

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 Errol Massiah

Before: The Honourable Justice Charles H. Vaillancourt

Her Worship Louise Rozon

Dr. Michael Phillips, Community Member

Hearing Panel of the Justices of the Peace Review Council

REASONS FOR DECISION

Counsel:

Mr. Douglas C. Hunt, Q.C.
Mr. Andrew Burns

Mr. Eugene Bhattacharya

Hunt Partners LLP

Barrister and Solicitor

Presenting Counsel

Counsel for His Worship Errol Massiah

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BAN ON PUBLICATION OF COMPLAINANTS' AND WITNESSES' IDENTITIES

[1] Justice of the Peace Errol Massiah appeared before this Panel in relationship to a number of allegations from staff members at his court location that are alleged to constitute judicial misconduct.

[2] Since the allegations involve sexual misconduct or sexual harassment, the Panel, on June 6, 2011, ordered a publication ban of information that might identify the complainants or witnesses in this hearing pursuant to Section 11.1(9) of the *Justices of the Peace Act*, R.S.O., c. J.4 as amended.

INTRODUCTION

[3] The Hearing Panel heard evidence on September 28, 29, 30 and November 9, 2011 in connection with the allegations particularized in Appendix "A" of the Notice of Hearing in this matter, dated April 11, 2011.

[4] The Hearing Panel is required to make findings of fact based on the evidence that has been adduced and thereafter determine whether the evidence establishes that the conduct of Justice of the Peace Massiah amounts to judicial misconduct.

[5] Presenting Counsel, Mr. Hunt, contends that the evidence supports judicial misconduct.

[6] Mr. Bhattacharya takes the position that the evidence demonstrates a misunderstanding between Justice of the Peace Massiah and the various members of the court staff but that his actions do not cross the threshold of judicial misconduct.

[7] In ascertaining whether judicial misconduct has been proven by Presenting Counsel, the Panel must be satisfied on the balance of probabilities.

THE EVIDENCE

First Allegation of AA Paragraph 2 of Appendix "A"

[8] On or about July 29, 2010, AA was performing her duties as a court clerk in the Ontario Court of Justice when she attended the office of Justice of the Peace Massiah in connection with the performance of her duties. Justice of the Peace Massiah asked AA to sit down on a couch in the office and rolled his chair in front of her and said, "You have beautiful eyes and I want to gaze into them." AA said, "Your Worship" and got up to leave. Justice of the Peace Massiah said, "Don't leave" or "Don't run away". Justice of the Peace Massiah then asked Ms. AA, "What colour are your eyes? Do they have green in them?" He also asked whether her eyes changed colour with the weather. Ms. AA left the office. Later that day, in relation to the aforementioned comments, Justice of the

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Peace Massiah stated to AA that, “I take it you don’t like compliments, you just like abuse.”

Evidence of AA on September 28, 2011.

[9] AA indicated that on the date in question, she entered Justice of the Peace Massiah’s chambers in order to obtain his signature on some release papers. A normal conversation was being held between the two of them when Justice of the Peace Massiah pulled his chair in front of hers and started commenting on how beautiful her eyes were and that he wanted to gaze into them.

[10] AA advised the Panel that the comments about her eyes made her feel uncomfortable and she left the office.

[11] She also indicated that Justice of the Peace Massiah asked her whether she had green eyes or whether they turned green. AA replied that she did not have green eyes.

[12] AA stated that as she was leaving the office, she believed that Justice of the Peace Massiah said, “Don’t leave” or “Don’t run away”. She indicated that it is possible that Justice of the Peace Massiah might have told her, “No wait, don’t run.” At this juncture, His Worship may have signed the paperwork which she took and did what she had to do with it.

[13] AA was not sure as to the exact timing in the day when this incident happened.

[14] AA said that when she was bringing Justice of the Peace Massiah back into court later in the day, he told her, “I take it you don’t like compliments. You just like abuse.”

[15] AA was taken completely off guard by this comment and advised the Panel that she didn’t know how to respond to it but told Justice of the Peace Massiah, “You got me.”

[16] She conceded that her response could have been interpreted by Justice of the Peace Massiah that she was responding in a jocular or funny fashion.

[17] AA acknowledged that she usually had an “okay rapport” with Justice of the Peace Massiah.

[18] AA immediately told MM, a fellow clerk, as to what had transpired and thought that MM might have said something to Justice of the Peace Massiah that prompted his last comment.

[19] She also became aware of MM’s post on her Facebook page that read, “A funny thing happened at the courthouse today. Ask AA about it.”

[20] AA made it very clear that she did not find the incident funny.

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[21] AA also told GG what had transpired.

Evidence of KK on September 29, 2011

[22] KK advised the Panel that she recalled AA telling her that Justice of the Peace Massiah had made comments to her about her eyes in his chambers and that the way those comments were said made her uncomfortable.

[23] KK suggested that AA tell someone about the situation. AA responded, "It's my word against his word and no one's going to believe me."

Evidence of MM on September 29, 2011

[24] MM confirmed that AA told her about Justice of the Peace Massiah looking or gazing into her eyes on the day that it happened.

[25] MM found the incident to be hilarious and made reference to the situation on her Facebook page. MM advised the Panel that she guessed that her take of the situation as opposed to AA's was based on the fact that she (MM) is not as easily offended as other people. Likewise, she stated that she never had any problem with Justice of the Peace Massiah's bantering.

Evidence of GG on September 29, 2011.

[26] GG confirmed that AA told her about an incident wherein Justice of the Peace Massiah asked AA to have a seat on the couch. Justice of the Peace Massiah then wheeled his chair over to her location and said, "You have beautiful eyes. I could gaze into your eyes all day." These comments made AA uncomfortable. The next time AA went to bring Justice of the Peace Massiah into court, he said, "What, you don't like a compliment, you prefer abuse?"

[27] GG was a court clerk trainer and advised the Hearing Panel that in the past she had warned other clerks about inappropriate comments on the part of Justice of the Peace Massiah. She indicated that these comments were usually directed towards younger and more submissive clerks.

[28] GG found Justice of the Peace Massiah to be a friendly person.

Evidence of Justice of the Peace Massiah on September 30, 2011

[29] Justice of the Peace Massiah indicated that on the day in question, he had noticed that AA was crestfallen and in low spirits. He thought that he would say something that was uplifting.

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[30] He stated that he asked her to sit for awhile and asked her how she was. AA sat on the couch and Justice of the Peace Massiah turned his chair and faced her. By this time, Justice of the Peace Massiah noted that AA seemed more relaxed and jovial.

[31] Justice of the Peace Massiah admitted that he told her, “You’ve got nice eyes.” “You’ve got beautiful eyes.” “Look, look, they are changing colours.”

[32] Presenting Counsel, Mr. Hunt, put the following suggestion to Justice of the Peace Massiah, namely,

“ But didn’t , didn’t a little alarm bell go off in your head at that point that I’m commenting on her eyes and calling them beautiful and talking about them changing colour? Didn’t an alarm bell go off that, you know, this is the sort of stuff that sexual or gender based harassment is made of, personal comments on people’s body features? Didn’t it sort of kick in?”

[33] Justice of the Peace Massiah responded, “No sir. Um, AA has nice eyes.”

[34] Justice of the Peace Massiah denied that he made any comment about gazing into AA’s eyes.

[35] Justice of the Peace Massiah acknowledged that he noted that AA was a little taken aback by his comments but he did not discern any discomfort on her part. She then smiled.

[36] Justice of the Peace Massiah agreed that there had been some papers that he signed although the timing of their presentation varies with that of AA.

[37] He also recalled calling her back to retrieve the papers and using the expression “hold on”.

[38] Justice of the Peace Massiah denied that he used any phrase about running away.

[39] Justice of the Peace Massiah denied that he made any comment about abuse.

Second Allegation of AA Paragraph 3 of Appendix “A”

[40] **On a day several months earlier in 2010, AA exited an elevator at the courthouse with a colleague. As they walked towards a courtroom, they passed Justice of the Peace Massiah and said hello. At that time, Justice of the Peace Massiah came up to AA, grabbed her hand and said, “Hey girl.” AA and her colleague continued into the courtroom.**

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Evidence of AA on September 28, 2011

[41] AA stated that on the date in question she and HH were getting off the elevator when Justice of the Peace Massiah said, “Hey girl.” He then reached out or grabbed her hand.

[42] AA and HH continued on their way. Once they were in the courtroom, AA said that HH asked her if Justice of the Peace Massiah had grabbed her hand and AA said that he had.

[43] In cross-examination, AA conceded that the physical contact was more like a hand-graze.

Evidence of HH on September 29, 2011

[44] HH advised the Panel that she remembers AA telling her something about Justice of the Peace Massiah either holding her hand or grabbing her hand. However, HH indicated that she does not remember being with AA when the incident happened.

Evidence of Justice of the Peace Massiah on September 30, 2011

[45] Justice of the Peace Massiah confirmed that he reached out his hand towards AA to shake her hand. He further stated that he does not believe that she saw him or that she was in the process of looking away with the result that his hand touched her hand as they passed one another.

Third Allegation of AA Paragraph 4 of Appendix “A”

[46] **On a day in 2009, AA had occasion to enter Justice of the Peace Massiah’s office in order to get him to sign some papers. There was another male Justice of the Peace present. When AA entered the office, she noticed that Justice of the Peace Massiah was either buttoning or unbuttoning his shirt. AA apologized for interrupting and was told by Justice of the Peace Massiah, “Okay, if anytime you want to see me with my shirt off just let me know.”**

Evidence of AA on September 28, 2011

[47] AA indicated that sometime during 2009 she attended at Justice of the Peace Massiah’s office to get some paperwork signed. When she entered the room, she noticed another Justice of the Peace present but cannot remember the name of that Justice of the Peace. At the same time, she observed Justice of the Peace Massiah either buttoning or unbuttoning his shirt. AA said, “Oh, I’m sorry Your Worship”. Justice of the Peace Massiah responded, “That’s okay. Anytime you want to see me with my shirt off, just let me know.”

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[48] AA did not respond to Justice of the Peace Massiah. However, she indicated that she told a number of people about the incident. She cannot recall the names of those individuals now.

[49] AA stated that she did not report this incident to her superiors because she was afraid that she would not be believed because she was just a clerk and he was a Justice of the Peace. Furthermore, she did not feel that anything would happen to her and she had no real safety concerns. Nevertheless, AA said that she felt uncomfortable about the comment.

Evidence of Justice of the Peace Massiah on September 30, 2011

[50] Justice of the Peace Massiah advised the Panel that he recalled the incident in question. He indicated that when AA came to his office he said that he would be right there. Justice of the Peace Massiah said that there may have been some banter between him and a colleague about his muscles.

[51] Presenting Counsel, Mr. Hunt, seemed taken aback about Justice of the Peace Massiah's contention that there was another Justice of the Peace present at this time. Mr. Hunt referred Justice of the Peace Massiah to his response that he made to the Review Council in February of 2011 regarding this allegation and Justice of the Peace Massiah agreed that he did not mention any comments about his muscles to someone else.

[52] Justice of the Peace Massiah stated that his recall about the muscle comment to a colleague came to him the night before he testified at this hearing.

[53] Justice of the Peace Massiah categorically denied any suggestion that he said, "That's okay, anytime you want to see me with my shirt off, just let me know."

First Allegation of BB Paragraph 5 of Appendix "A"

[54] **In May of 2010, BB was walking down a secure hallway in the courthouse. Justice of the Peace Massiah hurried to catch up with her and told her she looked attractive. Later on the same day, BB was in a small photocopy room in the basement of the courthouse when Justice of the Peace Massiah blocked the doorway and said, "I will make sure you get out by 4:30. You must have a date because you look so good."**

Evidence of BB on September 28, 2011

[55] BB indicated that in May of 2010 she was in her training phase of becoming a court clerk. She was instructed to bring Justice of the Peace Massiah into court. She went to his office and once she was aware that he had seen her she began to walk towards the courtroom. BB stated that Justice of the Peace Massiah seemed to catch up with her quickly and made some comment as to how attractive she looked. BB made no response to the comment and continued into court. She indicated that she felt horrible about the remark.

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[56] BB acknowledged that the word was “something to the effect of how attractive I looked that day. I can’t remember if attractive was the exact word.”

[57] BB advised the clerks that she had been working with about what had happened to her. She was upset about the comment.

[58] Later in the day, during a recess, BB was photocopying some material. Justice of the Peace Massiah was at the door of the photocopy room and made a comment about making sure that she got out at 4:30 for a good time because being dressed like she was, she must have a date.

[59] BB informed her mother of the comments later the same day.

[60] BB was of the opinion that everyone treated Justice of the Peace Massiah’s behaviour like it was a joke.

Evidence of HH on September 28, 2011

[61] HH who was BB’s trainer recalled that BB had made some comment but was unsure of exactly what was said and was unaware whether the comments disturbed her or made her feel awkward.

Evidence of JJ on September 29, 2011

[62] BB’s mother confirmed that her daughter had told her about the comments regarding how she was dressed and that her daughter seemed upset about the events.

[63] BB’s mother told her daughter that she had to put a stop to the inappropriate conduct but her daughter seemed to take the position that the other clerks were there longer than she was and nobody was doing anything about it.

Evidence of Justice of the Peace Massiah on September 30, 2011

[64] Justice of the Peace Massiah seemed very aware of the comments regarding BB’s appearance when he was originally introduced to her.

[65] It should be noted that in the transcript of the his evidence Justice of the Peace Massiah wrongly identifies BB as FF but there is no question that his evidence is related to BB’s allegation.

[66] Justice of the Peace Massiah stated that:

“A clerk was presented [to] me. Heather, the training clerk, brought FF [actually referring to BB], who in my view was exceptionally well

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dressed. I'm speaking about high heels and very, dressed to the nine's, and I was told that this clerk will be ... is in training and would be my clerk for the day. So, I welcomed her and I said, "You look lovely."

[67] Justice of the Peace Massiah further commented in his evidence that,

"... I'm picturing this because I can see it live. I recall it so well, so vividly ... I welcomed her as a member of the team and we spoke a little about who she was and her involvement now in the court system or in the work that she would be doing with me."

[68] Justice of the Peace Massiah maintained that his comment was meant to uplift BB.

[69] Presenting Counsel, Mr. Hunt, asked Justice of the Peace Massiah,

"And again, did it not sort of give you pause that when you start to make comments about how people look and whether they're lovely or not lovely, that you're getting into areas that are sort of the subject matter of harassment and discrimination?"

[70] Justice of the Peace Massiah responded to Mr. Hunt's suggestion, thusly,

"I'm not aware that a compliment, sir, or complimenting someone can amount to or is, based on the way you seem to be defining is harassment, sir."

[71] Justice of the Peace Massiah advised the Panel that court had finished around 4:30 p.m. and he advised all of the staff that,

"Good news. It looks like we are done early. All right, so even those who've got a date, those who've got this, those who've got that, I believe you can make it happen."

[72] He stated that the aforementioned comments were not directed specifically towards BB but rather at the collective group of staff members.

[73] Justice of the Peace Massiah categorically denies that he ever stood in the doorway of the photocopy room when BB was in it.

Second Allegation of BB Paragraph 6 of Appendix "A"

[74] **On a day in July of 2010, Justice of the Peace Massiah approached BB who was sitting alone in the cafeteria at the courthouse and placed his hand on her arm while asking her how she was doing.**

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Evidence of BB on September 28, 2011

[75] BB was sitting by herself in the cafeteria area at the courthouse in June or July 2010 waiting for some friends to join her.

[76] BB said that Justice of the Peace Massiah walked by her and placed his hand on her shoulder and back or something and said something to her. In cross-examination, she conceded that Justice of the Peace Massiah may have asked her how she was doing and put his hand on her arm.

[77] She rejected the idea that the contact was a mere brush. She stated that the contact lasted for a couple of seconds.

[78] BB felt “really uncomfortable” especially in light of the preceding incident.

Evidence of JJ on September 30, 2011

[79] BB’s mother advised the Hearing that her daughter told her about Justice of the Peace Massiah coming up from behind and putting his hand on her back and rubbing it.

[80] She described her daughter as being upset as a result of this encounter.

Evidence of Justice of the Peace Massiah on September 30, 2011

[81] Justice of the Peace acknowledges that as he was walking by BB in the cafeteria and that he tapped her lightly on the hand and asked her how she was doing.

First Allegation of CC Paragraph 7 of Appendix “A”

[82] **On a day in November 2009, CC was the court clerk in bail court. She attended Justice Massiah’s office in connection with her duties. Justice of the Peace R. was present in the office. His Worship R. commented that he had heard that congratulations were in order. Justice of the Peace Massiah asked why and CC responded that she was thirteen weeks pregnant. Justice of the Peace Massiah laughed and said, “I know what you were doing thirteen weeks ago.” As he said this, he nudged CC with his elbow.**

Evidence of CC on September 28, 2011

[83] CC stated that she went to get Justice of the Peace Massiah in November of 2009 from the office area of the courthouse. Justice of the Peace R. was also present and indicated that congratulations were in order.

[84] When Justice of the Peace Massiah was made aware that CC was thirteen weeks pregnant, CC testified that Justice of the Peace Massiah congratulated her and once they were

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in the hallway area he nudged her and said, “We know what you were doing thirteen weeks ago.”

[85] CC also said it was possible that Justice of the Peace Massiah may have also said, “You guys have been busy.” She conceded that this comment was made in a joking fashion.

[86] CC advised that she was a little bit upset and uncomfortable by the comments but laughed them off.

Evidence of Justice of the Peace R. on September 28, 2011

[87] Justice of the Peace R. confirmed that when CC came to the office, he congratulated her and she confirmed that she was pregnant.

[88] Justice of the Peace R. then stated that Justice of the Peace Massiah said, “Well girl, I guess we know what kind of things you were doing about thirteen weeks ago.” He confirmed that this comment was said in a joking manner.

[89] Justice of the Peace R. said, “I don’t recall her [CC] laughing. I do recall her looking, if it’s appropriate to say, askance. She looked somewhat startled.”

[90] It appeared to Justice of the Peace R. that Justice of the Peace Massiah at the very least was attempting to nudge CC.

[91] Justice of the Peace R. advised the Panel that he was uncomfortable about Justice of the Peace Massiah’s remark because it seemed inappropriate. Although he thought the conduct was improper, he did not raise this issue with Justice of the Peace Massiah at the time or at any later time.

Evidence of Justice of the Peace Massiah on September 30, 2011

[92] Justice of the Peace Massiah agreed that he congratulated CC about her pregnancy and said, “Congratulations.” “My, you’ve been a busy girl.”

[93] However, he denied ever nudging her or touching her or telling her, “Well girl, I guess we know what kind of things you were doing about thirteen weeks ago.”

[94] Justice of the Peace Massiah reluctantly seemed to concede that, if the aforementioned utterance had been made, it would amount to a sexual comment. Whether the remark has any place in the workplace was never clearly answered by Justice of the Peace Massiah. The following questions and answers between Presenting Counsel, Mr. Hunt, and Justice of the Peace Massiah highlight the issues:

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Q. And you'd agree with me that kind of remark would, it can only be a sexual remark, right?

A. Inferences could be there . . .

Q. Yes?

A. ... Yes.
[.]

Q. . . . Did they both [referring to CC and Justice of the Peace R.] misinterpret something you said?

A. In my reality and my opinion, sir, yes. It's all subject to interpretation, sir.

Q. And would you agree with me that that kind of remark has no place in a workplace situation?

A. If it was said, yeah, in the manner which you wish to convey it, sir, it perhaps could be troublesome, yes.

Q. Troublesome? It's totally inappropriate, isn't it?

A. I hesitate to comment on what a term appropriate can be construed in that context, sir. I wouldn't know.

.

Q. But would you agree with me, a pregnant woman shouldn't have to have comments made in a workplace about a sexual incident that led to her becoming pregnant?

A. Sir.

Q. That's just not right, is it?

A. That's a presumption, sir, and I, I, I'm concerned that it's being fashioned in the sense that statement was stated, sir.

Q. Alright.

A. It was not.

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[95] Justice of the Peace Massiah advised the Panel the when he used the term “girl” there may be some cultural aspect to it and it was intended as a salutation encompassing the idea of “what’s happening” or “how are things?” There was no intention to demean the recipient. No one had ever suggested to him that the phrase might not be an appropriate form of address. Justice of the Peace Massiah volunteered that upon reflection, he would not continue using the expression.

Second Allegation of CC Paragraph 8 of Appendix “A”

[96] **On other occasions, Justice of the Peace Massiah made CC uncomfortable by commenting on how she was dressed, how her hair looked and by eyeing her up and down and gawking at her.**

Evidence of CC on September 28, 2011

[97] CC indicated that it was not uncommon for Justice of the Peace Massiah to comment about her appearance.

[98] She indicated that other girls made references to Justice of the Peace Massiah eyeing them up and down. However, she did not associate this type of conduct with her.

Third Allegation of CC Paragraph 9 of Appendix “A”

[99] **On or about March or April of 2010, CC was working in the Intake Court area. While she was leaning over the desk of KK speaking to her, Justice of the Peace Massiah walked by and gave her a slap on the buttocks.**

Evidence of CC on September 28, 2011

[100] CC gave evidence that she was leaning over a cubicle talking with a colleague. This position would have caused her posterior to stick out a bit.

[101] CC stated that she noticed Justice of the Peace Massiah going by and felt a tap on her bottom. Justice of the Peace did not say anything.

[102] CC conceded that the incident could have been a mistake but the situation made her uncomfortable.

[103] CC advised KK, the person with whom she had been speaking, and said, “I think he just slapped my ass.”

[104] CC stated that, “I think I questioned in my mind if it could have been a mistake, if it could have been an accident, if it could have been done intentionally. I wasn’t sure.”

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[105] In cross-examination, CC agreed with Mr. Bhattacharya's suggestions as to the possibility that any contact could have been accidental. The following exchange demonstrates the complainant's view of the matter:

Q. [You] agree with me today, that if there was a touch by His Worship Massiah, it could have been accidental, correct?

A. I do agree with that. I thought it could have been [accidental] but I also thought that if he knew he hit me, he possibly could have turned and said, "Oh, I'm sorry". But, nothing was said. So, I just thought, I think he did it on purpose.

Q. Or the other option is that if he didn't realize that he had had contact with you, it could have been something in his hand, it could have been part of his body that he didn't realize was in contact with you?

A. That could be possible as well.

Evidence of KK on September 29, 2011

[106] KK confirmed that CC had stated that Justice of the Peace Massiah had touched her bottom and that she seemed very uncomfortable.

[107] KK asked CC whether it wasn't just a case of Justice of the Peace Massiah trying to get around her and the garbage cans and the recycling bin.

Evidence of Justice of the Peace Massiah on September 30, 2011

[108] Justice of the Peace Massiah stated that he has no recollection of seeing CC in the circumstances that she described.

[109] He conceded that if he had walked by the situation as described he may accidentally have had incidental contact with CC without realizing it.

[110] Justice of the Peace Massiah also described his manner of walking as brisk in accordance with his military background.

Allegation of DD Paragraph 10 of Appendix "A"

[111] **During 2009, DD was working as a court clerk with Justice of the Peace Massiah. At the conclusion of the court proceedings, DD attended Justice of the Peace Massiah's office with paperwork that required Justice of the Peace Massiah's signature. The door was ajar and DD knocked and was told to come in and asked why she was knocking. DD**

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explained that she wanted to make sure that Justice of the Peace Massiah was “decent”. Justice of the Peace Massiah responded that, “It is not like you haven’t seen anything like that before. Mine is just brown.”

Evidence of DD on September 28, 2011

[112] DD stated that on a day in the winter of 2009 after 5 p.m., she went to Justice of the Peace Massiah’s office to get some paperwork signed. The door was ajar and she rapped on it.

[113] Her evidence was that at this point Justice of the Peace Massiah asked why she had knocked and she said that she wanted to make sure that everyone was decent. It was at this time that she said that Justice of the Peace Massiah said, “Well, it’s not like you haven’t seen anything like that before, except mine is brown.” DD took this to mean his genital area.

[114] She was shocked by the comment. She put down the paperwork and left and told LL and EE about the incident.

[115] In cross-examination, DD agreed with Mr. Bhattacharya’s suggestion that, “[Justice of the Peace Massiah’s] normal demeanour or attitude outside of court was that he was friendly and fairly relaxed and joking with court staff.”

[116] Likewise, DD also agreed with counsel’s suggestion that Justice of the Peace Massiah could have been joking but she emphatically stated that she did not take it that way.

[117] Counsel put the proposition to DD that Justice of the Peace Massiah said, “It’s not like anything you haven’t seen before, there’s my gown.” DD categorically rejected this suggestion.

[118] DD stated that she did not report the incident because she did not want to make waves in the workplace.

Evidence of LL on September 29, 2011

[119] LL confirmed that DD told her about the aforementioned incident although she cannot recall whether the descriptor was brown or black.

[120] LL advised the Panel that her recollection was very vague as to what the exact words that were said and that she could only remember the gist of her conversation with DD.

[121] She remembered that DD was upset.

Evidence of Justice of the Peace Massiah on September 29, 2011

[122] Justice of the Peace Massiah was uncertain whether DD asked if he was decent.

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[123] He does recall that on the day in question he invited DD into his chambers and conveyed that he was almost done.

[124] Justice of the Peace Massiah absolutely denied that he said, “It’s not like you haven’t seen anything before. Mine is just brown.”

[125] Mr. Bhattacharya did not put to Justice of the Peace Massiah that he said, “It’s not like anything you haven’t seen before. There’s my gown.” Nor did Justice of the Peace Massiah volunteer this possible utterance in his testimony.

[126] Justice of the Peace Massiah suggested that DD misinterpreted him when he said, “I’m almost done.”

First Allegation of EE Paragraph 11 of Appendix “A”

[127] **In September or October of 2009, EE was working as a court clerk in a bail court in which Justice of the Peace Massiah was presiding. As EE was walking by, she said good morning and Justice of the Peace said, “Damn girl, you look fine. Where did that figure come from?” EE responded, “I don’t know Your Worship. I have two kids.”**

Evidence of EE on September 28, 2011

[128] EE and Justice of the Peace Massiah had a chance meeting in a hallway at the courthouse in 2009 and he stated, “Damn girl, where did that figure come from?”

[129] EE replied, “I don’t know. I’ve had two kids Your Worship.”

[130] EE advised the Hearing that she was shocked and couldn’t believe that the comment was said. She did not find the remark amusing. She allowed that the remark might be viewed as complimentary by some but she found that the comment made her very uncomfortable.

[131] Though she considered the remark inappropriate, she had been reluctant to make a formal complaint because she did not want to start the ball rolling.

[132] In cross-examination, counsel elicited the following information from EE’s original statement of August 25th, 2010 wherein she advised the interviewer that, “It (the comment) didn’t bother me at the time, but I knew it was out of order.” Furthermore, she stated that he was ‘a creepster’ and I will not be wearing that outfit again.”

[133] EE acknowledged that she was aware that several employees referred to Justice of the Peace Massiah as ‘a creepster’.

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Evidence of Justice of the Peace Massiah on September 30, 2011

[134] Justice of the Peace Massiah stated that he had worked with EE on many occasions and complimented her, “if she was attired in [a] particular way or anything of sorts. I would simply say that she looked nice that day or looked lovely or something to that effect.”

[135] Justice of the Peace Massiah acknowledged that he made the remark in question but it had been intended as a compliment and that EE said, “Thank you, Your Worship, I have two children.”

[136] Justice of the Peace Massiah did not observe any degree of discomfort being displayed by EE as a result of his comment.

Second Allegation of EE Paragraph 12 of Appendix “A”

[137] **On other occasions at the courthouse, you commented to EE, “Hey girl, you look fine.” “Hey girl, you look good today.” and “Oh, look at you, pregnant and you still look good.”**

Evidence of EE on September 28, 2011

[138] EE stated that when she was pregnant with her last child, Justice of the Peace Massiah said something along the lines of, “So pregnant and still so beautiful.”

[139] This remark made EE uncomfortable.

[140] She indicated that she did not report this incident because, “[she] was frightened. I just didn’t want to be ... he’s superior. He was a Justice of the Peace. I couldn’t ... I just didn’t know what to do, so I just kept my mouth shut.”

Evidence of Justice of the Peace Massiah on September 30, 2011

[141] These remarks were not addressed by Justice of the Peace Massiah in his evidence except in the most general sense in the following question and answer segment:

Q. And did you ever compliment her?

A. Yes, I have.

Q. How?

A. Ah. By simply indicating to her that, ah, that, ah, she was . . . if she was attired in a particular way or anything of sorts, I would say she

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looked nice that day or looked, ah, lovely or something to that effect. I don't specifically reference the words that . . .

First Allegation of FF Paragraph 13 of Appendix "A"

[142] **On a day in 2008, FF was working as a clerk in Justice of the Peace Massiah's courtroom. When she attended Justice of the Peace Massiah's office, he asked, "What do clerks wear under your gowns?" He went on and said, "I could picture clerks not wearing anything under their gowns."**

Evidence of FF on September 28, 2011

[143] FF stated that she was working as a clerk in 2008 and was outside one of the courtrooms with Justice of the Peace Massiah when he made a comment along the lines of, "What do you wear under your gowns?"

[144] FF could not remember the exact context or what her response was but she said that Justice of the Peace Massiah also stated, "I think you girls shouldn't be wearing anything under your gowns. I can picture you wearing nothing under your gowns."

[145] This exchange made FF uncomfortable but she did not report the situation because Justice of the Peace Massiah was a person in authority.

Evidence of Justice of the Peace Massiah on September 30, 2011

[146] Justice of the Peace Massiah recalls an animated discussion between staff members with respect to the issue of robes. He recalls a general conversation regarding what was worn under the robes and hearing FF state her preference. Whereupon, Justice of the Peace said, "Well, I cannot picture that change ... to the effect that I could not see the dress code changing to accommodate what she was saying."

[147] Justice of the Peace Massiah did not notice any discomfort on the part of FF.

Second Allegation of FF Paragraph 14 of Appendix "A"

[148] **Several months later, FF was with Justice of the Peace Massiah outside a courtroom when he said to her, "You ladies always look so nice." FF responded that if it was up to her she would prefer to be in a sweater and a tee shirt because it was more comfortable. Justice of the Peace Massiah said, "I can picture you changing." He then paused appearing to picture her changing. He then said, "Hold on a second ... hmm, okay, I'm ready to go in now."**

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Evidence of FF on September 30, 2011

[149] FF believes these comments were made after the preceding allegation but cannot be sure of that fact.

[150] On this occasion, FF said that Justice of the Peace Massiah commented that, “You ladies always look so nice.”

[151] FF responded to this by stating that if it were up to her she would be in sweat pants and a t-shirt.

[152] Justice of the Peace Massiah is reported to have then said, “Hmmm. Hold on. I’m picturing something. Okay, I’m ready to go now.”

[153] FF took this last statement as a reference to her changing her clothes.

[154] She then stated that she cannot remember if Justice of the Peace Massiah used the word changing. This uncertainty is demonstrated in the following exchange:

Q. All right. So, did he make the reference to you changing clothes?

A. To be honest, that’s how I took it. I can’t remember if that was the, his exact wording, but he had said something about he was picturing me changing or he was picturing, sorry, I’m trying to remember as best I can.

A. I can’t remember if he used the words changing but I remember I’m picturing something or I’m picturing you changing. That’s how I took it.

[155] FF denied that the comments of Justice of the Peace Massiah had anything to do with the policy changing with respect to the wearing of gowns or that the conversation was connected with the temperatures in the courtrooms.

[156] FF indicated that Justice of the Peace Massiah never suggested meeting her outside court and there was never any touching.

[157] She described Justice of the Peace Massiah as being a fairly happy and friendly person who tried to have a sense of humour.

Evidence of Justice of the Peace Massiah

[158] Justice of the Peace Massiah stated that he was dumbfounded as to why FF would attribute this statement to him.

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Additional Evidence of Justice of the Peace Massiah that is not Fact Specific to an Allegation

[159] Justice of the Peace Massiah filed a resume as part of his testimony at this hearing. This document gives a great deal of information regarding Justice of the Peace Massiah's antecedents. Of particular note, it would appear that Justice of the Peace Massiah possesses much more experience in the realm of what is appropriate and inappropriate conduct in the workplace due to his work with the Ontario Human Rights Commission and the Canadian Human Rights Commission prior to his appointment to the bench.

[160] Justice of the Peace Massiah agreed with Presenting Counsel Hunt's suggestion that harassment is behaviour that is going to be demeaning or humiliating or embarrassing to a person that on a reasonable view should have been known to have been unwelcome.

[161] Justice of the Peace Massiah repeatedly referred to his court staff as members of his team.

[162] He went to great lengths to state that he did not view his position on the bench as a position of power. Furthermore, Justice of the Peace Massiah elaborated that all the courtroom players were equal in power. He did not consider himself as "the boss".

[163] Justice of the Peace Massiah expressed dismay that there was no written policy or understanding on the part of the staff as to how they should address perceived misconduct of a Justice of the Peace.

[164] Justice of the Peace Massiah agreed with Presenting Counsel, Mr. Hunt, that commenting on people's looks is not okay. However, he was quick to point out that, "I would say, to compliment or extend a greeting or salutation as an extension of appreciation, I think it's equally fine sir. There is a piece behind where you're inferring. There is a requirement, there's an onus on any individual to advise that person that they are either not comfortable with it, not happy with it, or do not wish to have it."

[165] What led up to these allegations becoming public? The following exchange attempts to distil Justice of the Peace Massiah's position:

Q. But do I take it that in your view, these women were motivated or fuelled by an element of prejudgement of you, lack of tolerance of you and the way you communicated to come forward with these accounts and allegations that you say didn't happen?

A. Sir. I, I, I would not hesitate . . . ah, choose to comment in terms of what the motive might be, other than I can tell you, sir, which your own evidence indicates, they were collective. They spoke with each other. As to what became a group mindset and when it became a group

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mindset, based on what information was being fed and who said what, who was the leader of what, who could have poisoned it, who could have started it, I don't know, sir.

Evidence of witnesses called by counsel for Justice of the Peace Massiah

[166] Mr. Bhattacharya called a number of witnesses that he said might be described as character witnesses.

[167] Character witnesses are called to give evidence as to a person's general reputation in the community for honesty and integrity. Many individuals that are presented as character witnesses often do not seem to have a clear understanding as to their role. There is a tendency for character witnesses to want to give their life connection with the person for whom they have been called. In this hearing, the character witnesses provided interesting highlights regarding Justice of the Peace Massiah's many positive attributes but the answer to the question as to his general reputation for honesty and integrity in the community was not particularly well addressed.

[168] The specific answers to the question as to his general reputation for honesty and integrity in the community include:

- I found him very professional and I have never seen any type of conduct that would suggest otherwise.
- My comment would be that he is a person of integrity, and I believe, somebody who is respected.
- He is friendly and nice.
- I've never had any problems with him. We, it's a professional relationship.
- I have no problems with that. [honesty and integrity]
- I think, from what I've seen and my interactions, friendly, professional, outgoing, very approachable type of member of the judiciary. He was flexible and accommodating for any kind of issues that we would have whether it be schedule or different activities that were going on in the court office, he was accommodating for us.
- He is well known, and as a matter of fact, many in the community were very happy, very proud, when he was appointed Justice of the Peace. He had worked with many organizations, they knew of him, so I think they look up to him as a man of integrity, a man of trust and someone of which they could be very, very proud.

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- Without doubt, I trust him. I know him and I hold him in high regard and think he's a man of great integrity.

[169] Despite any frailties in the character evidence presentation, the Panel concludes that Justice of the Peace Massiah has a general reputation of honesty and integrity in the community.

THE LAW

The Role of Presenting Counsel

[170] Pursuant to section 4 of the *Justices of the Peace Procedural Code for Hearing*, established pursuant to subsection 10 of the *Justices of the Peace Act*, R.S.O. 1990, c.J.4, as amended (the "*Act*"), Presenting Counsel's duty before the Hearing Panel is not "to seek a particular order against the respondent, but to see that the complaint against the justice of the peace is evaluated fairly and dispassionately to the end of achieving a just result."

The Role of the Hearing Panel

[171] The Hearing Panel is to determine whether the evidence presented in this hearing does or does not result in a finding of judicial misconduct such that one or more of the range of dispositions set out under section 11.1(10) of the *Justices of the Peace Act* are required in order to restore public confidence in the judiciary.

The Standard of Proof

[172] The Supreme Court of Canada in *F.H. v. McDougall* [2008] 3 S.C.R. 41 set out the standard of proof that is to be applied. At paragraphs 45 and 46, the Court wrote that:

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. **I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.** (Emphasis added by the Panel)

[46] Similarly, 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

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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.

[173] The *McDougall* case put to rest the approach that had infiltrated decisions, including professional misconduct cases, regarding the standard of proof to be applied. Lord Denning had set out a “shifting standard” test in *Bater v. Bater* [1950] 2 All E.R. 458 (C.A.) wherein the civil standard of proof (i.e. a balance of probabilities) had degrees of variance that were “commensurate with the occasion”. In other words, the more serious the allegation, the closer the standard would move from the traditional civil standard of proof on the balance of probabilities to a point closer to the criminal standard of proof beyond a reasonable doubt.

[174] Mr. Justice Wake applied *McDougall* in the decision *In The Matter of a Hearing Respecting the Conduct of Justice of the Peace Paul A. Welsh*, (2009) J.P.R.C.

[175] Mr. Bhattacharya stated in his oral submissions that “I think the Supreme Court of Canada got it right [in reference to *McDougall*,] BUT ...”

[176] In his oral and written submissions, counsel noted that *In the Commission of Inquiry into the Conduct of His Worship Vernon A. Chang Alloy, A Justice of the Peace*, November 9, 2009, William A. Gorewich, Commissioner, observed that:

“The standard of proof in these matters is not as high as the standard of proof required in criminal matters, i.e. proof beyond a reasonable doubt, but requires more than simple probability. In such hearings, where serious allegations have been made and may result in the removal from office, the proof of the allegations ‘must be clear and convincing and based upon cogent evidence which is accepted by the tribunal’, such standard enunciated in *Re: Bernstein and College of Physicians and Surgeons of Ontario* (1997) 15 O.R. (2d) 477 at 485 (Ont. Div. Ct.).”

[177] A review of the *Vernon A. Chang Alloy Report* does not indicate that the *McDougall* decision had been brought to the attention of Commissioner Gorewich for his consideration.

[178] Mr. Bhattacharya seems to be less than convinced as to the direction provided by the Supreme Court in *McDougall* at paragraphs 44 and 45.

[179] The Panel does not view the *McDougall* decision as a ‘conditional opinion’ by the Supreme Court of Canada.

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Judicial Misconduct under the Act

[180] Section 11.1(1) of the *Act* provides that the range of dispositions therein listed may be made should the Hearing Panel “uphold the complaint”. While section 11.1 of the *Act* does not expressly refer to “misconduct” by the justice of the peace, section 11.1(10) is substantially similar to section 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990 c. C43, the applicable legislation in respect of complaints proceedings involving judges of the Ontario Court of Justice. Section 51.6(11) provides that: “After completing the hearing, the Judicial Council may [...] if it finds there has been misconduct by the judge may [...] impose a range of dispositions that are identical to those of section 11.1(1) of the *Act*.”

[181] Considering the similarity of the statutory provisions under the *Act* and the *Courts of Justice Act*, it is clear that the intent of the legislative scheme is that complaints in respect of justices of the peace are to be considered in light of whether there has been judicial misconduct, and where judicial misconduct is found to be established, the application of the range of dispositions under section 11.2(1) should be considered in the same terms as those applicable to provincial court judges.

[182] The Honourable Regional Senior Justice Kathryn Hawke in *The Matter of a Complaint Concerning the Conduct of the Peace Paul Kowarsky*, (2011) J.P.R.C., supported the aforementioned view of the legislative scheme when she stated at paragraph 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 the 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.).

[183] Public confidence in the justice system is a touchstone principle in the context of considering the issue of judicial misconduct. The important role of public confidence has been addressed by the Supreme Court of Canada in *Re: Therrien*, [2001] 2 S.C.R. 3 (S.C.C.) at paragraphs 108-112; and by the Quebec Court of Appeal in *Re Ruffo*, [2005] Q.J. No. 17953.

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[184] In *Re: Therrien*, Mr. Justice Gonthier, at paragraph, 110 wrote:

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 simply 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 or 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 judgement.

(Canadian Judicial Council, *Ethical principles for Judges* (1998), p.14)

[185] The Hearing Panel's reasons in *The Matter of a Complaint Respecting the Honourable Justice Norman Douglas*, (2006) O.J.C. are instructive when considering the meaning of judicial misconduct. The following passages from the decision are particularly noteworthy.

[5] Focusing on the broad scope of s. 51.6(1) *Courts of Justice Act*, R.S.O. 1990, c. C. 43, in *Re: Baldwin* (2002), a Hearing Panel of this Council considered the meaning of judicial misconduct. In doing so, it relied on two leading decisions of the Supreme Court of Canada: *Therrien v. Minister of Justice*, [2001] 2 S.C.R. 3 and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249. The Council stated:

[...]

Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, the question under s. 56.6(11) is whether the impugned conduct is so seriously

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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.

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

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

[10] To make a finding of misconduct, the Council must be satisfied that the evidence meets the requisite standard of proof required to demonstrate judicial misconduct. In *Re: Evans*, the Hearing Panel reviewed the authorities and adopted the requirement that a finding of professional misconduct requires clear and convincing proof based on cogent evidence.

[186] The mandate of a Hearing Panel has been enunciated in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (S.C.C.) at para. 68.

The Comité's mandate is thus to ensure compliance with judicial ethics in order to preserve the integrity of the judiciary. Its role is remedial and relates to the judiciary rather than the judge affected by a sanction.

[187] The test for judicial misconduct as referenced in the preceding cases has been applied to hearings involving justices of the peace in the Province of Ontario. (See *In the Matter of a Hearing Respecting the Conduct of Justice of the Peace Paul A. Welsh* (2009) J.P.R.C. at paragraph 7.)

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[188] In *Re Therrien*, (supra), under the heading, The Role of the Judge: “A Place Apart”, at paragraph 111, Mr. Justice Gonthier expressed the role of those performing judicial functions thusly:

“The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”

Principles of Judicial Office for Justices of the Peace

[189] The Justices of the Peace Review Council approved the *Principles of Judicial Office for Justices of the Peace* 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.”

[190] 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.”

[191] The Canadian Judicial Council’s publication *Ethical Principles for Judges*, Catalogue Number JU11-4/2004E-PDF, ISBN 0-662-38118-1, provides assistance when considering the issue of integrity in the judicial setting. The statement under the heading, Integrity, reads,

“Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.”

[192] Thereafter, Principle 1 states that:

“Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.”

[193] Commentary #2 highlights the difficulty in defining integrity with exactitude. The text of the commentary reads:

“While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific.

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There can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place and time.”

[194] Paragraph 99 in the *Report by the Canadian Judicial Council to the Minister of Justice in the Matter of the Review of the Conduct of the Honourable Theodore Matlow of the Superior Court of Justice* addressed the role that ethical guidelines play in evaluating a judge’s conduct.

“ . . . 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. Therefore, the fact that challenged conduct is inconsistent with or in breach of the *Ethical Principles* constitutes a weighty factor in determining whether a judge has met the objective standard of impartiality and integrity required of a judge and in determining whether the challenged conduct meets the objective standard for removal from the Bench.

For these reasons, we concluded that the Inquiry Committee was entitled to take *Ethical Principles* into account in assessing whether the conduct complained of constituted sanctionable conduct.”

[195] Justices of the peace are judicial officers. They are therefore subject to the same standards of conduct as judges. The case law makes no apparent distinction.

[196] In the *Report of the Judicial Inquiry Re: His Worship Rick C. Romain* (2003) at p. 21, Justice Russell J. Otter stated:

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

Alleged Conduct: Notice of Hearing Appendix “A”

[197] The alleged conduct against Justice of the Peace Massiah includes words and touching.

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Court Staff and the Judiciary

[198] *In the Matter of a Complaint Concerning the Conduct of Justice of the Peace Kowarsky*, the Panel noted at paragraph 16:

[16] . . . 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, c. 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 the 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).

[199] The Panel further observed at paragraph 36 that:

[36] . . . , 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.

Inappropriate Gender Related Comments and Conduct

[200] In 1996, the Ontario Rights Commission issued a *Policy on Sexual Harassment and Inappropriate Gender Related Comments and Conduct*. The *Policy* states in its introduction:

“Freedom from sexual harassment and other forms of unequal treatment expressed through demeaning comments and actions based on gender is, therefore, a human right.”

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[201] A non-exhaustive list of what may constitute sexual harassment or inappropriate gender-based comments and conduct includes: (i) gender-related comments about an individual's physical characteristics or mannerisms; (ii) unwelcome physical contact; (iii) suggestive or offensive remarks or innuendos about members of a specific gender; (vi) leering or inappropriate staring; (ix) offensive jokes or comments of a sexual nature about an employee, client or tenant; (xii) questions or discussions about sexual activities; (xiii) paternalism based on gender which a person feels undermines his or her self-respect or position of responsibility.

[202] Mr. Justice Carthy of The Ontario Court of Appeal, in *Bannister v. General Motors of Canada Ltd.*, 40 O.R. (3d) 577. (Ont. C.A.), addressed the issue of a female's responsibility to demonstrate her resistance or rejection of inappropriate comments where there is a power imbalance in an employment setting at paragraph 31 when he wrote:

“ . . . It is not a question of the strength or mettle of female employees, or their willingness to do battle. No female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented. It is an abuse of power for the supervisor to condone or participate in such conduct.”

[203] Presenting Counsel's written argument referenced several hearings in Ontario and the United States of America to illustrate findings of judicial misconduct with respect to inappropriate sexual comments and actions. The Panel has reviewed those authorities and notes that the conduct involved in those decisions differ from the findings of fact that we find in the present case and accordingly we do not propose to make comment on them except to highlight a useful passage from two of them. (See: *In the Matter of a Complaint Concerning the Conduct of Justice of the Peace Paul Kowarsky*, (2011) J.P.R.C.; *Report of a Judicial Inquiry Re: His Worship Leonard P. Blackman, A Justice of the Peace*, (1994); *Report of a Judicial Inquiry Re: His Worship G. Lenard Obokata, a Justice of the Peace*, (2003); *In the Matter of Warren M. Doolittle, a Judge of the District Court Nassau* (1985), *State of New York Commission on Judicial Conduct*; *In the Matter of Marvin C. Buchanan, a Judge of the District Court and Municipal Court*, (1983) *State of Washington Supreme Court*; *In the Matter of Mark S. Deming, a Judge of District Court No.1, Pierce County*, (1987) *State of Washington Supreme Court*; *Inquiry Concerning Judge John B. Gibson*, 48 Cal. 4th CJP Supp. 112 [2000] *Commission on Judicial Performance*; *Inquiry Concerning Judge W. Jackson Willoughby*, 48 Cal. 4th CJP Supp. 145 [June 2000] *Commission on Judicial Performance*.)

[204] The first quotation is from paragraph 11 *In the Matter of a Hearing of a Complaint Concerning the Conduct of Justice of the Peace Paul Kowarsky*, (2011) J.P.R.C. wherein the Panel concluded:

[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-

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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 indelicate. Given the circumstances, it was insulting and degrading.”

[205] *In the Matter of Warren M. Doolittle, A Judge of the District Court Nassau (1985), State of New York Commission on Judicial Conduct*, the Commission determined that:

“The cajoling of women about their appearance or their temperament has come to signify differential treatment on the basis of sex. A sensitized and enlightened society has come to realize that such treatment is irrational and unjust and has abandoned the teasing once tolerated and now considered demeaning and offensive. Comments such as those of [the] respondent are no longer considered complimentary or amusing, especially in a professional setting.”

[206] Mr. Bhattacharya drew the Panel’s attention to several of the decisions cited by Presenting Counsel that highlighted what he viewed as much more serious conduct than the circumstances facing Justice of the Peace Massiah.

[207] The Panel acknowledges that the factual findings in *Report of the Judicial Council to the Minister In the Matter of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice*, March 30, 2009; *The Matter of a Hearing Respecting the Conduct of Justice of the Peace Paul Kowarsky*, (2011) J.P.R.C.; *Re Therrien*, [2001] 2 S.C.R. 3 (S.C.C.); and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (S.C.C.) are remarkably different than the facts of this hearing. Obviously, each case depends on its own findings of fact. The Panel found the authorities useful when considering how the enunciated principles regarding the judicial misconduct in each case were applied by the various adjudicating bodies to the factual findings that were before them.

[208] Mr. Bhattacharya directed this Panel’s attention to *In the Matter of a Complaint Respecting the Honourable Justice Norman Douglas* (2006) O.J.C. to illustrate that even when there is clear and cogent evidence, the Panel must be satisfied that the evidence is convincing evidence of judicial misconduct. In the *Douglas* hearing, the Panel concluded that although Justice Douglas’ conduct showed alarmingly poor judgment and was close to the line, it did not amount to judicial misconduct.

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ISSUES FOR THE PANEL TO KEEP IN MIND WHEN ASSESSING THE FACTS

Staff Training and Awareness of Complaint Avenues

[209] Mr. Bhattacharya raised the issue that the clerks had not been given specific training in how to interact with the judiciary. More particularly, he pointed out they had not been instructed in how to proceed with a complaint against a member of the judiciary regarding workplace harassment.

[210] Along the same line, it was suggested that the staff had not been trained in workplace sexual harassment protocols under the Ontario Human Rights legislation.

[211] Furthermore, concern was expressed that some of the complaints before this Panel might have been subject to limitation periods under the Ontario Human Rights regime.

[212] The Panel is of the view that the aforementioned points have no particular bearing on this hearing. We agree with Presenting Counsel's submission that the issues herein are not being adjudicated pursuant to the *Ontario Human Rights Code*, R.S.O. 1990, Chapter H.19 (the "*Code*") as amended but rather pursuant to the *Justices of the Peace Act* as it relates to possible judicial misconduct. References to the Ontario Human Rights Commission, *Policy on Sexual Harassment and Inappropriate Gender Related Comments and Conduct* might very well provide assistance to the Panel when considering what constitutes harassment and inappropriate behaviour in the workplace but the recommendations as contained in the material are specific to the *Code* itself.

[213] The Panel is aided in its deliberations by the *Code's* definition of "harassment" as found in Section 10(1)(e). "Harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

[214] It should also be noted that although there is a the one-year limitation period in Section 34(1)(a) of the *Ontario Human Rights Code*, a Tribunal as constituted under the *Code*, pursuant to Section 34(2), may proceed if it is satisfied that the delay was incurred in good faith and that no substantial prejudice will result.

[215] A number of the complainants at this hearing testified that they did not report Justice of the Peace Massiah's actions for a variety of reasons including: their belief that Justice of the Peace Massiah's conduct was treated as a joke, their newness to their workplace, they would not be believed and the embarrassing nature of the complaint.

[216] This Panel is not governed by the procedural directions of the *Human Rights Code*. However, if we were so governed, we would have allowed the complaints to proceed in the current case. The reasons for the delay in reporting combined with the fact that these allegations are not particularly dated do not put Justice of the Massiah in a prejudicial

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position. In fact, Justice of the Peace Massiah's evidence demonstrated his familiarity with the events in question.

Reaction to the Conduct by the Complainants

[217] Mr. Bhattacharya drew to the Panel's attention that the complainants gave no indication to Justice of the Peace Massiah as to their unhappiness with his actions and in fact often they responded in an off-handed or jocular fashion. Since there was no input given to Justice of the Peace Massiah regarding his conduct and the employees continued to work with him and did not ask for reassignment, it is suggested that he could not have known that his conduct amounted to harassment.

[218] The Panel is of the view that because of the power imbalance between Justice of the Peace Massiah and the clerks, it is not surprising that they were either mute or pretended to laugh the comments off.

[219] We are in agreement with Presenting Counsel when he observed, "It strains credulity that His Worship did not know his comments to female court staff were inappropriate." This is particularly true considering Justice of the Peace Massiah's antecedents with the Ontario Human Rights Commission and the Canadian Human Rights Commission.

Attitude and Perception That Justice of the Peace Massiah Brought to his Role

[220] Justice of the Peace Massiah advised the Panel that as part of his training, he was made aware of the important role that the clerks played in conducting a smooth-running court. He realized that to achieve a good relationship it was crucial to have a good rapport with his staff.

[221] To achieve a good working environment, Justice of the Peace Massiah often used what he believed were compliments towards the clerks. These comments included references to their physical appearance and form of dress.

[222] Justice of the Peace Massiah projected a friendly, jocular, and outgoing personality.

[223] It is clear that a fundamental belief of Justice of the Peace Massiah was that the clerks were his equal in the courthouse setting. The Panel has a difficult time understanding how Justice of the Peace Massiah could seriously believe that there was not a power imbalance between him and his clerks.

[224] It is refreshing to hear that Justice of the Peace Massiah desired to promote a team concept with the staff. However, at the end of the day, Justice of the Peace Massiah must be viewed as a person of authority. Perhaps he did not hire, promote or fire the clerks involved, but the very nature of his role and position commanded respect and obedience.

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Words Used

[225] Mr. Bhattacharya argued that, unlike certain of the cases referred to by Mr. Hunt, Justice of the Peace Massiah did not use explicit sexual words. He conceded that two of the comments, if proven, could have been taken to express reference to sexual activity. Those expressions are “It’s nothing you haven’t seen before except mine’s brown.” and “I know what you were doing thirteen weeks ago.” However, it is conceded that some of the words he used could be taken to infer a sexual context.

[226] Presenting Counsel noted that notwithstanding the absence of sexually explicit language, the complainants testified that they took his comments to be sexual in nature. Mr. Hunt urged the Panel to view Justice of the Peace Massiah’s conduct in its totality.

Delay and Memory

[227] Mr. Bhattacharya stressed that none of the complainants made a formal complaint at or near the time of an incident.

[228] The Panel was asked to keep in mind that witnesses could not remember with exact clarity what had been said or done and that none of the complainants had made notes regarding the occurrences.

[229] Delay and memory issues are but two of the many aspects for the Panel to consider when assessing the credibility and reliability of any witness.

[230] The Panel is mindful of Mr. Justice Cory’s observations regarding the benefits of early hearings of matters in *R. v. Askov*, 59 C.C.C. (3d) 449 at 475 wherein he wrote:

“There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial.”

The Negative Reputation of Justice of the Peace Massiah that was in Play

[231] Mr. Bhattacharya drew to the Panel’s attention the fact that some personnel had been given information early on that Justice of the Peace Massiah had the reputation as a “creepster”. Counsel suggested that this kind of talk would create a poisoned atmosphere against Justice of the Peace Massiah.

[232] Mr. Bhattacharya was quick to point out that there were many individuals who did not subscribe to the view that Justice of the Peace Massiah was a “creepster”. In fact, they viewed him in a positive light.

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[233] The Panel recognizes that some of the complainants might have been aware of Justice of the Peace Massiah's negative reputation.

[234] The Panel has instructed itself regarding this possible lens through which some of the complainants might have viewed an event. However, at the end of the day, this is just another factor to keep in mind in assessing the credibility and reliability of each witness.

[235] The Panel is of the opinion that none of the complainants allowed the less than flattering reputation of Justice of the Peace Massiah to influence or taint the scenarios that they presented to the Panel.

Credibility

[236] Mr. Bhattacharya argues that his client's ability to recall specifics of some allegations was hampered by the passage of time and the delay of getting the specific particulars of the allegations that are before the Panel.

[237] In spite of the aforementioned shortcomings, Justice of the Peace Massiah seemed very capable of giving detailed accounts on most of the matters.

[238] The passage of time is recognized by the Panel as a valid explanation for forgetting or being unsure of past events. This applies to the all of the witnesses including Justice of the Peace Massiah.

[239] Fortunately, even the most distant dates before the Panel are not that long past.

[240] When credibility is being assessed, there are many factors for the trier of fact to consider. The Panel does not propose to provide an exhaustive list that might help determine the issue of credibility. However, consideration to the passage of time between the event and a witness' testimony; the ability to recall detail; the manner in which the evidence is given; whether the evidence is internally and externally consistent; motive; corroboration; variation of testimony; criminal record; whether witnesses have communicated one with the other; predisposition of a witness; disabilities, both physical and mental; possible misunderstandings; self interest; and character are but some of the tools that help in the final assessment of credibility.

[241] Once it is determined what the facts are, the question then arises as to how those facts are to be applied. Mr. Bhattacharya pressed the Panel to apply the principles in *R. v. W.(D)* , [1991] 1 S.C.R. 742, 3 C.R. (4th) 302, 63 C.C.C. (3rd) 397.

[242] *R. v. W.(D.)* is a criminal case. In David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law Inc., 2011, the authors at pages 532-3 wrote:

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“ . . . By the same token, the Crown case is not made out simply because the testimony of a complainant is preferred to the testimony of the accused. The complainant’s testimony, or other evidence, must establish the allegation beyond a reasonable doubt. Indeed, in a jury trial the judge must direct the jury on these matters where the accused has testified and “credibility is a central or significant issue” The suggested instruction, often referred to as the “W.(D) warning” is as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt of the guilt of the accused.”

[243] Paciocco and Stuesser then deal with civil cases and note at page 533:

“In a civil case, the plaintiff must establish its allegation on the balance of probabilities. Some courts and commentators have urged that the intensity of this standard varies with the matter in issue. They urge that where allegations carry increased risk or moral stigma, such as fraud, professional negligence, or sexual misconduct, courts should exercise increased caution before finding for the plaintiff. In *F.H. v. McDougall* the Supreme Court of Canada rejected this approach, saying there is only one standard and that in all cases, “the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.”

There is no equivalent to the W.(D.) warning for civil cases. W.(D.) does not translate well to the balance of probabilities standard. In civil cases, the plaintiff is entitled to win if their evidence is more credible than the defence evidence on all components of the cause of action, while the defendant will win if the defence evidence is preferred to plaintiff evidence on a necessary element of the lawsuit.”

(Emphasis added)

[244] Mr. Bhattacharya’s reliance on W.(D.) is misplaced and ignores the *McDougall* test.

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[245] Mr. Bhattacharya advised the Panel that Justice of the Peace Massiah gave his evidence in a clear and convincing fashion. It is up to the Panel to adjudicate this issue. It is the view of the Panel that counsel's assessment of his client's performance might be a bit overstated.

[246] We found that Justice of the Peace Massiah had a tendency to try and advance an agenda when responding to questions as opposed to focusing on the questions asked. His last moment recall of the "muscles" comment was rather incredulous. His version of the pregnancy situation was contradicted by another Justice of the Peace, as well as the complainant.

[247] The complainants as a general observation presented well. They gave their evidence in a straightforward manner. They were more readily prepared to acknowledge alternative positions that often favoured Justice of the Peace Massiah.

[248] The complainants quickly relayed each incident to other staff members. Those persons who had contact with the complainants were able to confirm what they had been told by the complainants and they were in a position to make independent observations as to the emotional state of the complainants.

Justice of the Peace R.'s Lack of Communication to Justice of the Peace Massiah Regarding His Conduct

[249] Principle #2 under Integrity, from the Canadian Judicial Council's publication, *Ethical Principles for Judges*, notes that,

"Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues."

[250] Commentaries # 6 and #7 expands upon this principle as follows:

Commentary #6

"In addition to judges observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one judge reflects on the judiciary as a whole."

Commentary #7

"Judges also have opportunities to be aware of the conduct of their judicial colleagues. If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of

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unprofessional conduct by another judge, serious consideration should be given as to how best to ensure that appropriate action is taken having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the chief justice or associate chief justice of the court.”

[251] The Panel recognizes the obligation imposed upon Justice of the Peace R. under the aforementioned principles. We are aware that Justice of the Peace R. was dismayed to witness the exchange between Justice of the Peace Massiah and CC and that he did not bring his concerns to Justice of the Peace Massiah’s attention. We understand that Justice of the Peace R.’s tactic was to break up the conversation as opposed to taking a strident position.

[252] The Panel does not consider what Justice of the Peace R. did or did not do to have any particular impact in determining whether the incident occurred and whether the situation amounted to judicial misconduct or not on the part of Justice of the Peace Massiah.

Effect of the Hearing on Justice of the Peace Massiah

[253] Justice of the Peace Massiah advised the Panel that he now realizes that several of the court staff did not appreciate his jocular, friendly personality that he exhibited out of court and it would be his intention in the future not to replicate his past approach.

PANEL’S FINDINGS OF FACT ON THE ALLEGATIONS

**First Allegation of AA Paragraph 2 of Appendix A
(The eyes / compliments-abuse comments)**

[254] Justice of the Peace Massiah conceded that he made comments to AA regarding her nice eyes and mentioned that he could see them changing colour. AA found that these comments made her uncomfortable. Justice of the Peace Massiah admitted that although he noticed that AA was taken aback by his comments, he was of the opinion that she did not show any discomfort.

[255] The Panel accepts the evidence of AA with regard to the comment that Justice of the Peace Massiah made about wanting to gaze into her eyes.

[256] The Panel finds that Justice of the Peace Massiah also stated to AA later in the day, “I take it you don’t like compliments. You just like abuse.” This statement flows naturally from Justice of the Peace Massiah’s recognition that AA had been taken aback and had made an immediate exit from his office.

[257] AA mentioned these events to three fellow employees on the same day that they occurred.

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[258] The Panel was surprised when Justice of the Peace Massiah did not recognize that his comments about beautiful eyes and their colour change should have at least caused him to reflect upon the appropriateness of such personal comments especially in light of his prior involvement with Ontario and Canadian Human Rights Commissions.

[259] The Panel is satisfied that the allegation is made out.

**Second Allegation of AA Paragraph 3 of Appendix “A”
(The elevator / hey girl / hand to hand contact incident)**

[260] The Panel is of the view that this allegation has not been made out.

[261] Although Justice of the Peace Massiah advised the Panel that he would desist from addressing female staff in the future with the expression “hey girl”, we find that the use of the word “girl” was not intended by Justice of the Peace Massiah to be demeaning but was used by him as a friendly and informal form of address. It might very well be that the expression was culturally generated or used by Justice of the Peace Massiah after he heard fellow female Justices of the Peace address themselves in similar fashion.

[262] The handshake or quasi-handshake objectively cannot be interpreted as a form of judicial misconduct.

**Third Allegation of AA Paragraph 4 of Appendix “A”
(Okay, if anytime you want to see me with my shirt off, just let me know.)**

[263] The Panel finds that this event has been made out.

[264] AA did not have any safety concerns about this comment but was uncomfortable when it was said.

[265] Justice of the Peace Massiah testified that, the night before giving his testimony before this hearing, he remembered that on the day in question he was having a conversation with a fellow Justice of the Peace about his muscles. This last moment revelation contrasts to his earlier response to the Review Council where he made no mention of muscles or an independent witness to the conversation.

[266] The Panel finds that there is no air of reality to this last minute memory recovery.

**First Allegation of BB Paragraph 5 of Appendix “A”
(Clerk told how attractive she was and later told she’d be out early because she must have a date because she looked so good.)**

[267] The Panel finds that this event has been made out.

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[268] Justice of the Peace Massiah acknowledged that when he was introduced to BB by a training clerk he complimented her by telling her that she was lovely. Even when he gave evidence at this hearing, Justice of the Peace Massiah recalled that, “she was exceptionally well dressed. I’m speaking about high heels and very dressed to the nine’s.”

[269] This dialogue upset BB and she reported the incident to others.

[270] Justice of the Peace Massiah considered this comment strictly in a complimentary context without any suggestion that it was any form of harassment.

[271] BB advised the Panel that later in the day when she was in the photocopy room, Justice of the Peace Massiah made a comment to her about making sure that she got out at 4:30 or a good time because being dressed like she was, she must have a date.

[272] Justice of the Peace Massiah denied making this comment to BB but acknowledged making a very similar statement to the staff at large, namely, “Good news. It looks like we are done early. All right, so even those who’ve got a date, those who’ve got this, those who’ve got that, I believe you can make it happen.”

[273] The Panel believes BB’s evidence and rejects the evidence of Justice of the Peace Massiah.

[274] The Panel fails to see how complimenting a new employee about how lovely she looks has anything to do with welcoming her as a member of the judicial team.

Second Allegation of BB Paragraph 6 of Appendix “A”
(Touching complainant on her arm while she was sitting in the cafeteria area and asking her how she was doing.)

[275] The Panel does not find that this act constitutes judicial misconduct.

[276] We have no doubt that the brief touch on the arm by Justice of the Peace Massiah was more disturbing to the complainant than one would normally expect because of the earlier interaction between BB and Justice of the Peace Massiah.

[277] However, Justice of the Peace Massiah’s evidence that he briefly touched BB on the arm to get her attention and ask a simple question as to how she was doing certainly does not seem untoward.

[278] The complainant’s evidence supported Justice of the Peace Massiah’s recollection of the events.

[279] The complainant’s mother’s evidence suggested a more sinister version of events but this evidence is not compelling in light of the complainant’s actual evidence at this hearing.

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**First Allegation of CC Paragraph 7 of Appendix “A”
(Comment made to CC about her pregnancy.)**

[280] The Panel finds that this allegation has been proven.

[281] Justice of the Peace Massiah denied that he nudged CC or said, “Well girl, I guess we know what kind of things you were doing about thirteen weeks ago.”

[282] CC and Justice of the Peace R. stated that the words indeed were said and that the nudging motion was made or attempted. Both described Justice of the Peace Massiah’s comments and actions being done in a jocular fashion.

[283] However, CC was a little bit upset and uncomfortable by the situation. Her discomfort was confirmed by Justice of the Peace R.

[284] We reject Justice of the Peace Massiah’s version of the event.

[285] Justice of the Peace R. also felt uncomfortable about the exchange although he never raised the issue with Justice of the Peace Massiah.

[286] We reject Mr. Bhattacharya’s suggestion that Justice of the Peace R. bears some ethical responsibility in not taking Justice of the Peace Massiah to task for his behaviour. The Panel is of the view that Justice of the Peace R. got caught up in his duties after this incident and cannot be faulted for not tracking down Justice of the Peace Massiah in order to express his opinion regarding Justice of the Peace Massiah’s conduct.

**Second Allegation of CC Paragraph 8 of Appendix “A”
(Comments about her dress, hair and eyeing her up and down.)**

[287] The Panel does not find that Presenting Counsel has presented sufficient evidence to meet his onus with respect to this allegation.

[288] At best, there was some evidence that it was not uncommon for Justice of the Peace Massiah to make comments about her personal appearance. However, this was not developed.

[289] Nothing in direct evidence suggested that Justice of the Peace Massiah looked her up and down and gawked at her. There was some suggestion that others were subjected to this conduct but there was no evidence to bolster this position.

**Third Allegation of CC Paragraph 9 of Appendix “A”
(Tap on the buttocks of CC)**

[290] This allegation is viewed by the Panel to be the most serious of all of the allegations against Justice of the Peace Massiah.

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[291] The Panel accepts that when Justice of the Peace Massiah went by CC as she was in conversation with a colleague there was physical contact between the two. Either Justice of the Peace Massiah's hand or papers he was carrying contacted CC's posterior.

[292] Justice of the Peace Massiah has no independent recollection of this situation.

[293] CC clearly was unsure whether this contact was accidental or on purpose.

[294] The probability of accidental contact is supported by the fact that the passageway in question is relatively narrow; Justice of the Peace Massiah walks in a brisk military fashion; and there was no indication on the part of Justice of the Peace Massiah that he was aware of any contact.

[295] The Panel finds that this allegation has not been proven on the balance of probabilities. We are of the view that any contact was unintentional and accidental.

Allegation of DD Paragraph 10 of Appendix "A"
(It's not like you haven't seen anything like it before. Mine is just brown.)

[296] The Panel finds that this allegation has been proven.

[297] DD was unequivocal about what she heard. She was shocked and upset to hear the comment. She immediately left the area and advised her colleagues of the exchange about the comment.

[298] LL confirmed that she recalls DD advising her about the event but was rather vague on exact particulars.

[299] Justice of the Peace Massiah's position is that DD misunderstood what he had said.

[300] There is absolutely no area for a misunderstanding between what is alleged to have been said by Justice of the Peace Massiah and "I'm almost done." At least in the hypothetical scenario put to the complainant by Mr. Bhattacharya, the rhyming of brown and gown might have conjured up the possibility of confusion but Justice of the Peace Massiah negates even this fanciful option by saying he never said, "There's my gown."

First Allegation of EE Paragraph 11 of Appendix "A"
(Damn girl, where did that figure come from?)

[301] The Panel finds that this allegation has been proven.

[302] EE found the comment made her uncomfortable.

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[303] Justice of the Peace Massiah admitted that he often complimented EE on her appearance and advised the Panel that this particular comment was intended as a compliment.

[304] He did not observe any discomfort on EE's part.

Second Allegation of EE Paragraph 12 of Appendix "A"
(Hey girl, you look good today. Oh, look at you, pregnant and you still look good.)

[305] The Panel finds that this allegation has been proven.

[306] EE indicated that Justice of the Peace Massiah said something along the lines of, "So pregnant and still so beautiful, but that's not the exact wording. I can't say verbatim."

[307] The Panel accepts that although the exact words could not be recalled the essence of the comment is made out on the balance of probabilities.

[308] Justice of the Peace Massiah was only able to say that he recalls saying something like she looked lovely.

[309] Considering Justice of the Peace Massiah's admission in connection with Paragraph 11 of Appendix "A", it isn't a stretch to find that a statement of the nature alleged here was made as indicated by EE.

First Allegation of FF Paragraph 13 of Appendix "A"
(Discussion regarding what the clerks wore under their robes.)

[310] The Panel is not satisfied that this allegation has been proven

[311] Justice of the Peace Massiah's explanation of a general discussion regarding robes and using the phrase, "Well, I cannot picture that change ... to the effect that I could not see the dress code changing to accommodate what she was saying" is a reasonable possibility.

Second Allegation of FF Paragraph 14 of Appendix "A"
(Discussion by Justice of the Peace Massiah visualizing FF changing her clothes.)

[312] The Panel is not satisfied that this allegation has been proven.

[313] FF's evidence was very uncertain as to whether the word "changing" was even used.

DO THE FINDINGS OF FACT AMOUNT TO JUDICIAL MISCONDUCT?

[314] The Panel has found that the following allegations have been made out to the standard of proof as set out by the Supreme Court of Canada in *McDougall*:

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Paragraph 2: The incident involving comments about a clerk's eyes and wanting to stare into them coupled with the suggestion that the clerk would prefer abuse over compliments.

Paragraph 4: The incident suggesting that the clerk could see the justice of the peace without his shirt by just letting him know.

Paragraph 5: The incident involving the justice of the peace commenting on the attractiveness of a clerk who was in the training phase of her employment coupled with a further comment on her physical appearance and getting out of court for a date.

Paragraph 7: The incident wherein the justice of the peace remarked about what a clerk had done thirteen weeks earlier that resulted in her pregnancy and giving her a nudge in connection with the comment.

Paragraph 10: The incident when the justice of the peace stated that, "It's not that you haven't seen anything like it before. Mine is just brown."

Paragraph 11: The incident wherein the justice of the peace said, "Damn girl, where did that figure come from?"

Paragraph 12: The incident involving the statement to a clerk, "Oh, look at you, pregnant and you still look good."

[315] The Panel further finds that the aforementioned conduct amounts to judicial misconduct. It is not our intention to repeat the comments and observations regarding judicial misconduct that we have mentioned earlier in these reasons except in the most general way.

[316] The judiciary should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

[317] Do the findings of fact herein suggest conduct above reproach?

[318] It is the Panel's view that they do not. We find each allegation capable of supporting a finding of judicial misconduct on its own. We are mindful of Presenting Counsel's submission that the Panel could also view the proven allegations in their totality and that the pattern of conduct displayed would amount to a finding of judicial misconduct. We agree with this submission although, under the circumstances, it is unnecessary to act upon that approach.

[319] Each of the proven allegations on its face clearly focuses on the physical appearance and condition of the court clerks or has a sexual innuendo which caused the clerks great discomfort.

Reasons for Decision
**In the Hearing Under Section 11.1 of the *Justices of the Peace Act* Concerning a
Complaint About the Conduct of Justice of the Peace Errol Massiah**

[320] The lack of official complaint or direct response by the complainants is of no moment. The common position of the complainants was, in essence, “He’s a Justice of the Peace and we’re only court clerks.” The Panel was somewhat distressed to hear the witnesses describing themselves as subservient. This certainly contrasts with Justice of the Peace Massiah’s view of the courthouse setting as a place of equality. The Panel recognizes that the reality of the situation is that there is an actual power imbalance between a Justice of the Peace and a court clerk.

[321] This imbalance certainly explains why the clerks were reluctant to complain or challenge Justice of the Peace Massiah’s comments. It must also be remembered that, especially in the case of new employees, there would be a desire not to upset the applecart.

[322] Justice of the Peace Massiah’s complimentary, jocular, team building view of the world does not hold up in the light of common sense and his own personal background. He had extensive experience in the realm of human rights. Certainly, he would have been aware that the kind of comments he was making were contrary to today’s acceptance of appropriateness. The Panel accepts that Justice of the Peace Massiah has a friendly and outgoing manner but, at the same time, the Panel finds that the constant references to his clerks’ appearances are completely inappropriate.

[323] The Panel accepts that both individually and collectively Justice of the Peace Massiah’s conduct amounts to judicial misconduct.

DISPOSITION

[324] The Panel will reconvene to hear submissions from counsel with respect to an appropriate disposition in view of the findings made by this panel.

COSTS

[325] The Panel acknowledges the request by Mr. Bhattacharya that Justice of the Peace Massiah’s costs for legal services incurred in connection with this hearing should be paid. The Panel invites Mr. Bhattacharya to submit a written Statement of Account and any submissions to the Panel through the Registrar.

DATED at the City of Toronto in the Province of Ontario this 1st day of March, 2012

HEARING PANEL:

The Honourable Justice Charles H. Vaillancourt

Her Worship Louise Rozon

Dr. Michael Phillips, Community Member