

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 Tom Foulds

Before: The Honourable Justice Peter Tetley, Chair
Justice of the Peace Monique Seguin
Ms. Jenny Gumbs, Community Member

Hearing Panel of the Justices of the Peace Review Council

DECISION ON DISPOSITION AND COMPENSATION FOR LEGAL COSTS FOLLOWING A FINDING OF JUDICIAL MISCONDUCT

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Ms. Amy Ohler
Presenting Counsel

Mr. Mark Sandler
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Tom Foulds

DECISION ON DISPOSITION AND COMPENSATION FOR LEGAL COSTS

Part I - Introduction

- [1] A complaint to the Justices of the Peace Review Council resulted in the Complaints Committee of that Council directing that a formal hearing be held, pursuant to s. 11.1 of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4 (the “Act”), concerning the actions of Justice of the Peace Tom Foulds. The particulars of the complaint are set out in Appendix “A” of the Notice of Hearing (attached as an addendum to these reasons and also filed as part of Exhibit 1(B)).
- [2] Evidence in relation to the complaint was heard by the Hearing Panel of the Review Council on October 10, 11, 12, 13, 16 and November 7, 2017.
- [3] On February 1, 2018, the Hearing Panel concluded that certain actions of Justice of the Peace Foulds constituted judicial misconduct as alleged in paragraphs 3(a), (c), (d), (e) and (f) of Appendix “A” of the Notice of Hearing.
- [4] These findings arose from the determination that His Worship had actively involved himself in matters relating to the criminal prosecution of Mr. BB in circumstances where His Worship was a close friend or romantic partner of the complainant, Ms. AA and had prior knowledge of Mr. BB.
- [5] The initials AA were used to describe the person who was the complainant in the criminal process during the course of the hearing. The initials BB were used to describe the person who was the accused in the criminal matter and the complainant in this judicial disciplinary proceeding.
- [6] The initials are employed for identification purposes in the referenced Notice of Hearing and in the Reasons for Decision. These initials will continue to be used throughout these reasons in order to maintain confidentiality in relation to the names of both the complainant and the accused in the criminal matter, which resulted in no findings, and the name of the complainant in this process.
- [7] In accordance with a previously issued publication ban, the names of AA and BB shall not be published, nor shall any information that might identify them be published.
- [8] In summary terms, the Reasons for Decision disclose the following findings which are concluded to constitute specific incidents of judicial misconduct:
 - (i) The receipt and signing of the original Information alleging a criminal charge against BB in circumstances where His Worship was in a conflict of interest as a consequence of his friendship with the complainant AA and the fact he was a potential witness in that prosecution;

- (ii) Continued contact and communication with Crown counsel having carriage of the B.B. prosecution in circumstances where His Worship knew that he was in a position of conflict of interest;
- (iii) The receipt and signing of a subpoena for the complainant to attend at BB's trial in circumstances where His Worship was a romantic partner and cohabitant of the complainant in addition to being a potential witness at the trial of BB. In addition to signing the subpoena, His Worship was concluded to have further involved himself in influencing the manner in which the subpoena would be served on the complainant;
- (iv) Repeated intervention in the adversary process supporting the contention that His Worship was seeking to exploit a special relationship that he enjoyed with the Toronto Police Service and crown counsel by virtue of his judicial office.

[9] These findings led the Hearing Panel to conclude that His Worship's actions constituted judicial misconduct. The Panel concluded that the evidence established a pattern of misconduct that extended from May 21, 2014, when His Worship signed the original Information against BB, to late April 2015 when he approached Ms. Jenkins and made reference to the BB prosecution.

[10] At paragraphs 166-173 of the Reasons for Decision, we summarized the findings of judicial misconduct as follows:

[166] The Hearing Panel concludes that His Worship intentionally shared incomplete or misleading information about his relationship with AA to members of the TPS and the Crown Attorney's office. We find that His Worship intentionally acted in a manner to obfuscate or conceal his personal interest in the prosecution of BB in a manner that was both calculated and deceptive.

[167] Justice of the Peace Foulds is concluded to have intentionally shared limited information with various state officials as the prosecution of BB advanced. The failure to completely disclose the nature of his relationship with AA at various stages of the BB prosecution is concluded to be contrary to the ethical considerations that govern the conduct of a judicial officer

[168] As a result of His Worship's failure to restrain himself from becoming involved in the BB prosecution, in circumstances where he was in a position of conflict of interest, a number of inappropriate interactions with members of the TPS and several Crown Attorneys resulted. While there is no evidence to suggest that these contacts impacted the BB prosecution in a negative way, it cannot be said that there was no direct impact of His Worship's conduct on BB personally. It would not be unreasonable to conclude that Justice of

the Peace Foulds' conduct had an aggravating influence on the legal fees that BB paid in defence of the charge arising from the AA allegation.

[169] The evidence would suggest that a portion of BB's legal costs arose directly as a consequence of Justice of the Peace Foulds' involvement in the criminal process. The evidentiary record would support the conclusion that the third-party records application, in which BB's defence counsel sought disclosure of any written form of communication between AA and His Worship, was instituted, in large measure, as a result of the acts of judicial misconduct identified in this hearing.

[170] In these circumstances, the Hearing Panel acknowledges a reasoned basis for BB to believe that his prosecution was being influenced in an improper manner as a consequence of Justice of the Peace Foulds' known involvement in matters relating to that prosecution. In BB's own words: "I knew he was a JP in those courts, and I felt I was up against, you know, the justice system, and, you know, he works there. I'm, you know, going there to be represented, and I felt like I was up against a wall. I guess...there was a senior judicial official effectively running interference on my file. And, you know, I don't know how the courts work, but I know how the workplace works. And, you know, people bump into people, and people share information, and they talk about things, and, you know, all of a sudden, before you know it, other decisions get made."

[171] His Worship's actions, comments and interventions during the criminal process were also concluded to have negatively swayed the perception of different participants in the criminal justice system, including Crown counsel and TPS staff and to result in his Worship's conduct being viewed as having compromised the independence, impartiality and integrity of the judicial office he holds.

[172] As a direct result of His Worship's conduct, an increased devotion of public resources was required by virtue of the fact Crown counsel was obligated to disclose various incidents of contact by Justice of the Peace Foulds. These communications were not related to his role as a potential witness in the criminal prosecution. This was another circumstance that resulted in additional legal expenses being incurred as a consequence of requests for information from BB's counsel. In due course this led to the institution of a third-party records application.

[173] The Hearing Panel concludes that, on any objective assessment, his Worship's repeated acts of misconduct resulted in the administration of justice being brought into disrepute. These

actions resulted in a loss of confidence on the part of BB in His Worship as a judicial officer, and in the creation of a negative impression in the mind of BB, and others, of the criminal justice system generally. The serious nature of the various acts of judicial misconduct here are concluded to require that a disposition be made under section 11.1(10) of the act in order to restore public confidence in the judicial officer and the judiciary.

Applicable Legal Principles on Disposition

The Legislative Framework

[11] Section 11.1(10) of the *Act* provides as follows:

The Review Council may, pursuant to subsection 11.1(10) of the *Justices of the Peace Act*, dismiss the complaint after completing the hearing, with or without a finding that it is unfounded or, if it upholds the complaint, it may:

- (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 complainants 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; and/or,
- (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 of the *Justices of the Peace Act*.

[12] Section 11.1(11) of the *Act* provides that the Panel “May adopt any combination” of dispositions set out in subsections 11.1(10)(a) to (f). A decision under subsection 11.1(10)(g) to recommend to the Attorney General that the justice be removed from office cannot be made in combination with any other dispositions provided for in section 11.1(10).

- [13] Section 11.1(1) of the *Act* provides that a justice of the peace may be removed from office only by order of the Lieutenant Governor in Council. Section 11.2(2) of the *Act* sets out the conditions under which the order for removal may be made;

The order may be made only if,

- (a) a complaint about the justice of the peace has been made to the Review Council; and
- (b) 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,
 - (i) inability, because of a disability, to perform the essential duties of his or her office, if an order to accommodate the justice of the peace's needs would not remedy the inability, or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability,
 - (ii) conduct that is incompatible with the due execution of his or her office, or
 - (iii) failure to perform the duties of his or her office. 2006, c. 21, Sched. B, s. 10.

- [14] On February 1, 2018, the Hearing Panel determined that certain actions of Justice of the Peace Foulds constituted judicial misconduct. As a consequence, the Hearing Panel is required to consider whether one of the dispositions available in section 11.1(10)(a) to (f) of the *Act*, or a combination thereof as authorized within the legislative framework, is required to restore public confidence in the judiciary.

- [15] A recommendation that His Worship be removed from office under section 11.1(10)(g), may only be made if the Hearing Panel is not satisfied that one of the dispositions under subsection 11.1(10)(a) to (f), or a combination thereof, is sufficient to restore public confidence and the Hearing Panel concludes that His Worship's misconduct has rendered him incapable of performing the duties of his office.

Counsel's Submissions

- [16] Submissions on disposition were received from Mr. Sandler on behalf of Justice of the Peace Foulds, who was largely self-represented throughout the course of the Hearing. In light of the Hearing Panel's findings, a disposition at the "higher end of the spectrum" was acknowledged as being required in order to restore public confidence in His Worship and the administration of justice generally. A recommendation for removal from office was not viewed as being warranted given the remedial focus of this judicial disciplinary proceeding, regard for His Worship's

personal circumstances, and Justice of the Peace Foulds' long service as a judicial officer.

- [17] Presenting Counsel, Mr. Fenton, prefaced his submissions by referencing the scope of the role of Presenting Counsel on a section 11.1 hearing as delineated in the Reasons for Decision in *Barroilhet*:¹

Counsel agree that pursuant to section 4 of the *Justice of the Peace Review Council's Procedural Code for Hearings*, presenting counsel's role shall not be to seek a particular order against a respondent, but to see that the complaint against the Justice of the Peace is evaluated fairly and dispassionately to the end of achieving a just result. Our role is now to make findings of fact based on the admissions and the evidence presented, and determine which of those facts result in a finding of judicial misconduct, such that one or more of the range of dispositions set out in section 11.1(10) of the *Justice of the Peace Act*, are required to restore public confidence in the judiciary (hereinafter simply "Judicial Misconduct")....

- [18] In furtherance of Presenting Counsel's role to "impartially assist" the Hearing Panel in its consideration of the appropriate disposition "such that the public's confidence and view of the administration of justice and the judiciary are fostered and maintained", Mr. Fenton directed the Hearing Panel's attention to the findings referenced in the Reasons for Decision that would support a disposition at the upper range of the available options. These findings were categorized as being compelling in nature and of sufficient seriousness to support a recommendation for removal from office.²
- [19] After noting the remedial focus of judicial misconduct proceedings, Presenting Counsel submitted, in light of the Hearing Panel's findings of judicial misconduct, that a disposition at "the more serious end of the range of available dispositions" as being required to restore the public's confidence in the judiciary and the administration of justice.

¹ In the Matter of Hearing ordered under section 11(15) of the *Justice of the Peace Act*, R.S.O. 1990, c. J.4, *J.P. Jorge Barroilhet (Re)*, Dated February 28, 2008, at page 1.

² The role of Presenting Counsel in relation to the issue of disposition is reviewed in a number of previous decisions on disposition. It has been compared to that of *amicus curiae* with the role limited to the offering of impartial assistance to draw the panel's attention to the various factors, both evidentiary and legal, that are germane to the determination of the appropriate disposition. The role is not viewed by Presenting Counsel as including the seeking of a particular disposition. See *Barroilhet* disposition, *supra*, at paragraph 8; In the Matter of Hearing ordered under section 11.1 of the *Justice of the Peace Act*, R.S.O. 1990, c. J.4, *(Re) J.P. Errol Massiah, Reasons for Disposition*, April 12, 2012 ("*Massiah 2012*"), at paragraph 3; In the Matter of Hearing ordered under section 11.1 of the *Justice of the Peace Act*, R.S.O. 1990, c. J.4, *(Re) J.P. Donna Phillips, Decision on Disposition ("Phillips")*, October 24, 2013, at paragraph 13; and see also, In the Matter of Hearing ordered under section 11.1 of the *Justice of the Peace Act*, R.S.O. 1990, c. J.4, *(Re) Paul Welsh, Reasons for Decision ("Welsh 2018")*, February 15, 2018, at paragraph 50.

- [20] Based on the findings made by the Hearing Panel in the Reasons for Decision, Mr. Fenton submitted that it would “not be unreasonable” for the Hearing Panel to conclude that the conduct of His Worship was akin to that described by the Hearing Panel in *Phillips*,³ at paragraph 2 of that disposition, as follows:

...so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role, that public confidence would be sufficiently undermined so as to render her incapable of executing the judicial office. (See the Canadian Judicial Council's *Report to the Minister of Justice Concerning Mr. Justice Paul Cosgrove of the Superior Court of Ontario* (2009) at para. 19).

- [21] In the event a similar conclusion were to be reached by the Hearing Panel here, Presenting Counsel submits that it would be open to the Panel to determine that the appropriate remedy to restore public confidence in the judiciary would be to recommend to the Attorney General, pursuant to sections 11.1(10)(g) and 11.2(2)(ii), that His Worship Justice of the Peace Foulds be removed from office.

Applicable Legal Principles

- [22] In *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 Supreme Court of Canada concluded that the purpose of judicial misconduct proceedings is essentially remedial.
- [23] In *Therrien*, the Supreme Court of Canada addressed a number of jurisdictional issues relating to disciplinary proceedings involving a provincially appointed Quebec-based judge. The appeal involved consideration of a circumstance where the judge had deliberately concealed the fact he had been charged with illegally and unlawfully giving assistance to four individuals associated with the kidnapping of Cabinet Minister Pierre Laporte and had plead guilty to related offences and been sentenced to a period of imprisonment as a consequence. The decision to revoke the judge's commission was upheld. At paragraph 147 of the judgment, Justice Gonthier, for the court, referenced the importance to be attached to the maintenance of public confidence in the justice system:

The public's invaluable confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public

³ *Re: Phillips*, (2013).

in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office [citation omitted].

- [24] Similar sentiments were expressed on behalf of the court, by Justice Arbour in *Moreau-Bérubé*, a case involving the appeal of a decision by the Judicial Council of New Brunswick, recommending removal from the office of a provincial court judge because of statements she made in court while presiding over a sentencing hearing.
- [25] In upholding the decision of the Judicial Council, Justice Arbour referenced the public's high expectations of those that hold judicial office:

The comments of Judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person. The expertise to decide that difficult issue rests in the Council, a large collegial body composed primarily of judges of all levels of jurisdiction in the province, but also of non-judges whose input is important in formulating that judgment. The Judicial Council has been charged by statute to guard the integrity of the provincial judicial system in New Brunswick. In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.

- [26] The terms “judicial misconduct” and “upholding a complaint” are not defined in the *Act*. The Hearing Panel accepts that the test for judicial misconduct was accurately defined in the Reasons for Decision⁴ in *Welsh* (2009). Decisions relating to the Canadian Judicial Council and the Ontario Judicial Council are concluded to have application in the determination of whether a complaint is or is not upheld in a disciplinary matter involving a justice of the peace pursuant to section 11.1(10) of the *Act*. Once the complaint(s) have been concluded to have been established, the available dispositions under the *Act* mirror the same dispositions that are available to the Ontario Judicial Council under subsection 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990 c. C43 (C.J.A.) in judicial disciplinary hearings. Dispositions in section 51.6(11) are invoked, when necessary, in order to restore loss of public confidence arising as a consequence of judicial misconduct.

⁴ *In the Matter of Hearing Ordered Under Section 11(15) of the Justice of the Peace Act, R.S.O. 1990, c. J.4, as amended, Respecting the Conduct of Justice of the Peace Paul A. Welsh, December 8, 2009.*

[27] It is only when the impugned conduct is so seriously contrary to the impartiality, integrity and independence expected of the judiciary that it undermines the public's confidence in the ability of a justice of the peace to perform the duties of office or the public's faith in the administration of justice generally that one of the dispositions referenced in the section is necessary in order to restore that confidence.⁵

[28] In another Supreme Court of Canada judgment, *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (SCC) at paragraph 68, the court considered the role of a body comparable to the Justice of the Peace Review Council under the *Quebec Courts of Justice Act*. Gonthier J. described the remedial nature and the purpose of judicial disciplinary proceedings as follows:

The Comité's role in light of these statutory provisions was accurately described by Parent J., at p. 2214:

[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.

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 reflect 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.

[29] In *Re: Baldwin*, (2002), O.J.C.,⁶ the Ontario Judicial Council recognized the progressive approach to judicial discipline that follows a finding of misconduct, noting as follows:

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

⁵ See *Welsh*, 2009, at paragraphs 30-31, *Therrien v. Minister of Justice*, at paragraph 147, and *Moreau-Bérubé v. New Brunswick, (Judicial Council)*, at paragraph 88.

⁶ In the matter of a complaint respecting the Honourable Madam Justice Lesley M. Baldwin, May 10, 2002.

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.

[30] This approach was also adopted and applied by the Ontario Judicial Council in the matter of *Re: Douglas*, (2006) O.J.C.,⁷ at paragraph 5, where the following principles were concluded to have apply in the determination of an appropriate disposition:

- (i) The Hearing Panel should first consider the least serious disposition and move sequentially to the most serious;
- (ii) The disposition must restore the public confidence in the judicial officer; and,
- (iii) The disposition must restore the public confidence in the administration of justice generally.

[31] As noted previously, a recommendation to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2, can only be made if the Hearing Panel is not satisfied that one of the alternative dispositions under subsection 11.1(10)(a) to (f) or a combination of those dispositions, is sufficient to restore public confidence in the judicial officer and the administration of justice generally.

[32] In *Re: Chisvin* (2012), O.J.C.,⁸ at paragraph 38, the Hearing Panel provided a list of factors that were viewed as being relevant to the determination of an appropriate disposition following a finding of judicial misconduct.⁹

[33] The factors referenced in *Re: Chisvin* include the following:

- (i) Whether the misconduct was isolated in nature or reflected a pattern of conduct of like nature;
- (ii) The nature, extent and frequency of the acts of misconduct;
- (iii) Whether the misconduct occurred inside or outside of the courtroom;

⁷ In the matter of a complaint respecting the Honourable Justice Norman Douglas, March 6, 2006.

⁸ In the Matter of a Hearing under Section 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended, Concerning Complaints about the Conduct of the Honourable Justice Howard I. Chisvin.

⁹ See *Phillips*, at paragraph 18; and *Massiah*, (2015) at paragraph 16.

- (iv) Whether the misconduct occurred in the course of the judicial officer's official capacity or during the course of his/her private life;
- (v) Whether the judicial officer acknowledged or recognized that the acts of misconduct had occurred;
- (vi) Whether the judicial officer had demonstrated an effort to change or modify his/her conduct;
- (vii) The length of service of the judicial officer;
- (viii) Whether there had been prior complaints of misconduct in relation to the judicial officer;
- (ix) The effect of the misconduct on the integrity of the justice system and respect for the judiciary; and,
- (x) The extent to which the judicial officer exploited his/her position in order to satisfy his/her own personal desires.

[34] Presenting Counsel provided a helpful review of all of the previously reported dispositions of the Justices of the Peace Review Council. That review revealed previous Hearing Panels to have considered a number of different factors in their deliberations on disposition. Those factors include the following:

- (a) Whether the Hearing Panel had found more than one incident of judicial misconduct to have occurred¹⁰;
- (b) Whether the misconduct was isolated in nature, or alternatively, had taken place over a period of time or constituted a pattern of conduct¹¹;
- (c) The length of the justice of the peace's time of service on the bench¹²;
- (d) Whether there were multiple complaints¹³;
- (e) Whether the misconduct took place outside the courtroom, or in the justice of the peace's capacity as a private citizen¹⁴;
- (f) Whether the acts that were concluded to have constituted judicial misconduct were also the subject of criminal sanction¹⁵;

¹⁰ See *Massiah* (2012), at paragraph 21; *Phillips*, at paragraph 13; *Massiah* (2105), at paragraph 17 and *Welsh* (2018), at paragraph 63;

¹¹ See *Massiah* (2012), at paragraph 21; *Phillips*, at paragraph 13, *Massiah* (2015), at paragraph 18; and, *Welsh* (2018), at paragraph 73.

¹² *Massiah* (2015), at paragraph 19; and, *Welsh* (2018), at paragraph 68.

¹³ *Massiah* (2012), at paragraph 21.

¹⁴ *Phillips*, at paragraph 23; *Massiah* (2015), paragraph 20; and, *Welsh* (2018), at paragraph 64.

¹⁵ *Welsh* (2009), at paragraph 78.

- (g) Whether there was an element of corruption to the judicial misconduct;¹⁶;
- (h) Whether the justice of the peace had exploited his/her position for personal gain¹⁷;
- (i) The effect of the misconduct on the integrity of the judicial officer and respect for the judiciary at large¹⁸;
- (j) Whether the justice of the peace demonstrated an understanding of the seriousness of the misconduct¹⁹;
- (k) Whether the justice of the peace has demonstrated a willingness to address the cause of the misconduct, demonstrating that he/she is capable of rehabilitation²⁰;
- (l) Whether the justice of the peace acknowledged the misconduct or otherwise demonstrated remorse²¹;
- (m) Whether there has been a previous finding of judicial misconduct²²;

[35] In *Re: Douglas, supra*, at paragraphs 8 and 9, the Hearing Panel noted the following:

[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.

¹⁶ *Welsh* (2009), at paragraph 84.

¹⁷ *Foulds* (2013), at paragraphs 20, 32; *Phillips*, at paragraph 25.

¹⁸ *Phillips*, at paragraphs 25-28; *Massiah* (2015), at paragraphs 31-34; and, *Welsh* (2018), at paragraph 71.

¹⁹ *Phillips*, at paragraph 13; and, *Welsh* (2018), at paragraph 65.

²⁰ *Massiah* (2012), at paragraph 33; *Foulds* (2013), at paragraph 23.

²¹ *Massiah* (2012), at paragraph 29; *Phillips*, at paragraph 13; *Foulds* (2013), at paragraph 25; *Massiah* (2015), at paragraph 22; and *Welsh* (2018), at paragraph 65.

²² *Massiah* (2012), at paragraph 36; *Phillips*, at paragraph 13; *Foulds* (2013), at paragraph 26; *Massiah* (2015), at paragraph 21; and, *Welsh* (2018), at paragraph 69.

[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.

Application of the Principles to this Hearing

- [36] The determination of the appropriate disposition in this hearing begins with consideration of the factors outlined in *Re: Chisvin* and the considerations referenced in the analysis of previous disciplinary proceedings as canvassed in paragraph 34 of this decision. The Hearing Panel notes His Worship's long service as a justice of the peace. Justice of the Peace Foulds was appointed on July 12, 1999 and has performed the duties as a justice of the peace for over 16 years with His Worship's continuous years of service disrupted by two periods of administrative suspension as a result of his misconduct.
- [37] Prior to his appointment as justice of the peace, His Worship accumulated over 41 years of military experience. He served for a number of year on the legal committee of the Confédération interalliée des officiers de Réserve (C.I.O.R.) where he was responsible for the delivery of Law of Armed Conflict (L.O.A.C.) education and testing. His Worship received a number of awards and official recognition for his commitment to these initiatives.
- [38] His Worship has also served as an adult educator and executive for certain non-profit endeavours. He was a founding director and now, life member, of the Canadian Society for Training and Development (C.S.T.D.), now the Institute for Performance and Learning, and was an executive director of the Toronto Advisory Committee on Employment Training (T.A.C.E.T), an agency involved in the funding of employment training. His Worship has also been an active community volunteer with a variety of amateur sports organizations.
- [39] Unfortunately, Justice of the Peace Foulds has been previously concluded to have engaged in judicial misconduct by involving himself in a public health inspection that occurred in a restaurant owned by a friend. In Reasons for Decision dated July 23, 2013, just ten months before Justice of the Peace Foulds issued the Information relating to the allegation of assault against BB, the Hearing Panel in that case found that His Worship had: "[A]ttempted to influence the regulatory duties of public officials whose employer, the City of Toronto, appears before him and other justices of the peace in this region as a litigant."
- [40] In the previous disciplinary proceeding, Justice of the Peace Foulds made certain admissions, including the acknowledgment that his actions, as detailed in an Agreed Statement of Facts, constituted judicial misconduct. His Worship also undertook that he would "not repeat such conduct in the future, mindful of the

potential harm that such conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice”.²³

- [41] At that time, Justice of the Peace Foulds agreed: “that a disposition ordered by the Justices of the Peace Review Council must be sufficient to restore and preserve the dignity and integrity of the judicial position. The disposition should also seek to restore public confidence in His Worship Foulds’ integrity and ability to carry out his duties as a justice of the peace.”²⁴
- [42] The Hearing Panel presiding over that hearing ordered that Justice of the Peace Foulds serve a seven-day suspension, without pay, commencing September 9, 2013.
- [43] His Worship acknowledged that his presence during the public health inspection and his actions thereafter “were inappropriate”. He expressed regret for allowing his personal concern for a friend “to compromise his judgment”. He agreed that he would “...not repeat such conduct in the future, mindful of the potential harm that such conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.”²⁵
- [44] The Hearing Panel concludes, 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.
- [45] The incidents of judicial misconduct here, as referenced in the Reasons for Decision at paragraph 165, were not isolated in nature and occurred over the course of approximately 10 months. The misconduct occurred both in the courtroom as well as outside of the courtroom. The signing of the Information and involvement with the witness subpoena were activities that occurred during the course of the discharge of His Worship’s activities as an aspect of his job function. Repeated contacts with the police and several Crown Attorneys occurred outside the courtroom and were not directly relation to His Worship’s role as a justice of the peace.
- [46] In these circumstances, the Hearing Panel concludes that His Worship’s out-of-court actions were inextricably linked to his role as a justice of the peace with His Worship being concluded to have intentionally and inappropriately exploited the relationship he enjoyed with both the police and Crown counsel by virtue of his judicial position. The incidents of misconduct, when considered in their entirety, are viewed as illustrating the absence of understanding by His Worship of the clear demarcation between the public and private life of a judicial officer.

²³ Re: Foulds, July 10, 2013, Agreed Statement of Facts, paragraph 30.

²⁴ Re: Foulds, Agreed Statement of Facts, at paragraph 28.

²⁵ Re: Foulds, Agreed Statement of Fact, July 10, 2013, at paragraphs 29-30.

- [47] As noted in the Reasons for Decision, His Worship's determination to advance his personal agenda or interest is concluded to have compromised and undermined the principles of impartiality, independence and integrity expected of all members of the judiciary.
- [48] In the view of the Hearing Panel, Justice of the Peace Foulds has not truly acknowledged any wrongdoing. He is concluded to continue to view the swearing of the Information against BB and the issuance of the witness summons for AA as merely being events that would have taken place regardless of whether or not he was personally involved. He is concluded to lack insight as to the impact his actions had on other criminal justice participants, including BB, several Crown Attorneys and both civilian and enlisted members of the Toronto Police Service. While Justice of the Peace Foulds is entitled to disagree with the conclusions reached by the Hearing Panel, his lack of appreciation for the consequences of his actions, acknowledgement of wrongdoing or expressed contrition, are relevant considerations in considering the appropriate disposition to preserve and restore public confidence in the integrity of the judiciary.
- [49] This is not a circumstance, like that reviewed in *Re: Chisvin, supra*, where there was an immediate recognition of the act of misconduct, an immediate rehabilitative response and an expressed apology, with numerous letters of support from judicial colleagues confirming that the action in issue was an aberration.
- [50] Similarly, the circumstances are not viewed as being analogous to those in *Re: Douglas*, where Justice Douglas was concluded to have "acknowledged his errors and admit that he conducted himself inappropriately".
- [51] Justice Douglas was viewed by the Hearing Panel as having effectively "conceded that he failed to conduct himself in a manner that the public expects of a judge, resulting in the loss of public confidence". His Honour was concluded to be sincere in acknowledging his inappropriate conduct and concluded to have learned "a hard lesson" from the events leading to the disciplinary hearing and from the hearing itself.
- [52] Most importantly, none of the conduct in which Justice Douglas engaged (conduct primarily related to the expression of his displeasure in relation to the manner in which "Over 80" cases were being defended and his frustration with the resulting trial delays arising from the limited availability of defence toxicologists, essential witnesses in the defence of those charges) was concluded to constitute incidents of judicial misconduct.
- [53] The same degree of insight, self-awareness and acknowledgement of inappropriate conduct demonstrated by Justice Douglas is not concluded to have been demonstrated here by Justice of the Peace Foulds.
- [54] Although no evidence was presented during the course of the hearing in relation to any proposed initiatives to change or modify the impugned conduct, His Worship

has stated, in the written submissions filed by counsel during the disposition phase of the proceedings, that he is prepared to offer a formal apology to the Crown Attorneys, police officers and police staff affected by his actions. His Worship did not offer any apology to BB.

- [55] At paragraph 7 of His Worship's Written Submissions Respecting Disposition, the following representation is made, "...the entire process has reinforced for him what he is not entitled to do, how he must act prudently to avoid potential conflicts of interest, and how he should ensure that he avoids situations which may give rise to both apprehension of bias as well as actual bias...".
- [56] In the Reasons for Decision, the Hearing Panel concluded that Justice of the Foulds' actions were motivated by animus towards BB and an effort to advance the criminal prosecution against BB while ensuring that BB was aware of his Worship's involvement and interest in that criminal prosecution. The decision to sign the BB Information was concluded to constitute an abuse of His Worship's judicial office and to demonstrate an improper or ulterior motive. The actions of Justice of the Peace Foulds were viewed as being intentional and of a continuing nature, despite the fact His Worship either knew, or ought to have known, that he was in a clear position of conflict of interest.
- [57] The actions were concluded to go well beyond a display of poor judgment. The conduct was found to constitute an exploitation of his role as a justice of the peace as His Worship used his position to facilitate access to Crown Attorneys who were responsible for the prosecution of the BB matter. The Hearing Panel concluded these actions were intentional and designed to ensure that the prosecution staff knew that His Worship had a continuing interest in that prosecution. His Worship was also concluded to have shared incomplete or misleading information about his relationship with the complainant in the BB case with members of both the Toronto Police Service and the Crown Attorney's office. This was also concluded to be an intentional act designed to conceal His Worship's personal interest in the prosecution of BB in a way that both calculated and deceptive.
- [58] As noted as paragraphs 161 to 162 of the Reasons for Decision, the evidentiary record does not support the contention that Justice of the Peace Foulds truly acknowledges and accepts that he conducted himself inappropriately or, unlike the circumstances discussed in *Re: Douglas, supra*, that he has "learned his lesson". The record confirms that His Worship has in fact failed to fully accept or recognize the seriousness of his conduct or to fully understand why it is inappropriate for a justice of a peace to engage in the behaviours detailed in the *Reasons*.
- [59] Acknowledgement of having "erred in his approach", having "...mishandled certain processes", or the acknowledgement of "...shortcomings on how I approach certain elements of this situation..." underscore the lack of insight into the profound effect that His Worship's acts of misconduct had on BB personally and on the administration of justice generally. His Worship continues to minimize the

seriousness of his misconduct and its impact on those affected by it, as well as its impact on public confidence in the judiciary and the administration of justice.

- [60] Justifications for these actions, on either moral or ethical grounds, based on the vulnerabilities of AA, underscore the lack of insight into the impropriety of his actions and serve as a basis for the Hearing Panel to conclude that His Worship does not appear to sincerely accept, comprehend or acknowledge the impropriety of his conduct.
- [61] The effect of His Worship's misconduct on the integrity of and respect for the judiciary is concluded to be significant. The Hearing Panel concludes that BB had an objectively reasonable basis to believe that his prosecution was being influenced in an improper manner as a consequence of Justice of the Peace Foulds' involvement in matters relating to that prosecution. As noted in the Reasons at paragraph 170-171 and 173, BB's conclusion that "...there was a senior judicial official effectively running interference on my file" was not too far off the mark.
- [62] His Worship's actions, comments and interventions during the criminal process involving BB were concluded to have negatively swayed the perception of other participants in the criminal justice system including several Crown Attorneys and members of the Toronto Police Service. His Worship's conduct is determined to have compromised the independence, impartiality and integrity of the judicial office he holds and to be incompatible with the due execution of the responsibilities of that office.
- [63] As a result of the repeated acts of misconduct, the administration of justice is concluded to have been brought into disrepute. His Worship's misconduct resulted in a loss of confidence on the part of BB in His Worship as a judicial officer and in the creation of a negative impression in the mind of BB and others, and of the criminal justice system in general.
- [64] Each of the incidents of judicial misconduct is concluded to have involved a circumstance where Justice of the Peace Foulds exploited his position in order to advance his own personal interest. These acts are determined to have undermined the confidence of the public in the justice system.
- [65] The evidentiary record establishes that, beginning with the decision to sign the BB Information and concluding with the improper interaction with Assistant Crown Attorney Christine Jenkins, His Worship engaged in a continuing series of acts of judicial misconduct demonstrating an improper ulterior motive. In so doing, His Worship failed to fulfil his ethical responsibilities, as a jurist, to remain independent from the prosecution service and criminal prosecutions generally.
- [66] In its Reasons for Decision, this Panel concluded that Justice of the Peace Foulds, by his actions, intended to influence the prosecutor's perception of the relative merits of the allegations of AA against BB, or alternatively, was endeavouring to

inform the Crown attorney that he, a justice of the peace, had a particular interest in the BB prosecution.

- [67] As detailed in paragraphs 106, 128, 157 and 163 of the Reasons, the Hearing Panel concludes that His Worship intentionally utilized the special relationship that he enjoyed with the police and Crown counsel by virtue of his position as a justice of the peace, a position he has been concluded to have exploited in order to further his own personal interests as those interests related to AA, a person of significance in his life.
- [68] His Worship's decision to advance his personal agenda or interests, in a manner that has been concluded to have compromised and undermined the principles of impartiality, independence and integrity expected of all members of the judiciary, is misconduct that offends the principles that constitute the essence of the ethical conduct expected of a judicial officer.
- [69] In determining the appropriate disposition in this matter, the Hearing Panel has considered the most recent circumstances where recommendations of removal from office has been made, *Barroilhet, Phillips and Massiah*, April 28, 2015.
- [70] In *Massiah* (2016), the Hearing Panel described the sexually oppressive conduct in issue as being "relentless" and having involved a number of complainants over an extended period of time. The absence of any significant mitigating factors was also referenced by the Hearing Panel in concluding that a recommendation for removal from office, in accordance with section 11.2 of the *Act*, was warranted.
- [71] In *Phillips*, the Hearing Panel considered a circumstance in which the justice of the peace had been concluded to have intentionally lied to a police officer regarding the identity of her own daughter. This misrepresentation occurred during the course of an active police investigation and was compounded by a subsequent false denial of the initial misrepresentation.
- [72] Justice of the Peace Phillips had no previous disciplinary history unlike the circumstance considered by the Hearing Panel in *Massiah*.
- [73] *Barroilhet* involved consideration of a veritable litany of misconduct including numerous acts of dishonesty and professional impropriety involving manipulation of the outcome of certain Provincial Offence matters. The circumstances were further aggravated by the fact Justice of the Peace Barroilhet had continued to be actively associated with a paralegal firm in which he was professionally connected prior to his appointment to the bench.
- [74] The factual scenarios reviewed in each of these three cases are submitted by Mr. Sandler as being qualitatively different from the acts under consideration in this disposition hearing. As the *Massiah*, *Phillips* and *Barroilhet* disposition decisions demonstrate, a recommendation for removal from office should only be made in the most compelling circumstances where no other disposition is concluded to be

capable of restoring confidence in the justice of the peace and the administration of justice.

- [75] On reflecting on these submissions, the Hearing Panel acknowledges that Justice of the Peace Foulds had been subject to administrative suspension for more than two years during the course of these disciplinary proceedings. During this period of time, the hearing has attracted wide publicity. This has no doubt occasioned personal embarrassment to His Worship. The proceedings have also exacted a heavy financial toll. Legal costs incurred relate primarily to His Worship's unsuccessful Divisional Court challenge of the referral of the complaint of judicial misconduct to this Hearing Panel.
- [76] The Hearing Panel has considered the various incidents of misconduct of Justice of the Peace Foulds, and has concluded that this is not a situation where these acts could be attributed to inadvertence, indiscretion or an error in judgment. Consideration of the latter circumstances have been construed by other Hearing Panels to result in some allowance being accorded to acts that might be reasonably concluded to have occurred as a consequence of human frailty or fallibility.²⁶

Disposition

- [77] Given the findings of fact supporting the conclusion that Justice of the Peace Foulds actively involved himself in the criminal prosecution of BB in circumstances where he was in a clear conflict of interest as a result of his relationship with AA, the complainant in that criminal prosecution, the Hearing Panel is of the view that the public would not have any confidence in the continuing ability of His Worship to perform the duties that his judicial function entails. A member of the public might well be left to wonder whether their case might be of particular interest to His Worship, an interest sufficient to result in His Worship deciding to personally intervene in the legal process. A person may have a suspicion that the outcome of his or her case may be influenced by His Worship's interest in another party in the case.
- [78] His Worship has not demonstrated a willingness or ability to refrain from misconduct that is reasonably perceived as attempting to influence or interfere with a course of action being undertaken in accordance with the law. Following his undertaking during his first disciplinary hearing in 2013 that he would not repeat such conduct in the future, Justice of the Peace Foulds engaged yet again in misconduct that may be reasonably perceived as an attempt to influence or interfere with the conduct a criminal proceeding.
- [79] As indicated above, throughout this hearing, His Worship failed to demonstrate a meaningful acknowledgment of, and appreciation for, the concerns about his

²⁶ The Honourable Mr. Justice Sydney L. Robins, *Commission of Inquiry re: Provincial Judge Harry J. Williams* (1978), quoted in Hon. J. MacFarland, *Report of Judicial Inquiry re: His Honour Judge W.P. Hryciuk* (1993), p. 55, as cited in paragraphs 61 of Massiah (April 28, 2015).

misconduct and its impact of that conduct on the public's confidence in him as a justice of the peace, and on the confidence in the integrity of the judiciary in general.

- [80] For the foregoing reasons, the Hearing Panel concludes that the incidents of judicial misconduct are so profoundly contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before His Worship, and the confidence of the public in its justice system, would be undermined, rendering Justice of the Peace Foulds incapable of performing the duties of his office. No statutorily available period of suspension without pay or combination of other available remedial sanctions is concluded to be sufficient to rectify this situation.
- [81] For the foregoing reasons, the Hearing Panel concludes that the actions of Justice of the Peace Foulds, as detailed in the Reasons for Decision, have eroded the confidence of the public in His Worship as a judicial officer beyond reclamation. In the process, the integrity of the judiciary and confidence in the administration of justice has also been damaged.
- [82] For the foregoing reasons, the Hearing Panel concludes that the only appropriate sanction that will restore public confidence in the judiciary is a recommendation to the Attorney General, pursuant to section 11.1(10)(g) and 11.2(2)(ii), that His Worship, Justice of the Peace Foulds, be removed from office, on the basis that he has been incapacitated in his ability to perform the duties of his office by reason of conduct that is incompatible with the standard of conduct required to discharge the responsibilities of that office.
- [83] His Worship's misconduct is concluded to have irreparably undermined the principles of impartiality, integrity and independence that are essential to the performance of the judicial function so as to render His Worship incapable of executing the duties of judicial office.

Compensation for Legal Costs Incurred by the Hearing

- [84] Justice of the Peace Foulds seeks a recommendation to the Attorney General that he should be compensated for legal costs incurred by the hearing in the total amount of \$49,813.01. This sum includes \$43,250.00 in fees, HST and disbursements. These expenses were incurred between August 4, 2016 through to March 23, 2018.
- [85] Written submissions in relation to the issue of costs were received from both Mr. Fenton and Mr. Sandler. Presenting Counsel took no position on the issue of compensation.
- [86] In furtherance of this request, Mr. Sandler submitted that Justice of the Peace Foulds had been largely unrepresented throughout the course of the disciplinary hearing. Reference was also made to the fact that His Worship had incurred legal expenses and disbursements totalling almost \$100,000.00 in his unsuccessful effort in the Divisional Court to challenge the referral of the misconduct allegations

by the Complaints Committee of the Justice of the Peace Review Council to the Hearing Panel.

- [87] The Bill of Costs is submitted as being reasonable. Mr. Sandler argues that the costs account for only about a third of the total of the legal expenses incurred by Justice of the Peace Foulds, given that he incurred additional costs at the Divisional Court in relation to this disciplinary proceeding.
- [88] In considering this costs request, guidance is provided by the Divisional Court decision in *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 (Div. Ct.) and Reasons for Decision – Compensation for Legal Costs, *Re: Keast*, Ontario Judicial Council, February 6, 2018. The principles in these two decisions have also been applied by the Justices of the Peace Review Council in *Welsh* and in the *Reasons for Decision on Reconsideration of the Issue of Compensation for Legal Costs, in the Matter of a Hearing under Section 11.1 of the Justices of the Peace Act*, R.S.O. 1990, c. J.4, *Concerning a Complaint About the Conduct of Justice of the Peace, Errol Massiah*, March 29, 2018.
- [89] The following principles arise from consideration of the Divisional Court ruling in *Massiah* (paragraphs 48-57):
- (i) A finding of judicial misconduct does not lead to the presumption that an order of compensation for costs will not be warranted;
 - (ii) Administrative bodies involved in addressing complaints involving judicial office holders should start from the premise that it is always in the best interests of the administration of justice for those subject to such complaints to be represented by counsel;
 - (iii) The awarding of costs helps ensure that the process is “...fair, full and complete”; and,
 - (iv) Costs, in these circumstances, should usually be borne by the public as it is the interests of the public that are primarily advanced through the judicial complaint process.
- [90] In assessing the request for costs, the Hearing Panel is to consider the following factors as detailed in paragraph 57 of the *Massiah* judgment in determining whether to make a recommendation for compensation, and if so, what that amount should be:
- (i) A decision on costs must be made separately in each case on consideration of the particular circumstances of the case when viewed within the context of the objective of the disciplinary process;
 - (ii) The nature of the misconduct and its connection to the judicial function is to be considered;

- (iii) Conduct more directly related to the judicial function may be more deserving of compensation than conduct that is less directly related;
- (iv) Conduct that is obviously inappropriate will be less deserving of compensation for costs;
- (v) Multiple incidents of misconduct may be less deserving of compensation than a single incident of misconduct;
- (vi) Repeated incidents of misconduct may be less deserving of a costs recommendation than one isolated incident; and,
- (vii) If a recommendation for costs is to be made, the recommendation may not be warranted for steps that are concluded to have been “unmeritorious or unnecessary”.

[91] As summarized in paragraph [26] of the *Keast* cost decision, compensation for legal costs, as directed by the *Massiah* cost directives, in cases involving “successful” complaints, is not automatic. Compensation of costs is to be made following due deliberation of the circumstances of the particular case as “viewed within the context of the objective of the process.” The objective of the process is to preserve and restore confidence in the judiciary in general.

Analysis

- [92] The Hearing Panel’s authority to award compensation for legal costs under section 11.1(17) of the *Act* is limited to the costs incurred in connection with the hearing over which the Panel is presiding. This authority does not extend to consideration of legal costs resulting from steps in another court proceeding.
- [93] Section 11.1(17) must be considered within the context of the provisions of the *Justices of the Peace Act* that govern the complaints process. The “hearing” is the proceeding ordered under section 11(15)(c) by a complaints committee. The hearing is conducted in accordance with section 11.1 which is titled “Hearings”. Section 11.1(17) does not authorize the panel to consider costs incurred in connection with proceedings other than those directly relating to “the Hearing”.
- [94] Mr. Sandler’s characterization of the \$49,813.01 account for legal services as being “reasonable” based on the fact the account reflects approximately one-third of the total costs (inclusive of disbursements and taxes) incurred by Justice of the Peace Foulds, is concluded to be a factor of no significance in the determination of the assessment of the costs issue. Mr. Sandler’s bill is the only account for which compensation is being sought and the only legal expense that falls within the purview of the Hearing Panel by virtue of section 11.1(17) of the *Act*.

- [95] Turning now to consider the application of the factors referenced by Justice Nordheimer in *Massiah*, the Hearing Panel notes that if misconduct is more directly related to the judicial function, it may be more deserving of a compensation order than conduct that is less directly related. In contrast, if the misconduct is so obvious that any person would have to know it was inappropriate conduct, the justice of the peace will be viewed as being less deserving of a compensation decision. The misconduct in issue in this Hearing was not of one type or variety. It consisted of the intentional performance of several acts directly related to the exercise or the functions of a justice of the peace in circumstances where His Worship was in a position of conflict of interest. The misconduct also included incidents where he engaged in inappropriate communications with various criminal justice officials, including members of the Crown Attorney's Office and both lay and enlisted members of the Toronto Police Service. His Worship has been determined to have inappropriately attempted to assert influence in a matter before the court.
- [96] The Hearing Panel has concluded that the incidents of judicial misconduct in issue in this proceeding took place both inside and outside the courtroom. Many aspects of the misconduct that the Hearing Panel found to have occurred were acts that took place during the exercise of Justice of the Peace Foulds judicial authority with the misconduct concluded to have essentially blurred the lines between His Worship's judicial and personal life.
- [97] The misconduct in issue is concluded to have occurred in circumstances where the fact His Worship was in a position of conflict of interest was evident. The nature of the conduct was such that any justice of the peace would have assessed it as being inappropriate. Based on His Worship's long record of service and previous disciplinary experience, His Worship must have known that his conduct was in conflict with the standard of conduct expected by the public of those appointed to this position.
- [98] The misconduct was concluded to demonstrate a bias toward BB, and an appearance of bias that is the antithesis of the type of behaviour expected to characterize the conduct of a judicial officer. Anyone in the same position would therefore be reasonably expected to take active steps to ensure there was no compromise to the criminal justice process or the appearance of justice as a result of a personal connection to a matter before the court, particularly a court in which the judicial officer routinely presides. Overall, the misconduct is serious and any person would have known that it was inappropriate. The consequences of His Worship's misconduct were significant.
- [99] More than one incident of misconduct has been determined to have occurred. There was a pattern of misconduct that extended from May 21, 2014, when His Worship signed the original Information against BB, to late April 2015 when he approached Ms. Jenkins and made reference to the BB prosecution.
- [100] This hearing was a second instance resulting in a finding of judicial misconduct against His Worship. The seriousness of His Worship's actions were compounded

by the fact that Justice of the Peace Foulds was an experienced judicial officer who had only recently been subject to a previous disciplinary proceeding in 2013 following which he agreed not to repeat such conduct in the future. Public funds paid for that disciplinary hearing and His Worship received \$3,000 for his legal costs. In that proceeding, His Worship acknowledged that he was mindful of the potential harm that could arise in situations where matters of personal concern were permitted to compromise the ethical standards expected of a judicial officer and the potential compromise to public confidence and the integrity and impartiality of the judiciary and the administration of justice that might be reasonable anticipated to ensue as a consequence.

- [101] Mr. Sandler's bill includes services provided during the period starting on August 4, 2016. Mr. Sandler attended the set-date on September 28, 2016. He indicated that he was not properly retained at that time but would be making submissions on His Worship's behalf. Mr. Sandler made submissions on further motions on January 20, 2017 although he was still not yet retained. The Hearing Panel provided its decision on the motions on February 1, 2017, refusing to adjourn the hearing. The Hearing Panel agreed to delay the hearing until October of 2017 in order to allow His Worship to get his financial affairs in order so that he might be in a financial position that would enable him to retain counsel. On June 20, 2017, His Worship raised motions that were not filed properly. He then proceeded to re-argue some of the same issues that had already been decided by the Panel in February of 2017.
- [102] His Worship was self-represented through the stage of the hearing when evidence was called, commenced October 10, 2017. Presenting Counsel closed his case on October 16, 2017. His Worship argued a meritless motion for a non-suit and sought reconsideration of the entire hearing process after the findings of misconduct were made by the Panel.
- [103] Mr. Sandler was subsequently retained to make submissions in relation to a medical report submitted in evidence by His Worship, submissions on the evidence and submissions on disposition. The Hearing Panel acknowledges that the participation of Mr. Sandler and Ms. Ross as counsel during aspects of this proceeding served to expedite those phases of the Hearing and to delineate and define the issues in dispute. Counsel's participation during the disposition phase of the hearing was of particular assistance to the Hearing Panel.
- [104] Section 11.1(18) of the *Act* requires that any compensation recommendation under subsection (17) be based on the rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services. We have been advised by counsel, and accept, that the account submitted by Justice of the Peace Foulds' counsel references the applicable rate and take no issue with the services provided or the fees related to those services.
- [105] Accordingly, the Hearing Panel concludes that an award of compensation is warranted for legal costs on application of the criteria referenced by the Divisional

Court in *Massiah*. The public interest is concluded to have been advanced, and the best interests of the administration of justice served, by Justice of the Peace Foulds having had the benefit, even on an intermittent basis, of the services of experienced legal counsel.

[106] A balancing of the *Massiah* factors leads the Hearing Panel to conclude that partial compensation for legal expenses incurred is warranted as the majority of the factors referenced by Justice Nordheimer in the *Massiah* costs decision mitigate against full or even substantial indemnity of His Worship's legal costs.

[107] Factors mitigating against full compensation include the following:

- (i) The fact that His Worship engaged in a number of different forms of judicial misconduct;
- (ii) The fact the misconduct was not entirely related to His Worship's judicial function;
- (iii) The fact these acts occurred in circumstances where His Worship ought to have known that he was in a position of conflict of interest and that the acts were accordingly inappropriate;
- (iv) His Worship's prior disciplinary history, a factor that serves to make His Worship less deserving of compensation for legal costs associated with a subsequent misconduct hearing.

[108] The factors that are capable of supporting a claim for partial compensation of the legal expenses incurred can be captured on a much more abbreviated list and are summarized in the following:

- (i) As indicated above, the helpful assistance of Mr. Sandler and Ms. Ross facilitated the hearing process, and contributed to a full, fair and complete hearing.

[109] The balancing of the aforementioned factors leads the Hearing Panel to recommend that partial compensation in the amount of \$20,000.00 be recommended as compensation for legal costs incurred by His Worship.

[110] In reaching this determination, the Hearing Panel has endeavoured to balance the principles delineated in the *Massiah* costs judgment, while recognizing that it is in the best interests of the administration of justice and the interest of the public, that those subject to such complaints be represented by counsel.

Dated at Toronto this 27 day of April, 2018

HEARING PANEL:

The Honourable Justice Peter Tetley, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Ms. Jenny Gumbs, Community Member

APPENDIX "A"

PARTICULARS OF THE COMPLAINT

The particulars of the complaint regarding the conduct of His Worship are set out below:

1. Justices of the peace are expected to be, and be perceived as, independent and autonomous from other offices and participants in the justice system and the administration of justice. While justices of the peace are people with lives outside of court, there are important boundaries between personal life and the duties of judicial office that justices of the peace are expected to respect.

The justices of the peace of the Ontario Court of Justice recognize their duty to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence, impartiality and integrity of their judicial office and to preserve the faith and trust that society places in the men and women who have agreed to accept the responsibilities of judicial office. A justice of the peace must personally observe those standards so that the integrity, independence and impartiality of the judiciary may be preserved.

The conduct of a justice of the peace is an important and essential element that promotes public confidence in the judiciary. Public confidence is impacted by negative perceptions about the conduct of judicial officers. Justice must not only be done, it must be seen to be done. The appearance that a justice of the peace is not independent, impartial or acting with integrity casts disrepute upon the judiciary.

Litigants have a right to expect that their cases will be processed and treated in accordance with the laws and standard procedures that govern the police, the Crown Attorneys and judicial officers each who have defined roles. It could be an abuse of judicial power, or a perceived abuse of judicial power, if a justice of the peace attempts to use his or her judicial power or office, or is perceived to use that judicial power or office, to advance personal interests or the interests of another party. Conflicts of interest, both actual and perceived, must be assiduously avoided.

Abuse of judicial office can include: intervening in the adversary process of the administration of justice; acting in a manner that suggests that the justice of the peace has or seeks a special relationship with the police or Crown Attorney, or; acting in a conflict of interest. Such intervention by a justice of the peace can give rise to actual or perceived special treatment on the part of the public, the police or Crown Attorneys. Such intervention by a justice of the peace could also be perceived as a justice of the peace attempting to use his position to influence judicial proceedings.

2. Between the spring of 2014 and the summer of 2015, His Worship acted in bad faith or with an improper motive, or in a manner that could reasonably be perceived as acting in bad faith or with an improper motive, and compromised the

independence, impartiality and integrity of the judicial office of the justice of the peace, by actively inserting himself into the criminal investigation and prosecution of Mr. BB by: issuing process (an *Information*) against Mr. BB; issuing a *subpoena* for the complainant Ms. AA (the “Complainant”) at a time when he was engaged in a romantic relationship with her; and engaging in inappropriate communications with the police and officers of the Crown who had carriage of the BB prosecution, when His Worship was in a clear conflict of interest thereby constituting an abuse of judicial office.

3. Specifically, His Worship acted in bad faith or with an improper motive, or in a manner that could reasonably be perceived as acting in bad faith or with an improper motive, and compromised the independence, impartiality and integrity of the judicial office of the justice of the peace, when:
 - a. on May 21, 2014 His Worship received and signed the *Information* alleging a criminal charge against Mr. BB in circumstances where His Worship was a close friend or romantic partner of the Complainant and was a potential witness in respect of the proceedings against Mr. BB, thereby constituting an abuse of judicial office;
 - b. on May 21, 2014, in circumstances where His Worship had personal involvement with the Complainant and Mr. BB, His Worship did not keep an audio recording when he received and signed the *Information* against Mr. BB, thereby constituting an abuse of judicial office;
 - c. on March 2, 2015 His Worship received and signed a *subpoena* for the Complainant to attend at Mr. BB’s trial in circumstances where His Worship was the romantic partner and co-habitant of the Complainant, as well as a potential witness in respect of the proceedings, thereby constituting an abuse of judicial office;
 - d. on March 2, 2015 His Worship made attempts to be present when the Complainant was to be served with the *subpoena* or to receive the subpoena himself on her behalf. These attempts were made even though His Worship improperly issued the *subpoena*, was the romantic partner and co-habitant of the Complainant, and was a potential witness in respect of the proceedings against Mr. BB, thereby constituting an abuse of judicial office;
 - e. between June 13, 2014 and October 27, 2014, and again in the summer of 2015, His Worship initiated and continued contact with Crown counsel having carriage of the prosecution of Mr. BB, even though he knew he had a serious conflict of interest in the case and was directly told so by Crown counsel, thereby constituting an abuse of judicial office;

- f. throughout the time frame referred to above, His Worship improperly repeatedly intervened in the adversary process and acted in a manner that suggested that His Worship had, or was seeking to exploit, a special relationship he had as a judicial officer with the police and Crown counsel, thereby constituting an abuse of judicial office; and
- g. on or before April 16, 2015, despite the Open Courts Principle, His Worship attempted to obtain an order seeking a non-publication and sealing order with respect to Mr. BB's application for production of third-party records to obtain His Worship's personal emails relating to His Worship's involvement in the investigation and prosecution of Mr. BB, thereby constituting an abuse of judicial office.

Personal Involvement in Investigation of Mr. BB

4. On February 19, 2014, His Worship contacted the Justice Sector Security Office alleging [delete: with respect to] troubling comments made by Mr. BB to the Complainant, then a friend of His Worship. Mr. BB and the Complainant had recently ended a romantic relationship.
5. On March 15, 2014, the Complainant telephoned the Toronto Police Service ("TPS") to report that her fur coat had been stolen. His Worship was present with the Complainant at the time of the report. The Complainant identified His Worship as her "partner". The attending police officer recognized His Worship as a justice of the peace. His Worship requested that he not to be named in the TPS Occurrence Report.
6. On May 18, 2014, His Worship attended with the Complainant at 53 Division, a police station within the jurisdiction in which he presides and was identified as a justice of the peace. The Complainant attended at the police station to report that her former partner, Mr. BB, had allegedly assaulted her. His Worship told members of the TPS that he was attending with the Complainant to assist her with the report and that he was not in a relationship with Ms. AA. His Worship provided context to the police, information regarding the condition of the Complainant, the reason for her attendance and remained at the station while the Complainant made a statement. His Worship also communicated to members of the TPS that it was the Complainant's request that Mr. BB not be kept overnight for a bail hearing and that she would be amenable to his release from the station provided that he be released on a condition not to have any contact with the Complainant.
7. On May 19, 2014, His Worship attended at a hospital with the Complainant and witnessed her sign a consent form for medical information in relation to her alleged injuries relating to the criminal charges against Mr. BB. On that date, His Worship also initiated contact with the police to report having seen Mr. BB at a restaurant.

Issuing Judicial Process Against Mr. BB

8. On May 21, 2014, a member of the TPS attended before His Worship in Intake Court at the College Park Courthouse to swear an *Information* alleging Mr. BB assaulted the Complainant. His Worship did not disclose the nature of his relationship with the Complainant and/or Mr. BB to the officer. His Worship signed and confirmed process of the *Information*, acting in a clear conflict of interest.

Failure to Digitally Audio Record Intake Court Proceedings

9. On May 21, 2014, in circumstances where His Worship had personal involvement with the Complainant and Mr. BB, he did not turn on the digital audio recording system to ensure that there was a proper record in Intake Court of the attendance of the officer before him who was seeking to swear the *Information* and have process confirmed.

Contact with the Assistant Crown Attorney

10. On June 13, 2014, His Worship attended at the Crown Attorney's office at the College Park Courthouse and spoke directly to Crown counsel regarding the BB prosecution. His Worship asked that he not be assigned to a court where Mr. BB's case might be heard because His Worship knew the Complainant. His Worship then advised Crown counsel that he had signed the *Information* alleging Mr. BB had assaulted the Complainant. During the conversation with Crown counsel, His Worship made a derogatory comment regarding Mr. BB suggesting that the relationship between Mr. BB and the complainant had been "abusive".
11. As a result of His Worship's disclosure, Crown counsel took immediate steps to have a replacement *Information* sworn to before a different justice of the peace as there were concerns about His Worship having issued the original *Information* while in a conflict of interest, thereby compromising the integrity and impartiality of the proceedings.
12. His Worship was aware that he remained in a conflict of interest due to his close relationship with the Complainant and the fact that he could be a witness. Notwithstanding that, on or about September 8 or 9, 2014, His Worship again contacted the same Crown counsel and sought legal advice as to whether His Worship should provide a witness statement to the police.
13. Again His Worship was fully aware that he remained in a conflict of interest due to his close relationship with the Complainant and the fact that he could be a witness. Notwithstanding that on October 23, 2014, His Worship emailed the same Crown counsel requesting legal advice about His Worship's involvement in the BB matter.

Issuing Subpoena and Attempt to Arrange Special Treatment for Ms. AA

14. On March 2, 2015, a civilian member of the TPS attended before His Worship to have a *subpoena* issued for the Complainant to attend court for Mr. BB's trial. His Worship signed the subpoena despite being aware that he remained in a conflict of interest due to his intimate relationship with the Complainant and the fact that he could be a witness, and even though the *Information* he improperly signed on May 21, 2014 had to be withdrawn and replaced.
15. Despite the above, His Worship then requested that he be advised when the *subpoena* was to be served so that he may be present. His Worship then contacted the officer in charge of the investigation and suggested that His Worship take the *subpoena* to the Complainant.

Attempt to Obtain Non-Publication Order and Order Sealing the Record

16. In the course of his defence, Mr. BB brought an application for third party records to obtain production of His Worship's personal emails with respect to His Worship's involvement in the investigation and the prosecution of Mr. BB. Despite the Open Courts Principle, sometime on or before April 16, 2015, His Worship attempted to obtain an order seeking a non-publication and sealing order with respect to those materials relevant to the third party records motion. The motion was withdrawn on April 16, 2015 following the decision by Crown counsel to enter a stay of the proceedings as against Mr. BB.

Approaching Crown Counsel to Discuss the BB Matter after It was Concluded

17. As stated, His Worship was aware that he remained in a conflict of interest due to his close relationship with the Complainant. Nevertheless in the summer of 2015, after Mr. BB's charges were withdrawn, His Worship approached another Crown counsel, who at one time had carriage of the BB matter, and stated, "Are we good?", causing Crown counsel to feel uncomfortable and take steps to avoid engaging with His Worship on the subject.

Effects of His Worship's Conduct

18. Further, His Worship acted in a manner to obfuscate his personal interest in the prosecution of Mr. BB in a manner that was calculated and deceptive. His Worship only shared limited information at different stages to make it appear as though he was being up front when, in fact, he was not being completely honest or forthcoming. His Worship's actions, comments and interventions during the criminal process led to:
 - a. Inappropriate interactions with members of the TPS and individual Assistant Crown Attorneys;

- b. the accrual of significant legal fees on the part Mr. BB;
 - c. the perception by different participants in the criminal justice system, including Crown counsel and TPS staff, that His Worship's conduct compromised the independence, impartiality and integrity of the judicial office of the justice of the peace;
 - c. over-taxing public resources by increasing the workload on the office of Crown counsel due to the need to respond to Mr. BB's allegations of improper involvement by His Worship, including responding to additional disclosure requests as well as requests for third party records related to His Worship; and
 - d. causing Mr. BB to lose confidence in His Worship as a judicial officer and to have a negative impression of the justice system.
19. Given His Worship's feelings about the Complainant, his strongly held views about Mr. BB, and the remedial lessons provided through His Worship's judicial disciplinary hearing in 2013, [wherein His Worship admitted engaging in judicial misconduct by interfering in an investigation carried out by Toronto Public Health inspectors into a restaurant owned by His Worship's friend], His Worship acted in bad faith or with an improper motive, or in a manner that could reasonably give rise to a perception that he acted in bad faith or with an improper motive, and compromised the independence, impartiality and integrity of the judicial office of the justice of the peace, when he signed the *Information*, later signed the *subpoena* for the Complainant and when he initiated and then continued improper contact with the TPS and Crown counsel, thereby abusing the office of the justice of the peace.
20. Further, His Worship demonstrated a pattern of inappropriate conduct that undermined the independence, impartiality and integrity of his judicial office, and/or His Worship gave the appearance that he failed to act with independence, impartiality and integrity, in relation to the allegations made by the Complainant against Mr. BB.
21. His Worship's actions were, or could be perceived by a reasonable fair-minded person as an abuse of the office of the justice of the peace.
22. Individually and cumulatively, His Worship's actions in relation to the criminal process involving the Complainant and/or Mr. BB, as summarized above constitute judicial misconduct.
23. The act or acts as set out in paragraphs 2 to 20, inclusive, constitute judicial misconduct that warrants a disposition under section 11.1(10) of the *Justices of the Peace Act*.