

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

REASONS FOR A PUBLICATION BAN

Counsel:

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

His Worship Tom Foulds, self-represented

REASONS FOR A PUBLICATION BAN

HEARD: October 10, 2017

Order made on October 10, 2017

1. On the request of Presenting Counsel and after hearing submissions by the parties, on October 10, 2017 this Panel made the following oral Order with written reasons to follow:

The names of AA, the complainant in the criminal matter which resulted in no findings, and BB, the accused in that process, shall not be published, nor shall any information that might identify them be published. The initials AA can be used to describe the person who was the complainant in the criminal process and the initials BB can be used to describe the person who was the complainant in this judicial disciplinary process.

Submissions by the Parties

2. Pursuant to section 18(3)(g) of procedural code for hearings contained in the Review Council's Procedures, Presenting Counsel, Mr. Fenton and Ms. Ohler, brought a motion before the Hearing Panel for an Order prohibiting the publication of information that might identify the complainant who filed the complaint that resulted in this hearing ("BB") or the person ("AA") who was the complainant in the criminal proceedings that gave rise to the complaint filed by BB about the conduct of His Worship Tom Foulds.
3. Presenting Counsel submitted that the salutary effects of the limited publication ban to protect the privacy interests of BB and AA outweigh the deleterious effects on the interests of the public.
4. Presenting Counsel submitted that neither of AA or BB were directly involved in the factual allegations comprising the alleged judicial misconduct of His Worship Foulds.
5. Mr. Fenton pointed out that AA was the complainant in a criminal case that alleged assault and harassment relating to BB where neither charge went to trial; the harassment charge was withdrawn on the basis that the Crown Attorney formed the opinion that there was no reasonable prospect of conviction and the assault charge was stayed at the request of the Crown Attorney without any findings. AA is not anticipated to be called as a witness in this hearing before us.
6. BB will be called as a witness for a limited purpose to testify to the impact that Justice of the Peace Foulds' alleged misconduct had upon him when, as the Crown Attorney provided disclosure to BB's counsel, BB learned incrementally of His Worship's involvement with the police, Crown Attorneys and Court Services staff.

7. Mr. Fenton argued that a further consideration is that the hearing before this Hearing Panel is a judicial misconduct hearing confined to allegations about the conduct of His Worship; this is not a retrial of the criminal case.
8. Mr. Fenton informed the Panel that BB has requested that his name not be identified. Mr. Fenton had no contact with AA and did not have information on her view as to whether her name should be identified.
9. Mr. Fenton argued that it would be unfair and unduly prejudicial for AA or BB to have their reputations affected by this hearing in circumstances where the underlying criminal proceeding didn't result in any findings of guilt. He further noted that the focus of this hearing is on His Worship's conduct, not on their conduct.
10. Mr. Fenton referred the Panel to the Notice of Hearing, Exhibit 1(b), which uses the initials AA and BB to identify the two persons, and he argued that the publication ban would be consistent with the Notice of Hearing. He submitted that the publication ban would not materially affect transparency and openness of the hearing.
11. His Worship submitted that this Panel may not have authority or jurisdiction to make such an Order, further arguing that section 18(3)(g) required notice on the Review Council's website of the motion for a publication ban and no notice was given. That section states:
 - 18.(3) Without limiting the generality of the foregoing, a motion may be made for any of the following purposes:
 - g. seeking a publication ban or an order that the hearing or part thereof be heard *in camera*. The Review Council will provide public notice of such a motion on its website.
12. His Worship argued that the Review Council has no jurisdiction to consider anonymous complaints and this publication ban would not be any different from that.
13. His Worship submitted that the jurisdiction the Review Council has to establish procedural rules does not give the Panel the right to do things that are not conveyed by the *Act*; the *Act* does not provide authority to grant an order where names would not be published except under section 11.1(9) which provides that if a complaint involves allegations of sexual misconduct or sexual harassment, the Panel shall, at the request of a complainant or of a witness who testifies to having been the victim of such conduct by the justice of the peace, prohibit the publication of information that might identify the complainant or the witness.
14. His Worship argued that the names of AA and BB were disclosed by the Review Council in the context of defending the judicial review he filed that was dismissed on October 3, 2017. Therefore, he argued, "the horse has left the barn" and the application for the publication ban should not be granted as it relates to BB.
15. His Worship consented, however, to the publication ban on the name of AA but not to such an Order on the name of BB.

Analysis

16. The provision in section 11.1(9) of the *Act* providing for a publication ban of a hearing in circumstances where the complaint involves allegations of sexual misconduct or sexual harassment makes it mandatory upon a Panel, at the request of a complainant or of a witness who testifies to having been the victim of such conduct by the justice of the peace, to prohibit the publication of information that might identify the complainant or witness. Through that provision, the Legislators ensured that protection of the identities of persons who allege sexual misconduct or sexual harassment will have the protection of a publication ban.
17. The *Act* does not attempt to contemplate all situations that may arise during judicial disciplinary proceedings. Subsection 10(1) of the *Act* states: “The Review Council may establish rules of procedure for complaints committees and for hearing panels and the Review Council shall make the rules available to the public.” That section recognizes that the Review Council should have, and does have, the authority and discretion to determine the rules of procedure that should govern the complaints process, including hearings, to fulfill its role in the administration of justice.
18. The Review Council has established section 18(3) in the procedural code for hearings that gives a Hearing Panel discretion to consider, as may be required, a motion for a publication ban. The procedural rule does not attempt to circumscribe the circumstances that may arise in hearings, nor does it limit such a motion to the narrow circumstances of section 11.1(9) which gives rise to a mandatory publication ban.
19. Section 18(2) contemplates that a Hearing Panel may need to consider “any procedural or other matters...as are required to be determined prior to the hearing of the complaint.” The *Act* was not intended to set parameters on the procedural issues that could arise during disciplinary proceedings before the Review Council. The *Act* sets out a general framework and part of the responsibility of the Review Council is to establish the procedural rules to carry out its legislative role.
20. We are satisfied that we have discretion to determine whether there should be a publication ban in the circumstances before us.
21. We do not accept His Worship’s argument that the limited publication ban sought by Presenting Counsel would be analogous to considering an anonymous complaint. Even with a publication ban on the identities of AA and BB, His Worship, whose conduct is the subject of this hearing, would know who the person is that brought forward the complaint. Further, the *Act* contemplates that a complainant must be informed of the disposition of his or her complaint; that is not possible if the complaint is anonymous. In this present instance, even if BB is identified publicly as BB, the Review Council is able to notify him of the disposition. The same cannot be said to an anonymous complaint.
22. His Worship’s argument that the “horse has left the barn” does not persuade us that a publication ban is not appropriate for this hearing. There may be media reports on the evidence presented in this hearing or on the decisions made by this

Panel. An Order by this Panel would still serve the objective of protecting the personal interests of AA and BB, whose conduct is not the subject of this hearing.

23. We accept that the presumption of openness in the hearing process, and that the principles from *Dagenais/Mentuck* apply to proceedings before this Hearing Panel, just as they do to courts. It is our view that the intention of paragraph 18(3)(g) is to ensure compliance with case law related the open courts principle that requires public notice, including notice to the media, when there is a motion for a hearing or part thereof to be heard *in camera*.
24. It is our view that notice to the public was not required of Presenting Counsel's motion; however, even if it were required, non-compliance with a technical step in this instance should not and does not preclude the Panel from making its determination, after taking into account the interests of the parties, the effects on the right to free expression, the right of His Worship to a fair and public hearing and the privacy interests of AA and BB who were involved in a criminal process that resulted in no findings. The Panel has jurisdiction to waive compliance of a technical procedural step if it is satisfied that the rights of the parties and the public would be served, and the important role of the Review Council of preserving confidence in the judiciary and in administration of justice would be served.
25. Two members of the media were present when the motion was brought and raised no objections to the request for the publication ban. One of them requested confirmation that the media could use the initials AA and BB to describe the two persons.
26. The Panel is satisfied that Presenting Counsel met the burden to justify the issuance of a ban on publication of the names of AA and BB and any information that might identify them.

Issued this 16th day of October, 2017

HEARING PANEL:

The Honourable Justice Peter Tetley, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Ms. Jenny Gumbs, Community Member