**JUSTICES OF THE PEACE REVIEW COUNCIL**

**IN THE MATTER OF** a complaint respecting

Justice of the Peace Claire Winchester

A Justice of the Peace in the East Region

**SUBMISSIONS OF PRESENTING COUNSEL ON DISPOSITION**

**A. OVERVIEW**

1. On February 19, 2020, the Hearing Panel made findings that Justice of the Peace Winchester committed judicial misconduct on June 27, 2018 as set out in the following paragraphs of the Notice of Hearing:

2(B): You failed to fulfill and uphold your judicial duties on June 27, 2018, when presiding in Bail Court in Cornwall, you closed court early in circumstances where you knew a defendant was in the building and you had been informed by the Assistant Crown Attorney that that the defendant was releasable, thus depriving an accused person of his right to reasonable bail, fair treatment in accordance with the law, due process, and ultimately his right to liberty. These events came to the attention of the Regional Senior Justice following an apparent attempt by the defendant to take his own life while in police custody on the night of June 27, 2018.

2(C): Your conduct in both instances[[1]](#footnote-1) denied persons timely access to the court to have their matters heard, and demonstrated a disregard for, or indifference to, the fundamental procedural rights of individuals who come before the courts.

2(D): Your comments and conduct displayed a flippant, dismissive attitude toward the liberty and rights of persons appearing before the court; a disrespect for the important role of a justice of the peace in the administration of justice; and a disregard for the impact of judicial conduct on persons in the justice system and on public confidence in the judiciary, including the following:

(b) On June 27, 2018, when presiding in Cornwall Bail Court, and Duty Counsel informed you that a defendant was in the building, and the Information wasn’t ready yet, you said at approximately 2:00 p.m.:

* “So I’m not willing to wait here until everybody finds their way through the system…”; and,
* Counsel pointed out to you that the accused, who was releasable, would have to spend the night in custody if you closed the court and you replied, “Yes, I know that. Yes, and that happens” and closed the court.

1. The issue now before this Panel is: what is the appropriate disposition to restore the public confidence in this justice of the peace, in the integrity of the judiciary as a whole, and in the administration of justice?
2. the following submissions set out the factors and principles to be considered in imposing a disposition where judicial misconduct has been found. They then discuss existing disposition-related case law from the Justices of the Peace Review Council and the Ontario Judicial Council. Finally, they examine the factors and findings that the Panel may wish to consider in determining the appropriate disposition in Her Worship’s case.

**B. GENERAL PRINCIPLES**

1. Public confidence in the justice system is at the very heart of a hearing into judicial misconduct.[[2]](#footnote-2) At the liability stage, the Hearing Panel’s role is to determine whether the conduct of the justice of the peace failed to uphold the impartiality, integrity and independence of the judiciary such that the confidence of individuals appearing before the justice of the peace, or of the public in the judiciary in general and in its justice system, has been undermined.[[3]](#footnote-3) That part of the hearing is now concluded. A finding of misconduct has been made. The Panel’s task is now to impose a disposition that can be expected to restore the public confidence that was compromised by Her Worship’s misconduct.[[4]](#footnote-4) In that sense, the Panel’s task is not punitive; it is “essentially remedial.”[[5]](#footnote-5)
2. Accordingly, the Panel must decide which of the dispositions, or combination of dispositions, as set out in s. 11.1(10) of the *Justices of the Peace Act* is required to restore public confidence in Her Worship and the judiciary more broadly. Pursuant to s. 11.1(10), the Panel may:
3. warn the justice of the peace;
4. reprimand the justice of the peace;
5. order the justice of the peace to apologize to the complainant or to any other person;
6. order that the justice of the peace take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a justice of the peace;
7. suspend the justice of the peace with pay, for any period;
8. suspend the justice of the peace without pay, but with benefits, for a period of up to 30 days; or
9. recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2.
10. The Panel may adopt any combination of the foregoing sanctions with the exception of, (g), the recommendation of removal from office to the Attorney General, which cannot be combined with any other sanction.[[6]](#footnote-6)
11. Removal is the most serious disposition and must only be imposed in circumstances where the judicial officer’s ability to discharge the duties of office is irreparably compromised such that he or she is incapable of holding judicial office. It cannot be forgotten that the Supreme Court of Canada in *Valente* insisted the security of tenure for judges is “the first of the essential conditions of judicial independence”.[[7]](#footnote-7) Removal because of judicial misconduct or incapacity is the one necessary qualification on security of tenure. It follows that removal from the bench must be reserved for those cases in which public confidence in the system requires it.[[8]](#footnote-8)
12. Consistent with the remedial purpose of these proceedings, the Panel should consider each available disposition in ascending order of seriousness, beginning with a warning. If the least serious disposition is not sufficient to restore public confidence, the Panel should move on to consider the next most serious disposition. Ultimately, the Panel should impose the disposition (or combination of dispositions) that is necessary to restore public confidence without going any further than is necessary to accomplish that objective.[[9]](#footnote-9) In other words, the disposition chosen should be *proportionate* to the misconduct and the damage to the administration of justice caused by it.[[10]](#footnote-10)
13. In determining the appropriate disposition, the Panel should consider both aggravating and mitigating factors.[[11]](#footnote-11) Such factors can relate to the personal characteristics of the justice of the peace and the nature and impact of the misconduct. In particular, the Panel should consider the following factors, which can either be aggravating or mitigating depending on the evidence and the Panel’s findings:[[12]](#footnote-12)
14. Whether the misconduct was an isolated incident or evidenced a pattern of misconduct;
15. The nature, extent and frequency of occurrence of the act(s) of misconduct;
16. Whether the misconduct occurred in or out of the courtroom;
17. Whether the misconduct occurred in the justice of the peace’s official capacity or in her private life;
18. Whether the justice of the peace’s has acknowledged or recognized that the acts occurred;
19. Whether the justice of the peace has evidenced an effort to change or modify her conduct;
20. The length of service on the bench;
21. Whether there have been prior findings of misconduct against this justice of the peace;
22. The effect the misconduct has on the integrity of and respect for the judiciary;
23. The extent to which the justice of the peace exploited her position to satisfy her personal desires.
24. These factors are not in any hierarchical order, and weighing them is not a mathematical exercise.[[13]](#footnote-13)

**C. DISPOSITION CASE LAW**

***Prior JPRC Case Law re: Disposition***

1. Factually, there is no prior judicial discipline case that is particularly similar to this one. Accordingly, no clear penalty “range” based on factual similarities can be identified. Prior decisions are informative chiefly for the underlying principles they elaborate. Presenting Counsel submits that the following JPRC cases, which involve diverse forms of misconduct, may provide useful guidance to the Panel in determining the appropriate disposition in Her Worship’s case.
2. In ***Romagnoli***, the justice of the peace was found to have committed misconduct by failing to know, maintain competence in, and apply the law.[[14]](#footnote-14) On numerous occasions, Her Worship failed to accept joint submissions on penalty in provincial offences cases where the law clearly obliged her to do so. Even when corrected on appeal, she continued to adhere to her mistaken view of the law in other cases and did not understand how the doctrine of precedent operated to constrain her decision-making. On a separate issue, Her Worship repeatedly failed to follow binding case law with respect to red light cameras. Finally, she repeatedly imposed a sentence unknown to law – a “negative” fine – in order to offset court costs.
3. The Hearing Panel accepted the justice’s admission that misconduct was established. In the lead-up to the hearing, Her Worship discussed the existing jurisprudence with her counsel, Mark Sandler, and also undertook legal training with the Honourable Stephen Goudge, formerly of the Court of Appeal for Ontario. On disposition, both counsel took the view that the Panel should impose a reprimand, together with a remedial requirement under s.11.1(10)(d) – namely, mentoring with an appropriately qualified person. The Panel accepted this proposal and specified that the mentoring “should consist of at least two sessions, and should address the topics of joint submissions, binding and non-binding precedents, procedural fairness, and avoiding the perception of unfairness or differential treatment.”[[15]](#footnote-15) While the repetitive nature of the misconduct was an aggravating factor, the Panel also noted a number of mitigating factors, including the justice’s long and distinguished service on the bench, which included a number of important leadership roles. She had no discipline history and had also acknowledged her misconduct, and had taken concrete steps toward remediation.
4. In ***Foulds (2013)***, the justice of the peace was present during the course of a public health inspection of a friend’s restaurant.[[16]](#footnote-16) The Panel found that he acted inappropriately when he attempted to influence the course of the investigation, invoking his status as a justice of the peace. It concluded that a seven-day suspension without pay was capable of restoring public confidence in both the justice of the peace and the bench as a whole.[[17]](#footnote-17)
5. In ***Foulds (2018)***, the same justice of the peace had improperly involved himself in a criminal prosecution where the complainant was his close friend and later his romantic partner.[[18]](#footnote-18) This improper involvement included signing a criminal information and a subpoena. He was also found to have intentionally misrepresented the nature of his relationship with the complainant to the Crown Attorney’s office. Unsurprisingly, the prior finding of misconduct was a major aggravating factor on disposition. After reviewing the prior disposition, the Panel noted that “less than a year later, His Worship again allowed concern for a friend to compromise his judgment resulting in a course of conduct that served to undermine public confidence in His Worship personally and in the judiciary and administration of justice generally.”[[19]](#footnote-19) The Panel was critical of Justice of the Peace Foulds for not truly acknowledging his wrongdoing.[[20]](#footnote-20) Due to the seriousness of the conduct and the justice’s lack of insight, the Panel determined that removal was the only appropriate disposition.[[21]](#footnote-21)
6. In ***Bisson***, the justice of the peace admitted that he had committed judicial misconduct in a number of respects, all closely linked to his judicial duties.[[22]](#footnote-22) He had failed to provide basic assistance to self-represented litigants; made sarcastic and disparaging remarks about litigants; and failed to conduct plea comprehension inquiries, among other things. Significantly, Justice of the Peace Bisson was the subject of four prior complaints, all of which had been resolved without a hearing but all of which related to similar conduct. The Panel found that the continuation of this pattern of conduct indicated a lack of any insight or understanding. His Worship had shown himself to be “unwilling or unable to change his ways.”[[23]](#footnote-23) The Panel therefore made a recommendation for removal.[[24]](#footnote-24)
7. In ***Johnston***, the justice of the peace failed to provide assistance to a self-represented defendant and, on another occasion, dismissed an entire docket for want of prosecution.[[25]](#footnote-25) At the hearing, His Worship admitted his misconduct, apologized, and underwent counselling. However, the Panel was critical of him for not having exhibited remorse earlier. The Panel imposed a seven-day suspension without pay and ordered His Worship to write a letter of apology.[[26]](#footnote-26)
8. In ***Welsh* *(2018)***, the justice of the peace was presiding in a busy remand court when counsel appeared with his client and adjourned his matter to a day that was later determined to be a Saturday.[[27]](#footnote-27) This was only noticed after the accused and counsel had left. His Worship directed the court clerk to unilaterally change the information to reflect what he believed to be the intended return date. Nobody notified the accused or his counsel about the new return date, although His Worship testified that he had intended to do so. The accused failed to appear on the return date and was later arrested on a bench warrant and found at that time to be in possession of drugs. He was held in custody for 24 days before his counsel was able to demonstrate what led to his client’s arrest. The fail to appear charge was withdrawn and the accused pleaded guilty to a different offence, with consideration for time spent in custody as a result of His Worship’s actions. His Worship admitted that he had acted improperly but argued that his mistake did not constitute judicial misconduct. The Panel disagreed and made a finding against him. On disposition, the Panel noted that His Worship had a prior finding of misconduct in 2009 for improperly intervening with respect to a traffic ticket issued to a judge. The Panel had imposed an education requirement for that misconduct.[[28]](#footnote-28) In the 2018 proceeding, the Panel imposed a reprimand, a requirement to apologise in writing to the accused who had been affected, additional judicial education, and a suspension without pay for 10 days.[[29]](#footnote-29)
9. In ***Phillips***, the Hearing Panel found that the justice of the peace had committed judicial misconduct by actively misleading a police officer conducting a traffic investigation involving the justice of the peace’s daughter.[[30]](#footnote-30) During the interaction in question, Justice of the Peace Phillips was identified by the police officer as a justice of the peace. The officer testified that he took comfort in the fact that information was being provided by a justice official. He directly put questions to Justice of the Peace Phillips regarding the identity of the driver and Her Worship actively misled the police officer by providing false information. The Hearing Panel concluded that this misconduct, despite being a single episode in an otherwise distinguished career, was so corrosive to the ideal of judicial integrity that removal was the only appropriate disposition.[[31]](#footnote-31)
10. In***Barroillet***, the Panel recommended removal from office as a result of a finding that the justice of the peace had intervened in a court case to assist a family friend.[[32]](#footnote-32) The Panel found that the justice of the peace was prepared to assist a family friend in a court in another jurisdiction by using his influence as a justice of the peace. He improperly communicated with two judicial colleagues and asked one of them to waive the requirement for a properly sworn affidavit. He had also maintained inappropriate ties with his former paralegal firm. The Panel found that, notwithstanding the justice’s full apology, only removal could restore public confidence in the administration of justice.[[33]](#footnote-33)
11. In the ***Romain*** case as well, the pattern of misconduct was seen as too serious and pervasive to justify anything less than removal.[[34]](#footnote-34) There, in three separate incidents over the course of two years, the justice of the peace had seriously abused his powers and denied due process to individuals before the court – incidents which Justice Otter, sitting as a commissioner of inquiry, characterized as “irrational, arbitrary and vindictive abuses of judicial power.” In explaining why removal was necessary, Justice Otter noted:[[35]](#footnote-35)

…[D]espite the rehabilitative and educative steps that Justice of the Peace Romain has taken and the length of time he has had to reflect on his handling of these cases, there remains a troubling tendency on his part to minimize and attempt to rationalize or justify what he did.

1. In ***Kowarsky***, the complainant was a courtroom clerk who had a close working relationship with Justice of the Peace Kowarsky.[[36]](#footnote-36) On one occasion, when court was in session and they were working in their respective capacities, Justice of the Peace Kowarsky made a sexually inappropriate comment to the complainant which the Panel found to be an “an ill-conceived attempt at humour.”[[37]](#footnote-37) Justice of the Peace Kowarsky admitted that this constituted judicial misconduct. He made a full apology to the complainant. A psychological report submitted to the Hearing Panel indicated that His Worship had “reflected critically upon his behaviour and its impact upon the complainant.” It also demonstrated that His Worship was thoughtful and genuinely remorseful, and had adjusted his behaviour such that he was unlikely to make a similar mistake in the future.[[38]](#footnote-38) The Panel decided that a reprimand was sufficient to restore public confidence, explaining that in its view Justice of the Peace Kowarsky was “keenly aware of the meaning and import of this action.”[[39]](#footnote-39)
2. In ***Massiah (2012)***, a number of staff members at the court where the justice presided alleged that he had made sexually inappropriate comments, many of which involved comments on women’s physical appearance.[[40]](#footnote-40) After a contested hearing, the Hearing Panel upheld most of the allegations and made several findings of misconduct. While the Panel found that His Worship had been oblivious to the impropriety and negative impact of his conduct at the time, “[a]ny misunderstanding that he may have had about his position of authority vis-à-vis the court staff surely has been brought home to him through this public hearing.”[[41]](#footnote-41) Following the Panel’s decision on liability, His Worship drafted apology letters to the complainants and attended one-on-one remedial human rights and sensitivity training.[[42]](#footnote-42) The Panel was satisfied that he was capable of rehabilitation.[[43]](#footnote-43) It imposed a reprimand, a requirement that His Worship apologize to the complainants, a further counselling or training requirement, and a suspension of ten days without pay.[[44]](#footnote-44)
3. Unfortunately, the Panel’s optimism proved unfounded. Justice of the Peace Massiah faced a further hearing based on complaints from staff members at a different courthouse. Although the conduct at issue predated the first hearing, His Worship’s performance at the second hearing revealed that he had not gained any insight into the nature or impact of his behaviour. In the view of the Panel in ***Massiah (2015)***, His Worship had “demonstrated through his testimony before us a refusal or inability to accept that sexually inappropriate conduct by a justice of the peace towards women in the workplace is not acceptable.”[[45]](#footnote-45) A recommendation for removal was necessary to restore public confidence.[[46]](#footnote-46)
4. In ***Sinai***, the justice of the peace pressured an unrepresented defendant to plead guilty to traffic offences and failed to afford him an opportunity to make submissions on sentence.[[47]](#footnote-47) When His Worship learned about the investigation into that incident, he responded to an inquiry from the Regional Senior Justice of the Peace by telling her administrative assistant that he would be unable to render two reserved judgments unless the RSJO could make the investigation “go away”. Justice of the Peace Sinai did not testify in the hearing or offer any explanation for his conduct. Sitting as a commissioner of inquiry, Justice Carr found that only removal from office could restore public confidence.[[48]](#footnote-48)
5. In ***Quon***, the justice of the peace had misconducted himself in an exchange with a self-represented litigant in a parking violation matter.[[49]](#footnote-49) When the defendant expressed some dissatisfaction with the process, His Worship responded by increasing the amount of court costs payable by the defendant. Each time the defendant objected, His Worship increased the costs award by $10. At the hearing, His Worship admitted misconduct and expressed remorse. Sitting as a commissioner of inquiry, Justice De Filippis found that the justice’s behaviour was “petty and abusive.”[[50]](#footnote-50) Due to His Worship’s remorse and otherwise exemplary record, Justice De Filippis found that public confidence could be restored by a warning.[[51]](#footnote-51)

***Prior OCJ Case Law re Disposition***

1. The principles disclosed by the judicial misconduct cases involving judges are equally applicable to justices of the peace.[[52]](#footnote-52) As Justice Otter stated in the *Romain Inquiry Report*:[[53]](#footnote-53)

Given the critically important role of the justice of the peace at the gateway to our judicial system, I am of the view that there is no reason that a justice of the peace should not be held to the same high standard of conduct as all other judicial officers.

1. In ***Chisvin***, the judge was presiding in plea court when, after a recess, Crown counsel was a few minutes late returning to the courtroom.[[54]](#footnote-54) In a fit of pique, the judge dismissed all of the remaining provincial matters on the docket “for want of prosecution.” This unwarranted action took a tremendous amount of time and expense to undo. At the hearing, Justice Chisvin admitted that his action amounted to judicial misconduct and tendered significant mitigating evidence. The Panel concluded that the misconduct, while serious, was “an aberration by a hard-working, dedicated judge who has fully acknowledged his misconduct and who does not minimize its impact.”[[55]](#footnote-55) The Panel was satisfied that a formal reprimand was sufficient to restore public confidence.[[56]](#footnote-56)
2. In ***Keast***, the judge sent text messages to a friend of his who worked for the local Children’s Aid Society about a challenging situation to which he had a personal connection.[[57]](#footnote-57) In these text messages, he “’vented’, saying intemperate and inappropriate things about two individuals and the CAS, all of whom he thought were not doing their jobs.”[[58]](#footnote-58) The CAS ultimately obtained these messages and brought a complaint. As summarized by the Hearing Panel, Justice Keast improperly:[[59]](#footnote-59)

* communicated confidential information to a party;
* used his friendship with the recipient of the text messages to gain access to confidential information;
* expressed his views about the CAS matter of which he was seized;
* made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
* provided legal advice to his friend; and,
* sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

1. After the Panel denied Justice Keast’s motion to exclude the text messages from evidence, Justice Keast admitted that he had committed judicial misconduct. He contended that a warning of a reprimand was the appropriate disposition. Presenting Counsel submitted that a suspension without pay for 15 days was warranted. The Hearing Panel disagreed with both sides and ordered the maximum non-removal penalty: a suspension without pay for 30 days. Although it considered that removal was a real possibility, the Panel was ultimately swayed by Justice Keast’s otherwise exemplary career and its confidence that the conduct would never be repeated.[[60]](#footnote-60)
2. In ***Zabel***, on the morning after the 2016 U.S. presidential election, the judge went into court wearing a “Make America Great Again” baseball cap.[[61]](#footnote-61) When court commenced, there was some jocular discussion with counsel about the hat. The incident garnered media attention and dozens of complaints from the public. Six days later, after stories had appeared in the media, His Honour apologized in court “for my misguided attempt to mark a moment in history by humour in the courtroom, following the surprising result in the United States election.”[[62]](#footnote-62) At the OJC hearing, His Honour admitted judicial misconduct and explained that he had thought “it would add a bit of humour by starting off the day with the hat, which was very ill-fitting – it looks very silly on me.”[[63]](#footnote-63)
3. The Hearing Panel considered the misconduct to be serious, as it directly contravened “the fundamental principle that judges must not express political views and that the administration of justice must remain separate from and above the fray of political debate.”[[64]](#footnote-64) The fact that the conduct occurred while Justice Zabel was acting in his official capacity was an aggravating factor.[[65]](#footnote-65) The Panel had certain reservations about inadequacies in His Honour’s in-court apology, but found that by the time of the hearing he fully acknowledged and regretted his actions.[[66]](#footnote-66) His Honour tried to take a course in judicial ethics, but when he learned that the course was not being offered within the time period required, he arranged for one-on-one training with a Regional Senior Justice of the Superior Court of Justice.[[67]](#footnote-67) Significantly, Justice Zabel had a 27-year track record of exemplary service on the court and tendered substantial evidence of the esteem in which he was regarded by bench and bar alike.[[68]](#footnote-68) The Panel was faced with a “stark contrast between the perception created by the November 9 incident and the reality of an experienced and fair minded judge.”[[69]](#footnote-69)
4. In the Panel’s view, given the gravity of the conduct, the choice was between a recommendation for removal and the second most serious option: suspension without pay for 30 days. It chose the latter option, chiefly because of Justice Zabel’s “long record of impeccable service as a fair and impartial judge.”[[70]](#footnote-70)

***Principles that can be gleaned from the case law***

1. In Presenting Counsel’s submission, the following general principles emerge from the cases just discussed.
2. Conduct that compromises the judicial officer’s core personal and professional integrity can rarely be remedied by anything other than removal. In such cases, not even acceptance of responsibility (e.g. *Barroillet*) or an otherwise exemplary record (e.g. *Phillips*) can offset the damage to public confidence caused by the justice’s unscrupulous conduct. In *Barroillet*, it was the justice’s willingness to use his influence for improper purposes (to help a personal friend) that the Panel found to be most egregious and incapable of repair.[[71]](#footnote-71) In *Phillips*, it was the justice’s dishonesty in lying to the police (and then lying to the Panel about it) that irreparably compromised her ability to serve in a judicial function. As the Panel stated in *Phillips*, “[a] single act of misconduct may wipe out years of meritorious service.”[[72]](#footnote-72) Presenting Counsel does not suggest that Her Worship’s misconduct in the present case involved any irremediable compromise of personal integrity.
3. Conversely, misconduct that involves errors in judgment without an element of dishonesty or unscrupulousness are more likely to receive dispositions geared toward rehabilitation. This was the case in *Chisvin* and *Johnston*, both of which involved rash and harmful conduct in court. The same can be said of *Zabel*. Likewise in *Welsh (2018)*, where the justice’s misconduct in changing the return date on an information led to a person’s arrest, the disposition was largely rehabilitative. The same was true in *Romagnoli*, where the incompetent decision-making was more repetitive, albeit in a context with smaller stakes. In such cases, a reprimand will inevitably be given, and a requirement to apologize will often be imposed if that has not already been done. Counselling or training may be included in the disposition depending on whether the judge or justice has already participated in it to the panel’s satisfaction. Finally, the panel may or may not decide that a suspension is necessary to communicate the public’s disapprobation of the conduct.
4. The judicial officer’s capacity for remediation is a powerful factor in determining what disposition is necessary to restore public confidence. Beyond an expressed willingness to remediate, evidence of concrete steps already taken toward that objective can significantly mitigate the harshness of the penalty required. In *Chisvin*, the judge apologized for his misconduct, sought professional assistance for the personal stress that helped precipitate the misconduct, and proposed an educational program on the subject of stress for other judges.[[73]](#footnote-73) In *Kowarsky*, the justice presented evidence that he had critically reflected on his misconduct to ensure against its repetition.[[74]](#footnote-74) In *Romagnoli*, the justice had undertaken training with a retired judge.[[75]](#footnote-75)By contrast, in *Bisson*, as a result of his repeated conduct, the justice was found to be “unwilling or unable to change his ways,” and removal was recommended.[[76]](#footnote-76) A similar finding was made in *Massiah (2015)*.[[77]](#footnote-77)
5. Relatedly, the judicial officer’s acceptance of responsibility is an important determinant of whether remediation is likely to be effective. This does not mean that the judicial officer needs to have pleaded guilty or is penalized for contesting the allegations. Even after contested hearings, panels in cases like *Massiah (2012), Welsh (2018)*, and *Keast* have found that the judge or justice in question has exhibited insight and demonstrated a sense of responsibility.
6. Finally, evidence of the judicial officer’s reputation, personal qualities, and judicial track record can make an important difference, especially when the choice is between two options that both appear warranted by the seriousness of the misconduct. In both *Keast* and *Zabel*, the judges’ sterling reputations and unblemished judicial careers tipped the balance in favour of a lesser disposition where removal might otherwise have been called for. Conversely, in *Bisson*, the justice’s track record of previous similar complaints was seen to require removal even if none of them standing alone could be seen as sufficiently serious to warrant the ultimate disposition.
7. Presenting Counsel submits that in terms of the conduct at issue, the case at bar shares the most features with *Romagnoli*, *Chisvin*, and *Johnston*. As in those cases, the misconduct took place in court, in the course of carrying out the official duties of a judicial officer. As in *Chisvin* and *Johnston*, Her Worship acted rashly, in a manner that disrespected the rights and interests of the litigants. As in *Romagnoli*, Her Worship appears to have been seriously misinformed about the governing law. In her testimony at the hearing, Her Worship did not resile from the view that her own misinterpretation of the Bail Protocol was somehow capable of superseding an accused person’s *Charter*-protected right to bail. While this mistake was not made repeatedly as in *Romagnoli*, the Panel may also consider that the stakes involved were immeasurably higher. While Justice of the Peace Romagnoli’s mistaken view of the law gave some undeserving defendants a monetary windfall, Her Worship’s misconduct resulted in an accused’s unwarranted loss of liberty for a night. Also distinguishing this case from *Romagnoli* is the fact that Her Worship continued to insist on her mistaken view of the law at the hearing, despite having had more than a year to study and reflect. The Panel may conclude that in light of these aggravating factors, a more substantial disposition is warranted.

**D. APPLICATION TO THE PRESENT CASE**

***Key Findings of the Panel***

1. The starting point in considering the appropriate disposition(s) is the nature of the conduct as found by this Hearing Panel. The Panel’s core conclusion was that “in disregarding the constitutional, procedural and fundamental rights of the accused on June 27, 2018, Her Worship failed to uphold and maintain judicial integrity, and undermined public confidence in the integrity of her judicial office and in the administration of justice.”[[78]](#footnote-78)
2. Additionally, Presenting Counsel submits that the following findings in the Panel’s Reasons for Decision are significant for purposes of disposition:

* Her Worship “acted in an impetuous fashion without due regard to the rights of the accused.”[[79]](#footnote-79)
* Some of her comments in the course of the June 27 hearing were flippant.[[80]](#footnote-80)
* At the hearing, Her Worship “appeared to shift the blame to many other actors in the system,” including Crown counsel, duty counsel, and the special constable.[[81]](#footnote-81)
* Her Worship maintained at the hearing that there was nothing she could or should have done because she had no information before her.[[82]](#footnote-82)
* Her Worship’s preferred interpretation of the Cornwall bail protocol “can only lead to the conclusion that the protocol was put in place to curtail the right to bail and not to enhance it, which would be nonsensical.”[[83]](#footnote-83)

1. With respect to the factors itemized by the Panel in *Re Chisvin*, mentioned above at para. 9, Presenting Counsel submits that the Panel may wish to consider the following:
2. **Whether the misconduct was an isolated incident or evidenced a pattern of misconduct**;

The Panel has already found that Her Worship did not engage in a pattern of misconduct. This is a mitigating factor. However, while the May 23 incident did not rise to the level of judicial misconduct, the Panel did find that Her Worship acted inappropriately in leaving court early on that occasion. This suggests that the June 27 misconduct was not an entirely isolated incident. To that extent, this factor is mitigating, but in a qualified sense.

1. **The nature, extent and frequency of occurrence of the acts of misconduct**;

As already indicated, this was a single act of misconduct, which is a mitigating factor.

1. **Whether the misconduct occurred in or out of the courtroom**;

The misconduct here occurred in the courtroom, which is an aggravating factor.[[84]](#footnote-84) In Presenting Counsel’s submission, the fact that it occurred in bail court where the subject’s fundamental right to liberty is at stake, rendered the conduct especially serious. Although judicial officers are required to exhibit exemplary fairness in all of their judicial functions, it is appropriate to recognize that this quality is at a premium where the stakes are highest.

1. **Whether the misconduct occurred in the justice’s official capacity or in her private life**;

The misconduct was committed by Her Worship in her professional capacity, exercising a core judicial function. This is an aggravating factor.[[85]](#footnote-85)

1. **Whether the justice has acknowledged or recognized that the acts occurred**;

There was never any dispute that the acts occurred, given that they took place on the record. The only real question was whether the acts constituted judicial misconduct.

Initially, in her written response to the complaint, Her Worship was eloquent in expressing remorse and accepting responsibility. As recognized by the Panel in its decision, Her Worship “took a much different position” at the hearing, now claiming that she wrote the response under “emotional duress.”[[86]](#footnote-86) Instead of accepting responsibility as the ultimate decision-maker in court that day, she attempted to shift blame to others, impugning their credibility in the process.

Presenting Counsel submits that this testimony was troubling and appears to evince a lack of insight on Her Worship’s part. This is an aggravating factor.

1. **Whether the justice has evidenced an effort to change or modify her conduct**;

As just described, Her Worship seems to lack insight into the impropriety of her conduct. As such, at this point – and subject to anything Her Worship’s counsel may submit at the upcoming hearing – it does not appear that she has made any progress toward remediation. This is an aggravating factor.

1. **The length of service on the bench**;

Her Worship was appointed to the bench on May 25, 2011. On September 18, 2018, a decision was made to non-assign Her Worship pending the final disposition of this complaint. This duration of service does not appear to be either aggravating or mitigating.

1. **Whether there have been prior complaints about this justice**;

There have been no prior complaints about Her Worship. This is a mitigating factor.

1. **The effect the misconduct has on the integrity of and respect for the judiciary**;

Presenting Counsel submits that Her Worship’s conduct had the effect of significantly undermining the public’s respect for the judiciary. Although this is not susceptible to empirical measurement, it follows from the fundamental principles elaborated in cases like *Hall* and *Antic* that an unwarranted deprivation of liberty brought about by judicial misconduct cannot have anything but a corrosive impact on the public trust. This is an aggravating factor.

1. **The extent to which the justice exploited her position to satisfy her personal desires**.

Her Worship did not exploit her position to satisfy her personal desires. That said, the Panel could take the view that Her Worship acted in a manner that prioritized her personal convenience over the interests of other people in the system. This factor therefore appears to be largely neutral.

1. Presenting Counsel submits that in light of the above, a disposition with a significant remedial component is required. The disposition should also encompass a punitive dimension, given the serious impact of the misconduct and Her Worship’s continuing refusal to acknowledge it. The Panel may wish to adopt a combination of the dispositions set out in s. 11.1(10) in order to accomplish these objectives and properly reflect the aggravating and mitigating factors at play.
2. Her Worship’s misconduct appears to have resulted from a serious misunderstanding of her judicial role – a role that requires her to be an even-handed guardian of liberty and due process, not a draconian enforcer of protocols and policies. It is concerning that with the benefit of over a year’s worth of reflection, Her Worship’s hearing testimony continued to betray a lack of comprehension of what she did wrong. Near the conclusion of her cross-examination at the hearing, for example, the following exchange occurred:

Q. Okay. But you made...you recognize now applying a protocol over the *Charter* right to bail is a serious mistake?

A. I am not sure that I would say a serious mistake. I was trying to work within what I had in front of me and I understood was in front, which was the protocol. So, I didn't...I didn't do...I didn't make the decision I made because I was trying to avoid anything. I made the decision based on the protocol. I see that I could have made the other decision of taking a recess, and then, yes, that would have been the much better choice.

But was I totally wrong to follow the protocol under the circumstances of the protocol at that time on the 27th? I don't think I was completely wrong. But there was a better choice and I did not choose it. And I have been really hard on myself ever since. And it is not negating everything you're saying. It's just that I was focused on that protocol, and I should not have been, but I was.[[87]](#footnote-87)

1. As can be seen in this passage and at several other points in the transcript, Her Worship’s admission to having made a poor choice is mingled with a continuing effort to justify her decision as having been to “follow the protocol.” But, as the Panel observed in its decision, her interpretation of the protocol would lead to “nonsensical” consequences – such as shutting down bail court early in the afternoon with a prisoner waiting in the cells. Her Worship needs to understand that this was not an “application” of the protocol but a flagrant misconstrual of it. The public, in turn, needs to have confidence that Her Worship has learned her lesson such that misconduct of this kind will never be repeated.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 4th of March, 2020.

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Matthew R. Gourlay

Alexa Ferguson

Presenting Counsel

**AUTHORITIES REFERRED TO**

**Legislation**

*Justices of the Peace Act*, R.S.O. 1990, c. J.4

*Justices of the Peace Review Council Procedures Document* (Revised January 10, 2020)

**Case Law**

Hon. David George Carr, *Report of the Judicial Inquiry re: His Worship Benjamin Sinai* (March 7, 2008)

Hon. Joseph De Filippis, *Report of the Judicial Inquiry Re: His Worship Richard Quon* (August 9, 2006)

Hon. Russell J. Otter, *Report of the Judicial Inquiry Re: His Worship Rick C. Romain* (July 17, 2003)

*Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191

*Re Baldwin*, (OJC, May 10, 2002)

*Re Barroillet* (JPRC, October 15, 2009)

*Re Bisson* (JPRC, July 10, 2018)

*Re Chisvin*, (OJC, November 26, 2012)

*Re Douglas,* (OJC, March 6, 2006)

*Re Foulds* (JPRC, July 24, 2013)

*Re Foulds* (JPRC, April 27, 2018)

*Re Keast* (OJC, December 15, 2017)

*Re Kowarsky* (JPRC, May 30, 2011)

*Re Johnston* (JPRC, August 19, 2014)

*Re Massiah* (JPRC, April 12, 2012)

*Re Massiah* (JPRC, April 28, 2015)

*Re Phillips* (JPRC, October 24, 2013)

*Re Romagnoli* (JPRC, August 29, 2018)

*Re Therrien*, [2001] 2 S.C.R. 3

*Re Welsh* (JPRC, December 8, 2009)

*Re Welsh* (JPRC February 15, 2018)

*Re Zabel* (OJC, September 11, 2017)

*Ruffo (Re),* [2005] Q.J. No. 17953 (C.A.)

*Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267

*Valente v. The Queen*, [1985] 2 S.C.R. 673

1. The Hearing Panel dismissed the allegation of misconduct with respect to the May 23, 2018 incident, so there is now only one instance to consider with respect to paragraph 2(C). [↑](#footnote-ref-1)
2. *Re Therrien*, [2001] 2 S.C.R. 3, at para. 147 [↑](#footnote-ref-2)
3. *Therrien*, supra note 2 at para. 147 [↑](#footnote-ref-3)
4. *Re Therrien*, supra note 2 at para. 147; *Ruffo (Re),* [2005] Q.J. No. 17953 (C.A.), at para. 18; *Re Douglas,* (OJC, March 6, 2006),at paras. 7-9 [↑](#footnote-ref-4)
5. *Re Baldwin*, (OJC, May 10, 2002), at p. 8; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 68 [↑](#footnote-ref-5)
6. *Justices of the Peace Act*, s. 11.1(11) [↑](#footnote-ref-6)
7. *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 694 [↑](#footnote-ref-7)
8. *Re Keast* (OJC, December 15, 2017), at para. 49; *Re Therrien*, supra note 2 at para. 147 [↑](#footnote-ref-8)
9. *Re Baldwin* supra note 5 at p. 6; *Re Zabel* (OJC, September 11, 2017), at para. 44. This principle is now reflected in JPRC Procedural Rule 17.2. [↑](#footnote-ref-9)
10. *Re Zabel*, supra note 9 at para. 44 [↑](#footnote-ref-10)
11. *Re Zabel*, supra note 9 at para. 45 [↑](#footnote-ref-11)
12. These factors were identified in *Re Chisvin*, (OJC, November 26, 2012) at para. 38. They are now codified in JPRC Procedural Rule 17.3. [↑](#footnote-ref-12)
13. *Re Phillips* (JPRC, October 24, 2013), at para. 18 [↑](#footnote-ref-13)
14. *Re Romagnoli* (JPRC, August 29, 2018) [↑](#footnote-ref-14)
15. *Re Romagnoli*, supra note 14 at para. 75 [↑](#footnote-ref-15)
16. *Re Foulds* (JPRC, July 24, 2013) [↑](#footnote-ref-16)
17. *Re Foulds* (2013) at para. 45 [↑](#footnote-ref-17)
18. *Re Foulds* (JPRC, April 27, 2018) [↑](#footnote-ref-18)
19. *Re Foulds* (2018), supra note 18 at para. 44 [↑](#footnote-ref-19)
20. *Re Foulds* (2018), supra note 18 at para. 48 [↑](#footnote-ref-20)
21. *Re Foulds* (2018), supra note 18 at paras. 80-83 [↑](#footnote-ref-21)
22. *Re Bisson* (JPRC, July 10, 2018) [↑](#footnote-ref-22)
23. *Re Bisson*, supra note 22 at para. 50 [↑](#footnote-ref-23)
24. *Re Bisson*, supra note 22 at para. 53 [↑](#footnote-ref-24)
25. *Re Johnston* (JPRC, August 19, 2014) [↑](#footnote-ref-25)
26. *Re Johnston*, supra note 25 at pp. 5-6 [↑](#footnote-ref-26)
27. *Re Welsh* (JPRC February 15, 2018) [↑](#footnote-ref-27)
28. *Re Welsh* (JPRC, December 8, 2009), at para. 88 [↑](#footnote-ref-28)
29. *Re Welsh* (2018), supra note 27 at para. 75 [↑](#footnote-ref-29)
30. *Re Phillips*, supra note 13 [↑](#footnote-ref-30)
31. *Re Phillips*, supra note 13 at para. 32 [↑](#footnote-ref-31)
32. *Re Barroillet* (JPRC, October 15, 2009) [↑](#footnote-ref-32)
33. *Re Barroillet*, supra note 32 at para. 28 [↑](#footnote-ref-33)
34. Hon. Russell J. Otter, *Report of the Judicial Inquiry Re: His Worship Rick C. Romain* (July 17, 2003) [↑](#footnote-ref-34)
35. *Report of the Judicial Inquiry Re: His Worship Rick C. Romain*, supra note 34 at p. 19 [↑](#footnote-ref-35)
36. *Re Kowarsky* (JPRC, May 30, 2011) [↑](#footnote-ref-36)
37. *Re Kowarsky*, supra note 36 at para. 11 [↑](#footnote-ref-37)
38. *Re Kowarsky*, supra note 36 at paras. 29-30 [↑](#footnote-ref-38)
39. *Re Kowarsky*, supra note 36 at paras. 40-43 [↑](#footnote-ref-39)
40. *Re Massiah* (JPRC, April 12, 2012) [↑](#footnote-ref-40)
41. *Re Massiah* (2012), supra note 40 at para. 25 [↑](#footnote-ref-41)
42. *Re Massiah* (2012), supra note 40 at para. 30 [↑](#footnote-ref-42)
43. *Re Massiah* (2012), supra note 40 at para. 33 [↑](#footnote-ref-43)
44. *Re Massiah* (2012), supra note 40 at para. 46 [↑](#footnote-ref-44)
45. *Re Massiah* (JPRC, April 28, 2015), at para. 65 [↑](#footnote-ref-45)
46. *Re Massiah* (2015), supra note 45 at para. 66. This disposition was upheld on judicial review: *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191. [↑](#footnote-ref-46)
47. Hon. David George Carr, *Report of the Judicial Inquiry re: His Worship Benjamin Sinai* (March 7, 2008) [↑](#footnote-ref-47)
48. *Report of the Judicial Inquiry re: His Worship Benjamin Sinai*, supra note 47 at p. 17 [↑](#footnote-ref-48)
49. Hon. Joseph De Filippis, *Report of the Judicial Inquiry Re: His Worship Richard Quon* (August 9, 2006) [↑](#footnote-ref-49)
50. *Report of the Judicial Inquiry Re: His Worship Richard Quon*, supra note 49 at p. 15 [↑](#footnote-ref-50)
51. *Report of the Judicial Inquiry Re: His Worship Richard Quon*, supra note 49 at p. 17 [↑](#footnote-ref-51)
52. OJC decisions are, in particular, more helpful than CJC decisions when it comes to disposition. This is because the range of dispositions is essentially identical to those available for justices of the peace. By contrast, the federal *Judges Act* provides only for a recommendation for removal. [↑](#footnote-ref-52)
53. *Report of the Judicial Inquiry Re: His Worship Rick C. Romain*, supra note 34 at p. 21 [↑](#footnote-ref-53)
54. *Re Chisvin*, supra note 12 [↑](#footnote-ref-54)
55. *Re Chisvin*, supra note 12 at para. 49 [↑](#footnote-ref-55)
56. *Re Chisvin*, supra note 12 at para. 51 [↑](#footnote-ref-56)
57. *Re Keast*, supra note 8 [↑](#footnote-ref-57)
58. *Re Keast*, supra note 8 at para. 25 [↑](#footnote-ref-58)
59. *Re Keast*, supra note 8 at para. 28 [↑](#footnote-ref-59)
60. *Re Keast*, supra note 8 at para. 53 [↑](#footnote-ref-60)
61. *Re Zabel*, supra note 9 [↑](#footnote-ref-61)
62. *Re Zabel*, supra note 9 at para. 18 [↑](#footnote-ref-62)
63. *Re Zabel,* supra note 9 at para. 9 [↑](#footnote-ref-63)
64. *Re Zabel,* supra note 9 at para. 46 [↑](#footnote-ref-64)
65. *Re Zabel,* supra note 9 at para. 46 [↑](#footnote-ref-65)
66. *Re Zabel,* supra note 9 at paras. 49-51 [↑](#footnote-ref-66)
67. *Re Zabel,* supra note 9 at para. 52 [↑](#footnote-ref-67)
68. *Re Zabel,* supra note 9 at paras. 53-56 [↑](#footnote-ref-68)
69. *Re Zabel,* supra note 9 at para. 58 [↑](#footnote-ref-69)
70. *Re Zabel*, supra note 9 at para. 67 [↑](#footnote-ref-70)
71. *Re Barroillet*, supra note 32 at paras. 27-28 [↑](#footnote-ref-71)
72. *Re Phillips*, supra note 13, at para. 18 [↑](#footnote-ref-72)
73. *Re Chisvin*, supra note 12 at paras. 46-52 [↑](#footnote-ref-73)
74. *Re Kowarsky*, supra note 36 at para. 29 [↑](#footnote-ref-74)
75. *Re Romagnoli*, supra note 14 at para. 27 [↑](#footnote-ref-75)
76. *Re Bisson*, supra note 22 at para. 50 [↑](#footnote-ref-76)
77. *Re Massiah* (2015), supra note 45 at para. 65 [↑](#footnote-ref-77)
78. Reasons for Decision, para. 62 [↑](#footnote-ref-78)
79. Reasons for Decision, para. 56 [↑](#footnote-ref-79)
80. Reasons for Decision, para. 56 [↑](#footnote-ref-80)
81. Reasons for Decision, para. 53 [↑](#footnote-ref-81)
82. Reasons for Decision, para. 59 [↑](#footnote-ref-82)
83. Reasons for Decision, para. 46 [↑](#footnote-ref-83)
84. *Re Chisvin*, supra note 12 at para. 39 [↑](#footnote-ref-84)
85. *Re Chisvin*, supra note 12 at para. 39 [↑](#footnote-ref-85)
86. Reasons for Decision, para. 52 [↑](#footnote-ref-86)
87. Cross-Examination of Her Worship Claire Winchester, December 2, 2019, p. 252 [↑](#footnote-ref-87)