Justices of the Peace Review Council

IN THE MATTER OF A HEARING UNDER SECTION 11.1 OF THE *JUSTICES OF THE PEACE ACT*, R.S.O. 1990, c. J.4, AS AMENDED,

Concerning a Complaint about the Conduct of Justice of the Peace Errol Massiah

Before: The Honourable Justice Charles H. Vaillancourt

Her Worship Louise Rozon

Dr. Michael Phillips, Community Member

Hearing Panel of the Justices of the Peace Review Council

RULING ON APPLICATION TO ADDUCE REPLY EVIDENCE

Counsel:

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

Hunt Partners LLP

Presenting Counsel

Mr. Eugene Bhattacharya

Barrister and Solicitor

Counsel for His Worship Errol Massiah

Ruling on Application to Adduce Reply Evidence
In the Hearing Under Section 11.1 of the *Justices of the Peace Act* Concerning a Complaint About the Conduct of Justice of the Peace Errol Massiah

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The Honourable Justice Charlie H. Vaillancourt for the Hearing Panel:

[1] A Notice of Motion dated November the 2nd, 2011, Presenting Counsel requested a ruling to permit him to adduce reply evidence at this hearing. Counsel for Justice of the Peace Massiah objected to such a ruling.

[2] Mr. Hunt's concerns focus on two areas of Justice of the Peace Massiah's evidence, namely: 1) the timing when Justice of the Peace Massiah became aware of the nature of the complaints and his retention of counsel; 2) whether Justice of the Peace Massiah was ever presented with any training materials that dealt specifically with how he ought to interact with staff members.

[3] In *R v. Krause*, [1986] 2 S.C.R. 466, the Supreme Court of Canada set out the principles governing the intervention of reply evidence. The overriding principle is that the Crown or plaintiff, or in our situation, Presenting Counsel, cannot be allowed to split their case. However, Presenting Counsel may be allowed to call evidence in reply where the opposite party has raised some new matter or defence which the presenting side has had no opportunity to deal with and which they could not reasonably have anticipated. Likewise, reply evidence is not permitted regarding matters which merely confirm or reinforce earlier evidence adduced that could have been brought forward before the respondent's evidence was adduced.

[4] In *R. v. Melnichuk*, (1995) O.J. No.3915, Mr. Justice Doherty of the Ontario Court of Appeal observed, at paragraph 28 of that quote:

> "The case law recognizes, however, that a trial judge may receive reply evidence which, while of some relevance to the allegations from the outset, takes on real significance only in light of the position advanced during the case for the defence."

[5] Justice Doherty referenced an article by Mr. Marc Rosenberg, as he then was, ***"****Developments in the Law of Evidence: The 1992-93 Term*: (1994), 5 Sup. Ct. L. Reports (2d) 421 at 4297, where Mr. Rosenberg wrote:

> "As the cases illustrate, an issue which is not strictly new may take on a greater relevance as a result of the defence case. In those cases, there would seem to be an area of discretion where the rules do not compel either admission or exclusion of the evidence and where the judge must balance the probative value of the evidence against its prejudicial effect, including confusion of issues, the risk of unfair emphasis and undue expenditure of time in the particular case."

[6] Mr. Hunt's factum suggests that the discretion to be exercised in such cases will essentially be limited only by unfairness to the accused that would result from the admission of the evidence. To support this conclusion, the Panel was referred to *R. v. (A.W.)*(1991) O.J. No.651, ONCA, 8. The Panel is of the view that Mr. Hunt's conclusion is somewhat generous and the result in *R. v.(A.W.)* is rather fact specific to the issue of unfairness. In *R. v. Aalders*, [1993] 2 S.C.R. 482(S.C.C.), Justice Cory, at paragraph 34, restated the issue of rebuttal evidence thusly:

> "In my view, the critical question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is determinative of an essential issue, but rather whether it is related to an essential issue which may be determinative of the case. Reply evidence cannot go to purely collateral issues."
>
> See *R. v. Morrell* (2005) O.J. No. 4093."

[7] *Morrell* dealt with whether credibility evidence is caught by the collateral factor, and at paragraph 39 of the decision, Justice Golden highlights the differing views of the topic. Justice Golden concluded, at paragraph 42, that the evidence in question in *Morrell* is relevant to credibility:

> "In that case, credibility was a critical factor in a Carter defence and therefore, was related to an essential issue which may be determinative of the case, as Corey J. said in *Aalders."*

[8] Prior to applying the aforementioned principles to this hearing, it would be worthwhile to examine the factual framework in order to determine whether, in all of the circumstances, reply evidence should be permitted. The first area of interest, is when did Justice of the Peace Massiah become aware of the allegations against him, more particularly the specific detailed allegations and the timing of his retaining of counsel.

[9] The Panel reviewed the transcript of Justice of the Peace Massiah's evidence in chief at pages 61 through 64, and notes that on August the 26th, 2010, at 9:25 p.m., he received a telephone call from Regional Senior Justice Regis and that there was to be a meeting the following meeting. On August the 27th, 2010, Regional Senior Justice Regis reassigned Justice of the Peace Massiah as a non-presiding Justice of the Peace and advised him that a complaint was being prepared. Justice of the Peace Massiah indicated that at that time he had no idea as to the number of the complainants, nor the specifics of the allegations and that he only received those details eventually from this Council.

[10] In cross-examination, which is covered at pages 116 through 120 of the transcript, it is noted that Justice of the Peace Massiah indicated that he was not sure of when he received notification of the particulars. He confirmed that as of August though, he was not aware that the complaints involved inappropriate sexual comments and/or behaviour. Presenting Counsel put to Justice of the Peace Massiah that he was aware of the

allegations, but Justice of the Peace Massiah indicated that he was not sure of the sequence of the events, and perhaps in frustration, Presenting Counsel observed, "maybe we're at cross-purposes".

"You knew in August?"

"No."

[11] I think it is worthwhile to quote into the record a part of the questions and answers, commencing at page 119, line 8:

Question: "Well, I'm going to suggest to you that he ...."

Referring to Mr. Carey, who was counsel at the time for Justice Massiah:

> "...to suggest to you that he communicated with the Registrar's office about that fact, which you well knew throughout October and in December of last year, that the complaints were being formalized and they involved sexual impropriety and sexual remarks on your behalf?

At line 14:

> "I, I can't comment on the date, ah, sir, because I think you have the benefit of that information before you, I don't. I'm simply saying that there was considerable –- I'm a judicial officer, so I really can't comment on the fair and fairness, sir. I can only give you an opinion in there's that, from my perspective, that there was an extremely, and I used the word in my reference to, ah, to Justice John Payne, unprecedented, that I was, I was suspended without being notified of why I was being suspended."

[12] Mr. Bhattacharya's response to the motion before the Panel draws on some of the proposed reply evidence which would indicate that the information forwarded by Justice of the Peace Wiley and Regional Senior Justice Regis in August suggested that the complaint was made by a number of female staff members from the Oshawa courthouse that were alleging that His Worship's actions and comments made to them were inappropriate. The word sexual was not used. Details were absent. Evidence involving now Mr. Justice Carey's role as counsel for Mr. Massiah could trigger solicitor/client privilege issues. Counsel advises that solicitor/client privilege is not being waived.

[13] The second area of interest involves the training/education as it relates to how to interact with staff or colleagues. Again, the Panel reviewed the transcript and between pages 30, at line 18, through page 42 at line 9, in-chief, the questions and answers dealt with Justice of the Peace Massiah's training and in cross-examination, which was found at page 113 to page 115, dealt with the advisability of staff training and on page 113, line 8:

> Question: "So, so I, I don't want to mischaracterize it, but I'm hearing that it's your view that the staff really needed training on how to deal with you?
>
> Answer: A. We all need training, sir. I've included in my reply, in my response, I welcome that both in terms of diversity training, or cross-cultural communication training, as well as human rights' training.
>
> Question: "So ..."
>
> Answer: "I welcome that."
>
> Question: "You would, you would like to see the staff, the people who have testified here take cross-cultural communication training?"
>
> Answer: "Yes."
>
> Question: "And human rights training?"
>
> Answer: "The term is now diversity training, sir."
>
> Question: "Diversity training? And this is all being directed to, towards not prejudging you, is that right?"
>
> Answer: "Helping the environment, sir. That's the whole notion, improving communication. Improving and understanding and it helps everyone, including members of the judiciary who, if I may be, again, be so bold, will either clearly or somewhat confused and/or not sure, I repeat not sure of how to interact with staff. And I say this within again, equally within the backdrop, sir ... "

[14] And here is the phrase that captured Presenting Counsel's attention:

> "... we have no written material that I'm aware of or that has presented to me specifically, ah, with interaction, including interaction with staff. With, ah, with our staff members. "

[15] Mr. Bhattacharya drew the Panel's attention to the fact that the various complainant staff members in fact have not been given training regarding how to complain about the conduct of the Justice of the Peace. In Mr. Bhattacharya's response to the Application, he advises that Justice of the Peace Devlin would confirm that the focus of her training was to deal with conduct between judicial officers and the internal policy. It had nothing to do with conduct between judicial officers and staff.

[16] The Panel is of the view that the perceived credibility issues suggested by Presenting Counsel are not of such moment as to warrant the granting of leave to call reply evidence.

[17] Dealing firstly, with the issue of what Justice of the Peace Massiah knew and when, Mr. Hunt suggests -- seems to suggest that Regional Senior Justice Regis' reference about inappropriate comments and behaviour to Justice of the Peace Massiah would have and should have been understood to equate to sexual misconduct.

[18] We disagree. The words inappropriate comments and behaviour is a very open-ended phrase and does not automatically trigger a sexual conduct component. It would seem more reasonable to expect the specific details disclosed as the matter proceeded through the appropriate stages leading up to this hearing. The suggested proposed evidence to be called in reply does not strike us as being particularly divergent from the respondent's evidence. The credibility factor would be of marginal importance in the circumstances. We find that counsel, Mr. Carey, may have been discussing particulars of the allegations with the Justice of the Peace Review Committee personnel in the fall of 2010, but one cannot speculate as to what information was forwarded to Justice of the Peace Massiah. Such communications would surely trigger solicitor/client privilege concerns. Again, the credibility issue is of marginal importance, especially in light of the amount of time that would be devoted to dealing to the solicitor/client privilege issue.

[19] The Panel was likewise unimpressed with the possible credibility issue that might arise from the fact whether Justice of the Peace Massiah did or did not receive any written material as to how to interact with staff members. We are of the view that "whole training evidence question" is a classic example of an examination-in-chief dealing with a), and a cross-examination dealing with b). The transcript clearly demonstrates that in-chief Justice of the Peace Massiah confirmed that he had been given training sessions and how with respect to how he should interact with staff and colleagues that he was working with. We observed that the transcript referred to earlier in these reasons tended to be rather rambling in nature, whereas, the evidence in-chief on training

dealt with Mr. Massiah's training, cross-examination wandered into staff training and Justice of the Peace Massiah's views on that training or lack thereof. Again, Mr. Hunt jumps upon relying:

> "We have no written material that I'm aware of or that has been presented to me that deals specifically, ah, with interaction, including personal interaction with staff. With, ah, with our staff members."

[20] Mr. Hunt submits that the aforementioned passage indicates that Justice of the Peace Massiah stated that he did not get training material regarding Justice of the Peace staff interaction.

[21] The Panel and Mr. Hunt have differing viewpoints as to the interpretation of the aforementioned passage. One must remember that up to the commencement of "the phrase", Justice of the Peace Massiah was on full throttle regarding staff training. There seems a strong presumption that his reference is to staff material. At the very least, there is ambiguity as to what Justice of the Peace Massiah meant. Mr. Hunt could have pursued this interesting phrase and had it clarified during his cross-examination, and he did not.

[22] Even if we were to find that Justice of the Peace Massiah was saying that he did not receive written material on this point and the instructing Justice of the Peace was to state that he did, would this significantly impact the issue of credibility? The Panel concludes that the probative value of the evidence that Presenting Counsel wishes to advance is minimal at best and would amount to an undue expenditure of time in the case at bar.

[23] In arriving at our decision, the Panel wishes to address two aspects of the respondent's response to this motion. Mr. Bhattacharya noted at paragraph 14 that, "in the event that this reply evidence is permitted, it is the position of defence counsel that it will create inordinate complicating issues in this case." The Panel is of the view that the creation of "inordinate complicating issues" should not be viewed as a basis to bar reply evidence.

[24] Lastly, Mr. Bhattacharya submitted that credibility was not even in issue with respect to at least one of the allegations; meaning "the bum slap". Even if Justice of the Peace Massiah's credibility does not impact this one issue, surely the overriding importance of credibility regarding the many other aspects of the hearing would remain in play. The Panel fails to see how the non-issue of credibility regarding one incident would somehow negate the overall considerations surrounding credibility. The Panel notes that even in the "bum slap incident", Justice of the Peace Massiah's credibility

does come into play in a somewhat limited extent when he was describing his manner of walking, but on balance, the Application is dismissed and we will proceed from there.

DATED at the City of Toronto in the Province of Ontario this 10st day of November, 2011.

HEARING PANEL:

The Honourable Justice Charles H. Vaillancourt
Her Worship Louise Rozon
Dr. Michael Phillips, Community Member