

# **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**

## **MOTION FOR DISCLOSURE AND MOTION FOR A TEMPORARY STAY / ADJOURNMENT OF THE DISCIPLINARY HEARING**

### **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

Counsel for His Worship Tom Foulds

# **MOTION FOR DISCLOSURE AND MOTION FOR A TEMPORARY STAY / ADJOURNMENT OF THE DISCIPLINARY HEARING**

HEARD: January 25, 2017

## **Motion for Disclosure**

1. Presenting Counsel, Mr. Fenton, and Mr. Sandler, on behalf of His Worship, have submitted that the principles of natural justice require that disclosure be made to His Worship of the names of:
  - a) The names of the Complaints Committee members who referred the complaint for a hearing on August 2, 2016;
  - b) Whether any members of that Complaints Committee were involved as members of any prior Complaints Committee or Hearing Panel in relation to any previous complaint against His Worship; and
  - c) If the answer to (b) is yes, the role of any members of the Complaints Committee in any such prior complaint or proceedings.
2. Mr. Sandler submits that the information is necessary to support His Worship's allegation that the decision of the Complaints Committee to refer the complaint to a hearing amounted to a denial of natural justice. In relation to this issue, three main concerns are referenced: that the referral decision was made by individuals whose identities His Worship is statutorily prohibited from ascertaining; that accordingly, he had no way of determining whether the Committee carried out its statutory functions because of the anonymity of the process itself; finally, that he has no way of determining whether bias or the potential of bias could have played a role in the referral of the complaint to a hearing. The potential influence of bias on the Committee's referral decision, or a reasonable apprehension of bias, is viewed by His Worship as going beyond mere speculation as a consequence of the possible prior involvement of the members of the Committee in a previous disciplinary matter concerning His Worship, or alternatively, based on conflicts that might arise from other interactions a specific Committee member might have had with His Worship in unrelated matters.
3. Mr. Sandler relies in part, upon the consent of Presenting Counsel to disclosure of the requested information. Counsel have directed the Panel to the provision in the Review Council's Procedures that grants discretion to hearing panels to order disclosure, on an exceptional basis, of information that would otherwise be confidential. The Procedures include the following provision:

Pursuant to section 8(18) of the *Justices of the Peace Act*, the Review Council has ordered that, subject to an order made by a complaints committee or a hearing panel, any information or documents relating to a

meeting, investigation or hearing that was not held in public are confidential and shall not be disclosed or made public.

4. The role of Presenting Counsel is an important one. The Procedures state that the role of Presenting Counsel is “not to seek a particular order against a respondent, but to see that the complaint against the justice of the peace is evaluated fairly and dispassionately to the end of achieving a just result.”
5. Even though Presenting Counsel consents to the disclosure of the requested information to His Worship and both counsel urge the Panel to release the information requested without any form of qualification or restriction as to its further dissemination, the Panel must independently consider the request for disclosure before it. As the Supreme Court of Canada observed in *Ruffo v Conseil de la Magistrature*, [1995] 4 S.C. R. 267 at para. 72, the judicial discipline process “does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.” Presenting Counsel presents his or her view but the Panel has its own responsibility to reach its determinations on the matter before it.
6. The Panel notes that the names of the members of the Review Council are not confidential. If His Worship was concerned about a possible apprehension of bias in relation to particular members of the Council in relation to his dealings with one or more of them outside of the complaints process, he could have asked the Committee to disclose whether any of those persons were on the Committee, and if so, requested that the member or members recuse themselves from the matter. We have no information before us as to whether such a request was made.
7. The Notice of Hearing was issued on September 2, 2016. The information before us is that His Worship requested disclosure of the information in a letter to Presenting Counsel in September of 2016. A set-date before us was held in this matter on September 28, 2016 and no motion was brought by His Worship for disclosure of the information at that time. This motion for disclosure was brought almost four months later on short notice at the appearance of January 20, 2017.
8. Although Presenting Counsel has agreed that the information should be disclosed to His Worship, he has also told us that the material is not in his possession because of the confidentiality provisions of the *Justices of the Peace Act* that govern the complaints process. Mr. Sandler contends that although the legislative framework contemplates confidentiality unless the complaint is referred to a hearing, the names of the members of the Committee should not be confidential.
9. This Panel has considered the legislative framework. The *Act* provides a comprehensive framework of confidentiality except where a hearing is ordered. Under the Procedures, a hearing is ordered where there is an allegation of judicial misconduct and “there is a basis in fact which, if believed, could result in a finding of judicial misconduct” (JPRC Procedures).
10. Section 11(8) of the *Act* states:
  - 11.(8) The investigation shall be conducted in private.

11. Section 11(9) provides an investigating Committee with the powers under the *Statutory Powers Procedures Act* to fulfill its responsibilities but does not allow for the justice of the peace to be given notice if witnesses are compelled to be heard by the Committee under oath:
  - 11.(9) Sections 4.2, subsections 12(1) to (3.1), and sections 13, 14, 15 and 22 of the *Statutory Powers Procedures Act* apply to the activities of a complaints committee.
12. Complaints that are not referred to a hearing must be kept confidential even from other members of the Review Council pursuant to section 11(18):
  11. (18) The complaints committee shall report to the Review Council on its decision and, except where it orders a formal hearing, it shall not identify the complainant or the justice of the peace who is the subject of the complaint in the report.
13. As a means of accountability and transparency about the complaints received and addressed by the Review Council, the *Act* permits the following information to be disclosed about its work in an Annual Report each year:
  - 9.(7) After the end of each year, the Review Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the justice of the peace, the complainant or a witness.
14. We recognize the tension that exists between the public's right to know and the requirement of confidentiality in the judicial discipline process. The policy objectives that govern this process are akin to those set out in the *Courts of Justice Act* that govern the judicial discipline process established in Ontario to address complaints about the conduct of provincially-appointed judges. The Ontario Judicial Council issued a thorough analysis of that comparable framework in its decision in *The Matter of Application Brought by the Toronto Star and Criminal Lawyers' Association* (OJC, October 14, 2015). The Judicial Council concluded:
  88. The Council rejects the arguments of the Toronto Star and the CLA that the statutory framework was intended to, or that it does, support complete openness in the complaints process in circumstances where there has not been a decision to order a hearing under s. 51.6. Our view is consistent with the conclusion expressed by the Divisional Court in the case *Kipiniak v. The Ontario Judicial Council*,<sup>1</sup> in which the Court stated at para. 12:

---

<sup>1</sup> 2012 ONSC 5866.

[12] The statutory mandate of the OJC includes addressing complaints alleging misconduct on behalf of a provincial court judge. Mr. Kipiniak takes issue with the confidential nature of the OJC's complaints procedure and suggests that this indicates something nefarious. The confidential and private nature of the complaints procedure is mandated by statute and intended to achieve a balance between accountability on the part of the judges for their conduct and constitutionally protected judicial independence. The CJA requires that the subcommittee's investigation and report and the review panel's deliberations be kept private.

89. The legislation establishes a complaints process that is generally private and confidential unless a review panel decides to order a hearing and a Notice of Hearing is filed. In keeping with the Minister's commitment of accountability, the Council publishes its Annual Reports. In furtherance of that commitment, when a hearing is ordered, the public receives information about the hearing through the Council's website and a notice published by the Council in the newspaper.
15. We are of the view that the reasoning of the Divisional Court in the *Kipiniak* case also applies to this judicial discipline process. The confidential and private nature of the complaints procedure is mandated by statute and intended to achieve a balance between accountability on the part of the justices of the peace for their conduct and constitutionally protected judicial independence. The *Justices of the Peace Act* contemplates that the Committee's investigation and deliberations be kept private, except what is presented in a public hearing, if the complaint is referred to that further stage in the process. In keeping with the legislative framework, the Review Council has historically maintained the names of its Complaints Committees in private.
16. We have considered whether there are exceptional circumstances in this case that justify disclosure of otherwise confidential information and are satisfied that the circumstances in this case are exceptional. This is a situation where the justice of the peace before us has been the subject of a prior disciplinary hearing before a Hearing Panel of the Review Council that resulted in findings of judicial misconduct. As well, His Worship is suggesting that he has a factual basis for believing there may be a reasonable apprehension of bias arising from his dealings with one or more of the members of the Review Council arising from his interactions in other matters outside of the complaints process. However, we are also mindful that the exceptional disclosure ordered in this case must respect the general requirement of confidentiality.
17. In an effort to balance these considerations the Hearing Panel orders that the names of the Complaints Committee may be disclosed by the Registrar to His Worship, counsel retained to represent him at the hearing, Presenting Counsel and counsel representing either party on the application for judicial review of the Committee's decision. The names are to otherwise remain confidential and shall

not be further disclosed or made public. The names may be disclosed to the Divisional Court if there is a factual basis for His Worship to advance the position that a reasonable apprehension of bias may exist because of any other dealings between those members and His Worship. In those circumstances the names may be disclosed by the Court as it deems appropriate.

18. Public confidence in the integrity of the complaints process is of fundamental importance. His Worship is seeking to advance the assertion that statutory duties may not have been upheld on the basis that members of the Review Council may have had repeated dealings with a previous complaint about his conduct in the course of carrying out their statutory duties. His position is that if that circumstance is confirmed to have taken place, a reasonable apprehension of bias may be concluded to exist.
19. The Review Council's practice is that when a justice of the peace is informed of a complaint and provided with an opportunity to respond, he or she is informed of the membership of the Committee assigned to investigate the complaint; therefore, he or she is provided with the information necessary to determine whether the Committee is constituted of the membership required by statute: a judge, a justice of the peace and a community member or lawyer member. Beyond the disclosure of the specific job function they perform, the applicable legislation does not direct that the identities of the individual Committee members be made public.
20. We also note that the Court of Appeal has recognized that the members of an administrative tribunal with a particular expertise may have repeated dealings with the same parties in carrying out their statutory duties and obligations. Such circumstances do not necessarily lead to a conclusion of a biased result or a situation where a reasonable apprehension of bias may exist. The Court held that it must be presumed, in the absence of any evidence to the contrary, that the members will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case: *E. A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R. (3d) 257; [1995] O.J. No. 1305.
21. We also note that section 11(4) of the *Act* prohibits members of a Complaints Committee who investigate a complaint from participating in the hearing in respect of that complaint. His Worship appears to have a concern as to whether that section was violated in his case where a hearing has been ordered.
22. In the unusual circumstances of this case, and with the objective of preserving public confidence in the complaints process, the Panel also orders that the Registrar may disclose to His Worship, counsel retained to represent him at the hearing, Presenting Counsel and counsel representing either party on the application for judicial review, to the Divisional Court and by that Court as it determines:
  - a) Whether the judge member, justice of the peace member and community or lawyer member of the Complaints Committee that referred the complaint before us to a hearing were members of any

prior Complaints Committee or Hearing Panel in relation to any previous complaint against His Worship; and,

- b) If the answer to (a) is yes, whether that involvement was on another Complaints Committee or on a Hearing Panel; what the disposition was of such complaint; and, a copy of the case summary that would or has appeared in the JPRC Annual Report for the period of time when that file was closed.

### **Notice of Motion for Temporary Stay / Adjournment of Disciplinary Hearing**

23. The bulk of the submissions received from both Mr. Sandler and Presenting Counsel dealt with matters such as prematurity and the relative merits of the pending Divisional Court review. In our view it is unnecessary to address those concerns at this time given that the Divisional Court review of the Complaint Committee's decision is likely to be heard before the end of May, 2017. Those issues will presumably be determined in that review. Notwithstanding the judicial review application, once a hearing is underway, the Hearing Panel has oversight of this phase of the hearing process and a duty to fulfill the responsibilities to assigned to this Council under the *Act*. Its role is a very important one in the administration of justice. The Hearing Panel in the case of *Re Spadafora* (JPRC, January 23, 2015) discussed the responsibilities of a Hearing Panel in relation to the scheduling of hearing dates. In that case, after hearing dates were scheduled, the justice of the peace submitted a letter to the Chief Justice stating he would retire. On that basis, the hearing dates were vacated. He then revoked his request to retire. Subsequently, he filed an acknowledgment indicating his intention to irrevocably retire. A motion was brought by Presenting Counsel to schedule new dates for the hearing. The Panel set out the following:

- 1) We have heard submissions today from Presenting Counsel Mr. Smith, on behalf of Mr. Fenton, and from Mr. Shime, on behalf of Mr. Sandler, Counsel for His Worship Spadafora. Mr. Smith filed a sworn "Acknowledgment", dated January 22, 2015, from His Worship Spadafora indicating his intention to "irrevocably" retire from judicial office, effective January 31, 2015.
- 2) Mr. Smith and Mr. Shime also made recommendations on how to proceed at this time. They suggested three possible approaches: adjourning the hearing *sine die* with no fixed date; reconvening the Panel shortly after January 31, 2015 to schedule dates to hear evidence; or, setting dates at this time.
- 3) We are extremely concerned about the course of events. We accept that His Worship has filed a sworn document today indicating for a second time his intention to retire effective January 31, 2015. However, we are very mindful of our mandate to maintain public confidence in the judiciary and in the administration of justice, including this complaints process.

- 4) Acting prudently, and in the interest of absolute certainty in the judicial discipline process, it is our view that the Panel must ensure that there is no risk of further delays in this hearing process if it becomes necessary to proceed. Therefore, it is imperative to have all steps in place for the hearing of evidence, should His Worship again request revocation of his retirement.
  - 5) The Panel is also sensitive to the expenditure of public funds and concludes that the most expeditious and least costly option moving forward is to set dates at this time. Should His Worship's retirement take effect on January 31, 2015, this Panel would lose jurisdiction and the dates would be vacated.
24. We agree that in scheduling hearings in a judicial disciplinary process, Hearing Panels must be mindful of the mandate to maintain public confidence in the judiciary and in the administration of justice, including this complaints process. We must act prudently, and in the interest of certainty in the judicial discipline process.
  25. Mr. Sandler has opined that there would be irreparable harm to His Worship if he is forced to participate in a lengthy disciplinary process before his judicial review is determined. He argues that it would be a serious waste of resources to conduct a hearing if it is determined by the Divisional Court that the Committee did not have jurisdiction to proceed. As well, he has argued that the most important balance of convenience factor to be considered is that there is no concern about how His Worship might interfere with members of the public or prosecution, given that he is not sitting pending the final disposition of the hearing.
  26. In reply, Mr. Fenton references the fact that the allegations in the Notice of Hearing are serious and that there is a strong public interest in having allegations, such as those made here against a justice of the peace, heard in a timely manner.
  27. In these circumstances, the time that has already passed since His Worship was notified that a hearing would take place is also relevant. On August 2, 2016, the Registrar communicated to His Worship that the Committee had ordered a hearing. A Notice of Hearing was served on him 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.
  28. On September 28, 2016, the Respondent appeared in person. Mr. Mark Sandler and Ms. Amanda Ross attended with the Respondent. Mr. Sandler informed the Panel that His Worship was in the process of being in a position to retain him and Ms. Ross as counsel in relation to the hearing.
  29. A pre-hearing conference was ordered and scheduled for January of 2017. As Mr. Sandler has not been fully retained by His Worship, it is unlikely that the conference was of benefit in narrowing issues.
  30. On January 20, 2017, Mr. Sandler informed the Panel that His Worship now contemplates that Mr. Sandler would not likely be properly retained until

approximately September of 2017. Mr. Sandler indicated that he may not be available until February of 2018 due to other previously scheduled court commitments. We are faced with a request to provide His Worship with more than a year to retain counsel from the time when he became aware of the hearing being ordered, and a request to delay the hearing of evidence even longer to accommodate the availability of counsel of choice, a counsel who has not yet been retained.

31. We agree with the principle set out by the Divisional Court in *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 that adjudicative bodies, dealing with complaints about judicial officer holders, ought to start with the premise that it is always in the best interests of the administration of justice, to ensure that persons, who are subject to such complaints, have the benefit of counsel. That does not mean that the justice of the peace can be permitted to unreasonably delay the complaints process by seeking to adjourn the hearing process until some undefined future date when he may be in an enhanced financial position that will enable him to retain counsel of choice and preferred counsel is available to act on his behalf.
32. The Panel is also sensitive to the expenditure of public funds. As indicated, His Worship is suspended from work and receiving his full salary.
33. If His Worship's application to stop the hearing process is successful, this process will cease. Until such an order is issued by the Divisional Court, in order to preserve public confidence in this complaints process, we conclude that it is imperative that our legislated mandate under the *Act* continue and that all necessary steps be in place to facilitate the hearing of evidence in relation to this complaint.
34. In balancing the uncertain outcome of the judicial review process, the principle that a justice of the peace should be represented by counsel in the complaints process, and the public interest in having a timely hearing into the allegations set out in the Notice of Hearing, the Panel concludes that hearing dates should be scheduled today for three weeks in October. By that time, His Worship will have had more than a year to get his financial affairs in order and to retain counsel who is available to accommodate the scheduled dates. With this much lead time it is anticipated that counsel of choice may be able to adjust his pre-existing trial schedule to accommodate all or some of the proposed hearing dates. Alternatively, the justice of the peace will have sufficient time to retain and instruct other counsel. The complainant and the public will also have the certainty of knowing, subject to any decision that may be issued in the interim by the Divisional Court, that the evidence in relation to the allegations set out in the Notice of Hearing will be presented to the Panel in a public forum without undue or unreasonable delay. The complaint will progress at that time to the stage where, in a public forum, it will be assessed on the merits. In that way, public confidence will be preserved in the judiciary, the administration of justice and this complaints process, pending the final disposition of the complaint.

35. As it is presently contemplated that the judicial review will be heard in May, this matter will be adjourned to a date in June, 2017. This interim date will allow for an update as to His Worship's continuing efforts to retain legal counsel and the status of the Divisional Court review.
36. We appreciate that His Worship has forecast that he will be unable to retain counsel of choice until October. The panel is mindful of that fact but also aware that, based on consideration of the available dates of Presenting Counsel, Mr. Sandler and the Panel members, this hearing could have been scheduled to proceed in June.
37. That is our ruling with respect to the two issues that form the subject of the motions.

Dated this 14<sup>th</sup> day of February, 2017

HEARING PANEL:

The Honourable Justice Peter Tetley, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Ms. Jenny Gumbs, Community Member