SUPREME COURT OF NOVA SCOTIA
Citation: *MacLean v. Fraser*, 2024 NSSC 97

Date: 20240408
Docket: 530174
Registry: Halifax

Between:

Halifax Regional Police Chief Officer Donald MacLean

Applicant

v.

Daniel Fraser, Jeanette Rogers, the Nova Scotia Police Review Board, and Attorney General of Nova Scotia

Respondents

DECISION ON MOTION TO DISMISS / STAY

Judge: The Honourable Justice Scott C. Norton

Heard: February 29, 2024, in Halifax, Nova Scotia

Decision: April 8, 2024

Counsel: Edward (Ted) Murphy and Andrew Gough for the Applicant
Mark Bailey for Daniel Fraser
Jason Cooke KC, and Ashley Hamp-Gonsalves for Jeanette Rogers
Myles Thomson for the Nova Scotia Police Review Board
Edward Gores, KC for the AGNS, not participating

By the Court:

Introduction

[1] This motion relates to events that occurred before the Nova Scotia Police Review Board ("Board") in January, 2024. Upon being dissatisfied with certain decisions of the Board on procedural matters made on January 25, 2024, the Applicant, Halifax Regional Police Chief Officer Donald MacLean ("HRP"), filed a Notice for Judicial Review of the Board's decisions. The Notice alleges that the following decisions made by the Board should be reviewed and overturned:

1. Finding that it had jurisdiction over the public complaint of Jeanette Roger, Police Complaints Commissioner ("Commissioner") file PC-16-0108);
2. Assuming jurisdiction over this public complaint, then refusing to open the hearing of the complaint to the public, pursuant to s. 76(1) of the *Police Act*, S.N.S. 2004, c. 31; and,
3. Dismissing HRP's motion to strike the appeal of PC-16-108 as a collateral attack on the decision made by HRP in dealing with an internal complaint (Commissioner file PC-16-0121), and an abuse of process.

[2] On January 25, 2024, the Applicant sought an emergency stay of the Board hearing. That motion was heard by Justice John Keith on January 26, 2024. By oral decision, with reasons to follow (since reported as 2024 NSSC 35), Justice Keith granted the emergency stay to allow the motion for a further stay to proceed on an accelerated basis.

[3] The present motion before the Court is for a stay of the Board hearing pending the judicial review. In addition, the Board moves for an Order seeking dismissal of the Notice for Judicial Review as being filed out of time; or, a stay of the judicial review on the basis that the request for judicial review is premature.

[4] All of the parties filed affidavit evidence and written briefs. Mr. Fraser was cross-examined on his affidavit.

[5] For the reasons that follow, I order the stay of the Board hearing pending the decision of the judicial review. I deny the Board motions to dismiss the Notice of Judicial Review or, alternatively, the requested stay of the judicial review.

Background Facts

[6] It is helpful to review the chronology of events leading to the Board decisions that have precipitated the Notice for Judicial Review. The evidence before the Court establishes the following facts.

[7] These proceedings arise out of the 2016 in-custody death of Corey Rogers in HRP's Prisoner Care Facility ("PCF"). The Respondent Daniel Fraser, one of two booking technicians on duty at the PCF, was charged with the care of Mr. Rogers at the time of his death (Ms. Cheryl Gardiner was the other booking technician).

[8] Mr. Fraser and Ms. Gardiner were the subject of lengthy criminal proceedings in relation to the death of Mr. Rogers. They were ultimately acquitted of criminal negligence causing death at a second trial before Justice James Chipman.

[9] Jeanette Rogers, mother of the late Corey Rogers, filed a public complaint against the "Arresting Officers" and Special Constables Dan Fraser and Cheryl Gardiner (the "Special Constables") on September 28, 2019, (the "Public Complaint") pursuant to the *Police Act*, and ss. 27(b) and 28(1) of the *Regulations*, NS Reg 230/2005 (the "Regulations").

[10] Arising from the same events, Sgt. David Publicover, a member of HRP, filed an internal complaint against the Special Constables pursuant to s-s. 45(2) of the *Regulations* (the "Internal Complaint").

[11] The investigation of both complaints was delayed by the process relating to the criminal charges.

[12] The matter involving Mr. Fraser came out of abeyance on August 19, 2020, when the Commissioner received a letter from HRP Insp. Derrick Boyd ("Insp. Boyd") dated August 18, 2020, which advised that the criminal proceedings against the Special Constables had concluded as of August 17, 2020, and that the suspension to his *Police Act* investigation was lifted. Insp. Boyd's letter only referenced the Internal Complaint . In response, the Commissioner wrote to HRP Chief Kinsella regarding the "Internal Allegation against S/Cst. Cheryl Gardner & S/Cst. Dan Fraser", to advise that the internal *Police Act* disciplinary investigation was to be completed by October 12, 2020. The Commissioner's letter to Chief Kinsella did not reference the Public Complaint, although it had been assigned file number PC-16-0121.

[13] On October 10, 2020, the Commissioner received a copy of the Form 9 "Notice of Completion of Investigation" dated October 9, 2020, as it related to the Special Constables. The Form 9 only referenced the Internal Complaint brought by Sgt. David Publicover (HRP file 063-16).

[14] On October 20, 2020, the Commissioner received a copy of the Form 10 "Notice of Meeting on a Public Complaint or a Matter of Internal Discipline" dated October 20, 2020, regarding S/Cst. Fraser. The Form 10 did not specify whether it was in relation to the Internal Complaint or the Public Complaint.

[15] On November 17, 2020, the Commissioner received a copy of the Form 12 "Decision of the Authority of Internal Disciplinary Proceedings" dated November 17, 2020. The Form 12 decision references the Commissioner's Internal Complaint file number (PC-16-0108) and does not reference the Commissioner's Public Complaint file number (PC-16-0121). By way of this Form 12, S/Cst. Fraser was found to be in disciplinary default and was ordered to resign, or if he did not resign within 7 days of the order, he would be dismissed.

[16] On December 5, 2020, Mr. Fraser submitted to the Commissioner a Form 13 "Notice of Review" of the Form 12 Internal Disciplinary Decision dated November 17, 2020. In turn, on December 8, 2020, the Commissioner referred the Internal Complaint (PC-16-0108) against S/Cst. Fraser to the Board for a hearing.

[17] However, on February 9, 2021, the Coordinator for the Board advised counsel for the parties that the Special Constables were successful in the appeal of their criminal verdicts and a new trial had been ordered. A conference call with the parties was requested to discuss how to proceed in light of this development.

[18] On March 19, 2021, a conference call was held with the Board and counsel for the parties. Following the call, Vice-Chair MacDonald provided a summary of the call. In that summary, Vice-Chair MacDonald noted that the Board had "not received any documents relating to the public complaint of Ms. Rogers against the Special Constables since 2017" and that the "Disciplinary Authority has proceeded with their internal matters only and has confirmed the termination of their employment which has brought us to their internal appeal."

[19] On March 29, 2021, Mr. Cooke, counsel for Ms. Rogers, wrote to the Board advising that his client wished for:

> her public complaint against the Special Constables be held in abeyance, pending the result of the internal complaints. In the event that the Special Constables are reinstated as a result, Ms. Rogers would to [*sic*] reserve her ability to proceed with her public complaint.

[20] On April 1, 2021, the Coordinator for the Board, upon direction from the Board, wrote Insp. Boyd to inquire as to the status of Ms. Rogers' Public Complaint (PC-16-0121) against the Special Constables as there had been no result from the Disciplinary Authority. Insp. Boyd replied on April 6, 2021, and stated that the "internal complaint was merged with the public complaint and they were not investigated separately" and that the two Special Constables were dismissed on November 24, 2020 (via the Form 12). Insp. Boyd further indicated that he would provide an update to Ms. Rogers that the Special Constables had been dismissed.

[21] As a follow-up to this correspondence, Vice-Chair MacDonald wrote a letter to the Commissioner on April 7, 2021 advising of the information received from Insp. Boyd and noted that no Decision (Form 11) had been received for the Public Complaint of Ms. Rogers against the Special Constables and that the Board had only received a Disciplinary Authority Decision (Form 12) for the Internal Complaint filed against the Special Constables.

[22] In response, the Commissioner wrote to Insp. Boyd on April 9, 2021, to inquire as to the status of the investigation into Ms. Rogers' Public Complaint against the Special Constables and raised the issue that no Form 11 "Public Complaint Decision" had been received. The Commissioner requested that if the investigation of Ms. Rogers' Public Complaint was considered finished, the Form 11 be filed immediately.

[23] On May 13, 2021, six months after the Commissioner received a copy of the Form 12 "Decision of the Authority of Internal Disciplinary Proceedings", the Commissioner received a Form 11 "Decision of the Disciplinary Authority" in relation to Ms. Rogers' Public Complaint against the Special Constables (PC-16-0121).

[24] The Commissioner did not receive a Form 9 (Notice of Completion of Investigation) in relation to the Public Complaint. The Form 10 (Notice of Meeting) provided on October 20, 2020, did not specify whether the meeting was public or internal; however, Insp. Boyd's Form 11 indicated that on November 17, 2020, he "had separate private meetings with S/Cst. Dan Fraser, S/Cst. Cheryl Gardner and both their legal counsel". The Form 12 (internal) decision of the Disciplinary

Authority followed this meeting. Under the heading "Decision", the Form 11 dated May 13, 2021, states: "On November 24, 2020 they [Fraser and Gardiner] were both dismissed from HRP".

[25] On June 14, 2022, Dean Stienburg, President of the Halifax Regional Police Association, wrote an email to the Coordinator for the Board advising that on "Thursday[,] June 2nd[,] 2020 Justice James Chipman acquitted both officers on the criminal matters." Mr. Stienburg requested that the matters before the Board regarding the Special Constables be brought out of abeyance.

[26] On June 29, 2022, Vice-Chair MacDonald wrote to counsel for the parties to the Internal Complaint (Fraser, Gardiner and HRP) advising of the internal appeals before the Board and raised the issue that there was no action taken from Ms. Rogers or S/Csts. Fraser and Gardner on the Form 11 outcome for Ms. Rogers' Public Complaint.

[27] On September 6, 2022, Mr. Pizzo, on behalf of Ms. Gardiner, wrote Amanda McLean, the Coordinator, Adjudicative Branch, Office of the Police Complaints Commissioner, to advise that he did not have the Public Complaint from Ms. Rogers and that "neither I [Mr. Pizzo] nor Ms. Gardiner were ever served with or received notice of a Form 11." Later on September 6, Mr. Pizzo wrote again by email to say that he did have the Form 11. In response, and copied to Mr. Bailey, counsel for Mr. Fraser, Ms. Mclean noted that she had also received a call from Mr. Fraser's wife requesting the Form 11.

[28] On November 4, 2022, Ms. McLean, sent a series of emails to HRP Professional Standards staff regarding the Public Complaint (PC-16-0121). First, at 3:16 p.m., Ms. McLean advised that, "counsel are requesting the Form 11 for the Jeannette Rogers file. We received it on May 13, 2021. Do you have record of sending it to Counsel at that time?" Jennifer Mahoney of HRP responded at 3:24 p.m., advising, "Just an FYI, it was David Bright [former counsel for Mr. Fraser] because we got the form 13 from the both of them, so they were sent the form 11". The second correspondence was at 3:29 p.m., wherein Ms. McLean wrote: "Ms. Fraser [Mr. Fraser's wife] and Dean [Stienburg] are requesting a copy of the Form 11 with regards to Jeannette Rogers' public complaint against S/Cst. Fraser and S/Cst. Gardner. Could you please forward a copy of both?" Ms. Mahoney replied at 3:34 p.m., "Taken care of."

[29] By email on November 4, 2022 at 3:34 p.m., Ms. Mahoney sent a copy of the Form 11 to Mr. Stienburg and Mr. Bailey.

[30] In cross-examination at the motion hearing, Mr. Fraser was referred to a Form 8 Notice of Allegation (Complaint or Internal Discipline) that refers to both the Internal Complaint and the Public Complaint. He identified his signature acknowledging receipt of both as of November 20, 2017. He acknowledged being aware of the Public Complaint as of this date.

[31] On January 30, 2023, the Coordinator, Ms. McLean, emailed counsel for the parties (except Ms. Rogers) regarding a request to hear both matters involving the Special Constables together. All parties agreed to have the matters heard together. In his reply to the Coordinator, dated January 31, 2023, Mr. Murphy for HRP indicated that, "in April 2021 the Board adjourned the public compliant of Jeannette Rogers in relation to these same matters and if she still intends to proceed with those complaints we would be seeking to have the evidence heard together with the internal appeals. It is my intention to raise same with the Board." Mr. Murphy's reply was not copied to other counsel or Ms. Rogers.

[32] On January 31, 2023, Board Chair, Jean McKenna ("Chair McKenna"), wrote to counsel for the parties (except Ms. Rogers) to advise that the internal disciplinary appeals for the Special Constables would be heard together and that a conference call would be scheduled for February 6, 2023, to set dates. At this time, Chair McKenna also raised the issue that there has been no appeal received from Ms. Rogers or the Special Constables in relation to the Form 11 Public Complaint decision and asked if this had an impact on the Internal Complaint appeal.

[33] On February 6, 2023, a conference call was held with counsel and the Board (but not Ms. Rogers) to set dates and discuss the issue raised in Chair McKenna's January 31, 2023, correspondence. At the time of the conference call, Chair McKenna framed the issue as follows (as transcribed from the audio recording provided to the Court):

> … there is a hiccup, umm, and that is of course, that is the appeal of the internal decision, umm, the same result, umm, occurred on the public complaint of Ms. Rogers, umm, HRP, umm, also ordered dismissal, and the public complaint was not appealed. Umm, so have you turned your mind people to the impact that would have, umm, on our ability to make a decision, umm, on the internal appeal? So, in other words, if the … if the penalty was reduced on the internal appeal to something short of dismissal or anything, umm, have we still got the public appeal sitting out there un-appealed, which was dismissal? Umm, and how do we remedy that? Because the way Ms. Rogers' appeal would be able to get to the Board, umm, it would have to go by way of, umm, the Commissioner's office and that didn't

> happen. Umm. So, what do we do with it? Has anyone turned their mind to any jurisdictional issue there?

[34] In response, Mr. Murphy for HRP stated (as transcribed from the audio recording provided to the Court):

> Umm, I…I have put some thought into the status of all this. And, umm, I think that the problem would be, well, Ms. Rogers wouldn't appeal the public decision for dismissal because I don't think there could be any further penalty that the Board could impose. But, umm, under section 77 of the *Police Act*, umm, she would be entitled to be a party in this matter if she, if she so wished. Umm, so perhaps the easiest way to make sure we don't have potentially divergent results would be to reach out to Ms. Rogers to see if she wants to be part of this proceeding as she is entitled to as per section 77. And then, aah, proceed from there.

[35] Mr. Pizzo for Ms. Gardiner and Mr. Bailey for Mr. Fraser also made submissions as follows (as transcribed from the audio recording provided to the Court):

> **RON PIZZO**: … In terms of fairness, aah, we would just allow Ms. Rogers to participate and then, aah, and then deem, I think you got to deem that the appeal would be filed to appeal the decision to terminate. Which apparently was made in November 17th, and the post of public and private complaints, although we weren't given notice of the public appeal, aah, aah, right. But that, that was a public issue as well. But that just to stands for both - just a tick on a box, that's all it is. But I think we can, we can safely do that and I think we can, you know, let Ms. Rogers participate as she normally would have in the police matter and then just move forward.
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> **MARK BAILEY:** … I agree with everything that Ron just said. Like, I'd say from Mr. Frazier's perspective, aah, he was completely unaware of the public complaint and the resulting, umm, termination until fairly recently. Umm, so at the time this process was undertaken by HRP, he had no notice of it. He had no knowledge of it. So, I think what those suggesting makes sense that we could do both the internal complain and the external Ms. Rogers' complaint as part of the same proceeding. Umm, I don't see any prejudice anybody by proceeding in that manner.

[36] Mr. Murphy did not object to the submissions of Mr. Pizzo or Mr. Bailey. Therefore, the Board ruled that Ms. Rogers should be invited to be a party to the Internal Complaint appeal proceeding, pursuant to s. 77 of the *Police Act*.

[37] Accordingly, on February 7, 2023, Chair McKenna wrote to Ms. Rogers advising that the Internal Complaint matters against the Special Constables were proceeding and that she was entitled to be added as a party if she so chose. Chair McKenna further advised that another conference call would be held on February 22, 2023.

[38] On February 22, 2023, a conference call was held with counsel, Ms. Rogers, and the Board to set dates for a hearing of the Internal Appeal of the Special Constables.

[39] On April 11, 2023, Mr. Cooke wrote the Board to advise that he would be representing Ms. Rogers at the hearing.

[40] On August 16, 2023, the Board sent a Hearing Notice to the parties advising of the hearing location, date and time. The hearing was scheduled for January 22, 2024 to February 2, 2024. The email attaching the Hearing Notice only referenced the Internal Complaint file, PC-16-0108, and stated that the review was "of decisions made by Inspector Derrick Boyd dated November 17, 2020."

[41] No further correspondence was received from the parties until the eve of the hearing when, on January 19, 2024, Mr. Murphy wrote to the Board to request postponing the hearing from January 22, 2024 to January 23, 2024. The Board granted this request.

[42] The hearing of Mr. Fraser's matter before the Board commenced on January 23, 2024. The Chair opened the hearing, noting that the appeal by S/Cst. Gardiner was not proceeding and by making the following remarks (Transcript, p. 5):

> **THE CHAIR**: So this is the appeal of S/Cst. Dan Fraser of a decision made November the 17th, 2020, four years ago. It's been through a number of different forums, shall we say, and S/Cst. Gardner, I believe, was an appellant and has withdrawn or resolved or whatever, all right. We have ... because of it ... because it is an internal complaint, the matter is closed to members of the public, with the exception of a member of the union to support Mr. Fraser and a ... his spouse, as I understand it, and she is here as a personal support person as well. Those are the exceptions.

[43] The Transcript of the hearing provided to the Court indicates that during the morning the Board heard some preliminary matters, including on whether the matter was "internal" or "public". Initially, the Board ruled that the hearing was in respect of the Internal Complaint only, as the parties had agreed to and as the Board had

ruled on February 6, 2023, and that Ms. Rogers would be added as a party pursuant to s. 77 of the *Police Act*. (Transcript, Keeping Affidavit, Ex. 55, at pp. 48-51):

> **THE CHAIR**: There is no question that the public/ private, internal/external nature of the proceeding has always been a struggle, and the rationale for making an internal complaint closed to the public might be difficult to understand, but it is what it is, and it's created by the legislation, 76(2), "A hearing with respect to an internal discipline matter is not open to the public."
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> This is an internal discipline matter. By Ms. Rogers' presence here does not change that. She is here for a couple of reasons. One, this was brought forward to us as an internal matter, and as we recall from our first teleconference, we suggested that perhaps Mrs. Rogers should become a party, and you'll ... when you look at section 77, it says, "At a hearing of the Review Board, where the review is the result of or involves a complainant, the complainant ...", so it does involve Mrs. Rogers, all right?
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> It goes on to say further who is entitled to be parties to the proceeding, and it includes "any person who can demonstrate a personal interest in the proceeding." Surely, she can demonstrate a personal interest in the proceeding. That does not change it from internal to public or public to internal, so it started as internal, she certainly has an interest in the proceeding, but that doesn't create it ... it doesn't change the water.
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> It is ... it is still an internal complaint. It is still closed to the public. Whatever the rationale is for that section, we've heard it argued many times before, but it does not, in our view, open the door for yet a further public complaint just because she's a party. She has an interest in this and, at least, if nothing else, it's a matter of compassion for her that we allow her to become a party to this proceeding so ... and present at the proceeding, so her role would be somewhat limited, but she is a party, and that's that, but it continues as an internal matter. So that's that.
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> **MR. MURPHY**: Just a point of clarification so that I may advise my client. A point of clarification so that I may advise my clients. Where, in this matter, there was a Form 11 and a Form 12, both of which resulted in a dismissal, is this Board taking the jurisdiction to vary the Form 11 or only vary the Form 12?
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> **THE CHAIR**: We don't even have a Form 11.
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> **MR. MANCINI**: Yeah, we don't have it.
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> **MR. MURPHY**: So for the perspective of myself advising my client, I ... there is a Form 11. I can undertake to provide a copy to the Board, but it seems like we might be at a cross purposes if the Form 11 is potentially going to stand and the Board is not taking jurisdiction over that portion of this matter. So perhaps it's just a matter that hasn't been put before the Board and that may be necessary but ...
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> **THE CHAIR**: There is no Form 11 before the Board. End of discussion. This is S/Cst. Fraser's appeal from the decision.

> **MR. MURPHY**: The Form 12.
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> **THE CHAIR**: Yes. The Notice of review is filed by Dan Fraser. He's what's here before us. It's not filed by Mrs. Rogers. It's filed by Dan Fraser. This is an internal matter. We're going to treat it as an internal matter. We've explained how she fits into this proceeding, and you can explain that to your client.
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> **MR. MURPHY**: Understood. And from what I gather from you, Madam Chair, is that you're … this Board is not taking the jurisdiction to vary any Form 11 which would … is not before the Board and would stand on its own in its …
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> **THE CHAIR**: Yeah.
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> **MR. MURPHY**: … perspective?
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> **THE CHAIR**: Correct.

[44] After its ruling on this preliminary matter, Mr. Murphy, on behalf of HRP, opened his case and played a video. Following this, the hearing was adjourned to the next day, January 24, 2024, at 9:30 a.m.

[45] On the afternoon of January 23, 2024, the Board received correspondence from Mr. Murphy, advising of HRP's intention to bring a motion to dismiss S/Cst. Fraser's appeal on the grounds that the Board had no jurisdiction to vary the penalty of termination that had been imposed in this matter.

[46] When the hearing resumed on the morning of January 24, 2024, the Board continued to hear evidence and held further discussion on Mr. Murphy's motion. Despite the mid-hearing motion, the Board allowed Mr. Murphy to make his argument but would not adjourn the matter for the day. The other parties were given until 1:00 p.m. to make oral submissions in response to the motion.

[47] Mr. Murphy proceeded with oral submissions on his motion. Mr. Murphy suggested that despite agreeing to proceed in this matter at the February 6, 2023 teleconference, he "didn't fully grasp the jurisdictional aspects to where we are today until we had our discussion yesterday morning about whether this was a public or a private hearing… ."

[48] Mr. Murphy asserted that the complaint against Mr. Fraser was "dual track" in nature and that "the internal is supplementary to the public complaint, which is really primary." However, the main thrust of HRP's submission was that the Board had no jurisdiction to hear the matter because Mr. Fraser had not filed a Form 13 "Notice of Review" to seek a review of the May 13, 2021, Form 11 Decision of Ms. Rogers' Public Complaint.

[49] Mr. Cooke, on behalf of Ms. Rogers, initially suggested that "the procedurally fair way" to deal with this would be to allow Mr. Fraser to amend his Form 13 and then proceed with the hearing. However, Mr. Cooke then argued that there was a question whether the Board had the statutory jurisdiction to amend Mr. Fraser's Form 13 and hear the Public Compliant.

[50] Mr. Bailey, on behalf of Mr. Fraser, argued that the parties were aware of this issue since Chair McKenna raised it in January 2023 and on the teleconference of February 6, 2023. Mr. Bailey suggested that this issue was already decided: "The Board decided that these two matters would proceed in tandem and my friend [Mr. Murphy] agreed to that" and that "All parties, including my friend, agreed to proceed by way of a blended hearing." The recording of the February 6, 2023, teleconference was then played for the parties.

[51] Mr. Bailey argued that it was procedurally unfair for HRP to wait for over a year and "after the eleventh hour" to raise this issue and attempt to thwart Mr. Fraser's ability to have a hearing. Finally, Mr. Bailey made further representations that Mr. Fraser was actually "never served with Ms. Rogers' complaint at any time."

[52] After hearing submissions from counsel, the Board adjourned to the following day, January 25, 2024, and issued an oral decision on HRP's motion on January 25, 2024. The Board ruled (Transcript, pp. 232-239):

> **THE CHAIR**: Thank you.
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> This is the matter of the decision on the jurisdictional issue that's been raised and discussed and argued over the past day. The Board has concluded that this will proceed, that we do have jurisdiction to hear it, and we have no question about that. We appreciate what the arguments are, but it's important to step back from those arguments and the paths that they take us down and just go to the simplest approach.
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> The simplest approach is this, and this is unquestionable. Mr. Fraser has the statutory right to appeal the decision of the disciplinary authority to a civilian oversight body which, theoretically, we hope really does perhaps take a different look at the situation through the eyes of the public. That's the object of the statute is to give him the right to pursue that appeal. He has a statutory right to that. Without even looking at procedural fairness or natural justice, there's a statutory right to that. It cannot be eliminated.
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> There is also authority for us to turn to procedural fairness within ... by this body and to natural justice. This is the Supreme Court of Canada in *Prassad v. Canada*, 1989 CanLII 131. I'm just going to read you a quote from that decision.

> In order to arrive at the correct interpretation of statutory provisions that are susceptible to different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi judicial functions, the rules of natural justice.

So there is no question that we can and we must apply the rules of natural justice and procedural fairness but we don't need to. We don't need to go there. We just have to go to the statutory right that this gentleman has to appeal the case.

And Mrs. Rogers, you understand ... and I know you've listened to a lot of stuff over the past two days ...

MRS. ROGERS: All stuff I don't understand.

THE CHAIR: ... over the past few years, so we're not making any decision at this point on the merits of Mr. Fraser's case, bad, good, correct, or wrong. We also want to make it clear that we are considering both the public and the private complaint, or the internal complaint, both. That's what this hearing is dealing with, and that's where we went off the track because we made a ruling that it would be a closed hearing because, at least part of it, and I think parallel was used as a description, I use intertwined, but as to the extent that it is, in part, a (sic) internal complaint, we must exclude the public, which is probably the rationale for the Simon MacDonald Panel in excluding the public. There's no choice.

In terms of the public complaint, however, there is discretion, and within the public complaint, the public can be excluded as well, but that was the ... what triggered and sent us down this whole trail, and I think somewhere we lost track of where we were going. Simply because we exclude the public didn't mean that we are ignoring the public complaint aspect, Mrs. Rogers' complaint, but if that was a problem, it was resolved, and it was resolved by the parties in a conference call, and the way it should have been resolved by giving Mrs. Rogers party status in this hearing. And, again, that was by statute.

And I've listened to our discussions at the beginning of the hearing, or the beginning of the argument and I think I said, Well, she's here as a party, and she can support the arguments, and she has some rights. Well ... and I was wrong in that regard, of course. A party has full rights. She has the right to call witnesses, she has the right to examine and cross-examine witnesses, she has the right to make argument, she has the right to introduce exhibits, she has the right that the other parties have in this case, so she has ... she's afforded full rights and so she should be. That's her statutory right. That's how she ... how ... if there is any prejudice, that is how it is overcome ... overcome by the ability of Mrs. Rogers to participate in this hearing as she is doing through counsel.

> The fact that it is very clearly, indisputably the same decision, the same case, the same facts, does make a difference as well if there has to be a distinction made. There's no question about that. It is artificial for us to pretend that there's a different story out there behind Mrs. Rogers' complaint that we haven't heard about.
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> It's the same story. It's the same issue, and by failing to tick box number two doesn't alter the fact that we're hearing Mrs. Rogers' complaint. If he had ticked both the boxes, we'd be in exactly the same position as we are today. Mrs. Rogers would, as a party, have the right to call witnesses, et cetera, et cetera. He only ticked one. The decision in two wasn't available anyway.
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> The other aspect of the similarity is that the internal decision, the Form 13, is just a mirror form signed by the authority. No reasons given, no details, nothing that would follow a meeting or come at the end of a meeting, I believe, with the subject of the complaint, but there are no reasons given, and so it's pretty clear that the decision that is being appealed is not just that one form. The decision that is being appealed is the decision that is written in detail by Insp. Boyd and which is dated May the 13th, 2021.
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> Whether that was written before, simultaneously, I don't think he made a ... he came to a different conclusion in May of 2021. There'd have to be reasons for the decision, especially in something of this magnitude where somebody's employment is terminated and where the issue that led to the termination was the death of a citizen, so there has to be more than just a blank form to make clear what the decision was.
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> So we say there is no prejudice to anyone. It's been argued that perhaps there's prejudice to the public because they can't attend and the media can't attend and report on the matter. That would be ... it would be hard to use that as a reason to deny somebody their statutory right of appeal to a civilian oversight body. But, particularly in this case, because this case has been heard by another review board, it has been in the press, it has gone through a trial, an appeal, another trial, there's not much left that the public is not aware of and so ... and I understand the public did attend the first part of the hearing against the sworn officers, and then they were excluded if there was anything else to be added, and there was nothing else to be added.
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> So, in conclusion, we have not only the jurisdiction, we have the statutory and procedural right to allow this man to be heard and, in fact, we have a duty to allow this man to be heard, whether you want to apply the principles of natural justice or whether you simply want us to follow the statutory authority, we have a duty to allow this matter to proceed. So that is our decision. Thank you very much.
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> [Emphasis added.]

[53] Following its decision, Mr. Cooke then raised the issue of whether the matter should proceed as a closed hearing or open to the public. The Board then heard from the parties on this issue. Following a brief adjournment, the Board ruled on a

"compromise position" wherein the parties would present evidence regarding the Internal Complaint in a closed hearing, but any evidence regarding the Public Complaint would be open to the public (Transcript, pp. 250-251):

> **THE CHAIR**: We have decided to give you a little compromise position on this. Section 76 governs the attendance and appearance of public at a hearing. Section 76 says,
>
> > (1) A hearing by the Review Board respecting a complaint is open to the public unless the Review Board is of the opinion that is in the best interests of the public, the maintenance of order or the proper administration of justice to exclude members of the public for all or part of the proceedings.
> >
> > (2) A hearing with respect to an internal discipline matter is not open to the public.
>
> So what we are going to do, and particularly, I think, guided by the proper administration of justice, being we've got to get this matter moving immediately. We're lagging behind, and the merits have got to be heard, but what we will do is we will proceed today and until the internal aspects, if they are unique, are concluded, we will keep it closed to the public.
>
> At the end, we'll do something like the Simon MacDonald Panel did. At the end of that, if there is anything else to be added that should be public, you will be able to do that, and that's the decision, okay?

[54] Following the Board's decision for a "compromise position", Mr. Cooke announced that "we'll be seeking judicial review of that decision."

[55] Mr. Murphy then suggested he would forego calling any evidence in the Internal Complaint process and proceeded to call evidence in the Public Complaint:

> Madam Chair, if I may, the way I understood the division between internal and public was that we would present evidence in the internal, and if there's anything we felt should be public, that we'd present it then.
>
> …
>
> It is our position that all of the evidence we wish to put forward should be public, so in our view, that would end the internal portion, and we would move straight to the public.

[56] Having closed the hearing to the public at the outset of the hearing on January 24, 2024, the Board did not open the hearing to the public in response to Mr. Murphy's proposition.

[57] Mr. Murphy agreed to proceed with his evidence but announced that he had instructions "to seek judicial review on the jurisdictional matter" and that he also had "instructions to seek an emergency motion to stay these proceedings in the interim and that my colleague, Mr. Gough, will be in court tomorrow in Chambers to seek an interim stay." An adjournment was requested on the basis that HRP would be seeking judicial intervention into this matter. The Board denied the adjournment.

[58] At 3:53 p.m., counsel for the Board received an email from Mr. Gough enclosing HRP's Notice of Judicial Review, Notice of Motion for an Emergency Stay of the Board's hearing, enclosure letter and draft order. The motion for the emergency stay was heard in general chambers the next morning, Friday, January 26, 2024, at 9:30 a.m.

[59] Justice Keith heard the emergency stay motion and granted the stay on an interim basis to enable the parties to assemble a fulsome record and present argument for a full stay pending judicial review – all on an accelerated basis. Justice Keith set filing deadlines for the hearing of the stay motion and any motion by the Board or Mr. Fraser to strike the judicial review. As stated, the Board filed such a motion. Mr. Fraser did not.

Issues

[60] *Civil Procedure Rule* 7.29 provides this Court the discretion to grant a stay of proceedings pending the outcome of a judicial review. The parties agree that the test to be applied when seeking such a stay is that stated by the Supreme Court of Canada in in *RJR-MacDonald Inc. v. A.G. (Canada*, [1994] 1 SCR 311 and *A.G. (Manitoba) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110. The *RJR* test calls for examination of three factors:

1. The strength of the case on the merits to ensure that it raises a serious question;
2. Whether the applicant for the stay will suffer irreparable harm if the stay is refused; and
3. Whether the applicant or respondent would suffer greater harm from granting or refusal of the remedy pending a decision on the merits.

[61] I will address the Board's argument that the judicial review is premature as part of the analysis of whether there is a serious issue to be tried.

[62] The Board also argues that the Applicant is out of time to seek judicial review. I will address that issue first.

Analysis

Is Notice of Judicial Review Out of Time?

[63] The Board submits that the relevant date of the Board's decision as it relates to the jurisdictional issues in this judicial review is February 6, 2023. As the Applicant failed to seek judicial review of the Board's decision within the prescribed limitation period out in *Civil Procedure Rule* 7.05(1) after February 6, 2023, this judicial review should be dismissed or set aside.

[64] Neither the phone conference of February 6, 2023, nor the letter to Mrs. Rogers on February 7, 2023, mentions either the Public Complaint or closing the hearing to the public. This letter very clearly states in address to Ms. Rogers:

> Special Constables Gardner and Fraser were dismissed after an internal review by Halifax Regional Police. They have appealed that decision to the Nova Scotia Police Review Board. As you have an interest in the outcome, you would be entitled to be added as a party to that appeal, if you wish.
>
> [Emphasis added]

[65] The "decision" to add Ms. Rogers as a party to the hearing of the Special Constable's Internal Complaint appeal is not under review.

[66] Instead, like Justice Keith, I find that the exceptionally unique facts before me raise serious issues that touch upon fundamental public law values and, absent a stay, undermine the possibility of an adequate remedy. My reasons are based on the cumulative impact of the following two extremely unusual circumstances:

(a) The Board's assumption of the statutory role of the Commissioner by referring Ms. Rogers' Public Complaint to itself on January 25, 2024 in direct contravention of the process mandated by ss. 12(1)(a) and 18(b) of the *Police Act*; and

(b) The Board's exclusion of the public from the hearing on January 25, 2024, without giving any notice or opportunity for the parties or the public to make submissions or present arguments or evidence on why it should be open, considering the presumption of an open

> hearing in respect of a Public Complaint is mandated by s. 76(1) of the *Police Act*.

[67] It is clear that neither of these issues was decided by the Board prior to the hearing. For example, the letter to Ms. Rogers makes no mention whatsoever that her Public Complaint would be heard or that the sanction imposed as a result of her complaint could be displaced. Indeed, the letter made no mention of Ms. Rogers' Public Complaint at all.

[68] At the outset of the hearing, on January 24, 2024, the Board stated (Transcript, pp. 49-51):

> **THE CHAIR:**
>
> …
>
> This is an internal discipline matter. By Ms. Rogers' presence here does not change that. She is here for a couple of reasons. One, this was brought forward to us as an internal matter, and as we recall from our first teleconference, we suggested that perhaps Mrs. Rogers should become a party…
>
> …
>
> It is ... it is still an internal complaint. It is still closed to the public.
>
> …
>
> We don't even have a Form 11.
>
> …
>
> There is no Form 11 before the Board. End of discussion. This is S/Cst. Fraser's appeal from the decision.
>
> **MR. MURPHY**: The Form 12
>
> **THE CHAIR**: Yes. The notice of review is filed by Dan Fraser. He's what's here before us. It's not filed by Mrs. Rogers. It's filed by Dan Fraser. This is an internal matter.

[69] However, the next day, in the context of rendering the Board's decision on the motion to dismiss brought by HRP, the Board stated (Transcript, p. 234) :

> **THE CHAIR**: ... over the past few years, so we're not making any decision at this point on the merits of Mr. Fraser's case, bad, good, correct, or wrong. We also want to make it clear that we are considering both the public and the private complaint, or the internal complaint, both. That's what this hearing is dealing with …
>
> [Emphasis added]

[70] There was no decision in February 2023 that the Board would take up the Public Complaint. Indeed, that was directly contrary to the Board's position as stated at the outset of the hearing.

[71] Further, the issue of whether the hearing would be closed to the public was not raised as a decision point for the Board prior to the submissions of counsel on January 25, 2024. It is clear that exclusion of the public had only been discussed by the Board immediately before the hearing began and without the parties present (Transcript, at p. 6).

[72] With respect, the only decision the Board made on February 6, 2023 was to invite Mrs. Rogers to be added as a party to the Internal Complaint appeal. That is not the same as the issues that were considered and decided by the Board on January 24, 2024 and are subject to the Notice for Judicial Review.

[73] Accordingly, the Board's argument that the Notice for Judicial Review was filed out of time fails.

Serious Issue to be Tried

Prematurity

[74] The next issue to address is whether the judicial review is premature. This issue was raised before Justice Keith as well. He introduced the issue as follows:

> [26] As a preliminary comment, all counsel agreed that staying the Review Board's ongoing proceedings must only be granted in the most rare and exceptional circumstances. The following concerns compel the need for judicial restraint in these circumstances:
>
> > 1. The democratic process: The Courts must respect the legislature's decision to grant administrative tribunals certain statutorily defined powers;
> >
> > 2. Expertise: The Court must show respect of (and demonstrate deference for) the expertise of administrative tribunals which possess an expertise in the matters which fall within its statutory scope of authority; and
> >
> > 3. Practicality and Efficiency: The Courts must give administrative tribunals the ability to effectively and efficiently fulfill their statutory mandate. The Courts must not allow an administrative tribunal's ongoing processes to be routinely interrupted, splintered, or bogged down by parties who seek judicial intervention for any complaint which might arise. To do so would inevitably infect administrative proceedings with corrosive waste and inefficiency. The Court must remain alive to this type of pernicious

> disruption and actively discourage it. Again, the Court should only intervene in the most rare and exceptional circumstances.
>
> [27] In *Re. Wilson and Atomic Energy of Canada Ltd*., 2015 FCA 17 ("**Re Wilson**"), Stratas, J.A. speaks powerfully to these same concerns at paragraph 31 – 32. See also *Thielmann v. The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 ("**Thielmann**") at paragraphs 51 – 59.

[75] The case law, generally, advises that absent exceptional circumstances, a Court should not interfere with ongoing administrative processes until after they are completed or until the available, effective remedies are exhausted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10. Cromwell, J. wrote:

> [36]... Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes ... Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision ... [Citations omitted]

See also *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, at paras. 30-33.

[76] In the more recent decision of *Thielmann*, *supra*, the Manitoba Court of Appeal considered the question of what constitutes the exceptional circumstances. Writing for the Court, Steel, J.A. provided a number of relevant factors to help guide the analysis:

> 49 In conclusion, the courts have not provided a definition of "exceptional circumstances" with respect to the prematurity principle. The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. The list of factors to be considered is not closed and courts will not have to apply every factor, but only those that are relevant.
>
> 50 Among the factors that might be considered are: (i) hardship/prejudice (including irreparable harm, urgency, and excessive delay); (ii) waste of resources if judicial review is not proceeded with; (iii) delays if judicial review proceeds; (iv) fragmentation of proceedings; (v) strength of the case, including whether there is a clear abuse of process or proceedings that are so deeply flawed that it is clear and obvious that judicial review will be successful; and (vi) the statutory context,

> including whether there is an adequate alternative remedy. Furthermore, weight should always be given to the overarching consideration that an administrative tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review.

[77] In *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24, the Nova Scotia Court of Appeal did find that a departure from the principle of prematurity was appropriate. In a human rights complaint, the Attorney General moved for the Chair (and only member of) a Board of Inquiry to recuse himself for an alleged reasonable apprehension of bias. The Court found that it was not "sensible, efficient or just" to permit the Chair to carry on with and complete "what is sure to be a lengthy set of hearings, followed by post-hearing submissions, then deliberations, and the ultimate filing of a decision" without addressing the issue of bias and leaving the possibility open of a later appeal on this same issue (para 27).

[78] Most recently, in the case of *Fraser v. Sampson*, 2023 NSSC 355, a judicial review was brought of the Police Complaints Commissioner's interlocutory decision to refer one of nine complaints to the Board for a hearing. The applicant alleged that the Commissioner's decision did not conform to the requirements of procedural fairness, that it breached his *Charter* rights and that there was bias or reasonable apprehension of bias of the Commissioner and the Board.

[79] The Commissioner brought a motion to dismiss the judicial review and the stay motion on the grounds that the judicial review was premature and therefore there was no serious issue to be tried.

[80] Gogan, J. concluded that the matter was premature and that the applicant had not demonstrated that the circumstances were sufficiently exceptional to grant a stay and allow the applicant's request for judicial review of the Commissioner's decision to proceed. (para. 32)

[81] The issue was considered in *James v. Canada (Minister of Employment & Immigration)* (1991), 45 F.T.R. 139, [1991] F.C.J. No. 465 (Fed. T.D.), wherein Justice Rouleau found, at para. 15:

> [15] This entire application is premature. No action has yet been taken that can be complained of; no credible basis hearing has been held, no ruling has been made on the constitutional questions by the adjudicator, and no deportation order has issued. It is conceivable that the applicant may succeed at her hearing, and the entire question will then become moot; if she is unsuccessful, recourse may be had through the provisions of the Act allowing for review. I am satisfied that

> administrative process should not be disrupted and delayed pending the applicant's challenge. The public interest in having these hearings continue must outweigh any interest of the applicants in having an injunction issue at this stage, particularly when its effect would be to delay the process even further. The statutory scheme, which has not been challenged per se, ought to be enforced until and unless it is held to be invalid. The procedure as set out in the Immigration Act has not yet been exhausted; once the hearing has been held, then any complaints which arise can be the subject of an application for judicial review.
>
> [Emphasis added]

[82] Applying these considerations to the facts before me, I find that the public interest is served by having the court determine if a hearing open to the public should be required. Public scrutiny is a necessary element of the public complaint process. If the judicial review does not proceed at this stage, the Applicant, Ms. Rogers, is left with "no effective remedy" (*Powell*, at para. 33). The irreparable harm is to the administration of justice and the public interest in the open court principal. Further, early judicial review should be permitted in rare cases, like this one, where "the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion." (*Lourenco v. Hegedus*, 2017 ONSC 3872, para. 6)

[83] In his Decision on the emergency stay, Justice Keith was "firmly convinced" that such circumstances were present on the submissions of the parties. The circumstances presented to Justice Keith by the parties' submissions have only been fortified by the evidence before me.

[84] In his survey of the authorities, Justice Keith cited *Black v. Advisory Council for the Order of Canada*, 2012 FC 1234, explaining that the process would be "fraught with uncertainty" and would leave the Applicant "with no possible alternative remedy if he was prevented from bringing his application for judicial review of the Council's refusal to let him appear before it."

[85] Additionally, on the present facts, the Applicant, Ms. Rogers, and Mr. Fraser will similarly be brought into a process fraught with uncertainty, where the Board is setting a process arguably in complete contravention of the available statutory guidance. This is a core jurisdictional issue: what party has the authority to bring a complaint to the Board? This is not a screening decision. It is taking on a hearing in the absence of a referral as required by the legislation.

[86] Ms. Rogers would be left with no other remedy if the hearing is to proceed without hearing these issues. She would be subject to a closed hearing that she is barred from speaking to the public about.

[87] The Board's assumption of jurisdiction over the Public Complaint and its direction for evidence in relation to that matter to be heard *in camera* are not, with respect, a "preliminary screening decision". Rather, the Board is an adjudicative tribunal whose decision is final, pursuant to s. 79(3) of the *Police Act*. The screening function is, instead, completed by the Office of the Police Complaints Commissioner and the Board is supplanting this role by unilaterally assuming jurisdiction over the matter.

[88] The only compromise to the carefully crafted legislative regime accordingly comes from the Board itself and not from this judicial review or stay motion, which seek to minimize and correct the harm to the regime.

[89] Many of the cases relied on by the Board relate to interim administrative proceedings in which further administrative appeals or hearings can be pursued by the parties. That is not the case here, as the Board says that HRP's only remedy is a judicial review following completion of its hearing.

[90] The Board does not explain how or why the harm caused by an *in-camera* hearing can be adequately remedied by a judicial review following the conclusion of all proceedings it says are before it. The whole *raison d'être* of the Board is to inspire public confidence in the fair adjudication of the public complaints regime, which is necessary in a democratic society which employs a police force to take policing actions against its citizens and otherwise maintain public order.

[91] The Board contends that the HRP's argument that the public complaint is primary is without authority. This point is clearly in dispute and mid-hearing guidance is required to ensure the Board follows a fair procedure that properly balances the Public complaint and the Internal appeal.

[92] A further unresolved issue contested by the Board is the jurisdictional boundary between the Office of the Police Complaints Commissioner and the Board. From the record before me, it appears that the Public Complaint of Ms. Rogers remains with the Commissioner and was not forwarded to the Board for determination pursuant to a filed Notice of Review.

[93] After consideration of all the authorities cited, I find that the potential harm to HRP, Ms. Rogers and the public interest in an open and transparent process for the adjudication of appeals of Public Complaints, caused by the approach adopted by the Board constitutes an exceptional circumstance to the general rule regarding prematurity.

[94] Accordingly, I will proceed with the analysis for a stay.

[95] Before Justice Keith, and on this motion, all parties except the Board agree that there are serious issues to be tried. The Board's only argument against there being a serious issue is prematurity, dealt with above. This issue is generally considered in the case authorities to have a low threshold.

[96] I find on the evidence before me that there is a serious issue as to:

1. Whether the Board assumed the statutory role of the Commissioner by referring Ms. Rogers' Public Complaint to itself on January 25, 2024 in direct contravention of the process mandated by ss. 12(1)(a) and 18(b) of the *Police Act*. The notion that the Board would presume the statutory power to initiate a review process on its own motion is problematic and goes to the core of public law principles. Judicial review considers the legality of an administrative decision-maker's decision which is predicated on the presumption that administrative tribunals act within the limits imposed by the state. In this case, neither the *Police Act* nor its *Regulations* entitle the Board to decide, unprompted and on its own initiative, to commence its own review of a Public Complaint.
2. The Board's exclusion of the public from the hearing on January 25, 2024, without giving any notice or opportunity for the parties or the public to make submissions or present arguments or evidence on why it should be open, considering the presumption of an open hearing in respect of a Public Complaint as mandated by s. 76(1) of the *Police Act*. The difficulty in this case is that the Board both activated the hearing of a Public Complaint and then contemporaneously excluded the public – without any public notice and any opportunity for members of the public to make submissions.

Irreparable Harm

[97] Unilaterally excluding the public from a public hearing, despite clear statutory wording of a presumption to the contrary, raises serious issue with respect to the proper administration of justice. Proceeding on the merits despite jurisdictional issues raises serious issues with respect to the proper administration of justice. Following the rules relating to Internal Complaints when a party is seeking to alter the outcome of the Public Complaints process raises serious issue with respect to the proper administration of justice. The harm in allowing the hearing to proceed on these bases is abundantly clear.

[98] Absent a stay to allow the judicial review to fully consider these serious issues, the opportunity to seek effective remedy would be irretrievably compromised and, based on the information before me, the risk of having to re-start the process is great.

Balance of Convenience

[99] The balance of convenience favours HRP and Ms. Rogers.

[100] Any inconvenience to S/ Cst. Fraser if an interlocutory stay were to be granted is only in the nature of delay. While the interlocutory stay will no doubt occasion some delay, this will not be the kind of delay that the Courts have cautioned against in an administrative context.

[101] For example, in order for delay to cause irreparable harm to a party, it must be inordinate. To assess whether a delay is inordinate, it must be considered in context, both with respect to the length and cause of that delay. (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 122)

[102] Here, it must be emphasized that the major cause of delay in bringing this matter before the Board to date is actually mandated by the *Regulations* themselves. Pursuant to s-s. 70(3), discipline proceedings before the Board cannot proceed while a criminal proceeding is ongoing.

[103] There have been no unreasonable delays in bringing these matters before the Board. Further, while it is important to conclude these matters in a timely way, the underlying Judicial Review alleges that the Board is acting without statutory authority and the Court's decision could be determinative of the issues before the Board more broadly. Any delay caused by pausing the Board process in order to allow these issues to be determined cannot be characterized as unreasonable.

[104] It is clear that the contemplated delay to S/Cst. Fraser is outweighed by the inconvenience caused to Ms. Rogers and HRP.

[105] Recognizing the exercise of extreme caution before granting these types of remedies, which threaten to delay, splinter or fragment ongoing proceedings of administrative tribunals, I am satisfied the circumstances exist in this case. To quote Corbett, J. in *Lourenco*, *supra*: "the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion."

[106] In summary, I grant the motion of HRP for a stay of the Board hearing pending the hearing of the Notice for Judicial Review. The motion to strike the Notice of Judicial Review is dismissed.

The Role of the Board on the Motions

[107] Counsel for HRP and Ms. Rogers raised concerns about the conduct of the Board as an active participant in this litigation. Put succinctly, they say there is a distinct tension between the neutral adjudicative role of the Board and the role of an adverse litigant to a contested court matter such as the proceeding before the court. This tension was considered by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 ("*OEB*"). There the Supreme Court of Canada made clear that in contested proceedings, a tribunal's role is significantly limited.

[108] Having found against the Board on the merits, I refrain from doing a deep dive on these issues, except to say that the Board must be careful in the manner in which it approaches any further submissions on the judicial review. I refer to paras. 52-54 of *OEB*, where the court advised:

> 52 The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis, Leon's Furniture,* and *Quadrini,* provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 C.J.A.L.P. 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 Can. Bar Rev.

> 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 C.J.A.L.P. 21.
>
> 53 Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.
>
> 54 Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[109] I direct the parties to schedule a Motion for Directions as soon as possible.

[110] If the parties cannot agree on costs, I will accept written submissions on or before April 19, 2024.

Norton, J.