administration of this Part** [i.e. Part V: Complaints and Disciplinary Proceedings] shall preserve secrecy with respect to all information obtained **in the course of his or her duties ...**” [emphasis added].
43. Neither the First Nation Public Complainants, the community, nor legal counsel are contemplated to be subject to this provision. No reasonable interpretation of section 95 could include a First Nation community, family of the deceased, or counsel to these parties. Reference to “discharge of duties” clearly indicates that the provision is intended to apply to employees or public officials who are discharging their duties under the *PSA*. There is no application to a public complainant who has received an OIPRD Report.

44. Importantly, Mr. Ferrier expressed concern in the Decision that if the Hearing was held publicly, the OIPRD Report would be published, which would threaten the integrity of the proceedings. To reiterate, the OIPRD Report in this matter has already been made public and there is no merit in attempting to make it appear confidential. Even as of this day, a full copy of that Report is available on the CBC news website and has been for several months. For all intents and purposes, there is no secrecy left to preserve regarding the OIPRD Report.
45. Mr. Ferrier's misunderstanding of the applicable law is clear in his analogy to *ex parte* situations where the proceedings are presumptively *in camera* (the swearing of an information or a pre-enquete hearing)⁸. In contrast, the Hearing, pursuant to subsection 35(3) of the *PSA*, is presumptively open to the public.
46. Without engaging in any form of weighing/balancing of interests as contemplated by the caselaw and the *Charter*, Mr. Ferrier decided that the *Dagenais/Mentuck* line of cases and principles articulated therein were of no application. In so doing, Mr. Ferrier committed an error of law. A stay should be granted for this court to hear that argument on its merits.

The Board is not a Court

47. The fact that the board is not a court does not preclude the application of the open court principle. The principle of openness applies to administrative tribunals. Furthermore, the protection of *Charter* guarantees is a fundamental and pervasive obligation, regardless of the adjudicative forum.⁹
48. This is yet another basis on which Mr. Ferrier ought to have given due consideration to the *Dagenais/Mentuck* line of authorities. The openness principle is inextricably linked to the

⁸ *Criminal Code*, R.S. c. C-34, ss 487.3 and 507(1)

⁹ *Toronto Star v AG Ontario*, 2018 ONSC 2586 at para 55

protection of freedom of expression in the *Charter*, and the fact that the board is not a court does not detract from this.¹⁰

Not a Judicial or Quasi-Judicial Proceeding

49. Mr. Ferrier found that the Hearing was not a judicial or quasi-judicial proceeding. In determining whether proceedings and decisions are judicial or quasi-judicial courts have been guided by, *inter alia*, the following considerations:

- (a) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- (b) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (c) Is the adversary process involved?
- (d) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?¹¹

50. An application of those considerations to the circumstances of this matter lead to the conclusion that that the Hearing before Mr. Ferrier is indeed judicial or quasi-judicial.

51. Application of consideration “(a)”, above, suggests that the proceedings are judicial or quasi-judicial. The Hearing before Mr. Ferrier is made pursuant to section 83(17) of the *PSA*. The section is entitled “Hearings, procedure” and is found under Part V (“Complaints and Disciplinary Proceedings”) of the *PSA*. This wording of the title of the provision makes it clear that a hearing is contemplated. Additionally, the specific language of section 83(17) contemplates the board making a determination as to reasonableness based on a given set of

¹⁰ *Vancouver Sun (Re)*, 2004 SCC 43 at para 26

¹¹ *British Columbia (Attorney General) v British Columbia (Information & Privacy Commissioner)*, 2004 BCSC 1597

circumstances. This wording suggests a hearing-type process whereby facts are presented, positions are taken, and a decision is eventually made based on the facts and positions.

52. Further, application of consideration “(b)”, above, indicate that the proceedings are judicial or quasi-judicial: the decision or order will affect the rights and obligations of the parties involved as well as the public. To state the obvious first, the decision will affect the rights of the officers involved as it will determine whether they will face disciplinary proceedings under the *PSA*. Additionally, it will affect the rights of the First Nation Public Complainants. A person who makes a complaint to the OIPRD has a right to have that complaint investigated and a right to have it proceed to a hearing.¹² That right will, of course, be directly impacted by Mr. Ferrier’s final decision on the matter.
53. Furthermore, it will impact the media’s right to report on, and the public’s right to receive information relating to, the proceedings before Mr. Ferrier. As the Supreme Court of Canada found in *Vancouver Sun (Re)*:

The open court principle is inextricably linked to the freedom of expression protected by section 2(b) of the *Charter* and advances the core values therein. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions. Consequently, the open court principle is not to be lightly interfered with.¹³

54. Additionally, application of consideration “(c)”, above, indicates that the proceedings are judicial or quasi-judicial: the adversarial process is quite clearly involved.
55. Finally, application of consideration “(d)”, above, also indicates that the proceedings are judicial or quasi-judicial: there is an obligation on Mr. Ferrier, acting in the place of the

¹² *Stewart et al. v Office of the Independent Police Review Director et al.*, 2014 ONSC 6150 (CanLII) at para 8

¹³ *Vancouver Sun (Re)*, 2004 SCC 43 at para 26

board, to apply and consider substantive rules on a case by case basis. An application pursuant to section 83(17) of the *PSA* by definition entails a consideration of the particular circumstances of each individual case, and making a finding as to reasonableness based on those particular circumstances.

56. Thus, all of the factors considered above suggest that Mr. Ferrier is making a judicial or quasi-judicial decision.

Irreparable Harm

57. If CBC's Stay Application is not granted, the Hearing will proceed *in camera* before Mr. Ferrier. There will be no obligation to keep a record of the Hearing, nor to provide reasons for the decision reached at the Hearing. Additionally, and importantly, the news media will be excluded and denied their opportunity and right to report on the proceeding.
58. Given the significant national public attention on the TBPS and the TBPSB as a result of the OIPRD's systemic review and OCPC's investigation, as well as on the Stacy DeBungee death investigation and OIPRD Report, it is essential that the proceeding before Mr. Ferrier be open to the public. Public confidence in the TBPS has already been seriously compromised and will be compromised further if the Hearing ultimately proceeds behind closed doors.
59. A decision will be made with respect to whether or not disciplinary proceedings under the *PSA* can be commenced, and the public as well as the media will be denied their common law and statutory right to know what happened during the Hearing.
60. A secret Hearing hurts everyone: the First Nation Public Complainants, the community, and the general public have a considerable interest in this matter and a right to the details of the Hearing. If a stay of proceedings is not granted in order for the judicial review to be heard,

the rights of the First Nation Public Complainants and the public in general will suffer irreparable harm, as the Hearing will proceed in *in camera*.

61. The First Nation Public Complainants and the public should not be denied their right to access these proceedings, particularly in these circumstances. It is imperative that proceedings relating to police misconduct are open to the public at every stage. This is consistent with the underlying purposes of the *PSA* as articulated by Molloy J:

...[T]he underlying purpose of the [*PSA*] is to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police.¹⁴

The Balance of Convenience

62. Here, the balance of convenience favours the granting of a stay. If a stay is granted, the judicial review Application of the Decision can be heard on its merits before the Hearing proceeds. Following that, the Hearing can proceed without having caused prejudice to any party.
63. If a stay is refused, the public, the media and the First Nation Public Complainants will be denied of their right to be informed of the particulars of this proceeding. Additionally, judicial review of the Decision of Mr. Ferrier to hold the Hearing *in camera* will not be possible. As described in these submissions, Mr. Ferrier failed to properly consider the *Dagenais/Mentuck* lines of authority. This serious error warrants judicial review which can only happen if a stay of the Hearing is granted.


¹⁴ *Endicott v Independent Police Review Director*, 2013 ONSC 2046 (CanLII) at para 40. rev'd in part 2014 ONCA 363

PART IV – ORDER SOUGHT

64. It is respectfully requested by the First Nation Public Complainants that CBC's Application for a Stay be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 24th day of September 2018.


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SCHEDULE “A”

British Columbia (Attorney General) v British Columbia (Information & Privacy Commissioner), 2004 BCSC 1597

Canadian Broadcasting Corp. v The Queen, 2011 SCC 3

Endicott v Independent Police Review Director, 2013 ONSC 2046 (CanLII)

R v Canadian Broadcasting Corp., 2018 SCC 5 (CanLII)

Stewart et al. v Office of the Independent Police Review Director et al., 2014 ONSC 6150 (CanLII)

Toronto Star v AG Ontario, 2018 ONSC 2586

Vancouver Sun (Re), 2004 SCC 43

SCHEDULE "B"

Criminal Code R.S.C., 1985, c. C-36

Order denying access to information

487.3(1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

Justice to her informant and witnesses – public prosecutions

507(1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

Police Services Act, R.S.O. 1990, c. P.15

Meetings

35 (1) The board shall hold at least four meetings each year.

Proceedings open to the public

(3) Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines.

Exception

(4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

(a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or

- (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

APPENDIX A



Rainy River First Nations

Manitou Rapids

P.O. Box 450
Emo, Ontario P0W 1E0
Phone (807) 482-2479
Fax (807) 482-2603

SENT BY ELECTRONIC MAIL

April 26, 2018

Ms. Linda Lamoureux, Executive Chair

Ontario Civilian Police Commission
Suite 605, 250 Dundas Street West
Toronto, ON M7A 2T3

Dear Ms. Lamoureux,

Re: *Immediate Appointment of an Administrator for the Thunder Bay Police Services Board*

Further to the joint letter to you of May 29, 2017, we are writing to once again ask that the Ontario Civilian Police Commission ("the Commission") immediately appoint an administrator for the Thunder Bay Police Services Board ("TBPSB"). Rainy River First Nations ("RRFNs"), Grand Council Treaty #3 (GCT#3), Nishnawbe Aski Nation ("NAN") and the DeBungee family originally formally sought this action by letter of May 29, 2017 and, since then, matters have simply deteriorated further.

The Thunder Bay Police Services Board has now, in correspondence dated March 29, 2018, declared that it cannot fulfill its statutory obligations to determine extension issues around discipline charges against officers who the OIPRD have identified as warranting being charged. Counsel for the TBPSB, Robert Edwards, took the position that the Board would not hear any motion to extend the time to serve the notice of hearing on the named officers on the basis that the TBPSB believe that they are in a conflict of interest. In short, the TBPSB has once again simply refused to exercise any decision-making authority that it appropriately holds, hiding behind excuse after excuse and continuing to abdicate their responsibilities. Attached for your consideration is a copy of Mr. Edwards' correspondence.

On behalf of my community, and at the request of Brad DeBungee, I am once again urging that the OCPC take action and do its job as the overseer of police boards. In this letter we outline the latest failures of both the Thunder Bay Police Service ("TBPS") as well as the TBPSB, which clearly justify the immediate need for the appointment of an administrator:

- Despite substantiated allegations of neglect of duty and discreditable conduct against several TBPS officers, the TBPSB continues to refuse to exercise its statutory responsibilities of police oversight;

- Despite multiple calls for the resignation of TBPS Chief J.P. Levesque, and requests for the TBPSB to intervene and remove him, the TBPSB took no action and provided little more than a superficial comment on the issue;
- Rather than participating in the statutory procedures to allow this matter to move forward to disciplinary hearings for the named officers, the TBPSB is doing everything in its power to divest itself of the matter, stall the process, and distance itself from its statutory responsibilities, citing jurisdictional issues which are suspect at best;
- In the face of what should be considered a crisis in Thunder Bay policing, it is our information that one of the officers who would be subject to a disciplinary hearing as a result of his conduct in the investigation into the death of Stacy DeBungee, will be receiving a promotion in rank in the coming months; and
- The TBPSB continues to fail in fulfilling its statutory obligations to the people of Thunder Bay, to the point that immediate action from the Commission is required.

Background

The Office of the Independent Police Review Director ("OIPRD"), recently released its Investigative Report on the TBPS investigation into the death of Stacy DeBungee (the "OIPRD Report"). Considering the egregious misconduct substantiated in the OIPRD Report, the family of Mr. DeBungee and First Nations leaders convened a press conference on March 5, 2018. Together, we called for the resignation of Thunder Bay Police Chief J.P. Levesque. Failing that, we asked that the TBPSB intervene and remove Chief Levesque.

After more than two (2) weeks of silence, the TBPSB released the following statement through Board Chair Jackie Dojack:

"the board respects the right of anybody at any time to call for anybody's resignation, the board is not going to ask J.P. to resign"

The current investigation into the TBPSB was initiated because of serious concerns about police board governance in Thunder Bay, as specifically outlined in our letter of May 29, 2017, to the Commission. Amongst other things, this letter sought "the immediate appointment of an administrator (culturally competent in respect of Indigenous issues), to oversee the Board pursuant to s. 23(1)(4) of the *Police Services Act*."

In appointing Senator Murray Sinclair to investigate the matter, the Commission stated that if the investigation provided evidence that an administrator of the police services board was necessary, "**the Commission will not hesitate to act accordingly**". Although the investigation is not over, the evidence is mounting and the dysfunction surrounding the TBPSB is clear. Mr. Edwards' letter describing the latest exercise of the TBPSB is just further proof that the TBPSB is grossly incapable of gauging public concern and awareness of matters of such great magnitude, and is therefore entirely incapable of acting in the public interest. The time has come to stop waiting.

In Senator Sinclair's interim report, he noted that it "is trite to say that there are significant concerns in Thunder Bay about the manner in which police conduct death and missing person investigations of Indigenous persons." He noted that the highest rate of police-reported hate crime in census-recorded metropolitan areas of Canada in 2015 was in Thunder Bay, and further wrote that, "[c]learly, there are

profoundly serious concerns about police handling of death and missing persons' investigations in relation to Indigenous people in Thunder Bay and other acts of overt racism by members of the public."

At the time of Senator Sinclair's appointment, the TBPSB had just publicly denied that there were any concerns regarding systemic racism in Thunder Bay, and assured the public that there was no crisis in Thunder Bay. The TBPSB expressly disputed the legitimacy of the Indigenous perspective. As Chief Levesque was suspended pending the investigation of criminal charges against him, acting Chief Hauth stated that it was "business as usual" for the Thunder Bay police. Business continues as usual, the TBSPB sits in silence, and Chief Levesque continues to ineffectively manage his police force.

OIPRD Findings

The OIPRD found that there is overwhelming evidence to support the allegation that the TBPS prematurely concluded that Mr. DeBungee rolled into the river and drowned without external intervention. The OIPRD found it to be a reasonable inference that this premature conclusion may have been drawn because he was Indigenous.

OIPRD investigators concluded that the evidence demonstrated misconduct by TBPS officers. The OIPRD Report substantiated allegations of neglect of duty and discreditable conduct based on, *inter alia*, the following facts:

- Investigators prematurely concluded that the death was non-criminal. The available evidence did not support the conclusion that foul play had been excluded. This infected the entire approach to the minimal investigation which followed.
- No formal statements were taken from any of the individuals who were with the deceased shortly before his death. In fact, Detective Constable Whipple stated that there was no thought of bringing in those individuals for formal interviews.
- Two media releases were issued within 24 hours of the discovery of the deceased, and one was issued a mere 3 hours after the discovery. These media releases presupposed, even before the autopsy had been performed, that the death was non-criminal. The Ontario Provincial Police, who had also been reviewing the investigation, concluded that there was no basis at that stage to determine that the death was non-criminal.
- Investigating officers neglected to review ongoing occurrence reports in the investigative file. The report referred to this as "basic policing".
- Thunder Bay police did not take any video of the scene or any photographs of the body itself or the riverbank. No consideration was given to holding the scene until the autopsy had been conducted.
- TBPS efforts to contact a witness, who by some accounts was the last person known to be alone with the deceased, were sporadic and given the lowest priority.
- The matter was not dealt with as an investigation subject to major case management and it should have been. There appeared to be little or no formal process for how a lead investigator was assigned.
- Because of the premature determination that it was a non-suspicious death, no forensic examination whatsoever was conducted on the exhibits.

The OIPRD Report also noted the ongoing Inquest into the deaths of Seven First Nations Youths, most involving river deaths, at the time of the inadequate DeBungee investigation. At page 118, the OIPRD Report reads:

"...[o]ne would have reasonably expected that investigators would be particularly vigilant in ensuring that the investigation of the sudden death of an Indigenous man found in the river was thorough and responsive to the community's concerns. Unfortunately, the opposite was true here."

The OIPRD Report explicitly noted that it could be reasonably inferred that Thunder Bay police officers failed in their duties to investigate the death of Stacy DeBungee because he was Indigenous. Specifically:

"[t]he evidence overwhelmingly supports the inference that Detective Harrison and Detective Constable Whipple prematurely concluded that SD rolled into the river and drowned without any external intervention. It can also be reasonably inferred that this premature conclusion may have been drawn because the deceased was Indigenous."

Further, at page 124:

"it can reasonably be inferred that the investigating officers failed to treat or protect the deceased and his family equally and without discrimination based on the deceased's Indigenous status"

The OIPRD Report found that there:

"...appeared to be little or no formal process for how a lead investigator was assigned and very little supervision or oversight of the investigation thereafter. That reflected, among other things, a misconception of the nature of sudden death investigations and organizational deficiencies."

The OIPRD Report also found that "at the time of the investigation, TBPS did not have a formal review process for ongoing death investigations. That raised obvious systemic issues."

The OIPRD concluded that:

"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 OIPRD substantiated neglect of duty charges against three officers: Detective Shawn Harrison, Detective Constable Shawn Whipple, and Acting Inspector Susan Kaucharik.

Specifically, the OIPRD found that "Detective Harrison's decision not to meet with the private investigator further contributed to the family's reasonably held belief that the matter was not being taken sufficiently seriously." It also concluded that, "this was not a situation in which TBPS investigators faced non-cooperation when they interviewed Indigenous witnesses. Instead, they failed to follow up with identified witnesses in an adequate and timely way." The OIPRD confirmed that, "police must be proactive in building trust in relation to each investigation", but found that "little or none of that occurred [in this investigation]."

Robert Edwards March 29, 2018 Letter

On March 29, 2018, Robert Edwards, counsel for TBPSB, provided a letter to counsel for the parties involved in the s. 83(17) Application. The letter claimed that the TBPSB had become concerned as to whether the Application would place them in a position of a reasonable apprehension of bias, which would result in a loss of jurisdiction to hear the Application. Mr. Edwards then detailed his attempts to have both the OCPC and the OIPRD assume jurisdiction over the matter. Both bodies responded there was no authority that would allow them to do so.

In outlining the issue of whether the TBPSB must recuse itself on the grounds of bias, the letter states that “[t]he tribunal hearing this matter must be seen as completely impartial. Justice must be seen to be done.” It is more than ironic and perplexing that Mr. Edwards would claim that the TBPSB could not be seen as impartial due to the ongoing OCPC investigation, yet attempted to pass jurisdiction to both the OCPC and OIPRD, both of whom were, and still are, conducting investigations into the TBPS and TBPSB. If either body assumed jurisdiction it would be akin to an investigating officer acting as the presiding judge in a given matter. This would be wholly inappropriate and both the OCPC and OIPRD were correct in declining his request.

A further concern articulated in Mr. Edwards’ letter is that any decision the TBPSB would render regarding this matter would be inevitably subject to appeal and/or to judicial review. Apparently, in the mind of the TBPSB, if a decision it makes is potentially appealable, then it should not bother making the decision in the first place. That line of thought is both unprofessional and unacceptable for a body such as the TBPSB in light of their statutory authority and responsibilities.

In the long list of reasons Mr. Edwards puts forward to suggest the TBPSB should recuse itself, he conveniently fails to mention the statutory duties to provide adequate and effective police services in their municipality pursuant to s. 31(1) of the *PSA*, that the TBPSB must fulfil. The language of Mr. Edwards’ letter, and the fact that the TBPSB is going so far as to refuse to hear even a procedural matter in the form of the s. 83(17) Application, only serves to strengthen the evidence that the TBPSB is incapable of fulfilling its statutory obligations of police oversight.

At its most basic level, the investigations into both the TBPS and the TBPSB arose out of concerns that neither were capable or willing to perform their duties adequately. The position articulated in Mr. Edwards’ letter has shown once again that those concerns continue to be more than justified.

Immediate Action Required

Today, Chief Levesque is back at the helm of the TBPS, and the TBPSB remains confident in his performance despite the shocking details of the OIPRD Report. The most recent action, or more correctly inaction, of the TBPSB has proven that the appointment of an administrator is urgently needed.

Chief Levesque has taken no steps to see that the officers involved are disciplined. Nor has the board taken any steps to seek accountability. There has been no evidence of any operational or policy changes, or even any acknowledgement that such changes are necessary. It appears that the situation remains “business as usual”.

The TBPSB’s statement on Chief Levesque confirms that it remains unwilling or unable to take necessary steps to correct the significant problems identified by the OIPRD and in Senator Sinclair’s interim report.

It has become abundantly clear that the TBPSB will continue to deliver inadequate and ineffective services to Indigenous community members in Thunder Bay without external intervention. The TBPSB has done absolutely nothing in response to the mounting examples of chronic systemic issues within the TBPS, including a "failure of basic policing". We are at a loss to determine what else needs to happen before action is taken.

We respect that the ongoing investigation into the TBPSB has been a considerable task. We further acknowledge and appreciate that such investigations are an important means of addressing public concerns regarding the TBPS. However, there is now sufficient evidence that the status quo is dangerous to our community members and cannot be maintained while the investigation continues. The TBPSB has repeatedly shown that they are either incapable of fulfilling their obligations toward Indigenous community members or choose to blatantly disregard them. In either case, the overwhelming need for an administrator can no longer be ignored.

Section 23(1)(4) of the *Police Services Act* states:

23 (1) If the Commission is of the opinion, after holding a hearing, that a board or municipal police force has flagrantly or repeatedly failed to comply with prescribed standards of police services, the Commission may take any of the following measures or any combination of them:

...

4. Appointing an administrator to perform specified functions with respect to police matters in the municipality for a specified period.

We urge the OCPC to act and hold an immediate hearing to consider the appointment of an administrator. Our Indigenous community members deserve a police board that represents the public interest and considers us to be part of the public they represent. We look forward to discussing these issues with you at your earliest convenience.



Chief Robin McGinnis
Rainy River First Nations

c.c. Brad Debungee

Ogichidaa Francis Kavanaugh, Grand Council Treaty #3

Grand Chief Alvin Fiddler, Nishnawbe Aski Nation

Minister Marie-France Lalonde, Ministry of Community Safety and Correctional Services

Deputy Minister Matthew Torigian, Ministry of Community Safety and Correctional Services

Assistant Deputy Minister Stephen Beckett, Ministry of Community Safety and Correctional Services

Director Gerry McNeilly, Office of the Independent Police Review Director

Senator Murray Sinclair, Senate of Canada

Chair Jacqueline Dojack, Thunder Bay Police Services Board

Chief J.P. Levesque, Thunder Bay Police Service

APPENDIX B

Safety, Licensing Appeals and
Standards Tribunals Ontario
Ontario Civilian Police Commission

20 Dundas Street West
5th Floor, Suite 530
Toronto ON M5G 2C2
Tel.: 416-314-3004
Fax: 416 -314-0198
Toll Free Tel: 1 888 515-5005
Toll Free Fax: 1 888 311-7555
Website: www.slsto.gov.on.ca

Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario
**Commission civile de l'Ontario
sur la police**

20, rue Dundas Ouest
5e étage, Bureau 530
Toronto ON M5G 2C2
Tél. : 416-314-3004
Télec. : 416-314-0198
Sans frais Tél. : 1 888 515-5005
Sans frais Téléc : 1 888 311-7555
Site web: www.slsto.gov.on.ca



May 2, 2018

Chief Robin McGinnis
Rainy River First Nation
robin.mcginnis@bellnet.net

Via Email

Dear Chief McGinnis:

**Re: Immediate Appointment of an Administrator for the Thunder Bay Police
Services Board**

I write in response to your letter to me of April 26, 2018.

Subsequent to receipt of your letter, the Thunder Bay Police Services Board ("TBPSB") commenced an Application to the Superior Court of Justice for the appointment of a person or tribunal to exercise the powers ordinarily imposed on the TBPSB pursuant to Section 83(17) of the Police Services Act, R.S.O. 1990, c.P.15, as amended ("PSA").

In your letter, you indicate that the Ontario Civilian Police Commission ("Commission") was correct in declining the request of counsel for the TBPSB that it accept jurisdiction over the Section 83(17) Application.

In my letter of May 30, 2017 to your predecessor, Chief Jim Leonard, I indicated that the Commission had commenced an investigation pursuant to Section 25(1)(b) and (c) of the PSA in order to inquire into the manner in which the TBPSB has been providing oversight to the Thunder Bay Police Service. I anticipate receipt of the Report of that investigation on or before August 31, 2018.

The Section 83(17) Application is before the Superior Court of Justice, the investigation is ongoing. As such, the Commission is not in a position to hold a hearing under Section 23(1)(4) of the PSA to consider whether it would be appropriate to appoint an Administrator for the TBPSB.

I do not have contact information for Mr. Debungee, whom you copied in your letter. I would ask that you pass this response on to him. Thank you.

Please do not hesitate to contact me if you have any further concerns or questions.

Sincerely,



Linda P. Lamoureux
Executive Chair
Safety, Licensing Appeals and Standards Tribunals Ontario

cc.

Julian N. Falconer, Counsel to Rainy River First Nation, Nishnawbe Aski Nation,
Grand Council Treaty #3

Mr. Brad Debungee

Ogichidaa Francis Kavanaugh, Grand Council Treaty #3

Grand Chief Alvin Fiddler, Nishnawbe Aski Nation

Minister Marie-France Lalonde, Ministry of Community Safety and Correctional
Services

Deputy Minister Matthew Torigian, Ministry of Community Safety and Correctional
Services

Assistant Deputy Minister Stephen Beckett, Ministry of Community Safety and
Correctional Services

Director Gerry McNeilly, Office of the Independent Police Review Director

Senator Murray Sinclair

Chair Jacqueline Dojack, Thunder Bay Police Services Board

Acting Chief of Police Sylvie Hauth, Thunder Bay Police Service

Robert Edwards, counsel to Thunder Bay Police Services Board

APPENDIX C

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

*Ontario Parole Board
Ontario Civilian Police Commission
Licence Appeal Tribunal
Fire Safety Commission
Animal Care Review Board*

Mailing Address: 77 Wellesley St. W.,
Box 250, Toronto ON M7A 1N3

In-Person Service: 20 Dundas St. W.,
Suite 530, Toronto ON M5G 2C2
Tel.: 416-327-6500
Toll Free Tel: 1-844-242-0608
TTY: 416-916-0162
1-844-650-2819
Fax: 416-327-6379
Website: www.slsto-tsapno.gov.on.ca

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

*Commission ontarienne des libérations
conditionnelles
Commission civile de l'Ontario sur la police
Tribunal d'appel en matière de permis
Commission de la sécurité-incendie
Commission d'étude des soins aux animaux*

Adresse postale : 77, rue Wellesley Ouest,
Boîte n° 250, Toronto ON M7A 1N3

Adresse municipale : 20, rue Dundas Ouest,
Bureau 530, Toronto ON M5G 2C2
Tél: 416-327-6500
Sans frais Tél: 1-844-242-0608
TTY: 416-916-0162
1-844-650-2819
Téléc.: 416-327-6379
Site web: www.slsto-tsapno.gov.on.ca



August 27, 2018

Grand Chief Alvin Fiddler
Nishnawbe Aski Nation
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Ogichidaa Francis Kavanaugh
Grand Council Treaty #3
grand.chief@treaty3.ca

Chief Robin McGinnis
Rainy River First Nation
robin.mcginis@bellnet.ca

Via email

Dear Grand Chief Fiddler, Ogichidaa Kavanaugh and Chief McGinnis:

RE: Thunder Bay Police Service Board – Investigation

While the Ontario Civilian Police Commission (OCPC) expected to receive the Honourable Murray Sinclair's investigative report by August 31, 2018, the Senator has indicated that an extension will be required. The OCPC expects to receive the report by the fall.

Once the report is received, the OCPC will consider its findings and determine next steps. The report will be formatted and translated, with an anticipated public release by the end of the year.

Please note that further details will be shared with you in October when more information becomes available. I can assure you that the Senator's team is making every effort to proceed as quickly as possible while ensuring a thorough investigation.

I have enclosed for your reference, a copy of a press release to be sent by end of day tomorrow and later uploaded to the OCPC's website at:

<https://slasto-tsapno.gov.on.ca/ocpc-ccop/en/investigative-division/reports/>

Sincerely,

A handwritten signature in cursive script, reading "Linda P. Lamoureux".

Linda P. Lamoureux
Executive Chair
Safety, Licensing Appeals and Standards Tribunals Ontario

Encl. Press Release – Investigation – Thunder Bay Police Services Board

cc.

Hon. Murray Sinclair
Independent Investigator

-and-

CANADIAN BROADCASTING CORPORATION

Applicant

THUNDER BAY POLICE SERVICES BOARD

Respondent

Court File No: 598/18

ONTARIO
SUPERIOR COURT OF JUSTICE
-DIVISIONAL COURT-

Proceedings commenced in **Thunder Bay**

**MEMORANDUM OF FACT AND LAW OF THE
FIRST NATION PUBLIC COMPLAINANTS**

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