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 Solange Guberman

Before: The Honourable Justice Paul M. Taylor, Chair
Her Worship Mary Ross Hendriks
Dr. Michael Phillips

Hearing Panel of the Justices of the Peace Review Council

Decision of October 11, 2011

Counsel:

Ms. Marie Henein	Presenting Counsel
Mr. Julius Grey	Counsel for Her Worship Solange Guberman
Mr. Richard Dearden	Counsel for the Ottawa Citizen (Intervenor)

DECISION: (presented orally on October 11, 2011)

[1] The Justices of the Peace Review Committee ordered a hearing pursuant to section 11(15) of the *Justice of the Peace Act*, Revised Statutes of Ontario 1990, chapter 14, as amended, into certain complaints regarding the conduct of Her Worship Justice of the Peace Solange Guberman. Today was to be the first day of hearing.

[2] At the commencement of the proceedings today, Ms. Henein, Presenting Counsel, and Mr. Grey, counsel for Justice of the Peace Guberman, filed a letter indicating that the Justice of the Peace had tendered her resignation. Upon her resignation this panel, would statutorily lose jurisdiction to adjudicate on the merits of the complaints. Given that the resignation was not to take effect until a date in the future, we were urged to adjourn the hearing *sine die*, that is, without disposition. In the unlikely event that Her Worship wished to continue in office, the hearing could then be recommenced. The justification for the effective date of the resignation being in the future was that this hearing would consume many days, given the complexity of the complaints, and that it was entirely possible that the matter would not conclude before the effective resignation date.

[3] Mr. Grey, who acts for Justice of the Peace Guberman, has sought an order for non-publication of the Notice of Hearing or, at minimum, an order redacting portions of the Notice. His application was opposed by Presenting Counsel, Ms. Henein, and by Mr. Richard Dearden who appears on behalf of the Ottawa Citizen newspaper. As a preliminary matter, we agreed to hear the application on short notice.

Background and Overview:

[4] A convenient summary of the background to this matter is found in the applicant's factum. On February the 21st, 2007, Her Worship Solange Guberman was sworn in and received her Order in Council as a justice of the peace in the East Region of Ontario. On September the 21st, 2009, her duties were suspended and a letter of complaint was submitted to the Justices of the Peace Review Council.

[5] Following a long and in-depth investigation, a Notice of Hearing was communicated to her on December the 6th, 2010. The set-date took place on the 16th of June 2011 and on this date the first date for a hearing was fixed for today, October the 11th, 2011. A pretrial conference took place before the Honourable Justice Timothy Lipson on the 21st of July 2011 in Toronto. The pretrial continued in Montreal on the 7th of September and an agreement was reached by which the respondent would elect to retire in December of 2012. The date set for the hearing was set in June of 2011; however, a settlement was reached before the hearing ever began. It was decided between the parties, that is, the Presenting

Counsel, counsel for the Justice of the Peace and the Justice of the Peace, that a request would be made to the panel to adjourn the hearing *sine die*. Pursuant to section 6(3) of the procedures of the Justices of the Peace Review Council, two weeks before the hearing was set to commence an announcement was published in the Ottawa Citizen newspaper and the press requested a copy of the Notice of Hearing.

The Positions of the Parties:

[6] Mr. Grey, who acts for the Justice of the Peace, has framed his argument in the following terms in his factum under the heading "Prejudice to Her Worship Justice of the Peace Guberman". The contents of the Notice of Hearing are prejudicial to the applicant. Moreover, many of the allegations are purely of a private nature. When deciding to elect retirement the applicant gave up her opportunity to have a hearing. She no longer has a chance to defend herself against the complaints or to disprove the allegations contained in the Notice. The applicant is 65 years of age. She has an accomplished professional career and has every intention of working again. A publication of the Notice of Hearing will greatly prejudice her future employment opportunities. The publication of the Notice of Hearing will also damage her reputation and those of her two young and professional children. Their right to privacy will also be violated. And finally, the contents of the Notice of Hearing being made public will violate the applicant's right to dignity. She has already suffered considerably since the suspension from her functions in 2009.

[7] Mr. Grey expanded those grounds in oral argument. He indicated that there was no need for affidavit material to be filed. He says that the plain text of the allegations are such that their mere publication would make any future employment impossible. He stressed that the allegations were highly personal in nature and that they were unproven.

[8] The position of Presenting Counsel and of counsel for the Ottawa Citizen is straightforward. Both counsel have argued that there was no evidentiary basis upon which the applicant could meet the tests set out in the twin cases of the Supreme Court of Canada of *Dagenais* and *Mentuck*. *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835. *R. v Mentuck* is at [2001] 3 SCR 442. The so-called *Dagenais-Mentuck* test governs the making of non-publication orders and the holding of in camera hearings.

Analysis:

[9] Open courts and tribunals are a hallmark of a democratic society. The open court principle was developed as part of the evolution of the Common Law and in part as a revulsion over the Court of Star Chamber. At various times, courts throughout Canada have adopted the aphorism of the English philosopher Jeremy Bentham, who stated, "Publicity is the very

soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity".

[10] This principle is incorporated into both the *Statutory Powers and Procedures Act* and the Justices of the Peace Review Council Procedures which mandate that all hearings must be open to the public. Section 6 of the Justices of the Peace Review Council Procedures reads:

> 6. (1) "A hearing shall be commenced by a notice of hearing in accordance with this Part.
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> (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 the 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.
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> (3) Once the complaint has become public, the Registrar will have the notice about the hearing posted in the prescribed form on the Review Council's website, subject to any orders made by the hearing panel. Not less than two weeks prior to the commencement of the hearing, the Registrar will have notice in prescribed form published in the local newspaper. The public notice will include a brief summary of the allegations of conduct."

[11] The Notice of Hearing in this matter was filed as Exhibit 1 in the proceedings slightly more than four months ago, on June the 6th, 2011. The Notice of Hearing was posted on the Justices of the Peace Review Council website together with a brief summary of the allegations. That brief summary reads as follows:

> "Her Worship demonstrated a pattern of conduct which included a failure to perform the duties of office; a failure to exercise judicial duties in a manner that was independent or impartial; there was a denial of rights of defendants; there was a denial of defendants' fundamental rights; inappropriate conduct towards court staff, her colleagues; was incompetent to sit as a justice of the peace resulting in harm to the public's perception of the judiciary, bringing disrepute upon judicial office, eroding public confidence in that office".

[12] There is a statutory authority in both the *Statutory Powers and Procedures Act* and the Justices of the Peace Review Council Procedures to direct an in camera hearing or to make

an order of non-publication. Section 9(1) of the *Statutory Powers and Procedures Act* reads:

> "An oral hearing shall be open to the public except where the tribunal is of the opinion that either (a) matters involving public security may be disclosed or (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature that, having regard to the circumstances that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public".

[13] Those provisions are incorporated, as I said, in the Justices of the Peace Review Council Procedures.

[14] A succinct summary of the test to be applied when considering an application for non-publication is found in the decision of the Supreme Court of Canada in *Her Majesty the Queen v. Toronto Star Newspapers*, 2005 SCC 41, [2005] 2 SCR 188. At paragraph 26 the Court wrote:

> "The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held that in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when
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> (a) when such 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
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> (b) 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".

[15] The essential question for this panel to decide is whether the applicant has met the *Dagenais-Mentuck* test. We are of the view that she has not. While there is no doubt that the allegations of her alleged misconduct have caused considerable embarrassment to Justice of the Peace Guberman, embarrassment alone is not a sufficient reason to grant the order. As the court wrote in *Mentuck* at paragraph 39, "It is precisely because of the

presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban".

[16] The allegations are not of a private nature. They involve allegations of incompetence and misfeasance of duty during the course of Her Worship's performance of judicial duties. Many of the allegations involve actions which occurred in public and open courtrooms.

[17] Judicial officers can and should expect scrutiny of their behaviour. It is something that goes with the office. It cannot be said that a judicial officer retains any privacy in the exercise of their judicial function, particularly where it is occurring in an open and public courtroom.

[18] Mr. Grey has suggested that any prospective employer who reviewed the allegations would conclude that something was seriously wrong with Justice of the Peace Guberman and would refuse to employ her. This, in our view, is entirely speculative. The allegations are just that, unproven allegations. Any reasonable, right thinking Canadian citizen would recognize that. Contrary to what is suggested in the applicant's factum, Justice of the Peace Guberman didn't have to refute the allegations. They would remain unproven unless and until presenting counsel could prove them.

[19] Mr. Grey suggested that it would be sufficient to release a redacted version of the complaints rather than the full particulars. We see very little difference between a release of a redacted version, for example as it appeared on the website, and the release of the full complaint. If Mr. Grey is correct that employers would shun Justice of the Peace Guberman, a premise that we disagree with, they would have fertile ground even based on a redacted version of the complaint.

[20] Mr. Grey relied principally in the course of his argument on the decision of the Quebec Court of Appeal *C. v. B*, 1990, CanLii, 3132. The case is distinguishable on a number of basis, not the least of which is that it antedates both *Dagenais* and *Mentuck*. Another reason to distinguish the matter is that it involved a civil dispute between two parties. Such disputes are essentially private and in that particular case it was settled without trial.

[21] There is a further matter to consider. The resignation of Her Worship Justice of the Peace Guberman ousts our jurisdiction to adjudicate on the issues. We will make no finding. The resignation, however, does not come into effect for approximately 14 months. The rationale for that relatively long time period is that the allegations are complex and that they would involve a great deal of time to consider and adjudicate, ultimately that there wouldn't be sufficient time to conclude the hearing before the resignation would take effect. The public have a right to look at the complaints and the particulars and make their own

informed judgment as to that rationale. The result is that the application for an order of non-publication of the Notice of Hearing, Exhibit 1, is dismissed.

[22] It is common in situations such as this to allow a period of time in which to launch an appeal. Mr. Grey confirmed that Her Worship Guberman would not be seeking judicial review so no order is necessary to delay the release of the Notice of Hearing to the public.

[23] On the request of Mr. Dearden, Counsel for the Ottawa Citizen, the panel releases him from his undertaking of confidentiality with respect to the copy of the Notice of Hearing which had been provided to him for the purposes of preparing for the motion.

The Panel orders the hearing adjourned *sine die*.

Dated at the City of Ottawa in the Province of Ontario, October 11th, 2011.

HEARING PANEL:

The Honourable Paul M. Taylor, Chair

Her Worship Mary Ross Hendriks

Dr. Michael Phillips, Community Member