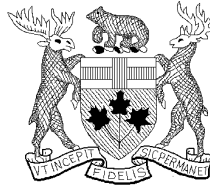


Justices of the Peace Review Council



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 Paul Kowarsky

Before: The Honourable Justice Kathryn L. Hawke
Regional Senior Justice

Her Worship Cornelia Mews, Senior Justice of the Peace

Mr. Steven G. Silver, Community Member

Hearing Panel of the Justices of the Peace Review Council

Reasons for Decision

Counsel:

Ms. Marie Henein
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Mr. Mark Sandler
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Presenting Counsel

Counsel for His Worship Paul Kowarsky

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Introduction

- [1] The Justices of the Peace Review Council, pursuant to Section 11(15)(c) of the *Justices of the Peace Act* R.S.O. 1990, c.J.4, as amended (the “Act”), ordered that a complaint regarding the conduct of Justice of the Peace Paul Kowarsky be referred to a Hearing Panel of the Review Council, for a formal hearing under Section 11.1 of the Act.

- [2] By way of Notice of Hearing, dated March 22, 2011, the hearing process began. The Panel convened on March 25, 2011. Pre-hearing motions and procedural matters were addressed on March 25, 2011 and April 26, 2011. On May 6, 2011 the Panel received evidence and heard submissions. The hearing adjourned to May 30, 2011 for disposition.

- [3] The Notice of Hearing – Appendix A particularized complaints involving the events of three dates. These dates, in the order set out in the Appendix are:
 - 1) January 29, 2010;
 - 2) a date between 2008 and January 29, 2010; and
 - 3) March 2, 2010.

- [4] An Agreed Statement of Facts was filed at the hearing outlining the events of the three dates.

Legislative Framework

- [5] Section 11.1 (10) of the *Justices of the Peace Act* states:
 - 11.1. (10) After completing the hearing, the panel may dismiss the complaint, 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 complainant or to any other person;
 - (d) order that the justice of the peace take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a justice of the peace;
 - (e) suspend the justice of the peace with pay, for any period;

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(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.

- [6] Neither the Section nor the Act elaborate upon the words “upholds the complaint” used in this Section. The Hearing Panel in *Re: Welsh (2009)*, a decision of the Justice of the Peace Review Council, addressed this aspect of the Section. We agree with that Panel’s remarks stated at Paragraph 30:

The terms “judicial misconduct” and “upholding a complaint” are not defined in the *Act*; however, we agree with presenting counsel that decisions of the Canadian Judicial Council and the Ontario Judicial Council that determine whether a judge has engaged in judicial misconduct are apposite to the test we have to apply in determining whether to “uphold” a complaint (pursuant to s. 11.1.(10) of the *Act*) and, if so, whether to apply one or more of the dispositions set out in that subsection which mirrors the same dispositions available to the Ontario Judicial Council under subsection 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990,c. C. 43 (C.J.A.).

- [7] Turning to the meaning of “judicial misconduct”, an excerpt from *Re: Baldwin (2002)*, a Hearing Panel of the Ontario Judicial Council, is instructive. Being informed by two decisions of the Supreme Court of Canada in *Therrien v. Minister of Justice* [2001] 2 S.C.R. 3 and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, the Hearing Panel stated at page 5:

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.

Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, the question under s. 51.6(11) is whether the impugned conduct is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public’s confidence in the ability of the judge to perform the duties of office or in the administration of justice generally **and** (emphasis added) 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.

It is only when the conduct complained of crosses this threshold that the range of dispositions in s. 51.6(11) is to be considered. Once it is

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determined that a disposition under s. 51.6(11) is required, the Council should first consider the least serious – a warning – and move sequentially to the most serious – a recommendation for removal – and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally.

The Facts

- [8] The Panel's factual findings, based upon the Agreed Statement of Facts, are set out below.
- [9] The complainant is a courtroom clerk. Justice of the Peace Kowarsky was regularly assigned to preside in the courthouse where the complainant is employed. They were assigned to the same courtroom many times over the course of the two, to two and a half years mentioned in this matter. They had a close working relationship which included His Worship providing some training and mentoring. Also, over the course of time they each had confided with the other over personal matters. The complainant regarded Justice of the Peace Kowarsky as a father figure.
- [10] On January 29, 2010, they were each working in their respective capacities in a courtroom. During the course of the proceedings Justice of the Peace Kowarsky got the complainant's attention and made a sexually inappropriate comment to her. The comment was said at least once and was captured on the courtroom audio recording. The comment was not heard by the other courtroom clerk and, as far as can be known, it was not heard by any member of the public. It may have been made a second time.
- [11] The sexually inappropriate comment, involving eight words, was very short. It is agreed, and the Panel finds that the comment was not intended to be hurtful. The comment involved an ill-conceived attempt at humour on behalf of His Worship. It involved using a double entendre when making what otherwise would have been an innocent request. Unlike most double entendres, however, the risqué meaning was obvious and the innocent meaning, while available in the circumstances, was obscure. Further, the risqué meaning went beyond being indelicate. Given the circumstances, it was insulting and degrading.
- [12] The complainant was very upset. She did not return to the courtroom in the afternoon and was absent the next day. After court adjourned on Jan 29, 2010, Justice of the Peace Kowarsky telephoned her and indicated that his actions had been wrong and inappropriate, and that he valued her work. He asked that she return his call. She decided not to.

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- [13] Prior to January 29, 2010, sometime in 2008, Justice of the Peace Kowarsky and the complainant greeted each other prior to being in court together. During this timeframe it was His Worship's custom to greet female colleagues and clerks who he had not seen for a while with a hug. On one such occasion, while greeting the complainant in this way, he commented using words to the effect that some people say hello by kissing on the lips.
- [14] Subsequent to January 29, 2010, on March 1, 2010, Justice of the Peace Kowarsky was presiding in court with two clerks. One of them was the complainant. During court His Worship addressed the clerks and stated that they were distracting him and that they were to stop. On the following day, when His Worship and the complainant were once again assigned to the same court His Worship called the complainant to his office and raised what he regarded as the inappropriate behaviour from the day before. During this exchange, the complainant denied inappropriate behaviour and raised Justice of the Peace Kowarsky's behaviour of January 29th. Each voiced their respective positions about January 29th, with His Worship indicating the innocent interpretation of his words and his apology. He also enquired as to what more she wanted. The complainant told him that it (the comment) was inappropriate, and that she looked upon him as a father figure, which is why it upset her tremendously. During this exchange His Worship raised his voice to the point that he could reasonably be considered to be yelling. The complainant was crying and shaking and she stated she wasn't paid enough to be yelled at. Further, she apologized for her behaviour the previous day and she indicated that she would not be in his court the next day.
- [15] The complainant subsequently requested not to be assigned to the same courtroom as Justice of the Peace Kowarsky.
- [16] In addition to the above findings drawn from the Agreed Statement of Facts, the Panel notes the following about the employment of courtroom clerks. Courtroom clerks are employed by the Court Services Division of the Ministry of the Attorney General and not by the Ontario Court of Justice directly. There is, however, a clear working relationship between a presiding justice of the peace and a courtroom clerk as established by the *Courts of Justice Act* R.S.O. 1990, Chapter C.43, s. 76(2).

76.(1) In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the direction of the chief justice of the court. 2006, c.21, Sched. A, s. 14.

(2) Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, justice of the peace, master or case management master while the court is in session. 2006, c.21, Sched. A, s.14; 2009, c.33, Sched.2, s.20 (16).

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Issue of Judicial Misconduct

- [17] Justice of the Peace Kowarsky acknowledged in the Agreed Statement of Facts, and through his counsel at the hearing, that the comment he made on January 29, 2010 constitutes an act of judicial misconduct.
- [18] Counsel for Justice of the Peace Kowarsky and Presenting Counsel each submitted in their respective capacities that the facts surrounding the other two dates, set out in the Appendix of the Notice of Hearing and covered in the factual findings above, do not constitute judicial misconduct and should be dismissed.
- [19] It is agreed that the facts about these two other dates should be considered in the overall context of the January 29, 2010 complaint.

Complainant's Response

- [20] The complainant's immediate reaction to Justice of the Peace Kowarsky's actions is included in the Agreed Statement of Facts and in "The Facts" set out above. Further information was provided, on consent, through Presenting Counsel.
- [21] Throughout, the complainant supports the view that His Worship was not at any point being sexually aggressive toward her. The complainant indicates that she respects justices of the peace, including Justice of the Peace Kowarsky. She regarded him as a father figure. She had been going through some difficult times. She wanted to be treated as an equal. The January 29th incident, combined with the events of March 1st and 2nd, left her feeling disrespected and belittled. This led to the complaint which, along with the events themselves, caused her severe anxiety at work. During the following year they both continued to work in the same courthouse. The complainant's schedule was arranged to accommodate her in such a way that she would not be working with His Worship. She found this accommodation made things awkward with coworkers and she also felt that it made others look at her differently. These things also contributed to her anxiety.

Justice of the Peace Kowarsky's Background and Post Complaint Actions

- [22] Justice of the Peace Kowarsky is 68 years of age. He was a distinguished cantor in South Africa, USA and Canada (Montreal and Toronto). He retired from this in 2001. He received his Bachelor of Laws degree in 1972 in South Africa. He came to Canada in 1976. He came to Toronto with his wife and 5 children in 1980. He remarried in 2001. He also suffered the significant loss of a grandchild in 2007.

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- [23] His Worship Kowarsky has been a justice of the peace since May, 2002. He has presided in all of the courts to which justices of the peace are assigned including bail court, in particular youth bail court, and also Provincial Offences Court where his work has included trials of lengthy and complex cases. He has had a very active role in mentoring other justices of the peace. He has had duties as a Local Administrative Justice of the Peace. He is well respected by colleagues and others who work with him, including clerks who have been interviewed. There have been no prior complaints.
- [24] In the Agreed Statement of Facts, Justice of the Peace Kowarsky acknowledged that his comment on January 29, 2010 was completely inappropriate, unwelcomed, and wrong. He also acknowledged that it deeply upset the complainant.
- [25] He made a full apology to the complainant in a letter that was filed in the hearing.
- [26] Two unsolicited letters of support from colleagues have been filed. They speak of his integrity, and of his skill and professionalism. It is apparent through counsel's submission that he has not solicited letters of support, not because he couldn't have, but because he chose not to. Particularly with respect to work colleagues, given the complainant's employment, the Panel accepts this as an appropriate approach in the circumstances, as to do otherwise could potentially lead to further discomfort for the complainant in her workplace.
- [27] Justice of the Peace Kowarsky sought and has been given approval to be assigned to locations other than the one where the complainant works. Also, if she changes locations he will make similar arrangements. A letter has been filed from Regional Senior Justice Robert Bigelow, dated April 19, 2011. This letter agrees to carry out this scheduling request. The significance of this voluntary accommodation by His Worship has been underlined by Presenting Counsel as being a significant consideration for the complainant and in turn the Panel.
- [28] A report authored by Dr. Lori Haskell, Clinical Psychologist, dated April 23, 2011, was filed in the hearing. The purpose of Dr. Haskell's contact was to review appropriate sexual boundaries and behaviours and to assess Justice of the Peace Kowarsky's own understanding of his actions and their repercussions. Dr. Haskell had the benefit of the having the Agreed Statement of Facts.
- [29] The material in the report supports finding that His Worship has reflected critically upon his behaviour and its impact upon the complainant. The report canvasses the dynamics of the situation wherein it appears that the hurt and upset caused from his inappropriate comment was intensified by the closeness and expectations they had of one another in what previously had been a comfortable

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working relationship. With regard to the events of 2008, Dr. Haskell and His Worship discussed his responsibility of being aware of his status and social power and of not crossing boundaries.

- [30] Dr. Haskell in her “Summary and Opinion” section notes: she found him to be thoughtful and genuinely remorseful; he had real concern for the harm caused to the complainant; his adjustment in his professional behaviour means he is unlikely to make a similar mistake in the future; and in addition to being more vigilant about his professional behaviour he is aware that his intentions and the impact of his conduct are distinct. She concludes her report by noting:

“It also appears as if Justice of the Peace Kowarsky has, as a result of these events, an enhanced appreciation for the importance of professional boundaries, and he has reflected critically upon both what he did and its impact on others. The indications are that he is aware and vigilant and, given the process and professional consequences which have unfolded for him, he would be quite unlikely to transgress boundaries in this way in the future.”

Disposition

- [31] The Panel agrees with the submissions of Counsel that the facts of January 29, 2010 constitute judicial misconduct and the panel upholds this complaint.
- [32] Further, the Panel agrees with the submissions of Counsel that the facts involved in the other two dates particularized in the Notice of Hearing do not constitute judicial misconduct and the Panel dismisses those complaints. The facts did not meet the test set out in paragraph 7 above.
- [33] The threshold test, as set out above in greater detail in paragraph 7, “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** (emphasis added) 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.”
- [34] Returning to the January 29, 2010 complaint, of the aspects listed in first part of the test, the facts concerning that date are seriously contrary to the aspect of the “integrity” “of the judiciary”. For the following reasons one would expect that reasonable, fair minded and informed members of the public would have their confidence in the administration of justice undermined as a result.

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- [35] Firstly, conduct of this nature would not be tolerated from any other participant in the court process particularly when, as here, court is in session. In order to maintain the integrity of the judiciary a presiding judicial officer must conduct himself/herself at least as well as everyone else before the Court. When, as here, actions fall below this level there is an undermining of public confidence in the administration of justice.
- [36] Secondly, even though a courtroom clerk is not employed by the Court directly, as noted above, the courtroom clerk acts under the direction of the presiding justice of the peace in the courtroom. In order to maintain the integrity of the judiciary within this framework, the standard of conduct expected in this relationship could reasonably be expected to be analogous to that expected of someone in a supervisory capacity in a more typical working relationship. This conduct fell short of this expectation and as such it is an additional source of the undermining of public confidence in the administration of justice.
- [37] The second part of the test is whether it is necessary to make one of the dispositions set out in Section 11.1(10) in order to restore public confidence.
- [38] Presenting Counsel submitted that this complaint was judicial misconduct requiring a disposition and advised the panel of available dispositions, but did not take a position as to a specific disposition. Counsel for Justice of the Peace Kowarsky submitted that a reprimand was the appropriate disposition.
- [39] The Panel is mindful of the fact that this was a short incident and accepts the context and intent set out in the facts above.
- [40] The Panel finds that actions already taken by Justice of the Peace Kowarsky make consideration of some of the possible dispositions unnecessary. These actions include having apologized to the complainant at the time and as part of the hearing process and having taken appropriate counselling from Dr. Haskell. Dr. Haskell's opinion also confirms the lack of need for further counselling. The Panel commends these actions as they assist in restoring public confidence.
- [41] Further, the Panel acknowledges that Justice of the Peace Kowarsky has taken a very significant step in having his assignment adjusted to accommodate the complainant. It is a measure that may not have been achievable in any other way. It is a very positive act for the complainant. It is an act that exhibits integrity and should assist in restoring public confidence.
- [42] The Panel's decision is to reprimand Justice of the Peace Kowarsky.

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- [43] The Panel is confident, based on the evidence at this public hearing, that Justice of the Peace Kowarsky is keenly aware of the meaning and import of this action. Given this, and the steps he has taken on his own, the action of a Reprimand by this Panel is sufficient to restore public confidence in the administration of justice.

Dated at the city of Toronto in the Province of Ontario, May 30th, 2011.

HEARING PANEL:

The Honourable Kathryn L. Hawke, Regional Senior Justice
Regional Senior Justice

Her Worship Cornelia Mews, Senior Justice of the Peace

Mr. Steven G. Silver, Community Member