

**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: Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member

**Hearing Panel of the Justices of the Peace Review
Council**

**DECISION ON A MOTION FOR DISCLOSURE OF APPOINTMENT
LETTERS; A MOTION ASSERTING BIAS OR REASONABLE
APPREHENSION OF BIAS, CONFLICT OF INTEREST AND
BREACH OF PROCEDURES BY PRESENTING COUNSEL; AND,
NOTICE OF INTENTION TO BRING A MOTION SEEKING A RE-
OPENING OF THE FINDINGS OF LIABILITY AND PENALTY**

Counsel:

Ms. Marie Henein
Mr. Matthew Gourlay
Henein Hutchison, LLP

Presenting Counsel

Mr. Ernest J. Guiste
E. J. Guiste Professional Corporation
Mr. Jeffry A. House

Counsel for Mr. Errol Massiah

Decision on a Motion for Disclosure of Appointment Letters; a Motion Asserting Bias or Reasonable Apprehension of Bias, Conflict of Interest and Breach of Procedures by Presenting Counsel; and, Notice of Intention to Bring a Motion Seeking a Re-opening of the Findings of Liability and Penalty

BACKGROUND

- 1) On 6 March 2017, this Hearing Panel released our *Decision on Jurisdiction in Relation to a Notice of Constitutional Question*, regarding Motions brought by Mr. Massiah. In that decision, we noted that our jurisdiction is very narrow, based on the Divisional Court ruling in *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191. We also advised Mr. Massiah that we would not condone any collateral attacks on the rulings of the Divisional Court and the Court of Appeal through an attempt to re-litigate the matters which were before those courts.
- 2) On 8 March 2017, just two days after the release of our decision, we were advised by the Registrar of the Justices of the Peace Review Council (JPRC) that Mr. Massiah had filed two new motions which are:

MOTION 1 titled as:

Re: Massiah-Compensation-Rehearing-Motion for Disclosure of Appointment Letters Re Hon. Justice Livingstone and H.W. Cuthbertson by Chief Justice.

This was then amended in the actual filing of the Motion, dated 8 March 2017, but received by the JPRC on 13 March 2017, to read:

Re: Massiah-Compensation-Rehearing – Motion for Disclosure of Appointment Letters – Motion Asserting Bias – Conflict of Interest – Presenting Counsel Acting in Breach of Procedures Document as Advocate

MOTION 2 titled as:

Re: Massiah – Compensation – Rehearing – Reasonable Apprehension of Bias Motion Per Procedures Document

OVERVIEW OF THE MOTIONS

- 3) Motion 1 seeks documents surrounding the appointment by the Chief Justice of the Ontario Court of Justice of both of the judicial officers who formed part of this Hearing Panel as it was constituted. Mr. Massiah maintains that the Hearing Panel was not properly constituted. As well, he seems to be asking for the names of the members of three sets of complaints committees that considered complaints about his conduct. Presumably, two of the three complaints committees dealt with matters other than those before this Panel.
- 4) Mr. Massiah, in his second iteration of Motion 1, also claims that Presenting Counsel is in a conflict of interest as they were retained by the Registrar of the JPRC who allegedly also instructs them. They are therefore not impartial or independent, according to Mr. Massiah. We note that we dealt with the role of Presenting Counsel in paragraph 16 of our *Decision on Jurisdiction and Alleged Abuse of Process*, dated 12 January 2015.
- 5) Motion 2 alleges, in part, the following:
 - a. The re-hearing of the compensation issue is tainted by bias due to Presenting Counsel improperly dealing with issues during the hearing, including compensation;
 - b. The JPRC through Presenting Counsel did not file a complete record of proceedings for the judicial review before the Divisional Court. The effect of the deficient record of proceedings is alleged to have circumscribed the issues apparent for review by the Divisional Court and at the appellate level before the Court of Appeal;
 - c. The Hearing Panel committed errors in its conduct of the original hearing and the subsequent compensation hearing;
 - d. The Registrar of the Justice of the Peace Review Counsel has misused confidential information.

ANALYSIS

- 6) A plain reading of the above noted issues from Mr. Massiah's motions and the factum in support of the motions convinces us that he seeks, once again, to re-litigate or newly litigate issues surrounding the original hearing, which was concluded before us in June of 2015. He also seeks to re-litigate or newly litigate matters which were the subject of judicial review

at Divisional Court and the Court of Appeal's appellate review of that decision, beyond the very narrow issue of our reconsideration of the compensation issue, as ordered following the judicial review.

- 7) Mr. Massiah has presented no statute or case law relevant to circumstances where there has been a judicial review and a denial of leave to appeal in support of his arguments to re-litigate matters from the hearing or newly litigate matters related to the complaints process beyond our re-consideration of the compensation issue.
- 8) In our 6 March 2017 decision, we were clear in our position that we have no jurisdiction to hear such matters. We also stated that we will not condone collateral attacks.
- 9) When we consider these new motions, it appears that one of two events has occurred.
 - a. First, it is possible that Mr. Massiah has failed to understand our ruling of 6 March 2017.
 - b. If that is the case, then we invite him to review it. Additionally, we refer him to the Supreme Court of Canada decision in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63, (hereinafter *CUPE79*), which provides the reasoning for finality through judicial review and/or appellate decisions and the law against collateral attacks on those decisions. In our view, Mr. Massiah and his counsel would be well served by reviewing this thoughtful decision.
 - c. Second, the other possibility is that Mr. Massiah has willfully ignored our ruling of 6 March 2017.
 - d. If that is the case, then we refer him to paragraphs 35, 36, 37 and 38 of *CUPE79* which sets out the doctrine of the abuse of process and "the inherent power of the court to prevent the misuse of its procedure, in a way that would... bring the administration of justice into disrepute". While this Hearing Panel is a tribunal and not a court, the abuse of process framework is provided as one of our powers through section 11.1(4) of the *Justices of the Peace Act* and the Procedures of the Justices of the Peace Review Council which import the provisions of the *Statutory Powers Procedures Act (SPPA)*. Section 23 of that act provides that "a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes".

- e. As we have already informed Mr. Massiah in our 6 March decision that our jurisdiction is limited and we will not allow collateral attacks, we are disappointed that he has filed these new motions which attempt to do exactly what we told him we will not allow. Allowing such motions to proceed would bring the administration of justice into disrepute.
- f. Therefore, we now invoke s. 23 of the *SPPA* to prevent abuses of our processes. As a result, Mr. Massiah is to file no more motions without first being granted leave to do so, by this Hearing Panel.

ISSUE OF A PUBLIC HEARING

- 10) There is another issue raised in Motion 2 which needs to be addressed. Mr. Massiah stated that this Panel has refused to allow public scrutiny of the proceedings as we ruled earlier that we would accept only written submissions on our reconsideration of the compensation of costs issue (see *Notice of Public Hearing into the Question of Whether to Recommend Compensation for Mr. Errol Massiah* on the JPRC's public website). Mr. Massiah is incorrect. Our ruling was fully within the law as set out in the ruling. The documents filed by the parties and the rulings of the Hearing Panel are public documents and fully available to interested parties.

ISSUE OF A POTENTIAL CONFLICT OF INTEREST FOR HIS WORSHIP CUTHBERTSON

- 11) Finally, we now consider Mr. Massiah's allegations in Motion 2 that Justice of the Peace Cuthbertson is in a conflict of interest. The way in which this allegation has been presented is troubling.
- 12) Mr. Guiste, co-counsel for Mr. Massiah states under the heading - JPRC silent on Chair's Retirement at Divisional Court that he filed a complaint against Justice of the Peace Cuthbertson with the JPRC, sometime after the conclusion of the hearing in June 2015. Up until 8 March 2017, Justice of the Peace Cuthbertson had not been advised by anyone, including the Registrar and/or staff of the JPRC, of the filing of a complaint. In this regard, the JPRC maintained information about the complaint in confidence. This is exactly what it is required to do under the *Justices of the Peace Act* and its own Procedures. Therefore, there existed no possibility that His Worship might be aware of the complaint or that there could be any possibility of a conflict of interest situation.

- 13) For Mr. Massiah to allege a conflict of interest, it was necessary that Justice of the Peace Cuthbertson be aware of the complaint. In an action which is in our opinion a self-serving tactic, as part of Motion 2, Mr. Guiste disclosed to His Worship Cuthbertson that the complaint had been made. On behalf of Mr. Massiah, Mr. Guiste then proceeded to claim His Worship is in a conflict of interest because of that complaint.
- 14) Complaints against the judiciary happen and it is certainly the right of any person to file a complaint. However, the simple filing of a complaint does not automatically place a judicial officer in a conflict of interest. The reason is obvious. If the mere filing of a complaint were to immediately create a conflict of interest which would result in the recusal of the judicial officer, then a mischievous litigant could file a complaint with the appropriate judicial conduct body against every judicial officer who may be assigned to preside over his or her matter in an effort to try to eliminate the judicial officer from presiding over the case. If the filing of a complaint by the litigant required a recusal by the subject judicial officer, very quickly then, the whole administration of justice would come to a grinding halt since there would be cases in which every judicial officer otherwise available to hear the matter would have a complaint filed against her or him, thereby leaving no judicial officer to determine the case on the merits.
- 15) The Procedures of the JPRC remedy this issue by holding in abeyance a complaint against a judicial officer presiding over a case until all appeals or other related proceedings have been fully and finally completed. Then and only then, will the complaint be considered by a Complaints Committee of the JPRC, which will determine whether there is any possible merit to the complaint. Thereafter, the appropriate course of action will be determined by the Complaints Committee according to the Procedures.
- 16) In an Addendum to our *Decision on the Request for a Recommendation for Compensation of Legal Costs* of 16 June 2015, we instructed the Registrar of the JPRC to file our complaint with the Law Society of Upper Canada (LSUC) regarding the conduct of Mr. Guiste during the earlier stages of the hearing. The Registrar subsequently did so. The Hearing Panel was later advised that the LSUC, pursuant to its Procedures, would not consider that complaint on its merits until all appeals and proceedings in Mr. Massiah's matter are concluded.
- 17) Since it was part of our decision, we understand that this Addendum was fully available to the Divisional Court (for judicial review) and the Court of Appeal (for application for leave to appeal) during their considerations.

18) We note that the Divisional Court had the Addendum and expressed no concern about this Hearing Panel being able to carry out its legislated responsibilities appropriately. If the Court had concerns about a potential conflict of interest, it would not have directed us to reconsider the compensation issue. In our opinion, the complaint filed by Mr. Guiste against His Worship Cuthbertson should similarly be viewed as not causing a conflict of interest. The members of this Panel are fully cognizant of and respectful of our responsibility to adjudicate impartially and with an open mind.

19) Further, in our view, as there has been no consideration of the merits of the complaint at this time, Justice of the Peace Cuthbertson is not in a conflict of interest.

THE NOTICE OF MOTION OF 6 MARCH 2017

20) In addition to the two properly filed Motions noted above, Mr. Massiah delivered a Notice of Motion, dated 6 March 2017, which states:

- a. Take notice that the (sic) His Worship Justice of the Peace Massiah intends to bring a motion before the Panel – seeking a re-opening of the findings of liability and penalty – in writing – since the Panel has dispensed with the traditional oral public hearing.

Also included was an email written on March 6, 2017 by Mr. Guiste to Mr. Massiah that indicates that they intended to email the Registrar to seek the Panel's leave to bring a motion seeking re-opening of the findings on liability and penalty. The Notice of Motion does not include a request for leave to file.

21) We have reviewed this document and decline to consider it as it is not a proper motion; but is a statement of intention. In any event, if the accompanying email to Mr. Massiah from Mr. Guiste is intended to constitute a request for leave to file the motion, we note that we do not have jurisdiction to re-open the finding of judicial misconduct or the disposition. Those were matters that were pursued in Mr. Massiah's application for judicial review and determined by the Divisional Court. Leave to appeal was denied. As indicated, our jurisdiction is limited to the reconsideration of compensation as directed by the Divisional Court. This Panel has no jurisdiction to re-open the findings of judicial misconduct or the disposition recommending Mr. Massiah's removal from office.

22) We strongly encourage Mr. Massiah to consider and apply our rulings of 6 March and of this decision in its entirety before he seeks leave to file any further motions.

DECISION

23) In summary, we provide the following rulings on the two Motions filed before us:

- a. Our jurisdiction is narrow and only as permitted by the Divisional court ruling (see our decision of 6 March 2017). As a result, we decline to further consider Motion 1;
- b. We will not allow re-litigation or new litigation of matters beyond our jurisdiction as ordered by the Divisional Court (see our decision of 6 March 2017). As a result, we decline to further consider Motion 2;
- c. To avoid an abuse of process, Mr Massiah is to file no more motions without leave from this Hearing Panel.
- d. We will not consider the Notice of Motion of 6 March 2017 indicating an intention to file a motion seeking remedies beyond our jurisdiction.

Dated: March 30, 2017

Hearing Panel: Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member