

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 Deborah K. Livingstone, Chair
Justice of the Peace Michael Cuthbertson
Ms. Leonore Foster, Community Member

Hearing Panel of the Justices of the Peace Review Council

Decision on Jurisdiction and Alleged Abuses of Process

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PUBLICATION BAN:

On June 11, 2014, this Panel made an order that the names of all witnesses who appear in any of the facts or motion materials or application records in this hearing shall not be published, nor shall any information that might identify them be published. Names of witnesses have been redacted.

DECISION ON JURISDICTION AND ALLEGED ABUSES OF PROCESS

1. A Complaints Committee of the Justices of the Peace Review Council ("the Review Council"), pursuant to Section 11(15)(c) of the *Justices of the Peace Act*, R.S.O. 1990, c.J.4, as amended ("the Act"), ordered that a formal hearing into a complaint regarding the conduct of Justice of the Peace Errol Massiah be held by a Hearing Panel of the Review Council under Section 11.1 of the Act.
2. On June 17, 2014, this Panel gave its oral decision that the Divisional Court ruling in *Massiah v Justices of the Peace Review Council, 2014 ONSC 3415* does not preclude His Worship from advancing three grounds (1, 3 and 6 (3)) as set out in his second Amended Notice of Motion. Those grounds are:
 - Ground 1 – *None of the purported complaints comply with the express requirement in s. 10.2(2) of the Justices of the Peace Act that they be in writing.*
 - Ground 3 - *All of the purported complaints pre-date the disposition rendered on the applicant's prior judicial discipline proceeding and are consequently subsumed in that disposition.*
 - Ground 6(3) - *The Complaints Committee's decision to order a formal hearing into the complaint pursuant to s. 11(15) of the Act was void of natural justice and fairness, in that the Applicant was entitled to some reasons which would inform him of the legal basis for the referral to a public hearing.*
3. The Hearing Panel has now received written and oral submissions from His Worship and Presenting Counsel on these remaining grounds. In summary, His Worship argued in his final submissions that this Panel has no jurisdiction to hear

this case, as there has been no “complaint” in writing. Second, in the alternative, he submitted that the Panel should exercise its jurisdiction under s. 23(1) of the *Statutory Powers Procedures Act* to prevent an abuse of its processes and impose an appropriate remedy. Additional grounds in support of those arguments were also tendered.

4. The Association of Justices of the Peace of Ontario (“the AJPO”), having been granted limited intervenor status, also made written and oral submissions. Several of its arguments were dealt with by the Divisional Court in *Massiah (supra)*.
5. Essentially, there are two major issues to be decided. First, whether this Panel has jurisdiction to conduct a hearing. The AJPO made submissions on this issue only. Second, whether there has been an abuse of process.

A) JURISDICTION

6. Counsel for His Worship argued that the legislative requirements under s. 10.2 of the *Act* were not followed at the time of the purported complaint(s). As well, His Worship was of the view that the Complaints Committee exceeded its authority in the investigations it undertook. In addition, His Worship submitted that the Notice of Hearing was improper. If any of these concerns proves to be valid, then this Panel would not have jurisdiction to proceed.
7. The Panel finds that it has jurisdiction in this matter, therefore the motion is dismissed. First, Mr. Hunt was the complainant. Second, a complaint in writing existed. Third, the Complaints Committee conducted its investigation within its authority. Finally, the Notice of Hearing filed as Exhibit 1A and 1B provides this Panel with authority over the hearing. Accordingly, all of the jurisdictional prerequisites exist for this Panel to fulfill its responsibilities under the *Act*, including making findings on the evidence and imposing the appropriate disposition. Our reasons follow.

A.1 THE LAW OF COMPLAINTS

8. The law which governs complaints and Complaints Committees is set out in the *Act*. The relevant sections are:

Complaint re justice of the peace

10.2 (1) Any person may make a complaint to the Review Council

about the conduct of a justice of the peace. 2006, c. 21, Sched. B, s. 8.

Same

- (2) A complaint to the Review Council must be made in writing. 2006, c. 21, Sched. B, s. 8.

Same

- (3) If a complaint about the conduct of a justice of the peace is made to any other justice of the peace or to a judge or the Attorney General, the other justice of the peace or the judge or the Attorney General, as the case may be, shall provide the person making the complaint with information about the Review Council's role in the justice system and about how a complaint may be made, and shall refer the person to the Review Council. 2006, c. 21, Sched. B, s. 8.

Investigations

Complaints committees

- 11. (1) As soon as possible after receiving a complaint about the conduct of a justice of the peace, the Review Council shall establish a complaints committee and the complaints committee shall investigate the complaint and dispose of the matter as provided in subsection (15). 2006, c. 21, Sched. B, s. 10.

Timely reporting to complainant

- (3) The complaints committee shall report in a timely manner to the complainant that it has received the complaint and it shall report in a timely manner to the complainant on its disposition of the matter. 2006, c. 21, Sched. B, s. 10.

Rules of procedure

- (10) The rules of procedure established under subsection 10 (1) apply to the activities of a complaints committee. 2006, c. 21, Sched. B, s. 10.

- 9. The Review Council has the authority under s. 10(1) of the *Act* to establish rules of procedures for Complaints Committees and Hearing Panels. Under s. 11(10) (see above) the Procedures apply to the activities of the Complaints Committee. The Review Council has established the following Procedures (with accompanying references to the relevant section of the *Act*) for complaints and

Complaints Committees:

Review and investigation of complaints

As soon as possible after receiving a complaint about the conduct of a justice of the peace, the Review Council shall establish a complaints committee and the complaints committee shall investigate the complaint and dispose of the matter. *s. 11*

Complaints

Any person may make a complaint to the Review Council about the conduct of a justice of the peace. *subs. 10.2 (1)*

Complaints to the Review Council must be made in writing. *subs. 10.2 (2)*

Justices of the Peace Review Council, Procedures Document, pp. 2, 5

10. From the legislation and the Procedures, we find the following are required for a Complaints Committee to be established by the Review Council:
 - i. There must be a complainant.
 - ii. There must be a complaint. It must be in writing.
 - iii. Any person may make a complaint.
 - iv. The complaint must be about the conduct of a justice of the peace.

A.2 OVERVIEW OF THE REPORTS

11. For ease of understanding, the Panel sets out the following descriptions of the two Reports which were involved in determining and documenting allegations of judicial misconduct in this case:
 - a. The **Hunt Report** is the document submitted to the Review Council by Mr. Douglas Hunt, Q.C. who was Presenting Counsel during His Worship Massiah's first judicial disciplinary hearing which took place in 2011 and 2012, concluding with dispositions on April 12, 2012. This Report contains a cover page from Mr. Hunt's law office and 'Will States' from five people at the Whitby courthouse. This Report was

dated November 1, 2011.

- b. The **Investigators' Report** is the document submitted to the Complaints Committee by the investigators, Mr. Lindsay and Mr. Davis, who were retained on behalf of the Complaints Committee pursuant to section 8(15) of the *Act* to assist in its investigation. This Report contained new allegations which became known to the Complaints Committee as a result of the witness interviews conducted by the investigators in 2012 during the Committee's investigation of the Hunt Report allegations.

A.3 THE COMPLAINANT

Positions of the Parties

12. His Worship previously submitted that as Presenting Counsel, Mr. Hunt was a representative of the Attorney General and could not be the complainant. The AJPO submitted that Mr. Hunt was retained by the Review Council, and as such, a complaint could not come from Presenting Counsel because that would be a complaint from the Review Council itself. Both His Worship and the AJPO argued that the Review Council only has authority to receive complaints, not to initiate them. The AJPO also argued that a complaint cannot be anonymous and must be in writing.
13. Presenting Counsel submitted that Mr. Hunt acted as 'any person' and therefore was the complainant.

Analysis

14. We disagree with the suggestion that Mr. Hunt was a representative or agent of the Attorney General.
15. First, we note that nothing in the legislation gives the Attorney General any authority over the Review Council, its complaints process or its decision-making, or persons participating in the complaints process in any way. The Review Council is an independent body established by legislation that is not under the direction of the Attorney General.
16. The role of Presenting Counsel is defined by the Review Council in the Procedures as follows:

Procedural Code for Hearings

Preamble

These Rules of Procedure apply to all hearings of the Review Council convened pursuant to subsection 11 (10) of the *Justices of the Peace Act* and are established and made public pursuant to subsection 10(1) of the *Justices of the Peace Act*.

These Rules of Procedure shall be liberally construed so as to ensure the just determination of every hearing on its merits. Where matters are not provided for in these Rules, the practice shall be determined by analogy to them.

Interpretation

1. The words in this code shall, unless the context otherwise indicates, bear the meanings ascribed to them by the *Justices of the Peace Act*.

(1) In this code,

- d. “presenting counsel” means counsel engaged on behalf of the Review Council to prepare and present the case against a respondent.

Presentation of complaints

2. The Review Council shall, on the making of an order for a hearing in respect of a complaint against a justice of the peace, engage legal counsel for the purposes of preparing and presenting the case against the respondent.
3. Legal counsel engaged by the Review Council shall operate independently of the Review Council.
4. The duty of legal counsel engaged under this Part shall not be to seek a particular order against a respondent, but to see that the complaint against the justice of the peace is evaluated fairly and dispassionately to the end of achieving a just result.
5. For greater certainty, presenting counsel are not to advise the Review Council on any specific matter set for a public hearing in which he or she has been retained as presenting counsel. All communications between presenting counsel and the Review

Council shall, where communications are personal, be made in the presence of the respondent and/or counsel for the respondent, and in the case of written communications, such communications shall be copied to the respondents.

**Justices of the Peace Review Council, Procedures Document,
p. 16**

17. Therefore, a Presenting Counsel is not an agent or representative of the Attorney General and operates independently of the Review Council.
18. The AJPO provided no legal basis that persuades us to accept its position of a limitation on a Presenting Counsel's ability to make a complaint. Such an interpretation would arbitrarily and unduly narrow the purpose of section 10.1 in the context of the legislation. It also would be inconsistent with the process being open and public as noted in the Divisional Court's ruling in *Massiah* (see below). We therefore reject the AJPO's position.
19. With no evidence to the contrary, we find that, despite being a Presenting Counsel in a hearing of the Review Council that was underway to consider particular allegations, Mr. Hunt was acting in the role of 'any person' pursuant to s. 10.2(1) of the *Act*, when he spoke with and had interviews conducted with the original five people from the Whitby courthouse who contacted him with new information about His Worship Massiah's conduct at that location. He then filed his Report with the Review Council.
20. If we are in error that Presenting Counsel has no connection with the Attorney General, then we would rely on the Divisional Court's findings in *Massiah* when the Court stated:

The legislation makes clear that a complaint may be made by "any person" and must be "in writing" (*Justice of the Peace Act*, R.S.O. 1990, c. J.4, s.10.2(1) and (2)). There is nothing that suggests that the ability to make a complaint is restricted to the "victim" or that the involvement of any "agents of the Attorney General" is restricted to advising complainants about the role of the Review Council, referring them to the Review Council or to explaining how a complaint is to be made (*Justice of the Peace Act*, R.S.O. 1990, c. J.4, s. 10.2(3)). The purpose of this section is not to limit the role of Ministry officials. It is designed to ensure that the process is open and public. The section obliges those officials to inform complainants of their rights and to refer them to the Review Council.

***Massiah v. Justices of the Peace Review Council, 2014 ONSC
3415, Para. 7***

21. We conclude that even if there was any basis to consider Mr. Hunt to be an agent of the Attorney General (although none was established before us), he would still have the authority to act as 'any person' and file a complaint.
22. We also conclude that Mr. Hunt was the complainant. Therefore, the complaint was not anonymous.

A.4 COMPLAINTS IN WRITING

Was the Hunt Report a Complaint? Did It Need to be Signed?

Positions of the Parties

23. Counsel for His Worship and AJPO submitted the 'Will States' in the Hunt Report were unsigned and the Report did not constitute a complaint. They relied also on statements on the section of the Review Council's website called "Making a Complaint" and in its Annual Report which indicate that complaints must be signed.
24. Presenting Counsel submitted that no such requirement exists and the Hunt Report was intended as a complaint.

Analysis

25. The Hunt Report was submitted by Mr. Hunt in writing to the Review Council on November 1, 2011 with a covering document titled 'In the matter of a complaint respecting His Worship Justice of the Peace Errol Massiah'. The additional letter from Mr. Hunt of November 3, 2011 was titled 'Re: Complaint Respecting His Worship Justice of the Peace Massiah' and 'Re: Report dated November 1, 2011'.

Applicant's Motion Record, Tabs 2, A, C, E, F, G, H; filed July 12, 2013

26. One need only consider the title of the covering document submitted by Mr. Hunt to conclude that the Hunt Report was intended to be a 'complaint in writing'.

27. From the Report submitted by Mr. Hunt on November 1, 2011, the Registrar's response of November 3 and Mr. Hunt's response of November 3, we accept that the Registrar of the Review Council received the Hunt Report as a new complaint.

Applicant's Motion Record, Tabs 2, A, C, E, F, G, H; filed July 12, 2013

28. We accept that the Complaints Committee considered the correspondence and enclosures from Mr. Hunt to be a complaint and decided that an investigation should be carried out. If the Committee had determined that the correspondence and materials received from Mr. Hunt did not constitute a complaint, they could have dismissed it as being outside of their jurisdiction pursuant to s. 11(15)(a) of the Act.
29. His Worship's reliance on the statements on the Review Council's website called 'Making a Complaint' (Exhibit 11) and in its Annual Report indicating that a complaint must be signed is misguided. There is no requirement in the statute nor in the Procedures that a complaint must be signed to be valid. Nonetheless, we note that Mr. Hunt, the complainant, signed the letter of November 3, 2011 that was filed as Exhibit 30(A).

Letter, dated November 3, 2011, Exhibit 30(A), filed October 8, 2014.

Interpretation of the 'In Writing' Requirement

Positions of the Parties

30. His Worship submitted that the availability of the initial voicemails received by Mr. Hunt from people at the Whitby courthouse during His Worship's first hearing are a prerequisite to a complaint in writing to exist. Further, it is argued that the legislation does not permit a broader interpretation of the 'in writing' requirement such that it could be interpreted that a complaint was valid if it was only 'capable of being written' or 'capable of being reduced to writing'. In other words, he argues, the voicemails are the actual complaints and they cannot be considered to be complaints in writing. Further, the Will States which constitute the Hunt report are unsworn and unsigned, and therefore are insufficient to constitute a complaint.
31. Presenting Counsel submitted that after receiving phone calls from several people and having them interviewed, Mr. Hunt produced the written Hunt Report and submitted it to the Review Council. Therefore, the voicemails were not

required as the Hunt Report was a 'complaint in writing'.

Analysis

32. The Panel sees no basis for His Worship's suggestion that the loss of the original voicemails received by Mr. Hunt from the five people who called him, negates the validity of the Hunt Report, as a complaint. Nothing in the statute or Procedures supports the notion that the voicemails are necessary. Nor have the telephone voicemails ever been considered to be complaints. Those voicemails were simply information received that initiated the process which led to the Hunt Report. It is the documents from Mr. Hunt and the enclosed written information contained in the Will States of the Hunt Report which form the prerequisite for a 'complaint in writing' to exist. Those Will States were generated from discussions between the individuals who left the original voicemails and Mr. Hunt's representatives who interviewed them.
33. We see no merit in His Worship's interpretation that the legislation does not permit a broad interpretation of the 'in writing' requirement, such that a letter from an identified complainant accompanied by a transcribed Will State of an interview of a person who was the recipient or observer of allegedly inappropriate conduct by Justice of the Peace Massiah does not meet the 'in writing' requirement of the *Act*. The narrow interpretation favoured by His Worship is inconsistent with the finding by the Divisional Court that the section 'is designed to ensure that the process is open and public'. We support the view that the complaints process is designed to be a funnel for concerns about judicial conduct, not a fence.

***Massiah v. Justices of the Peace Review Council*, 2014 ONSC 3415, Para. 7; Report to the Justices of the Peace Review Council, dated November 1, 2011, from Mr. Douglas Hunt, Q. C.; Applicant's Motion Record, Tab 2, filed July 12, 2013; Motion Record of Presenting Counsel, Tab A, filed July 19, 2011**

Was the Complainant Advised by the Complaints Committee of the Disposition of the Complaint?

Positions of the Parties

34. His Worship Massiah submitted s. 11(7) of the *Act* requires that a 'complaint in writing' must be made by a 'complainant' who will be informed that the complaint

has been received and how the Complaints Committee disposed of the complaint.

35. Presenting Counsel took the position that the complainant need not be informed of the disposition until the end of the hearing in front of this Panel.

Analysis

36. We disagree with the position of Presenting Counsel. Both the *Act* and Procedures are clear – it is the duty of the Complaints Committee to report its disposition to the complainant.

Justices of the Peace Act, s. 11(3) & Justices of the Peace Review Council, Procedures Document, p. 12

37. In the Applicant's submissions, His Worship stated, 'The evidence will show that this did not happen in this particular case'. During testimony by the witnesses who provided specific evidence as to allegations concerning the conduct of Justice of the Peace Massiah, each was asked if they received any response from the Review Council (or Complaints committee). The answer was consistently in the negative.

Applicant's Submissions, Tab A, para 11; filed July 07, 2014

38. As we have stated earlier, none of the witnesses was the complainant. Whether they intended to make a complaint is irrelevant. It was Mr. Hunt who considered the information contained in the Will States of the initial witnesses to be a basis for a complaint. He submitted the information to the Review Council. As noted above, the complainant was Mr. Hunt.
39. No evidence was led as to whether Mr. Hunt was advised by the Complaints Committee of its disposition of the complaint.
40. In any event, we do not see the relevance in this proceeding as to whether this was done or not. The provision of notice to the complainant serves a purpose of keeping him or her informed. It is an administrative step that assists in upholding the confidence of the complainant in the complaints process. It is not a step that should or would preclude a Complaints Committee from ordering a hearing where it has a basis to believe there may be evidence of judicial misconduct or that would preclude us from conducting this hearing. Such an interpretation would undermine public confidence in the process.
41. Notable, as well, is that the obligation to report belonged to the Complaints

Committee, not this Hearing Panel. Our jurisdiction over the hearing is predicated on the Notice of Hearing filed as Exhibits 1A and 1B. (See below).

42. The final requirement of the complaint is that it be about the conduct of a justice of the peace. We are satisfied that the complaint filed by Mr. Hunt met this requirement.

Report to the Justices of the Peace Review Council, dated November 1, 2011, from Mr. Douglas Hunt, Q. C.; Applicant's Motion Record, Tab 2, filed July 12, 2013; Motion Record of Presenting Counsel, Tab A, filed July 19, 2011

43. We conclude that a complaint in writing exists.

A.5 INVESTIGATIVE AUTHORITY OF THE COMPLAINTS COMMITTEE

Positions of the Parties

44. Both Counsel for His Worship and AJPO submitted that there was no authority for the Complaints Committee to look beyond the allegations contained in the five original Will States of the Hunt Report. It was argued that those allegations were subsequently reduced to allegations from only one person through the investigation, and therefore the Complaints Committee should have considered nothing more.
45. His Worship relied on s. 11(1) of the *Act* in support of his position that the legislative authority of the committee is to deal with 'the complaint' only. In his view, the *Act* does not provide a basis for a Complaints Committee (or the Review Council) to broaden the scope of an investigation beyond the specific details in the original complaint. Accordingly, His Worship submitted that the allegations that came to light through the witness interviews conducted during the Committee's investigation and contained in the Investigators' Report should not have been considered by the Complaints Committee, nor should they have formed part of the Notice of Hearing.
46. Presenting Counsel submitted the legislation authorizes the actions taken by the investigators who assisted the Complaints Committee in its investigation and the Complaints Committee. Further, the investigators had an obligation to provide the new allegations which came to light during the investigation and were included in the 2012 Investigators' Report. Thereafter, the Complaints Committee acted lawfully by considering those new allegations.

Analysis

The Law on Investigations by Complaints Committees

47. The legislation provides authority to conduct investigations to a Complaints Committee. The relevant subsections of the *Act* state:

Investigations

Complaints committees

11. (1) As soon as possible after receiving a complaint about the conduct of a justice of the peace, the Review Council shall establish a complaints committee and the complaints committee shall investigate the complaint and dispose of the matter as provided in subsection (15).

Investigation

- (7) The complaints committee shall conduct such investigation as it considers appropriate.

Investigation private

- (8) The investigation shall be conducted in private.

Justices of the Peace Act, s. 11(1), (7), (8)

48. While the language of s. 11(1) is replicated in the Procedures document, that document contains a more expansive explanation of the conduct of an investigation:

Conducting investigation

The complaints committee shall conduct such investigation as it considers appropriate. The Review Council may engage persons, including counsel, to assist it in its investigation. The investigation shall be conducted in private. If the complaint is not dismissed, the justice of the peace who is the subject of the complaint will be asked for a response.

Justices of the Peace Review Council Procedures Document, subs. 8 (15), 11 (7) and (8)

49. We accept that Mr. Lindsay and Mr. Davis were therefore retained, as investigators, on behalf of, and to assist, the Complaints Committee in accordance with the Procedures and the *Act*. This is further confirmed by the letter provided to each witness that was filed as Exhibit 18.

Information to Witness Letter, Exhibit 18, filed July 15, 2014.

The Case Law on Investigations by Complaints Committees

50. We have reviewed case law provided by the parties on the issue of the investigative powers of a Complaints Committee.
51. His Worship relied on *Mackin* in support of its position that a body with oversight over the judiciary may investigate a “written complaint” but not a written “report”.

***Mackin v. Judicial Council*, 1987 Canlii 138, New Brunswick Court of Appeal, p. 15**

52. Presenting Counsel submitted that *Mackin* stands for the principle that there must be sufficient detail provided by a complainant to make the allegations an actual complaint capable of being understood by the Judicial Council and the judge who is the subject of the allegations. In *Mackin*, the Court of Appeal ruled that there was insufficient detail provided and it could not consider that a true complaint had been lodged. It stated:

A complaint, in my view, made against a Judge must be expressed in clear terms.

***Mackin v. Judicial Council*, 1987 Canlii 138, New Brunswick Court of Appeal, p. 13**

53. It cannot be said that the allegations contained in the complaint regarding His Worship Massiah were lacking in detail and did not, therefore, constitute a complaint. The complaint provided information on why the informants had come forward and included the following allegations:
- A prosecutor alleged that what bothered him about His Worship was he was kind of leering, ogling, attractive female, defendants in court. It was obvious on a number of occasions.

- He went up to a young girl and moved right to her and put his hands on her shoulders and was saying “How are you doing today?” “Sort of like hovering and I was kind of in a state of shock that he did that he did that so openly.” The young woman whipped her head right around and she was beet red.
- One of the younger girls was going to the washroom and His Worship said, “Mmm...do you ever look good today.”
- EE twice went up to get him and he had his shirt off. He said, “Oh that’s ok” or something. She was embarrassed.
- His overall conduct was inappropriate and crossing the line.
- Was this isolated or the type of thing going on over a period of time? “I feel that it goes on over a period of time. This was the way he was.”
- People were creeped out by it....I am just amazed that JJ, our management, didn’t get us together on this but I know they were creeped out by him because there were three or four young girls at that time and he defiantly made a point of coming down and changing into his jeans. I would describe [his behaviour] as sort of leering and intrusive.
- Two staff didn’t want to go into the area. One of them refused to go upstairs because she was so intimidated by him. There was an email that said admin staff are not to go upstairs.
- A female prosecutor alleged that His Worship stated, “Looking Gooooood!” and raked her up and down with his eyes. She felt uncomfortable and vulnerable because she was alone at the time.

Report to the Justices of the Peace Review Council, dated November 1, 2011, from Mr. Douglas Hunt, Q. C.; Applicant’s Motion Record, Tab 2, filed July 12, 2013; Motion Record of Presenting Counsel, Tab A, filed July 19, 2011

54. Unlike the *Mackin* case, His Worship Massiah received full disclosure. He received a copy of the complaint and full disclosure of the allegations about his actions that were included in the transcripts of interviews conducted with

witnesses during the investigation. A letter, dated January 2, 2013, sent to him on behalf of the Complaints Committee, provided him with notice as to which allegations the Committee was concerned about and he was provided with an opportunity to respond to those allegations. A copy of that letter was included in the Applicant's Motion Record. He had counsel at that time and he did respond.

Applicant's Motion Record, Tab 3, filed July 12, 2013

55. We conclude therefore, the circumstances in *Mackin* do not exist in this hearing. *Mackin* is, therefore, not applicable to this matter.
56. Counsel for His Worship relied on *Katzman* as authority for the proposition that the *Act* must be considered narrowly. The governing legislation in that matter was very narrow in its mandate, restricting a Complaints Committee to consider only 'all records and documents it considers to be relevant to the complaint' and to "refer a specified allegation of the member's professional misconduct or incompetence to the Discipline Committee if the allegation is related to the complaint". The Ontario Court of Appeal held that there was no authority to refer 'discipline allegations of other misconduct uncovered during an investigation of the complaint'.

***Ontario College of Pharmacists v. Neil Katzman and More for Less Variety Inc.*, [2002] O.J. No. 4913, Ontario Court of Appeal, paras. 35, 37**

57. Noteworthy is the narrow authority of the *Regulated Health Professions Act* (RHPA) at issue in *Katzman*. As well, that legislation had a bifurcated process involving both a Complaints Committee and, under certain circumstances, an Executive Committee which would consider complaints, depending on their source. The structure of the *RHPA* could remove an individual's opportunity to respond to allegations.
58. The *Justices of the Peace Act* is significantly different. Section 11(7) conveys a very broad authority on a Complaints Committee to conduct an investigation 'as it considers appropriate'. As well, it supports a singular process where all of the related allegations concerning a justice of the peace are considered by one body only – the Complaints Committee. As we have said, Justice of the Peace Massiah had an opportunity, as required by the legislation and Procedures, to receive disclosure and respond to the full allegations provided to him by the Complaints Committee and he did so.
59. In our view, *Katzman* is distinguishable by the legislative considerations from the

matter before us and is not helpful.

60. We find more persuasive the Ontario Court of Appeal's decision in *Sazant v. The College of Physicians and Surgeons of Ontario*. Simmons, J. A., writing for the Court, re-iterated the process by which legislation must be considered. The Court stated:

[93] The modern approach to statutory interpretation requires that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. No. 559, at para. 26, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87.

***Sazant v. The College of Physicians and Surgeons of Ontario*,
Ontario Court of Appeal, 2012 ONCA 727, Para. 93**

61. As well, Justice Simmons held the following:

[101] The Supreme Court of Canada has consistently emphasized the need for courts to interpret professional discipline statutes with a view to ensuring that such statutes protect the public interest in the proper regulation of the professions: see e.g. *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. No. 232, at p. 249; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. No. 17, at para. 40.

***Sazant v. The College of Physicians and Surgeons of Ontario*,
Ontario Court of Appeal, 2012 ONCA 727, Para 101**

62. The Court applied these principles to the *Regulated Health Professions Act*, 1991, and then found:

[102] As the court put it unequivocally in *Pharmascience Inc. v. Binet*, 2006 S.C.C. 48, [2006] 2 S.C.R. No. 513, at paras. 36-37:

The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them....[page 440]

In this context, it should be expected that individuals with not only the

power, but also the duty, to inquire into a professional's conduct will have sufficiently effective means at their disposal to gather **all information relevant** to determining whether a complaint should be lodged. (Emphasis added.)

***Sazant v. The College of Physicians and Surgeons of Ontario*, Ontario Court of Appeal, 2012 ONCA 727, Para. 102**

63. We further our analysis by stating that an investigation is not a hearing. For this, we rely on the Divisional Court's decision:

It is important to understand that the Complaints Committee conducted an investigation and not a hearing. The legislation authorizes counsel to be retained to assist a Complaints Committee (*Justice of the Peace Act*, R.S.O. 1990, c. J.4, s. 8(15)).

The obligation of the Complaints Committee is not to determine if the complaints are justified.

***Massiah v. Justices of the Peace Review Council*, 2014 ONSC 3415, Paras. 9, 10**

Conclusions on the Investigative Authority of the Complaints Committee

64. Section 11 of the *Act* and its related Procedures set out a broad scheme to investigate and consider complaints about any potential judicial misconduct of justices of the peace. Taken in the totality of their context, and with the guidance from *Sazant* and *Massiah*, we conclude that it is in the public interest of maintaining confidence in the judiciary and in the administration of justice to interpret the *Act* broadly in terms of the investigative authority of the Complaints Committee.
65. In the letter, dated January 2, 2013, referred to in paragraph 54 above, sent by the Complaints Committee inviting His Worship to respond to the allegations, the Committee was fair and transparent in explaining the approach that it took in the investigation:

The committee has considered your assertion that the new allegations emulate the same behaviour as that already addressed and your state of mind. In light of the nature and scope of the alleged behaviour and comments, the range of women (a prosecutor, defendants, and court

staff) who were allegedly recipients of your inappropriate conduct, an allegation that you may have inappropriately touched a female court staff, the perceptions of partiality resulting from your conduct, and your history of judicial misconduct of a similar nature at a different courthouse, the committee is concerned that the allegations under consideration here may indicate an apparent serious pattern of inappropriate behaviour and negative perceptions about the administration of justice arising from that behaviour.

In Mr. Bhattacharya's letter to Regional Senior Justice Gregory Regis, Central East Region, he correctly pointed out that some of the information contained in the original allegations was based on hearsay.

The committee was of the view that any decision on these new allegations must be based on the truth as determined by a consideration of direct knowledge and experience of witnesses, not hearsay or rumours. The committee conducted a thorough and careful investigation in order to fulfill its responsibility of making any decisions based on direct evidence about what occurred. As well, in fairness to you, the committee sought to consider all of the relevant evidence. Interviews of thirty-three witnesses were transcribed and considered by the committee.

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66. Therefore, we find that the investigators for the Complaints Committee had the authority to gather the information about the new allegations and to provide the results to the Committee. The transcripts from the witness interviews conducted in 2012 during the investigation were filed as part of the Record by His Worship.
67. We further conclude that the Complaints Committee had the authority to consider the new allegations in those transcripts within its mandate under s. 11(7) of the *Act* and pursuant to the ruling in *Sazant*, (supra), as an extension of the complaint filed by Mr. Hunt. All of the allegations before us are acts of alleged judicial misconduct that fall within the category of misconduct alleged in the complaint submitted by Mr. Hunt. As Simmons, J. A. explained in relation to the facts in *Sazant*:

[164] That said, I agree with counsel for the College that the requirement that the registrar describe the acts of professional misconduct or incompetence he or she formed reasonable and probable grounds to believe were committed should not be interpreted

in a manner that would frustrate the College's ability to carry out its statutory mandate.

[165] So, for example, if the registrar authorizes an investigation based on reasonable and probable grounds to believe that a member is having sexual relations with an adult patient, the investigators' use of the s. 76(1) summons power is limited to that investigation. However, if the investigators uncover evidence that the member has had sexual relations with another, [page 451] previously unknown, adult patient, a new appointment may not be necessary, given that the nature of the misconduct falls within the category of sexual misconduct with a patient. On the other hand, if, during the same investigation, the investigators uncovered evidence of unrelated misconduct -- for example, that the member is trafficking narcotics in unrelated circumstances -- a new appointment would be required before the investigators could resort to the s. 76(1) summons power to pursue this new avenue.

Sazant v. The College of Physicians and Surgeons of Ontario, Ontario Court of Appeal, 2012 ONCA 727, paras. 164, 165

68. As a result, allegations from the Investigators' Report were properly incorporated in the Notice of Hearing.

A.6 NOTICE OF HEARING

Positions of the Parties

69. His Worship submitted that the concept of a Notice of Hearing is not set out in s. 11.1(1) of the *Act*; rather it is the 'complaint' which dictates what evidence in this hearing is relevant.
70. Presenting Counsel was of the view that the Notice of Hearing is the document which initiates the hearing process.

Analysis

71. His Worship is correct that s. 11.1(1) does not mention a 'Notice of Hearing'. However, the Review Council has established rules in the Procedures that do refer to a Notice of Hearing and extensively so. Under the section titled Procedural Code for Hearings, the following sections articulate the role of

the Notice of Hearing:

Notice of Hearing

6.(1) A hearing shall be commenced by a Notice of Hearing in accordance with this Part.

(2) Recognizing the role that the complaints process has in maintaining and restoring public confidence, and that the legislative requirements for maintaining privacy no longer apply for formal hearings under section 11.1 of the *Act*, once presenting counsel files the Notice of Hearing as an exhibit in the initial set-date proceeding presided over by the hearing panel, the complaints process will become public, subject to any orders by the hearing panel.

7. Presenting counsel shall prepare the Notice of Hearing.

(1) The Notice of Hearing shall contain,

- a. particulars of the allegations against the respondent;
- b. a reference to the statutory authority under which the hearing will be held;
- c. a statement of the time and place of the commencement of the hearing;
- d. a statement of the purpose of the hearing;
- e. a statement that if the respondent does not attend at the hearing, the panel may proceed in the respondent's absence and the respondent will not be entitled to any further notice of the proceeding; and,

8. Presenting counsel shall cause the Notice of Hearing to be served upon the respondent by personal service or, upon motion to the panel hearing the complaint, an alternative to personal service and shall file proof of service with the Review Council. In the alternative, if counsel for the justice of the peace agrees to accept service by email on behalf of the justice of the peace, service may be effected by the Registrar emailing a scanned in copy of the Notice of Hearing to counsel for the justice of the peace.

Justices of the Peace Review Council, Procedures Document, p. 17

72. These sections set out a comprehensive scheme which provides the legal

framework for the use of a Notice of Hearing to initiate a hearing and provide particulars of the allegations to be placed before the Hearing Panel.

73. Ther
efore, the Notice of Hearing with its particulars, dated July 4, 2013 and filed as Exhibits 1A and 1B, provides our jurisdiction over this hearing.

B) ABUSE OF PROCESS

74. In His Worship's view, the process which has brought him before this Hearing Panel has been unnecessary and/or unfair to such an extent that the matter should be concluded without further proceeding.
75. We found several of His Worship's submissions to be more about the merits of the case than relevant to an abuse of process. We will consider issues relating to the merits of the case in that decision and focus on the abuse of process issues here.
76. From Motion Grounds 3 and 6(3) (see paragraph 2 above) and the other written and oral submissions, there are several issues we are being asked to consider. In broad brush strokes those issues are:
- a. The current purported complaint was dealt with by the disposition from the first hearing.
 - b. There should have only been one hearing instead of two.
 - c. The process puts judicial independence at risk.
 - d. The allegations were not made in a timely manner.
 - e. Memories have faded due to delay.
 - f. The subject persons of His Worship's purported inappropriate conduct had a responsibility to make him or the employer aware of their concerns.
 - g. The Complaints Committee should have provided reasons for its decision.

- h. The investigatory phase of the complaints process required a high level of procedural protection and solemnity.
77. We conclude there has been no abuse of process, therefore the motion is dismissed. First, the previous disposition does not subsume the allegations (if proven) of this hearing. Second, the law required separate hearings. Third, neither His Worship's judicial independence nor the administrative independence of the judiciary has been compromised. Fourth, there is no time limit for allegations of judicial misconduct to be made. Fifth, fading memories may affect the credibility of witnesses but do not constitute an abuse of process. Sixth, the persons who were the subject of his alleged actions or comments had no obligation in law to advise His Worship of their concerns about his conduct. Seventh, the Complaints Committee had no obligation to provide reasons but nonetheless provided brief reasons for its decision to order a hearing. Finally, appropriate procedural protections were followed during the investigation; however, there is no requirement during the complaints process for solemnity. As a result, there is no basis for a finding of an abuse of process. Our reasons follow.

B.1 IS THIS MATTER SUBSUMED BY THE PREVIOUS HEARING'S DISPOSITION?

Positions of the Parties

78. Justice of the Peace Massiah argued that as the allegations in this hearing are similar in nature to the findings of judicial misconduct of the first hearing and they relate to the period of time prior to the imposition of that disposition then the counselling and training ordered as part of that disposition adequately addressed any similar inappropriate conduct. His Worship submitted that as a result of the first hearing he has learned his lesson and will change his ways in the future. He argued that he suffers prejudice if this hearing is permitted to proceed.
79. Presenting Counsel submitted that the two hearings are entirely separate matters. In their view, there is no basis in law to suggest that where a justice of the peace faces disciplinary proceedings for misconduct at one courthouse and witnesses to similar misconduct at a different courthouse come forward, the Review Council is estopped from doing anything about the new allegations. Such an interpretation would have the effect of preventing the Council from taking steps that may be necessary to restore public confidence resulting from the misconduct of the justice of the peace at the second location.

Analysis

80. We approach this ground with considered caution. We remind ourselves that as yet we have made no findings of fact either in favour of or against His Worship.
81. At first glance, it may appear that some or all of the allegations presented before us are similar to those which were determined to be judicial misconduct at the first hearing. Despite our stated need for caution, we note that the allegations before this Panel are separate and distinct from those which led to findings of judicial misconduct during His Worship's first hearing. Both the court location and the alleged victims are different.
82. His Worship has provided no authority in statute or case law that persuades us to accept his assertion that as a result of these allegations of judicial misconduct pre-dating the prior hearing's disposition, these allegations, if substantiated, are subsumed by that disposition even though they were not before that Hearing Panel.
83. His Worship's assertion is one without any underlying legal foundation. Accepting his argument would prevent the Review Council from taking steps to consider whether there has been any judicial misconduct at the Whitby courthouse which would require a disposition to restore public confidence in the judiciary. Further, accepting his argument would undermine the very purpose of the framework in place to provide accountability for judicial conduct and to preserve or restore confidence in the judiciary when there has been judicial misconduct. There is, therefore, no merit to His Worship's proposition.

B.2 SHOULD THERE HAVE BEEN ONE HEARING INSTEAD OF TWO?

Positions of the Parties

84. His Worship Massiah put forth three arguments in support of his concerns that having been forced to face two separate hearings is inherently unfair. First, he argued as the allegations were of a similar nature for both hearings, he should have had one combined hearing only. In his view, the witnesses who made allegations against him in late 2012 should have come forward prior to the commencement of his first hearing and Presenting Counsel should have presented its comprehensive case in one hearing.

85. Second and in the alternative, His Worship submitted that there was an obligation for the Complaints Committee to have conducted a wide investigation in all courthouses where His Worship presided during the 'complaint stage' of the process leading up to the first hearing which would have revealed the second set of allegations. This would, in his opinion, have led to only one hearing with all of the allegations before one Hearing Panel.
86. Third, His Worship stated he suffered prejudice by having two separate hearings with both including cross-examination. As well, he argues that he faces prejudice if Presenting Counsel can make a second recommendation for disposition, if a finding of judicial misconduct is made.
87. Presenting Counsel Ms. Henein submitted that both the *Act* and relevant case law were followed by Mr. Hunt and the Review Council when the second set of allegations was brought to light during His Worship's first hearing. As well, His Worship did not ask to merge the two hearings when he became aware of the allegations that led to this hearing. Ms. Henein submitted that there is no basis in law for the proposition that a province-wide investigation of the conduct of a justice of the peace should be held when a complaint of judicial misconduct is made.

Analysis

88. The law on the process which is to be followed when new allegations arise during a hearing on judicial misconduct is well settled. The Ontario Court of Appeal determined the law in 1996 in a case involving Judge Hryciuk of the provincial criminal court. The Court held:

Pursuant to s. 46, there can be no removal of a provincial court judge unless two prior conditions have been met: that a complaint has been made to the Judicial Council and that the removal is recommended for any of the reasons set out in s. 46(1)(b) after an inquiry has been held pursuant to s. 50. The mandatory nature of these two conditions precedent is derived from the introductory language of s. 46(1) which states that a provincial court judge can be removed only if these conditions have been satisfied.

There are, therefore, two stages in this statutory scheme which must have taken place before a provincial court judge can be removed by order of the Lieutenant Governor. The first is that a complaint must be made to the Judicial Council for investigation by that body into whether the complaint should be proceeded with publicly. The second stage, if

so recommended by the Judicial Council, is a public hearing presided over by a judge of the General Division.

The discipline process under the *Courts of Justice Act* is mandatory. By requiring that there be two stages of review, the Legislature has balanced the public and judicial interests in a way which attempts to protect both and compromise neither. The fact that the subject of the process is a judge ought not, and does not, yield particular procedural advantages to that judge. But neither should his or her judicial office be a reason to deny procedural safeguards provided by law.

***Hryciuk v. Ontario (Lieutenant Governor)*, 31 O.R. (3d), [1996] O.J. No. 3831, paras 34, 35, 41**

89. Section 11 of the *Act* mirrors the legal framework of the *Courts of Justice Act* which was determined to be mandatory in *Hryciuk*. It is this section which governed the actions of Mr. Hunt and the Justices of the Peace Review Council when it received the Hunt Report in November 2011. As determined above, it received those allegations as a new complaint and established a Complaints Committee to consider them. His Worship Massiah was informed of the new allegations during his first hearing.
90. The letter, dated January 2, 2013, which invited His Worship to respond to the complaints showed that the Complaints Committee informed him of the basis for the approach taken by them in that letter:

The complaints process and the procedural safeguards set out under the *Justices of the Peace Act* and the Procedures of the Review Council must be fulfilled before a disposition is rendered on new allegations that are received by the Review Council. The complaints committee determined that in fairness to you, the new allegations should be held in abeyance pending the completion of the first hearing to ensure that any investigation, such as interviewing of witnesses, would not in any way interfere with, or be perceived to be interfering with, the ongoing matter.

After the hearing was completed, the committee activated the complaints process in relation to the new allegations.

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91. When the Complaints Committee completed its investigations and

considerations, it invited Justice of the Peace Massiah to respond. Having been given an opportunity to respond, Justice of the Peace Massiah did so.

92. Neither the Review Council nor the Complaints Committee had any way of knowing that persons with new allegations from a different court location might come forward. The Review Council could only consider the allegations before it, alleging misconduct towards a range of women at a particular courthouse, and follow the *Act* and its own Procedures when the Hunt Report allegations were presented. In accordance with *Hryciuk*, the procedural safeguards of the *Act* had to be respected in addressing the new allegations.
93. We agree with Presenting Counsel that no basis in law exists to support a province-wide inquiry into His Worship's conduct in all the courthouses in which he presided. It is a novel argument to be sure but without a legal basis. However, we reject as without merit the argument that it would be fair to a justice of the peace for allegations of inappropriate conduct towards women at one courthouse to justify an investigation of his conduct at all courthouses where he presides or has presided when his conduct at those locations has not been put in issue by the complaint or by him. We see that as reaching beyond the scope of the complaint that was submitted by Mr. Hunt and as inconsistent with procedural fairness. Such a wide spread inquiry would amount to a 'fishing expedition' which would potentially have the effect of unreasonably throwing a pall over the reputation of a judicial officer.
94. We conclude that the Review Council and its Complaints Committee met their legal obligations and provided for procedural fairness in the complaints process which ultimately led to a second hearing.
95. Counsel for Justice of the Peace Massiah relied on *R. v. Biddle*, [1995] 1 S.C.R. 761 to argue that the cross-examination as to character by using His Worship's testimony from his first hearing amounted to a splitting of the Crown's case. With respect we disagree. *Biddle* was a trial followed by appellate review. It is distinguishable from the matter before us. While we recognize there was an earlier hearing, we are dealing with a separate and distinct set of allegations. When we ruled that His Worship had put his character in issue, Presenting Counsel was, in law, entitled to cross-examine His Worship on his evidence from the prior distinct hearing. It did not constitute a splitting of Presenting Counsel's case.
96. Logically then, given that the law was followed in the process which led to this hearing in order to ensure that he was afforded due process and that the public interest was protected, it cannot be successfully argued that His Worship has

suffered prejudice from it. It also logically follows that should a finding of judicial misconduct be made in this hearing, a second disposition would be appropriate and legally necessary. Once again, he has provided no legal basis for his claims of prejudice. We, therefore reject His Worship's positions.

97. The procedural safeguards provided by law were accorded to Justice Massiah. It was appropriate to have two hearings.

B.3 WAS JUDICIAL INDEPENDENCE AT RISK?

Positions of the Parties

98. Counsel for His Worship argued that the lack of a province-wide investigation (as referenced above) put judicial independence at risk by having two virtually continuous hearings which led to His Worship not presiding for an extended period of time. He further submitted that 'Justices of the Peace are fully protected members of the judiciary, who ought not to be interfered with as a constitutional principle, except where there is an overriding reason to do so'. As well, Justice of the Peace Massiah submitted the actions and decisions of the Complaints Committee which led to this hearing undermined his judicial independence.
99. Presenting Counsel submitted that there has been no threat to judicial independence.

Analysis

100. We considered the issue of judicial independence in our earlier ruling on a publication ban sought by His Worship. In that ruling, we stated:

26. Judicial independence for justices of the peace was considered in the Supreme Court of Canada decision of *Ell v. Alberta*. Justice Major, writing for the Court, held that the principle of judicial independence applies to justices of the peace as it does to all other judicial officers (see para 17). The Court also provided historical context for judicial independence in para 21:

The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference; see Beauregard, *supra*, at p. 69. The integrity of judicial decision-making depends on an

adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, [page 870] the need to ensure that a particular judge is free to decide upon a case without influence from others.

Justice Major, in para 29, summarized the reasons why judicial independence is an imperative:

Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see *Provincial Court Judges Reference*, supra, at para. 9. **The principle exists for the benefit of the judged, not the judges.** If the conditions of independence are not “interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts”: see *Mackin*, supra, at para. 116, per Binnie J. in his dissent. (Emphasis added.)

***Ell v. Alberta*, 2003 SCC 35; [2003] S.C.J. No. 35; [2003] 1 S.C.R. 857**

27. It is clear then that judicial independence refers to His Worship’s ability to make decisions on the cases before him without outside influence.

***Decision on the Motion by His Worship Massiah to Ban Publication*, (JPRC, April 11, 2014) paras. 26, 27**

101. Our view remains that His Worship’s argument that his judicial independence has been impacted is without merit. No evidence has been led to suggest anyone has or will attempt to influence His Worship’s independence to make his own judicial decisions in the cases before him.
102. As stated above, there was no requirement for a province-wide investigation to uncover any and all allegations about his conduct prior to the first hearing. Rather, we conclude His Worship is misconstruing the decision by his Regional Senior Judge that he not be assigned work while these proceedings are under way as interference with judicial independence. That decision falls within the category of the administrative independence of the courts – a very important

principle established in our *Constitution*.

103. The administrative independence of the judiciary is recognized in the *Act* whereby a Complaints Committee may only make an interim recommendation to the Regional Senior Justice (formerly called a Regional Senior Judge) that a justice of the peace should not be assigned work, or should be reassigned to a different court location, pending a final disposition of a complaint of judicial misconduct. The *Act* provides the Regional Senior Justice with the authority to decide whether or not the justice of the peace will be assigned work or whether he or she will be reassigned elsewhere. The *Act* states:

Interim recommendations

- (11) The complaints committee may recommend to a regional senior judge that, until the final disposition of a complaint,
- (a) the justice of the peace who is the subject of a complaint not be assigned work; or
 - (b) the justice of the peace who is the subject of a complaint be reassigned to another location. 2006, c. 21, Sched. B, s. 10.

Same

- (12) The recommendation shall be made to the regional senior judge appointed for the region to which the justice of the peace is assigned and the regional senior judge may,
- (a) decide to not assign work to the justice of the peace until the final disposition of the complaint but he or she shall continue to be paid; or
 - (b) with the consent of the justice of the peace, reassign him or her to another location until the final disposition of the complaint. 2006, c. 21, Sched. B, s. 10.

Justices of the Peace Act, s. 11(11), (12)
(see also, *Massiah v. Justices of the Peace Review Council*, 2014 ONSC 3415, Para 13)

104. Regional Senior Justice Regis, as a senior member of the judiciary, made the decision not to assign work to His Worship Massiah - another member of the judiciary. There was no influence by any governmental body or any person

outside the judiciary over that decision.

105. Therefore, the decision of the Regional Senior Justice was not only permitted by the *Act* but it also respected the constitutional principle of administrative independence. At no time was the administrative independence of the judiciary at risk. On the contrary, judicial administrative independence was honoured while the interests of the public in having the allegations considered in an appropriate forum, according to law, were respected.
106. We have already considered and determined that the Complaints Committee acted within its investigative powers. As the actions of the Complaints Committee had no sway over the judicial decisions of His Worship, the suggestion that it undermined his judicial independence is without foundation.

B.4 WERE THE ALLEGATIONS MADE IN A TIMELY MANNER?

Positions of the Parties

107. Counsel for His Worship submitted that pursuant to the *Tranchemontagne* (see below) decision, we have concurrent jurisdiction with respect to human rights principles and the *Human Rights Code* (HRC) applies to this hearing. Counsel then relied on s. 34(1) of the *HRC* to argue that the allegations contained in the Investigators' Report should have been reported within one year of the actual alleged events which is the time limit set out in the *Code* for persons to seek remedies under that *Act*. Mr. House submitted that this Panel should interpret the *HRC* so as to apply the one year restriction for new allegations to His Worship, as a member of the judiciary. He also submitted that several of the witnesses were acting in bad faith by not coming forward sooner.
108. Presenting Counsel Henein argued that the time limits under the *HRC* cannot be extended to His Worship. Rather, there is no time limit for allegations of judicial misconduct under the *Act*.

Analysis

109. We accept, pursuant to *Tranchemontagne v. Ontario Director, Disability Support Program*), [2006] 1 S.C.R. 513, 2006 SCC 14, that we have concurrent jurisdiction to look beyond the *Act* and to consider the law on sexual harassment and sexualization in the workplace as defined under the *Human Rights Code* to assist us in determining whether there was judicial misconduct:

49. The intersection of the *ODSPA* regime with human rights law in the present dispute only accentuates the importance of the SBT deciding the entire dispute in front of it. In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC), [1992] 2 S.C.R. 321, at p. 339, Sopinka J. described human rights legislation as often being the “final refuge of the disadvantaged and the disenfranchised” and the “last protection of the most vulnerable members of society”. But this refuge can be rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective.

***Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006] 1 S.C.R. 513, 2006 SCC 14 at para. 49**

110. We also agree that we have the authority to determine questions of law, including violations of the *Human Rights Code* (see Exhibit 17, Legal Opinion – Stockwoods LLP dated May 23, 2014).
111. The question then is whether the one year limitation for complaints under the *HRC* applies to alleged judicial misconduct that is the subject of this hearing and precludes us from making findings on the evidence and imposing a disposition. An examination of the following *HRC* law will assist:

Application by person

34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
- (a) within one year after the incident to which the application relates; or
- (b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

Late applications

- (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. 2006, c. 30, s. 5.

Orders of Tribunal: applications under s. 34

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this *Act*. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

- (2) For greater certainty, an order under paragraph 3 of subsection (1),
 - (a) may direct a person to do anything with respect to future practices; and
 - (b) may be made even if no order under that paragraph was requested. 2006, c. 30, s. 5.

Human Rights Code, s. 34, 45.2

112. A plain reading of these two sections in context shows that a person who is seeking a remedy under s. 45.2 must make an application under s. 34 within one year or show good faith as to why the deadline should be extended.
113. No witness heard by this Panel is seeking any s. 45.2 remedy. Therefore, on its face the s. 34 time limit is not applicable, whether a witness acted in good faith or

not.

114. His Worship relied on *Tranchemontagne*. The case, however, is not authority for special status to a time limit. His Worship's claim of special status is at odds with the concepts that the judiciary is not above the law, that a member of the judiciary is accountable to the public for his or her conduct and that a disposition should be imposed to restore public confidence if that confidence has been lost as the result of judicial misconduct. There is no basis for Justice Massiah's position on this issue.
115. Our responsibility is not limited to considering whether actions and comments of His Worship Massiah constituted human rights violations. Nor is the remedy one that applies only to the persons who were the subject of his actions. We may, as *Tranchemontagne* indicates, decide whether there have been human rights violations. However, our responsibility is broader. We must determine whether the alleged acts took place and whether those acts constitute judicial misconduct. If there was judicial misconduct, the remedy imposed would be intended to benefit the public at large – to preserve and restore public confidence in the judiciary in general. The *Act* imposes no time limitation on bringing forward an allegation of judicial misconduct and it would be inconsistent with the objective of the complaints process and of the goal of human rights legislation of protecting vulnerable members of society to try to import a one-year time limit into this framework.
116. We find there is no time limit for allegations of judicial misconduct to be filed as a complaint with the Review Council.

B.5 PASSAGE OF TIME AND MEMORIES HAVE FADED DUE TO DELAY

Positions of the Parties

117. His Worship submitted that the length of time it took for the allegations to be brought forward and presented to us has caused an impact on his ability to answer the allegations. As well, he argued that many of the witnesses laboured to recall relevant points of evidence as some of the allegations go back to as early as 2007.
118. Presenting Counsel argued that His Worship is responsible for much of the delay that has occurred since this hearing commenced in July 2013.

Analysis

119. The ability of each witness, including His Worship, to recall events and provide accurate testimony on events of years ago is an issue to be assessed when we consider and weigh the evidence on its merits. In our opinion, a passage of time that may cause memory to fade does not, however, form a basis to conclude there has been an abuse of process. No legal basis or actual prejudice on the facts of this case was presented which counters that view.
120. His Worship appeared to hold the view that prejudice resulted because, with the passage of time, the original voicemails made when witnesses contacted Mr. Hunt's office are no longer available. We are satisfied that no prejudice resulted. Witnesses who made those telephone calls gave testimony at this hearing and were available for cross-examination on the nature and content of their original calls.
121. We do agree with Presenting Counsel that motions brought by His Worship since the inception of this hearing have taken much time. We acknowledge His Worship's right to bring forward appropriate motions.
122. We do not agree that His Worship's change in or addition of counsel contributed significantly to delay in the process.
123. However, eight days were scheduled for witnesses to give evidence during December of 2013. His Worship's decision to pursue an application of judicial review and terminate the retainer of one of his two lawyers resulted in the loss of those dates. The witnesses ultimately gave evidence in July of 2014.
124. The issue of delay of reporting of the allegations before us must be considered in context. The catalyst for the initial witnesses to contact Mr. Hunt was the article about His Worship's first hearing in *The Law Times* published on October 20, 2011. The evidence of the motivations of the witnesses in coming forward when they did may be relevant in our decision on the merits. We do not find that there was any explanation or motivation of witnesses that supports a finding that the delay or the result to His Worship was prejudicial. Once Mr. Hunt was involved, the process unfolded in a timely fashion. We do not intend to restate all of the steps which led to this hearing, as they are discussed, in part, earlier in this decision and are well documented in the Record, but we accept that the legal processes as well as the procedural safeguards necessary to protect His Worship's rights required time. We do not find that the time necessary to accomplish the needed steps was either wasted or inordinate.

B.6 DID A SUBJECT OF HIS WORSHIP'S PURPORTED INAPPROPRIATE CONDUCT HAVE A RESPONSIBILITY TO MAKE EITHER HIM OR THE EMPLOYER AWARE OF HER CONCERNS?

Positions of the Parties

125. His Worship Massiah submitted that pursuant to the *Collective Agreement between the region of Durham and the Canadian Union of Public Employees* (see Exhibit 29) and/or the *Regional Municipality of Durham, Harassment and Discrimination Prevention Policy* (see Exhibit 26), the employee had a responsibility to advise his/her employer of any alleged inappropriate actions of His Worship Massiah. It was then the responsibility of the employer to ensure a discrimination-free workplace. Further, in his own testimony, His Worship suggested that those who were allegedly offended by or the subject of his allegedly inappropriate behaviour should have made him aware of their concerns.
126. Presenting Counsel submitted that as a judicial officer, Justice of the Peace Massiah had received formal training which set boundaries for appropriate conduct and interactions with courthouse personnel. Also, as noted in his first hearing, as a former investigator and adjudicator of Human Rights complaints, His Worship Massiah knew full well that it was his responsibility and no-one else's to ensure his conduct was appropriate.

Analysis

127. While the *Collective Agreement* and the *Regional Municipality of Durham Harassment and Discrimination Prevention Policy* govern the workplace relationships between the employer and employees, we are not of the view that they contemplate or have authority over alleged misconduct by a member of the judiciary. The relationship between the Region of Durham and/or its employees and the judiciary who preside at the Region's POA courthouses are not equivalent to that which is considered under those documents. As discussed above, the judiciary is independent both in its decision-making responsibilities, as well as its administrative authority from either the Region or its employees.
128. We also find that any obligation an employee of the Region may have had to report any inappropriate behaviour by His Worship to his/her employer is irrelevant to our ability to conduct this hearing. This is a hearing regarding alleged judicial misconduct under the *Act*, not a right that may exist for an

employee of the Region of Durham under the *Collective Agreement* or the *Regional Municipality of Durham, Harassment and Discrimination Prevention Policy*. The authority under the *Act* to address judicial conduct is not ousted by documents that are put in place to protect the rights of employees.

129. We accept that training was provided to His Worship Massiah regarding workplace conduct and the need for respect towards all stakeholders in the judicial system. During His Worship Massiah's training as a newly-appointed justice of the peace, a judge of the Ontario Court of Justice conducted a workshop, including a power point presentation, on workplace harassment and discrimination and the responsibilities of judicial officers. Some notable excerpts from the power point presentation are:

Is Known or Ought Reasonably be Known

- The onus for recognizing harassment rests primarily with the harasser
- The victim is not obliged to verbally say "Stop!"
- Blushing, embarrassment, and moving away are all ways of indicating that the behaviour is unwelcome and should stop

Unwelcome

- The test is whether the behaviour is *unwelcome to the victim*, not the harasser
- It is not a defence to say "I didn't mean anything."

Poisoned Work Environment

- Inappropriate behaviour can offend other people in the workplace, not just the person who is the target of the harassment

It Was Only a Joke

- The intention of the harasser is not a defence to harassment
- The only issue is how did the harasser behave and what was the *impact* of the behaviour on the victim.

Responsibility of Our Court

- The *Ontario Court of Justice* is legally responsible to ensure that our court is free from discrimination and harassment

Exhibit 24, *Workplace Harassment Prevention Workshop: Better Safe Than Sorry*, Justice of the Peace Orientation II, Fall 2007, The Honourable Justice Mary Teresa Devlin

130. Nothing in the *HRC* indicates that a victim must advise a harasser that his/her

actions are unwelcome. That is also made clear in the power point presentation above.

131. The law in this regard was referenced by the Hearing Panel of the Review Council in the first hearing about the conduct of His Worship Massiah:

[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..."

132. Further, we agree with the comments in the disposition decision from His Worship's first hearing when that Hearing Panel stated:

It is troubling that the comments made by Justice of the Peace Massiah were made by an individual with his background with the Ontario and Canadian Human Rights Commissions. If anyone should have been cognizant of the issues that were highlighted in this hearing, it should have been Justice of the Peace Massiah.

Re Justice of the Peace Errol Massiah – Reasons for Disposition, (JPRC, April 12, 2012) para 23

133. Based on the judicial training extended to Justice of the Peace Massiah, the *Human Rights Code*, and his personal professional experience, we find there is no basis for His Worship's assertion that any witness had an obligation to advise him that his conduct was viewed as inappropriate by themselves or others.

B.7 THE COMPLAINTS COMMITTEE SHOULD HAVE PROVIDED REASONS

Positions of the Parties

134. Counsel for His Worship submitted that the Complaints Committee had an

obligation to provide reasons for its decision to order a formal hearing pursuant to s. 11 (15) (c) of the *Act* rather than one of the other remedies of s. 11 (15).

135. Presenting Counsel submitted that the Complaints Committee serves a screening function, does not make findings of fact and does not finally dispose of anyone's rights or interests. They argue that the Committee performs a screening function to decide whether a matter should proceed to a hearing and no reasons were required to be given by the Complaints Committee.

Analysis

136. The Procedures provide the framework for a decision by the Complaints Committee to order a hearing. It states:

Criteria for decisions by complaints committees

- c) A complaints committee will order a hearing into a complaint where there has been an allegation of judicial misconduct that the complaints committee believes has a basis in fact and which, if believed by the finder of fact, could result in a finding of judicial misconduct.

Justices of the Peace Review Council, Procedures Document, p. 11

137. The Procedures document sets out the following as to when reasons are to be provided by a Complaints Committee:

Notice of Decision

Decision communicated

The Review Council shall communicate the decision of the complaints committee to both the complainant and the subject justice of the peace. If the Review Council decides to dismiss the complaint or dispose of the complaint by providing advice to the justice of the peace or if the complaint is referred to the Chief Justice, it will provide brief reasons.

Justices of the Peace Review Council, Procedures Document, p. 12

138. From these procedures, it is clear that the only time reasons are provided by a Complaints Committee is if a complaint is dismissed or advice is provided to a justice of the peace. Neither circumstance existed here. The Complaints Committee which considered the complaint filed by Mr. Hunt ordered a hearing.
139. We also note that there may be a duty to give reasons in certain administrative law proceedings. This originated with the Supreme Court of Canada's decision in

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. In that case, there existed a statutory right of appeal. In our view *Baker* is distinguishable from the matter at bar. The Complaints Committee conducted an investigation not a hearing. A Hearing Panel makes findings of credibility and fact based on evidence. Reasons are required at a hearing, in part, as they may be the subject of judicial review. A Complaints Committee does not hear evidence. It has no authority to make findings of credibility or fact. Its decision to order a hearing is not subject to appellate review.

140. Therefore, we conclude there was no requirement for the Complaints Committee to provide reasons.
141. If we are wrong, we find that the Committee did give reasons for ordering a hearing in a letter, dated April 29, 2013, sent to His Worship on behalf of the Complaints Committee, a copy of which was included as Exhibit “F” in the Applicant’s Supporting Affidavit on the Motion Alleging Abuse of Process. The reasons reflected and were consistent with the criteria for ordering a hearing contained in the Procedures of the Review Council described above in paragraph 136. In that letter, His Worship was informed of the following:

Pursuant to the Procedures and section 11(15)(c) of the *Justices of the Peace Act*, the Committee has ordered that a formal hearing into the complaint be held by a Hearing Panel. The Review Council has established criteria in the Procedures of the Justices of the Peace Review Council for decisions by complaints committees on dispositions. The Procedures state that a complaints committee will order a hearing into a complaint where there has been an allegation of judicial misconduct that the complaints committee believes has a basis in fact and which, if believed by the finder of fact, could result in a finding of judicial misconduct. The Committee was satisfied that those criteria were met.

The hearing will be conducted in accordance with section 11.1 of the *Act*. The Notice of Hearing containing the particulars of the allegations against you that will be before the Hearing Panel will be served upon you shortly.

142. The reasons in the letter, combined with the information set out in the Notice of Hearing referred to in the letter and filed as an exhibit in this hearing, constituted sufficient reasons to inform His Worship Massiah why a hearing was taking place.

Applicant’s Supporting Affidavit, Exhibit “F”, filed March 28, 2014

B.8 DID THE INVESTIGATORY PHASE OF THE COMPLAINTS PROCESS REQUIRE A HIGH LEVEL OF PROCEDURAL PROTECTION AND SOLEMNITY?

Positions of the Parties

- 143. Counsel for Justice of the Peace Massiah submitted there needed to be a high level of procedural protections and solemnity during the investigatory phase conducted by the Complaints Committee.
- 144. Presenting Counsel argued that procedural protections were in place and there was no requirement for solemnity by the Complaints Committee or its investigators.

Analysis

- 145. We agree with His Worship that the Complaints Committee is obligated to follow the procedural protections set out in the legislation. For example, a Complaints Committee by statute (s. 11(8) *JPA*) conducts its work in private. The Complaints Committee did so.
- 146. The letter sent to His Worship on January 2, 2013, referenced above, shows that the Complaints Committee held the new allegations in abeyance pending the completion of the first hearing to ensure that any investigation, such as the interviewing of witnesses, would not in any way interfere with, or be perceived to be interfering with, the ongoing matter.
- 147. The Committee informed His Worship of its investigation in the letter dated April 26, 2012, referenced above. He was provided with preliminary disclosure, informed that the investigation was ongoing and provided with an opportunity for him to respond on the question of whether the Committee should make an interim recommendation to the Regional Senior Justice that His Worship should be non-assigned pending the final disposition of the complaint. He did respond in writing. In the letter, dated January 2, 2013, referenced above, the Committee explained its concerns about an apparent serious pattern of inappropriate behaviour and negative perceptions about the administration of justice, and why it sought to consider all of the relevant evidence.
- 148. As we have indicated, after receiving full disclosure, His Worship was invited to provide a response in writing and he did so.

149. We find no legal basis that satisfies us that the legislated procedural protections were not met by the Complaints committee or its investigators. On the contrary, all requirements of procedural fairness were met.
150. As well, His Worship offers no legal underpinning for the proposition that the investigation on behalf of and the considerations by the Complaints Committee demand a high level of solemnity. We state again – an investigation is not a hearing. Solemnity is an inherent part of an open and public hearing where allegations of misconduct are levied against a judicial officer and he is given an opportunity to provide evidence and make submissions. His Worship's position on this issue is not tenable.
151. There has been no abuse of process.

Dated January 12, 2015

Hearing Panel: The Honourable Justice Deborah K. Livingstone, Chair
 His Worship Michael Cuthbertson
 Ms. Leonore Foster, Community Member