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 Errol Massiah

Before: The Honourable Justice Deborah K. Livingstone, Chair

Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member

Hearing Panel of the Justices of the Peace Review Council

DECISION ON THE MOTION TO BAN PUBLICATION

Counsel:

Ms. Marie Henein
Matthew Gourlay
Henein Hutchison, LLP
Presenting Counsel

Mr. Ernest J. Guiste
Trial and Appeal Lawyer
Counsel for His Worship Errol Massiah

Introduction

1. A Complaints Committee of the Justice of the Peace Review Council (the "Review Council"), pursuant to subsection 11(15)(c) of the *Justices of the Peace Act*, R.S.O. 1990, c.J.4, as amended (the "JPA"), ordered that a complaint regarding the conduct or actions of Justice of the Peace Errol Massiah ("His Worship) be referred to a Hearing Panel of the Review Council for a formal hearing under section 11.1 of the JPA.

2. His Worship has brought a motion for an order dismissing the complaint on the basis that the Hearing Panel is without jurisdiction to consider it because it does not meet the definition of "complaint" under the JPA and on the basis of an abuse of process. Presenting Counsel opposes the motion. His Worship and Presenting Counsel have exchanged Motion Records for the purposes of that motion (the "Motion Records"), which contain materials including the statements of witnesses to the alleged misconduct. The Motion Records are not yet in the public record.

3. His Worship now seeks a publication ban with respect to the particulars listed in the Notice of Hearing (which is in the public record as Exhibit 1B in this proceeding) and in the Motion Records. In accordance with the Procedures of the Review Council, notice of this motion was posted on the relevant website. Sun Media Corporation and Toronto Star Newspapers Ltd. (together "the media") have filed joint submissions in response to the motion to ban publication.

4. Oral submissions from Mr. Ernest Guiste, counsel for His Worship, from Ms. Marie Henein, Presenting Counsel, and from Mr. Iain MacKinnon, counsel for the media, were heard on November 4, 2013.

5. In his submission, counsel for His Worship has clarified that the publication ban is sought only until such time as the motion to dismiss the complaint has been decided. He submits that it would be prejudicial to have the information in the Notice of Hearing and Motion Records available to the public, when, if his motion to dismiss the complaint is successful, the materials would never become public. He concedes that if the Hearing Panel were to dismiss that motion and commence a hearing into the substance of the complaint, that hearing must be held in public.

6. In support of the publication ban, counsel for His Worship urges us to conclude that publication of the allegations, while the jurisdiction of the Hearing Panel remains in issue, threatens the judicial independence of a sitting Justice of the Peace. He argues that the issue of statutory interpretation which arises in the motion to dismiss the complaint is a public issue which is just as important as those held by the Supreme Court of Canada to justify publication bans in *Dagenais v. Canadian Broadcasting Corp.,* 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76 (CanLII) (hereinafter "Dagenais/Mentuck").

7. Presenting Counsel reminded the Hearing Panel that the enabling statute and the procedural rules provide a strong presumption of openness, in accordance with the strong public interest in maintaining the transparency of judicial conduct proceedings. This presumption is only displaced where the Applicant, applying the Dagenais/Mentuck test, can show that the salutary effects of a ban in the particular case would outweigh the systemic interest in free expression and a transparent legal system.

8. In support of her submissions that no publication ban should issue, Presenting Counsel made three points:

> First, she argued that the motion is moot, because the allegations contained in the Notice of Hearing have been in the public record for some time and have already been extensively reported on in the media.
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> Second, she argued that Dagenais/Mentuck are the governing authorities and that His Worship has called no evidence to satisfy either prong of the test.
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> Third, she argued that challenges to the jurisdiction of a decision-making authority are commonplace and have not been recognized as grounds for restricting publication.

9. Counsel for the media concurred with the three points argued by Presenting Counsel. He argued further that, contrary to the position taken by His Worship's counsel, if the process leading to the formation of this Hearing Panel was tainted, it ought to be brought to light and endure public scrutiny. Mr. MacKinnon, in fact, echoed Mr. Guiste's submission that "justice must be seen to be done".

10. The openness principle is a fundamental aspect of judicial proceedings, including hearings constituted under the *Justices of the Peace Act*; subsection 9(6).

11. The only provision in the JPA allowing for a publication ban of a hearing is section 11.1(9), which states: "if the 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 witness, as the case may be."

12. Subsection 10(1) of the JPA states: "The Review Council may establish rules of procedure for complaints committees and for hearing panels and the Review Council." Pursuant to section 10(1), a Procedures Document and Rules of Procedure have been established.

13. The Review Counsel Procedures Document states: “The *Statutory Powers Procedure Act* applies to any hearing held by the Review Council with the exception of sections 4 and 28 of that Act.”

14. Subsection 9(1) of the *Statutory Powers Procedure Act* (the “SPPA”) states as follows:

> An oral hearing shall be open to the public except where the tribunal is of the opinion that
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> (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, 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, in which case the tribunal may hold the hearing in the absence of the public.

15. The Review Council Procedures Document states as follows:

> Meetings of the Review Council and of its complaints committees shall be held in private but hearings shall be open to the public unless the hearing panel determines, in accordance with criteria established by the Review Council, that exceptional circumstances exist and the desirability of holding an open hearing is outweighed by the desirability of maintaining confidentiality in which case it may hold all or part of a hearing in private.

16. The Review Council Procedures Document echoes the SPPA with respect to hearings being presumptively open:

> The members of the Review Council will consider the following criteria to determine what exceptional circumstances must exist before a decision is made to maintain confidentiality and hold all, or part, of a hearing in private:
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> a. where matters involving public or personal security may be disclosed, or
>
> b. where intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, 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 the hearing be open to the public.

17. These principles of openness are further reiterated in subsection 6(2) of the Review Council Rules of Procedure:

> 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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> Review Council Procedures Document – Procedural Code for Hearings, ss. 6(2)

18. It is clear that the only statutory provision that could apply to His Worship's request for a publication ban would be that set out in subparagraph (b); His Worship would need to establish that the desirability of avoiding disclosure of "intimate financial or personal matters or other matters" outweighs the "desirability of adhering to the principle that the hearing be open to the public."

19. As Presenting Counsel argued, the allegations over which His Worship is seeking a publication ban have already been publicly disclosed and published.

20. Section 2(b) of the Charter is relevant in this motion. It states as follows:

> 2. Everyone has the following fundamental freedoms
>
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> *Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, Part 1, s. 2*

21. Judicial authorities consistently affirm that it is only in the most exceptional circumstances that courts should limit the public's right to know what goes on in them. The Dagenais/Mentuck test, emanating from the Supreme Court of Canada is, we accept, the law. Despite Mr. Guiste's submission that "the authority from the Supreme Court is binding and helpful, but the panel must be mindful of the distinguishing facts and circumstances of this case", no evidence was presented that could distinguish the principles set out in Dagenais/Mentuck.

22. Further, we accept that the presumption of openness, and the principles from Dagenais/Mentuck apply to proceedings before this Hearing Panel, just as they do to other courts. In *Toronto Star v. Ontario*, the Court made the following comment about the appropriate test when section 2(b), freedom of expression rights, are infringed:

> In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in the Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter.
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> *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII) at para. 7

23. Any order the Hearing Panel might make limiting the media's ability to report on the hearing before us must comply with the principles set out by the Supreme Court of Canada:

> 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 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) 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**
>
> **(b) the salutary effects of the publication ban outweigh the deleterious effects of 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.** (emphasis added)
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> *Toronto Star Newspapers*, supra at para. 26

24. Having offered no evidence to support either branch of the Dagenais/Mentuck test, let alone both, His Worship has not met his burden to justify the issuance of a ban on publication.

25. Counsel for His Worship argued that the media publication of allegations against His Worship will affect his judicial independence. He strongly expressed the point of view that His Worship Massiah is being inappropriately set upon by agents of the state. He alleges that the Ministry of the Attorney General, the Attorney General (whose predecessor appointed His Worship), the alleged witnesses in this matter who work in a courthouse, the past and current Presenting Counsels retained on behalf of the Justices of the Peace Review Council are actively pursuing the removal or reputational destruction of His Worship as a justice of the peace. Mr. Guiste summarized his argument by stating:

> And you have a situation where, from what I can gather, there appears to be either intentionally or unintentionally, objective of seeing to, "If we can't get him out by legitimate means in accordance with the law, then we will so taint his reputation so that he will be unfit."

26. Judicial independence for justices of the peace was considered in the Supreme Court of Canada decision of *Ell v. Alberta*. Justice Major, writing for the Court, held that the principle of judicial independence applies to justices of the peace as it does to all other judicial officers (see para 17). The Court also provided historical context for judicial independence in para 21:

> The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference; see Beauregard, supra, at p. 69. The integrity of judicial decision-making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, [page 870] the need to ensure that a particular judge is free to decide upon a case without influence from others.

Justice Major, in para 29, summarized the reasons why judicial independence is an imperative:

> Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see Provincial Court Judges Reference, supra, at para. 9. **The principle exists for the benefit of the judged, not the judges.** If the conditions of independence are not "interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts": see Mackin, supra, at para. 116, per Binnie J. in his dissent. (emphasis added)
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> *Ell v. Alberta*, 2003 SCC 35;[2003] S.C.J. No. 35; [2003] 1 S.C.R. 857

27. It is clear then that judicial independence refers to His Worship's ability to make decisions on the cases before him without outside influence. The question therefore is – did or will any of the parties mentioned by Mr. Guiste have influence over His Worship's decision making?

28. While this Hearing Panel acknowledges that an Attorney General was responsible for His Worship's appointment as a justice of the peace of the Ontario Court of Justice, it is also fair to say that the last time an Attorney General had any influence over him was immediately preceding that appointment. Judicial officers swear to decide "without fear or favour" and there is no evidence before this Panel that His Worship has done, or will do, otherwise. No evidence was presented that the Attorney General has or will attempt to influence his decisions.

29. We heard no evidence that any representative of the Ministry of the Attorney General ("MAG") has or will have any influence in His Worship Massiah's decision-making process.

30. The Hearing Panel is cognizant that at least some of the allegations may have come from staff and prosecutors (see Exhibit 1B) working in a courthouse in Ontario. However, having received no evidence to support an effort to influence His Worship's judicial independence, we reject the suggestion that those individuals have played or will play any such role.

31. Noteworthy is the fact that the Review Council is a body which has been established under the JPA. It is separate and distinct from any other organization including the Ministry of the Attorney General or the Attorney General.

32. Mr. Guiste's position that Presenting Counsel have been or are engaged in an attempt to undermine the judicial independence of His Worship illustrates a misunderstanding of the role of Presenting Counsel. The Procedural Code for Hearings sets out the role of Presenting Counsel for the presentation of complaints, at a hearing. It states that Presenting Counsel must operate independently of the Review Council. Presenting Counsel is not to seek a particular order against the respondent. Rather the role is to present the complaint so it may be evaluated fairly and dispassionately to the end of achieving a just result. (Review Council Procedures Document – Procedural Code for Hearings, ss. 3 and 4)

33. Nothing in the mandate of Presenting Counsel provides for an opportunity to influence the decisions in cases heard by a justice of the peace. Nor was any evidence presented to indicate that Presenting Counsel has in the past influenced or will attempt to influence the decisions of His Worship Massiah.

34. We remind ourselves that *Ell* sets out the principle that judicial independence exists for the benefit of the judged, not the judges. Nothing but His Worship's Counsel's speculation was presented to indicate that the public has lost confidence in the administration of justice as a result of the publication to date by the media of allegations set out in the Notice of Hearing. To the contrary, in our view, the public's ability to recognize that the Hearing Panel is dealing with allegations only at this time is greatly enhanced through media reporting of this tribunal's proceedings. To put a veil of secrecy over the hearing under the guise of protection of judicial independence would reverse the principle described in *Ell*, in order to benefit the judge instead of the judged. Judicial independence does not include independence from public scrutiny. We therefore decline to find that judicial independence provides a justification for a publication ban.

35. Having found nothing in the evidence to support Mr. Guiste's arguments that His Worship Massiah's judicial independence has been, is being, or will be, influenced by state actors, we now consider the core issue. From Mr. Guiste's own submission, it is that His Worship's reputation may be tainted by the

allegations. Put another way, the allegations may be prejudicial and/or embarrassing to His Worship Massiah.

36. Presenting Counsel, Ms. Henein, referenced the decision of an earlier Review Council Hearing Panel where Justice of the Peace Guberman sought a publication ban, as a basis for considering this situation: *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* (Justices of the Peace Review Council, October 11, 2011). Mr. Guiste submitted that the fact situation in *Re: Guberman* was different than the one before this Panel and the decision is therefore, distinguishable.

37. We agree that *Re: Guberman* did deal with a different fact situation. However, one of the issues that the Hearing Panel considered was that the allegations against Her Worship Guberman were potentially prejudicial and/or embarrassing. In our view, the rationale articulated by the Hearing Panel in *Re: Guberman* is equally applicable to the same issue in the matter before this Panel.

38. In para 15 of *Re: Guberman*, the Hearing Panel held:

> …While there is no doubt that the allegations of her alleged misconduct have cause considerable embarrassment to Justice of the Peace Guberman, embarrassment alone is not a sufficient reason to grant the order …

39. In para 18, the Hearing Panel also recognized that allegations are considered by the public to be quite different than findings of fact. The Panel held:

> 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.

40. We adopt these findings of the *Re: Guberman* Hearing Panel. Allegations which have the potential for tainting, creating prejudice or embarrassment for His Worship Massiah are just allegations. They provide no basis for a publication ban.

41. His Worship relies also on s. 11.1(21) of the *Justices of the Peace Act*. That section applies where an order has been made under s. 11.1(9) for non-publication of the identity of a complainant in a sexual misconduct or sexual harassment case. If the complaint is ultimately found to be "unfounded" by the Hearing Panel, s. 11.1(21) provides that the justice of the peace who is the

subject of the hearing will not be identified in the report without his or her consent, and that other information identifying the justice will not be made public without his or her consent. This section of the JPA has no application until the conclusion of a hearing, and only when a Hearing Panel determines that the complaint was unfounded. This provision of the JPA has no application at this hearing, at this stage, before adjudication on the allegations has been made.

42. We conclude, therefore, there is no basis in law upon which the Hearing Panel should, or could ban the media from publishing the particulars in the Notice of Hearing and in the exhibits that have been filed.

43. The Motion Records have not been filed as exhibits. Counsel have indicated that the Motion Records contain documents that were part of the investigation of the complaint. The Review Council's Procedures Document states:

> Pursuant to section 8(10) of the *Justices of the Peace Act*, the Review Council has ordered that, subject to any 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.

Under section 8(19) of the JPA, the order made by the Review Council applies whether the documents are in the possession of the Review Council or any other person.

44. The Motion Records and any other documents and information relating to the investigation that are not tendered as exhibits in this hearing remain, at this time, subject to the order made by the Review Council.

Dated this 11th day of April, 2014.

HEARING PANEL:

The Honourable Justice Deborah K. Livingstone, Chair

Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member