

Justices of the Peace Review Council

IN THE MATTER OF A HEARING UNDER SECTION 11.1 OF THE *JUSTICES OF THE PEACE ACT*, R.S.O. 1990, c. J.4, AS AMENDED

Concerning a Complaint about the Conduct of Justice of the Peace Tom Foulds

Before: The Honourable Justice Peter Tetley, Chair

Justice of the Peace Monique Seguin

Ms. Jenny Gumbs, Community Member

Hearing Panel of the Justices of the Peace Review Council

SUPPLEMENTARY REASONS FOR INTERIM RULING

Counsel:

Mr. Scott K. Fenton
Ms. Amy Ohler
Fenton, Smith Barristers
Presenting Counsel

Mr. Mark J. Sandler
Ms. Amanda Ross
Cooper, Sandler, Shime & Bergman LLP

His Worship Tom Foulds appearing in person

SUPPLEMENTARY REASONS FOR INTERIM RULING

HEARD: September 28, 2016

Background

[1] On August 2, 2016, a Complaints Committee of the Justices of the Peace Review Council (the "Review Council"), acting pursuant to subsection 11(15) of the *Justices of the Peace Act* (the "Act"), ordered a complaint regarding the conduct or actions of His Worship Justice of the Peace Tom Foulds to be referred to a Hearing Panel of the Review Council pursuant to section 11.1 of the *Act*.

[2] A Notice of Hearing was served on the Respondent on September 2, 2016. The Notice of Hearing specified a first appearance date, before the Hearing Panel of the Review Council, of September 28, 2016.

[3] On September 28, 2016, the Respondent appeared in person. Mr. Mark Sandler and Ms. Amanda Ross attended with the Respondent in the capacity of un-retained counsel.

[4] Mr. Sandler advised the Hearing Panel that although he had not yet been retained as counsel for the purpose of the hearing proceedings, he anticipated the formalization of his retainer in the relatively near future. Mr. Sandler also advised that he had acted as legal counsel for the Respondent in the proceedings before the Complaints Committee.

[5] Mr. Sandler acknowledged non-compliance with the procedures of the Review Council that requires ten days written notice in advance of a procedural motion.

[6] In the absence of formal notice, motion record, filed authorities, factum or other form of supporting documentation, the Hearing Panel received and considered Mr. Sandler's oral request that the proceedings be briefly adjourned with the Notice of Hearing filed provisionally or filed and marked as Exhibit A but that the Panel should order that the Notice of Hearing and these proceedings not be published until such time as the motion of non-publication could be properly argued once legal counsel was retained.

[7] These requests were ultimately dismissed on the basis that the applicable statutory directives, directives founded on recognition that the complaints process is designed to maintain and restore public confidence in the investigation of complaints involving justices of the peace, outweighed the Respondent's privacy interests and undermined his request that a publication ban be ordered on an interim basis.

Relevant factual considerations

[8] During the course of his submissions, Mr. Sandler advised that the Respondent is currently seeking judicial review of the decision of the Complaints Committee of the Justices of the Peace Review Council. The decision of the Committee forms the basis for the particulars of the complaint that is the subject matter of this hearing.

[9] Mr. Sandler referred to the Procedures of the Review Council which provide that the initial set-date commences with the filing of the Notice of Hearing, at which point the proceedings become public. He advised that in view of the Respondent's existing legal challenge to the decision of the Complaints Committee to order a hearing, the Hearing Panel was urged to exercise restraint in receiving the Notice of Hearing as a numbered exhibit that could be publicized as existing legal proceedings brought by His Worship Foulds include a challenge to both the legal and factual foundations of the complaint itself.

[10] Mr. Sandler expressed concern with regard to the "potential prejudice" to Justice of the Peace Foulds as His Worship seeks judicial review of the decision of the Complaints Committee. The nature or specifics of the "potential prejudice" to the Respondent were not specified other than by general reference to the assertion that the publicizing of the complaint may be reasonably foreseen to effect the ability of the Respondent to continue to discharge the duties of his office while the legal challenge continues to unfold.

[11] Mr. Sandler, as noted, requested that the Notice of Hearing not be received as an exhibit, or alternatively, that it be received provisionally or marked as a lettered exhibit subject to an order that it could not be published to enable the Respondent to formalize counsel's retainer with a view to enabling a formal notice of motion to be brought before this Panel or alternatively, a motion in the context of the application for judicial review that His Worship has instituted in the Divisional Court, with a view to securing an order of prohibition pending the outcome of the existing judicial review challenging the decision of the Complaints Committee.

[12] In summary terms, Mr. Sandler requested the following alternative relief:

That the Hearing Panel defer its decision on the receipt of the Notice of Hearing as a public numbered exhibit until such time as counsel is retained and a formalized Notice of Motion is received or alternatively, receive the Notice of Hearing and the particulars of the complaint, filed provisionally, or in the alternative, filed and marked as Exhibit "A", but subject to an order that it not be published until such time as counsel's motion can either be formalized and heard by the Panel or a challenge to the jurisdiction of the Hearing Panel determined.

Legal Considerations

[13] The Review Council Procedures document provides as follows:

6. (1) A hearing shall be commenced by a Notice of Hearing in accordance with this part.
- (2) Recognizing the role that the complaints process has in maintaining and restoring public confidence and that the legislative requirements for maintaining privacy no longer apply for formal hearings under section 11.1 of the *Act*, once presenting counsel files a Notice of Hearing as an exhibit in the initial set date proceeding presided over by the Hearing Panel, the complaints process will become public, subject to any orders by the Hearing Panel.
- (3) Once the complaint has become public, the registrar will have notice about the hearing posted in the prescribed form on the Review Council's website, subject to any orders by the Hearing Panel. Not less than two weeks prior to the commencement of the hearing, the Registrar will have notice in the prescribed form published in the local newspaper. The public notice will include a brief summary of the allegations of conduct. The public notice shall not identify complainants or witnesses, due to the possibility that the complainant or witness could bring a motion in the proceeding for an order of non-publication of his or her identity. The Hearing Panel may, on such grounds as it deems appropriate, abridge the time for publication.

[14] These Procedures recognize that the complaints process is designed to assist in the restoration of public confidence that can only be achieved by a process that is both open and accessible to the public.

[15] This intention is further reflected in section 9(6) of the *Act*. This provision reads as follows:

Meetings of the Review Council and of its complaints committees shall be held in private but, subject to subsection 11.1 (4), hearings under section 11.1 shall be open to the public. 2006, c. 21, Sched. B, s. 7.

[16] A review of these provisions confirms that the enabling statute and the procedural rules arising from that statute create a "strong presumption of openness". That intention reflects the fact that there is a significant and continuing public interest in the maintenance of judicial conduct proceedings that are transparent and accessible.

[17] The Supreme Court of Canada decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442 directs that an applicant who seeks a publication ban in such circumstances must demonstrate that his or her privacy interests outweigh the public's interest, including the right to free expression and the maintenance of transparency in our legal system.

[18] As Presenting Counsel rightfully submits, section 9(6) of the *Act* directs that the proceedings "shall be open to the public". By virtue of the enabling statute itself, these proceedings are intended to be public.

[19] The *Statutory Powers Procedure Act* applies to this hearing and section 9 of that *Act* directs that any "oral hearing"... "shall be open to the public". Section 6(2) of the

Act reflects that objective by providing that the complaints process becomes public once the Notice of Hearing is received as a numbered exhibit.

[20] As the hallmarks of a review process are openness and transparency, Presenting Counsel submits that the openness of the proceedings should not be deferred until such time as counsel is either formally retained or contemplated challenges to the jurisdiction of the Hearing Panel have been mounted and/or determined.

[21] In the submission of Presenting Counsel, the Notice of Hearing is akin to an information in a criminal case and may be viewed as simply representing an unfounded or unproven allegation.

[22] Presenting Counsel also references the aforementioned *Dagenais/Mentuck* test and the duty to notify the media in advance of the application of the kind contemplated by His Worship and Mr. Sandler as a consequence of the significant public interest in accountability and transparency that proceedings of this kind entail.

[23] Reference is made by Presenting Counsel to two previous decisions of the Hearing Panels of the Review Council, in which requests were made for orders that contents of the Notice of Hearing not be made public. These applications include the determination of a complaint regarding the conduct of Justice of the Peace Solange Guberman, dated October 11, 2011, and that related to a complaint regarding the conduct of Justice of the Peace Errol Massiah, dated April 11, 2014.

[24] These decisions serve to reiterate and confirm the emphasis that is placed on maintaining openness in and public accessibility to these proceedings.

Analysis and Conclusion

[25] In dismissing the Respondent's application, consideration has been given to the following factual and legal considerations:

- (i) That open and publically accessible courts and tribunals are the hallmark of our legal system and a coveted feature of our democratic society;
- (ii) These principles (openness and accessibility) have been incorporated into the *Statutory Powers Procedures Act* and are reflected in the Review Council Procedures as previously noted (see section 6);
- (iii) The Notice of Hearing in this matter was formalized and served on September 2, 2016, some four weeks before the first appearance without recommendation by the Complaints Committee that the matter be considered via an in-camera hearing as authorized by section 9(1) of the *Statutory Powers and Procedures Act*;
- (iv) The Respondent has not met the test applicable for a non-publication order as referenced by the Supreme Court of Canada in *Her Majesty*

the Queen v. Toronto Star Newspapers, 2005 S.C.C. 41, [2005] 2 S.C.R. 188, at paragraph 26. In this regard, the Respondent has not established “why such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk” and that the “salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice”;

- (v) While the allegations of alleged misconduct may cause embarrassment to the Respondent, there is nothing to suggest that the mere receipt of the Notice of Hearing and the particulars of the complaint will, in themselves, undermine the ability of the Respondent to discharge the duties associated with his office. That said, the allegations relate directly to the performance of the Respondent’s duties as a judicial officer. In these circumstances, it cannot reasonably be expected that such conduct would not be subject to public scrutiny;
- (vi) The request that the Notice of Hearing be noted as Exhibit “A”, rather than public exhibit property, is concluded to amount to the equivalent of a de facto interim publication ban that would in essence defeat the principles of openness that are determined to be of priority in these proceedings;
- (vii) As there is no pre-existing judicial directive that this hearing be made “non-public”, with no advance notification to the press, no formalized motion and no supporting materials, it is concluded, on application of the principles of openness referenced above, that the oral motion is dismissed and the Notice of Hearing should be received as an exhibit and in accordance with the Procedures of the Review Council, the complaints process will become public. In accordance with the Procedures of the Review Council, the public notice shall not identify any named complainant or witness due to the possibility that a complainant or witness could bring a motion in the proceeding for an order of non-publication of his or her identity. Accordingly, the redacted version of the Notice of Hearing, with the exclusion of the names of any complainant, is received as Exhibit 1(B) and it is a public exhibit.
- (viii) In reaching this determination, it is acknowledged that the publication of a Notice of Hearing cannot be challenged until the Notice of Hearing has been made an exhibit. In effect, the Respondent is deprived of the ability to secure a “pre-emptive order” by way of a request for judicial review. That circumstance alone, in the view of the Hearing Panel, does not constitute an incident of procedural unfairness and is not concluded to be unreasonable.
- (ix) In reaching this decision, the Hearing Panel understands that the receipt of the Notice of Hearing as an exhibit effectively amounts to the specifics of the complaint being made public and may negate the

efficacy of any future application for non-publication. It is acknowledged that the Notice of Hearing and the attached Appendix set out in detail the particulars of the complaint. That is effectively the result of the receipt of the Notice of Hearing as a public numbered exhibit. The Hearing Panel is mindful of that fact.

Conclusion

[26] While the publication of the allegations referenced in the Notice of Hearing may cause embarrassment to Justice of the Peace Foulds, the potential for embarrassment alone is not a sufficient reason to grant the requested order.

[27] The reference to the potential undermining of His Worship's ability to discharge the duties of his office is similarly concluded to be speculative and without any factual foundation. We conclude, on the basis of the review of the legal principles cited, that proceedings of this nature should be open to the public and the publication of the particulars in the Notice of Hearing and the Notice of Hearing itself should not be restricted in any way.

Dated this 19th day of October, 2016

HEARING PANEL:

The Honourable Justice Peter Tetley, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Ms. Jenny Gumbs, Community Member