

Justices of the Peace Review Council



In the Matter of Complaints Respecting His Worship Jorge Barroilhet, a Justice of the Peace

Reasons for Decision on the Voir Dire

Before: The Honourable Justice Deborah K. Livingstone
 Her Worship Senior Justice of the Peace Cornelia Mews
 Ms. S. Margot Blight

Hearing Panel of the Justices of the Peace Review Council

Counsel:

Mr. Douglas C. Hunt, Q. C.
Presenting Counsel

Mr. Julian N. Falconer
Counsel to His Worship Jorge Barroilhet

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This is a Voir Dire in relation to Mr. Joe Grasso. He was called as a witness by presenting counsel on April 2, 2009. Presenting counsel has submitted that Mr. Grasso should be declared an adverse witness, adverse in interest to presenting counsel, and a hostile witness, one displaying a hostile animus to presenting counsel.

The Voir Dire was commenced on April 2nd and continued on April 3rd 2009.

Section 23 of the *Ontario Evidence Act* applies to this hearing, and reads as follows:

How far a party may discredit his or her own witness

23. A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding, proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1990, c.E.23, s.23.

Section 9(1) of the *Canada Evidence Act* is identical to section 23 of the *Ontario Evidence Act*.

The panel accepts presenting counsel's submission that case law in relation to section 9(1) of the *Canada Evidence Act* is relevant to the legal determinations on this Voir Dire.

Specifically referred to were:

R v. Cassibo (1982), 39 O.R. (2nd) 288

R v. McInroy (1979) 1 S.C.R 588

Wawanesa Mutual Insurance Co. v. Hanes (1961) O.R. 495

Presenting counsel has asked the panel to accept, on the balance of probabilities, that certain utterances made by Mr. Grasso are inconsistent with his testimony in Chief of April 2nd, 2009.

Presenting and responding counsel agree that, pursuant to section 23 of the *Ontario Evidence Act*, once the panel accepts that there have been inconsistent statements made, such utterances may be placed in evidence in the hearing and put to the witness. Presenting and responding counsel also agree that, if Mr. Grasso is declared a hostile witness, he can be cross-examined “at large” on all issues relevant to the hearing.

Presenting counsel submits that if the panel were to accept the evidence of any of three witnesses on the Voir Dire, namely Ms. Consuela Hernandez, Mr. Andrew Burns and Mr. Michael Wong, the evidence of Mr. Grasso on the Voir Dire demonstrates that he is not only adverse in interest to presenting counsel but that he has expressed a hostile animus.

Mr. Falconer has argued, and we agree, that there are two categories of utterances. The first he described as the recollections of Ms Hernandez of two telephone conversations between herself and Mr. Grasso, one on January 17, 2009 and the other on approximately March 16, 2009. Ms Hernandez reported each of these conversations with Mr. Grasso to presenting counsel’s office. The first conversation was reported by voice-mail message on Sunday, January 18, 2009 and the second was reported by voice-mail on March 24, 2009. The transcripts of those voice-messages have been filed as exhibits on the Voir Dire.

There has been no evidence that Ms Hernandez took any notes which were contemporaneous with the utterances made by Mr. Grasso to her, and as a result we are not persuaded, on a balance of probabilities, that they are sufficiently complete and in context or were recorded reliably. As a result, we make no finding of any inconsistent statement by Mr. Grasso with respect thereto.

The other category of utterances referred to by Mr. Falconer are those to Mr. Andrew Burns on January 28, 2008 and to Mr. Michael Wong on January 19, 2009. Mr. Falconer conceded that these utterances were reliably recorded by Mr. Burns and Mr. Wong. We agree. These utterances are therefore in a different category from those made to Ms Hernandez.

We find as a fact that Mr. Grasso uttered words to both Mr. Burns and to Mr. Wong which are inconsistent with his testimony given in Chief in this proceeding.

On January 28, 2008 Mr. Grasso's utterances to Mr. Burns included the following:

That His Worship Justice of the Peace Barroilhet physically hired him to work at Stop All Traffic Tickets on the same day that he bumped into His Worship at the Eglinton courts. He began employment with Stop All Traffic Tickets the next day.

He told Mr. Burns that His Worship Justice of the Peace Barroilhet met him for dinner one week after he began work, informed him that they were happy with his performance and offered \$1,000 per week in pay which Mr. Grasso accepted.

Mr. Grasso told Mr. Burns that he spoke with His Worship Justice of the Peace Barroilhet all the time regarding Stop All Traffic Tickets files and that when His Worship was not in court he was on the phone to Mr. Grasso.

This evidence is clearly inconsistent with Mr. Grasso's evidence in which he denied having been hired by His Worship Justice of the Peace Barroilhet, did not recall a dinner meeting such as the one he had described to Mr. Burns, and claimed that all his business with Stop All Traffic Tickets was conducted with His Worship's wife, Marta.

Mr. Grasso remembered being interviewed by presenting counsel on January 19, 2009 and stated in that interview that he remembered the discussion he had with Mr. Burns on January 28th, 2008 and that he was being fairly honest. Later in the interview of January 19th 2009 he claimed not to remember when his prior discussion with Mr. Burns took place or what was said. During the interview of January 19th 2009, he also stated that his dealings with Stop All Traffic Tickets were always with Marta.

On January 19, 2009, Mr. Grasso's utterances to Mr. Wong included the following:

That he has spoken to the lawyers and told them that he does not want to have anything to do with this file because his evidence will hurt the Justice of the Peace and he doesn't want to hurt anyone.

This is clearly inconsistent with Mr. Grasso's evidence in which he claimed to not recall making any such utterance to Mr. Wong. Mr. Grasso recalled, however, the remainder of Mr. Wong's statement.

The panel must consider all the circumstances in deciding whether, as a result of these inconsistencies, Mr. Grasso is an adverse witness.

The witness offered no explanation for these inconsistencies in his evidence, other than the passage of time, but did refer to his addiction to crack cocaine and testified that he was using crack cocaine while he was employed by Stop All Traffic Tickets and was dismissed from his employment as a result of performance issues related to his use of cocaine. Mr. Falconer asked the panel to infer from this evidence that Mr. Grasso's memory lapses could reasonably be attributed to drug use and as a result, there has been no proof of adversity on a balance of probabilities.

With great respect to Mr. Falconer's submissions, there is no evidence from Mr. Grasso that relates his inability to recollect his prior utterances to his cocaine use.

We find that there has been no reasonable, credible explanation for the inconsistencies between Mr. Grasso's testimony and his prior statements to Mr. Burns and to Mr. Wong, and hereby declare him to be an adverse witness.

With respect to the issue of hostility, the panel accepts presenting counsel's submissions that the variance between Mr. Grasso's testimony and his previous statements relates to a vital issue in these proceedings, namely, the relationship between His Worship Justice of the Peace Barroilhet and Stop All Traffic Tickets. Further, Mr. Grasso's utterances to Mr. Wong, such as "I will not make service easy for you" and "I will accept service but you will have to find me first", clearly, in the view of the panel, demonstrate a hostile animus with respect to presenting counsel's insistence that he participate in this process.

In all the circumstances, the panel is convinced, on a balance of probabilities, that Mr. Grasso is a hostile witness and hereby declares accordingly.

Dated at the City of Toronto, in the Province of Ontario, April 6, 2009

The Honourable Justice Deborah K. Livingstone
Her Worship Senior Justice of the Peace Cornelia Mews
Ms. S. Margot Blight

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