

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

REASONS FOR DECISION

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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names of all witnesses who appear in any of the facts or motion materials or application records in this hearing shall not be published, nor shall any information that might identify them be published.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.

REASONS FOR DECISION

Introduction

1. A complaints committee of the Justices of the Peace Review Council, pursuant to Section 11(15)(c) of the *Justices of the Peace Act*, R.S.O. 1990, c.J.4, as amended (the “*Act*”), ordered that a 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. His Worship Massiah was appointed as a justice of the peace on May 30, 2007.
3. The Notice of Hearing, dated May 31, 2013, particularizes the complaint against His Worship Massiah that was ordered to a hearing and is appended to these reasons as Exhibit 1. The allegations involve inappropriate conduct towards and sexual harassment of female court staff, prosecutors and defendants.
4. A set-date took place July 4, 2013 and after hearing and adjudicating upon a number of pre-hearing motions, the Panel began hearing evidence on July 15, 2014.
5. Presenting Counsel called thirteen witnesses. Counsel for His Worship called six witnesses, in addition to His Worship Massiah, who testified on his own behalf.
6. Written and oral submissions were provided by counsel, with submissions concluding on October 8, 2014.
7. Presenting Counsel submits that the evidence supports a finding of judicial misconduct.
8. His Worship Massiah was the subject of a previous public hearing, which concluded on March 1, 2012, in findings of judicial misconduct. It is alleged that the events presented in evidence before this Hearing Panel occurred prior to the findings of judicial misconduct at the previous hearing and at a different court

location.

The Law

Role of Presenting Counsel

9. Pursuant to section 4 of the Justices of the Peace Review Council's Procedural Code for Hearings, established pursuant to subsection 10(1) of the *Act*, Presenting Counsel's duty before the Hearing Panel is "not 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."

Role of the Hearing Panel

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

Standard of Proof

11. We accept that the standard of proof in this hearing is that of civil cases, on the balance of probabilities. The Supreme Court of Canada set out the test in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 at paragraph 49:

[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 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.

.....

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil

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.

12. The Panel must ask itself: Is there credible cogent and compelling evidence to satisfy the Panel that, on the balance of probabilities, there was judicial misconduct?

F.H. v. McDougall 2008 SCC 53; *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193.

Judicial Misconduct

13. The *Principles of Judicial Office for Justices of the Peace of the Ontario Court of Justice* have been established pursuant to s. 13(1) of the *Justices of the Peace Act* in order to provide guidance on the conduct expected of justices of the peace. For present purposes, the relevant principle is:

3.1 Justices of the peace should maintain their personal conduct at a level which will ensure the public's trust and confidence.

14. Because of the unique role that judicial officers play in the constitutional democracy, the authority they enjoy, and the esteem in which they are held, judges and justices of the peace are expected to conduct themselves in exemplary fashion – not just in court, but outside of it as well. As the Supreme Court of Canada stated in *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paras. 110-11:

110. Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect

for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.

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

111. 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.

15. Hearing Panels established by the Ontario Judicial Council have adopted the principles set out in *Therrien* in assessing whether judges of the Ontario Court of Justice have engaged in judicial misconduct:

[8] Based on *Re: Baldwin* and *Re: Evans*, the test for judicial misconduct combines two related concerns: (1) public confidence; and (2) the integrity, impartiality and independence of the judge or the administration of justice. The first concern requires that the Hearing Panel be mindful not only of the conduct in question, but also of the appearance of that conduct in the eyes of the public. As noted in *Therrien*, the public will at least demand that a judge give the appearance of integrity, impartiality and independence. Thus, maintenance of public confidence in the judge personally, and in the administration of justice generally, are central considerations in evaluating impugned conduct. In addition, the conduct must be such that it implicates the integrity, impartiality or independence of the judiciary or the administration of justice.

Re Douglas (OJC, 2006)

16. That same test has been adopted and applied by Hearing Panels of the Justices of the Peace Review Council.

Decision on Disposition Re Barroilhet (JPRC, 2009); *Reasons for Decision Re Foulds* (JPRC, 2013); *Reasons for Decision Re Phillips* (JPRC, 2013); *Reasons for Decision Re Johnston* (JPRC, 2014)

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

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

Justices of the Peace Advisory Appointments Committee,
www.ontariocourts.ca/ocj/jpaac/role/

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

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

19. Section 1.2 of the Principles states that “Justices of the peace have a duty to follow the law.”

20. Section 3.1 of the Principles provides that “Justices of the peace should maintain their personal conduct at a level which will ensure the public’s trust and confidence.”
21. We agree with the conclusion stated by the Canadian Judicial Council in their decision in the *Report of the Canadian Judicial Council to the Minister of Justice Concerning the Honourable Justice Theodore Matlow* (December, 2008 at paras. 94-100) that while the principles of judicial office do not constitute a prescriptive code of conduct, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a justice of the peace. The fact that conduct complained of is inconsistent with or in breach of the Principles constitutes a factor to be taken into account in determining whether there has been judicial misconduct.
22. In the Report of a *Judicial Inquiry Re: His Worship Benjamin Sinai*, released on March 7, 2008, the Commissioner made the following comments regarding the important role that justices of the peace occupy in relation to the public perception of the judicial system:

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

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

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

23. As the allegations in the complaint relate to sexually-themed comments and conduct by His Worship, we have jurisdiction to look beyond the *Justices of the*

Peace 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

24. The *Ontario Human Rights Code* R.S.O. 1990, c. H.19 (the “Code”) defines harassment in section 10, as “engaging in a course of vexatious comments or conduct that is known or ought reasonably to be known to be unwelcome”. A single instance of inappropriate conduct may be a violation of the *Code* if it creates a poisoned environment.

Bannister v. General Motors of Canada Ltd., 40 O.R. (3d) 577 (Ont. C.A.)

25. As His Worship’s previous employment history included work as an investigator for the Ontario Human Rights Commission, Presenting Counsel argued, and we accept, that his professional experience would have familiarized him with the law and principles prohibiting sexual harassment in the workplace. Section 7(2) of the *Code* states as follows:

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. R.S.O 1990, c. H.19, s. 7(2); 2012, c. 7, s. 6 (2).

26. Sexual harassment is recognized by the Supreme Court of Canada as a form of discrimination on the basis of sex. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, Chief Justice Dickson wrote:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Lada*, *supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female.

27. A “poisoned work environment” can exist when unwelcome comments or conduct inappropriately sexualize a workplace. In *Smith v. Menzies Chrysler*, 2009 HRT01936, the Ontario Human Rights Tribunal stated at paragraph 151:

The purpose of section 7(2) of the code is to protect employees from sex harassment and this includes inappropriate sexualization of the workplace. Human rights jurisprudence has long accepted that the “emotional and psychological circumstances in the workplace” which underlie the work atmosphere constitute part of the terms and conditions of employment: see *Dhillon v. F. W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 (Ont. Bd. Inq.) at para. 6691 and *Moffatt v. Kinark Child & Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.) (“Moffatt”). It is well-settled law that the prohibition against discrimination in section 5(1) affords employees the right to be free from a poisoned work environment in relation to Code-protected grounds. If sexually charged comments and conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment contrary to both section 5(1) and 7(2) of the Code: see *Cugliari v. Teleefficiency*

Corporation, 2006 HRTO 7 (CanLII), 2006 HRTO 7 (CanLII) and Moffatt, *supra*. [*Emphasis added.*]

28. Further in *Smith*, at paragraph 148, the Ontario Human Rights Tribunal acknowledges that the Supreme Court of Canada in *Janzen* defined sexual harassment broadly, extending from jokes and innuendo to actual touching:

The Supreme Court's interpretation of sexual harassment clearly contemplates a broad range of behaviours with respect to matters of sex, including, but not limited to, sexual gestures, sexual posturing and sexually-oriented practices, which negatively impact the work environment. As such, sexual harassment law provides protection from the imposition of sexually inappropriate overtones and undercurrents in the workplace.

Smith, supra, at para. 148

29. At a previous JPRC hearing, in addition to the one involving His Worship Massiah, an inappropriate sexualized comment to a female court staff was held to amount to a finding of judicial misconduct: *Re Kowarsky* (JPRC, 2011.)

Assessment of the Evidence in Relation to the Allegations

30. As Presenting Counsel submitted, the first six allegations particularized in the Notice of Hearing describe offensive and inappropriate conduct by His Worship in or around a courthouse directed specifically at females. The particulars of the complaint regarding the conduct of His Worship that were ordered to a hearing in the Notice of Hearing are set out below:

1. Between May 30, 2007 and August 23, 2010, you engaged in a course of conduct, including comments and/or conduct, towards female court staff, prosecutors and defendants that was known or ought to have reasonably been known to be unwelcome or unwanted. The conduct resulted in a poisoned work environment that was not free of harassment;
2. You acted in a manner inconsistent with the *Ontario Court of Justice Discrimination and Harassment Policy for Judges and Justices of the Peace* by failing to treat others in the justice system with mutual respect and dignity;

3. You displayed improper and/or offensive conduct and made inappropriate, sexual and/or offensive comments directed at females that made persons working in the justice system feel uncomfortable, uneasy or embarrassed;
 4. Your Worship ought to have known that such behaviour, particularly given your position as a judicial officer, could cause offence, harm, discomfort and/or undermine the dignity of female staff and prosecutors;
 5. The behaviour occurred in the workplace at the Courthouse or at a location or event related to the workplace;
 6. Your Worship's inappropriate and/or offensive conduct contributed to a poisoned work environment such that the comments and/or behaviour created a hostile or offensive work environment for individuals or groups and diminished individuals' confidence in you as a judicial officer and their confidence in the administration of justice.
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31. The "work environment" from which the allegations arose was the Region of Durham Provincial Offences Court at 605 Rossland Road East in Whitby, at which His Worship presided from time to time after his appointment in May of 2007.
 32. His Worship Massiah's testimony was that he did not at any time during the relevant time frame between May 30, 2007 and August 23, 2010 engage in any inappropriate conduct or make any comments towards any female in or around the Whitby courthouse which were unwanted, or unwelcome or which poisoned the work environment.
 33. In outlining his professional career before his appointment, or "ascension" to the justice of the peace bench, as it is described in Tab 2, P. 1 of His Worship's written submissions, Justice of the Peace Massiah stated:
 - A. My training, to some extent, involved quite a lengthy career in the Ontario Public Service, initially started with Employment Standards, working my way through. Police complaint, as an investigator and a hearing officer, leading right up to working at the Ministry of Transportation of Ontario as a hearing officer.

(Transcript July 29 pp. 6, 7)

34. What he failed to mention, until it was raised by Presenting Counsel in cross-examination, was his six years of experience working with the Ontario Human Rights Commission, including investigation, mediation and adjudication.

(Transcript July 29, p. 143)

35. His Worship described that part of his training as a justice of the peace included education on sexual harassment and sexual discrimination and testified that “I would say I have a grasp or a sense of what was expected and what was required ...”

(Transcript July 29, p. 11)

36. His Worship testified that the culture of the Durham courthouse was one of “a great sense of camaraderie, a great sense of people getting along, working well.”

(Transcript July 29, p. 16)

He stated that the collegiality was actively encouraged by his superiors.

(Transcript July 29, p. 17)

37. His Worship testified that part of his training was “that we were told that our clerks are equal, or very, very important component of the administration of justice.”

(Transcript July 29, p. 20)

38. When asked by his counsel to describe his interaction with the women in the office, His Worship stated:

A. I thought I was well received initially. My personality, I’m a very compassionate, personable, engaging, understanding individual. And I brought that individual personality and characteristics in my interaction with all of the clerks that I engaged in ... I used compliments to - - as part of my management style. And by that, I mean, I would simply just say, “How are you doing today? How are you feeling?” And so on.

(Transcript July 29, pp. 21-22)

39. When asked by his counsel to clarify his “compliments”, His Worship stated:

A. Well, I would say, you know “You’re looking well.” Mainly their health conditions, you know, “You’re looking well, how are you feeling?” That was my understanding of my compliments, or at least that’s what I extended greatly. Or more so than others, I should say.

Q. What do you mean by that?

A. Well, there were times I would say that, you know, “You’re looking –“ you know, “You’re looking great today;” or, “Is something happening?” Based on my level of familiarity, or interaction, or friendliness with that particular individual.

This was not a blanket – I didn’t say that to everyone, I have no reason to say that to everyone. And I said it equally to males. I make mention of one individual who from time to time put together, you know, get all spiffy and so on. And I would, in a jocular manner, or in a humorous way just indicate that something must be happening today, because he’s looking, you know, very fine, or dressed up at the time and so on.

And so the banter went back and forth. And that was, in my opinion, this was regular. This was all part of the culture.

(Transcript July 29, pp. 22, 23)

40. In sharp contrast to His Worship’s description of the camaraderie and collegiality at the Whitby courthouse was the evidence of a number of the witnesses who were court staff there. Two themes resonated in their testimony.
41. The first theme was that there is a distinct hierarchy in a courtroom and courthouse. The judicial officer, in this case the justice of the peace, His Worship Massiah, was the person in charge. The court staff served him. They were not a ‘team’ of equals.
42. II, with over 16 years of experience as a court clerk stated: “...we aren’t a team. I need his permission to go pee.”

(Transcript July 15 p. 110)

43. BB, an administrative clerk since 2005, was asked by Presenting Counsel about how His Worship’s conduct impacted “her view of the administration of justice, if at all”. She answered:

A. Feeling disbelief that that kind of behaviour was happening in this day and age. And that, you know, what can I – what can I do to just kind of avoid. And especially the position that he held, the status. You know, I'm down here and he's up there, and that was making me feel uncomfortable. And not really believing that that kind of behaviour was taking place, especially in the environment that we were working in it's a very professional environment.

(Transcript July 16, p. 84)

44. HH, a provincial prosecutor, with 35 years of experience in the courts, stated in her cross-examination:

A. That was just – that's just not the way it is. We are not on level footing. We are not on level footing with the jurists. There is a very different power dynamic. The Justice of the Peace is in charge. They have counsel, they make the decisions, we just present the case.

Q. Right. That's inside the courtroom, right?

A. Even outside courtroom.

(Transcript July 17, p. 86)

45. We note that at the previous hearing before a different Hearing Panel of the Justices of the Peace Review Council, involving judicial misconduct by His Worship Massiah towards female court staff, the Panel referred to the relationship between a presiding justice of the peace and court clerks. In their decision, that Panel cited comments made in the Review Council hearing regarding His Worship Paul Kowarsky at para. 198:

[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. 20056, 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.

Re Massiah, Reasons for Decision, (JPRC, 2012)

46. His Worship's evidence before us clearly demonstrated that he still fails to appreciate or acknowledge that there is a court hierarchy and the implications that hierarchy has for those who work in the justice system who interact with him or appear before him in the courtroom.
47. We accept, as compelling evidence, that in a courtroom setting, the judicial officer is considered by his or her court staff to be "in charge". We reject His Worship's contention that all were "equals", a "team", at the Whitby courthouse.
48. The second theme portrayed through the evidence of the witnesses was the notion of a "courthouse culture". Unlike the culture of collegiality His Worship described, we heard evidence from a number of court staff and prosecutors alike about the unwillingness of someone at a lower level in the courthouse hierarchy to complain about someone at the top – such as a justice of the peace. We heard also that if staff made a comment to a supervisor about a judicial officer, nothing would happen.
49. Both II, and HH testified that the culture of the courthouse was "not to complain".

(Transcript July 15, pp. 58, 59, 101, 103, 122. Transcript July 17, pp. 33, 34, 50, 83)

50. When a court clerk, EE, told her supervisor, JJ, that His Worship Massiah had been getting dressed for court with his chambers door open when she delivered his court dockets, the supervisor did nothing. Both Ms. JJ and KK, supervisors of the court staff, made light of the inappropriateness of a judicial officer undressing with the door open and inviting staff to enter when they appeared at the open door in the course of performing their job.

(Transcript July 16, pp. 165, 166; Transcript July 28, pp. 210, 211, 212; Transcript July 28, pp. 44, 45)

51. It should be noted that in cross-examination, Ms. JJ re-considered her lack of response to Ms. EE when she stated that:

In hindsight, because we are all having this conversation, I can look at it and say "Well, maybe I should have called her in and said 'okay. I want to hear about this. When is this happening? How is this happening'?" No I didn't do that.

(Transcript July 28, p. 211)

52. KK, supervisor of Court Support Services, testified that II made her aware that BB was extremely upset and agitated by an incident involving His Worship Massiah. Ms. KK testified that Ms. BB was crying, shaking, extremely upset and she wanted it to go away. Ms. KK confirms that she spoke to Ms. JJ who took the position that if there was no complaint coming from the person that was impacted, there was nothing they could do. Ms. KK could not recall whether she suggested to Ms. JJ they should speak to II who witnessed it. No further steps were taken to investigate what had happened.

(Transcript July 28, pp. 70-83)

53. In cross-examination by Presenting Counsel, Ms. JJ first indicated that she could not recall Ms. KK talking to her about an incident between His Worship and BB. Ms. Henein questioned her further, making it clear that the Panel had been told by Ms. KK that she told Ms. JJ about BB and her concern, that II had witnessed it, and that BB was reluctant and did not want to come forward. Ms. JJ then acknowledged that she did "have a bit of a recollection". She testified that she although she had only this vague recollection, she did not disagree with Ms. KK's evidence and she could confirm that she never took any action involving II and BB.

(Transcript July 28, pp. 206, 207)

54. It is curious and concerning, in our view, that Ms. JJ would have only a vague recollection of receiving such information from Ms. KK, particularly in a work environment that was, as set out in the *Regional Municipality of Durham Harassment and Discrimination Prevention Policy*, expected to be free of sexual harassment.
55. Submissions by Counsel for His Worship were that any notion that court staff thought of His Worship as their “employer” was “just nonsense” and that it is unreasonable for us to accept that a staff member or prosecutor would be fearful of complaining about inappropriate conduct on the part of a justice of the peace. Counsel argued that as none of the staff or Ms. HH told His Worship that his conduct was unwelcome, it would implicate the independence of the judiciary to accept their evidence at the hearing that inappropriate conduct occurred.
56. In our view, this is an untenable argument. We reject the premise that a court clerk or prosecutor is a patently unreliable witness if she expresses that she, subjectively, was cognizant of a differential power dynamic between a judicial officer and a court employee. And we reject the argument that it is the obligation of any person who experiences sexualizing behaviour, or harassing behaviour to confront the alleged harasser. That is not the law in Ontario.

Bannister v. General Motors of Canada Ltd., 40 O.R. (3d) 577. (Ont. C.A.)

57. As it relates to our general assessment of the evidence of the witnesses in this hearing, we accept the existence of the “courthouse culture” at this courthouse. The discomfort and unease of a number of the court staff called by Presenting Counsel as witnesses to give evidence against a justice of the peace was palpable. It was clear to us that speaking about His Worship Massiah was not something they were comfortable doing.
58. Our obligation is to assess the credibility and reliability of all of the witnesses, including His Worship, and to determine if, on the evidence we accept to be cogent and compelling, judicial misconduct has been proven on the balance of probabilities. After hearing the evidence, we find at the outset that “court hierarchy” and “courthouse culture” are reliable concepts and that the testimony about them from the witnesses called by Presenting Counsel rings true.
59. Counsel for His Worship questioned the managerial staff whom he called as witnesses, Ms. JJ, Ms. LL and Ms. KK, about the collective agreement in existence between the Region of Durham and its staff, and the agreement eventually was filed as Exhibit 29 in the hearing at the request of Counsel for His

Worship. Evidence was led by His Worship about the Regional Municipality of Durham Harassment and Discrimination Prevention Policy which aims to protect staff from inappropriate conduct in the workplace and from reprisals for exercising their rights under the *Human Rights Code*. His Worship's position is that this Panel should accept that the existence of the collective agreement and anti-harassment workplace policy should be used to find against the credibility of the witnesses who testified about his conduct and comments. The Panel should be persuaded that if such conduct had occurred, the collective agreement would have and should have been used at the Whitby courthouse by the staff to complain about His Worship Massiah. Since they failed to do so, the Panel should find either that the conduct did not happen or that staff had a different remedy and His Worship should not now be the subject of this hearing.

60. We reject these arguments. We note that LL, a supervisor of administrative staff, testified that it was a union environment and everyone had the right at work to be free from harassment. The policy set out a protocol for an employee to make a complaint and then an investigation had to be done and steps taken accordingly. In cross-examination, she reviewed with Ms. Henein the broad range of harassment, personal harassment and sexual harassment that the Policy indicated should not be experienced by employees in the workplace. She also agreed with Ms. Henein that the Policy applied only to employees and not to justices of the peace, and the protocol and remedies available to staff under the Policy did not apply to justices of the peace.

(Transcript July 28, pp. 18-38)

61. In our view, as Presenting Counsel submitted, the provisions in such documents are intended to protect the right of employees to work in an environment that is free of workplace harassment and sexually inappropriate conduct, not to impose an obligation on them in a manner that is inconsistent with human rights legislation and case law in Ontario. Nor should they be used by a judicial officer to try to erect an obstacle to judicial disciplinary proceedings that involve allegations about sexually inappropriate conduct. We note the comments referenced recently by the Supreme Court of Canada in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R.513, 2006 SCC14:

...In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1991] 2 S.C.R. 321, at page 339 Sopinka J. described human rights legislation as often being the “final refuge of the disadvantaged and 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.

62. Similarly, counsel for His Worship cross-examined Ms. HH about her failure to complain about alleged conduct by His Worship towards her to her collective bargaining unit for prosecutors or to the Law Society of Upper Canada. Her response was that His Worship was not a member of either body and they would have no jurisdiction over him.

(Transcript July 17, p. 40)

63. Again, in our view, there is no obligation in law for Ms. HH to have made a complaint in any other forum before we can assess here whether we accept her evidence about His Worship in our determination of whether there has been judicial misconduct.
64. The allegations contained in paragraphs 1 through 6 in the Notice of Hearing, as referred to herein paragraph 32, describe general patterns of behaviour, rather than specific incidents.
65. For the sake of clarity, we will firstly address the specific acts alleged, in paragraphs 7 through 14 of the Notice of Hearing in the context of the evidence, and then will relate the specific acts which we accept occurred, if any, back to the general allegations. **Paragraph 7** alleges inappropriate interaction with female staff, including: a) leering at and/or ogling female court staff.
66. His Worship specifically denied that allegation. The question to His Worship and his response was as follows:

Q. So, first of all, I think it would be fair to say that there is a general allegation out there that you ogled, or looked clerks and other women up and down. So do you have a generalized response to that or - -

A. Yeah, I do. That's an impression that individuals or others have. I do not share that, I do not agree with it. I do not look at anyone, anyone in an ogling manner, or up and down fashion, I simply do not.

In court, I administer my role that I'm required to do. And that is, I am required to make an assessment of anyone coming before me. Both in terms of themselves, how they're behaving and what have you. And I made that part of my initial judgments. I have no reason to do that and I did not do that.

(Transcript July 29, pp. 30,31)

67. Several witnesses called by Presenting Counsel described the leering, as alleged.

68. II, a court clerk, previously described as having sixteen years of experience in the courts, including at Old City Hall, Toronto Provincial Offences Court, Oshawa Criminal Court, and since 2007 at the Durham Provincial Offences Court, testified as follows:

A. Well, I just feel he always had never missed the opportunity to look a female staff up and down. We're sitting in the back corridor, so oftentimes, you have to - - people from admin, or court staff, have to go through that back corridor to go to our bathrooms. And if he was standing out there, he would always look them up and down, leering, in my opinion.

Q. When you say "leering," what do you mean by that?

A. "Leering" to me is like checking you out in a sexual manner.

Q. Did you see that occur on one occasion, or two occasions? Can you give us a sense of how often this would occur?

A. Multiple occasions.

Q. All right. And this would just be a weekly event, a monthly event?

A. It was just an ongoing event.

(Transcript July 15, pp. 37, 38)

69. MM, a trial scheduler at the Whitby courthouse, testified he had worked in the courts since 1998. He noticed that when His Worship Massiah would look at female staff, "he'd have to look them over ... it was, you know, checking them out kind of thing. Like, you know, that you would do to somebody you are interested in, you know".

(Transcript July 16, p. 145)

70. BB, the administrative clerk referred to earlier in our reasons, described, both in words, and by moving her head up and down slowly, that His Worship Massiah

would look at her and at other female staff by eyeing them up and down. It made her feel uncomfortable “when somebody is checking somebody out. Observing their entire body, scanning their entire being.”

(Transcript July 16, p. 80)

71. Counsel for His Worship argued that we should reject the evidence from II about ogling. His Worship’s position was that her evidence is too vague to be relied upon, and that she bore an animus against His Worship Massiah. His Worship alleged the animus developed from her disagreement with him after she tried to prevent someone from speaking out in the body of the court and he stopped her, and her frustration at how he conducted himself in the courtroom generally, and therefore her motivation to make allegations about his conduct is suspect. Similarly, Mr. House argued we should not accept BB’s evidence as her specific recollection of events was not clear, particularly when she was questioned by the lawyers retained to assist the complaints committee in its investigation.
72. It is significant, however, in our view, that a male staff member, Mr. MM, described exactly the same type of “checking out” of female staff by His Worship Massiah as Ms. II and Ms. BB describe.
73. Further corroboration of how His Worship looked at female staff arose in the evidence of JJ, the Manager who was called as a witness by His Worship’s counsel to testify on his behalf. She gave her evidence from British Columbia by teleconference. She described an observation she had made of His Worship’s conduct which made her feel uncomfortable. Ms. JJ said she was showing a female human resources official around the courthouse. The lady had a low-cut blouse on and was wearing a pendant on her neck, and when the ladies met His Worship Massiah, Ms. JJ observed His Worship ask about and pay extra attention to the pendant and stare at the woman’s bodice.

(Transcript July 28, pp. 165, 195, 196)

74. In cross-examination, she disclosed why she felt uncomfortable watching His Worship’s conduct towards the woman:

Q. So there was something about the way Justice of the Peace Massiah was interacting with this woman that made it sexual, right?

A. Yes.

Q. All right. And that's what made you feel uneasy, right?

A. Yes.

(Transcript July 28, p. 196)

75. The evidence of Ms. II, Ms. BB, Mr. MM, Ms. HH and of Ms. JJ is inconsistent with His Worship's assertion:

A. I live in a house with my wife, and a 26 year old, an 18 year old, and a 15 year old, sir. I have a great deal of respect, great deal of respect and understanding of women. And that is something I would never do. I do not scan anyone's body.

(Transcript July 29, pp.34 - 35)

76. Another female staff member, AA, who, since 2009, worked in the Oshawa Criminal Court and then at the Whitby court, described His Worship's behaviour when they were first introduced. This interaction is particularized at **paragraph 7(b)** of the Notice of Hearing.
77. Her evidence of His Worship's handshake, and "just receiving like a long up and down look, that made me feel uncomfortable at the time" is striking in its similarity to the conduct that Ms. II, Ms. BB, and Mr. MM described.

(Transcript July 17, p.157)

78. We note that His Worship, in his evidence about this allegation, was adamant that, even though he did not recall meeting Ms. AA, it did not occur as she described:

A. I may give a nod -- I have a formal manner, if you wish, which is that, "How are you?" I give a nod of the head, which is a formality of acknowledgment. Nothing to do with scanning of the eyes, or the eyes going up and down. I have no reason to do that, I didn't do that, I would never do such a thing. (Emphasis added.)

(Transcript July 29, p. 39)

79. The specific acts alleged in paragraph **7(c), (d), (e) and (f)** in the Notice of Hearing refer to comments from His Worship to female staff, which Presenting Counsel submit to the Panel were inappropriate. The Notice of Hearing describes comments as being sexual, suggestive and/or inappropriate comments and including gender-related comments about an individual's physical

characteristics or mannerisms; and/or suggestive or offensive remarks.

80. BB was the alleged recipient of the comments specified in paragraphs **7(c)** “Looking good today” and **7(e)** “I like two-tone blondes”.

81. Ms. BB, was initially unable to recall these specific comments by His Worship. She was allowed an opportunity to refresh her memory from the transcript of her interview during the investigation, and she testified that the comments were made to her by His Worship as he was walking down the hall towards his courtroom, passing Ms. BB on her way to the staff washroom. Ms. BB described the context, as she recalled it, in which the comments were made:

Q. And what was the relevance?

A. My hair at the time was blonde, it was dark underneath.

Q. I see, okay. And do you remember the context of that comment at all?

A. It was just kind of out of the blue. Again, it was not just the statement, it was the way it was conveyed.

Q. And how was it conveyed?

A. Like I said before, he'd inhale, the exhale, the way he looked at you.

(Transcript July 16, p. 82)

82. His Worship denied making either comment to Ms. BB. The wording of his response, however, was somewhat equivocal:

A. I do not recall ever saying that to BB in any context that comes to mind. No, I do not recall that. I'm apt to say that - - no. In terms of her specifically, no, I don't recall ever saying that to her. I was about to say that part of my general, my general exchanges or pleasantries that I've made, I make reference, and I have done so in the past. But specifically to BB, I do not recall ever saying that to her.

(Transcript July 29, p. 33, 34)

83. The comments alleged in paragraph **7(d)** of the Notice of Hearing all relate to CC, who worked as a court clerk at the Rossland Road courthouse since its inception but with experience in courtrooms since 1998 or 1999.

84. Ms. CC testified that His Worship called clerks by their first names, but that she did not think this was right, that it indicated a lack of respect, because he was her superior.

(Transcript July 15 pp. 163,188)

85. Ms. CC expected to be referred to as “Madam Clerk”, which all of the other judges and justices of the peace called her.

(Transcript July 15, p. 187)

86. Ms. CC found it inappropriate that His Worship addressed her as “girl”, “hey girl”, “what’s going on girl”.

(Transcript July 15, p. 165)

87. According to Ms. CC, His Worship would make comments to her about what she was wearing, “how it looked good” or “it fit good”, ...Such comments did not make her feel good “because when I’m in the courtroom, he’s my boss”.

(Transcript July 15, pp. 168, 169)

88. Ms. CC, like Ms. II, Ms. BB and Mr. MM, also described observing His Worship scanning female court clerks and administrative staff, “eyeballing from the top to the bottom and back up.”

(Transcript July 15, pp. 170, 171)

89. His Worship admitted he may have addressed CC as “girl”, “as a sort of manner of what I call in-depth familiarity”.

(Transcript July 29, p. 40)

90. Paragraph 7(f) of the Notice of Hearing sets out the allegation that His Worship made the comment, “Oh DD, you’re looking great today” and “Have you lost weight? Those pants really look good on you” to a court clerk, DD.

91. Ms. DD was called as a witness by His Worship. She did not recall His Worship commenting about her pants or her weight.

(Transcript July 28, pp. 138, 139)

92. EE, another court clerk, testified that she heard His Worship make the comments and that it stood out in her memory because she would have felt uncomfortable if the comment had been made to her.

(Transcript July 16, pp. 169, 170)

93. His Worship denied ever making such comments to DD.

(Transcript July 29, p. 46)

94. Mr. MM, like his female co-workers, gave evidence about the manner in which His Worship made comments towards female staff. Mr. MM observed that His Worship's comments towards female court staff "crossed the line" and "it was something I would never do, you know, and that's kind of why it would stay with me you know". "It was kind of like, you know, mostly it was like, 'Did he really just say that?'" Mr. MM explained:

A. I mean, specifics, I can't give you. But I do remember, you know, him saying things that – making compliments to some of the women I work with. And just the tone and the way it was said, it didn't really sit right with me, you know.

Q. Why not?

A. Just because it didn't seem professional to me.

Q. What about it, to the best of your recollection, did not seem professional?

A. Well, it was kind of –there might have been some undertones to it that, you know, whether it was sexual or – it just wasn't right.

(Transcript July 16, pp. 138,139)

95. **Paragraph 8** of the Notice of Hearing alleges that His Worship invited court staff into his chambers when he was not fully dressed and sets out allegations that involved four different women.
96. EE, referred to previously herein, testified that on two occasions she had gone to His Worship's chambers in the morning to deliver his docket. Because the door was open, Ms. EE assumed no one was present, but when she entered, His Worship was standing there getting dressed, putting his shirt on. He was

shirtless. Ms. EE was surprised, she stated, to see His Worship bare-chested and she apologized. His Worship's response was "it's okay, don't worry about it". On the second occasion, the door was again open when she walked in and she believed that he had his shirt on and was buttoning it up.

(Transcript July 16, pp. 159-162, 184).

97. Ms. EE, who has been employed in the court system for over 15 years and who worked as a court clerk with justices of the peace for about 10 of those years, told the Panel that at the time of the alleged events, clerks started work at 8:00 a.m. and that part of their duties was to get the court docket ready and take it to the justice of the peace in his or her chambers.

(Transcript July 16, p. 156, 157)

She testified that in all her years working with justices of the peace, she had never walked in on one who was changing. There was a private bathroom in the office with a door that could have been used for changing or dressing. If the door to the office had been closed, she would have knocked and waited.

(Transcript July 16, pp. 163, 164)

98. Ms. EE testified that after the first incident, she told her supervisor JJ but there was no follow-up; after the second similar occurrence, she was uncomfortable so she "kind of made sure that if I did go up, it would be either really early in the morning at 8 o'clock, or closer to the time where all the justices are around and sort of talking. I wouldn't walk into a room." She didn't tell His Worship that she thought it was inappropriate for him to be changing with the door open because "I didn't think it was my place to tell him that."

(Transcript July 16, pp. 162-164)

99. CC, referred to previously, testified that justices of the peace usually had the door to their chambers shut in the morning when they arrived and were getting ready for the day and robing. (Transcript July 14, pp. 174-175.) She recalled two incidents clearly in her mind when she went to deliver paperwork to His Worship, knocked on an open door and was invited in by His Worship Massiah to enter the office when he was not fully dressed. Because of the office's "L-shaped" format she could not see His Worship prior to entering, but when she did walk in, he had his pants on and was putting on his shirt. He was not wearing an undershirt. On the first occasion, she recalled, Ms. CC felt embarrassed and she immediately turned and left. She testified that "I felt that – I was afraid, really, because I didn't

know what to do. As I said, he was my boss, I don't know what I could have done."

(Transcript July 15, p. 179-184)

100. On the second occasion, she recalls exclaiming something like "Oh my God", and His Worship saying "something like "it's okay, I'm just about done." She did not report the incidents to anyone. She testified that, "At that time when things were happening, he could hurt me more than I could hurt him, by status alone. I don't think -- at that time, I didn't think anybody would listen to a courtroom clerk."

(Transcript July 15, pp. 179-185)

101. FF was an administration clerk at the Rossland court during the relevant time frame. She testified that her interaction with His Worship and other justices of the peace would relate to clarification of signing of paperwork. She recalled one occasion when she attended at His Worship Massiah's chambers, knocked on the open door but saw no-one and heard no response. When she looked into the office, she saw His Worship's bare arm. She was uncomfortable and backed out of the office. She waited, knocked again, heard "come in" and His Worship was then fully dressed. She did not report this incident.

(Transcript July 17, pp. 137-142)

102. His Worship Massiah testified that the justices of the peace never close their chambers doors, unless in a private meeting and did not want to be interrupted.

(Transcript July 29, p. 50)

103. GG, a court clerk at the Rossland court, testified that His Worship Massiah would occasionally change out of his judicial robes in the hallway behind the courtrooms – which stuck out in her mind because she had not observed any other justices do that. His Worship was not bare-chested – he had an undershirt on when she observed this behaviour.

(Transcript July 17, p. 177)

104. His Worship categorically denied that any staff member saw him shirtless. He always wears an undershirt, he stated; he also described a large disfigurement on his chest, that is visible – "Let's put it this way, I do not go to the beaches and take off my shirt, sir."

(Transcript July 29, pp. 53, 54)

105. **Paragraphs 9 and 10** in the Notice of Hearing are allegations relating to HH, now HH, the provincial prosecutor previously referred to herein. **Paragraph 9** alleges that in late spring or early summer of 2010, Ms. HH, a provincial prosecutor, was coming in from the parking garage to the courthouse. As she was walking past His Worship, he said, “Mrs. HH, looking goooooood” in a manner that conveyed sexual undertones. With his eyes he also looked her up and down in a manner that conveyed sexual connotations. This caused Ms. HH to feel very uncomfortable and vulnerable.

106. Ms. HH described that her initial interactions with His Worship Massiah, shortly after he started presiding in Whitby, were normal.

(Transcript July 17, p. 20)

107. The incident which Ms. HH described as inappropriate occurred in 2010, as she was walking from the courthouse parking lot towards the west doors in the building leading to her office. Ms. HH observed His Worship Massiah sitting on some concrete blocks that ran along the building.

108. Ms. HH testified that as soon as she saw His Worship “...I thought, I have to walk past him. And I didn’t want to.” She said that she knew he was going to say something and that “I just knew that he wouldn’t be -- just be nice and be normal”.

(Transcript July 17, p. 23)

109. She described the incident as follows: I was walking up, and he was – he would have been to my right, but just slightly ahead so I could still see him. And he said, “Mrs. HH, looking good.” He stretched out the “looking”, he stretched out the ‘good’, and he raped me up and down with his eyes. And I wanted – so many things went through my mind at that moment. I wanted to turn on him and say, “What are you doing?” I wanted to take a turn on him and take a round out of him, “that’s not how you address me. This is not right.”

(Transcript July 17, pp. 23, 24)

110. Ms. HH described how she felt: “..the look, the eyes up and down, it was totally inappropriate. And I felt, I felt very vulnerable. I’m outside, I’m all alone, there was nobody else there.”

(Transcript July 17, p. 23)

111. Ms. HH testified that she did not confront His Worship Massiah, but rather: “I just kept walking. I didn’t turn to him and say, “thanks”. I didn’t say anything. I just kept my lips pressed tightly together and kept walking. I was very offended. This was - even years later, I can still see him sitting there and still - I still remember, I had a little catch in my step. Because I thought about it, I thought about turning on him. And then I thought it would be, it would be suicide for my career.”

(Transcript July 17, pp. 25, 26)

112. His Worship recalled an incident when Ms. HH approached him and he said “It’s looking good”, referring to the 2:00 p.m. docket. His evidence was that she “clearly must have misinterpreted” his remark.

(Transcript July 29, p. 75)

113. **Paragraph 10** alleges that between 2007 and 2008, when HH was walking up the stairs in the courthouse, His Worship leaned in toward her from behind and with his mouth close to her ear, he said, “Oooh, Lady in red” in a manner that appeared to be deliberately flirtatious, intimate and/or suggestive in an inappropriate way toward a female in the workplace.

114. This second incident involving Ms. HH was described in the evidence of NN, who at the relevant time was a provincial prosecutor and colleague of HH. Her Worship testified that she and Ms. HH were walking up the stairs to their offices, side by side, chatting. Ms. HH was wearing a “striking red business suit. It was a pencil skirt to just below her knees, and a fitted red jacket.”

(Transcript July 18, p. 111)

115. NN testified:

A. And just as we were getting to the top of the stairs, His Worship Massiah came up beside me, and immediately behind HH, taking me a bit by surprise, and leaned into – toward HH’s left ear and said to her in a low voice, “Ooh, lady in red.”

[...]

The way it was said, surprised me. And the way it was said --- the way it was said was in a very low, suggestive voice. But certainly plenty loud enough for me to hear as well, I was right beside her. I would characterize it as in a low singsong type of voice. And the “ooh, lady in red” part was drawn out, the “oooh.”.

[...]

It was said in a very – it's hard to articulate it without saying it myself. But it was said in a way that was – that was suggestive in my mind, flirtatious and very suggestive. As if it was admiring, certainly, that came across. But in a way that it has sexual overtones, and that was very surprising to me, the way he said it.

(Transcript July 18, pp. 111,112)

116. NN stated that at the top of the stairs, His Worship walked away, “And I saw him just sort of look back over his shoulder into our direction, and just threw a really big smile. Which I can only characterize appeared to be a very playful sort of smile.”

(Transcript July 18, p. 113)

117. Ms. HH testified that she didn't remember everything about this incident because she was in a conversation with NN, but she recalled being on the stairs, having His Worship Massiah brush past her and that something was said. She remembered NN's reaction, “the look of surprise, and disgust on her face.”

(Transcript July 17 pp. 26, 27)

118. NN stated that she personally thought the comment was “inappropriate and unfortunate given his position as a Justice of the Peace and with a prosecutor”. When asked to elaborate, she testified as follows:

A. Remember that the – a Justice of the Peace, of course, has a wide range of discretion in the courtroom. And a prosecutor appears frequently in front of the same Justice of the Peace, develop a rapport with each other. Which that rapport, lack of rapport, could affect how effective we are at securing just results bringing matters before us. And a Justice of the Peace has a position of authority, implicit in their role, and can significantly affect the outcome of those cases.

So it's important to a prosecutor maintain a collegial relationship with the bench, and of course out of respect for what that represents, separate and apart from the actual person that's in the role. And a person in that level of authority, I think has to be particularly mindful of their – of how they present, whether it's in a courtroom or outside the courtroom. And it made me very uncomfortable as a woman and as a prosecutor, that that sort of comment would be made. I thought it went across the line.

(Transcript July 18, pp. 113, 114)

119. His Worship's evidence was that he did not recall the incident on the stairs involving Ms. HH. He testified:

A. I offered an inference that I'm familiar with a song that is associated "Lady in Red" and if that was the case, then it's quite possible I may have said, "lady in red", and whether I was humming the bar or whether I was – I guess acknowledging that she wore a red outfit of some sort. But I do not recall that incident at all. And more so, I have never, will never flirt with Ms. HH. Which is now – HH.

(Transcript July 29, pp. 69, 70)

120. NN, in cross-examination, specifically rejected the suggestion that His Worship was singing to Ms. HH.

(Transcript July 18, pp. 121, 122)

121. In addition, His Worship Massiah described Ms. HH as "not one of my preferred prosecutors, put it gently that way".

(Transcript July 29, p. 71)

122. Through cross-examination of Ms. HH by His Worship's counsel, it was suggested that Ms. HH had a motivation to complain about His Worship Massiah because she was aware that he could be a witness in a complaint about her directed to the Law Society by another Justice of the Peace.

(Transcript July 17, pp. 52-56)

123. From the evidence, it would appear that the complaint to the Law Society of Upper Canada against Ms. HH was investigated and dismissed in a time frame months before these allegations came to the attention of the Review Council.

124. **Paragraph 11** of the Notice of Hearing alleges that His Worship approached administrative clerk BB as she was seated at her desk, stood inappropriately close, hovered over her, and touched her shoulders and in a sensual way said, "How are you doing today?" causing her to feel uncomfortable.

125. A number of witnesses testified in relation to the allegation involving Ms. BB. In oral submissions, Counsel for His Worship submitted that if this allegation is accepted to be true, it, standing on its' own, it would be evidence of judicial misconduct.

126. Ms. BB, previously referred to herein, told Presenting Counsel about an interaction with His Worship Massiah:

A. There was one particular time where he came around the corner, I was working, typing at my desk, and from what I can remember, he just put his arms on my shoulders and made a remark. I don't really remember what it was, I just remembering feeling uncomfortable.

Q. Okay. And can you tell us more about that? What the context for that interaction was?

A. The context? Well as I said, I'm typing at my desk, and he just come up behind me and sort of put his hands on my shoulders and made a comment. And I can't remember what the comment was, but I remember feeling very uncomfortable.

(Transcript July 16, p. 48)

127. Ms. BB said that after the incident, she tried to avoid His Worship, including using the public washrooms, rather than the staff washroom where she would have to go down the hallway where the courtrooms were.

(Transcript July 16, p. 51)

128. Il, previously referred to herein, also described the incident with Ms. BB. Ms. Il testified that she was bringing His Worship Massiah to the administration area to sign some paperwork that her colleague, OO, had for him to sign. When she and His Worship were approaching OO together, His Worship veered off to the right to where Ms. BB was sitting, working at her computer on her desk, with her back towards him. Ms. Il described, "Well, first of all, he's supposed to be coming with me to OO to get the paperwork, but he decided to go towards BB, and creep up on her. She didn't even know he was coming, and completely inappropriate and..." She testified that His Worship came up behind Ms. BB and "put his hands on her shoulders". Ms. Il testified, "Well, to me, it was sexual in nature."

(Transcript July 15, pp. 44-46)

129. Ms. Il described that she could hear a little "... like, oh, how are you doing" but that when His Worship spoke to Ms. BB she "never turned around. She kept her head straight towards her computer." When Ms. Il went to Ms. BB after His Worship had moved away, Ms. BB "... turned around and her face was beat (sic)

red, she whipped her head around and looked me right in the eye “and Ms. II told her “you don’t have to take this.” Ms. BB responded with something like “I know.”

(Transcript July 15, p. 48)

130. Ms. BB was examined by both Presenting Counsel in examination-in-chief and by His Worship’s counsel in cross-examination about her statements in 2012 to the lawyers who were assisting the complainant committee by interviewing witnesses in relation to the complaint about His Worship Massiah. Ms. BB referenced her response on July 4, 2012 during the following exchange in her testimony:

A. Okay. There’s a question by the investigator and I was asked: “Do you recall him coming up behind you, putting his hands on your shoulder, and saying something to you and then walking away?”

My answer was:

“Yup, that may have happened; yup, yup. I remember it was definitely not appropriate what was said, what he did, but I – and I remember that because of the reactions. I remember because of how I felt. I don’t remember the specifics.”

(Transcript July 16, pp. 74, 75)

131. However, she also told His Worship’s counsel, in cross-examination, that she was telling the truth when she told the investigator in 2012 that “I don’t remember him putting his hands on me”.

Q. So with respect to the saying something, you're quite certain that something was said?

A. Yes.

(Transcript July 16, pp. 86, 103, 104)

132. In cross-examination, Mr. House also referred to Ms. BB’s 2012 responses and memory of the incident in the following exchanges with her:

Q. But I'm going to suggest to you that what you told them was that you didn't have any recollection of him touching you?

A. No. I pointed that out on page 30, line 209.

(Transcript July 16, p. 86)

And later, she said:

Q. Was your memory about the incident better then or now?

A. Well, on page 209 -- I think, I think what had happened is, because it was such an uncomfortable situation, I had pushed it to the back of my head.

(Transcript July 16, p. 89)

133. In cross-examination, II was confronted with the transcript of her interview with the lawyers who interviewed witnesses for the complaints committee wherein she stated – “His hands are, to me, looked like was on her shoulder”. She agreed that His Worship’s body was partially blocking her view, but “they looked to me that they were on her shoulder.”

(Transcript July 15, p. 135)

134. KK, the supervisor referred to previously herein, called as a witness by His Worship, recalled arranging a meeting with Ms. BB after Ms. II told her she had observed a very upsetting interaction between His Worship Massiah and BB. Ms. II told Ms. KK that Ms. BB was not comfortable reporting it, and when Ms. BB attended with Ms. KK she had a “meltdown”, was crying and shaking, was upset with Ms. II for having reported the incident to Ms. KK, and said that she didn’t want to discuss it and just wanted it to go away.

(Transcript July 28, pp. 67-70)

135. Ms. KK testified that when Ms. JJ, the office manager, to whom we have referred previously, returned from sick leave, she went to her for guidance about BB. Ms. JJ’s response was “If there’s no complaint coming forward from the person that was impacted, there’s nothing we can do.”

(Transcript July 28, pp. 79, 80)

136. His Worship’s evidence was that he did not touch BB and that he never touched anyone without their consent.

(Transcript July 29, p. 35)

137. **Paragraph 12** of the Notice of Motion alleges that at a dinner with a group of justices of the peace at the University Women’s Club, His Worship inappropriately “eyeballed” a female justice of the peace and stared at her chest.

138. His Worship PP was appointed to the Court at the same time as His Worship Massiah and they were at a training program together in 2007. At the end of the program there was a celebration dinner at the University Women's Club. His Worship Massiah delivered an impromptu speech and appeared to be looking down at a visiting female Justice of the Peace from Manitoba rather than making eye contact with the rest of the audience. His Worship PP's wife noted it as well and made a comment to her husband. His Worship PP found His Worship Massiah's actions odd.

(Transcript July 18, pp. 21-23)

139. His Worship Massiah testified that he did not stare at a female Justice of the Peace's chest. When asked about the allegation his evidence was:

A. I'm familiar with the function. And that is the time when we were just concluding our training. And there was a celebration, if you wish, after the, after our extensive training. And we had two visiting – three to be exact, two from Winnipeg, one from Nunavut. We had three visiting Justices of the Peace, or all of them justices, shadowing what we were doing while we were getting part of the training.

And I was unexpectedly asked to give a oral thanks for their participation by Andrew Clark, who is the Chief Advisor.

And I recalled scribbling in my hand on a piece of paper here, just some points that I wanted to reference. And delivering a remark, you know, and thanking them for attending and trust that they learned very well.

I did not, I have no reason to look at anyone's breasts, or anyone's bosom in that manner. I think I was probably a bit more – I was sweating a little bit, because I was called unexpectedly to deliver the remarks to my colleagues.

But no, I did not I did not, -- no, that is, -- that is, anyone should know that is inappropriate and certainly I would not.

(Transcript July 29, pp. 67, 68)

140. **Paragraph 13** alleges that His Worship Massiah demonstrated inappropriate conduct towards female defendants in the courtroom, including leering at female

defendants in the court who appeared before him, looking them up and down in a sexual manner when they were standing in the courtroom, or walking up to the front of the court, or walking away to the door of the courtroom, giving them “the once over”. The Notice of Hearing further alleges that some prosecutors and some court staff felt that their confidence in him as a judicial officer and that public confidence in the administration of justice were negatively impacted by their observations of this conduct in the courtroom towards female defendants.

141. QQ is now the manager of provincial prosecutions at the Whitby courthouse, having commenced work in the court system, as a court clerk, in 1984. During the relevant time frame he appeared as a prosecutor in His Worship Massiah’s court four to five times a month.

(Transcript July 18, pp. 30-32)

142. Mr. QQ testified that after reading an article in the Law Times, wherein comments by His Worship Massiah in response to allegations from the previous Hearing about him were reported, and having heard talk amongst the staff, he contacted then Presenting Counsel Doug Hunt.

(Transcript July 18, p. 33)

143. From what he had observed in His Worship’s court, Mr. QQ’s opinion was that the comments from His Worship in the Law Times were not accurate. When asked about His Worship’s behaviour in the courtroom when he was the prosecutor, Mr. QQ testified:

A. There were times and it was – okay. He was always pretty fair with people, and maybe friendlier than some jurists would be. He liked to establish a rapport, I think, with all the people in the courtroom.

Q. Yes?

A. But, in my observation, there were times when, particularly with attractive female defendants, I observed that there was a bit more interest expressed, non-verbally, by His Worship. With the persons walking up towards the dais, while engaged in conversation, dealing with matters and walking away.

Q. Can you give me a little bit more detail in terms of what you observed him doing when an attractive female defendant would be before him?

A. This didn't happen all the time, but often enough that I observed it numerous times.

You can be friendly to someone, you can be positive, you can be smiling, you can be open, that's okay and normal, in my view, there's nothing wrong with that. When I was interviewed earlier, I'll use the same words, it went beyond that. It tended to be, to me, more a once over, kind of up and down, checking out type of observation, which I observed numerous times, and I thought it was embarrassing. But, yeah.

Q. All right. So it was an up and down. Did you ever observe him – is that what you mean by "leering"?

A. Yeah, I do. Kind of excessive interest.

(Transcript July 18, pp. 36, 37)

144. Mr. QQ described the type of behaviour he observed in the context of how His Worship looked at a particular attractive female defendant who appeared before him in the courtroom:

Q. How did you perceive it?

A. I perceived it as a lot of interest in a non-verbal way, that's the way I perceived it, that's my perception.

Q. Would it be the type of interest you'd expect in the courtroom?

A. No.

Q. What sort of context would you expect that sort of display?

A. Social situation, party.

(Transcript July 18, p. 41)

145. In re-examination, he provided further information about his observations:

A. But the point is, I wanted to reiterate the fact that the leering and ogling, to me, is what I was concerned about.

And I could see at some point, it being characterized as just being friendly. And I did not agree with that. There's a line, and I told that to the folks earlier who were investigating. You can be friendly with someone, and that's fine. But the line has to stop -- especially in the courtroom, when you go past that line, that was my concern.

Q. And the leering and ogling that you observed, was it within the line or past the line?

A. Far past.

(Transcript July 18, p. 96)

146. Mr. QQ testified about the impact of His Worship Massiah's conduct in the court on Mr. QQ's confidence in the administration of justice. He stated:

A. When these types of situations would occur, I felt it was inappropriate at the least. It just seemed wrong to me, it's not what should be happening in a courtroom in this country.

I thought -- there's a time for socializing and that type of thing. This is not the time, or the place for that matter. It offended me. I felt it lessened the entire dignity of the court, the process. People in the room saw this type of thing, and I'd be thinking, "what do we look like? 'We' look like?" Because I'm part of this process. I think I'm -- of course in a different role, but people see us, actors, as playing our parts and they lump us together, I think: "people" being defendants, etcetera.

Just wrong, just inappropriate, unnecessary, made no sense to me. I've never seen it to this extent in my career. Unusual, that's how I felt.

(Transcript July 18, pp. 44, 45)

147. NN, who was, as stated previously, a provincial prosecutor at the relevant time, testified that His Worship Massiah developed a reputation among her colleagues. She also observed "that it appeared that he had a pattern with a certain type of young female defendants, where he behaved differently in the courtroom." When asked to explain the behaviour, NN stated:

A. Yes. In terms of his language, not all the time, but with some regularity I'm afraid, he would start referring to them by their first

name, which was surprising. A person before or after he might refer to as “mister” or “miss” so and so. And his body language, to me appeared to change.

Q. In what way?

A. Well, from sort of leaning forward, all of a sudden calling them by their first name. Sometimes pushing the paper away, and just trying to have a bit more of a connection with them, with the person.

Q. If you were to characterize it or summarize it, how would you characterize the interaction you observe him engaging in with the attractive, female defendants?

A. How would I characterize it? It would appear to me that he was trying to make a connection.

Q. What do you mean by “a connection”?

A. Like an intimate connection to the extent that the role was very restrictive, of course, but ...

(Transcript July 18, pp. 105, 106)

148. As to the impact His Worship’s conduct on then prosecutor, now NN, she testified that it:

A. ... diminished my confidence in his ability to put aside any biases for a certain type of profile of a defendant before him, and treat them all equally and the same. And it seemed to me, he had difficulty doing that with a certain type of defendant before him, particularly young, attractive females. And that diminished my confidence in his ability to objectively execute his duties.

(Transcript July 18, p. 115)

149. It’s evidence was that her observations as a court clerk about how His Worship Massiah interacted with female defendants was “... typically he was over friendly, he would address them by their first names.”

(Transcript July 15, p. 33)

150. She testified that:

A. Well, yeah. I mean, to be fair, I sit in front, he sits behind me; so I'm not looking at him, obviously. But it would just be addressing them by their first names, just the tone, the manner, the tone of his voice, the way he would, you know, "Hi, Il. So what happened today?" And just sort of very casual, not – I didn't think it was very professional the way he addressed – in my experience working in the judicial system for years – the way he addressed the defendants.

(Transcript July 15, p. 36)

151. Ms. Il's reaction to these observations affected her confidence in the administration of justice. She stated:

A. Well, you know, I didn't have much confidence in it, that he would be on the bench and treating females, the defendants, in an overly friendly manner. And that the staff, I just found the arrogance. Because all of this stuff was done right out in the open.

(Transcript July 15, p. 51)

152. His Worship Massiah categorically rejected the suggestion that a prosecutor's or staff member's confidence in the administration of justice was affected negatively by his conduct. His evidence was:

A. Absolutely. That they're incorrect, point blank. There's two aspects to that.

On the one hand, any prosecutor or defence person within courtroom operations choose to disagree with my sentencing, disagree with my findings, disagree with my decisions, there's an option, there's an avenue for them to proceed. To the best of my knowledge, that had not been done.

Secondly, if they choose to make observations as to how I conduct myself, if you wish, with regards to defendants coming before me, which is what I think you're alluding to. As I indicated to you, in that one of the stresses of our early training was for us to be very mindful, very attune to unrepresented defendants.

We provide adequate information, we slow the process down, if need be, we provide very clear directions as to their duties and their rights. And would say that this has caused some members, particularly in 605 Rossland, to be a little perturbed by my similarly manner to truly ensure that anyone coming before me, clearly understands why they're there, and to some extent to make them feel comfortable.

And one point I want to raise with regards to that, because I saw a number of facial expression to this. Is that I would thank a defendant coming before say, and me "thank you for attending". I am not aware that my colleagues do that; I do that.

Q. Why do you do that?

A. Again, I go back to the fact that one of the stresses was of customer service. We are public servants, all right? We are the face, if you wish, of the -- well, let's just go with judges -- the person who the public will come in contact with in the judicial system. And we are to extend courtesy, patience, understanding, and clearly to advise them of their rights. If we need to slow it down, if we need to take the time to do so, we do so. And so I dispense my duties in that manner.

(Transcript July 29, pp. 76-78)

153. **Paragraph 14** of the Notice of Hearing alleges that the conduct described in paragraphs 1-13, the range of women who were recipients of his conduct, and together with the history of His Worship's misconduct of a similar nature towards other women at a different courthouse, demonstrate a pattern of inappropriate conduct toward women in the justice system.
154. On March 1, 2012, in a hearing cited as *Re Massiah, Reasons for Decision* (JPRC, 2012) a Hearing Panel of the Justices of the Peace Review Council made findings of judicial misconduct by His Worship, based on evidence called in that hearing about his conduct towards female court staff at a location different from the courthouse that the present allegations relate to:

[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*:

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.

155. His Worship has testified that he now "accepts" the findings of the public hearing in 2012. It is noteworthy that in the Fall of 2013, after the present hearing was ordered and hearing dates were scheduled, His Worship brought an application for judicial review of the prior hearing's decision. That application, cited at *Massiah v. Justices of the Peace Review Council*, 2014 ONSC 3415, was unsuccessful.

156. His Worship testified in examination-in-chief:

A. I think I have learned, I've learned very clear and very well, I've alluded to the fact that despite my best intention, or despite what I believe to be a nice, collegial banter back and forth and so on, can be interpreted or can be received in a manner that is not intended to.

(Transcript July 29, p. 85)

157. In cross-examination, he responded to a question from Ms. Henein as follows:

Q. Just so we are clear, and we are going to come back to this, you maintain even today, as you sit here under oath, that all you were doing was giving innocuous compliments; is that right?

A. My intention was to create a friendly, engaging working environment with my clerks and all members of the staff. That was my intention, and I said I put emphasis on that aspect.

What I am about to say is not intended to be an excuse. On reflection, I would say that I still had on my political hat. Five months earlier I ran for local office, for local council, and it is clear to me that I did not make that adjustment. I came on board. I was very pumped. I was extremely pleased and happy to be there. I greeted everyone in a very uplifting manner, shook hands. I reached out to people. So naturally, that style, on reflection, perhaps caused some people to be concerned or seemingly very, very different.

(Transcript July 30, pp. 11-12)

158. His Worship also provided the responses below during cross-examination:

Q. So you accept that you were making sexual comments?

A. They were in violation of the Code, yes.

Q. No, that is not what I asked you. You were making sexual comments; do you accept that then today?

A. Yeah, but I don't quite understand what you meant by I'm making sexual comments.

(Transcript July 30, p. 13)

Assessments of Credibility

159. As set out in paragraph 12 herein, the standard of proof in a hearing of this nature is “on the balance of probabilities”. As set out in paragraph 58 herein, our obligation is to assess the credibility and reliability of all of the witnesses and determine if there is clear, convincing and cogent evidence which proves judicial misconduct to that standard.
160. His Worship Massiah’s evidence must be assessed in the same light as that of the other witnesses. As has already been stated, His Worship specifically denies leering, ogling and making inappropriate sexualized comments to females in the Whitby courthouse, inviting female staff into his chambers when not fully clothed, and touching a female staff member seated at her desk.
161. His denials of such behaviour were unconvincing, in our view. His explanations for his habit of making friendly, personal comments, which he described as “compliments” and “comments mainly on their health conditions”, were that they were part of his “management style”, and “banter” which was “part of the culture”. His evidence in relation to his chambers was that justices never close their doors. His evidence that he never touched Ms. BB included the proviso that because of his particular height and weight and the close proximity of the desks in the administrative workplace, an inadvertent touching could occur.
162. This evidence is considered in the context of other concerning evidence from His Worship. Given his considerable employment experience with the Ontario Human Rights Commission prior to his appointment to the bench, and his training while a justice of the peace on the subject of workplace harassment prevention, His Worship’s evidence that compliments such as “you’re looking great today” or “is something happening” were based on “my level of familiarity, or interaction, or friendliness with that particular individual” does not ring true. In our view, His Worship’s evidence was an attempt to minimize the obvious sexualized manner in the workplace, which he portrayed as his “management style” in the workplace.
163. His testimony, and his demeanour while testifying, painted a picture of a man who is arrogant and who perceived himself to be appealing to women. When his lawyer was questioning him about his compliments to women, he said:

A. My personality, I'm a very compassionate, personable, engaging, understanding individual. And I brought that individual personality and

characteristics in my interaction with all of the clerks that I engaged in. I received -- I thought I was well received, in essence.

(Transcript July 29, p. 22)

164. When counsel for His Worship Massiah suggested in cross-examination of AA that in the courthouse, there was "a reference to Justice Massiah that he's very full of himself, very arrogant", she confirmed that this was the case.

(Transcript July 17, p.167)

165. In examination-in-chief, His Worship did not mention his experience working in the area of human rights law. Only in cross-examination did he acknowledge it. When questioned about the omission, one which we see as very significant, he said: "It was just part of the continuation of my career, my career development."

(Transcript July 29, p. 142)

166. In cross-examination he acknowledged that his work in human rights included involvement in the adjudication of workplace sexual harassment "quite a bit". Yet he attempted to downplay that background and expertise in the context of the allegations of judicial misconduct, stating:

A. You make reference to the fact that my training and my work at the time at the Human Rights Commission, which was quite some time back, I do not recall -- I do not recall that I dealt with cases with regards to compliments. I dealt with a variety of different sexually-related matters possibly in violation of the *Code*, but I do not recall any one particular case in reference to compliments.

(Transcript July 30, p. 16)

167. His Worship Massiah's efforts to minimize and deny the seriousness of his conduct was apparent when he was giving evidence about Mr. Hunt's disclosure to him of new allegations being received. His testimony was: "My understanding that there were allegations made -- and actually, I choose not to use the word "allegations". I choose to use the word "information"."

(Transcript July 29, p. 86)

168. It is notable and concerning that His Worship took this stance, put forward these views and gave this evidence after findings of judicial misconduct in a previous judicial discipline hearing relating to sexualized comments to females at another courthouse.
169. When questioned about the previous findings made by that Hearing Panel, His Worship's evidence was equivocal at best. In one moment he testified that he "accepts" the prior findings, but also maintained they were "incorrect". He appeared unable or unwilling to acknowledge the distinction between appropriate and inappropriate conduct in the workplace. The following exchange from His Worship's cross-examination, cited in our findings of fact above, is an example of his obfuscation:

Q. So you accept that you were making sexual comments?

A. They were in violation of the *Code*, yes.

Q. No, that is not what I asked you. You were making sexual comments; do you accept that then today?

A. Yeah, but I don't quite understand what you meant by I'm making sexual comments

(Transcript July 30, p.13)

170. In a similar vein of denial and misrepresentation, His Worship asserted that the Chief Justice "on her own volition- there was not a requirement...recommended counselling" and that he voluntarily accepted the suggestion.

(Transcript July 29, p. 83)

171. In fact, one of the dispositions of the previous Hearing Panel was an order that His Worship take gender sensitive counselling. His Worship conceded, in cross-examination, that that was indeed the case.

(Transcript July 30, p. 40)

172. His Worship's evidence was variable and inconsistent regarding whether females who received compliments they deemed inappropriate had an onus to speak out, or speak up to His Worship. At one point, in cross-examination, His Worship appeared to agree with Presenting Counsel's suggestion that it was not the

woman's obligation, but his evidence then shifted. The exchange was as follows:

Q. Yes. And that it is your obligation, not the woman's obligation, to not engage in conduct that may potentially be perceived in a negative way, right?

A. That's correct. I hastened to add, however, prior to Bill 168 there was an onus, and the onus is clearly to engage the individual or the person who alleged to have made the conduct, to alert them of the possibility that it was unwelcome, or not appreciated, or quite frankly some indication. And should that person continue, to fail to cease and desist, and of course it can constitute – yes.

Q. Just so we understand it. Your position is that it was the obligation of these women to raise it with you?

A. Not an obligation, it certainly was an indication that, if you wish, a requirement to advise, if need be, or to alert the alleged perpetrator, prior to Bill 168.

(Transcript July 29, p. 151)

173. When Bill 168 was presented to him by Presenting Counsel in the course of cross-examination the following day, His Worship tried to disavow his earlier evidence:

Q. Correct, and it has nothing to do with changing any obligation on a victim to report or tell the harasser to stop, right? There is nothing in there about that; will you accept that?

A. Absolutely, and if I said -- again, if I misspoke or if I conveyed this impression, then I was wrong and I will say that right now.

There has always been an obligation, and I have never – again, that is all I can say, is that the obligation on someone perpetrating harassment in any form – there is no obligation on the person who is the recipient or receiving that behaviour to advise.

I thought I tried to explain, perhaps this morning, that in the broader sense what the context were, but what I – referring to Bill 168 – let me put it this way. Perhaps what I intended to convey in Bill 168 was it

added definition, call it the broadening, the widening, the tightening up, if you wish, that of additional behaviour impediments.

(Transcript July 30, pp. 37, 38)

174. Counsel for His Worship, in his written submissions, highlighted that we should consider “internal consistency or inconsistency of evidence”, “the witness’s opportunity and/or inclination to tailor evidence”, and “the witness’s opportunity and/or inclination to embellish evidence” as relevant factors in the assessment of credibility and reliability. In all of these aspects, we find His Worship’s evidence to be problematic. His testimony was replete with inconsistency, an air of insincerity, and efforts to adjust his testimony to minimize the inappropriateness of his conduct. We do not accept that he is a credible witness or that his evidence was reliable.
175. Counsel for His Worship submitted that a number of the witnesses called by Presenting Counsel had a questionable motive to make the allegations against His Worship Massiah such that their evidence about his actions or comments should be disbelieved. In relation to II, his position was that as she made no complaint about His Worship until she read about the first hearing, and although she testified that she had no knowledge of the previous complaints, she was concerned he would get “a kiss”, in effect, a minimal disposition; thus, her motivation to give evidence should be suspect. He argued that she bore an animus against His Worship because he appeared to coddle defendants, especially females, and because he overruled her on an occasion when she called security to the courtroom to assist with a person who spoke out. He argued that she demonstrated racial bias against His Worship when she used the term “soul brother” to describe his manner of speaking.
176. In our view, Ms. II’s evidence was cogent and unshaken. Regarding her use of the term “soul brother”, we accept her evidence that she did not call His Worship a “soul brother” as a racialized term, but rather, used it to describe the tone of his voice and the manner in which he spoke. Ms. II, like other witnesses including Ms. HH, Ms. BB, and NN, described through imitation in their testimony, the tone and manner of His Worship’s “compliments” to them. As Ms. II described, the words as well as the slow, breathy manner of expressing them, were reminiscent of a style of speaking which the phrase “soul brother” connotes. Ms. BB described how His Worship would slowly inhale and exhale, commenting as he was exhaling, in a sensual way.
177. The motivation of QQ, HH and NN was also questioned by His Worship in the

oral and written submissions, wherein he alleged that it was the prosecutor's office which "generated" the second set of allegations resulting in this hearing.

178. In our view, the evidence of Ms. II, who had worked many years in the court system as a clerk, and the evidence of the three prosecutors, each with significant experience in a courtroom, were not only consistent in their descriptions about the type of inappropriate behaviour from His Worship which they observed, but also as to why they finally decided something needed to be said about it. We find that their motivation for complaining was not an animus towards His Worship but rather their incredulity at His Worship's comments put forward in his defence in the previous hearing. We find as credible their respective indignation when they read the article about his testimony from the *Law Times* in circumstances where they each knew that his conduct was also inappropriate at the courthouse where they worked. We accept that despite the courthouse culture at their location that discouraged or oppressed complaining about inappropriate behaviour by a justice of the peace, when the clerks at another courthouse were being accused by His Worship of "ganging up" against him, the response of experienced staff and prosecutors was to speak out, and describe their observations of His Worship Massiah and the impact his behaviour had on them and others who worked with them.
179. His Worship, in his evidence, appeared to attribute Ms. HH's complaint against him to some grudge she might have held against him in relation to a complaint lodged by another justice of the peace against her with the Law Society. This testimony made no logical sense. Ms. HH's evidence, which we accept, was that the complaint was dismissed before her involvement in this proceeding, so it would have no relevant connection to His Worship and further that she had no inclination that His Worship was a possible witness, as the complaint was made by another justice of the peace.
180. As referenced earlier, when His Worship also suggested that when Ms. HH saw him raking her body up and down with his eyes in a sexual manner, and he said, "looking goooooood, Ms. HH", she possibly "misinterpreted" a comment he made about a court docket "looking good". His Worship appeared to us to be "gilding the lily". It was palpable from her testimony that Ms. HH still has an emotional reaction from the experience and that she recalled it very vividly. The fact that she may have used two different verbs to describe His Worship's attention, namely "raking" and/or "raping" her with his eyes, is of no relevant significance. We accept Ms. HH's version of the incident.
181. Counsel for His Worship argued that the evidence of CC should be rejected in its

entirety. In cross-examination she was confronted with an email exchange between her and His Worship's previous counsel Eugene Bhattacharya when he sought to have her act as a character witness for His Worship during the previous hearing, and specifically with an email dated September 12, 2011 (Exhibit 19). In that document, Ms. CC made complimentary comments, describing His Worship as a "very kind, caring, and down-to-earth person", who "always treats me with the greatest respect." "Yes he may make comments with regards to how you look or a new hairdo but has never made me feel uncomfortable."

182. Ms. CC acknowledged writing the email but testified that she wrote it so that the lawyer, who had called her repeatedly at work and at home, would not bother her anymore. She testified that "... he was pressuring me to become a character witness for his first trial. I was not going to be a character witness, because he has no character."

(Transcript July 15, p. 200)

183. We accept that Ms. CC's reliability with respect to His Worship's interactions with her and other staff is questionable, in that the contents of her email are inconsistent with her evidence that she observed His Worship "eyeballing" female staff, and that he made personal comments to her which made her feel uncomfortable. Her comments in the email were made with the knowledge that they could be used and relied upon in a hearing about judicial discipline, and they must be considered in that context.
184. Ms. CC's explanation, however, that she felt she had to disclose what she knew when she was interviewed by the investigators in this proceeding because she was sworn to tell the truth, was believable in the context of the courthouse culture. Ms. CC stated in cross-examination:

A. I did not feel that it was not inappropriate. What I was trying to put across is that in my training and my experience in the courts, that things went on, which were never brought to light.

I would never go and say anything against a higher judge, judiciary, Justice of the Peace, those are kind of things, whether they bother me or not, that I would keep to myself.

(Transcript July 15, pp. 192, 193)

185. Even if Ms. CC's email in the previous hearing renders her description of His

Worship's inappropriate conduct unreliable, other witnesses, including Ms. II, Mr. QQ and NN gave compelling evidence about what they saw and heard even when the looks and/or comments were not specifically addressed to them. It was clear to us that their concerns were for others who were the subjects of His Worship's conduct and for the impact on the administration of justice. Each of them expressed a sense of surprise and discomfort that a justice of the peace would conduct himself in such a way. For example, in giving his evidence, Mr. QQ appeared uncomfortable when asked to describe "ogling" and he genuinely appeared to regret that he had not taken steps much earlier to address the situation.

186. The nature of these experiences has left an impression with these witnesses. Like Ms. HH, AA had a clear memory of how His Worship Massiah looked at her when she was introduced to him, describing it as a "long up and down look that made me feel uncomfortable at the time." She explained:

A. Just the introduction, look in the eyes, but then looking from the eyes downwards, and then back up again. Just not maintaining eye contact, which just made me feel uncomfortable.

Q. What did you take that look to convey, if anything?

A. Well, it just -- it just made me take note of it, and it just felt kind of sexual in nature. Like it just felt different than any of the introductions that I ever had at that courthouse. So it stood out in my mind, and I just took note of it. ...that wasn't the typical introduction that I would get in the legal setting, and so it stood out as something that I would take note of and remember for future interactions.

(Transcript July 17, p. 157)

187. We note that one of the court clerks, who testified she was not offended by His Worship's comments to her, not only highlighted the themes of hierarchy and courthouse culture but also the type of "compliment" which His Worship Massiah frequently bestowed. GG met His Worship in 2008 and found him to be "friendly" and "approachable". He made comments to her, she stated, like "nice hair", "oh you look good today" and "oh, I'm glad we're off the record so I can tell you how good you look today". Although Ms. GG accepted these comments to be compliments, when asked if anything His Worship did made her feel weird she stated:

A. Yeah. I mean, once -- once you hear, oh somebody is thinking that

he's – I don't know how to explain it. But, yeah he'll look you right in your eyes, and it did feel strange, I guess, sometimes. Because most times you're – I don't know – you don't look people right in their eyes and tell them how good they look it's just something that would make me feel a little bit awkward.

Q. It would make you feel awkward because why?

A. Because he's a Justice of the Peace, he's an older man, he's attractive, and you're just kind of a much lower level, and I don't know, Hierarchy I guess.

Q. Did any other Justices of the Peace ever look you in the eye and tell you, "you look good"?

A. No, not – no.

(Transcript July 17, pp. 179, 180)

188. When asked if she ever considered reporting His Worship's conduct, Ms. GG testified:

A. It didn't really bother me that much; I wasn't really offended by it. I'm surprised everybody else was offended by it, because they never seemed to have a problem with it at the time.

And in the past, also, if there was a problem, and if it involved a Justice of the Peace, if you would ever say anything to management, it's just as if the Justice of the Peace – you can't complain about them; anything they do is okay. So I just wouldn't feel like there would be a point to even complain because – management isn't going to do anything about it.

(Transcript July 17, p. 184)

189. We are satisfied that there is consistent, cogent and compelling evidence from numerous witnesses, female and male, staff and prosecutors, which proves on the balance of probabilities that leering and ogling of female court staff, prosecutors and defendants, and inappropriate sexualized comments towards female court staff and a female prosecutor by His Worship Massiah were common occurrences at the Whitby courthouse.

190. Ms. JJ, who testified on His Worship's behalf, and Ms. GG who stated she was not personally offended by his compliments to her, provided similarly cogent and corroborative evidence about His Worship's behaviour.
191. We reject the evidence of His Worship that a perception that he was leering and ogling female defendants in the courtroom resulted from his manner of taking his glasses off and on, and that action led to the belief that he was looking their bodies up and down. He testified as follows in examination-in-chief:

Q. ...So, first of all, I think it would be fair to say that there is a general allegation out there that you ogled, or looked clerks and other women up and down. So do you have a generalized response to that or --

A. Yeah, I do. That's an impression that individuals or others have. I do not share that, I do not agree with it. I do not look at anyone, anyone in an ogling manner, or up and down fashion, I simply do not. In court, I administer my role that I'm required to do. And that is, I am required to make an assessment of anyone coming before me. Both in terms of themselves, how they're behaving and what have you. And I made that part of my initial judgments. I have no reason to do that and I did not do that.

Q. I see you have glasses in front of you.

A. Yes.

Q. So let me ask you about your vision. What is your vision like?

A. Fairly poor. I see you a little bit at the far side there, I need to put on my glasses, I cannot see that well. So I take it on and off.

Q. Okay. Is there some reason you sometimes take it off?

A. Yes. Because I have 20-20 vision close up, and I can concentrate on what I am doing in front of me. I've got to be mindful of my decision or the information I have before me.
(Reporter sought clarification.)

Q. So what are you telling me about now when you say you have to be mindful of your decision?

A. In other words, I pay attention to what I'm doing in front of me. And as

I need to, to make an observation, or to reference a point. I put my glasses on and I get a sense of what I am looking at, for example, if someone appeared before me, then I put my glasses on and I would see that I have someone before me, in whatever fashion and manner, and I concentrate on that.

So if I'm looking at a person without my glasses, I really -- I don't see that person very well.

(Transcript July 29, pp. 30-32)

192. In cross-examination, he agreed that the prescription for the glasses was a fairly minor modification. His Worship attempted, nevertheless, to attribute his leering and ogling behaviour to putting his glasses on and off in court. Mr. QQ, however, confirmed that the act of putting glasses on and off was not a valid explanation for conduct that was in fact leering and ogling at women, and Mr. QQ's evidence of what he observed was convincing.

193. We accept that His Worship made inappropriate comments to females both in the courtroom and in and around the courthouse. We accept as reliable and compelling the evidence of NN, who characterized His Worship's behaviour in her testimony:

A. It frankly reinforced the concern that I had – the behaviour that I had observed in the courtroom. And it made me, even though it wasn't directed at me, it made me feel very uncomfortable that a man in which I interacted professionally, would behave in a way that objectified how a woman looks.

(Transcript July 18, p. 115)

194. Counsel for His Worship argued also that BB was incapable of being believed. He argued that Ms. BB's evidence had been adversely affected by the passage of time; that it was II who planted the details of the touching incident because of her animus for His Worship, and then pressured Ms. BB to come forward with her allegations. Counsel pointed to the statements Ms. BB provided when she was interviewed by the investigators assisting the Complaints Committee during the investigation to argue that her testimony that she was touched by His Worship should be found to be unreliable and should not be accepted.

195. In our view, Ms. BB's explanation of why she provided fewer details and was

more vague in her recollections when she spoke with the investigators than she was when she gave evidence before us has a ring of truth. She testified she wanted to put it out of her mind. What she recalled most specifically was her reaction to His Worship moving behind her and doing and saying something inappropriate.

196. That reaction was strikingly consistent with Ms. II's evidence as to what she says she observed. We accept, as His Worship argued, that Ms. II would not have had an unobstructed view of His Worship's hands, and if or where they were on Ms. BB's shoulders. We also accept, however, from the evidence of RR and AA, (whose evidence was admitted for the limited purpose of rebutting the allegation of recent fabrication advanced in His Worship's cross-examination of Ms. BB), that Ms. BB was upset after an incident involving His Worship, and how uncomfortable he had made her feel and she expressed this discomfort to others after it occurred. Further cogent evidence of the inappropriate interaction between His Worship and Ms. BB came during the testimony of staff supervisor, KK, who recalled meeting with Ms. BB after II reported the incident. Ms. KK testified in cross-examination that, at the time, Ms. II seemed genuinely agitated and upset. Ms. KK testified that when she met with Ms. BB, Ms. BB was upset with Ms. II, not for making something up about Justice of the Peace Massiah, as His Worship's counsel suggested, but rather because Ms. BB did not want Ms. II to tell Ms. KK about the incident; she did not want to talk about the incident; and she just wanted it 'to go away'. Ms. KK testified that Ms. BB was crying and shaking during their interview. And, as previously referenced, neither Ms. KK, nor Ms. JJ, both staff supervisors, took any further steps to investigate or address what had occurred between a justice of the peace and a female staff member in the workplace, despite both Ms. II reporting and Ms. BB confirming that there had been "an incident".

197. Ms. AA's evidence corroborated Ms. BB's explanation that she sought to put this experience with His Worship Massiah out of her mind. Ms. AA testified:

A. Well, I remember her feeling that it made her -- saying that it made her feel very uncomfortable, like I think even kind of shivering when she said it. Like it was kind of awful to think about, or talk about.

(Transcript July 17, 2014, p. 162)

198. We accept that there is credible, cogent and compelling evidence that His Worship interacted inappropriately with Ms. BB, including moving close behind her while she was working at her desk and without warning deliberately touching

her shoulders with his hands. We reject His Worship's proposal that if there was a touching, it was inadvertent, because of his stature and the tightness of the space. There is no plausible evidence or explanation from His Worship which would place him behind an administrative staff member's desk, leaning close to her, such that an accidental touching could occur. We accept Ms. II's evidence that he was in the office to sign paperwork and he veered in a different direction, approached Ms. BB from behind. We find that he touched her and leaned close, commenting in her ear.

199. His Worship PP's evidence about the alleged incident at the University Women's Club in Toronto was unspecific and not reliable as to proof of His Worship Massiah looking at the chest of a female justice of the peace.
200. With respect to the allegation that His Worship invited female court staff into his chambers when he was not fully clothed, as we stated above, His Worship testified that he rarely shut the door of his chambers. His evidence was that it was an informal atmosphere and his colleagues would just walk in. In our view, his evidence on this point is not logical or credible as he said that if anyone knocked at the open door, he never said, "come in". His evidence was: "And I may say, "I'm coming," or "coming." And I didn't say the "coming in." I said, "I'm coming."

(Transcript July 29, p.54)

201. As referenced earlier, His Worship categorically denied that any staff member saw him shirtless and suggested he was reluctant to have anyone see his body. In cross-examination, when speaking about an incident addressed at the earlier JPRC hearing, he testified that he did not tell a clerk that she could see him with his shirt off. Rather, he said that he had been on various supplements and said to a colleague, "If you want to see me with my shirt off, just let me know."

(Transcript July 30, pp. 105, 106).

This is a direct contradiction with his expression of self-consciousness about his scar.

202. We accept that His Worship was in the habit of changing into his court attire with his chambers door open, and inviting staff to enter if they arrived when he was doing so. As EE testified, she felt so uncomfortable after she found herself in his chambers with him in a state of partial undress, that she went downstairs and told her manager, JJ. Both the managers, Ms. KK and Ms. JJ, confirmed the

evidence of Ms. EE that she had seen him with his shirt off. Surprisingly neither manager seemed to appreciate that such conduct by His Worship was inappropriate. Rather, their evidence was that Ms. EE made light of it and enjoyed it. Neither of the managers took any steps to investigate the incidents reported to them by their female staff.

203. With respect to the “Lady in red” allegation, His Worship acknowledged that he may have uttered those words but he could not recall. He testified that what he most heartily disagrees with is that he leaned in and whispered it. He categorically stated that he would not do that, particularly with Ms. HH. This evidence is contradicted by what we accept occurred in relation to Ms. BB, when he leaned close to her and said something in her ear. In fact, the actions have a striking similarity. As stated previously, Her Worship NN's description of His Worship's conduct on the stairs in relation to Ms. HH was compelling. We accept her version of the events, and find that His Worship leaned in toward Ms. HH and that the comment “Lady in red” was made with flirtatious sexual overtones.
204. There is, in our view, credible cogent evidence from the many witnesses previously referenced which proves, on the balance of probabilities, that between May 30, 2007 and August 23, 2010, at the Whitby courthouse, His Worship engaged in a course of conduct, which included both sexualized comments and conduct towards female court staff, a female prosecutor, and female defendants, that was known or ought reasonably to be known to be unwelcome, unwanted and inappropriate. There is compelling evidence that proves a pattern of such conduct by His Worship towards women in the workplace which made them feel uncomfortable, uneasy, embarrassed and offended.
205. In our view this pattern of inappropriate and offensive conduct resulted in a poisoned work environment that was not free of harassment such that the comments and/or behaviour created a hostile or offensive work environment for individuals or groups and diminished individuals' confidence in him as a judicial officer and their confidence in the administration of justice. There is cogent, credible evidence that female staff were affected in their daily work. Ms. BB used the public washroom to avoid the risk of meeting His Worship in the hall and asked other clerks to take documents to His Worship's chambers, until the time when the policy changed and female clerks no longer took paperwork to the chambers of justices of the peace at that location. Several staff members, including Ms. BB and Ms. EE, avoided his chambers when they believed he would be present or alone. There is compelling evidence from Ms. HH that she dreaded walking past him outside the courthouse and got out of his courtroom as soon as her work there was completed, not remaining to “chit chat” as she did with other judicial officers. There is credible evidence from Mr. QQ, NN and Ms. II

that their confidence in Justice of the Peace Massiah and in the administration of justice was negatively impacted by his conduct towards females in the courtroom.

206. His Worship's evidence that his compliments, which we accept objectified and sexually harassed women, were simply part of his "management style" demonstrated complete lack of insight or callous disregard for the women in his workplace. Given his depth of experience working in the area of human rights law, and his position as a judicial officer, His Worship would have known or ought to have known that such behaviour could cause offence, harm, discomfort and/or undermine the dignity of female staff and prosecutors.
207. We note that the *Ontario Court of Justice Discrimination and Harassment Policy for Judges and Justices of the Peace* was not established until 2009. However, we find that His Worship acted in a manner inconsistent with the *Human Rights Code*. His actions constituted sexual harassment and he failed to treat others in the justice system with mutual respect and dignity. He also acted in a manner inconsistent with the *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* that articulate the public's expectation of a high level of conduct from justices of the peace.
208. His Worship Massiah's interaction with female staff was inappropriate and included sexual, suggestive and/or inappropriate comments and/or conduct. His conduct included gender-related comments about an individual's physical characteristics or mannerisms; and/or unwelcome physical contact; and/or suggestive or offensive remarks or innuendoes about the female gender; and/or leering or inappropriate staring, including:
 - (a) Leering at and/or ogling at female court staff and female defendants.
 - (b) When he was introduced to AA in 2007, he slowly looked her up and down in a sexual way causing her to feel uncomfortable and giving rise to a perception of an "undressing" look.
 - (c) He said to Ms. BB, "Looking good today, BB" while looking her up and down head to toe with his eyes, and he often looked her up and down head to toe.
 - (d) He said to Ms. BB in the back hallway near the woman's washroom that he liked two-tone blondes.
 - (e) He said to Ms. GG "nice hair", "oh you look good today" and "oh,

I'm glad we're off the record so I can tell you how good you look today".

209. We accept that His Worship left the door to his chambers open when he was changing his clothes despite the fact that he had a washroom area where he could change in privacy, and often changed in the office area outside of the private washroom, in circumstances where he would have or ought to have known female court staff could enter. The evidence demonstrated that clerks generally went to the chambers of justices of the peace around the same time each morning to take the court docket and could be expected to be coming and going from those offices to bring paperwork as part of their duties.
210. Based on the evidence we find to be cogent and compelling, we accept that the allegations set out in **Paragraphs 1, 2, 3, 4, 5, 6, 7(a), 7(b), 7(c), 7(e), 8(a), 8(c), 8(d), 9, 10, 11, 13, and 14** of the Notice of Hearing, have been made out on the balance of probabilities.
211. In light of the nature of the conduct set out above, the range of women who were recipients of the conduct of His Worship Massiah that has been proven on a balance of probabilities, and his history of judicial misconduct of a similar nature at a different courthouse, his conduct demonstrates a pattern of inappropriate conduct toward women in the justice system.

Conclusion

212. The acts that have been found to be made out in paragraph 210 above individually and collectively constitute judicial misconduct that warrants a disposition(s) under section 11.1(10) of the *Justices of the Peace Act* to preserve the integrity of the judiciary and restore public confidence.
213. The hearing will reconvene on Monday, March 23, 2015 at 10:00 a.m. for oral submissions on disposition and any evidence that either party may wish to call on the issue of the appropriate disposition.

Date: January 12, 2015

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