

Application Pursuant to Section 83(17) and 83(18)(c)  
of the *Police Services Act*, R.S.O. 1990, Chapter 15, as amended

BETWEEN

Thunder Bay Police Service

and

Courtney Clair #709

DECISION and REASONS OF  
THE THUNDER BAY POLICE SERVICES BOARD

To: Constable Courtney Clair #709

1. THIS IS AN APPLICATION FOR a determination by the Thunder Bay Police Services Board ("Board"), pursuant to Section 83(17) of the *Polices Services Act*, R.S.O. 1990 Chapter 15, as amended ("*PSA*), whether it is of the opinion that it was reasonable, under the circumstances, to delay the service of a Notice of Hearing respecting the Allegations of Misconduct against Constable Courtney Clair #709 ("Constable Clair").

2. The Application was heard in writing.

3. The Notice of Application was served and filed on August 16, 2019.

4. The Response of Constable Clair #709 was delivered on August 23, 2019.

5. The Reply of the Thunder Bay Police Service ("Service") was delivered on September 3, 2019.

6. After a careful consideration of the written submissions of the parties, the applicable legislation and the relevant authorities, the Board has determined to grant the Application to delay service of the Notice of Hearing.

7. The reasons for our Decision are as follows:

A. LEGISLATIVE FRAMEWORK

8. Section 83(17) of the *PSA* provides as follows:

**"Six-month limitation period, exception**

83(17) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing."

9. Section 83(18)(c) provides as follows:  
“83(18) The day referred to in subsection (17) is,  
(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be.”

B. RELEVANT AUTHORITIES

10. The Divisional Court in the case of Forestall v Toronto Police Services Board, [2007] O.J. No 3009, articulated the law governing the effect of delay in Part V PSA proceedings. Section 83 is located in Part V.
11. The Court rejected the position of the respondent officer that delay represented a denial of procedural fairness. It stated, as follows, in paragraphs 75 to 76:

“[75] In *Blencoe v. British Columbia (Human Rights Commission)* (2000), 190 D.L.R. (4<sup>th</sup>) 513, the Supreme Court of Canada discussed undue delay and the duty of procedural fairness. The majority concluded that unreasonable delay could constitute procedural unfairness, if the delay is “unacceptable to the point of being so oppressive as to taint the proceedings “ (at para. 121). The Court stressed that the determination of whether a delay is inordinate turns on an assessment of contextual factors, including the nature of the proceeding and its complexity (at para. 121).

[76] The decision of the Board under [now 83(17)] is not directed at, nor does it finally dispose of the issue of unreasonable and prejudicial delay. Whether there has been unreasonable delay that has prejudiced the officers or that constitutes an abuse of process is a matter that should be determined in a hearing on the merits before the officer hearing the

disciplinary charges and on the basis of a proper evidentiary record. In our view, it is premature to consider this issue at this time (*Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Div. Ct.) at p. 800; *Coombs, supra* at para. 12).”

12. The section directs the Board to form an opinion, whether it was reasonable for the Chief to delay serving the Notice of Hearing. In coming to its opinion on this very limited issue, it is for the Board to decide how much weight to give to the relevant factors. The Board has to evaluate the complexity of the investigation, the potential prejudice to Constable Clair as well as the public interest in seeing serious police misconduct adjudicated.

13. The Divisional Court in Forestall stated that: “the Board was not required to form an opinion on a time line, but to consider whether the reasons advanced by the Chief for delaying service of the notices of hearing were reasonable under the circumstances. It bears repeating that 83(17) is not a limitation period. It speaks of reasonableness (for the delay), under the circumstances (emphasis added).” (ibid – paragraph 86)

14. The Divisional Court in the case of Bennett v. Toronto (Metropolitan) Police Services Board, [1995] O.J. No 4816 – held that, in determining whether delayed service may be made, the Board is exercising a statutory power of decision of an administrative nature under its constituent statute.

15. Thus, our decision has nothing to do with the merits of the Allegations contained in the Notice of Hearing but, as stated by the Divisional Court in Forestall (*supra*, para. 44) is “directed at the investigation and pre-charge stage and determining only whether the circumstances preceding the service of the notices reasonably warrant the delay . . . 83(17) is not in the nature of a limitation period.”

C. POSITION OF THE PARTIES

16. In support of her position, the Chief made, *inter alia*, the following submissions:
- (a) On or about December 1, 2018, the Chief became aware of an incident involving a Thunder Bay Police member, later determined to be the Respondent Officer, Courtney Clair, which had garnered attention from the community via various social media outlets.
  - (b) The incident occurred at a call for service on December 1, 2018. The video that surfaced appeared to depict the Respondent Officer striking a person after being spit on. The person appeared to be handcuffed to the ambulance gurney at the time.
  - (c) A Chief's Complaint was initiated on Monday, December 3, 2018.
  - (d) At the time the Chief's Complaint was initiated, the Investigator was instructed to serve the Respondent Officer with a Notice of Investigation but not to request a Duty Report as criminal charges were being considered.
  - (e) On December 3, 2018, Counsel for the Chief reached out to the Crown's office to receive an opinion on whether criminal assault charges should be laid against the Respondent Officer.
  - (f) On December 4, 2018, Counsel for the Chief sent the Crown the video clip of the incident as well as various general and supplementary occurrence reports.
  - (g) On December 4, 2018, Counsel for the Chief received an e-mail from the Crown outlining a preliminary opinion which ultimately resulted in the conclusion that further investigation of the incident was needed.

- (h) On December 20, 2018, Counsel for the Chief sent further documentation to the Crown.
- (i) On January 7, 2019, the Crown responded requesting additional statements and reports.
- (j) All interviews and follow up were completed by January 10, 2019.
- (k) On January 17, 2019, a USB was couriered to the Crown in Sudbury that contained the entirety of the documentation requested in order for them to provide a fulsome opinion.
- (l) The Crown opinion was received on January 23, 2019.
- (m) On that same day, January 23, 2019, the Investigator contacted the Respondent Officer and informed her criminal charges were not being pursued and that the *PSA* investigation would commence at this time.
- (n) As the Respondent Officer was off on leave, the Investigator inquired into her ability to file a Duty Report. The Respondent Officer advised she wished to speak with her Association representative first before providing an answer. The Investigator agreed.
- (o) On February 5, 2019, the Notice of Investigation was amended, removing one charge.
- (p) On February 7, 2019, the Investigator spoke with the Respondent Officer's Association representative and told him he was waiting for a response from the Respondent Officer and since he had not heard the Chief had made the decision to proceed with the request for a Duty Report from the Respondent Officer.
- (q) The Investigator spoke with the Respondent Officer on February 8, 2019, and informed her of the decision to proceed with the request for a Duty Report.

- (r) On February 11, 2019, the Investigator served the Respondent Officer with the supplementary notice, along with a package of reports she had authored so that she could adequately respond to the allegations.
- (s) On February 21, 2019, the Investigator received the Respondent Officer's Duty Report via e-mail.
- (t) Over the following weeks, the Investigator gathered additional documents, including the 911 and dispatch audio, media stories, social media commentary, opinions, duty reports and notes.
- (u) As part of this investigation, the Investigator had to review two incidents consisting of various statements and reports, totaling over 70 pages.
- (v) On March 18, 2019, the Investigator contacted the mother of the young person who was involved in the incident in order to get a statement. The mother indicated she would need to speak with her lawyer prior to making a decision on whether to respond.
- (w) On March 22, 2019, the Investigator contacted the mother again as he had not yet heard back from her. At that time, the mother indicated she had not heard back from her lawyer.
- (x) The Investigator attempted to contact the mother again on March 28, 2019 and April 11, 2019, and did not receive a response.
- (y) On April 16, 2019, the Investigator got in touch with the mother of the young person in an attempt to get a statement so he could finalize his investigation. There was confusion surrounding who her lawyer was and if they filed an OIPRD complaint.

- (z) Counsel for the Chief of Police contacted the OIPRD to determine if a complaint had been filed. They had no record of a complaint being filed.
- (aa) On April 23, 2019, the Investigator attempted to contact the mother of the young person again to inform her no OIPRD complaint existed. He left a message.
- (bb) On May 7, 2019, the Investigator attempted to call the mother but, again, received no answer.
- (cc) On the same day, May 7, 2019, the Chief of Police reached out through Nishnawbe-Aski Nation (NAN) to receive assistance in getting a statement from the young person.
- (dd) On May 17, 2019, the Chief of Police received word from NAN that they had reached out to the mother of the young person. It was at this time the Chief of Police was informed that the mother stated that she had declined to have any participation in the investigation at her lawyer's advice.
- (ee) In an attempt to clarify that the young person would be under no jeopardy if she were to participate in the investigation, further attempts were made to contact the mother. Through these attempts, the mother agreed to come to Thunder Bay Police Station on June 16, 2019, to provide information.
- (ff) The mother did not attend the station on June 16, 2019, and, as of June 17, 2019, additional messages left by the Chief had not been returned.
- (gg) It was decided to finalize the investigation without input from the young person.
- (hh) On July 8, 2019, the Chief of Police was provided the Investigative Report from the Investigator for her review.
- (ii) On July 17, 2019, the Investigative Report was finalized.



- (jj) On July 25, 2019, the Investigator met with the Respondent Officer and her Association representatives to inform them of the findings. The Respondent Officer was offered an informal without prejudice resolution offer. She had twelve (12) days to consider the offer.
- (kk) On August 6, 2019, the Respondent Officer, through her Association representative indicated she would not be accepting any informal resolution offers and would like to take the matter to a formal hearing.
- (ll) On August 16, 2019, the Chief brings this application to the Board on an expedited basis in order to determine if the delay in service of the Notice of Hearing would be reasonable in the circumstances.
- (mm) At this time, a little over eight (8) months – 8 months and 12 days – have lapsed since the facts that make up the complaint became known to the Chief of Police.
- (nn) From December 1, 2018, until January 23, 2019, the *PSA* investigation was on hold and could not go ahead while waiting for the Crown opinion on criminal charges. This took one (1) month and 22 days, bringing the effective delay to 6 months and 14 days.
- (oo) From January 23, 2019, until July 17, 2019, the Investigator worked diligently to complete the investigation.
- (pp) Such attempts to contact the affected young person occurred over the course of two (2) months.
- (qq) Further, the delay that occurred from January 23, 2019 to February 11, 2019, was a result of the Chief of Police attempting to consider the situation of the Respondent Officer as she was off work on leave. This was a nineteen (19) day process.

- (rr) Further, the delay from July 25, 2019 to August 6, 2019, was as a result of an attempt to resolve the matter informally, which was ultimately rejected by the Respondent Officer. This was a twelve (12) day process.
- (ss) It is the position of the Chief of Police that a statement from the affected young person was an important part of completing a fulsome investigation and all steps taken to get in touch with her were reasonable and necessary.
- (tt) The delay caused by the Crown opinion and the attempts to contact the affected young person were relatively brief in nature and reasonable in the circumstances.
- (uu) The incident received significant media attention and it is submitted that the Chief has a duty to attempt to receive statements and input from all those involved in the incident.
- (vv) Further, the Chief submits that it was reasonable to allow some delay to take the interests of the Respondent Officer into account.
- (ww) For reasons set out above, it is respectfully submitted that it was **reasonable** under the circumstances to delay service of the notice of hearing beyond 6 months.
- (xx) The resulting delay, even taken in its totality of 8 months and 13 days, is not unreasonable. That is 2 months and 13 days over the 6 month limit outlined in the *PSA*.
- (yy) It is submitted that at this juncture, a failure to have a public hearing could lead to a loss in public confidence in the Thunder Bay Police Service.

17. Constable Clair delivered a fulsome Response to the Chief's Submissions.

18. The Response was, essentially, *ad idem* with the Legislative Framework outlined above. In addition, there is little significant difference between the authorities relied upon by the Board and those put forward by Constable Clair.

19. The difference between the parties lies in how the relevant legislation and authorities are applied to the facts at hand.

20. The major dates and events are, essentially, agreed upon.

21. From paragraph 11 to 49 of her Response, Constable Clair has made very extensive statements and submissions with respect to:

- (a) her personal history;
- (b) the impact of the events and process on her;
- (c) the events of December 1, 2018; and
- (d) the alleged misconduct.

22. These statements and submissions would certainly form a very important element in any hearing where they could be tested and debated in the normal course of events. This Board has no jurisdiction to make any finding as to the merits, or lack thereof, of the Allegations in the Notice of Hearing. We are only concerned with whether the delay in serving the Notice of Hearing was reasonable in the circumstances.

23. As indicated in Forestall, our decision is not directed at, nor does it finally dispose of, the issue of unreasonable and prejudicial delay. Constable Clair is free to argue the issue of abuse of process before the hearing officer and on the basis of a tested evidentiary record.

D. ANALYSIS

24. We have carefully considered the factual timeline and have concluded that the Chief acted in a reasonable manner throughout.

25. The alleged incident occurred on December 1, 2018. The Chief's complaint was initiated two days later on December 3, 2018. On December 3, 2018, the Chief, through her Counsel, reached out to the Crown's office to seek an opinion as to whether criminal charges would be laid. The Chief's office co-operated with the Crown's office in providing all information requested.

26. On January 23, 2019, the Crown advised that criminal charges were not being pursued. Constable Clair was immediately advised that a *PSA* investigation was being pursued. Constable Clair requested an opportunity to speak with her Association representative before indicating when a Duty Report would be filed. Her wish was granted.

27. On February 5, 2019, the Notice of Investigation was amended removing one charge. This was served on Constable Clair on February 11, 2019, along with a package of relevant material. The Duty Report was received on February 21, 2019.

28. A fulsome investigation was conducted. As part of this investigation, repeated attempts were made to contact the mother of the young person, who was involved in the incident, to get a statement. This was entirely appropriate.

29. Over the course of the next several months, while the investigation was proceeding, the Investigator tried numerous avenues to attempt to obtain a statement. These are all detailed in the Submissions from the Chief outlined above. The Investigator is to be commended for his persistence.

30. By approximately the middle of June of 2019, the Investigator decided to finalize the Investigative Report without input from the young person. The Report was provided to the Chief on July 8, 2019, and finalized on July 17, 2019.

31. On July 25, 2019, the Investigator met with Constable Clair and her Association representative to inform them of the findings. Resolution discussions ensued. On August 6, 2019, Constable Clair indicated that a resolution was not possible.

32. The Application was then brought to the Board on August 16, 2019.

33. In her Notice of Application, the Chief has outlined in detail the reasons for the delay. We accept her explanations unreservedly.

34. The incident received significant media attention. Constable Clair was off work as a result of the incident. It was incumbent on the Chief to ensure that a thorough investigation was done. This included making efforts to receive both a statement and input from all those involved.


35. We are satisfied that a thorough investigation was done. We are satisfied that, throughout the process, Constable Clair was fully aware of the Allegations against her.

36. In our view, there should be a full and fair public hearing in order to ascertain whether the Allegations contained in the Notice of Hearing can be established against Constable Clair. A failure to do so could result in a loss of public confidence in the Service.

E. ORDER

37. We hereby order that the Application to extend the time for service of the Notice of Hearing is granted. If the Notice of Hearing has not as yet been served, we order that the time for service is extended for a period of thirty (30) days from the date that this Decision is issued.

DATED at Thunder Bay, Ontario, this 19<sup>th</sup> day of September, 2019.

  
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Celina Reitberger, Chair  
On behalf of the Thunder Bay Police Services Board