Justices of the Peace Review Council

IN THE MATTER OF A HEARING ORDERED UNDER SECTION 11(15) OF THE *JUSTICES OF THE PEACE ACT*, R.S.O. 1990, c. J.4, as amended,

Respecting the conduct of
Justice of the Peace Jorge Barroilhet,
Justice of the Peace in the Toronto Region

Before: The Honourable Justice Deborah K. Livingstone
Her Worship Senior Justice of the Peace Cornelia Mews
Ms. S. Margot Blight – Borden Ladner Gervais LLP

Hearing Panel of the Justices of the Peace Review Council

Decision on Disposition

Counsel:

Mr. Douglas C. Hunt, Q. C. Mr. Andrew Burns Ms. Grace David	Mr. Brian H. Greenspan
Hunt Partners LLP	Greenspan, Humphrey, Lavine
Presenting Counsel	Counsel to His Worship Jorge Barroilhet

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DECISION ON DISPOSITION

1. The Hearing Panel, pursuant to section 11.1(10) of the *Justices of the Peace Act*, R.S.O., c. J.4, as amended *(*hereinafter *"the Act")*, having made findings in respect of the Particulars in the Notice of Hearing proved and more specifically, those Particulars that were found to constitute judicial misconduct that went beyond the Admissions of His Worship Barroilhet, must consider the appropriate disposition to restore the public's confidence in the judiciary and the administration of justice.

2. Section 11.1(10) of the *Act*, provides that:

> After completing the hearing, […], if it upholds the complaint, it [the panel] may,
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> (a) warn the justice of the peace;
> (b) reprimand the justice of the peace;
> (c) order the justice of the peace to apologize to the complainant or to any other person;
> (d) 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;
> (e) suspend the justice of the peace with pay, for any period;
> (f) suspend the justice of the peace without pay, but with benefits, for a period up to 30 days; or
> (g) recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2.

3. Section 11.1(11) of the *Act* provides that the "panel may adopt any combination of the dispositions set out in [section 11.1] clauses (10) (a) to (f)".

4. Section 11.2(2) of the *Act* provides that a justice of the peace may be removed from office only if a complaint about the justice of the peace has been made to the Review Council and a Hearing Panel, after a hearing under section 11.1, recommends to the Attorney General that the justice of the peace be removed on the ground that "he or

she has become incapacitated or disabled from the due execution of his or her office by reason of", *inter alia*, "conduct that is incompatible with the due execution of his or her office" or the "failure to perform the duties of his or her office."

5. Section 11.1(10) of the *Act* provides that the range of dispositions therein listed may be made should the Hearing Panel "uphold the complaint". While section 11.1(10) of the *Act* does not expressly refer to "misconduct" by the justice of the peace, section 11.1(10) is substantially similar to section 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990 c.C43, the applicable legislation in respect of complaints proceedings involving judges of the Ontario Court of Justice. Section 51.6(11) provides that: "After completing the hearing, the Judicial Council may […] if it finds there has been misconduct by the judge …" impose a range of dispositions that are identical to those of section 11.1(1) of the *Act*. Pursuant to section 51.8 of the *Courts of Justice Act*, the test for the most serious disposition removal from office, is identical to that under section 11.2(2) of the *Act*, that is removal on the ground that a judge has "become incapacitated or disabled from the due execution of his or her office by reason of", *inter alia*, "conduct that is incompatible with the due execution of his or her office" or the "failure to perform the duties of his or her office."

6. Accordingly, given the similarity of the statutory provisions under the *Act* and the *Courts of Justice Act*, Presenting Counsel has submitted and we agree that that the intent of the legislative scheme is that complaints in respect of justices of the peace are to be considered in light of whether there has been judicial misconduct, and where judicial misconduct is found to be established, the application of the range of dispositions under section 11.2(10) should be considered in the same terms as those applicable to judges of the Ontario Court of Justice.

7. Presenting Counsel and Counsel for His Worship agree on the law which we must apply at this disposition hearing. They have both conceded that public confidence in the justice system is at the very heart of the inquiry into alleged judicial misconduct.

8. Presenting Counsel has submitted and we agree that his role is to impartially assist the Hearing Panel in its consideration of the appropriate disposition pursuant to section 11.1(10) of the *Act* such that the public's confidence and view of the administration of justice and the judiciary are fostered and maintained.

9. The Supreme Court of Canada in *Ruffo v. Conseil de la magistrature,* [1995] 4 S.C.R. 267 (S.C.C.) at para. 68 described the role of a body comparable to the Justices of the Peace Review Council under the *Quebec Courts of Justice Act* in the following passage from the judgment of Gonthier J.:

> [68] The Comité's role in light of these statutory provisions was accurately described by Parent J., at p. 2214:
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> > [Translation] . . . the Comité is a body established for a purpose relating to the welfare of the public, namely to ensure compliance with the code of ethics that sets out the rules of conduct for and duties of judges toward the public, the parties to a case and counsel. The Comité's role is to inquire into a complaint alleging that a judge has failed to comply with the code, determine whether the complaint is justified and, if so, recommend the appropriate sanction to the Conseil.
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> The Comité's mandate is thus to ensure compliance with judicial ethics in order to preserve the integrity of the judiciary. Its role is remedial and relates to the judiciary rather than the judge affected by a sanction. In this light, as far as the recommendations the Comité may make with respect to sanctions are concerned, the fact that there is only a power to reprimand and the lack of any definitive power of removal become entirely comprehensible and clearly reflects the objectives underlying the Comité's establishment: not to punish a part that stands out by conduct that is deemed unacceptable but rather to preserve the integrity of the whole.
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> *Ruffo v. Conseil de la magistrature,* [1995] 4 S.C.R. 267 (S.C.C.) at para. 68

10. Accordingly, taking guidance from the principles in the Supreme Court of Canada case of *Ruffo*, supra, in assessing the conduct of justices of the peace, the Hearing Panel's role is remedial and relates to the judiciary rather than the specific justice of the peace affected by a sanction. As such, the role of the Hearing Panel in addressing judicial misconduct is not to punish a part, i.e. the individual justice of the peace who

stands out by conduct that is deemed unacceptable but, rather to preserve the integrity of the whole, i.e. the entire judiciary itself.

11. In *Re Douglas* (2006) O.J.C., a recent decision of a Hearing Panel of the Ontario Judicial Council, the provisions under section 51.6(11) of the *Courts of Justice Act* were observed to empower the Ontario Judicial Council with the ability to impose a broad range of sanctions if it finds that a judge has "engaged in misconduct relative to the degree of the misconduct."

> *Re Douglas* (2006) O.J.C. at para. 4

12. In *Re Douglas*, the Hearing Panel accepted the meaning of judicial misconduct considered in *Re Baldwin* (2002) O.J.C., another case from the Ontario Judicial Council which relied primarily on two leading decisions of the Supreme Court of Canada: *Therrien v. Minister of Justice*, [2001] 2 S.C.R. 3 (S.C.C.) and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (S.C.C.). The hearing panel in *Re Douglas* cited the following important passage from *Re Baldwin*:

> [5] Focusing on the broad scope of s. 51.6(1) in Re: Baldwin (2002) a Hearing Panel of this Council considered the meaning of judicial misconduct. In doing so, it relied primarily on two leading decisions of the Supreme Court of Canada: Therrien v. Minister of Justice, [2001] 2 S.C.R. 3 and Moreau – Bérubé v. New Brunswick (Judicial Council),[2002]1 S.C.R.249. The Council stated:
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> > In *Moreau - Bérubé v. New Brunswick (Judicial Council)*, the Supreme Court discussed the tension between judicial accountability and judicial independence. Judges must be accountable for their judicial and extra-judicial conduct so that the public has [sic] confidence in their capacity to perform the duties of office impartially, independently and with integrity. When public confidence is undermined by a judge's conduct there must be a process for remedying the harm that has been occasioned by that conduct. It is important to recognize, however, that the manner in which complaints of judicial misconduct are addressed can have an inhibiting or chilling effect on judicial action. The process for reviewing allegations of judicial misconduct must therefore provide for accountability without inappropriately curtailing the independence or integrity of judicial thought and decision-making.

> The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in s. 51.6(11) should be invoked, when necessary, in order to restore a loss of public confidence arising from the judicial conduct in issue.
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> Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, the question under s. 51.6(11) is whether the impugned conduct is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office or in the administration of justice generally and that it is necessary for the Judicial Council to make one of the dispositions referred to in the section in order to restore that confidence.

Re Douglas (2006) O.J.C. at para. 5

Therrien v. Minister of Justice, [2001] 2 S.C.R. 3 (S.C.C.)

Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 259 (S.C.C.)

13. Counsel for His Worship asked us to place particular emphasis on the following passage from *Re Baldwin*, supra:

> It is only when the conduct complained of crosses this threshold that the range of dispositions in s. 51.6(11) is to be considered. Once it is determined that a disposition under s. 51.6(11) is required, the Council should first consider the least serious - a warning - and move sequentially to the most serious - a recommendation for removal - and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally.

Re: Baldwin (2002) O.J.C. at p.5

14. In *Re Douglas* the Hearing Panel noted, citing *Therrien,* supra, that a lack of integrity on the part of judges is capable of undermining public respect and confidence and, therefore, judges should strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment. Further, judges must be and must give the appearance of being an example of impartiality, independence and integrity. Accordingly, the Hearing Panel in *Re Douglas* stated:

> [8] Based on *Re Baldwin* and *Re Evans*, the test for judicial misconduct combines two related concerns: (1) public confidence; and (2) the integrity, impartiality and independence of the judge or the administration of justice. The first concern requires that the Hearing Panel be mindful not only of the conduct in question,

> but also of the appearance of that conduct in the eyes of the public. As noted in *Therrien*, the public will at least demand that a judge give the appearance of integrity, impartiality and independence. Thus, maintenance of public confidence in the judge personally, and in the administration of justice generally, are central considerations in evaluating impugned conduct. In addition, the conduct must be such that it implicates the integrity, impartiality or independence of the judiciary or the administration of justice.
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> [9] Accordingly, a judge must be, and appear to be, impartial and independent. He or she must have, and appear to have, personal integrity. If a judge conducts himself, or herself, in a manner that displays a lack of any of these attributes, he or she may be found to have engaged in judicial misconduct.
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> *Re Douglas* (2006) O.J.C. at paras. 8 to 9
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> *Re Therrien*, supra, at paras. 110 to 111

15. In exercising its mandate in respect of disposition, Presenting Counsel has submitted, and we agree, that the Hearing Panel should be guided by the ethical duties that are inherent in the judicial function. These ethical duties are well established under Canadian jurisprudence. In *Re Therrien,* supra, Justice Gonthier provides clarification of these duties in commenting on the role of the judge and the manner in which the public perceives that role:

> [108]The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
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> [109]If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the

> Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).
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> [110]Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:
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> > Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
> > (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)
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> [111]The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens....
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> *Re Therrien,* supra, at paras. 108 to 111

16. With respect to the issue of public confidence, Counsel for His Worship, Mr. Greenspan, provided us with some background information about His Worship Barroilhet including his education in both Chile and Argentina before his arrival in Canada as a refugee in 1978, and his employment as an insurance broker until his marriage in 1992 to Ms Mateluna. It was at that time that the paralegal firm J.H. Barroilhet & Associates Inc. was created. In addition to the education and business background of His Worship, filed as Exhibit 2 were 18 letters in support of His Worship Barroilhet. The letters speak to His Worship's high standing in the Canadian-Hispanic community. The Panel accepts that His Worship has the respect of many and has made significant contributions in the community. We acknowledge his commitment to social justice.

17. Exhibit 1 at the disposition hearing is a letter of apology, dated September 17, 2009, in which His Worship expresses his sincere regret for his misconduct as set out by this Hearing Panel in its Reasons for Decision, dated July 29, 2009. We have considered the apology at this stage of the proceedings and accept the submission made by Counsel for His Worship, Mr. Greenspan, that it is sincere.

18. Counsel for His Worship conceded that the public's confidence may have been eroded by the misconduct engaged in by His Worship Barroilhet but that the ultimate penalty, namely a recommendation for removal, is not appropriate.

19. The Panel must however, as set out in *Re: Douglas,* consider the integrity, impartiality and independence of the justice of the peace. The Panel's findings in its Reasons for Decision in relation to Particulars 11-16 pertain to His Worship's misconduct in the "Chad Evans" matter. In that case, His Worship acknowledged that he improperly intervened in respect of Mr. Evans' provincial offences case. This misconduct raises, in the Panel's view, not only the issue of public confidence but also a serious question of whether integrity, impartiality and independence were demonstrated by His Worship Barroilhet.

20. His Worship did not make a momentary lapse or error in judgment in the Chad Evans matter. His conduct, or misconduct, as we have found it to be, demonstrated that he was prepared to assist a family friend in a court in another jurisdiction, by using his influence as a justice of the peace, and with the assistance of an employee of the paralegal firm with which he had inappropriate ties.

21. In exercising its mandate in respect of disposition, Presenting Counsel has submitted and we agree that the Hearing Panel should be guided by the judicial duty in respect of impartiality. In this regard, the decision of the Quebec Court of Appeal in *Ruffo(Re),*[2005] Q.J. No. 17953 (C.A.), which was upheld by the Supreme Court of Canada, is instructive:

> [148]It is accepted that the judicial duty of impartiality is a continuous one. The oath of office attests to this. The rights of citizens are preserved and their confidence in the judicial system is preserved at the price of a judge's constant vigilance. Primarily, then, it is a judge's duty to preserve this impartiality jealously and to ensure that it be both actual and apparent.
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> [149]Moreover, the presumption of impartiality that accompanies the judicial function serves a very precise objective, that of the integrity of the judicial system. This premise may not be questioned every time a person who comes before the court is dissatisfied with a decision. Judges may err in fact or in law and be corrected on appeal. This does not mean, however, that the error arose from a lack of impartiality.
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> *Ruffo (Re),* [2005] Q.J. No. 17953 (C.A.) at paras. 148 to 149

22. As an indication of the public's confidence in His Worship Barroilhet's integrity and impartiality, His Worship has chosen to file, at Tab 18 of Exhibit 2, a letter from the father-in-law of Chad Evans, who was the old family friend for whom His Worship chose to do a favour. In that letter, the writer states: "Note that Mr. Evans was not charged with a criminal offence, nor that we asked Mr. Barroilhet to amend the charges. My only request to Mr. Barroilhet regarding the above was to assist us to re-open his case in order to have his day in Court…". There is no indication in the letter that the writer appreciates that His Worship's conduct in entertaining the request for a personal favour and acting on it was improper. When His Worship relies upon this letter before this Panel, he underlines the public confidence issue which arises when a justice of the peace entertains and acts on requests for "favours". Such conduct, or misconduct as we have found it to be, must not be perceived by members of the public to be a normal or unexceptional state of affairs within an impartial and independent judiciary.

23. In addition, His Worship admitted that he improperly communicated with two judicial colleagues and the panel has held that he asked one of them to waive the requirement for an affidavit duly sworn by Mr. Evans**.** As we are instructed in *Ruffo v. Conseil de la magistrature,* [1995] 4 S.C.R. 267 (S.C.C.), the integrity of the entire judiciary must be considered when we assess the misconduct of His Worship Barroilhet. We accept the evidence of Her Worship Miller as to how uncomfortable she felt after her

conversation with His Worship, a more senior justice of the peace, in the Chad Evans matter. Her response was the appropriate one. She refused to agree to His Worship's request. The administration of justice, however, is undermined if judicial officers within it attempt to use their position and influence to encourage others to circumvent the law or ignore their oath of office.

24. As we have already stated, the evidence demonstrated and the Panel found that an employee of the paralegal business with which His Worship maintained an inappropriate involvement was sent to request that a justice of the peace grant the reopening in the Chad Evans matter.

25. In his submissions on September 17, 2009, the date of the letter of apology, Counsel for His Worship indicated that His Worship Barroilhet and his wife agreed that it was unwise and imprudent to continue the paralegal business and that in the last several months they have attempted to sell it. Counsel for His Worship stated that it is their unequivocal intention to have the business sold or closed within the next six months, to ensure that there is no perception of conflict. In our view, this submission confirms that His Worship never made a clear, unequivocal break in his business relationship with the paralegal firm and that relationship continues now as he participates in attempts to sell the business.

26. In light of these findings, the Hearing Panel must determine whether the conduct of the justice of the peace in issue is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the justice of the peace, or of the public in its justice system, would be undermined, rendering the justice of the peace incapable of performing the duties of his or her office.

> *Re Therrien*, [2001] 2 S.C.R. 3 (S.C.C.) at para. 147
> *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (S.C.C.) paras. 66 to 73

27. The impartiality, integrity and independence of the judiciary and the confidence of individual members of the public appearing before this Justice of the Peace have, we conclude, been irreparably undermined by His Worship Barriohlet's misconduct. There were additional findings of misconduct in our Reasons for Decision, but it is the misconduct in the Chad Evans matter which we find to be the most egregious. We conclude that such misconduct renders His Worship Barroilhet incapable of performing the duties of his office.

28. The public's confidence in the ability of His Worship Barroilhet to perform the duties of office, and in the administration of justice generally, would be irreparably undermined, in the Panel's view, if the Panel's response to such behaviour were any disposition other than a recommendation for removal. The range of dispositions set out in section 11.1(10) of the *Act* are remedial, as both counsel have noted. In the case of the misconduct in the Chad Evans matter, the most serious sanction is the only remedy which, in our view, would restore the public's confidence in the administration of justice.

29. We therefore recommend to the Attorney General that His Worship Jorge Barriolhet be removed from office in accordance with section 11.2 of the *Act.*

Dated at the city of Toronto in the Province of Ontario, October 15th, 2009.

HEARING PANEL: The Honorable Madame Justice Deborah K. Livingstone
Her Worship Senior Justice of the Peace Cornelia Mews
Ms. S. Margot Blight – Borden Ladner Gervais LLP