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 Two Complaints about the Conduct of Justice of the Peace Paul Welsh

Before: The Honourable Neil L. Kozloff, Chair
Her Worship Justice of the Peace Kristine Diaz

Hearing Panel of the Justices of the Peace Review Council

REASONS FOR RULING ON A MOTION FOR A CONTINUATION OF THE PUBLICATION BAN ON EVIDENCE AND DOCUMENTS RELATING TO THE PERSONAL MEDICAL ISSUES OF JUSTICE OF THE PEACE PAUL WELSH

Counsel:

Mr. Scott Fenton Mr. Ian R. Smith Fenton, Smith Barristers	Mr. Eugene Bhattacharya Ms. Mary C. Waters Rodriguez Barristers and Solicitors
Presenting Counsel	Counsel on behalf of His Worship Justice of the Peace Paul Welsh

OVERVIEW

[1] This is a ruling on an application by Justice of the Peace Paul Welsh (hereinafter also "Justice of the Peace Welsh", "His Worship Welsh", "His Worship", and "the Applicant") for a continuation of the publication ban on evidence and documents relating to the personal medical issues of Justice of the Peace Welsh as it relates to His Worship's application for an adjournment of a hearing into the matter of two complaints regarding the conduct or actions of Justice of the Peace Welsh that were referred to a Hearing Panel of the Review Council (hereinafter "the Panel") for a formal hearing under section 11.1 of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4 as amended (hereinafter "the *Act*") by Notice of Hearing dated February 28, 2019.

[2] At the conclusion of the hearing of the Applicant's adjournment motion on September 28, 2020, the Hearing Panel ordered a temporary ban on publication of the details of His Worship's Welsh's medical circumstances pending our consideration of that (publication ban) application on its merits and pending our ruling on the motion to adjourn.

[3] On October 6, 2020, counsel for the Applicant served a Notice of Motion returnable October 19, 2020. The Motion is for:

1. A continuation of the publication ban on evidence and documents relating to the personal medical issues of Justice of the Peace Welsh as it relates to an application for adjournment of the Hearing based upon his medical condition.

2. Such further and other relief as may be appropriate in the circumstances.

[4] The Motion was served *inter alia* on "Major Media Outlets" including the CBC, *Globe and Mail*, *Toronto Star*, CTV News (Toronto), *La Presse*, and *National Post*.

[5] The grounds of the Motion are set out in the Notice of Motion as follows:

1. His Worship Justice of the Peace Paul Welsh has provided evidence to the Hearing Panel in respect to a request for an adjournment of this complaint hearing. The basis is that his health does not allow him to prepare properly for the Hearing and would put his physical and mental health in jeopardy. In the circumstances, he is requesting that the evidence and information regarding his medical issues remain subject to a ban on publication.

2. The need to avoid disclosure of this evidence to the public is in the interest of Justice of the Peace Paul Welsh and outweighs the desirability of adhering to the principle that the hearing should be open to the public.

3. His Worship relies on Sections 15 and 16 of the Justice of the Peace Procedures Document.

4. The *Statutory Powers and Procedures Act*, R.S.O. 1990, Chapter S22 at Section 9(1) (a) and (b).

5. Such further and other grounds as this Honourable Council may permit.

[6] On October 15, 2020, the Hearing Panel (hereinafter "the Panel") released its ruling on the motion to adjourn, denying the application for adjournment. The Panel ordered that the temporary publication ban would continue.

[7] On October 19, 2020, the motion for continuation of the publication ban – including the submissions of Ms. Waters Rodriguez on behalf of His Worship and the comments of Presenting Counsel, Mr. Smith – was heard by the Panel.

[8] At the conclusion of the hearing, the Panel ordered that the temporary ban on publication would continue until the release of our ruling to the parties.

[9] These are the reasons for our ruling on the motion for a continuation of the publication ban.

THE TEMPORARY BAN ON PUBLICATION

[10] At the outset of the application for adjournment heard by the Panel on September 28, 2020, Mr. Bhattacharya made a "request on His Worship's behalf, and that is for a publication ban that details of his medical circumstances including his medical condition, diagnosis and prognosis shall not be published by any media or posted on any social media as it pertains to his personal specific medical circumstances".

[11] The *Act* sets out the statutory framework that governs the complaint process.

[12] Section 11(4) of the *Act* provides that the *Statutory Powers Procedure Act* (hereinafter "the *SPPA*"), except sections 4 and 28, applies to the hearing.

[13] Section 11(5) of the *Act* provides that the rules of procedure established under subsection 10 (1) of the *Act* (hereinafter "the Procedures Document") apply to the hearing.

[14] Procedural Rule 15 of the Procedures Document – which is titled "EXCEPTIONS TO FULLY OPEN HEARING" - incorporates by reference Section 9 (1) of the *SPPA,* which provides:

> 9. (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (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] Procedural Rule 15.1 of the Procedures Document - which is set out immediately below the reference to s. 9 (1) of the *SPPA* - provides:

15.1 When deciding whether there are exceptional circumstances that justify maintaining confidentiality and holding all or part of a hearing in private, the Hearing Panel shall consider,

c) where matters involving public or personal security may be disclosed, or

d) where intimate financial, personal or other matters may be disclosed at the hearing of such a nature that, having regard to the circumstances, the desirability of avoiding disclosure is in the interests of any person affected or in the public interest and outweighs the desirability of adhering to the principle that the hearing be open to the public.

[16] Mr. Bhattacharya relied on Procedural Rule 15.2 of the Procedures Document as authority for the Panel to make the order he sought.

[17] Procedural Rule 15.2 provides:

15.2 The Hearing Panel may, on motion by any party and at any time during the hearing, order that certain information or documents remain confidential or be subject to a publication ban, including information contained in the allegations in the Notice of Hearing.

[18] Procedural Rule 15.3 provides:

15.3 When a party files a motion requesting a publication ban, the Council shall provide public notice of such motion on its website.

[19] Procedural Rule 15.4 provides:

15.4 The onus is on the party bringing a motion for a publication ban to give proper notice of the motion to major media outlets.

[20] Notwithstanding the "request" was initially made by Mr. Bhattacharya in the course of the hearing – without prior notice to the Panel, without having given proper notice of the motion to the media, and with only a few hours' advance notice to Presenting Counsel – Mr. Smith did not object to our hearing and dealing with the "request" as an application on its merits.

[21] At the outset of the submissions he made in support of his request, Mr.

Bhattacharya acknowledged that "transparency in these hearings is a primary consideration for the public."

[22] He argued that the intimate (personal) matters in this case, which is to say the details of the Applicant's medical conditions, diagnosis, and prognosis,

> are not core to the actual hearing itself. They pertain to the application that we're making today for the adjournment based upon medical circumstances. They are not germane to the actual issue of the finding of misconduct or non-findings of misconduct in respect of the factual circumstances of the actual complaint.

[23] With regard to the parameters of the ban he was requesting, and with regard to how the Panel was to communicate its decision Mr. Bhattacharya stated:

> So I am seeking that just in respect to the evidence of Dr. Nayar, and I certainly anticipate that the decision on the motion may include a consideration of that evidence.
>
> About the more general position that the Panel may take in respect to whether the onus has been met to prove that there's a medial issue here, I may presume that the specific details of that condition may not necessarily be factual matters that can be communicated as part of a decision that would be available generally for the public's consumption.
>
> So the specific details of the – how that's framed in terms of a consideration of the actual evidentiary basis for the motion, I leave [in] the Panel's hands.

[24] Presenting Counsel began his response by noting that he could find no authority "one way or the other" (in the prior decisions of this Tribunal and of the Ontario Judicial Council) for a publication ban "in circumstances like these".

[25] Mr. Smith put his position as follows:

> I will say, I'm not opposed to his request. I'm sympathetic to it, but I'm not in a position to consent to it either … I am sympathetic to the desire of His Worship not to have his personal medical information the subject of widespread publication.
>
> Of course, any request like this runs up against the open courts principle, which is a principle that this Tribunal and other administrative tribunals have recognized and do their best to uphold. Of course, both the Rules and the *SPPA* provide for the non-publication of intimate personal details, and I think that's the head under which my friend asks you to exercise your authority.
>
> I will say though that the difficulty with that submission is that it has been

> applied, for the most part, to non-parties. So where it's one of the parties to the litigation who's making the request, in this case His Worship, or in the research I've done this morning, a lawyer at the Law Society, there is less inclination to make the order sought for the banning of publication.
>
> That authority though does go on to say that where the issue is not central to the chief issues of the litigation, in other words, isn't at the core of the work that the tribunal is doing, there may be a greater willingness to make the publication ban that is asked.
>
> So the question that this Tribunal needs to ask itself is whether or not this material, this information is at the core to its decision-making. Certainly it's at the core of the request for an adjournment and there is a public interest in knowing why this Tribunal adjourns things or doesn't adjourn things. And it may be necessary, in the context of explaining your decision on this motion today, to refer to some or all of the evidence that you might hear.

[26] The authority to which Mr. Smith referred is *Law Society of Upper Canada v. Nicolas Xynnis*, 2014 ONSLAP 0009.

[27] The relevant rule at play in that case – Rule 18.02 (c) of the Law Society's Rules of Practice and Procedure – is the functional equivalent of – and virtually identical in wording to both s. 9 (1) of the *SPPA* and Procedural Rule 15.1 of the Procedures Document.

[28] With respect to the parameters of this application, the Panel was (and remains) of the view that what was (and is) actually being sought in the "request" for a ban on the publication of His Worship's "medical circumstances including his medical conditions, diagnosis, and prognosis" is a ban on publication of <u>all</u> of the medical evidence tendered on the Applicant's behalf and <u>all</u> of the references thereto, which is to say not only the *vive voce* testimony of Dr. Nayar but also the letters written by Dr. Carol and Dr. Nayar that were filed in support of the motion(s) to adjourn, the various affidavits filed in support of the motion(s) to adjourn, and the references to the medical evidence made by counsel in their submissions. (Emphasis added)

[29] Following the submissions of counsel, the Panel ordered a temporary ban on publication (of the details of His Worship's medical circumstances) pending our consideration of that application on its merits and pending our ruling on the motion to adjourn.

THE HEARING ON THE MOTION FOR CONTINUATION OF THE PUBLICATION BAN

[30] His Worship proposes that both the reasons for the Panel's ruling on the motion to adjourn proceedings, and, this ruling, be redacted to remove any and all references to the specifics of his medical circumstances.

[31] In her oral submissions on behalf of His Worship, Ms. Waters Rodriguez relied "primarily on the arguments laid out in the Factum" filed in support of the Motion.

[32] She stated that it is the position of His Worship that the public interest "in knowing about and having a complete understanding of the request for the adjournment will not be compromised by his request for a publication ban of the nature that's laid out in the motion materials, and we would suggest that by limiting the scope of the publication ban to the specific references of ailments, diagnoses, treatments, or prognoses, the public will still have a complete understanding of the fact that His Worship was relying on medical conditions in support of his application to adjourn and that such evidence was not sufficient for this panel to grant the request."

[33] Ms. Waters Rodriguez clarified that none of the medical information relied upon on the motion to adjourn will be relied upon as part of the defence to the complaints.

[34] She also made it clear that the publication ban sought is with respect to "mentions of depression, anxiety, actual specific medical ailments as opposed to the fact that the motion was brought on medical grounds and that it was denied because there was insufficient evidence to establish those grounds."

[35] In response to a question from the Panel, Ms. Waters Rodriguez confirmed that the references to His Worship's physical condition – specifically his high blood pressure and osteoporosis – are included in the request for a (continuation of the) ban on publication.

[36] In paragraph 29 of the Applicant's Factum, it is posited that:

> Publicizing the intimate medical details of judicial officers could detrimentally impact public confidence in the administration of justice and could leave judicial officers open to criticism from litigants solely on the basis of their mental health.

[37] When it was put to her by the Panel that public attitudes about mental health have evolved, that we have come to recognize that it is far healthier for afflicted individuals and the public at large to deal with mental illness openly rather than to bury it, and that her argument was effectively gainsaying that evolution, Ms. Waters Rodriguez responded:

> Yes. However, I would suggest that it's more about the external pressure that could arise by publishing this type of information.
>
> So it's a reasonable inference that knowledge of a judicial officer's medical condition or personal tragedies could lead to criticism by litigants in an attempt to criticize the individual judge with respect to making decisions in a particular case which could impact the perception of judicial independence.

[38] After she reiterated that the "main part of the argument" is that information about His Worship's mental health is not germane to the actual hearing with respect to the

complaints, Ms. Waters Rodriguez agreed with the Panel's suggestions in response that:

a. His Worship's mental health is germane to the issues on the adjournment application;

b. if the Panel orders that there be a continuation of the publication ban, the grounds for His Worship requesting the adjournment and the Panel's reasons for denying the adjournment "will not be before the public effectively"; and

c. what His Worship is really asking the Panel to do is "to reduce our decision to the following: His Worship requested an adjournment based on his medical condition. The Panel was not satisfied that the evidence presented justified an adjournment. End of story."

[39] For his part, Presenting Counsel reiterated what he said when counsel for His Worship first made the request for a publication ban at the outset of the proceedings on September 28, 2020, and relied upon what he wrote in his letter to the Registrar dated October 7, 2020, which is to say that he takes no position on the publication ban request but makes submissions for the benefit of the Panel.

[40] The submissions of Presenting Counsel may be summarized as follows:

1. The Panel has the jurisdiction to order a ban on publication of "intimate…personal matters" where "the desirability of avoiding disclosure thereof …outweighs the desirability of adhering to the principle that hearings are open to the public";

2. There is a strong presumption in favour of open courts and against *in camera* hearings or bans on publication;

3. *L.S.U.C. v. Xynnis, supra* is a useful starting point for considering the issues before the panel;

4. The key paragraphs of *Xynnis* are para. 45 and para. 46:

   45. The closer the facts sought to be shielded come to the core of the issues before the Tribunal and the actions of the parties to the proceeding, the harder it will be to justify restrictions on openness…

   46. Where facts are at the heart of the case and are about the subject of the proceeding, limits on transparency should be imposed on such information only in particular and unusual circumstances, based on evidence that shows a risk of harm to the administration of justice through evidence based on the specific facts of the case.

5. Here the request for an adjournment has nothing to do with the allegations of judicial misconduct made against His Worship or with His Worship's defence to those allegations;

6. On the other hand, the evidence of His Worship's medical condition is at the very core of the request for an adjournment;

7. This tribunal has previously held that decisions respecting adjournments can be matters of significant public interest:

> 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.
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> *In the Matter of Justice of the Peace Tom Foulds*, Ruling on Motion for Disclosure and Motion for a Temporary Stay / Adjournment of the Disciplinary Hearing, February 14, 2017, at para. 24;

8. Accordingly, while unconnected to the allegations, the adjournment request made by His Worship is a matter of public interest; and

9. To grant the publication ban request, the Panel will have to be satisfied that the public interest in having a complete understanding of the request for an adjournment is outweighed by the interest expressed by His Worship in protecting his private medical information.

[41] With respect to His Worship's position that publicizing the intimate medical details of judicial officers could detrimentally impact public confidence in the administration of justice and could leave judicial officers open to criticism from litigants solely on the basis of their medical health (i.e. paragraph 29 of the Applicant's factum), Mr. Smith suggested that the submission it contains was made "without evidence" and could be rejected by the Panel on that basis.

[42] He reminded the Panel that there is prior authority from this Tribunal that "adjournment decisions are a matter of importance (and) of public interest and I think that's relevant to your considerations on this case."

[43] Finally, Mr. Smith agreed that the proposed redaction and/or editing of the Panel's reasons for denying the application for adjournment would result in a gutting of those reasons which may be relevant to a consideration of the public interest.

THE GOVERNING PRINCIPLES

[44] It is a basic principle of Canadian law that proceedings of courts and

administrative tribunals should be open to the public with the ability to be publicized and reported upon. The open court principle protects democracy by ensuring that the exercise of decision-making power can be scrutinized. The right to publish information about court and tribunal proceedings falls within the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Law Society of Upper Canada v. Nicolas Xynnis, supra at para. 10.

[45] The Supreme Court of Canada explained the reasons for and the importance of the open court principle in *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26:

> This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings…
>
> The open court principle has long been recognized as a cornerstone of the common law…The right of public access to the courts is "one of principle…turning not on convenience but on necessity… Justice is not a cloistered virtue… Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity…
>
> Public access to the courts guarantees the integrity of the judicial process by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law… Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principle component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts…
>
> The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein… The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression.

[46] The open court principle is enshrined in the legislation and rules that govern this hearing: the *SPPA* - section 9 (a) and (b) and the Procedural Rules - 15.1 (c) and (d), 15.2, 15.3, 15.4, and 15.5.

[47] Openness is particularly vital for Hearing Panels of the Justices of the Peace Review Council, which deal with complaints made against justices of the peace who are appointed by the Provincial Government and who are empowered by the authority of their office to carry out important duties including presiding in court (where they adjudicate criminal and quasi-criminal cases) and otherwise administering the law.

[48] Conduct hearings must be transparent so that members of the public and of the bench are aware of and can have confidence in the impartial and fair resolution of the issues

that come before them.

[49] The Factum filed on behalf of His Worship in support of the motion for continuation of the publication ban recognizes the importance of the open court principle:

> 15. In any case where a publication ban is sought, the open court principle is directly engaged. It is a basic principle of the Canadian justice system that proceedings of courts and administrative tribunals should be open to the public, with the ability to be publicized and reported upon. The Supreme Court of Canada has repeatedly recognized the open court principle as a cornerstone of the common law and as a hallmark of a democratic society that applies to all judicial proceedings. (see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 21; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 at para. 187; and *Vancouver Sun (Re)*, 2004 SCC 43 at Paras. 23-26).

[50] The presumption in favour of open hearings means that the burden is on the person seeking limits on openness to establish the need for an order. The basis should be established through evidence or facts of which judicial notice may be taken, unless the category of information is something that has been recognized as justifying a publication ban, such as the protection of children or sexual assault complainants: *A.B. v. Bragg Communications Inc*., 2012 SCC 46 at para. 16.

> *Xynnis, supra* at para. 30

[51] The Panel must consider the impact (of a publication ban) on open justice and the importance of that right even if there is no person present opposing the order: *R. v. Mentuck*, 2001 SCC 76 at para. 38.

[52] This means that parties seeking a publication ban – even on consent or where the opposing party and/or Presenting Counsel takes no position – must explain why it is justified and the Panel must independently weigh the reasons proffered against the (presumptive) right to open courts and freedom of expression.

[53] To obtain a publication ban … the party seeking such an order must establish first, that such an order is necessary to prevent a serious risk to the administration of justice because reasonable alternative measures will not do so; and second, that the benefits outweigh the effects on the right to free expression and the efficacy of the administration of justice: see *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, *supra* at para. 32.

APPLICATION OF THE PRINCIPLES TO THIS CASE

[54] It is abundantly clear to the Panel that "the details of the Applicant's medical circumstances including his medical conditions, diagnosis, and prognosis" were at the core of the decision that we were being called upon to render on September 28, 2020; namely,

the request for a publication ban that details of his medical circumstances including his medical condition, diagnosis and prognosis shall not be published by any media or posted on any social media as it pertains to his personal specific medical circumstances".

[55] It is equally clear that the "the details of the Applicant's medical circumstances including his medical conditions, diagnosis, and prognosis" are at the core of the decision that we are being called upon to render on this motion for continuation of the publication ban.

[56] It is apparent, and significant, that this application was brought by His Worship at the outset of the hearing of his motion for an adjournment, and that the medical information in respect of which he seeks a ban on publication is the very information he relied upon in support of that motion.

[57] While we appreciate that the details of the Applicant's medical circumstances including his medical conditions, diagnosis, and prognosis were heretofore his own private affair and disclosable only with his informed consent and according to his instructions, His Worship made a deliberate decision to rely on the evidence he proffered of his medical circumstances in support of his various applications to adjourn these proceedings.

[58] Put another way, it was His Worship who caused those details to be brought under the glare of public scrutiny – albeit at this stage "public scrutiny" refers to the attention and consideration of the members of the Panel, the Registrar and staff members of the Justices of the Peace Review Council, counsel for the parties, and anyone else who is currently privy to them – when he knew there was at the very least a risk of disclosure to the public at large.

[59] Taking the evidence before us at its highest, His Worship's medical circumstances include a diagnosis of depression and anxiety. This is said to be the product of the tragic illness and death of his son, and the stress occasioned by his preparation for and participation in the proceedings before this Panel as well as the proceedings before another Hearing Panel of the Justices of the Peace Review Council.

[60] The death of a child is an unspeakable tragedy. That such a profound personal loss would be devastating to a parent will not come as a surprise to anyone. This is so whether or not that parent is a jurist, a surgeon, a politician, a commercial airline pilot, an air traffic controller, or indeed any person who bears the responsibility of making decisions and taking actions that affect the lives and well-being of others.

[61] Nor should it come as a surprise to any reasonable person that the cumulative effects of that loss together with the stress of the proceedings before this Panel and the other JPRC proceedings have adversely affected His Worship's mental (and physical) health.

[62] In the Factum and in her oral submissions on behalf of His Worship, counsel for the Applicant posited the following argument in favour of the (continuation of the

temporary) publication ban.

[63] Quoting first from the Factum:

> 25. Although His Worship acknowledges that "litigation often involves personal information, including health information" and that "personal details about individuals' lives become part of many other types of legal proceedings" he submits that there is a clear risk to the administration of justice if the specific medical diagnoses, treatments and prognosis of a judicial officer are to be made public.
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> 26. The publication of the medical information of a judicial officer differs from the more typical concerns of litigants seeking to avoid publicity, minimize embarrassment, lessen adverse reactions of colleagues, and/or to circumvent any stigma, as it has the potential to undermine the independence of the judiciary, particularly when such medical information is not at all germane to the core issue to be decided at the Public Inquiry.
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> 27. In contrast to the *Xynnis* case, where the medical information of the lawyer went directly to the core sentencing issue being decided, the medical circumstances of His Worship in the present case are only relevant to the ancillary issue of whether or not to grant an adjournment of the core Hearing.
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> 28. Like the open court principle, judicial independence is a critical component of the Canadian justice system, as it ensures that judges can make their decisions free from external influences or interferences, and that the public can thereby maintain confidence in the administration of justice.
>
> 29. Publicizing the intimate medical details of judicial officers could detrimentally impact public confidence in the administration of justice and could leave judicial officers open to criticism from litigants solely on the basis of their mental health.
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> 30. Where such intimate medical information is a core fact at the heart of the case, the right of the public to know about it would outweigh the privacy interests of the subject judicial officer. However, where the intimate medical diagnoses, treatments and prognoses have no bearing on the heart of the case, the privacy interests of the judicial officer and the interests of maintaining judicial independence must prevail.

[64] With respect, this argument is predicated on a series of bare, unproven assertions. How and why does publication of the medical diagnoses, treatments and prognosis of a judicial officer pose a clear risk to the administration of justice? How and why does publication of those details have the potential to undermine the independence of the

judiciary, and why is that particularly so when such medical information is not at all germane to the core issue to be decided?

[65] No evidence has been offered to support these assertions. At its highest, we are being asked to draw inferences from those bare, unproven assertions.

[66] The key assertion among those – as we apprehend the position of His Worship – is that publicizing the intimate medical details of judicial officers could detrimentally impact public confidence in the administration of justice and could leave judicial officers open to criticism from litigants solely on the basis of their mental health.

[67] That assertion may have been regarded as "gospel" or at the very least a reasonable assumption in the not too distant past, but in the view of the Panel, it is no longer tenable.

[68] Last year the documentary **One Judge Down** aired on the C.B.C. Radio programme, *The Sunday Edition.* It tells the story of what happened to Supreme Court of Canada Justice Gerald Le Dain in 1988.

[69] Justice Le Dain had been appointed to the Supreme Court in 1984. He quickly became known as one of Canada's most conscientious and respected jurists.

[70] But the burden of his office took its toll. Le Dain's wife Cynthia, concerned about his well-being, asked his Chief Justice, Brian Dickson, to grant her husband a leave of absence to allow him time to recuperate from depression.

[71] Instead, Dickson handed Le Dain his walking papers. And even though Le Dain had meticulously crafted the court's ruling in the landmark case of *Ford v. Quebec* – the momentous decision that dealt with Quebec's controversial language charter known as Bill 101 – his efforts were negated by an asterisk and a note that he took no part in the historic judgment. Le Dain was also expunged from the record of work he had completed from his hospital bed.

[72] Richard Janda, a professor of law at McGill University, was Gerald Le Dain's law clerk at the time. He appealed to Chief Justice Dickson, who declined to correct the record.

[73] According to Janda, Dickson acted out of his "concern for the reputation of the court"; at the time, Dickson felt, rightly or wrongly, that the Canadian public was not ready to have a decision of that significance attributable to a judge who was in hospital for depression.

[74] Contrast those events with what happened to former Supreme Court Justice Clement Gascon in 2019. His sudden disappearance triggered a police search.

[75] In a statement he released in the aftermath, Gascon explained that his disappearance was the result of a long battle with depression and anxiety and a recent

change in medication:

> For over 20 years, I have been dealing with a sometimes insidious illness: depression and anxiety disorder. This is an illness that can be treated and controlled, some days better than others. On the afternoon of Wednesday, May 8, affected both by the recent announcement of a difficult and heart-rending career decision, and by a change in medication, I conducted myself in an unprecedented and unaccustomed manner by going out without warning and remaining out of touch for several hours. I can neither explain nor justify what I understand to have been a panic attack, and I wish to apologize most profusely to all those who suffered as a result. This health issue has been taken care of and treated with the necessary medical support.

[76] Judging by the positive support he received in response, when a public person such as Justice Gascon speaks openly about his struggles with depression, that candour tends to wipe away the stigma around mental illness rather than add to it.

[77] It is the view of the Panel that to decide this application in favour of the Applicant on the basis that publicizing the intimate medical details of judicial officers might detrimentally impact public confidence in the administration of justice and leave judicial officers open to criticism from litigants solely on the basis of their mental health, would – in addition to making a decision on the basis of bare, unproven assertions proffered without any evidence in support – be taking a giant step backwards.

[78] It is also significant that what the Applicant was seeking in his motion to adjourn was not an adjournment for a week or for a month or for a definite time period; rather, His Worship was in effect seeking an indefinite adjournment of the proceedings based upon the effects of his depression and anxiety on his ability to prepare for and participate in the hearing. (Emphasis added)

[79] Whether the Panel granted the adjournment or refused it, an inevitable effect of the order banning publication sought by His Worship would be to gut the Panel's reasons for its ruling. In the result, the public would be at a loss to understand why we ruled as we did.

[80] There is no particularly intimate or sensitive information in the relevant correspondence and testimony that justifies a Procedural Rule 15 order under the *Dagenais/Mentuck* test.

[81] More particularly, there is no evidence of any demonstrated specific harm that would be caused to His Worship if the details presented to the Panel on the various motions for adjournment are made public.

[82] Stigmatization of a person with mental illness is the act of unfairly describing or regarding that person as deserving of disgrace or great disapproval. It usually arises from lack of awareness, lack of education, lack of perception, and/or the nature and

complications of the mental illness, although it can also be the product of malicious intent.

[83] A desire to avoid stigmatization and/or publicity and/or embarrassment – whether in the work place or at large - does not meet the test set out in Procedural Rule 15.1, which is that (the) intimate personal details are of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure outweighs the desirability of adhering to the principle that hearings be open to the public.

[84] Even if there was evidence of harm sufficient to satisfy the first stage of the test, any harm to His Worship would be outweighed by "the desirability of adhering to the principle that the hearing be open to the public", especially because the details at issue are so central to an understanding of the considerations and reasoning underlying our rulings on both (the adjournment and publication ban) applications.

[85] Openness and transparency are essential to the work of discipline panels such as this one. Discipline proceedings are best conducted under the glare of public scrutiny. Absent such scrutiny, abuses may occur that otherwise would not occur.

[86] In any event, a (continuation of the) ban on publication sought by His Worship would mean that public assessment of the propriety of our decision-making on the applications (for adjournment and for a continuation of the publication ban) sought by His Worship would be significantly and adversely compromised.

[87] In the result, the Applicant has failed to discharge the burden "on the person seeking limits on openness" to establish the need for an order.

[88] The Panel is grateful to all counsel for the excellence and economy of their materials, correspondence, and oral submissions, all of which were of great assistance.

RULING

[89] The motion for a continuation of the temporary ban on publication of the details of His Worship's Welsh's medical circumstances is denied.

Dated at the City of Toronto in the Province of Ontario, October 27, 2020.

HEARING PANEL:

The Honourable Justice Neil Kozloff, Chair

Her Worship Kristine Diaz