ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF complaints respecting the Honourable Justice Kerry P. Evans

BEFORE The Honourable Justice Louise V. Charron
Ontario Court of Appeal

Associate Chief Justice J. David Wake
Ontario Court of Justice

Mr. Henry G. Wetelainen

Ms. Jocelyne Côté-O'Hara

COUNSEL Mr. Andrew Burns, Presenting Counsel

Mr. Brian Greenspan, Counsel to Mr. Justice Kerry Evans

REASONS FOR RULING

[1] The Ontario Judicial Council has directed, pursuant to s. 51.4(18) and s. 49(16) of the *Courts of Justice Act*, R.S.O. 1990, c.43 (the "*CJA*"), that this panel hold a hearing under s. 51.6 of the *CJA* regarding the conduct of The Honourable Justice Kerry P. Evans. The panel has all the powers of the Judicial Council for that purpose and will be conveniently referred to as "the Council".

[2] It is alleged that Justice Evans has conducted himself in a manner that is incompatible with the due execution of the duties of his office. The allegations relate to complaints made by six

employees of the courthouse at Barrie, Ontario. Particulars of the complaints are set out in the Notice of Hearing dated July 10, 2003, a copy of which is attached.

[3] The Council convened on August 27, 2003 to set a date for the hearing and to consider any preliminary motions. Justice Evans, appearing through counsel, moved for an order adjourning the hearing *sine die* pending the disposition of a criminal charge relating to one of the matters under consideration before the Council. Justice Evans further moved for an order that the hearing under s.51.6 be held in camera.

[4] After considering the submissions of counsel for Justice Evans and presenting counsel, the motion for an adjournment was granted, in part, for reasons to follow, and the matter was adjourned to January 15, 2004 to set a date for the hearing at that time. The following are our reasons for this ruling.

[5] It is of significant interest to both Justice Evans and to the public that the hearing in respect of these complaints be conducted in a fair and expeditious manner. The question that arises on this motion is whether these objectives can be better met by holding the hearing after the conclusion of the criminal trial on the sexual assault charge. The following circumstances are relevant to the determination of this question.

(a) The significance of the disposition on the criminal charge

[6] Mr. Greenspan concedes on behalf of his client that a criminal conviction on the charge of sexual assault would constitute conduct incompatible with the due execution of his office.

Hence, he informed the Council that, if the criminal trial results in a conviction, Justice Evans will resign from his position and, in that event, there would be no need to hold a hearing. Counsel submits that, for this reason alone, it would make eminent good sense to postpone the hearing until the final disposition on the criminal charge.

(b) The overlapping subject-matter

[7] In the event that Justice Evans is acquitted at his criminal trial and a hearing before this Council becomes necessary, it is submitted that there could still be a substantial saving of resources if the criminal trial proceeded first because of the significant overlap in the subject-matter underlying the two proceedings.

[8] As noted earlier, Justice Evans faces a criminal charge of sexual assault in respect of one of the six complainants whose allegations form the subject-matter of this hearing. Although he is not charged in respect of the other five complainants, their evidence may potentially be introduced by the Crown at the criminal trial as similar act evidence, either as part of the prosecution's main case, or by way of rebuttal in the event that Justice Evans chooses to put his character in issue. The subject-matter of the witnesses' evidence is the same at the trial as at the hearing. Mr. Greenspan also acknowledges that the issues in respect of the various allegations would be the same at trial as they would be at the hearing before this Council. Hence, if the criminal trial proceeded first, Mr. Greenspan anticipates that much of the evidence could be introduced at the subsequent hearing by way of transcript without the necessity of calling *viva*

voce evidence. This would not only result in a saving of time, judicial resources and personal resources for Justice Evans but it would relieve the complainants of having to testify twice.

(c) Anticipated timeline for the criminal trial

[9] The criminal charge against Justice Evans was laid on May 28, 2003. The matter is scheduled to be spoken to at the courthouse in Hamilton on September 15, 2003. The parties are hopeful that the matter will not only be spoken to on that date but that a judge will be available to hold a judicial pre-trial at that time. It is anticipated that the Crown will elect to proceed summarily and that, consequently, the trial will be by judge alone before a judge of the Ontario Court of Justice. The parties anticipate that the trial will take one or two weeks and they are hopeful that a date could be set for some time later this year, or early in the new year.

[10] It is self-evident that the criminal trial and the hearing cannot be held concurrently. Justice Evans has the constitutional right to be tried within a reasonable time on the criminal charge. Counsel on his behalf expressly waived any procedural right that he may have to an expeditious hearing before this Council in the interest of safeguarding that constitutional right.

[11] In light of the anticipated timeline for the criminal proceedings and the potential benefits of proceeding with the criminal trial first, it is our view that no date should be set for the hearing at this time. However, we are not prepared to grant an adjournment until the final disposition of the criminal charge as requested because the course of the criminal proceedings remains too uncertain at this point in time. In addition, we are not persuaded that the fairness of the trial would be impaired in any way if the hearing were to proceed first. Hence, if unexpected delays

are encountered in respect of the criminal trial, it is our view that it may become in the public interest to proceed with the hearing first.

[12] It is for these reasons that we have allowed the motion for an adjournment only in part and have adjourned the matter to January 15, 2004 for a date to be set at that time. In the meantime, counsel are directed to inform the Council by letter on the progress of the criminal proceedings.

[13] In light of our ruling on the motion for an adjournment, we have not considered the motion for a private hearing at this time as different considerations may apply depending on whether the hearing is ultimately held before or after the criminal trial. That motion, therefore, is to be spoken to next on January 15, 2004.

[14] As a result of the Council not yet considering the motion for a private hearing, this interim ruling shall not be disclosed or made public unless and until that determination is made and the Council so orders in accordance with s. 19(24) and (25) of the *Courts of Justice Act*.

DATED at the City of Toronto, in the Province of Ontario, September 9, 2003.

The Honourable Justice Louise V. Charron
Ontario Court of Appeal, Chair

Associate Chief Justice J. David Wake
Ontario Court of Justice

Mr. Henry G. Wetelainen

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DATED at the City of Toronto, in the Province of Ontario, September 9, 2003

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The Honourable Justice Louise V. Charron
Ontario Court of Appeal
Chair

Signed on behalf of the Ontario Judicial Council