

Court of Appeal File No.: **M50074**
Divisional Court File No.: DC-18-018-JR

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CANADIAN BROADCASTING CORPORATION

Applicant
(Respondent on Motion)

- and -

**LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES
OF THE THUNDER BAY POLICE SERVICES BOARD, THE CHIEF OF POLICE OF
THE THUNDER BAY POLICE SERVICE, THE INDEPENDENT POLICE REVIEW
DIRECTOR, AND THE RESPONDENT OFFICERS**

Respondents
(Respondents on Motion)

- and -

THE FIRST NATION PUBLIC COMPLAINANTS

Respondent
(Moving Party)

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE APPELLANT, THE FIRST NATIONS PUBLIC COMPLAINANTS, WILL BRING
A MOTION in writing to the Court of Appeal for Ontario on such a date and in such a manner as
may be directed by the Court at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard in writing pursuant to Rule 61.03.1(1) of the *Rules of Civil
Procedure*.

THE MOTION IS FOR:

- a) an Order granting leave to appeal the decision of the Divisional Court released on January 7, 2019, comprising of the panel of Justices Warkentin R.S.J, Aitken, and Mulligan JJ, dismissing the application for judicial review brought by the Canadian Broadcasting Corporation;
- b) leave to extend the time for service and filing of the notice of motion for leave to appeal, if necessary;
- c) if costs are sought by any of the responding parties, the costs of this motion to be fixed by the Court;
- d) an order that the appeal be heard on an expedited basis; and
- e) such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. Section 6(1)(a) of the *Courts of Justice Act*, Rule 61.03.1 of the *Rules of Civil Procedure*, and section 6 of the *Judicial Review Procedure Act*, RSO 1990, c.J.1, as amended.
2. The proposed appeal is *prima facie* meritorious and raises issues of significance to the parties and to the public as a whole. The proposed appeal addresses important questions of administrative and constitutional law including whether a substitute decision maker presiding over a statutorily open hearing must apply the *Dagenais/Mentuck* test in order to determine whether the hearing should be held *in camera*, and further whether that decision maker should be afforded the same level of deference as the administrative body despite not having the same level of knowledge and expertise.
3. The proposed appeal also raises important common law questions as well as constitutional right of access to the Courts.

Background

4. The moving party, The First Nation Public Complainants, were respondents in an application for judicial review brought in the Divisional Court by the Canadian Broadcasting Corporation (the “CBC”) for an order quashing the decision of the Respondent, Lee Ferrier, Q.C., Exercising Powers and Duties of the Thunder Bay Police Services Board (“Ferrier”) that the application for an extension of time in which to serve a notice of disciplinary hearing on the Respondent Officers under s. 83(17) of the *Police Services Act*, R.S.O. 1990, c. P. 15 (the “PSA”) would be determined *in camera*.
5. Section 35(3) of the *PSA* provides that meetings and hearings conducted by the board “shall be open to the public” unless the board finds that one of the exceptions contained in the statutes applies. In order to meet the exceptions, it is incumbent on the board to conduct a balancing test to determine whether the permissive exclusionary provision applies in this particular circumstance – an exercise nearly identical to that which a judge would be asked to undertake in a determination of the open court principle.
6. On March 18, 2016, the Respondent, Office of the Independent Police Review Director (“OIPRD”) received complaints from the First Nation Public Complainants relating to the Thunder Bay Police Service’s (“TBPS”) investigation into the death of Stacy DeBungee. Within hours of the discovery of Mr. DeBungee’s body, the TBPS advised in a media release that the death was not suspicious.
7. Mr. DeBungee’s death and the subsequent investigation added to a crisis of confidence on the part of the TBPS to thoroughly investigate the drownings of Indigenous people in Thunder Bay, and statements that “no foul play” was involved without a proper

investigation were a common occurrence within the TBPS and a pattern of racism towards Indigenous people.

8. On April 22, 2016, the OIPRD began its own investigation into the TBPS' handling of Mr. DeBungee's death, and on November 3, 2016, further announced the terms of reference for a systemic review into the TBPS' policing of Indigenous people.
9. On February 15, 2018, the OIPRD issued an investigative report (the "Report") in which it found that there was sufficient evidence to believe that the Respondent Officers had committed serious misconduct in their investigation of Mr. DeBungee's death. Given that more than six (6) months had elapsed since the day on which the OIPRD had retained the complaint however, the OIPRD directed the Respondent, Chief of Police of the TBPS, to bring an extension application to the Thunder Bay Police Services Board (the "TBPSB") under section 83(17) of the *PSA*, seeking approval to serve the notice of hearing on the Respondent Officers. Without the TBPSB's permission, no disciplinary action could be taken against the Respondent Officers.
10. In light of the ongoing systemic review by the Ontario Civilian Police Commission into the TBPSB, the OIPRD investigation into the TBPS, the TBPSB determined that deciding the extension application would "give rise to a reasonable apprehension of bias".
11. On July 25, 2018, the TBPSB's application requesting the appointment of a disinterested person under section 16 of the *Public Officer's Act*, R.S.O. 1990, c. P. 45, to hear the

extension application in place of the TBPSB, resulted in the appointment of Mr. Ferrier to exercise the powers and duties of the TBPSB.

12. On July 27, 2018, Mr. Ferrier sought the position of the parties as to whether the hearing of the extension application should be *in camera* in view of the wording of the *PSA*, specifically sections 35(3) and 35(4). Counsel for the TBPS, the OIPRD and the Respondent Officers advised Mr. Ferrier that the hearing should be held *in camera*, given that it was “general practice” in Thunder Bay that extension applications be conducted *in camera*.
13. The First Nation Public Complainants however, were not in agreement, and as such, Mr. Ferrier directed the parties to provide written submissions on the issue of whether the extension application should be held *in camera*. In light of the importance of the issues, the First Nation Public Complainants advised various media outlets that the hearing would likely be held *in camera*, and CBC subsequently advised Mr. Ferrier of its interest in being heard on this issue.
14. CBC provided its written submissions prior to the deadline of September 19, 2018, and on September 20, 2018, Mr. Ferrier released his decision that the extension application would be heard *in camera* in which he failed to appropriately apply the balancing test for closed proceedings.
15. On that date, Mr. Ferrier adjourned the hearing of the extension application scheduled for the following day to allow CBC sufficient time to seek a stay of the hearing while it brought an application for judicial review of Mr. Ferrier’s decision.

21. The Divisional Court erred in fact and law in concluding that the decision to be made on the extension application is not judicial or quasi-judicial. Further the Divisional Court erred in finding that Mr. Ferrier was not required to apply the *Dagenais/Mentuck* to determining whether or not to close a statutorily open proceeding.
22. The Divisional Court erred in law in concluding that the standard of review was reasonableness:
 - a. Mr. Ferrier's decision directly implicated section 2(b) of the *Canadian Charter of Rights and Freedoms*. The proper standard of review for such a decision is correctness.
 - b. The issue for the Divisional Court was whether Mr. Ferrier had failed to apply the correct legal test in the circumstances of his decision. This is question of law which is subject to the correctness standard.
23. The Divisional Court erred in the degree of deference afforded to Mr. Ferrier's decision on the basis that he was interpreting his home statute:
 - a. Mr. Ferrier's finding that *Dagenais/Mentuck* did not apply to him was not a question relating to the interpretation of his home statute, and was instead a legal finding of general application which ought to be reviewed on a standard of correctness; and
 - b. Mr. Ferrier, a retired judge appointed to fulfil a discrete function in lieu of the board, should not be afforded the same deference as ought to be afforded to the TBPSB in interpreting its home statute generally.

24. The Divisional Court erred in misapprehending and/or failing to fully appreciate and consider the uniqueness and relevance of the social context and public interest in this matter. This error:
- a. Caused the Court to have an unreasonably narrow view of the nature/circumstances of the decision being reviewed; and
 - b. Tainted the Court's consideration of section 35(4)(b) of the *Police Services Act* ("PSA") as well as the ultimate decision reached by the Court.
25. The Divisional Court erred in fact and in law by misapprehending the wording and effect of sections 68 and 95 of the *PSA*, and specifically as related to the First Nation Public Complainants' duty to keep the OIPRD report confidential.

The Test For Leave Is Met

26. The Divisional Court was sitting as a court of original jurisdiction on the judicial review application, which favours granting leave.
27. The proposed appeal involves ss. 35 and 83 of the *PSA* and the proper constitutional test to be applied in closing statutorily open Police Service Board hearings.
28. The proposed appeal involves the general principle of the test to be applied when a statutorily open hearing is to be closed to the public. As such, there is important public interest in the question of when and how the *Dagenais/Mentuck* test applies to decision makers when the decisions to be made will close statutorily open proceedings. Further, whether a substitute decision maker is entitled to the same deference as the tribunal he/she replaces is of great public importance, especially in light of the circumstances surrounding the death of Mr. DeBungee.
29. The common law constitutional right of access to the Courts.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. The record before the Divisional Court in Court File No.: DC-18-018-JR;
2. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: January 22, 2019

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Court File No: DC-18-018-JR
**LEE FERRIER, Q.C., EXERCISING POWERS AND DUTIES
OF THE THUNDER BAY POLICE SERVICES BOARD et al.**
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PROCEEDINGS COMMENCED AT TORONTO

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