

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 FOR DISCLOSURE AND PARTICULARS

Counsel:

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

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

DECISION ON THE MOTION FOR DISCLOSURE AND PARTICULARS

1. Mr. Ernest Guiste, Counsel for Justice of the Peace Massiah, has advanced numerous requests for disclosure and particulars, namely:
 - 1) A Notice of Motion, dated April 1, 2014;
 - 2) An amended Notice of Motion contained in a Motion Record, dated April 1, 2014;
 - 3) A Notice of Motion, dated May 22, 2014;
 - 4) Applicant's Factum Disclosure and Particulars, dated May 23, 2014;
 - 5) Correspondence to Presenting Counsel, Ms. Marie Henein, June 9, 2014;
 - 6) Email to Presenting Counsel, Ms. Henein and Mr. Matthew Gourlay, dated June 10, 2014.
2. The Hearing Panel heard oral submissions on the above matters on June 11, 2014. This is our decision.
3. Mr. Guiste relies on the Justices of the Peace Review Council ("JPRC") Procedures and on the Ontario Court of Appeal decision *Ontario Human Rights Commission re Dofasco Inc. et al* 57 O.R. (3d) 693.
4. The JPRC Procedures Document provides for disclosure at paragraphs 10 and 11 in the Procedural Code for Hearings, which read as follows:

Disclosure

10. Presenting counsel shall, before the hearing, forward to the respondent or to counsel for the respondent names and addresses of all witnesses known to have knowledge of the relevant facts and any statements taken from the witness and summaries of any interviews with the witness before the hearing.

11. Presenting counsel shall also provide, prior the hearing, all non-privileged documents in its possession relevant to the allegations in the Notice of Hearing.

5. Presenting Counsel, Ms. Henein, submits that on April 14, 2014, she disclosed a list of witnesses and their addresses to Mr. Guiste. A copy of the document, titled Witness Address List, was provided for our review.
6. Mr. Guiste complained about both the timing of the disclosure of the Witness List, and that the contact information was at the witnesses' workplaces where, he submitted, the employers could obstruct His Worship's ability to contact those who worked within the justice system. There is no substance to these submissions. The Panel asked Mr. Guiste for a description as to how contact with the employee witnesses had been thwarted. He had to date made no effort to speak with the witnesses.
7. The names and contact information were disclosed within two weeks of His Worship's first motion for disclosure when the first day that evidence could be called appeared to be many weeks away. We are satisfied that no further disclosure relating to the names and addresses of witnesses should be ordered at this time.
8. His Worship seeks summaries of the interviews of witnesses, and particulars of how each of their respective statements provides evidence of judicial misconduct. We are satisfied that His Worship has received transcripts of the statements of every witness; his counsel, Mr. Guiste, so confirmed.
9. Presenting Counsel has confirmed that no new interviews have been conducted and that she understands she has an obligation to disclose summaries from any further interviews with witnesses.
10. Further, we accept that there is no requirement for Presenting Counsel to particularize how each or any witness' statement relates to the specific acts described in paragraphs 7 to 13 in the Notice of Hearing. That is precisely what *viva voce* evidence and submissions will or will not do when the substantive portion of the hearing finally commences.
11. Mr. Guiste seeks disclosure of notes about and/or voicemails of the calls made by potential witnesses to Mr. Douglas Hunt, who was then Presenting Counsel in a different JPRC hearing. Presenting Counsel, Ms. Henein, submits there are no recordings or notes. Mr. Guiste submits there is prejudice to His Worship as a result of lost or missing evidence.
12. We cannot order disclosure of something which does not exist. Ms. Henein submits that the question of whether there is any prejudice to His Worship can be determined after evidence has been presented. The Panel agrees.

13. Counsel for His Worship seeks employment files and collective agreements applicable to the employee witnesses, copies of harassment-type complaints made by the witnesses since 2007, the discipline record of justice of the peace witnesses and copies of all discrimination and harassment policies applicable in the workplaces of the witnesses.
14. Presenting Counsel argues that all such information is, firstly, not relevant and, secondly, would be classified as third party records, requiring an *O'Connor* application (*R. v. O'Connor* [1995] 4 S.C.R. 411). Clearly, all of these documents are not in Presenting Counsel's possession.
15. Mr. Guiste surmises that the employment records are relevant to the issue of the witnesses' credibility. He relies on the *Dofasco* decision in support of his submissions that records relating to the witnesses should be ordered to be produced.
16. Although the *Dofasco* case addresses the power of a tribunal, namely the Human Rights Commission, to order a complainant to provide consent to her medical practitioner for the production of her medical files, it does not stand for the principle that if credibility of a witness in a proceeding is in issue, his or her privacy interest in personal records is lost. In fact, *Dofasco* confirms that relevance and privilege are paramount considerations. The Court states at para. 52:

Did the board err in ordering production of documents that are privileged or are not arguably relevant?

[52] I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (Statutory Powers Procedure Act, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

17. We find no merit in Mr. Guiste's position that there is a basis for invading the witnesses' privacy rights. A general claim of relevancy on credibility is not sufficient. The same principle would apply to all of the documents requested by His Worship in paragraph 13 of our reasons as stated above. There is no basis for an order of disclosure of such documents.

18. Furthermore, Mr. Guiste's submission that such documents are, in fact, not third party records is innovative, but also without merit. He suggests that under s. 11.1(8) of the *Justices of the Peace Act* we, the Hearing Panel, can determine who are the parties, and thereby should determine that all of the witnesses are parties. We decline to name the witnesses as parties. To do so, makes no sense.
19. Presenting Counsel described Mr. Guiste's request for disclosure as a fishing expedition. We agree. His Worship is entitled to all non-privileged documents in the possession of Presenting Counsel relevant to the allegations in the Notice of Hearing (Justice of the Peace Review Council Procedures Document, para. 11. (Emphasis added.)
20. The retainer agreements sought by His Worship between the JPRC and Presenting Counsel or the Complaints Committee and the lawyer retained to assist them in the investigation are privileged. There will be no order for disclosure of the retainer agreements.
21. Similarly, Mr. Guiste submits that as judicial misconduct is alleged, His Worship is entitled to disclosure of the Standards of Conduct described in s.13 (1) of the *Justices of the Peace Act*, and that no such standards exist. In fact, the Standards were enacted pursuant to s.13 (1) by the JPRC on December 7, 2007. Ms. Henein indicated that these principles titled the *Principles of Judicial Office for Justices of the Peace of the Ontario Court of Justice* are on the website and a copy was provided to the Panel by Presenting Counsel. Therefore, there is no need for an order for disclosure.
22. Finally, in his submissions relating to disclosure Mr. Guiste reiterates His Worship's desire for a Pre-Hearing Conference. Such a conference has nothing to do with disclosure. Pursuant to para. 14 of the JPRC Procedures Document the panel may order that a conference take place, for the "purposes of narrowing the issues and promoting settlement".
23. At this stage of the proceeding, with another motion from His Worship pending, alleging an abuse of process, the Hearing Panel sees no useful purpose for a Pre-Hearing Conference and a further delay in progressing to the substantive portion of the hearing, which was ordered over a year ago.

Dated this 12th day of June, 2014.

HEARING PANEL:

The Honourable Justice Deborah K. Livingstone, Chair
Justice of the Peace Michael Cuthbertson
Ms. Leonore Foster, Community Member