COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Broadcasting Corporation v. Ferrier, 2019 ONCA 1025
DATE: 20191227
DOCKET: C66995 & C66998

Strathy C.J.O., Doherty and Sharpe JJ.A.

BETWEEN

Canadian Broadcasting Corporation

Applicant
(Appellant in Appeal)

and

Lee Ferrier, Q.C., Exercising powers and duties of the Thunder Bay Police Services Board, the Independent Police Review Director, the First Nation Public Complainants, the Chief of Police of the Thunder Bay Police Service, and the Respondent Officers

Respondents
(Respondents in Appeal except the First Nation Public Complainants)

Ryder L. Gilliland and Agatha Wong, for the appellant Canadian Broadcasting Corporation

Julian N. Falconer and Mary (Molly) Churchill, for the appellants, the First Nation Public Complainants

Joanne E. Mulcahy, for the Respondent Officers

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

Jean C.H. Iu and Pamela Stephenson Welch, for the respondent the Independent Police Review Director

David Migicovsky, for the respondent Lee Ferrier, Q.C., exercising powers and duties of the Thunder Bay Police Services Board

Daniel Guttman, for the intervener the Attorney General (Ontario)

Heard: October 31, 2019

On appeal from the judgment of the Divisional Court (Bonnie R. Warkentin R.S.J., Catherine D. Aitken, and Gregory M. Mulligan JJ.) dated January 7, 2019, with reasons reported at 2019 ONSC 34; 53 Admin. L.R. (6th) 236.

Sharpe J.A.:

[1] This appeal raises an important issue regarding the openness of police board hearings. The case involves the tragic death of an Indigenous man and allegations that the members of the Thunder Bay Police Service (the "TBPS") were guilty of misconduct in relation to their investigation of his death. Within hours of the discovery of the body, they concluded that the death was not suspicious, and they failed to conduct any further investigation. The complaint that they were guilty of misconduct forms part of a much larger pattern of concern regarding the conduct of the TBPS in relation to the Indigenous community.

[2] Because it took longer than six months for the Ontario Independent Police Review Director (the "OIPRD") to report that there were reasonable grounds to believe that the officers were guilty of misconduct, it was necessary to ask the TBPS Board for an extension before a disciplinary hearing could be commenced.

[3] The *Police Services Act*, R.S.O. 1990, c. P.15, provides that subject to certain exceptions, police services board hearings are presumptively open to the public. The decision maker, a retired judge appointed to make the decision the

TBPS Board would ordinary make, entertained submissions and ordered that hearing would be closed.

[4] The Canadian Broadcasting Corporation (the “CBC”) and the Complainants appeal the order of the Divisional Court refusing to interfere with the decision, arguing that both the Divisional Court and the decision maker failed to pay adequate attention to the s. 2(b) *Charter* right to freedom of expression by failing to require an open hearing.

[5] For the following reasons, I would allow the appeal, set aside the judgment of the Divisional Court, quash the decision ordering a closed hearing and remit the matter for reconsideration in the light of these reasons.

A. BACKGROUND

[6] The body of Stacy DeBungee, an Indigenous man, was discovered in the McIntyre River in Thunder Bay on October 19, 2015. Within hours, the TBPS advised that the death was not suspicious. The two Complainants, Brad DeBungee, Stacy’s brother, and Chief Jim Leonard, Rainy River First Nations, asked the OIPRD to investigate allegations of misconduct against the officers who had conducted the investigation and to undertake a systemic review of the relationship between First Nations peoples and the TBPS.

[7] On April 22, 2016, the OIPRD decided to undertake an investigation into the handling of the DeBungee death. Under the *Police Services Act,* this is referred to

as the day that the complaint was “retained” by the OIPRD. On November 3, 2016, the OIPRD announced terms of reference for a systemic review into the TBPS policing of First Nations peoples. The OIPRD report issued on February 15, 2018 found that there was sufficient evidence to believe, on reasonable grounds, that the officers had committed misconduct in their investigation of Stacy DeBungee’s death.

[8] Because more than six months had elapsed from the date the complaint was retained, no notice of hearing to consider the complaint and disciplinary action could be served unless the TBPS granted an extension on the ground that the delay in serving the notice was reasonable: *Police Services Act*, at s. 83(17). The OIPRD directed the Chief of the TBPS to bring an extension application to the TBPS Board.

[9] On account of the ongoing OIPRD systemic review of the TBPS’s relationship with the Indigenous community, the Board was concerned about potential bias allegations. Accordingly, it sought the appointment of a “disinterested person” under the *Public Officers Act*, R.S.O. 1990, c.P.45, s. 16, to hear the extension application in its place. The Superior Court appointed a retired judge, the Honourable Lee Ferrier, Q.C., to act as the substitute decision maker to consider and exercise the Board’s powers in relation to the extension.

[10] The parties at the extension application hearing included the Chief of Police, the OIPRD, the officers and the Complainants. The Complainants had standing to make and receive submissions.

[11] The *Police Services Act*, at s. 35(3), provides that police board meetings and hearings are presumptively open:

> 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.

[12] Section 35(4) allows the board to hold a closed meeting and defines the circumstances when that may be done:

> (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.

[13] The decision maker sought the views of the parties as to whether the hearing of the extension application should be *in camera*. Counsel for the Chief of Police, the OIPRD and the officers asked that the hearing be closed. Counsel for the

Complainants advised that his clients sought an open hearing. The decision maker asked for written submissions. Counsel for the Complainants notified the CBC, and the CBC advised the decision maker of its interest in being heard on the *in camera* issue. The decision maker allowed the CBC to make written submissions.

[14] The CBC and the Complainants submitted that an open hearing was required by s. 2(b) of the *Charter*:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

[15] The CBC and the Complainants argued that principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck,* 2001 SCC 76, [2001] 3 S.C.R. 442, (the "*Dagenais/Mentuck*" test) applied. This test applies to discretionary decisions limiting freedom of the press in relation to court proceedings. As restated in *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 26, and explained by this court in *R. v. Canadian Broadcasting Corporation,* 2010 ONCA 726, 102 O.R. (3d) 673, at para. 20, the *Dagenais/Mentuck* principle, is as follows:

> Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice

> because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

B. DECISION ORDERING A CLOSED HEARING

[16] The decision maker cited a Divisional Court decision for the proposition that the consideration of a request for an extension under s. 83(17) of the *Police Services Act* is administrative in nature and that procedural fairness and natural justice do not always require a police services board to hold a public hearing. He also noted that the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, does not apply to a Board meeting to consider an extension. The decision maker then cited a series of decisions and Board orders to support the proposition that employment and disciplinary matters qualify as “intimate … personal matters” under s. 35(4)(b) of the *Police Services Act,* noting that investigations of conduct undertaken by the OIPRD are confidential pursuant to s. 95. The decision maker found that if the investigative report completed by the OIPRD in this case was made public, it could taint the witnesses and result in negative stigma for the officers involved. He suggested that as the extension application hearing precedes the commencement of proceedings, it was akin to the swearing of an information or a *pre-enquete* in criminal proceedings, both of which are held *in camera*.

[17] For two reasons, the decision maker rejected the submission that the *Dagenais/Mentuck* test applies. First, the proceeding to consider the reasonableness of the delay was administrative as opposed to judicial or quasi-judicial and the *Dagenais/Mentuck* test applies only to judicial or quasi-judicial proceedings. Second, s. 35(4) lays out a test for determining whether to conduct a public or closed proceeding and *Dagenais/Mentuck* did not supersede the prescribed statutory test. Finally, the decision maker concluded that, although the investigative report had been made public by the Complainants, the hearing should be held *in camera* in order to ensure the integrity of the proceedings.

C. DIVISIONAL COURT: INTERIM INJUNCTION DECISION (2018 ONSC 5872)

[18] The CBC sought an interim injunction to enjoin the decision maker from proceeding with the *in camera* hearing pending consideration of the CBC's application to the Divisional Court for judicial review.

[19] The motion judge, who is based in Thunder Bay, granted the interim injunction. She found that there was a serious question to be tried as "it is important for the court to consider the extent to which the public can expect openness in administrative decision-making" (at para. 48). The question of whether the *Dagenais/Mentuck* test should apply in the context was an important issue that required the court's attention (at para. 43). The motion judge found that given the context in which the case arose – allegations of racist policing practices relating to

Indigenous peoples – the need for transparency in the complaint procedure was heightened (at paras. 48-49). She also found that as the OIPRD report had already been made public, there was “no evidence that intimate financial or personal matters may be disclosed on an extension application” (at para. 40).

[20] The motion judge found that the CBC and the First Nations community would suffer irreparable harm if a stay were not granted because, regardless of whether an extension is granted or not, an *in camera* hearing would deny the public their right to understand the process (at para. 60).

[21] Finally, the motion judge held that “the balance of convenience favours transparency in the circumstances of this case where racist policing is alleged” (at para. 66).

D. DIVISIONAL COURT: JUDICIAL REVIEW (2019 ONSC 34; 53 ADMIN. L.R. (6TH) 236)

[22] The Divisional Court identified the sole issue arising on the CBC’s application for judicial review as whether the decision maker erred by not applying the *Dagenais/Mentuck* test to the question of whether the extension application should be heard *in camera* (at para. 23). The Complainants, the officers and the Chief of Police were added as respondents as they had taken part in the proceedings before the decision maker. As an interested party, the OIPRD was also added as a respondent

[23] The court took note of the social context surrounding the dispute; namely, that there is a "very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist" (at para. 25). However, the court held that, despite this context and the fact that the community "has a strong interest in the circumstances surrounding the death of Stacy DeBungee and in the TBPS's investigation of his death," it is important to "not lose sight of the reality that the extension application is being determined in the context of possible disciplinary proceedings against employees" (at paras. 29-33). The level of public concern should not change "the nature of the decision-making process or the nature of the role being undertaken by [the decision maker]" (at para. 33).

[24] The court found that the applicable standard of review was reasonableness. The case law established that the function of the Board under s. 83(17) of the *Police Services Act* is not judicial or quasi-judicial but rather administrative and procedural in nature. The case law also established that the standard of review for the Board's decision on an extension application is reasonableness. The court found that the reasonableness standard was supported by the Supreme Court of Canada's decision in *Doré v. Barreau du Québec,* 2012 SCC 12, [2012] 1 S.C.R. 395.

[25] The Divisional Court held that neither the open court principle nor the *Dagenais/Mentuck* test applied because the extension hearing was not a judicial

or quasi-judicial proceeding. The *Dagenais/Mentuck* test was also excluded as the *Police Services Act*, ss. 35(3) and (4) set out a specific statutory test for how to address the question of whether a hearing is to be open to the public. As the statute itself laid out the "balancing act to be undertaken and there is no ambiguity in the legislative provisions", there was no need for the *Dagenais/Mentuck* test to apply (at paras. 52-53).

[26] The Divisional Court concluded that the decision was both reasonable and correct (at para. 60). He was transparent in his decision-making process, his reasons were clear and intelligible, he adequately justified his decision, and he considered the important public interest at play.

E. ISSUES

[27] The following issues arise on the Complainants' and the CBC's appeal to this court:

1. What is the appropriate standard of review?
2. Does the decision ordering a closed hearing satisfy the applicable standard of review?
3. Should the Complainants' fresh evidence motion be granted?
4. If the appeal is allowed, what is the appropriate remedy?

F. ANALYSIS

(1) What is the appropriate standard of review?

[28] As an appellate court hearing an appeal from a judgment refusing judicial review, the question for us to decide is "whether the court below identified the appropriate standard of review and applied it correctly": *Canada Revenue Agency v. Telfer,* 2009 FCA 23, 386 N.R. 212, at para. 18.

[29] This appeal had been argued and a complete draft of these reasons had been written before the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 modifying standard of review analysis. As I will explain, it is my view that *Vavilov* confirms that the appropriate standard of review is correctness. Moreover, even if the appropriate standard of review were reasonableness, *Vavilov* confirms that the decision to hold a closed hearing was unreasonable.

[30] The decision to hold a closed hearing, as explained by the Divisional Court, would ordinarily attract the deferential "reasonableness" standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[31] I note that in oral argument, the Complainants withdrew the submission in their factum that the standard of review was altered by the fact that the decision was that of a substitute decision maker without the expertise of a police services

board. In any event, *Vavilov*, at para. 30, holds that expertise is no longer a factor to be considered when determining the appropriate standard of review.

[32] In my respectful view, the Divisional Court failed to recognize that the attack on the decision focussed on the refusal to apply the *Dagenais/Mentuck* test when concluding that the extension hearing should be closed. The challenged decision was not, as the Divisional Court suggested, a decision under s. 83(17) whether to grant an extension. Rather, it was a decision under s. 35(4) whether to hold a closed hearing. The appellants argued that that decision could only be made if the *Charter* rights to freedom of expression and freedom of the press were considered. They argued that the decision maker was wrong to conclude that the exercise of his discretion was governed solely by the terms of s. 35(4) and to refuse to take those *Charter* rights into accounts.

[33] I agree with the appellants' submission that the decision that the *Dagenais/Mentuck* test does not apply is reviewable on a correctness standard of review.

[34] If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of advocates* requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom

of expression. Similarly, in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry,* 2007 ONCA 20, 278 D.L.R. (4th) 550, the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

[35] On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E.,* Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' … uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted…where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

[36] The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a whole…respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".

[37] The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.

[38] I refer here to a passage in *Episcopal* which, in my view, has a direct bearing on this issue. In that case, the inquiry commissioner applied the *Dagenais/Mentuck* test when declining to order an *in camera* hearing. This court held that his decision was reviewable on a reasonableness standard because he did consider the impact

of the *Charter* right on the decision he had to make. However, we noted, at para. 36, that in *Dagenais* itself, the judge who made the challenged decision did not have available the new test enunciated when the case went to the Supreme Court. That meant that his "failure to arrive at a result that could be supported under the new test … amount[ed] to an error of law", reviewable on a standard of correctness. The same applies here. As I will explain, the decision maker did not have the benefit the decision of this court in *Langenfeld v. Toronto Police Services Board,* 2019 ONCA 716, 437 D.L.R. (4th) 614, an authority that bears directly upon the discretionary decision he was asked to make.

(2) Does the decision ordering a closed hearing satisfy the applicable standard of review?

[39] The appellants submit that the decision maker erred by concluding that the *Dagenais/Mentuck* test did not apply to the s. 35(4) decision whether to hold an open or closed extension hearing. They submit that *Dagenais/Mentuck* establishes a general standard that applies to all judicial, quasi-judicial and administrative decisions, and that it is not ousted by statutory provisions such as s. 35(4) that prescribe a specific test to determine whether a meeting should be open or closed. They urge us to take a contextual approach and to recognize the paramount importance of openness in the circumstances of this case. The issues surrounding allegations of racism and mistreatment on the part of the TBPS towards the

Indigenous community have attracted wide attention and the appellants assert that it is of utmost importance that the s. 83(17) extension hearing be open.

[40] The appellants also rely heavily on the recent decision of this court in *Langenfeld*, delivered after the decision ordering a closed hearing was made and after the Divisional Court dismissed the application for judicial review.

[41] The respondents submit that *Dagenais/Mentuck* test only applies to judicial or quasi-judicial proceedings and that a s. 83(17) extension hearing is administrative in nature. Supported by the intervener, the Attorney General of Ontario, they also submit that as the appellants did not challenge the validity of s. 35(4), they cannot use the *Dagenais/Mentuck* test to, in effect, re-write that provision to alter the test applicable to a s. 83(17) extension hearing.

[42] I turn first to the question of whether the *Dagenais/Mentuck* test applies to a s. 83(17) hearing.

[43] *Dagenais* and *Mentuck* hold that the *Charter's* s. 2(b) guarantee of freedom of expression and freedom of the press fortifies the common law open court principle. "[T]he presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society". Closed proceedings can only be ordered upon "a convincing evidentiary basis" that such an order "is necessary in order to prevent a serious risk to the proper administration of justice": *Mentuck*, at paras. 39 and 32.

[44] The respondents rely on a strong line of authority for the proposition that a s. 83(17) extension hearing is an administrative rather than judicial or quasi-judicial matter. They point out that while the procedural protections of the *Statutory Powers Procedure Act* apply when a police services board is conducting a disciplinary hearing, the Act is explicitly excluded when a board considers a request for s. 87(17) extension: *Police Services Act*, at s. 37.

[45] In *Forestall v. Toronto Police Services Board* (2007), 228 O.A.C. 202 (Div. Ct.), the Divisional Court held, at para. 44, that as an extension hearing does not determine the merits of allegations or impose discipline, the decision is "administrative in nature", purely procedural, and, at para. 53, that while "some degree of procedural fairness is required", the Board is "not required to hold a judicial-type of hearing" and that only "minimal rights of procedural fairness", including notice, disclosure, and an opportunity to respond, apply. Similarly, in *Ackerman v. Ontario Provincial Police Service*, 2010 ONSC 910, 259 O.A.C. 163 (Div. Ct.), the court held that a decision to allow an extension is "clearly interlocutory" as all that has been decided is that it is "reasonable to delay service of the notice of hearing" (at para. 20). There has been no determination of the officer's rights. The Board is "exercising a procedural, administrative function in extending the time for service of the notice" (at para. 21). In its reasons, the Divisional Court cited a number of other decisions to the same effect: *Coombs v. Toronto (Metropolitan) Police Services Board,* [1997] O.J. No. 5260 (Div. Ct.);

Payne v. Peel (Regional Municipality) Police Services Board (2003), 168 O.A.C. 69 (Div. Ct.); *Figueiras v. (York) Police Services Board,* 2013 ONSC 7419, 317 O.A.C. 179 (Div. Ct.).

[46] The appellants do not suggest that these cases were wrongly decided or seriously challenge the characterization of a s. 83(17) extension hearing as being administrative and procedural in nature. However, the appellants urge us to hold that *Dagenais/Mentuck* applies to the meetings of all public institutions and therefore, even if the s. 83(17) extension hearing is characterized as administrative in nature, the TBPS Board cannot escape its reach.

[47] In my view, to accept that submission would represent a significant expansion of the reach of the *Dagenais/Mentuck* test beyond judicial and quasi-judicial decisions, in a manner not supported by authority.

[48] The *Dagenais/Mentuck* test evolved in relation to discretionary judicial decisions in criminal proceedings. As the Supreme Court stated in *Toronto Star Newspapers Ltd. v. Ontario*, at para. 7: the *Dagenais/Mentuck* test applies "to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings" (italics in original, underlining added). The test was extended to civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, but civil proceedings are judicial in nature.

[49] The CBC relies on the application of the *Dagenais/Mentuck* test in relation to a commission of inquiry: *Episcopal.* However, in *Episcopal*, the applicability of the *Dagenais/Mentuck* test was assumed by the inquiry commissioner and not challenged in this court. That is hardly surprising. The public hearing and fact-finding phase of a commission of inquiry "may well have an adverse effect upon a witness or a party to the inquiry" and although the findings of the commissioner do not result on penal or civil liability, "procedural fairness is essential": *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System*), [1997] 3 S.C.R. 440, at para. 55. The applicability of the *Dagenais/Mentuck* test in *Episcopal* also fits with case law finding commissions of inquiry to be quasi-judicial proceedings: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner*, 2004 BCSC 1597, 34 B.C.L.R. (4th) 298, at paras. 48-72.

[50] The appellants also rely upon the application of *Dagenais/Mentuck* by some administrative tribunals and professional discipline bodies. In my view, those cases are also distinguishable as they deal with proceedings classified as quasi-judicial in nature. For example, *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2003), 180 O.A.C. 151 (Div. Ct.), dealt with quasi-judicial a proceeding to which the *Statutory Powers Procedure Act* applied. As I have noted, that Act does not apply to police services board meetings to consider s. 83(17) extension requests. *Southam Inc. v. Canada (Attorney General)* (1997), 36 O.R.

(3d) 721, and *Canadian Broadcasting Corp. v. Summerside (City of)* (1999), 170 D.L.R. (4th) 731 (P.E.I. Sup. Ct.), dealt with police discipline proceedings at the stage of the actual hearing which, again, brings them into the quasi-judicial category.

[51] The appellants also rely on *Toronto Star v. AG Ontario,* 2018 ONSC 2586, 421 D.L.R. (4th) 687, striking down as an infringement of s. 2(b) the application of the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31 ("FIPPA") to the adjudicative records of thirteen administrative tribunals. Those tribunals were subject to the *Statutory Powers Procedure Act* and exercised quasi-judicial powers. The adjudicative records included: documents by which proceedings were commenced, notices of hearing, interlocutory orders made by the tribunal, documentary evidence filed with the tribunal, transcripts of evidence and reasons for decision. The court held that the open court principle and the right to freedom of expression guaranteed by s. 2(b) applied to these adjudicative records and that the restrictions imposed by FIPPA on access could not be justified as a reasonable limit under s. 1. While the case represents a strong statement on the need for openness in proceedings before quasi-judicial administrative tribunals, it does not apply here for the same reason I have distinguished the cases discussed above: it deals with quasi-judicial proceedings and the case before us does not.

[52] I conclude that the decision maker did not err when he found that the *Dagenais/Mentuck* test did not apply to the decision he had to make under s. 35(4).

[53] However, that does not end the matter. The *Dagenais/Mentuck* test does not exhaustively define the application of the s. 2(b) right to freedom of expression and freedom of the press in the context of this case. This court's decision in *Langenfeld* deals directly with the issue we must decide, namely, the application of 2(b) to administrative meetings of police services boards.

[54] Regrettably, neither the decision maker nor the Divisional Court had the benefit of the *Langenfeld* decision.

[55] In *Langenfeld,* this court allowed an appeal from the decision of the Superior Court (2018 ONSC 3447; 414 C.R.R. (2d) 85), striking down a security protocol instituted by the Chief of Police requiring any person entering Toronto Police Headquarters to pass through a metal detector and wanding process designed to uncover dangerous items and weapons. The protocol was challenged by an individual who regularly attended police board meetings and who asserted that the protocol infringed his s. 2(b) right to freedom of expression.

[56] While the court allowed the appeal on the ground that the security protocol was a reasonable limit on the s. 2(b) right to freedom of expression, at paras. 18-21, it agreed with and adopted Copeland J.'s conclusion the right to attend the police services board meeting was protected by s. 2(b).

[57] In the portion of her reasons adopted by this court, Copeland J. stated, at paras. 50-52, as follows. The public meeting requirement of s. 35 of the *Police Services Act* "fosters the objective of public confidence in decision making through transparency and accessibility to the public". The rationale of openness to foster public confidence "is similar to the rationale for the open courts principle (it differs only in that the open courts principle has a further basis of ensuring that litigants are treated fairly)". Copeland J. identified the "two pillars" for the proposition that the right to attend court proceedings is protected expression. First, "public confidence in the courts, an important institution of democratic government, is fostered by transparency and accessibility", and second, "freedom of expression protects listeners as well as speakers, particularly in the context of members of the public receiving information about the activities of public institutions." She then applied those principles to the right to attend public meetings of police services boards:

> The *Police Services Act* makes public meetings the default for police services boards in order to foster public confidence in the decisions of the boards, by way of transparency and accessibility. Police services boards perform an important democratic function. Thus, I find that the right of members of the public to attend public meetings of police services boards is protected by s. 2(b) of the *Charter*.

[58] If Mr. Langenfeld had a s. 2(b) *Charter* right to attend a regular and purely administrative meeting of the Toronto Police Services Board, it is difficult to see

why, subject to the exclusions set out in s. 35(4), the CBC does not enjoy the same right to attend the s. 83(17) hearing.

[59] On the state of the law as it now stands, the *Dagenais/Mentuck* test does not apply to this administrative hearing. However, the presumption of an open hearing under s. 35(3) of the *Police Services Act* and the s. 2(b) *Charter* right recognized in *Langenfeld* do apply.

[60] While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could be considered reasonable. This court's application of s. 2(b) in *Langenfeld* means that the decision ordering a closed hearing, through no fault of the decision maker, failed to consider an applicable right protected by the *Charter*. That decision cannot survive scrutiny under the *Vavilov* test for reasonableness. The reasonableness standard requires "an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker"; *Vavilov*, at para. 85. A decision that fails to consider an applicable *Charter* right cannot satisfy that standard or "the principle that the exercise of public power must be justified, intelligible and transparent": *Vavilov*, at para. 95.

[61] For convenience, I repeat here s. 35(4), the test the legislature has prescribed for determining when a police services board may conduct a closed hearing:

> 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.

[62] The question the decision maker had to decide was whether the desirability of avoiding disclosure or "intimate financial or personal matters … outweighs the desirability of adhering to the principle that proceedings be open to the public." In my view, that statutory test and not the *Dagenais/Mentuck* test governed the exercise of his discretion. However, the s. 2(b) right recognized in *Langenfeld* has a direct bearing on the exercise of that discretion. Through no fault of his own, the decision maker did not consider *Langenfeld.* The "principle that proceedings be open to the public", recognized by s. 35(4), is considerably fortified by the s. 2(b) *Charter* right recognized by *Langenfeld* in relation to police services board meetings.

[63] *Doré*, at para. 56, explains that the administrative decision maker is "to ask how the *Charter* value at issue will best be protected in view of the statutory objectives" and that the core of this "proportionality exercise" will require the decision maker "to balance the severity of the interference of the *Charter* protection with the statutory objectives." As *Doré* explains, at para. 57, this proportionality exercise "calls for integrating the spirit of [the *Charter*'s s. 1 reasonable limits scrutiny] into judicial review".

[64] As I will explain when discussing the issue of remedy, it will be for the decision maker to conduct that proportionality exercise. However, I propose to outline what seem to me to be some of the relevant considerations.

[65] Section 35 reflects three relevant statutory objectives. The first objective is congruent with s. 2(b). Meetings of police services boards are presumptively open to the public. The second and third relevant statutory objectives are the protection of "intimate financial or personal matters" and the public interest in a fair and impartial hearing. Both factors require a proportional response, appropriately balancing the severity of interfering with the *Charter* right with the achievement of the statutory objectives.

[66] For reasons I have explained, I do not think that the *Dagenais/Mentuck* test applies. On the other hand, the measuring of a proportional response in the context of an administrative hearing such as this is bound to take on a similar hue. As

Morgan J. explained in *Toronto Star v. AG Ontario*, at para. 92: “The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals”. He added, at para. 93: “The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no ‘one size fits all’ application of the openness principle.”

[67] The administrative decision maker should, as required by the *Dagenais/Mentuck* test, consider reasonably alternative measures that could avoid the risk of impeding the statutory objective. Counsel for the decision maker argues that it was not open to the decision maker to consider as an alternate measure a limited publication ban that would preclude publication of the OIPRD report and the names of the officers in order to protect their interest and the public interest in a fair and impartial hearing. I disagree with that submission. Section 35(4) provides that “[t]he board may exclude the public from all or part of a meeting or hearing” (emphasis added). In my view, that language indicates that the Board is not required to make an “all or nothing” order and that where an order less restrictive than a total ban will achieve the relevant statutory objectives, such an order can and should be made. It was therefore open to the decision maker to make an order

banning further publication of the OIPRD investigative report and/or the names of the Respondent Officers.

[68] Consideration of the s. 35(4) test in the light of s. 2(b) and freedom of the press is a highly contextual exercise and framing an appropriate order will very much depend upon the circumstances of each case. The decision maker identified the factors favouring an *in camera* hearing. Here are the factors that, in my respectful view, he should consider as favouring an open hearing.

[69] The first contextual feature of the present case is that the extension hearing forms one small part of a much larger controversy. As the interim injunction judge noted, at paras. 14-15: the question of "whether there has been systemic racism in policing Indigenous cases" in Thunder Bay was a matter "of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens." At para. 48 of her reasons she observed: "Because of the complaint underlying this process – the policing practices related to Indigenous citizens in Thunder Bay are racist – it is even *more critical* that every step in the complaint procedure be dealt with transparently" (emphasis in original). Similarly, the Divisional Court observed, at para. 25, the context is important and "there is a very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist." The racial tension between the Indigenous community and the TBPS, the distrust of the Indigenous community towards the

TBPS and the current state of administration of criminal justice all point strongly to the need for openness and transparency.

[70] The second contextual factor is that, as the decision maker noted, rightly or wrongly, the OIPRD investigative report has already been made public. The issues surrounding Stacy DeBungee's death and the details of the OIPRD report on the TBPS investigation have attracted significant media interest and were well-known in the Thunder Bay community and beyond.

[71] The third contextual feature of this case is that the TBPS Board and the decision maker have structured the consideration of the request for a s. 83(17) extension as if it were a quasi-judicial decision. The Board appropriately applied quasi-judicial considerations when it decided that there could be a reasonable apprehension of bias if it were to consider the extension request in the ordinary course. Rather than appoint someone with a background in police services administration as a substitute decision maker, the Superior Court appointed a retired judge. The decision maker quite properly treated the issue of whether to order a closed hearing as requiring adversarial submissions for the interested parties, considered those submissions and then handed down a reasoned, judgment-like decision. I do not retreat from the characterization of the extension request as an administrative act. However, it seems to me that these steps were taken to lend a dimension of quasi-judicial legitimacy to the decision. It is arguable

that the price to be paid for that added element of legitimacy is the kind of openness that quasi-judicial proceedings ordinarily attract.

[72] The fourth contextual factor to consider is the interest of transparency in relation to police discipline. The purpose of the *Police Services Act* has been judicially described as being "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police": *Figueiras,* at para. 41. *Figueiras*, at para. 62, also described the statutory framework as being "designed to increase the transparency of and public accountability for the way in which the conduct of the police is dealt with." In his 2005 "Report On The Police Complaints System In Ontario", (Toronto: Ministry of the Attorney General of Ontario, 2005), the Honourable Patrick J. LeSage emphasized the importance of transparency. He suggested, for example, that "if the review of a decision not to order a hearing is transparent, there will be greater understanding and acceptance of the system" (at p. 75).

(3) Should the Complainants' fresh evidence motion be granted?

[73] The Complainants move for the introduction of fresh evidence. First, they ask the court to admit two reports issued after the matter was heard by the Divisional Court: the OIPRD's systemic review "Broken Trust: Indigenous People and the Thunder Bay Police Service"; and Senator Murray Sinclair's Ontario Civilian Police Commission report "Thunder Bay Police Services Board Investigation: Final Report". Second, they ask us to consider a revised standard

form letter sent by the OIPRD to the Complainants upon completion of an investigation. Third, they ask for the admission of two newspaper articles, the first reporting an incident of alleged police misconduct and the second reporting that the progress of the OIPRD and Sinclair reports.

[74] I would not admit the fresh evidence as I believe it to be unnecessary for the resolution of this appeal. As I have pointed out, both the interim injunction judge and the Divisional Court were fully aware of the allegations of racism and the tension between the TBPS and the Indigenous community. While the reports explore those issues in considerable detail, I do not think we require that level of detail to decide this appeal.

[75] The revised standard form letter and the newspaper articles have no relevance to the issues we must decide.

[76] Accordingly, I would dismiss the fresh evidence motion.

(4) If the appeal is allowed, what is the appropriate remedy?

[77] This brings me to the issue of the appropriate remedy. Ordinarily, where a court grants judicial review and quashes a decision, the appropriate remedy is to remit the matter to the decision maker for reconsideration in the light of the court's decision: *Oakwood Development Ltd. v. St-François Xavier,* [1985] 2 S.C.R. 164, at p. 176. There is an exception to that rule where remitting the matter would be "pointless" as there is only one possible outcome in view of the court's decision:

Giguère v. Chambre des notaires du Québec, 2004 SCC 1, [2004] 1 S.C.R. 3, at para. 66; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at para. 54; *Vavilov*, at para. 142.

[78] The respondents and the decision maker submit that if we allow the appeal, the matter should be remitted to the decision maker. The Complainants submit that the reasons for an open hearing are so strong that we should simply make the order the decision maker should have made.

[79] This appeal deals with a preliminary issue and the open hearing issue has further stalled the very slow pace of the OIPRD recommendation for disciplinary proceedings. In these circumstances, I am tempted do as the Complainants ask: see *Vavilov*, at para. 142, holding that "urgency of providing a resolution to the dispute" is a relevant factor to consider.

[80] In the end, however, I am not persuaded that this is one of those exceptional cases where the court should put itself in the shoes of the decision maker. My view of the matter largely turns on the *Langenfeld* decision that was not available and therefore not considered by the decision maker. *Vavilov* holds, at para. 142, that a factor to consider on this issue is "whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question". The decision maker should be permitted to take another look at the matter with the benefit of

Langenfeld. Accordingly, I would remit the matter to the decision maker for reconsideration in light of these reasons.

G. DISPOSITION

[81] For these reasons, I would allow the appeal from the Divisional Court's judgment and set aside its order dismissing the application for judicial review. I would quash the decision and remit the matter to him for reconsideration in light of these reasons.

[82] No party seeks costs of the appeal.

Released: December 27, 2019
"GRS"

"Robert J. Sharpe J.A."
"I agree G.R. Strathy C.J.O."
"I agree Doherty J.A."