IN THE MATTER OF a complaint respecting the Honourable Justice Marvin G. Morten

BEFORE The Honourable Justice Eileen E. Gillese
Court of Appeal for Ontario

The Honourable Annemarie E. Bonkalo
Associate Chief Justice of the Ontario Court of Justice

Mr. J. Bruce Carr-Harris

Ms. Madeleine Aldridge

COUNSEL Mr. Douglas Hunt and Mr. Michael Meredith, Presenting Counsel

Mr. Robert G. Schipper, counsel to Justice Marvin G. Morten

Mr. Paul Schabas, counsel to the Toronto Star Newspaper

Mr. Peter Jacobsen, counsel to The Globe and Mail

Mr. Munyonzwe Hamalengwa, counsel for Pride News Magazine

Ms. Marlys Edwardh, counsel for The Criminal Lawyer's Association

REASONS FOR RULING

[1] The Ontario Judicial Council, pursuant to sections 51.4(18) and 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c.43, as amended, (the "Act") has directed that complaints regarding the conduct or actions of the respondent, Justice Marvin G. Morten, be referred for a hearing. The Notice of Hearing discloses, among other things, complaints alleging numerous and sustained instances of judicial conflict and disharmony between the Respondent and members of the court staff and judiciary in Brampton.

[2] Presenting Counsel brings an application to close those portions of the hearing relating to the judicial conflict (the "Application"). The grounds for the Application are that public disclosure of the nature of the conflicts is likely to significantly undermine the public's confidence in the administration of justice in Brampton and across the Province generally.

[3] The Application is strongly opposed by the Respondent, who wishes the hearing to be conducted in public. It is opposed also by The Globe and Mail, the Toronto Star, Pride News

Magazine and the Criminal Lawyers' Association, all of which were given intervenor status for the purpose of the Application.

[4] Before turning to the merits of the Application, we will address the Respondent's preliminary objection in which he argues that the hearing panel ought not to entertain the Application. The preliminary objection is founded on the following three submissions:

(i) Presenting Counsel does not have authority or jurisdiction to bring the Application;
(ii) By bringing the Application, Presenting Counsel has exceeded the boundaries of his role and become an advocate on behalf of the complainants and witnesses; and
(iii) By considering the evidence in support of the Application, the hearing has been tainted and the hearing panel ought to be dismissed.

JURISDICTION TO BRING THE APPLICATION

[5] The Respondent argues that Presenting Counsel's role is limited to "preparing and presenting the case against the respondent" and that the Application falls outside of that role. The Respondent contends that the right to bring such an application belongs exclusively to the Respondent, the complainants and witnesses.

[6] In s. 2 of that portion of the Ontario Judicial Council Procedures Document entitled "Procedural Code for Hearings", the role of Presenting Counsel is described as "preparing and presenting the case against the Respondent". Section 3 provides that Presenting Counsel "shall operate independently" of the Judicial Council. Section 4 states that the duty of Presenting Council is to "see that the complaint against the judge is evaluated fairly and dispassionately to the end of achieving a just result".

[7] In our view, it is clear that Presenting Counsel has the authority to bring this Application. There is nothing in the language of sections 2 through 4 (or elsewhere in the Procedures Document) to suggest that the powers of the Presenting Counsel should be narrowly interpreted. On the contrary, from the breadth of the duty imposed on Presenting Counsel and the lack of limiting language, it appears that the powers of Presenting Counsel are to be given a wide and liberal interpretation so that Presenting Counsel is best able to fulfil his task. Moreover, a plain reading of the words "preparing and presenting" show that, when read in the context of Presenting Counsel's obligation to act "independently" and this hearing panel's power to determine whether a hearing should be closed, they encompass the power to bring the Application.

THE SCOPE OF THE ROLE OF PRESENTING COUNSEL

[8] For the same reasons, we are of the view that Presenting Counsel did not exceed the boundaries of his role in bringing the Application.

POSSIBLE TAINTING OF THE HEARING PANEL

[9] The statutory and procedural regime that governs the hearing expressly empowers the hearing panel to close a hearing. See s. 51.6(7) of the Act and Ontario Judicial Council Procedures Document, p. 11.

[10] In order to decide whether to close the hearing, of necessity, evidence will be placed before the hearing panel. The hearing panel cannot be given the express task of deciding whether to close the hearing but be foreclosed from hearing the evidence necessary to properly decide the issue.

[11] In any event, we reject the notion that receipt of such evidence, whether or not the evidence is later tendered as evidence on the merits, causes the hearing panel to lose the appearance of impartiality. The members of the hearing panel have the requisite training and experience to consider the evidence tendered on the Application for the limited purpose for which it was tendered.

THE APPLICATION

[12] Section 49(11) of the Act stipulates that Judicial Council hearings "shall be open to the public" unless s. 51.6(7) applies. Section 51.6(7) provides that hearings may be closed only in "exceptional circumstances", where the Judicial Council determines that "the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality".

[13] We are not satisfied that such exceptional circumstances exist. Open hearings are of fundamental importance to the Canadian justice system. The principle of openness applies to all facets of the justice system, not just proceedings in courtrooms. Its role in fostering public confidence in the administration of justice has been highlighted repeatedly by the Supreme Court of Canada. For example, in Canadian Broadcasting Corp. v. New Brunswick, [1996] 3 S.C.R., at para. 22, LaForest J. writing for a unanimous court states:

The importance of ensuring that justice can be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.

[14] This hearing involves a matter of significant public interest. Closing the hearing or any part of it would place a limit on the public's access to the hearing, a prima facie violation of s. 2(b) of the Charter of Rights and Freedoms. The Respondent is the person most directly affected by whether the hearing is open or closed. He wishes the hearing to be open.

[15] The alleged harm to the public interest is speculative. Against that is the known value that a transparent process brings to public confidence in the hearing process. We are not satisfied that whatever harm may occur rises to the level that would warrant departure from the principle that hearings are to be open to the public.

DISPOSITION

[16] For these reasons, the application is dismissed. The hearing shall be conducted in public.

DATED at the City of Toronto, in the Province of Ontario, February 10, 2006

The Honourable Justice Eileen E. Gillese
Court of Appeal for Ontario

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