COURT OF APPEAL FOR ONTARIO

CITATION: Stanley v. Office of the Independent Police Review Director, 2020 ONCA 252
DATE: 20200415
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Watt, Hourigan and Trotter JJ.A.

BETWEEN

Faye Stanley, Yasin Stanley, Yusuf Stanley and Taufiq Stanley

Applicants

(Respondents in appeal)

and

Office of the Independent Police Review Director

Respondent

(Appellant)

and

Chief of Police of the Toronto Police Service, and Constable Christopher Howes

Respondents

(Respondents in appeal)

W. Scott Childs, for the appellant

Selwyn A. Pieters and Brian M. Clarke, for Faye Stanley, Yasin Stanley, Yusuf Stanley, and Taufiq Stanley

Alexandra D. Ciobotaru, for the Chief of Police of the Toronto Police Service

Lawrence Gridin, for Constable Christopher Howes

Heard: November 27, 2019

On appeal from the order of the Divisional Court (Regional Senior Justice Geoffrey B. Morawetz and Justices Anne M. Mullins and Wendy M. Matheson) dated January 8, 2019, with reasons reported at 2019 ONSC 180.

Trotter J.A.:

A. INTRODUCTION

[1] This appeal concerns an investigation into alleged police misconduct. The respondents – Faye Stanley, Yasin Stanley, Yusuf Stanley and Taufiq Stanley (collectively "the Stanleys") – filed complaints with the Office of the Independent Police Review Director ("the OIPRD" or "the Director") about a number of police officers.

[2] The Stanleys' complaints arose from the execution of a search warrant at their home by members of the Toronto Police Service ("TPS"), including Constable Christopher Howes. They alleged excessive use of force, the failure to show them the entire contents of the search warrant, unnecessary property damage, and other discreditable conduct, including a racist threat.

[3] The OIPRD is an independent civilian oversight agency that receives, manages, and oversees all public complaints about the police in Ontario. It receives its legislative authority from the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*").

[4] After an investigation, the OIPRD found that an allegation that Constable Howes had used excessive force was "substantiated" and referred the matter to

the Chief of Police of the TPS for a disciplinary hearing. The infraction was deemed “serious”. Shortly after the referral, an officer from the Professional Standards Unit of the TPS contacted the Director about a transcription error in Constable Howes’ statement to the investigators. He also asked the Director if the matter could be re-classified as “less serious”, allowing for the option of informal resolution by way of discipline without a hearing.

[5] The Director advised the Stanleys that new information had come to light that required further investigation, but he did not disclose who brought this information to his attention. Following a further investigation, the Director determined that the allegation against Constable Howes was now “unsubstantiated” and advised the Stanleys of his decision. The file was closed. There was no disciplinary hearing.

[6] The Stanleys sought judicial review of the Director’s second decision in the Divisional Court. That court framed the issues as follows: (1) whether the OIPRD had authority to re-open the investigation and reconsider its initial decision; (2) whether there was a breach of procedural fairness arising from the OIPRD’s dealings with the TPS in the course of re-opening the investigation and reconsidering the initial decision; and (3) whether the new decision was reasonable, both in terms of the allegation against Constable Howes, and in relation to the search warrant issue. The Divisional Court allowed the application on the procedural fairness ground. It set aside the Director’s “decisions” and

ordered the OIPRD to conduct a third investigation using investigators not previously involved in the case. Moreover, it ordered that a delegate of the Director decide whether the case should be referred to the TPS for a disciplinary hearing.

[7] The OIPRD appeals this decision, supported by the TPS and Constable Howes.

[8] I would allow the appeal in part. I would uphold that part of the Divisional Court's decision setting aside the Director's second decision (i.e., finding that the allegation against Constable Howes was "unsubstantiated"). However, I would do so for different reasons than the Divisional Court. The Director lacked any authority to reconsider his decision to refer the case to the TPS for a disciplinary hearing. The Director was *functus officio*. Although the OIPRD has since amended its Rules of Procedure to permit the type of reconsideration at issue on this appeal, that power did not exist when the Director dealt with the Stanleys' complaints. However, I would set aside that part of the Divisional Court's decision ordering that a third investigation be conducted. In the circumstances, it is unnecessary to directly address the procedural fairness issue.

B. FACTUAL BACKGROUND

(1) Execution of the search warrant

[9] The police received information that Taufiq Stanley was unlawfully in possession of a firearm. A warrant was obtained. On April 25, 2014, just after midnight, the police broke down the front door of the Stanleys' house and 19 police officers, many from the Emergency Task Force, rushed inside.

[10] Faye Stanley had been sleeping and was awakened by her son, Yasin, who told her that the police were at the door with their firearms drawn. When the police ascended the stairs, Faye and Yasin were ordered to the ground. Faye was eventually allowed to sit on her bed.

[11] Yasin, who was close by, asked if he could get up as well. He said that an officer stomped on his neck while he was handcuffed. Faye described it differently. She said the officer put his foot on Yasin's neck and then pushed down, but she could not tell how hard. Both Yasin and Faye complained about this treatment to the officers.

[12] Faye was asked to move the family dog from one room to another. When Yasin commented on what was happening, a white police officer (allegedly Constable Howes) yelled "shut up" and stomped on his neck. Faye said she witnessed this incident. Yasin further alleged that, when the dog was being moved, the same officer leaned down and whispered, "Shut the fuck up, or I will

put you in a hole with the rest of them, n…..” Faye saw the officer lean down to speak to her son, but she did not hear what was said.

[13] The officers did not locate any firearms in the Stanleys’ home. No charges were laid.

[14] Yasin was eventually taken to the hospital in an ambulance, wearing a neck brace. He was released later that morning, having been diagnosed with a “contusion/minor head injury”.

[15] In addition to the alleged assault on Yasin, the Stanleys complained about the damage caused to their possessions while the police executed the warrant. They alleged other discreditable conduct, including inappropriate remarks about the tidiness of their home. Lastly, Faye complained that, although she was shown the search warrant, she was not shown the appendices.

(2) Proceedings before the OIPRD

[16] The Stanleys filed complaints with the OIPRD on July 3, 2014. The allegations were investigated and resulted in an investigative report, dated March 4, 2015 (“the first report”). The 118-page report contains a thorough review of the evidence of the Stanleys, civilian witnesses (i.e., paramedics), and 19 police officers. Of the numerous allegations made by the Stanleys, the Director determined that only one of the allegations was substantiated. The first report concludes:

> The available information indicates that Constable Howes stepped on Yasin's neck two times. His actions and the force are deemed unnecessary and unreasonable.
>
> Therefore, with the respect to the allegation of Unnecessary Exercise of Authority against Constable Howes, upon review of all available information, the Director has determined that there is **sufficient evidence** to conclude that misconduct occurred. Therefore this allegation is found to be **substantiated.** [Emphasis in original.]

All other allegations were determined to be "unsubstantiated".

[17] On March 4, 2015, the Director wrote to the Stanleys to inform them that he had completed his investigation. He said:

> After careful investigation I have found that there is evidence of misconduct of a serious nature as it relates to Constable Chris Howes, Badge 7716, as defined by the *Police Services Act*…A final report has been completed and will be forwarded to the Chief of the Toronto Police Service for adjudication. A copy of the report is attached to this letter.

The letter also explained that there was "insufficient evidence for me to determine that there are reasonable grounds to believe" that any other misconduct occurred. The Stanleys were told that a prosecutor would contact them in the near future.

[18] On the same day, the Director sent a letter to the Chief of the TPS, to the attention of Acting Inspector Russell Jarosz of the Professional Standards Unit, advising of his findings. The Director indicated that the allegation of excessive

force against Constable Howes was substantiated and had been classified as serious and, pursuant to s. 68(3) of the *PSA*, a hearing must be scheduled.

[19] The facts giving rise to this appeal occurred in the days that followed. On March 10, 2015, Acting Inspector Jarosz sent the following email to the Director:

> Superintendent Ed Boyd and I have had the opportunity to review your March 4, 2015, report of investigation with regard to the above noted matter. We have some concerns with regard to the investigative findings and would like to discuss the matter with you at your earliest convenience. I am suggesting a conference call if that is most convenient for you.

[20] What occurred next is not entirely clear because no record was kept. It would appear that a conference call did occur, during which Acting Inspector Jarosz identified an error in the transcription in Constable Howes' statement to OIPRD investigators. The purported error went to whether Constable Howes perceived Yasin to be assaultive and a threat. Acting Inspector Jarosz also requested that the matter be treated as "less-serious", permitting the possibility of a disposition without hearing. However, this would require Constable Howes' consent. Acting Inspector Jarosz said he would communicate this option to Constable Howes. This conference call was followed up in a March 25, 2015 letter from Acting Inspector Jarosz to the Director in which he thanked him for "revisiting your decision of March 4, 2015".

[21] On April 15, 2015, Acting Inspector Jarosz sent another email to the Director to advise that Constable Howes was not willing to accept a disposition

without a hearing (i.e., a reprimand) and that a hearing would need to be conducted.

[22] The next part of the documentary trail consists of a series of redacted internal OIPRD emails on April 17, 2015. They reveal the Director's request for a wholesale review of the first report. A five-page, undated internal document entitled, "Investigative Review – Stanley Investigation" was produced. The Review found some "areas of concern" relating to Constable Howes' statement.

[23] On May 6, 2015, the Director wrote again to the Chief of Police of the TPS, to the attention of Acting Inspector Jarosz, and reported that he had re-opened his investigation. The Director explained:

> It has since been brought to my attention that there may be inaccuracies in the Investigative Report. I have undertaken a review of my investigation and have in fact identified some inaccuracies, as well as some areas that warrant further investigation. I have also identified that one of the allegations set out in Faye Stanley's complaint, namely that she was not shown the search warrant in its entirety, was not fully investigated.
>
> As a result, **I have decided to re-open my investigation**. I am accordingly **suspending all of my previous investigative findings** against all twenty officers, all of whom remain designated as respondent officers. [Emphasis in original.]

On the same day, the Director wrote to the Stanleys to apprise them of his decision.

[24] On June 10, 2015, the African Canadian Legal Clinic, on behalf of the Stanleys, wrote to the Director to protest the decision to re-open the investigation. The author, Mr. Roger Love, said that neither the *PSA* nor the Rules under the *PSA* authorized the Director to re-open an investigation once it has been referred to the Chief of Police for a hearing. Mr. Love also expressed concerns about the lack of openness in the process, writing, "The circumstances which caused these 'inaccuracies' to come to your attention and your decision to review the completed report are unknown to the complainants and raise fairness concerns."

[25] The Director responded to Mr. Love on June 24, 2015. He explained the focus of his re-investigation – whether Constable Howes had used excessive force, as well as the lack of a proper investigation of Faye Stanley's complaint about the search warrant. The Director specifically referred to issues concerning Constable Howes' statement, but did not mention that the issue arose through communications with the TPS. The Director explained his authority to re-visit his decision in the following passage:

> I have carefully considered your position that I not have the authority to reopen my investigation. **With respect, I disagree. While you are correct that neither the *Police Services Act* (the "PSA") nor the OIPRD Rules of Procedure explicitly set out the authority for doing so, neither do they explicitly preclude it. Importantly, section 72 of the PSA permits me to direct the chief of police to deal with a complaint in the manner in which I specify, before a hearing**

> **under subsection 66(3) or 68(5) is commenced.** The Divisional Court in *Figueiras v. (York) Police Service Board* [2013 ONSC 7419, at paras. 56-57(Div. Ct.)] affirmed that this power of direction applies to both investigations which have been referred to the chief of police and those which have been retained by the OIPRD.
>
> **In addition to my statutory authority derived from subsection 72 of the PSA, I take the position that I have common law authority to suspend my investigative finding and reopen my investigation.** My decision to do so is an investigative decision, made at an investigative stage, not an adjudicative one. This decision is very different from the caselaw respecting the inability of administrative tribunals to change their decisions after a hearing on the merits. Rather, my investigative decision is akin to a decision made during a criminal investigation, which is always ongoing and does not end once a charge is laid [citing *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 84]. [Emphasis added. Footnotes omitted.]

[26] On December 10, 2015, the Director sent near-identical letters to the TPS and Mr. Love, explaining the results of his reinvestigation, attaching an Addendum to the first report. The Director explained that, due to conflicting evidence regarding whether Yasin was handcuffed when Constable Howes applied pressure to his head/neck area, and the dynamic situation faced by the officers, the allegation of excessive force was unsubstantiated.

[27] The Director also found that providing Faye Stanley with a copy of the warrant, regardless of the appendices, was sufficient to discharge the duties set out in s. 29(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides:

> It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

In light of *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, the Director concluded that providing Faye Stanley with a copy of the warrant alone was sufficient.

C. PROCEEDINGS IN THE DIVISIONAL COURT

[28] The Stanleys made an application for judicial review to quash the Director's second decision of December 10, 2015 and sought to have the March 4, 2015 decision reinstated. The Stanleys argued that: (a) the Director lacked the authority to re-open the investigation after his March 4, 2015 decision to refer the matter to the TPS for a hearing; (b) there was a breach of the rules of procedural fairness arising from the communications between the Director and the TPS; and (c) the Director's second decision was unreasonable.

[29] The Divisional Court allowed the application solely on the basis of the procedural fairness issue. As Mullins J. wrote, at para. 28:

> As is emphasized by the name of the decision-maker, the Director of the Office of Independent Police Review was obliged to conduct an independent investigation and reach an independent decision. This independence is central to the OIPRD's role in providing a public complaints system against police officers in Ontario: *Nobody v. Ontario Civilian Police Commission*, 2016 ONSC 5824 (Div. Ct.), at para. 49. **Here, in circumstances which belie the independence of the OIPRD, the Director had**

> **undisclosed discussions with the TPS about changing his decision and, ultimately, he did change his decision. These undisclosed communications give rise, at least, to an appearance of unfairness and compromise the independence of the Director.** [Emphasis added.]

[30] The court found that there had been a breach of procedural fairness and that there was no need to address the Stanleys' other arguments. The Director's decision was quashed and the complaints were referred back to the OIPRD for a fresh investigation.

[31] The OIPRD obtained leave to appeal to this court on April 26, 2019. On August 26, 2019, Pepall J.A. stayed the order of the Divisional Court: see *Stanley v. Office of the Independent Review Director*, 2019 CarswellOnt 13600.

D. THE POSITIONS OF THE PARTIES

[32] The OIPRD submits that the Divisional Court erred in finding that the decision to re-open the investigation was not in accordance with rules of procedural fairness. He submits that the Divisional Court erred in its approach by applying procedural standards applicable to adjudicative decision-making rather than investigative decision-making. The TPS and Constable Howes support the Director's position. All three contend that the Director had the power to re-open his investigation and reverse his decision to refer the case to the TPS for a hearing.

[33] The Stanleys contend that the Divisional Court was correct to find a breach of the rules of procedural fairness. They support the order that a fresh investigation be conducted.

E. ANAYLSIS

(1) Introduction

[34] In my view, the December 10, 2015 decision of the Director must be set aside. However, I would do so for different reasons than the Divisional Court. The Director had no authority to reconsider his decision to refer the case to the TPS for a disciplinary hearing. Despite his claim, he lacked common law powers to do so. He also lacked such statutory powers: s. 72 of the *PSA* does not supply this power, nor did the OIRPD's Rules of Procedure that were in place at the time. Consequently, the December 10, 2015 decision of the Director must be set aside. However, as explained below, I would not direct that a third investigation be conducted at this stage and would set aside that part of the Divisional Court's decision.

(2) Legislative Context

[35] In order to explain my conclusions, it is necessary to outline the legislative framework within which the OIRPD operates. The procedure for addressing police complaints is complex. This summary, which is not comprehensive,

highlights the difference between the powers of the OIPRD to refer cases to a chief of police for investigation and the power to refer a case for a hearing.

[36] The OIPRD is an arms-length agency of the Ministry of the Attorney General. It derives its authority from Parts II.1 and V of the *PSA*. As stated in its *Annual Report (April 1, 2018 to March 31, 2019)*, at p. 7: "The OIPRD ensures that public complaints about police are effectively dealt with in a manner that is transparent and fair to both the public and the police. All decisions are independent of the government, the police and the public."

[37] In general, any member of the public may make a complaint to the OIPRD under the *PSA* about the policies of, or the services provided by, a police force, or the conduct of one of its officers (ss. 58(1), (2)). The Director shall review every complaint it receives (s. 59). A complaint is presumptively "screened in" (meaning that it will be investigated), unless the Director exercises his legislative discretion to "screen out" the complaint (meaning that it will not be investigated) (s. 60). This may occur, for example, when the Director determines that the complaint is vexatious (s. 60(4)). Therefore, the presumption is that complaints are "screened in".

[38] This initial screening power has been interpreted to be a statutory power of decision within the meaning of the *Judicial Review Procedure Act*, R.S.O. 1990,

c. J.1: see *Endicott v. Ontario (Independent Police Review Office)*, 2014 ONCA 363, 373 D.L.R. (4th) 149, at para. 28.

[39] In *Wall v. Office of the Independent Police Review Director*, 2014 ONCA 884, 123 O.R. (3d) 574, at paras. 33-36, the Director decided not to consider a complaint that had been made six months after the alleged incident. He relied upon s. 60(2), which provides that the Director "may decide not to deal with a complaint by a member of the public if the complaint is made more than six months after the facts on which it is based." The Divisional Court held that the Director erred in treating s. 60(2) as a limitation period, failing to apply the discoverability principle, and failing to give adequate reasons: *Wall v. Independent Police Review Director*, 2013 ONSC 3312, 362 D.L.R. (4th) 687 (Div. Ct.).

[40] In dismissing the Director's appeal, this court described the Director's discretion under s. 60 as a "screening" function: *Wall (ONCA*), at para. 62. Writing for the court in *Wall (ONCA)*, Blair J.A. observed, at para. 45, that this function involves the exercise of "a discretion to be exercised within the confines of the factors set out in s. 60(3) and the bounds of procedural fairness": see also paras. 28, 49, 60.

[41] If a complaint remains "screened in", s. 59(2) requires the Director to ensure that every complaint reviewed under s. 59(1) is "referred or retained and

dealt with in accordance with section 61". Section 61 gives the Director three options:

> (a) refer the complaint to be *investigated* by the chief of police of the officer's force (s. 61(5)(a));
>
> (b) refer the complaint to be *investigated* by the chief of police of another force (s. 61(5)(b)); or
>
> (c) retain the complaint to be *investigated* by the OIPRD (s. 61(5)(c)).

Where the OIPRD retains the complaint for investigation and finds it to be substantiated, it must refer the matter under s. 68(3) to the chief of police for a *hearing*. That is what happened in this case – the Director originally found the Stanleys' complaint to be substantiated and made a hearing referral.

[42] Thus, it can be seen that there are two types of referral: investigation referral under ss. 61(5)(a), (b), and hearing referral under s. 68(3).

[43] At the conclusion of an investigation, the decision-maker (be it the Director or a chief of police) must report on the investigation in writing and provide reasons explaining whether there are reasonable grounds to believe misconduct occurred (ss. 66(1)-(3) (chief of police); ss. 68(1)-(4) (OIPRD)).

[44] The decision-maker must then determine whether the misconduct is "serious". Misconduct that is determined to be "not of a serious nature" may be dealt with by informal resolution, or discipline without a hearing, with the consent

of the complainant and the officer (ss. 66(4)-(7) (chief of police); ss. 68(4)-(7) (OIPRD)). Importantly, with all "serious" misconduct findings, a hearing must be held to determine whether the officer committed the misconduct alleged.

[45] In his letter to Mr. Love, and in submissions made in the Divisional Court and this court, the Director stresses that his investigative role is predominant. But the OIPRD is more than just an investigative body. It is also an administrative decision-maker. This is clear from this court's decisions in *Endicott* and *Wall*, both of which dealt with the initial screening function of the OIPRD. In my view, the determination of whether reasonable grounds exist to believe misconduct has been committed, and the concomitant decision of whether to refer the case to the chief of police for a disciplinary hearing, cast the Director in a more enhanced decision-making role, even if it falls short of adjudication.

(3) The Power to Reconsider and the Doctrine of *Functus Officio*

[46] The doctrine of *functus officio* applies to administrative decision-makers. The general common law rule is that a decision-maker (historically, a court) is *functus officio* when they make "a final decision in respect of the matter before it": *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 861. In *Chandler*, the Supreme Court considered this doctrine in the administrative law context. Writing for the majority, Sopinka J. wrote that "there is a sound policy

reason for recognizing the finality of proceedings before administrative tribunals": *Chandler*, at p. 861. He defined the rules as follows:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.* [[1934] S.C.R. 186].

Sopinka J. further clarified that the doctrine should not operate so strictly in the administrative law context, "where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation": *Chandler*, at p. 862; see also the helpful discussion in David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pp. 384-389.

[47] In *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353*, 2009 ONCA 749, 98 O.R. (3d) 677, this court considered whether the Ontario Labour Relations Board had jurisdiction under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A. ("the *LRA*") to issue a second, supplementary set of reasons elaborating on a short set of original reasons. Following *Chandler*, Epstein J.A. (Blair J.A., concurring) wrote, at para. 33: "Beyond clerical or mathematical errors, or an error in expressing the tribunal's intention, *functus officio* generally applies except

where varied by statute. There is no suggestion in this case of a slip or error. Therefore the Board's jurisdiction to revisit its reasons must be through the authorization of the *LRA.*"

[48] Epstein J.A. found that, although s. 114 of the *LRA* furnished the Board with jurisdiction to "reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling", it did not permit the issuance of supplementary reasons in the absence of reconsideration (which was accompanied by a set of procedural safeguards). Having no jurisdiction to issue the second set of reasons, the majority found a denial of procedural fairness and the appeal was allowed: *Jacobs Catalytic*, at para. 71.[1]

[49] Therefore, the question becomes whether the OIPRD, as a creature of statute, is empowered by its legislative framework to reconsider a hearing referral decision. At the time of the Stanleys' complaints, it was not.

(a) No Power at Common Law

[50] Before I address the legislative framework, I briefly consider the Director's claim – in his letter to Mr. Love of June 24, 2015 (set out at para. 25, above), in

[1] In concurring reasons, Simmons J.A. would have allowed the appeal for different reasons, finding the power to issue supplementary reasons implicit in the power to reconsider.

his factum, and in his submissions before this court – that he had a common law power to reconsider his decision. I am unable to discern such a power.

[51] The Director relies upon the oral reasons of the Divisional Court in *Greer v. Ontario Provincial Police Commissioner*, [2006] O.J. No. 4771 (Sup. Ct. (Div. Ct.)). *Greer* involved an application for judicial review of the Superintendent of the police force to reconsider a police complaint that he had previously determined to be unsubstantiated. After the Superintendent reversed his original decision, the subject officer sought judicial review of this decision.

[52] The Divisional Court held that the Superintendent was not prohibited from revisiting a decision that the complaint was unsubstantiated. As the court said in its reasons, at para. 7: “Such a decision in our opinion is not a final adjudicative decision and the doctrine of *functus officio* is not applicable. [The Superintendent] was performing a screening function that was investigative, not adjudicative and therefore administrative in nature.”[2]

[53] Respectfully, this decision is unhelpful. It was decided before the creation of the OIPRD and the framework for decision-making under the current model. Further, the characterization of decisions as “investigative”, “adjudicative”, “final

[2] The Director also relies upon *Barnes v. Ontario (Social Benefits Tribunal)* (2009), 96 Admin L.R. (4th) 243 (Ont. Sup. Ct. (Div. Ct.)), where the Social Benefits Tribunal held a reconsideration hearing. However, the Tribunal had issued rules with respect to reconsideration hearings. The decision of the Divisional Court does not address the doctrine of *functus officio*. It is unhelpful to the determination of the issue in this case.

adjudicative", and "administrative" is inconsistent with the approach in *Endicott* and *Wall*. Moreover, these types of distinctions are not evident in *Chandler* or *Jacobs*. If the OIPRD is correct that all of the decisions it makes are investigative in nature, then it would never be *functus officio* in respect of any decision taken by the Director. This cannot be the case. It would undermine the principle of finality that was at the heart of *Chandler*.

[54] The Director has no power at common law to re-open an investigation and reconsider his hearing referral decision.

(b) No Statutory Power under the *PSA*

[55] In his letter to Mr. Love, the Director acknowledged that he had no explicit statutory power of reconsideration but insisted that the *PSA* and the OIPRD's Rules of Procedure in force at the time did not "explicitly preclude it". The Director purported to find the power in s. 72 of the *PSA*.

[56] I am unable to find a power to reconsider a hearing referral decision in s. 72. Section 72 reads as follows:

> **Public complaints may be directed**
>
> 72 (1) The Independent Police Review Director may, with respect to a complaint made by a member of the public under this Part about the conduct of a police officer other than a chief of police or deputy chief of police, at any time after the complaint is referred to a chief of police under clause 61 (5) (a) or (b) and before a hearing under subsection 66 (3) or 68 (5) in respect of the complaint is commenced,

> (a) direct the chief of police to deal with the complaint as the Independent Police Review Director specifies;
>
> (b) assign the investigation of the complaint or the conduct of a hearing in respect of the complaint to the chief of police of a police force other than the police force to which the complaint relates;
>
> (c) take over the investigation of the complaint; or
>
> (d) take or require to be taken by the chief of police any other action with respect to the complaint that the Independent Police Review Director considers necessary in the circumstances. [Emphasis added.]

[57] The distinction between investigative referrals and hearing referrals discussed above is crucial to a proper reading of s. 72(1). According to the underscored words above, the applicability of s. 72 is conditional upon an *investigative* referral having been made under ss. 61(5)(a) or (b). Moreover, the window closes after a disciplinary hearing commences. The powers enumerated in s. 72(1)(a) to (d) all contemplate the director taking action after having referred the matter for investigation under ss. 61(5)(a) or (b). For example, ss. 72(1)(b) and (c) specifically refer to the "the investigation".

[58] In its factum, the Chief of Police relies upon the power to take over an investigation in s. 72(1)(c) as authorizing what the Director did in this case. I disagree. The Director had retained the investigation, completed it, and then referred the matter to the Chief of Police to conduct a hearing. There was no longer any investigation to "take over". Again, the power in s. 72(1) is triggered by an investigative referral. It has no application where there has been a

retention under s. 61(5)(c) followed by a hearing referral under s. 68(3) – the situation in this case.

[59] The Director relies on the underscored reference to hearings under s. 66(3) (hearing after investigation by a chief of police) *and* 68(5) (hearing referral by the Director) as supporting his position that s. 72(1) applies in the circumstances of this case. On its face, the inclusion of s. 68(5) supports the position of the Director. However, these references to hearings being commenced cannot be disjoined from the requirement that the complaint must first be referred to a chief of police under s. 61(5)(a) or (b) (for investigation). Admittedly, the reference in s. 72(1) to a hearing under s. 68(5) is confusing. However, it may be explained by a scenario whereby an investigation was initially referred to a chief of police (ss. 61(5)(a) or (b)), only to be subsequently taken over by the Director (s. 72(1)(c)), ultimately resulting in a hearing referral under s. 68(5).

[60] The Chief of Police also relies on *Figuerias v. York Police Services Board*, 2013 ONSC 7419, 317 O.A.C. 179 (Div. Ct.), in which the court rejected the argument that the powers in s. 72(1) may not be exercised when the complaint is retained by the OIRPD and then referred to a chief of police for hearing. As the court said, at para. 57: “Neither the language of the legislation nor the policies behind the legislation support the limited interpretation of these sections urged upon us by the Respondents.” However, the court explicitly noted that the

determination of this issue was “not essential” to its to determination of the issues before it. This *obiter* from *Figuerias* has not been adopted in any subsequent decision. For the reasons already given, I respectfully reject this interpretation.

[61] I return to the underscored words of s. 72(1), above. Although the section presents certain interpretative difficulties by the inclusion of a reference to a hearing under s. 68(5), a fundamental precondition to its operation is an investigative referral. Without an investigative referral in the first place, the Director is powerless to exercise the powers set out in ss. 72(1)(a)-(d).

[62] Even if could be said that s. 72(1) applied to situations where the Director has made a hearing referral, the powers listed in paras. (a) to (d) cannot be read so broadly so as to include the power to reconsider the hearing referral in the first place. In this regard, it is noteworthy that the *PSA* does provide for reconsideration where a complaint is found to be *unsubstantiated*: s. 71. The implied exclusion rule of statutory interpretation further supports the conclusion that the *PSA* does not provide for reconsideration of *substantiated* complaints. Where legislation provides for one exception to a general rule – in this case, being an exception to *functus officio* where there is an unsubstantiated complaint – this suggests that other exceptions are excluded: *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142, at p. 152. This lends further support to the idea that there is no exception to *functus officio* in the event of a substantiated complaint.

[63] For these reasons, I conclude that the Director was powerless to suspend his decision made under s. 68(3) of the *PSA*, conduct a new investigation, and then decide that the complaint was unsubstantiated.

(c) The Rules of Procedure and the Path Forward

[64] Since the Director considered the Stanleys' complaints, circumstances have changed. The OIPRD's Rules of Procedure now clothe the Director with the reconsideration authority he purported to exercise in relation to the Stanleys' complaints.

[65] The *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22 ("the *SPPA*") addresses when it is appropriate for tribunals[3] to reconsider its decisions. Sections 21.1 and 21.2 provide as follows:

> **21.1** A tribunal may at any time correct a typographical error, error of calculation or similar error made in its decision or order.
>
> **21.2 (1)** A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.
>
> **(2)** The review shall take place within a reasonable time after the decision or order is made.

[3] Section (1)(1) provides that "tribunal' means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute".

> **(3)** In the event of a conflict between this section and any other Act, the other Act prevails. [Emphasis added.]

[66] The OIPRD's Rules of Procedure that were in force at the time of the Stanleys' complaints did not address the powers in s. 21.2(1). On July 7, 2016 (in the summer following the Director's reversal of his original decision in this case), the OIPRD amended its Rules of Procedure. The new Rule 17 deals specifically with the jurisdictional issue on appeal:

> **Rule 17 Reconsiderations**
>
> 17.1 The Director may, at any time, correct a typographical error, error of calculation, misstatement, ambiguity, technical error or other similar error made in his or her decision or determination.
>
> 17.2 The Director may reconsider his or her decision when it is in the public interest to do so, and having regard to any relevant considerations including, but not limited to, the following:
>
> (i) the need to correct an error of fact or law, defect in procedure or improper application of its mandate or jurisdiction.
>
> (ii) there is new information which was not available at the time of the original decision that may have reasonably affected the outcome.
>
> (iii) the extent to which any party has relied on the original decision.
>
> (iv) the extent to which any party or person has been affected by the original decision.
>
> (v) the balancing of interests between the need for finality of decisions and the prejudice to all parties. [Emphasis added.]

[67] This rule applies to the situation of the present case – the ability to reconsider a decision. The creation of this new power confirms the Director's view, expressed in his letter to Mr. Love, that there was no explicit power to reconsider his decision to refer the complaint to the TPS for hearing. Had this rule been in place at the time, it would have been a complete answer to the jurisdictional objection raised by Mr. Love.

[68] Consequently, while this power was not available to the OIPRD at the time it dealt with the Stanleys' complaints, it is now empowered to reconsider certain decisions mandated under the *PSA*, in accordance with the factors enumerated in r. 17.2.

(4) The Rules of Procedural Fairness

[69] Given my conclusion that the Director lacked authority to take the steps that he did, it is not strictly necessary to address the Divisional Court's finding that the rules of procedural fairness were infringed and the independence of the OIPRD was compromised. However, I would not wish these reasons to be considered as an endorsement of the conclusions that were reached. Nevertheless, I would make the following observations.

[70] This litigation was triggered by a mistake. The statement given by Constable Howes seems to have been transcribed inaccurately, and in a very important way. Although the Stanleys disagree with the ultimate decision taken

by the Director, they do not dispute that there was a mistake in the original transcription.

[71] For the Director, this mistake was potentially very serious, and portrayed the complaints in an entirely different light. Concerned about the integrity of his investigation, he was anxious to correct any error that investigators in his office might have made, and which may have led him into error in assessing the complaints.

[72] The manner in which this information was brought to the attention of the Director raised some eyebrows. It emanated from a police force from which the OIPRD was required to maintain its independence. The entire situation might have been avoided had the Director advised the Stanleys of exactly what had happened. When Mr. Love responded to the Director's letter informing the Stanleys of his decision to re-open his investigation, he said: "The circumstances which caused these 'inaccuracies' to come to your attention and your decision to review the completed report are unknown to the complainants and raise fairness concerns." The Director did not respond.

[73] The Director, along with the TPS and Constable Howes, brush aside these concerns because Mr. Love did not come right out and ask *who* brought the inaccuracies to the Director's attention, nor did he follow up with a further inquiry. They essentially assert that the factual lacuna was Mr. Love's fault. I reject this

approach. Mr. Love raised legitimate concerns. He did so in a temperate and professional manner. As it turned out, he was on solid legal ground. Irrespective of the dictates of procedural fairness, he deserved an answer.

[74] Had the Director advised Mr. Love of exactly what happened, it is likely that their dialogue would have continued, perhaps to resolution. Litigation may have been avoided. The failure to provide this information turned an unusual situation, in which the Director was undoubtedly attempting to act in the public interest, into one that quite reasonably aroused the suspicions of the Stanleys. This approach must be avoided in the future.

F. CONCLUSION AND DISPOSITION

[75] I would uphold the Divisional Court's decision to set aside the Director's decision made on December 10, 2015. However, I would set aside the Divisional Court's order requiring the Director to conduct a fresh investigation. There would be little point in ordering a third investigation now that almost six years have passed since the underlying events took place. Memories will have faded or have been tainted by the interview process that has already transpired.

[76] The effect of these reasons is to restore the Director's original decision of March 4, 2015, referring the complaint against Constable Howes to the Chief of Police for a hearing, pursuant to s. 68(3) of the *PSA*.

[77] While I would return this case to the TPS for hearing, the case is not transported back to 2015. The Director now has the authority of reconsideration under r. 17. Procedural laws are intended to have immediate effect and avoid the strictures of retrospectivity: see *Peel (Police) v. Ontario (Special Investigations Unit)*, 2012 ONCA 292, 110 O.R. (3d) 536, at paras. 71-77; *R. v. R.S.*, 2019 ONCA 906, at para. 27; and *R. v. Chouhan*, 2020 ONCA 40, 60 C.R. (7th) 1, at paras. 186-191. Consequently, there is no barrier to the Director applying the new Rules of Procedure to this case.

[78] The Director was aware of the transcription error with respect to Constable Howes' statement before formally re-opening his investigation. As early as the internal Investigative Review written in April or May of 2015 (referred to in para. 22, above), the Director learned of the problem. If the Director determines that it is in the public interest to do so, he may exercise his discretion under r. 17.2 to reconsider his original decision to refer the matter to the TPS for a hearing.

G. DISPOSITION

[79] The appeal is allowed in part. As no party sought costs of the appeal, no order will be made.

Released: "DW" April 15, 2020

"Gary Trotter J.A."
"I agree. David Watt J.A."
"I agree. C.W. Hourigan J.A."