

# **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**

#### **REASONS FOR DECISION**

Mr. Scott K. Fenton  
Ms. Amy Ohler  
Presenting Counsel

Mr. Mark Sandler  
Ms. Amanda Ross  
Counsel for His Worship  
Tom Foulds

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## **REASONS FOR DECISION**

### **Part I - Background**

#### **Ban on Publication**

- [1] As a result of a complaint made to the Justice of the Peace Review Council, a complaints committee of the Council directed that a formal hearing be held pursuant to section 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 the Addendum to these Reasons).
- [2] The complaint arises from Justice of the Peace Foulds’ involvement in a criminal prosecution in circumstances where His Worship was a close friend and later a romantic partner of the complainant. The Hearing Panel has ordered that the names of the complainant in the criminal matter, which resulted in no findings, and the accused in that process, shall not be published, nor shall any information that might identify them be published.
- [3] The initials AA were used to describe the person who was the complainant in the criminal process. The initials BB were used to describe the person who was the accused in the criminal matter and the complainant in this judicial disciplinary process.
- [4] Those initials are employed for identification purposes in the referenced Notice of Hearing and will be used throughout these reasons.

#### **History of the Matter**

- [5] On August 2, 2016, the Registrar communicated to His Worship that the complaints committee of the Review Council had ordered a hearing. A Notice of Hearing was served on him on September 2, 2016. The Notice of Hearing specified a first appearance date, before the Hearing Panel of the Review Council, of September 28, 2016.

- [6] On September 28, 2016, Justice of the Peace Foulds appeared in person. Mr. Mark Sandler and Ms. Amanda Ross attended with him. Mr. Sandler informed the Panel that His Worship was in the process of retaining his firm as counsel in relation to the hearing.
- [7] A pre-hearing conference was ordered and scheduled for January of 2017. As Mr. Sandler was not retained at that time, the conference did not result in the narrowing of any of the matters in issue.
- [8] On January 20, 2017, Mr. Sandler appeared on the basis of a limited retainer to argue motions on behalf of His Worship. Mr. Sandler sought a temporary stay of the hearing or to have it adjourned *sine die* as His Worship had filed an application in the Divisional Court for review of the complaints committee's decision to order the hearing and a request to stay the Review Committee Hearing. On February 14, 2017, that request was denied.
- [9] During this time period, the Hearing Panel were mindful that the allegations in the Notice of Hearing are serious and that there is a strong public interest in having the evidence relating to the allegations heard in a timely manner. We were also sensitive to the expenditure of public funds. His Worship is suspended from work and receiving his full salary. This Panel decided that unless an order were issued by the Divisional Court that prevented the hearing from proceeding, in order to preserve public confidence in this complaints process, it was imperative that our legislated mandate under the *Act* continue and that all necessary steps be in place to facilitate the hearing of evidence in relation to this complaint.
- [10] Mr. Sandler informed the Panel on that date that His Worship contemplated that he would not likely be able to retain counsel's services until approximately September of 2017. Mr. Sandler advised that he might not be available until February of 2018 due to other previously scheduled court commitments. As a consequence of these considerations the Hearing Panel was faced with a request to provide His Worship with more than a year to retain counsel from the time when

he became aware of the hearing being ordered, and a request to delay the hearing of evidence even longer to accommodate the availability of counsel of choice, a counsel who had not yet been retained.

- [11] On February 14, 2017, hearing dates were scheduled for three weeks in October. That timeframe afforded His Worship more than a year to get his financial affairs in order and to retain Mr. Sandler as counsel. It was anticipated that Mr. Sandler could adjust his pre-existing trial schedule to accommodate all or some of the proposed hearing dates. Alternatively, Justice of the Peace Foulds was provided with sufficient time to retain and instruct other counsel. In that way, the complainant and the public had the certainty of knowing that, subject to any decision that may be issued in the interim by the Divisional Court, the evidence in relation to the allegations set out in the Notice of Hearing would be presented to the Panel in a public forum without undue delay. Decisions on scheduling were made with a view to preserving public confidence in the judiciary, the administration of justice and this complaints process, pending the final disposition of the complaint, while being respectful of His Worship's expressed intention to be represented by legal counsel.
- [12] The Hearing Panel adjourned the matter from February 14, 2017 to June 20, 2017 as an interim date to allow for an update as to His Worship's continuing efforts to retain legal counsel and the status of the Divisional Court review.
- [13] On June 20, 2017, His Worship appeared without counsel and requested reconsideration of his January 20, 2017 motion in which he had sought a temporary stay/adjournment of the disciplinary hearing. The Hearing Panel re-affirmed the previously issued scheduling directive and confirmed that the hearing would proceed on October 10, 2017 as previously contemplated. On June 20<sup>th</sup>, His Worship filed four motions, on short notice. The Panel provided direction to His Worship to enable the issues raised to be addressed in a timely, cost-effective and transparent manner.

- [14] On October 3, 2017,<sup>1</sup> the Divisional Court dismissed His Worship's motion for a stay of the hearing. A cross-motion brought by the Review Council was granted and the Court quashed His Worship's application for judicial review on the basis of prematurity.
- [15] The hearing proceeded on October 10, 2017. Evidence was called on October 10, 11, 12, 13, and 16. His Worship appeared without counsel and cross-examined witnesses himself. On October 17<sup>th</sup>, His Worship brought a motion for a non-suit. One allegation was dismissed at that time, as set out in this decision. The non-suit motion was otherwise noted dismissed.
- [16] His Worship sought an adjournment in order to file medical evidence. The matter was adjourned to October 30<sup>th</sup> and again until November 7<sup>th</sup>. On November 7, 2017, Mr. Sandler appeared on behalf of His Worship and a medical report was filed as the evidence put forward by His Worship. Justice of the Peace Foulds chose not to give testimony or call other witnesses with counsel agreeing that his written response, filed as Exhibit 8, be accorded full evidentiary value.
- [17] On November 30, 2017, submissions on the evidence and the law were heard from Mr. Fenton and Mr. Sandler. Mr. Sandler was retained by His Worship to make those submissions on his behalf. Written submissions were also filed.

### **Role of the Hearing Panel**

- [18] The Hearing Panel is to determine whether the evidence presented in the hearing does or does not result in a finding of judicial misconduct such that the complaint should be dismissed or one or more of the range of dispositions set out under section 11.1 (10) of the *Act* are required in order to restore public confidence in the judicial officer and in the judiciary.

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<sup>1</sup> *Foulds v. Justices of the Peace Review Council*, 2017 ONSC 5807.

### **Acknowledgements by His Worship**

[19] His Worship acknowledges having personally engaged in the following activities during the course of the criminal prosecution of BB:

- (i) The swearing of the original Information against BB and the confirmation of process in relation to charges of criminal harassment and assault against AA;
- (ii) Repeated incidents of contact and communication with various police personnel involved in matters related to the prosecution of BB and communication with Crown counsel involved in the prosecution of the criminal charges involving BB; and,
- (iii) The receipt and signing of a subpoena for AA to attend at BB's trial and attempts to influence the manner in which the subpoena was to be served on AA.

### **Position of Presenting Counsel**

[20] As a consequence of these actions, Presenting Counsel, Mr. Fenton, submits that it would be open to the Hearing Panel to conclude that Justice of the Peace Foulds seriously compromised the independence, impartiality and integrity of his judicial office by one or more of the following means:

- (i) Acting in a position of conflict of interest;
- (ii) Actively inserting himself into the criminal investigation and prosecution of BB, misusing his position and judicial office;
- (iii) Engaging in inappropriate communications with members of the Toronto Police Service ("TPS") and officers of the Crown; and,
- (iv) Seeking special treatment from members of the TPS and officers of the Crown, to assist his friend AA.

## **Respondent's Position**

- [21] On behalf of the respondent, Mr. Sandler takes the position that the evidence is insufficient to establish judicial misconduct even if the principles of independence, impartiality and integrity of Justice of the Peace Foulds' judicial office are concluded to have been compromised.
- [22] The conduct is acknowledged by Responding Counsel to be "inappropriate" or to reveal "the exercise of poor or even extremely poor judgment" but not to amount to judicial misconduct.
- [23] The conduct may even be viewed as "unjustified" or to "have arisen from circumstances of conflict of interest or to give rise to a perceived conflict of interest or bias, or a perception of bias" but not to constitute incidents of judicial misconduct.
- [24] In assessing the acknowledged actions of his client, Mr. Sandler references the absence of any animus, bad faith, improper motive or intention to influence the criminal proceedings against BB.
- [25] In his May 18, 2016, substantive response to the complaint (entered as Exhibit 8 in this proceeding), Justice of the Peace Foulds acknowledges the following:
- (i) "In hindsight, I acknowledge that the optics, if not the reality, of my having signed this Information were problematic and I ought properly have had a different justice of the peace sign it."
  - (ii) "I very quickly realized after signing the Information that my doing so was problematic. I brought my involvement in the signing of the Information and issuance of process to the attention of the Crown Attorney at the first opportunity available."
  - (iii) "Erring" in his approach to the criminal proceedings between AA and BB;

- (iv) “Mishandling” certain processes, including the confirmation of process and signing of the original information and the issuance of a subpoena to AA, given his “nexus” to AA, while referencing these acts being both “pro-forma” or “administrative” in nature; and,
- (v) The “problematic optics” arising from the signing of the Information and his failure to ensure that resulting perceptions were “not skewed” as a consequence.

[26] These actions are submitted as having been motivated by Justice of the Peace Foulds’ concern for the health and welfare of AA, a friend who would subsequently become his intimate partner or spouse while the prosecution of BB continued. His Worship’s concern to protect AA and to preserve the deteriorating state of her mental and physical health are submitted as factors that illuminate the motivation for the referenced actions and serve to prevent those actions from crossing the threshold of judicial misconduct.

## **Part II – Factual Review**

### **Chronology of Significant Events**

November 2012	Justice of the Peace Foulds meets AA for the first time after they have “shared a social circle for many years before formally meeting” (Exhibit 8, p.3).
Early 2013	Justice of the Peace Foulds in contact with AA again – “We became good friends after my return” (referencing His Worship’s recent return from a European excursion). (Exhibit 8, p. 4).
September 2013	Justice of the Peace Foulds becomes aware that AA had begun to cohabit with BB (Exhibit 8, p. 4).
Late November 2013	AA confides in Justice of the Peace Foulds that she had been assaulted by BB on several previous occasions in 2009 through 2010 (Exhibit 8, pp. 3-4).

December 2013	AA and BB are reported to have separated after what is described as an “on-again – off-again” relationship (Exhibit 8, p. 5).
Mid-December 2013	Justice of the Peace Foulds acknowledges assisting AA to move into (or back into) her residence, after she had been apparently residing with BB in his home (Exhibit 8, p. 5).
Early 2014	Justice of the Peace Foulds separates from his spouse (Exhibit 8, p. 7).
February 19, 2014	Justice of the Peace Foulds contacts the Justice Sector Security Office to report concerns that His Worship had arising from inquiries that BB had conveyed to AA in relation to the ownership of an automobile that was parked in front of AA’s apartment. The automobile was owned by Justice of the Peace Foulds’ son. The purported mention by BB of an intention to rely on a police contact to check the registration of the automobile was found by His Worship to be troubling. (Exhibit 8, p. 6).
March 7, 2014	Justice of the Peace Foulds and AA attend a party at P.J. O’Brien’s Irish Pub during which AA’s coat goes missing. Justice of the Peace Foulds describes AA at this time as being “simply...my friend” (Exhibit 8, p. 7).
March 15, 2014	Detective Craig McFarquhar of the TPS attends AA’s home in relation to the investigation of the missing coat. Justice of the Peace Foulds is present. His Worship advises “...I was certainly interested in Ms. AA at that stage and had hopes that our relationship might evolve beyond friendship.” Justice of the Peace Foulds advises in his reply material that it was a “...matter of happenstance” that he was at AA’s home when the police arrived as he was en-route elsewhere. His Worship asks that he not be named by the attending officer in the theft report (Exhibit 8, p. 8).
March 25, 2014	Reported attempt by BB to contact AA by a LinkedIn inquiry of Justice of the Peace Foulds’ profile. Justice of the Peace Foulds ignored the inquiry as he felt it was an attempt by BB to monitor AA’s affiliations. During cross-examination, BB advises that he did not recall making an

attempt to access Justice of the Peace Foulds' LinkedIn account (Exhibit 8, p. 6).

May 18, 2014

Justice of the Peace Foulds receives a call from AA advising that she has been assaulted by BB and was injured. His Worship attends at AA's residence and escorts her to 53 Division where a police report of the alleged assault is filed. Justice of the Peace Foulds is previously known to the investigating officer assigned to the complaint, Detective Wynia. His Worship recollects advising Detective Wynia that he is a Justice of the Peace but is there in the capacity of a friend of AA. Justice of the Peace Foulds interacts with the intake officer P.C. Ali and with Detective Wynia. In parting, His Worship informs Detective Wynia that AA does not wish BB to be detained. In his response, His Worship confirms that he observes a scrape to AA's face and an apparent injury to her hip which he believes had been occasioned as a consequence of her assault by BB (Exhibit 8, pp. 9-12).

Later on May 18, 2014

BB is arrested and charged with the offences of assault and criminal harassment.

May 19, 2014

Justice of the Peace Foulds attends with AA at St. Michael's Hospital emergency department and witnesses the TPS medical release form that AA signed. At this stage, Justice of the Peace Foulds acknowledges that he and AA were "good friends" (Exhibit 8, p. 12).

Later on May 19, 2014

AA and Justice of the Peace Foulds enter a restaurant and observe BB to be present (Exhibit 8, p. 13). Both AA and Justice of the Peace Foulds falsely assume that BB had not yet been arrested. They expected, if the arrest had occurred, that BB would likely be in custody. AA uses Justice of the Peace Foulds' cell phone to call Detective Wynia to report her encounter with BB.

May 21, 2014

Justice of the Peace Foulds receives an Information against BB for the charges of assault and criminal harassment and confirms process that formalizes the criminal charges against BB.

June 13, 2014

Justice of the Peace Foulds attends the office of Deputy Crown Attorney Michael Callaghan at the College Park Courthouse, where they both work, and advises that he should not be assigned to any domestic assault cases

because of a potential conflict of interest that has arisen. In parting, His Worship tells Deputy Crown Attorney Callaghan that he has sworn an Information in which he has direct knowledge of the parties. At the conclusion of the meeting His Worship is recalled by Deputy Crown Attorney Callaghan to advise: "Oh, and there's one more thing. I had this Information sworn in front of me. Do you think that's a problem?"

During this meeting, Justice of the Peace Foulds is also recollected as having commented on past allegations of mistreatment of AA by BB (Exhibit 8, pp. 17-19).

Post June 13, 2014	Further inquiry is recalled as being made by Justice of the Peace Foulds to Deputy Crown Attorney Callaghan regarding the status of the prosecution's case against BB.
August 8, 2014	Original Information is withdrawn and a replacement Information is sworn on June 16, 2014.
September 2014	AA moves into Justice of the Peace Foulds' residence as what His Worship characterizes as "a sub-tenant". Concerns are expressed at that time regarding the cost of a security system and the cost of housing AA's car in a nearby underground lighted garage as a result of her ongoing safety and security issues in relation to BB (Exhibit 8, p. 19).
September 12- October 9, 2014	Telephone call from Justice of the Peace Foulds to Deputy Crown Attorney Callaghan occurs in which Justice of the Peace Foulds inquires as to whether he should provide a statement to the police with respect to his involvement in the AA/BB matter (Exhibit 8, p. 18-19).
October 9, 2014	Justice of the Peace Foulds provides a written statement to Detective Wynia in which he confirms that he related AA's request that BB not be held overnight at the time of his accompaniment of AA to the police station on May 18, 2014.
October 10, 2014	The charge of criminal harassment is withdrawn against BB at the request of Assistant Crown Attorney Christine Jenkins; "no reasonable prospect of conviction" is cited as the rationale for the withdrawal of the charge.
October 23, 2014	Further contact between Justice of the Peace Foulds and Deputy Crown Attorney Callaghan is initiated by His

	<p>Worship via email. In the email, Justice of the Peace Foulds asks for direction from Deputy Crown Attorney Callaghan as to whether he should attend the Victim Witness Assistance Program interview with AA (Exhibit 8, p. 19).</p>
October 27, 2014	<p>Blunt response to Justice of the Peace Foulds from Deputy Crown Attorney Callaghan reiterating the impropriety of Justice of the Peace Foulds continuing contact with the Crown's office in relation to the BB prosecution.</p>
December 2014-February, 2015	<p>AA is reported by Justice of the Peace Foulds to be working but that employment is short-lived resulting in AA being "devastated" when her employment is truncated (Exhibit 8, p. 20).</p>
January, 2015	<p>Justice of the Peace Foulds adds AA as a beneficiary to his employment benefits package (Exhibit 8, p. 20).</p>
March 2, 2015	<p>Justice of the Peace Foulds signs the subpoena that is to be issued to AA as a witness in the BB prosecution. His Worship variously represents "necessity", the "pro-forma" nature of the matter and the request from the TPS for the subpoena as being "urgent", as justification. Justice of the Peace Foulds says that AA is "his neighbour" and advises the civilian member of the TPS, Reyna Correia, who was responsible for having subpoenas issued, that he wants to be present when AA is served. His Worship asks for advance notice of when the subpoena would be served. Ms. Correia informs His Worship that such a request is contrary to TPS policy in such matters and that it was not within her authority to provide such notice. His Worship gives Ms. Correia his phone number and asks her to consider having her supervisor contact him to facilitate service on AA. Justice of the Peace Foulds subsequently contacts Detective Wynia by email and requests the Detective's assistance in ensuring His Worship is present at the time the service of the subpoena takes place (Exhibit 8, pp. 19-22).</p>
April 16, 2015	<p>The assault charge against BB is stayed. The prosecuting Crown Attorney, Mr. Vandenberg, advises that while there are "clearly triable issues...it would not be an easy case for the Crown to prove". The Crown references the fact that AA does not wish to proceed to trial and is content the charges be stayed on the</p>

understanding that BB “will not make unwanted contact with her.” In response, defence counsel, Mr. Richard Shekter, references BB’s adamant denial of the allegations and the intended bringing of a motion for the production of material “...that would give rise to not only inevitable inference, but evidence that the Justice of the Peace that received the Information was actually the boyfriend of the complainant and the other man in a sort of three-way relationship...”

Later April, 2015

Justice of the Peace Foulds approaches Assistant Crown Attorney Ms. Jenkins, in the hallway of the College Park Courthouse, to inquire “Are we okay?” When Ms. Jenkins expresses some uncertainty as to what Justice of the Peace Foulds is talking about, His Worship references the BB prosecution (Exhibit 8, pp. 23-24).

May 18, 2016

BB’s letter of complaint is received by the Registrar of the Justice of the Peace Review Council.

## **Findings of Fact**

- [27] The evidence establishes that Justice of the Peace Foulds knew AA and was aware of her prior relationship with BB at the time he received a call from AA on May 18, 2014 in which she advised that she had been assaulted by BB. By his own admission, Justice of the Peace Foulds first met AA in November 2012 and he and AA became “good friends” thereafter.
- [28] His Worship was also aware of AA’s historic relationship with BB and acknowledged in his response that he had been told by AA that she had been assaulted by BB before in 2009 and 2010.
- [29] The chronology of events references an acknowledged contact by Justice of the Peace Foulds with the Justice Sector Security Office in mid-February 2014. This contact was prompted by concern regarding a comment attributed to BB. This comment troubled His Worship as it indirectly related to a motor vehicle that was owned by His Worship’s son.

- [30] On May 18, 2014, AA telephoned Justice of the Peace Foulds to report that she had been assaulted by BB. Thereafter, Justice of the Peace Foulds attended her residence and later accompanied her to 53 Division where a police report of the alleged assault was filed. The next day, Justice of the Peace Foulds attended with AA at St. Michael's Hospital. While there, he witnessed the medical release form that AA had been provided by the officer in charge of the criminal investigation of BB, Detective Wynia.
- [31] The evidence is concluded to establish that Justice of the Peace Foulds was aware that the Information that he swore on May 21, 2014, three days after he had attended at the police station with the complainant and two days after he had accompanied AA to the hospital, related to the May 18<sup>th</sup> incident involving AA and BB. He states in his response to the complaint, "...even after realizing that this particular Information was in relation to BB, I did not avert at the time to any issue with signing it."
- [32] Based on the evidence offered by Ms. Melanie Comeau, a TPS Court Services Supervisor at the College Park Courthouse, the Hearing Panel is satisfied that Justice of the Peace Foulds was either read a synopsis of the criminal allegation or was provided with a general overview of the facts supporting the allegation prior to the swearing of the Information and confirmation of process.
- [33] The Hearing Panel is satisfied that Justice of the Peace Foulds knew, at the time the Information was sworn, that it related to the criminal charge in which AA was the complainant and BB the accused. We reject His Worship's position that he did not have such knowledge at that time. His evidence on that point is inconsistent.
- [34] In relation to the issue of knowledge, His Worship variously asserts, as referenced at pages 13 and 14 of his response, that, "I did not realize, upon first reviewing the Information, that it was even related to BB. It was a simple and straightforward document that disclosed an offence on the basis of reasonable and probable grounds set out in the synopsis. I was not hearing viva voce evidence, or "clarifactory" evidence or evidence from the complainant or even an officer who

dealt directly with the complainant.” Later, in recounting the circumstances leading to his endorsement of the Information, His Worship offers a seemingly contradictory account of events when he states: “As such, even after realizing that this particular Information was in relation to BB, I did not avert at the time to any issue with signing it.”

[35] Further, at page 14 of his response to the complaint, His Worship notes, “In hindsight, I acknowledge that the optics, if not the reality, of my having signed this Information were problematic and I ought properly have had a different justice of the peace sign it.” He asserts that, “I very quickly realized after signing the Information that my doing so was problematic. I brought my involvement in the signing of the Information and the issuance of process to the attention of the Crown Attorney at the first opportunity available.”

[36] His Worship’s response is concluded to be contradictory, inconsistent and unreliable as it relates to the state of his knowledge at the time of the execution of the Information and confirmation of process. The contention that His Worship became aware of the fact he had signed the Information relating to the criminal complaint by AA against BB by some unexplained means, sometime after the fact, is concluded to be implausible. This representation is undermined by the following facts:

- (i) His Worship’s direct involvement in the reporting of the criminal complaint by AA;
- (ii) The recency of the events giving rise to the criminal complaint in relation to the date when the Information was signed;
- (iii) His Worship’s attendance at the police station and the hospital during the intervening three-day period between the alleged occurrence and the signing of the Information;
- (iv) His Worship’s friendship with AA and his prior knowledge of BB;

- (v) His Worship's prior knowledge of the relationship between AA and BB and his awareness of incidents of alleged criminal misconduct by BB toward AA; and,
- (vi) The evidence of Ms. Correia that, as a matter of standard practice, reviewing justices of the peace are given a summary of the allegations prior to the endorsement of the Information or the confirmation of process.

These factors are also concluded to refute any suggestion of oversight, error or inadvertence by His Worship at the time he signed the Information and confirmed process.

- [37] Justice of the Peace Foulds' subsequent actions provide further confirmation that he was aware of the fact the Information related to the AA/BB matter at the time the charging document was endorsed. The Hearing Panel notes that approximately three weeks after signing the Information, on June 13, 2014, a date described by His Worship as constituting "the first opportunity", Justice of the Peace Foulds attended at the office of the Deputy Crown Attorney, Michael Callaghan, at the College Park Courthouse, where they both worked and where the trial of BB would be scheduled to be conducted. His Worship acknowledges that one of the purposes of the meeting was to inform Deputy Crown Attorney Callaghan that he had signed the referenced Information.
- [38] While some modest dispute exists between His Worship's response and the testimony of Deputy Crown Attorney Callaghan as to the content and order of the subsequent conversation that took place between Justice of the Peace Foulds and Deputy Crown Attorney Callaghan, the evidence establishes that Justice of the Peace Foulds disclosed that he knew both BB and AA and that he had sworn the Information and confirmed process in relation to the criminal allegation against BB some three weeks earlier. Deputy Crown Attorney Callaghan testified that His Worship came to their office "...to let us know that he had a friend who was a complainant on a domestic violence case, and that ostensibly he wanted us to

know that so that we would ensure it's not -- ensure that it was not in front of him so there would be no conflict of interest or perceived conflict of interest...."

- [39] The suggestion by His Worship that he gained insight into the conflict of interest, or possible perception thereof, at some time after signing the Information is not supported by the evidentiary record, including Justice of the Peace Foulds' own account of events. In this regard, the Hearing Panel notes that His Worship acknowledges an awareness of "the optics, if not the reality" of a conflict of interest arising from his involvement with the BB Information.
- [40] After considering the content of His Worship's response and the evidence adduced in relation to this issue, the Hearing Panel concludes that His Worship was aware, at the time he signed the Information, that his endorsement of the Information was problematic and that he knew he was in a position of conflict of interest and that a reasonably based perception of a conflict of interest by others would arise as a consequence.
- [41] The evidentiary record also establishes that when Justice of the Peace Foulds went to talk with Deputy Crown Attorney Callaghan, His Worship disclosed that his friend, AA, was concerned about BB who had not been good to her in the past. Steps were then implemented by Deputy Crown Attorney Callaghan for a new Information to be sworn, to avoid any appearance of conflict, with the original Information to be withdrawn at the time of the August 8, 2014 court appearance.
- [42] Sometime later (the exact date is uncertain, with the hearing record suggesting a date sometime between September 12 and October 9, 2014), Deputy Crown Attorney Callaghan testified that he had an encounter with Justice of the Peace Foulds in the hallway at the College Park Courthouse. We accept Mr. Callaghan's evidence that His Worship asked whether someone (a specific prosecutor) had been assigned to the case. At the time, the inquiry was viewed by Deputy Crown Attorney Callaghan as being "open-ended" and "fairly benign" in nature.

- [43] Prior to Thanksgiving 2014, Justice of the Peace Foulds called Deputy Crown Attorney Callaghan to advise that the police had asked him if he was willing to provide a statement in relation to the BB matter and to inquire if this might result in a change in his “status” in the case (particularly whether it might result in him becoming a witness in the case). Deputy Crown Attorney Callaghan advised “It was up to him whether or not he provided a statement to the police.” On October 9, 2014, Justice of the Peace Foulds provided a witness statement to Detective Wynia as requested.
- [44] In the October 9<sup>th</sup>, 2014 witness statement, Justice of the Peace Foulds confirmed his attendance with AA at the police station when the initial criminal complaint was made by AA on May 18, 2014 and that he conveyed AA’s request to Detective Wynia that BB not be held in custody overnight.
- [45] While Justice of the Peace Foulds’ identity was known to the officer in charge of the case, Detective Wynia, the police synopsis of the circumstances of AA’s attendance at 53 Division on May 18, 2014 referenced AA as being in the company of a “family friend”. In due course, a defence request for disclosure of the identity of the “family friend”, following a Crown pre-trial, ultimately resulted in Justice of the Peace Foulds being requested to provide a witness statement by Detective Wynia. The Assistant Crown Attorney in charge of the BB prosecution at the time, Christine Jenkins, testified that she believed the accompanying witness could have relevant evidence to give at BB’s trial in relation to AA’s demeanor and the circumstances leading to AA’s decision to formalize the complaint to the police.
- [46] Assistant Crown Attorney Jenkins was informed by Deputy Crown Attorney Callaghan as to the content of the June 13, 2014 meeting and the fact that Justice of the Peace Foulds had advised Deputy Crown Attorney Callaghan at that meeting that he would not preside in the “domestic court” until the BB prosecution was concluded, in order to avoid a potential conflict of interest.
- [47] On review of Justice of the Peace Foulds’ witness statement, Assistant Crown Attorney Jenkins advised that the statement reinforced her initial assessment of

his potential as a Crown witness. “He had contact with the complainant when she was in an injured state, observed her demeanor, her upset and her - - also took her to the hospital and observed her injuries basically. So he was a potential Crown witness.”<sup>2</sup> After reading the statement, she became aware for the first time that Justice of the Peace Foulds had advised Detective Wynia that it was AA’s request that BB not be held overnight for a bail hearing following his arrest and that AA was content that BB be released from the station, provided BB was restrained from having contact with her.

- [48] Assistant Crown Attorney Jenkins testified that Justice of the Peace Foulds’ comment on the bail issue was concerning because of the fact he would regularly preside in bail court, in the same courthouse in which the BB matter was being prosecuted. Christine Jenkins further noted that whether or not a bail hearing is to be conducted is a decision for the police. Consequently, the recommendation that a “show cause” hearing not be held “...would raise the concerns.”<sup>3</sup>
- [49] The witness statement provided by Justice of the Peace Foulds to Detective Wynia on October 9, 2014 did not disclose that he was in a romantic relationship with AA at that point in time.
- [50] On October 15, 2014, a judicial pre-trial took place before Justice Moore of the Ontario Court of Justice at the College Park Courthouse. During the course of the pre-trial, BB’s counsel suggested that Justice of the Peace Foulds was “directing” the investigation. The defence also expressed concern with respect to the fact that Detective Wynia had requested Justice of the Peace Foulds statement by email, a circumstance that counsel had reportedly “never seen” before.
- [51] In her October 15, 2014 memo to file, Assistant Crown Attorney Jenkins expressed concern that “...this trial would turn into a sideshow about J.P. Foulds...” and noted that the defence was also interested in pursuing disclosure of emails between AA and Justice of the Peace Foulds with a view to demonstrating animus toward BB

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<sup>2</sup> Transcript of Evidence of Christine Jenkins, October 12, 2017, at page 450, lines 19-24.

<sup>3</sup> Transcript of Evidence of Christine Jenkins, October 12, 2017, at page 451, lines 5-25, page 452, line 1.

or revelation of a motive to fabricate. The memo also referenced the fact that an outside jurist might be required to hear the case as a consequence of the fact that Justice of the Peace Foulds might be called as a witness at the criminal trial of BB.

[52] On October 27, 2014, Ms. Jenkins testified that she received an email from Deputy Crown Attorney Callaghan in which he advised that Justice of the Peace Foulds had again contacted him via email seeking direction as to whether he should attend a Victim Witness Assistance Program interview with AA.

[53] Ms. Jenkins testified this caused concern for the following reasons:

- (i) Justice of the Peace Foulds was a potential Crown witness who was directly contacting the Deputy Crown in the courthouse where the outstanding criminal prosecution was taking place;
- (ii) Justice of the Peace Foulds was seeking advice from a Deputy Crown Attorney in that courthouse, despite the fact he was a potential Crown witness and a justice of the peace that regularly presided in the College Park Courthouse. This contact, and those that had preceded it, were viewed as “complicating the matter further” as far as the prosecution of BB was concerned given defence counsel’s contention that Justice of the Peace Foulds was involved in either “directing the prosecution or involved in some way [with] meddling in the prosecution”; and,
- (iii) Further contact with the Crown Attorney’s office by Justice of the Peace Foulds led to further obligations on the Crown Attorney to disclose the particulars of the contact and served to complicate the prosecution from Ms. Jenkins’ perspective.<sup>4</sup>

[54] In due course, the initially assigned trial prosecutor, Assistant Crown Attorney “Rob” Sidhu, expressed concern about his ability to fulfill his responsibilities as Crown counsel in light of the known involvement and expressed interest in the

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<sup>4</sup> Evidence of Christine Jenkins, October 12, 2017, page 471, lines 4-18.

case by Justice of the Peace Foulds and the fact he regularly appeared before Justice of the Peace Foulds at the College Park Courthouse. In his memo to Deputy Crown Attorney Michael Callaghan a number of concerns are referenced that ultimately led to the BB prosecution being transferred to another Metropolitan Toronto court location and a different prosecutor. The Sidhu memo reads as follows:

Hi, Mike. This is a matter that involves J.P. Foulds, a matter you know all too well. Has he contacted you about the case. He's up for a third-party records application on April the 16<sup>th</sup>. For the following reasons, I strongly believe that neither I nor any Crown from this office should be appearing on this for pre-trial motions or the trial proper. His Worship will certainly be under scrutiny at all stages of this proceeding. Defence counsel will not only allege that he helped orchestrate and play out the allegations, they will also make much of the fact that he was hands-on in the court process, (initially swearing the info). The Crown will not be able to avoid him. Furthermore, for the trial proper, he may very well be a witness. While any prior consistent statements of the complainant are not admissible, he is a potentially valuable witness in that he can give evidence of the victim's demeanor and physical state following the alleged assault. In a similar case, I called such a witness in order to take this out of W.D. analysis. I have been appearing before His Worship for over 10 years. I continue to appear before him and ask him for rulings and judgments in the Crown's favour. Based on this, I question my own ability to be impartial when dealing with him as a witness. If he were to be a difficult or uncooperative witness for the Crown, would I really "play tough" with him in order to get clear and accurate evidence? Would I be comfortable sitting impassively if he was savaged by the defence under cross-examination? On the flip side, any hesitation in this regard would compromise my effectiveness as a prosecutor. The final reason for not allowing a downtown Toronto crown to litigate this case: as a witness and involved party in this matter, His Worship would understandably have an emotional attachment to the outcome of these proceedings. This may be projected upon the assigned Crown (as is often the case) if he is unsatisfied with the result. Sincerely, Rob Sidhu.

- [55] Following what was acknowledged to be a "blunt" response from Deputy Crown Attorney Callaghan to Justice of the Peace Foulds' October 23, 2014 email, in which Deputy Crown Attorney Callaghan reiterated the impropriety of His Worship's continuing contact with the Crown Attorney's office in connection to

matters related to the BB prosecution, no further direct contact in the case by His Worship occurred until March 2, 2015. On that date, Reyna Correia, a civilian member of the TPS, attended at the College Park Courthouse in order to obtain a subpoena compelling the attendance of AA as a witness at the pending trial of BB. Ms. Correia appeared before Justice of the Peace Foulds and he issued the subpoena. The Agreed Statement of Facts, entered as Exhibit 27B at the hearing, details the events that occurred that day.

- [56] When presented with the subpoena, Justice of the Peace Foulds informed Ms. Correia that he knew AA and that she was his “neighbour”. He also advised that he wished to be present when the subpoena was served on AA. The identification of AA as a “neighbour” was false as it is conceded before this Panel that Justice of the Peace Foulds and AA were living together as spouses at that time.
- [57] Ms. Correia told Justice of the Peace Foulds that the TPS did not generally provide advance notice to those who were about to receive subpoenas in criminal prosecutions and that she did not have the authority to make such an arrangement.
- [58] Ms. Correia felt “uncomfortable” as a result of His Worship’s request that he should be advised when the subpoena was to be served and she perceived that he was becoming “frustrated” with her. As a result of her interaction with His Worship, Ms. Correia asked that she not continue to be assigned to the College Park Courthouse for a period of time. His Worship acknowledges the impact of his conduct in the Agreed Statement of Facts.
- [59] Following her encounter with Justice of the Peace Foulds, Ms. Correia forwarded an email to Detective Wynia detailing the interaction and His Worship’s request that he be present for the service of the subpoena on AA. In the email, Ms. Correia noted that “His Worship also indicated that you (Detective Wynia) were made aware of the matter.”<sup>5</sup>

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<sup>5</sup> Agreed Statement of Facts, Exhibit 27 “A”. See also Transcript of Evidence of Detective Wynia, October 13, 2017, at page 603.

[60] During the course of his testimony, Detective Wynia recalled that Justice of the Peace Foulds had called him to request that he either be served with the subpoena to give to AA or, alternatively, that he be present when she was served. No special service arrangements were ultimately made.

[61] In his response by email to Ms. Correia, also dated March 2, 2015, Detective Wynia advised as follows:

“There are no pre-arrangements for service of the victim. If the subpoena is sworn, please serve it. Justice Foulds has no standing in this matter, he did contact me and I advised him a subpoena would be served but did not make any arrangements about when or how service was to be made.”<sup>6</sup>

[62] The final contact between Justice of the Peace Foulds and an Assistant Crown Attorney, who had formerly been involved in the prosecution of the BB matter, occurred late in the month of April 2015. This contact involved Justice of the Peace Foulds speaking to Assistant Crown Attorney Jenkins in the hallway of the College Park Courthouse. He was recalled as asking “Are we okay?” When Ms. Jenkins expressed some uncertainty as to what Justice of the Peace Foulds was talking about, His Worship stated that he was talking about the BB case or the BB matter.<sup>7</sup>

[63] Ms. Jenkins testified that the approach was disconcerting. In her own words, “It was uncomfortable. I was aware of all the correspondence and the contact he had with Mr. Callaghan. I had concerns prior to that about his involvement in the background of this case, so it was somewhat uncomfortable, and I made sure that it was a very brief contact, and I carried on my way back to the Crown’s office.”<sup>8</sup>

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<sup>6</sup> Agreed Statement of Facts, Exhibit 27 “A”, evidence of R. Wynia, Transcript of Evidence, October 13, 2017, at page 609-610.

<sup>7</sup> Transcript of Evidence of Christine Jenkins, October 12, 2017, page 483, lines 20-25, page 484, lines 1-11.

<sup>8</sup> Transcript of Evidence of Christine Jenkins, October 12, 2017, page 484, lines 5-11.

## Part III - Applicable Legal Principles

### Standard of Proof

[64] Proof of judicial misconduct is to be established on a balance of probabilities standard.

[65] That said, the Supreme Court of Canada held at paragraph 46 of *F.H. v. McDougall*, [2008] 3 S.C.R. 41, as follows:

46 ...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[66] In ascertaining whether judicial misconduct has been proven to have occurred, the Panel must be satisfied on the balance of probability standard based on consideration of "...clear and convincing proof based on cogent evidence to establish the allegations as set out in the Notice of Hearing and whether or not the allegations we accept constitute judicial misconduct."<sup>9</sup>

### Expectations of Ethical Conduct

[67] Justices of the peace are judicial officers. In *Re Massiah* (January 12, 2015), a second disciplinary hearing about the conduct of former Justice of the Peace Massiah, the Hearing Panel provides an overview of the high standard of ethical conduct expected of a justice of the peace:

12. There is no difference in the standards of conduct that apply for judges and for justices of the peace of the Ontario Court of Justice. Both are judicial officers of the Court:

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<sup>9</sup> 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)*, Reasons for Decision, Dated July 29, 2009, at page 1.

A justice of the peace in Ontario is a judicial officer appointed pursuant to the *Justices of the Peace Act*, R.S.O. 1990, C. J.4. This Act affirms that a justice of the peace has judicial jurisdiction throughout Ontario and creates a framework under which justices of the peace are appointed and hold office, and also provides for the conditions under which they perform their duties. The judicial functions, powers and duties of a justice of the peace are set out in legislation and case law. Two of the more important legislative Acts which confer jurisdiction upon a justice of the peace are the *Criminal Code* and the Ontario *Provincial Offences Act*, but there are many other federal and provincial statutes and regulations that empower justices of the peace with legal authority and/or jurisdiction. Primarily, the two main areas of jurisdiction are criminal law and regulatory law (provincial offences).

Justices of the Peace Advisory Appointments Committee,  
[www.ontariocourts.ca/ocj/jpaac/role/](http://www.ontariocourts.ca/ocj/jpaac/role/)

13. Under section 13(1) of the *Act*, the Associate Chief Justice Co-ordinator of Justices of the Peace established standards of conduct for justices of the peace. Under section 8(c) of the *Act*, the Justices of the Peace Review Council approved those standards in the form of the *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* (the “Principles”) on December 7, 2007. The preamble to the Principles states that:

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 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.

14. Section 1.2 of the Principles states that “Justices of the peace have a duty to follow the law.”
15. Section 3.1 of the Principles provides that “Justices of the peace should maintain their personal conduct at a level which will ensure the public’s trust and confidence.”
21. We agree with the conclusion stated by the Canadian Judicial Council in their decision in the *Report of the Canadian Judicial Council to the Minister of Justice Concerning the Honourable*

*Justice Theodore Matlow* (December, 2008 at paras. 94-100) that while the principles of judicial office do not constitute a prescriptive code of conduct, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a justice of the peace. The fact that conduct complained of is inconsistent with or in breach of the Principles constitutes a factor to be taken into account in determining whether there has been judicial misconduct.

22. In the *Report of a Judicial Inquiry Re: His Worship Benjamin Sinai*, released on March 7, 2008, the Commissioner made the following comments regarding the important role that justices of the peace occupy in relation to the public perception of the judicial system:

It is clear that justices of the peace are very important judicial officers. Although they are not required to have formal legal training before their appointment, their decisions regarding bail, the issuance of search warrants and *Provincial Offence* matters seriously impact the liberty and privacy of those who appear before them. Indeed, for the vast majority of society who has contact with the court system, their first and only contact would be to appear before a justice of the peace.

As Justice Hogan stated in the *Commission of Inquiry into the conduct of His Worship Justice of the Peace Leonard Blackburn*:

“It is the justices of the peace who preside in court on matters such as parking tags, speeding tickets, by-law infractions, and Provincial Offences. These are the day-to-day type of “judicial” issues that confront most people. It is therefore quite probable that a great number of the public will form judgments of our justice system based on their experiences with a justice of the peace.”

- [68] As noted above, in accordance with the *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* that govern their conduct, justices of the peace are obliged “to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence 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.”<sup>10</sup>

- [69] We agree with the Canadian Judicial Council when it stated in its Report to the Minister of Justice in relation to the conduct of the Honourable Justice Theodore Matlow:

“While the *Ethical Principles* are not absolutes and while a breach will not automatically lead to an expression of concern by the CJC, much less a recommendation for removal from the Bench, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judge.”<sup>11</sup>

### **Test for Judicial Misconduct**

- [70] Counsel agree that the matters to be determined by this Hearing Panel are informed by two decisions of the Supreme Court of Canada, *Therrien v. Ministry of Justice*, [2001] 2 S.C.R. 3, and *Moreau-Bérubé v. New Brunswick* (Judicial Council), [2002] 1 S.C.R. 249. The applicable test was succinctly stated by the Hearing Panel of the Ontario Judicial Council in *Baldwin (Re)* (2002) as follows:

Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, the question under section 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.

- [71] In *Moreau-Bérubé v. New Brunswick* (Judicial Council), the Supreme Court of Canada addresses the tension that exists between judicial accountability and the

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<sup>10</sup> Excerpt from the Preamble of the *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice*, (the “Principles”) on December 7, 2007.

<sup>11</sup> *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of the Conduct of the Honourable Justice Theodore Matlow of the Ontario Superior Court of Justice* (Presented December 3, 2008) at para. 99

exercise of judicial independence. As summarized in *Baldwin (Re)*, (2002) at page 7:

...Judges must be accountable for their judicial and extra-judicial conduct so that the public have 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.

[72] As the Hearing Panel in *Re Baldwin* observes:

The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in section 51.6(11) should be invoked, when necessary in order to restore a loss of public confidence arising from the judicial conduct in issue.

[73] In determining whether judicial misconduct has been established, the following considerations apply:

- The Hearing Panel must evaluate each particular of alleged conduct;
- Impugned conduct, not rising to the level of misconduct, does not become so simply because it occurs in combination with other conduct of a similar nature;
- The Hearing Panel is entitled to evaluate whether each particular of alleged conduct has been proven by examining impugned conduct in the context of all of the evidence bearing upon it; and,
- The conduct must be concluded to seriously compromise the impartiality, integrity and independence of the judiciary to the extent that it would undermine the public's confidence in the ability of the justice of the peace to perform the duties of his office and where the

public's confidence in the administration of justice generally has been undermined, warranting a disposition under section 11.1(10) of the *Act*.

### **Conflict of Interest**

[74] In the reasons for decision in *Welsh (Re)* (December 8, 2009), reliance was placed on the Canadian Judicial Council's *Ethical Principles for Judges*, in relation to the issue of conflict of interest. At paragraphs 67-69 of the decision, the Hearing Panel quotes from those Principles, noting:

- (i) Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially;
- (ii) Judges should disqualify themselves in any case in which they believe that a reasonable, fair-minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty; and,
- (iii) Disqualification is not appropriate if:
  - (a) The matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or,
  - (b) No other tribunal can be constituted to deal with the case, or because of urgent circumstances, failure to act could lead to a miscarriage of justice.

[75] Reference is made by Presenting Counsel to the commentary in Part 6 on the subject of impartiality of the *Ethical Principles for Judges* published by the Canadian Judicial Council. As noted in the commentary, Part 6 E.2, under the subheading of Conflict of Interest, "...in judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self-interest and the duty of impartial adjudication in circumstances which a reasonable, fair-minded and informed person would reasonably apprehend a conflict."

- [76] The commentary in Part 6 E.7 and E.8 references the fact that the interests of a judge's family, close friends or associates, in matters before the judge, could give rise to a reasonable apprehension of conflict of interest and duty.
- [77] In such circumstances, as a matter of general principle, the judge "should disqualify him or herself if they are aware of any interest or relationship which, to a reasonable, fair-minded and informed person, would give rise to a reasoned suspicion of lack of impartiality."<sup>12</sup>
- [78] In *Therrien*, at paragraph 110, Mr. Justice Gonthier emphasized the significance that public confidence in the justice system plays in the maintenance of respect for the justice system:

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:

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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<sup>12</sup> Part 6 (E)(2).

[79] The *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* include the following:

1.1 Justice of the peace must be impartial and objective in the discharge of their judicial duties.

[80] The importance of an independent and impartial judiciary is reflected at paragraph 9 in the decision of a Hearing Panel of the Ontario Court of Justice considering evidence in relation to a complaint regarding the conduct of the Honourable Justice Norman Douglas<sup>13</sup>, as follows:

Accordingly, a judge must be, and appear to be, impartial and independent. He or she must have, and appear to have, personal integrity. If the 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.

[81] As Responding Counsel points out, not all conduct that demonstrates a lack of impartiality necessarily leads to a finding of judicial misconduct, as the decision in the hearing about the conduct of Justice Douglas illustrates.

[82] On review of Justice Douglas' attempts to intercede on behalf of the Crown in relation to appeals of several of his own decisions, the Hearing Panel concluded that Justice Douglas had "exhibited alarmingly poor judgment." It was concluded that he should not have communicated directly with the Crown law office to encourage it to appeal judgments decided on legal principles to which he took personal umbrage and that he should not have offered to provide assistance to the Crown in preparing the appeal materials.

[83] In concluding that judicial misconduct had not been established, the Judicial Council referenced the fact that Justice Douglas had "acknowledged his errors." In arriving at this determination, the Hearing Panel also noted that Justice Douglas had admitted "that he conducted himself inappropriately" and by his own admission "has learned a lesson." The Council expressed their view of the inappropriateness

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<sup>13</sup> Re Douglas (OJC, on March 6, 2006)

of the conduct by stating they were “not prepared to conclude that he engaged in judicial misconduct, although we are bound to say that his conduct was very close to the line.”<sup>14</sup>

- [84] Responding Counsel submits, by analogy, that a similar circumstance occurred here with Justice of the Peace Foulds exercising poor judgment, without committing judicial misconduct (see also *Porter (Re)*, 2014 Carswell Nfld. 221, 243 ACWS (3d) 856, Provincial Court, at paragraphs 33-38).

#### **Part IV - Application of Law to the Facts**

- [85] Justice of the Peace Foulds acknowledges that he swore the Information and confirmed process on May 21, 2014, that formalized the charges of assault and criminal harassment against BB in relation to a complaint that had been made to the police by AA. This process was not recorded.
- [86] Justice of the Peace Foulds further concedes that he engaged in direct contact with the Crown Attorney’s Office on June 13, 2014, and thereafter had further contact with Deputy Crown Attorney Michael Callaghan, Assistant Crown Attorney Christine Jenkins, the officer in charge of the BB prosecution, Detective Randall Wynia, and a civilian member of the TPS, Reyna Correia, in connection to matters relating to the prosecution of BB.
- [87] Finally, Justice of the Peace Foulds acknowledges that he signed a subpoena that was to be served on AA in relation to the prosecution of BB and that he endeavoured to arrange for indirect service of the subpoena by having the subpoena served on himself personally or, alternatively, to have AA served at a time when he could be present.
- [88] By actively and repeatedly inserting himself into the criminal prosecution of BB, and by engaging in continuing communications with various members of the TPS and the prosecutorial staff who had carriage of the BB prosecution, when he was

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<sup>14</sup> Douglas (Re), March 6, 2006 at paras. 42, 43 and 45.

in an obvious position of conflict of interest due to his connection with AA, it is contended by Presenting Counsel that Justice of the Peace Foulds' behaviour constitutes judicial misconduct warranting a disposition under s. 11.1 (10) of the *Act*. Further, Justice of the Peace Foulds' involvement in the BB prosecution is viewed as forming a reasonable basis for others, including BB, to perceive that His Worship acted in bad faith or with an improper motive, even if that was not His Worship's intention. A review of the specific incidents of alleged judicial misconduct follows.

### **Swearing of the Information and Confirmation of Process**

[89] Paragraph 3(a) of Appendix "A" states:

- 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.**

[90] Justice of the Peace Foulds' May 21, 2014 involvement in the swearing of the Information, formalizing charges of assault and criminal harassment against BB and confirmation of process occurred just three days after His Worship had attended, at AA's request, at 53 Division Headquarters of the TPS where the factual allegations underlying the charges of assault and criminal harassment were reported.

[91] Thereafter the Hearing Panel concludes, despite His Worship's representations to the contrary, that it would have been readily apparent to Justice of the Peace Foulds that he was in a position of conflict of interest in relation to the criminal prosecution of BB. This conflict of interest was obvious and would have been known to Justice of the Peace Foulds when confronted with the Information relating to BB's prosecution only three days after he had personally attended at the police station with AA. His Worship had prior knowledge of AA and BB, had previous interactions with AA, and he had involvement with both AA and BB on May 19,

2014. Those interactions included the attendance with AA at St. Michael's Hospital and the subsequent chance encounter with BB later that same day.

[92] The Hearing Panel finds that Justice of the Peace Foulds was provided with a summary of the allegations by Ms. Comeau when she presented the Information. Furthermore, the Information shows the name of the accused and the complainant. The Hearing Panel finds that Justice of the Peace Foulds intentionally abused the authority of his office when he signed the Information that commenced criminal process against BB in circumstances where he knew that he was in an obvious position of conflict of interest.

[93] Based on Ms. Comeau's testimony, and His Worship's own response to the complaint, the Hearing Panel is satisfied that Justice of the Peace Foulds would have either been read a copy of the synopsis outlining the allegations of criminal misconduct involving BB or he would have been referred to the synopsis and reviewed the allegations himself.

[94] Any claimed lack of knowledge of Justice of the Peace Foulds' involvement with the Information is refuted by His Worship's own response to the complaint (Exhibit 8) and the testimony of Deputy Crown Attorney Michael Callaghan. This evidence confirms that Justice of the Peace Foulds was aware of the fact he had signed the Information formalizing the charges arising from the allegations that AA had made against BB and that he was also aware that he should not have done so. His disclosure of the resulting position of conflict of interest to Deputy Crown Attorney Callaghan confirms this conclusion. That disclosure ultimately led to the withdrawal of the original Information and the preparation of a new Information.

[95] The Hearing Panel acknowledges, as Responding Counsel has suggested, that in most circumstances the swearing of an Information is essentially a pro-forma, or purely administrative act. It cannot be disputed that an Information, alleging the referenced criminal allegations against BB, would have issued absent the involvement of Justice of the Peace Foulds. Any suggestion of necessity or the absence of an alternative judicial option is undermined by the fact the Information

was sworn in a Toronto court location, where there were other judicial officers who could have performed this function.

- [96] While the swearing of the Information is acknowledged to be an administrative act, the act of confirming process is not. Considering process is a judicial function in which the Justice of the Peace is required to exercise discretion: *R. v. Allen* (1974), 20 C.C.C. (2d) 447 (ONCA); *R. v. Whitmore*, [1987] O.J. No. 102 (S.C.J.), affirmed *R. v. Whitmore*, [1989] O.J. No. 1611 (ONCA).
- [97] In confirming process, the justice of the peace is required to receive the Information and to consider the validity of the Information or charging document. The second step is to confirm process. This step requires that the justice of the peace consider whether a *prima facie* case is made out. Confirmation also requires that the justice of the peace be satisfied that the accused has been served with the police process: *R. v. DeMelo*, [1994] O.J. No. 1757 (ONCA). Based on these considerations, the Hearing Panel is satisfied that the process could not have been lawfully confirmed without His Worship being aware of the underlying facts and their relationship to the criminal allegation involving AA and BB .
- [98] Justice of the Peace Foulds was also in a clear position of conflict of interest as he presided in the very courthouse in which the BB prosecution was to be conducted. This fact, along with his direct connection to both AA and BB, and the circumstances of the offence itself were factors that were readily apparent. These considerations should have been sufficient to restrain His Worship from involving himself in any court processes that were even remotely relating to the prosecution of BB.
- [99] In summary, the Hearing Panel is of the view that any of the following factors, standing alone, should have caused His Worship to declare a conflict of interest in relation to the BB Information and alerted His Worship to the need to direct that the matter go before another Justice of the Peace for processing. These same considerations should certainly have directed His Worship to refrain from any form

of participation in any proceedings relating to the BB prosecution that were not directly connected to his role as a potential witness in the case:

- (i) His Worship's prior knowledge of both AA and BB in a matter involving Justice of the Peace Foulds' own son;
- (ii) His Worship's call to the Justice Sector Security Office in which concern was expressed in relation to certain conduct attributed to BB;
- (iii) His Worship's friendship with AA, as confirmed by the fact that AA elected to call Justice of the Peace Foulds for assistance immediately following the alleged incident of assault;
- (iv) His Worship's potential as a witness in the criminal prosecution of BB given that he had attended to AA in the immediate aftermath of the alleged assault and was in a position to give evidence with respect to the injuries he observed, her demeanor, and the circumstances relating to AA's decision to involve the police;
- (v) The relaying of information to Detective Wynia in regard to AA's position on bail;
- (vi) His Worship's attendance with AA at the hospital the day following the alleged assault and further contact, later that same day, with BB;
- (vii) The fact His Worship was aware, based on prior disclosure by AA, of similar allegations of assaultive misconduct by BB toward AA that had reportedly occurred in the past;
- (viii) The fact His Worship had formulated an opinion regarding the veracity of AA and the reliability of her account of alleged mistreatment by BB based on comments that were subsequently conveyed to Deputy Crown Attorney Callaghan at the time of their initial meeting three weeks after the Information had been signed; and,

- (ix) The fact that the criminal prosecution of BB was to be conducted in the same courthouse in which Justice of the Peace Foulds routinely presided.

[100] Consideration of these factors leads the Hearing Panel to conclude that the signing of the Information and confirmation of process, as informed by the prior events and His Worship's subsequent conduct, was an intentional act. This act occurred in circumstances where His Worship was aware that he was in a clear position of conflict of interest. The Hearing Panel finds that despite His Worship's awareness of this position of conflict, he intentionally, or wilfully, chose to ignore the obvious and knowingly proceeded to sign the Information relating to BB.

[101] The Hearing Panel concludes that, as an experienced justice of the peace, His Worship also realized that he was a potential witness in relation to the criminal prosecution of BB as a result of his involvement with AA on May 18 and May 19 and his interactions with her during that timeframe.

[102] The Hearing Panel concludes that His Worship knowingly acted in a position of conflict of interest, by involving himself with the BB Information and confirmation of process, notwithstanding the readily apparent compromise to the appearance of justice that those acts would entail. As a justice of the peace of long standing, His Worship would have been aware that, in all likelihood, the Information with his signature on it would eventually find its way to BB. In these circumstances, the Hearing Panel concludes it was not unreasonable for BB to believe that Justice of the Peace Foulds was utilizing his position as a judicial officer to intentionally and actively involve himself in matters relating to his criminal prosecution.

[103] The Hearing Panel concludes that the actions of Justice of the Peace Foulds in intentionally endorsing this Information, in circumstances where he knew that he was in a position of a conflict of interest, were motivated by animus towards BB. This animus is concluded to have been based on a desire to advance the criminal prosecution against BB while ensuring that BB was aware of His Worship's involvement and interest in that criminal prosecution. This conclusion is confirmed, in the view of the Hearing Panel, by the events that subsequently unfolded in

relation to Justice of the Peace Foulds' continuing involvement in matters relating to this criminal prosecution.

[104] Given the high standard of conduct expected by the public of judicial officers, the Hearing Panel concludes that Justice of the Peace Foulds' personal involvement with AA affected the independent and impartial judgment that he was required to exercise when performing his duties.

[105] In reaching this determination, the Hearing Panel notes the comments of the Canadian Judicial Council in its Report to the Minister of Justice in the matter of the conduct of the Honourable Justice Theodore Matlow of the Superior Court of Justice, presented December 3, 2008, in which the Council states:

[131] Accordingly, a more comprehensive and appropriate formulation of the principle may be this. A discretionary judicial decision may warrant a finding of sanctionable conduct if the judge's conduct in any part of the proceedings up to and including the decision involves abuse of office, bad faith or analogous conduct. For this purpose, abuse of office can arise through a variety of circumstances, including abuse of judicial independence. And bad faith includes making decisions for an improper ulterior motive.

[106] The Hearing Panel concludes that the swearing of the Information and confirmation of process cannot be characterized as either a "legal error" or "a mistake". On consideration of all of the factual circumstances that unfolded before His Worship signed the Information, His Worship's subsequent acknowledgment to Deputy Crown Attorney Callaghan of his conflict of interest and His Worship's continuing involvement in matters relating to the BB prosecution, we conclude that the decision to sign the BB Information involved an abuse of His Worship's judicial office and demonstrates an improper ulterior motive.

[107] Notwithstanding the limited scope of judicial discretion involved in the confirmation of process<sup>15</sup>, the Hearing Panel concludes that in these circumstances the swearing of the Information and the confirmation of process by Justice of the

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<sup>15</sup> *R. v. Lupyrypa*, 2011 ABCA 52; *R. v. Whitmore*, [1989] O.J. No. 1611 (ONCA).

Peace Foulds is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined both the public confidence in the ability of the justice of the peace to perform the duties of his office and the administration of justice generally. For the foregoing reasons, the Hearing Panel concludes that this allegation has been proven.

### **Issuing Judicial Process and Failure to Record the Proceeding**

[108] The interaction between Melanie Comeau and Justice of the Peace Foulds, leading to the execution of the Information and confirmation of process was not recorded. Presenting Counsel has not requested that the Hearing Panel make findings of judicial misconduct in relation to the allegation in the Notice of Hearing arising from His Worship's failure to maintain an audio recording when he received and signed the Information and confirmed process in relation to the criminal complaint against BB<sup>16</sup>. Counsel agree that this circumstance does not disclose any improper conduct on the part of Justice of the Peace Foulds. The Hearing Panel concludes that His Worship's failure to record the proceeding does not amount to judicial misconduct as the governing statutory provisions do not clearly mandate that an audio record be kept of such proceedings.

[109] In view of the significance of the procedures employed in the swearing of the Charging Document and confirmation of process, the Hearing Panel is of the view that some further commentary on this issue is warranted from a remedial perspective and as a suggested practice directive to be employed in like circumstances.

[110] His Worship's assertion of uncertainty regarding the facts of the Information conveyed to him by Melanie Comeau at the time the Information relating to BB was signed and process confirmed is a circumstance that illustrates the importance of maintaining a public record of such proceedings. This situation serves to reinforce

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<sup>16</sup> See paragraph 3(b) of Appendix "A" to the Notice of Hearing. Presenting Counsel advised "significant emphasis" was not being placed on this averment. Transcript of Proceedings, November 20, 2017, pp. 1093-1094.

the view that the recording of such proceedings before a judicial officer should be directed as a “best practice” in the future.

[111] Counsel agree, and the Hearing Panel acknowledges, that not all procedural matters related to a criminal prosecution are required to be recorded. For instance, in *R. v. Lupyrypa*, 2008 ABQB 427 (affirmed on appeal, 2011 ABCA 52, application for extension of time to serve Notice of Appeal to the Supreme Court of Canada denied), the Court considered the requirement to transcribe an informant’s allegations in relation to an application for issuance of a summons under s. 507 of the *Criminal Code*.

[112] In concluding, the requirement to transcribe the informant’s allegations in relation to the s. 507 proceeding was not absolute. The Court noted the following:

It may seem curious that while the s. 504 information must be under oath, and while the evidence of witnesses, if considered, must be under oath, and while the contents of the information must be in writing and the evidence of witnesses must be recorded, Parliament has not required the additional information which the justice obtains from the informant, as part of the allegations of the informant, to either be under oath or recorded. Yet that appears to have been the judicially approved practice for more than a century.

[113] *R. v. Billingham*, 1995 CanLII 7224 (ONSC) and *R. v. Davies*, [1997] 35 W.C.B. (2d) 64 (OCJ) are cases that consider pre-enquete hearings conducted *in camera* pursuant to s. 507 of the *Code* and the entitlement of both the accused in a criminal case and the Crown Attorney to disclosure of the information relied on by the justice of the peace if criminal process issues as a result of that hearing.

[114] It is acknowledged that neither of these decisions definitively stand for the proposition that proceedings involving the swearing of an Information and confirmation of process must be recorded.

[115] As noted by the Alberta Court of Appeal in *R. v. Lupyrypa*, (2011), 270 C.C.C. (3d) 571, an officer is entitled to use a fax machine to lay an Information. Section 507(1)(a) of the *Criminal Code* does not require that another person read the fax

material out loud to the justice so that it could be heard. Obviously, in these circumstances, no confirming audio record would necessarily result.

[116] The assertion of judicial misconduct referenced in Appendix “A” - 3(b) related to the allegation of His Worship’s failure to record the proceeding is therefore dismissed.

#### **Contact with the Toronto Police Service Personnel and Crown Counsel at College Park Courthouse**

[117] Paragraph 3(e) of Appendix “A” states:

- 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.**

[118] Contacts by Justice of the Peace Foulds with different TPS personnel and members of the Crown Attorney’s office, in relation to matters involving the BB prosecution began on May 18, 2014, when Justice of the Peace Foulds attended with AA to file a report that led to BB being charged with the offences of assault and criminal harassment and ended with the interaction with Assistant Crown Attorney Christine Jenkins at the College Park Courthouse in late April 2015.

[119] In assessing the propriety of the referenced Crown contacts and Justice of the Peace Foulds’ interactions with Detective Randall Wynia, Melanie Comeau and Reyna Correia, the Hearing Panel is cognizant of Justice of the Peace Foulds’ prior acquaintance with both AA and BB and the fact AA advised His Worship that she had previously been assaulted by BB. We have also considered the fact that Justice of the Peace Foulds himself had contacted the Justice Sector Security Office, in February 2014 to report a security concern involving BB that related to a matter involving His Worship’s son. The Justice Sector Security Office provides province-wide security services to the judiciary.

- [120] Regardless of whether the nature of the relationship between Justice of the Peace Foulds and AA developed as Justice of the Peace Foulds suggests, the Hearing Panel concludes that His Worship's friendship with AA placed His Worship in a position of conflict of interest that would have informed his obligation to conduct himself in a circumspect fashion as of May 18, 2014 in relation to all matters connected to the prosecution of BB.
- [121] It is acknowledged that Justice of the Peace Foulds' conduct may have been motivated by what the Hearing Panel concludes to be his misguided, yet understandable, intention to minimize continuing emotional and physical distress to AA. The fragile state of AA's physical and mental health are confirmed by the medical report that was received in evidence at this hearing. This motivation is not concluded by the Hearing Panel to justify the intentional and continuing pattern of undeterred conduct by His Worship that directly related to various aspects of the BB prosecution. Considering the totality of this behaviour, the Hearing Panel concludes that Justice of the Peace Foulds intentionally involved himself in various aspects of the prosecution of BB, despite the fact that he knew that he was in a clear position of conflict of interest.
- [122] The Hearing Panel accepts Deputy Crown Attorney Callaghan's account of events with respect to his interaction with Justice of the Peace Foulds on June 13, 2014. That account would suggest that the disclosure of Justice of the Peace Foulds' involvement with the signing of the original Information and confirmation of process was made known to Deputy Crown Attorney Callaghan, almost as an afterthought.
- [123] Justice of the Peace Foulds' initial conversation with Deputy Crown Attorney Callaghan, in which His Worship commented on the character and/or conduct of BB, is concluded to be entirely inappropriate. This interaction reflects indifference by His Worship to his duties and obligation as an impartial judicial officer. In such circumstances, His Worship was required to disassociate himself from all aspects of the criminal prosecution of BB unrelated to his limited role as a potential witness in the case. By failing to disassociate himself from the prosecution, in matters

unrelated to his role as a potential witness, and by engaging in repeated contacts with Deputy Crown Attorney Callaghan and other members of the prosecution staff, it is concluded that Justice of the Peace Foulds willfully and intentionally disregarded his professional responsibilities.

[124] Further direct inquiries to Deputy Crown Attorney Callaghan regarding the status of the prosecution's case against BB, whether or not His Worship should give a witness statement to Detective Wynia or whether he should accompany AA to a preparatory meeting in advance of BB's criminal trial, cannot be considered to be justified in such circumstances.

[125] Even after Deputy Crown Attorney Michael Callaghan forwarded what was acknowledged to be a "blunt" response advising Justice of the Peace Foulds, in no uncertain terms, of the impropriety of his continued direct interaction with the Crown Attorney's office in relation to the BB prosecution, Justice of the Peace Foulds is concluded to have failed to conduct himself in an impartial manner. The Hearing Panel is of the view that, in such circumstances, a reasonable, fair-minded and informed person, would conclude that respect for and confidence in His Worship as a judicial officer, and in the administration of justice generally, was compromised as a result.

[126] The Hearing Panel further concludes that it was unnecessary for Justice of the Peace Foulds to have any contact with Deputy Crown Attorney Callaghan in relation to matters relating to the assignment of His Worship's duties as a justice at the College Park Courthouse. Justice of the Peace Foulds had his own administrative structure including a Local Administrative Justice and a Regional Senior Justice of the Peace who he could have contacted to report any conflict of interest in a specific court matter. Appropriate arrangements could then have been made with the local trial coordinator that would have ensured that His Worship did not preside in a court in which the BB matter was scheduled to be addressed. These arrangements could have been made without any contact with Deputy Crown Attorney Callaghan and his office. An experienced justice of the peace

would be well aware that the assignment and scheduling of justices of the peace are determined by the judiciary as a component of the exercise of judicial independence.

[127] Arrangements could have easily been made through the local administrative judicial structure, facilitated by the local trial coordinator at the College Park Courthouse, to ensure that Justice of the Peace Foulds did not preside in a court where the BB matter would be on the court docket. None of these readily available and appropriate judicial administrative procedures involve any contact with members of the Crown staff or police personnel. As a consequence, the Hearing Panel concludes that the primary motivation for His Worship's initial contact with Deputy Crown Attorney Callaghan was not related to the court assignment issue.

[128] The evidentiary record here establishes that Justice of the Peace Foulds took the opportunity, during his initial contact with Deputy Crown Attorney Callaghan, to express personal comments regarding BB that reflected His Worship's personal knowledge of both AA and BB. In these circumstances, the Hearing Panel is not convinced that a judicial officer, who has an ethical responsibility to remain independent from the prosecution service and criminal prosecutions generally, would believe it to be appropriate to inform a supervising Crown Attorney of a personal assessment or the veracity of a criminal complainant or recount, even in a general way, past misdeeds of a criminal nature of a defendant in a criminal case. Applying these self-evident considerations to the circumstances here, it is concluded that Justice of the Peace Foulds 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 His Worship, a judicial officer before whom the Crown Attorneys at College Park regularly appear, had a vested interest in this particular prosecution.

[129] In these circumstances, the assertion by Responding Counsel that there were no *mala fides* or untoward or improper intent by Justice of the Peace Foulds in making these comments is logically inconsistent when one considers the subject matter

discussed, the person with whom Justice of the Peace Foulds was interacting, and the circumstances of the courthouse interaction when the comments were related.

[130] By June 13, 2014, it seems evident that AA was more than simply “a friend” or “a family friend”, as Justice of the Peace Foulds suggested to Deputy Crown Attorney Callaghan. The Hearing Panel concludes that His Worship was being less than candid about the true nature of his relationship with AA at the time of his initial meeting with the Crown.

[131] A subsequent encounter with Deputy Crown Attorney Callaghan, sometime in September or early October 2014, in which he sought advice as to whether he should provide a statement to the police, is also viewed by the Hearing Panel as being most inappropriate. By this time a replacement Information had been sworn based on Justice of the Peace Foulds’ initial involvement in the criminal prosecution of BB. Despite his known position of conflict of interest, Justice of the Peace Foulds persisted in continuing to interact with the Deputy Crown Attorney as if he were his personal lawyer.

[132] The Hearing Panel is unable to accept the contention that there was no intentional intrusion on the prosecutorial decision-making process as a consequence of Justice of the Peace Foulds’ further inquiry as to the status of the case that occurred sometime after June 13, 2014, or the advice His Worship sought in relation to the police witness statement or his request for direction regarding the proposed attendance with AA at a meeting involving the Victim Witness Assistance Program office.

[133] The Hearing Panel concludes that Justice of the Peace Foulds’ continued interaction with one of the senior Crown Attorneys, in the very courthouse in which BB’s case was scheduled to be prosecuted, was not “innocuous”. The suggestion that there was no intent to influence the proceedings against BB is concluded to be unconvincing, given the number of contacts with the Crown Attorney’s office, the content of the matters discussed and the circumstances in which those contacts occurred.

[134] Although Justice of the Peace Foulds' involvement in the BB prosecution as a potential witness may have resulted in the case being transferred to another court in metropolitan Toronto for prosecution, it could be reasonably concluded, on an objective assessment of the evidence presented during this hearing, that Justice of the Peace Foulds' failure to disassociate himself from the prosecution created an additional element of concern for the prosecution that was unrelated to the fact Justice of the Peace Foulds was a potential witness in the BB matter.

[135] As Assistant Crown Attorney Christine Jenkins noted in one of her notes in the Crown's electronic filing system, Justice of the Peace Foulds' involvement, both actual and perceived, served to sidetrack the prosecution and threatened to derail what should have been a relatively straightforward criminal trial.

[136] Based on consideration of these factors, the Hearing Panel concludes that a sound factual basis exists for an objective observer to reasonably conclude that Justice of the Peace Foulds intentionally involved himself in the criminal prosecution of BB and endeavoured to assert some influence on that proceeding by virtue of the judicial office he occupied.

[137] In view of the foregoing, the Hearing Panel concludes that Justice of the Peace Foulds' continuing interactions with the Crown Attorney's office at the College Park Courthouse and members of the TPS, in circumstances where His Worship was in an evident position of conflict of interest, are of a sufficiently serious nature to give rise to a violation of the principles of judicial independence, integrity and impartiality that govern his office.

[138] Accordingly, the Hearing Panel concludes that this allegation has been proven.

### **Signing of the Subpoena and Efforts to Direct Service**

[139] Paragraphs 3(c) and (d) of Appendix "A" state:

**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.**

[140] As previously noted, Justice of the Peace Foulds signed the subpoena that was to be served on AA to compel her attendance at BB's criminal trial. This event occurred on March 2, 2015, more than nine months after Justice of the Peace Foulds disclosed to Deputy Crown Attorney Callaghan the position of conflict of interest that His Worship was in, arising as a result of his friendship with AA and prior knowledge of both AA and BB.

[141] The Hearing Panel does not view Justice of the Peace Foulds' personal concern for the health and welfare of AA as justifying His Worship's involvement with the subpoena in circumstances where he was a judicial officer and knew that he was in a position of conflict of interest.

[142] As the trial in the criminal prosecution of BB was not scheduled to occur until April 16, 2015, it is also difficult to accept Justice of the Peace Foulds' representation that Ms. Correia attended at the clerk's desk outside his door on March 2, 2015, advising that she had an "urgent" subpoena for personal service.

[143] The assertion that the issuance of a subpoena is a routine matter of a "pro-forma" or "largely mechanical" nature for a justice of the peace is concluded to be an inadequate and unconvincing justification in the circumstances before us.

[144] The issuance of subpoenas has been recognized by the courts as a judicial act. In *R. v. Brown*<sup>17</sup>, Trafford, J of the Superior Court of Justice of Ontario. sets out the law in this regard:

13. Let me emphasize and comment upon the need for care in the obtaining and issuance of subpoenas under the Code. One must emphasize that the issuance of a subpoena under s. 698 and the related sections of the Code is a judicial act. It is not an administrative or otherwise perfunctory act. Nor is it one that may be delegated to clerical staff or, effectively, to the persons requesting the subpoena. Nor should a justice of the peace issue a subpoena without appropriate caution on the theory that the trial judge is better situated to consider the matter in depth. Rather, it is a judicial task that is properly performed only when the legal principles I have summarized in this ruling are carefully applied to the evidence of information tendered in support of the request for the subpoena...As a matter of practice, a proper record of the proceedings leading to the issuance of the subpoena should be kept by the issuing court or judicial officer to facilitate a review of the issuance of the subpoena. Everyone involved in the issuance of a subpoena, whether it be a lawyer or peace officer seeking the subpoena, the justice of the peace issuing the subpoena or the person names as a witness in the subpoena, is better protected through a proper record of the proceedings...”

[145] This analysis was subsequently adopted and applied by Hill, J., in another decision of the same Court, *R. v. Coote*<sup>18</sup>:

(5) A justice of the peace considering issuance of a subpoena ought generally to receive an affidavit in support of the application or information provided orally: *R. v. Brown* (Ont. Gen. Div.) at para. 13. “The justice may choose not to insist upon evidence under oath but he [or she] may want to conduct an oral examination”: *Foley v. Gares* (1989), 55 C.C.C.(3d) 82 (Sask. C.A.) at 88. Without making any final determination as to whether the application for issuance of a subpoena is a court of **record** proceeding, there should nevertheless be “a proper **record** of the proceedings...in a manner that facilitates a review of the entire process” should it prove necessary: *Brown*, at para. 13.

[146] The Hearing Panel concludes that the signing of the subpoena, in circumstances in which Justice of the Peace Foulds knew he was in a clear position of conflict of interest, combined with his subsequent efforts to direct and control the service of

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<sup>17</sup> *R. v. Brown*, 1997 CarswellOnt 5991, [1997] O.J. No. 6171, para. 13

<sup>18</sup> *R. v. Coote*, 2009 CarswellOnt 2051, [2009] O.J. No. 11595

that subpoena, are acts that support the finding that this conduct was another deliberate attempt by His Worship to involve himself directly in matters relating to the prosecution of BB. His Worship's characterization of the proceeding fails to address the resulting compromise to his ethical obligations as a justice of the peace. These obligations include the maintenance of independence, impartiality and objectivity. This conduct is viewed as undermining the appearance of justice and to compromise the administration of justice generally.

[147] The Hearing Panel is not persuaded that these actions fall short of misconduct by a judicial officer because of Justice of the Peace Foulds' professed personal concerns for the health, emotional well-being, personal security interests or other personal vulnerabilities of AA. AA's vulnerabilities were well-known to His Worship at this time. Justice of the Peace Foulds was intimately familiar with the difficulties confronting AA as of September 2014 when he acknowledged that he and AA were cohabitating together. Any concerns with respect to AA's general welfare and the state of her emotional well-being, as those current concerns relate to the service of the subpoena, should have been addressed through official channels such as the Victim Witness Assistance Office and made known to the police independent of the direct involvement of Justice of the Peace Foulds in the subpoena process itself.

[148] His Worship could have demonstrated support for AA by refraining from the conduct in which he engaged, conduct that the Hearing Panel concludes was intricately related to the prosecution of BB. His desire to provide supportive assistance to AA should have been accomplished by directing his focus to the provision of personal comfort and support outside of his judicial role.

[149] The insistence by Justice of the Peace Foulds that service be made in the manner he directed caused unnecessary upset to Ms. Correia who was sufficiently distressed by the encounter with His Worship that she asked not to be assigned in future to the College Park Court location. His Worship's request for a special service arrangement also resulted in Detective Wynia being required to intervene

when Justice of the Peace Foulds refused to recuse himself and allow the process to unfold in the usual fashion.

[150] The evidentiary record establishes that no special arrangements were ultimately instituted in order to serve the subpoena on AA. The Hearing Panel concludes that this is not a factor that mitigates the impropriety of His Worship's actions. The fact that the TPS personnel did not accede to His Worship's attempts to control the service of the subpoena on AA does nothing to detract from the fact that Justice of the Peace Foulds went to extraordinary lengths in an effort to control that process.

[151] The Hearing Panel concludes that this allegation has been proven. Issuance of the subpoena and efforts to arrange special service of the subpoena on AA, in circumstances where Justice of the Peace Foulds knew he was in a clear position of conflict, are concluded to constitute an abuse of the judicial office he holds.

#### **Intervention in the BB Prosecution – Appendix “A” – 3(f)**

[152] Paragraph 3(f) of Appendix “A” states:

**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.**

[153] Based on the foregoing analysis of events between June 13, 2014 and the summer of 2015, the Hearing Panel concludes that His Worship improperly and repeatedly intervened in the BB prosecution despite the fact that His Worship knew he was in a clear position of conflict of interest.

[154] The Hearing Panel is of the view that an objective observer would reasonably conclude, as we have, that His Worship was seeking to exploit a special relationship he enjoyed with the TPS and Crown counsel by virtue of his judicial office and his long experience as a justice of the peace in the same jurisdiction where the BB prosecution was to be conducted.

- [155] The Hearing Panel concludes that His Worship's actions and repeatedly inserting himself into the criminal process involving BB and by his repeated contacts with Crown counsel and members of the TPS staff, not related to his role as a potential witness in the BB prosecution, infringed the ethical principles of impartiality and objectivity, independence and integrity, that govern the conduct of all Justices of the Peace. In these circumstances, His Worship's conduct is concluded to rise to the level of judicial misconduct.
- [156] A professed absence of animus, bad faith or improper motive is not borne out by the evidentiary record here. The Hearing Panel concludes that the actions of Justice of the Peace Foulds go well beyond a display of poor judgment. His Worship is concluded to have exploited his position as a justice of the peace to facilitate access to Deputy Crown Attorney Callaghan, to provide the senior prosecutor with information in relation to an ongoing criminal investigation that was to be conducted in the same courthouse where Justice of the Peace Foulds presides, to inform the prosecution that he had a continuing interest in the matter and to continue communication with the supervising Crown Attorney thereafter. His Worship is concluded to have taken advantage of his position in intervening in the processing and issuance of the subpoena to AA and his efforts to involve himself in the service of that subpoena.
- [157] A member of the public would not have the opportunity to access the Crown Attorney in a similar way or any means of communicating in like fashion. The Hearing Panel concludes that His Worship intentionally exploited a special relationship that he enjoyed with the police and Crown Counsel by virtue of the position he holds as a judicial officer and that his position was exploited in order to further his own personal interests as those interests related to AA, a person of significance in his life. As a consequence, it is concluded that an abuse of his judicial office resulted. The conduct in issue is concluded by the Hearing Panel to have infringed the ethical principles that govern the conduct of all judicial officers and to have undermined the public's confidence in the ability of Justice of the

Peace Foulds to perform the duties of his office. The conduct is also viewed as having compromised the administration of justice generally.

[158] The Hearing Panel is satisfied that this allegation has been proven.

### **Non-Publication and Sealing Order Request**

#### **Re: BB's Third-Party Records Application – Appendix "A" – 3(g)**

[159] Presenting Counsel did not ask the Panel to make findings of judicial misconduct in relation to the allegation in the Notice of Hearing arising from His Worship's efforts to obtain both a non-publication and sealing order with respect to BB's application for production of the personal emails relating to His Worship's involvement in the investigation and prosecution of BB<sup>19</sup>.

[160] This allegation was dismissed on October 17, 2017 following His Worship's motion for a non-suit.

### **Judicial Misconduct**

[161] The evidentiary record here does not support a finding that Justice of the Peace Foulds truly acknowledges and accepts that he conducted himself inappropriately or, that through the complaints process, he has generally "learned his lesson". Unlike the circumstances in the *Douglas* hearing, we conclude that His Worship has failed to fully accept or recognize the seriousness of his conduct or to fully comprehend why it is inappropriate for a Justice of the Peace to engage in the behaviours detailed in this decision, behaviours and conduct that we have concluded to constitute incidents of judicial misconduct.

[162] In his response to the complaint, Justice of the Peace Foulds states that he "erred in his approach" and "I do acknowledge that I mishandled certain processes." His Worship is concluded by the Hearing Panel to continue to view his actions as being justified. This conclusion is based on consideration of Justice of the Peace Foulds' own representations as reflected in the following excerpt from his filed response:

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<sup>19</sup> See paragraph 3(g) of Appendix "A" to the Notice of Hearing. No evidence was adduced in relation to this averment and it was noted dismissed on October 17, 2017.

“Simply put, I felt (and still feel, despite acknowledging the shortcomings in how I approached certain elements of this situation) that I could not morally or ethically have refused to assist AA when she needed me.” This sentiment is viewed as confirmatory of the Hearing Panel’s conclusion that Justice of the Peace Foulds does not appear to sincerely accept, comprehend, or appreciate the impropriety of his actions.

[163] His Worship’s actions, when considered and assessed by members of the public or a participant in the justice system, like BB, are concluded to reflect His Worship’s decision to advance his personal agenda or interests, in a manner that compromised and undermined the principles of impartiality, independence and integrity expected of all members of the judiciary.

[164] For the foregoing reasons, the Hearing Panel has concluded that the following allegations referenced in paragraph 3 of Appendix “A” of the Notice of Hearing have been made out on the standard of proof referenced by the Supreme Court of Canada in *F.H. v. McDougall*, at paragraphs 45-46:

- 3(a) (the signing of the Information and confirmation of process),
- 3(c) (the issuance of the subpoena),
- 3(d) (involvement in attempting to direct service of the subpoena), and
- 3(e) and 3(f) (continuing contact with Crown counsel, the police and intervention in the adversary process).

[165] The Hearing Panel concludes that the evidence presented on each of these allegations supports a finding of judicial misconduct on its own. Further, the evidence is concluded to establish a pattern of misconduct that extended from May 21, 2014, when His Worship swore the original Information against BB, to late April, 2015 when he approached Ms. Jenkins and made reference to the BB prosecution.

## **Effects of His Worship's Misconduct**

- [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 the 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.

### **Submissions on Disposition**

[174] The Hearing Panel will reconvene, at a date to be scheduled by the Panel on February 1, 2018, in order to hear submissions from counsel with respect to disposition in view of the findings that have been made by this Panel.

Dated at Toronto this 1st day of February, 2018

HEARING PANEL:

The Honourable Justice Peter Tetley, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Ms. Jenny Gumbs, Community Member

## **ADDENDUM**

### **JUSTICES OF THE PEACE REVIEW COUNCIL**

**IN THE MATTER OF** a complaint respecting  
**Justice of the Peace Tom Foulds**  
Justice of the Peace in the  
Toronto Region

### **NOTICE OF HEARING**

A complaints committee of the Justices of the Peace Review Council (the "Review Council"), pursuant to subsection 11(15)(c) of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4, as amended (the "*Act*"), has ordered that the following matter of a complaint regarding the conduct or actions of His Worship Justice of the Peace Tom Foulds be referred to a Hearing Panel of the Review Council, for a formal hearing under section 11.1 of the *Act*.

The Hearing Panel will determine whether the allegations against you support a finding of judicial misconduct and whether, by reason of that, a disposition should be imposed pursuant to section 11.1(10) of the *Act*. The particulars of the complaint that will be presented to the Hearing Panel are set out in Appendix "A" to this Notice of Hearing.

**The Hearing Panel of the Review Council will convene at the Justices of the Peace Review Council Boardroom, Suite 2310, 1 Queen Street East, in the City of Toronto, on Wednesday, September 28, 2016, at 9:00 a.m. or as soon thereafter as the Hearing Panel of the Review Council can be convened to set a date for the hearing into the complaint.**

A justice of the peace whose conduct is the subject of a formal hearing before the Review Council may be represented by counsel and shall be given the opportunity to be heard and to produce evidence.

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*.

The Panel may adopt any combination of dispositions set out in clauses (10)(a) to (f). A recommendation under clause (10)(g) cannot be combined with another disposition.

You or your counsel may contact the office of Mr. Scott Fenton of Fenton, Smith Barristers, the solicitor retained on behalf of the Review Council to act as Presenting Counsel in this matter.

If you fail to attend before the Review Council in person or by representative, the Review Council may proceed with the hearing in your absence and you will not be entitled to any further notice of the proceeding.

In accordance with the Procedures of the Review Council, any motions should be filed not later than 10 days before the set-date.

September 2, 2016

Original signed

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Marilyn E. King  
Registrar  
Justices of the Peace Review Council

cc. Mr. Mark Sandler, Counsel for His Worship

Mr. Scott Fenton, Presenting Counsel

## **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 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 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*.