

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 THRESHOLD JURISDICTION QUESTIONS

Counsel:

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

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

Decision on Threshold Jurisdiction Questions

The Background

- 1) In April 2012, a Hearing Panel of the Justices of the Peace Review Council (“Review Council”) made a finding of judicial misconduct against His Worship Errol Massiah and made an order pursuant to s. 11.1(10) of the *Justices of the Peace Act* (“*JPA*”) imposing dispositions. According to the findings, the judicial misconduct was considered in that case specific to one courthouse in the Central East region.
- 2) While that hearing was on-going, information was provided to then Presenting Counsel, Mr. Douglas Hunt, alleging inappropriate conduct on the part of His Worship in a different courthouse. Mr. Hunt took certain actions and then submitted information to the Review Council) for its consideration. The Review Council considered the information to be a new complaint and pursuant to s. 11(1) of the *JPA*, it established a Complaints Committee to which the complaint was assigned to investigate the complaint. Ultimately that Complaints Committee ordered a hearing under s. 11(15)(c) of the *JPA*.
- 3) This Hearing Panel was established pursuant to s. 11.1(1) of the *JPA* and a Notice of Hearing was filed. The public hearing commenced on July 4, 2013.
- 4) His Worship Massiah filed a Notice of Motion in July of 2013, an Amended Notice of Motion on February 23, 2014 and a further Amended Notice of Motion of February 27, 2014 alleging an abuse of process arguing that certain actions of the Complaints Committee were inappropriate, with specific concerns focused on whether a valid complaint pursuant to s. 10.2 *JPA* was before the Complaints Committee.
- 5) This Hearing Panel posed the question to both Presenting Counsel and Counsel for His Worship as to whether we (the Panel) have the jurisdiction to consider the actions of the Complaints Committee. The Hearing Panel determined that its jurisdiction in this regard must be determined prior to the hearing of the abuse of process motion. Oral argument on this narrow issue was heard on April 09, 2014.

Positions of the Parties

Presenting Counsel

- 6) Presenting Counsel Mr. Matthew Gourlay submitted that the Hearing Panel has limited jurisdiction which flows from the Notice of Hearing. This authority is defined by the *JPA* and the Review Council’s Rules of Procedure established under s.

10(1) of the *JPA*.

- 7) Mr. Gourlay referenced s. 11.1(4) of the *JPA* which furnishes the authority of the *Statutory Powers Procedures Act* (“*SPPA*”) to a Hearing Panel. He noted that s. 23 of the *SPPA* grants authority to a Hearing Panel to control its own process. The section states:

Powers re control of proceedings

Abuse of processes

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. R.S.O. 1990, c. S.22, s. 23 (1)

- 8) Presenting Counsel submitted that the Hearing Panel has the jurisdiction to decide the following:
- a. If an abuse of process exists which undermines the fairness of hearing;
 - b. If a jurisdictional defect in the chain of proceedings, including the complaints process, exists then that entitles the Hearing Panel to decline to proceed with the hearing;
 - c. If a valid complaint under s. 10.2 of the *JPA* exists.
- 9) Presenting Counsel further submitted that the Hearing Panel has no jurisdiction to:
- a. Sit in judgment of the Complaints Committee;
 - b. Consider the Regional Senior Judge’s decision on the scheduling of work to His Worship Massiah pursuant to s. 11(12) (a) of the *JPA* ;
 - c. Conduct an inquiry into the history of His Worship’s dealings with the Review Council.
- 10) There appear to be no decisions from judicial conduct hearings for justices of the peace where relief for alleged irregularities in the complaints process were considered or granted. Presenting Counsel referenced several cases under the *Regulated Health Professionals Act* which provide guidance. In general, these cases stand for the principle that such alleged irregularities should be dealt with by the Discipline Committee (called a Hearing Panel under the *JPA*) and not by way of an interlocutory motion to Divisional Court (see *Haigh v. College of Denturists*, 2011 ONSC 2152 (Div. Ct), *Sutherland v. College of Physicians & Surgeons (Ontario)*, [2007] O.J. No. 4694 (Div. Ct.), *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541(Court of Appeal).
- 11) However, *Krop v College of Physicians & Surgeons (Ontario)* [2002] O.J. No. 308

(Div. Ct.) is a potentially contrary authority. It provides that the Discipline Committee takes its authority from the Notice of Hearing but lacks the jurisdiction to consider the fairness of the investigation which preceded it.

- 12) In *Sazant v. The College of Physicians and Surgeons*, 2011 ONSC 323 (Div. Ct.), the Court considered *Krop* and *Sutherland* and held that “whether a Discipline Committee has jurisdiction to address matters relating to the investigating stage depends on the reason why it is being asked to look at the issues” (para 189-190).

Responding Counsel

- 13) Counsel for His Worship, Mr. Ernest Guiste, submitted that pursuant to s. 18(3) of the Review Council’s Procedures, the Hearing Panel has very broad authority to consider the actions of the Complaints Committee. This section states:

18. (1) Either party to the hearing may, by motion, not later than 10 calendar days before a set-date, bring any procedural or other matters to the hearing panel as are required to be determined prior to scheduling the hearing of the complaint.

(2) Either party to the hearing may, by motion, not later than 10 calendar days before the commencement of the date set for the hearing, bring any procedural or other matters to the hearing panel as are required to be determined prior to the hearing of the complaint.

(3) Without limiting the generality of the foregoing, a motion may be made for any of the following purposes:

- a. objecting to the jurisdiction of the Review Council to hear the complaint;
- b. resolving any issues with respect to any reasonable apprehension of bias or institutional bias on the part of the panel;
- c. objecting to the sufficiency of disclosure by presenting counsel;
- d. determining any point of law for the purposes of expediting the hearing;
- e. determining any claim of privilege in respect of the evidence to be presented at the hearing;
- f. any matters relating to scheduling; or
- g. seeking a publication ban or an order that the hearing or part thereof be heard *in camera*. The Review Council will provide public notice of such a motion on its website.

- 14) Counsel for His Worship submitted the Hearing Panel has the jurisdiction to:
- a. Determine any point of law;
 - b. Review the actions of then Presenting Counsel Hunt in receiving and forwarding to the Review Council information which he received while the prior hearing was on-going ;
 - c. Review the actions and sit in judgment of the Complaints Committee's investigation and its decisions;
 - d. Determine threshold issues as to whether preconditions exist to conduct a hearing on its merits, which includes but is not limited to whether a complaint in writing pursuant to s. 10.2 *JPA* existed;
 - e. Determine whether the investigation breached the principles of natural justice and fairness;
 - f. Consider whether the process and/or the Complaints Committee breached His Worship Massiah's s. 7 *Charter* rights;
 - g. Consider relevancy of the first JPRC hearing to the present hearing, as it relates to establishing a pattern of conduct by the Review Council;
- 15) Mr. Guiste was in agreement with Mr. Gourlay's position that an early application for judicial review to Divisional Court would likely be unsuccessful unless exceptional circumstances existed. This position accords with that set out by the Court of Appeal in *Deemar v. College of Veterinarians* 2008 ONCA 600, cited in Presenting Counsel's submissions.
- 16) Mr. Guiste provided no additional authorities to support his submissions.

Independent Legal Counsel

- 17) Having heard the submissions of both Presenting Counsel and Counsel for His Worship on April 9, 2014, the Hearing Panel decided, pursuant to s. 8(15) of the *JPA*, to request that the Review Council retain Independent Legal Counsel; the Review Council retained Mr. Brian Gover to assist the Panel.
- 18) The legal opinion was invited on two questions:
1. What is the extent of the jurisdiction (if any) of this Hearing Panel of the Justices of the Peace Review Council to review and/or grant relief concerning decisions or actions taken by the Complaints Committee?
 2. What is the extent of the jurisdiction (if any) of the Hearing Panel to consider whether there is a valid complaint under s. 10.2 of the *Justices of the Peace Act* ("*JPA*" or "*Act*"), or is the Hearing Panel mandated only to proceed with a hearing once it has been ordered by the Complaints Committee under s. 11(15)(d) of the *JPA*?

- 19) Mr. Gover provided his legal opinion on May 23, 2014. This opinion was provided to both parties on May 29, 2014. Written submissions on Mr. Gover's opinion were received from Presenting Counsel on June 2, 2014 and from Counsel for His Worship on June 3, 2014. The Hearing Panel decided to accept the late submissions from Mr. Guiste. The submissions from both counsel have been considered.

Independent Legal Counsel's Opinion

- 20) Mr. Gover's advice and opinions on the two questions are as follows:
1. The Hearing Panel does not have jurisdiction to "sit in review" of, vary or overturn, decisions of the Complaints Committee, nor to give the Complaints Committee direction or refuse to comply with the Complaints Committee's decision to order a hearing under s. 11(15)(d) of the *JPA*. However, the Hearing Panel does have jurisdiction to determine questions of law and to grant relief within, and affecting, the current hearing. Such determinations may (and in this instance appear to) require the Panel to consider the steps taken by the Complaints Committee and draw legal conclusions from them, and empower the Panel to grant relief accordingly, including a remedy for abuse of process and *Charter* remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.
 2. Yes, the Hearing Panel may consider and determine the question of whether a valid "complaint" exists under s. 10.2 of the *JPA* as part of its jurisdiction to determine any question of fact or law arising in the proceedings before it.

In short, the question of whether the Hearing Panel has jurisdiction really turns on the purpose for which it is considering the Complaints Committee's processes. The Hearing Panel cannot take action which would effectively appropriate powers exclusively within the Complaints Committee's jurisdiction, but it may make orders and determinations within *the present hearing* which require it to consider the Complaints Committee's processes and how they operated in the present case.

Ruling

- 21) Mr. Gover provided the following explanation and underlying analysis of his opinion:

Analysis

The jurisdiction of the Hearing Panel to "review and/or grant relief concerning decisions or actions taken by the Complaints Committee" requires careful consideration of the separate functions of each of the two bodies as established under the *JPA*. The Complaints Committee, as established in s. 11, performs an investigative function which can (as it has in this case) lead to an order that a formal hearing be held into a

complaint made under s. 10.2. Its members are prohibited, by s. 11(4), from then participating in such a hearing. Its investigations are held in private (s. 11(8)). Its core power is to determine, at the conclusion of the investigation, whether to dismiss a complaint, invite the justice of the peace to attend to receive advice, order a formal hearing by a Hearing Panel, or refer the complaint to the Chief Justice, arises under s. 11(15).

The Hearing Panel, by contrast, is established only as a consequence of a Complaints Committee's decision that a hearing is necessary under s. 11(15)(c). The resulting hearing is an oral, adjudicative hearing governed by the *Statutory Powers Procedure Act*² ("SPPA")³, at the conclusion of which the Hearing Panel is entitled to reach the dispositions listed in s. 11.1(10) of the *Act*. Unsurprisingly, the Panel has no express authority to override, review, or reconsider any of the determinations made by the Complaints Committee nor to exercise any of its powers.

In our view, the structure of the *JPA* makes it clear that the Hearing Panel cannot "review" a decision or action of the Complaints Committee in the sense of altering or varying that decision. To do so would be to purport to exercise powers granted to the Complaints Committee in s. 11 of the *Act*, which are clearly separate from the powers granted to the Hearing Panel under s. 11.1. However, it may in a sense "grant relief concerning" such decisions or actions *where those decisions or actions are significant* to the exercise of a power of the Panel concerning its *own* mandate.

In other words, the Panel may not purport to vary, overturn, or otherwise modify a decision or action already taken by a Complaints Committee. But it can make orders in its own proceedings that include an analysis of a Complaints Committee's actions or decisions, including potentially reaching the conclusion that a Complaints Committee made a decision, or took an action, in error. The Hearing Panel's powers in that regard include the power to consider and decide the specific item you have raised under Question 2: the validity of a "complaint" made under s. 10.2 of the *JPA*.

- 22) With respect to the Panel's second question concerning its authority to determine the validity of a "complaint" under section 10.2 of the *JPA*, we rely on *Sazant* (supra), para. 189. It resolved the competing positions in *Krop* and *Sutherland* over a discipline committee's authority to review the investigatory stage which led to a hearing. If the "issues went to the underlying jurisdiction of the committee to proceed with a hearing" then a review of the investigatory process is appropriate.
- 23) This is exactly the circumstance this Hearing Panel is being asked to consider by His Worship. It is whether former Presenting Counsel, Mr. Hunt, could be considered a complainant and whether the materials which he sent to the Review Council could constitute "a complaint". A "complaint" pursuant to 10.2 *JPA* is an overriding requirement under the *Act* for the establishment of a complaints

² R.S.O. 1990, c S.22

³Other than ss. 4 and 28 thereof, as provided for in s. 11.1(4) of the *JPA*.

committee.

- 24) In our view, *Sazant* provides the authority for this Hearing Panel to consider the circumstances in the investigatory process as threshold issues. The Panel can consider whether the Complaints Committee's decisions or actions affect the exercise of a power of the Panel concerning its own mandate. If the investigatory process is found to have been appropriate, then the Panel has the jurisdiction to conduct the hearing on its merits.
- 25) We accept that the Hearing Panel has jurisdiction to consider the specific issue of the sufficiency of the "complaint" within the meaning of s. 10.2 in assessing whether it has jurisdiction to conduct the hearing.
- 26) The Hearing Panel has previously received materials and written submissions in preparation for the abuse of process and fairness motion filed by His Worship.
- 27) In response to the jurisdiction question raised by the Panel, in our view, both Presenting Counsel and Counsel for His Worship also provided materials and/or oral submissions related to the abuse of process and fairness motion. As well, Mr. Gover also commented on abuse of process and fairness issues in his legal opinion. Submissions from all counsel on those issues have been instructive.
- 28) However, the abuse of process and fairness motion has not been fully argued by Presenting Counsel and Counsel for His Worship, as yet. That motion is scheduled to be heard shortly. In our view, it would be premature for us to make any ruling on those matters now.
- 29) As a result, it is only the narrow issues framed in the two questions the Hearing Panel posed to Mr. Gover (see para. 18) on which the Hearing Panel has ruled in this decision.

Addendum

- 30) Finally, it should be noted that the Hearing Panel found merit in the portion of Mr. Gover's legal opinion entitled *Administrative Law Remedies*. We provide the relevant passages below for those who might find them useful.

Administrative Law Remedies

Another important thread of jurisprudence to consider – particularly with respect to the Panel's second question concerning its authority to determine the validity of a "complaint" under s. 10.2 of the *JPA* – emerges from a series of Supreme Court of Canada cases dealing with jurisdiction to grant remedies under the *Canadian Charter of Rights and Freedoms*, culminating in the important case of *R. v. Conway*, 2010 SCC 22. In addition to outlining *Charter* jurisdiction, these decisions shed some light on the more general power of a tribunal to decide "questions of law" arising in proceedings before them. In *Martin v. Nova Scotia (Workers*

Compensation Board), 2003 SCC 54, the Court explained how this power could be located either in explicit statutory language, or implicitly provided for in the governing legislation. As there is no express provision granting the Panel the power to decide all questions of law arising in proceedings before it, the Court's guidance on implicit conferral of such power is of greatest significance:

Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

Martin, *supra* para. 41

Here there is no direct challenge to the constitutional validity of any provision of the *JPA*. Nonetheless, the Court's explanation of the power to determine questions of law (including statutory interpretation) is significant to considering the Hearing Panel's jurisdiction here. In our view, the Hearing Panel clearly has the power to determine questions of law provided they arise in the course of the hearing before them, for several of the reasons mentioned in *Martin*:

- The mandate of the tribunal cannot be effectively fulfilled without the power to determine questions of law. The broad subject matter of judicial misconduct implies the probability that questions of law will be raised in the course of considering whether a complaint against a Justice of the Peace ought to be upheld in any given case.
- This conclusion is bolstered by provisions in the *JPA* which clearly contemplate the likelihood that the Hearing Panel will make legal determinations, including the authorization to retain "counsel" to assist it in s. 8(15), and the power to determine the parties to the hearing under s. 11.1(8).
- The *Rules of Procedure* referred to in s. 11.1(5) specifically

contemplate (e.g., at s. 18(3)) the determination of questions of law arising in motions.

- The Hearing Panel is fundamentally adjudicative in nature, as reflected by the application of the *S.P.P.A.*
- As it is composed of a judge, a justice of the peace, and a third person who may (though she need not) be a judge or a lawyer, the Hearing Panel clearly has the institutional competence to determine questions of law.

It also appears clear to us that there is jurisdiction in the Hearing Panel to consider questions of law specifically arising under s. 10.2 of the *JPA* not only because of these general factors, but because the Hearing Panel's own governing provision (s. 11.1) repeatedly refers to the subject matter of the hearing as being the "complaint". This is seen, for example, at ss. 11.1(9), (10) and (19). Particularly with respect to s. 11.1(10), the triggering event for the Hearing Panel's jurisdiction to impose specific dispositions is the Hearing Panel's view as to whether to uphold the "complaint". It is therefore necessarily the case that the Hearing Panel must have the power to consider both the content of, and the legislative requirements applicable to, a "complaint" within the meaning of the *JPA*, since ultimately it is a "complaint" which the Hearing Panel is adjudicating.

Dated June 6, 2014

Hearing Panel:

The Honourable Justice Deborah K. Livingstone, Chair

His Worship Michael Cuthbertson

Ms. Leonore Foster, Community Member