Justices of the Peace Review Council

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

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

Before: The Honourable Justice Charles H. Vaillancourt

Her Worship Louise Rozon

Dr. Michael Phillips, Community Member

Hearing Panel of the Justices of the Peace Review Council

REASONS FOR DISPOSITION

Counsel:

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Presenting Counsel

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Reasons for Disposition
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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BAN ON PUBLICATION OF COMPLAINANTS' AND WITNESSES' IDENTITIES

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

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

Position of Counsel as to the Appropriate Disposition in These Matters

[1] Mr. Hunt observed that the role and duty of Presenting Counsel, as set out under section 4 of the Justice of the Peace Review Council's Procedural Code for Hearing, established pursuant to subsection 10 of the *Justices of the Peace Act*, R.S.O. 1990, c.J.4, as amended, is not "to seek a particular order against the Respondent, but to see that the complaint against the justice of the peace is evaluated fairly and dispassionately to the end of achieving a just result."

[2] This role continues into the disposition phase of the hearing and is similar to the role of Independent Counsel in respect of complaint proceedings involving Superior Court of Justice judges. In the *Report of the Canadian Judicial Council to the Minister of Justice in respect to the Honourable Paul Cosgrove* (March 30, 2009) at paragraph 54, the Panel noted that: "The mandate of Independent Counsel, it must be remembered, is not that of a lawyer retained to achieve a certain result".

[3] In his oral submissions, Presenting Counsel, Mr. Hunt, directed the Panel's attention to certain aspects of the hearing that would support a disposition at the upper range of the disposition options.

[4] Mr. Bhattacharya, on behalf of Justice of the Peace Massiah, advocated in his written submissions that the Panel consider a disposition that included a reprimand, apologies to the complainants, and appropriate education and counselling programmes. During his oral presentation, Mr. Bhattacharya conceded that the option of suspension might also be an appropriate disposition.

Possible Sanctions for Judicial Misconduct

[5] Section 11.1(10) of the *Act* provides that:

> 11.1 (10) After completing the hearing, the panel […], if it upholds the complaint, it may,
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> (a) warn the justice of the peace;
> (b) reprimand the justice of the peace;
> (c) order the justice of the peace to apologize to the complainant or to any other person;
> (d) order that the justice of the peace take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a justice of the peace;
> (e) suspend the justice of the peace with pay, for any period;
> (f) suspend the justice of the peace without pay, but with benefits, for a period up to 30 days; or
> (g) recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2.

[6] Section 11.1(11) of the *Act* provides that the "panel may adopt any combination of the dispositions set out in [Section 11.1] clauses 10(a) to (f)".

Principles to Consider When Ascertaining Appropriate Disposition

[7] *Re: Baldwin* (2002) O. J.C. at page 6 captures the essence thusly:

> The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in s. 51.6(11) [which is parallel to the legislative framework that this Panel has] should be invoked, when necessary, in order to restore a loss of public confidence arising from the judicial conduct in issue.
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> Paraphrasing the test set out by the Supreme Court in Therrien and Berube, the question under s. 51.6(11) is whether the impugned conduct is so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office or in the administration of justice generally and that it is necessary for the Judicial Council to make one of the dispositions referred to in the section in order to restore that confidence.
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> It is only when the conduct complained of crosses this threshold that the range of dispositions in s. 51.6(11) is to be considered. Once it is determined that a disposition under s. 51.6(11) is required, the Council should first consider the least serious - a warning- and move sequentially to the most serious – a recommendation for removal – and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally.

[8] In respect of the most serious disposition, removal, in the *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of the Honourable Paul Cosgrove* (March 30, 2009) at paragraph 19 the Canadian Judicial Council adopted the following standard:

> [19] Accordingly, it remains for Council to proceed to the second stage to determine if public confidence in the judge's ability to discharge the duties of his office has been undermined to such an extent that a recommendation for removal is warranted. In this regard, we adopt the standard identified by the Council in the *Marshall* matter and widely applied in other cases since then:
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> > Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judiciary role, that the public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[9] The Panel has noted at paragraph 186 of our Reasons the Supreme Court of Canada decision of *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (S.C.C) at paragraph 68 where the court stated that:

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

[10] In *Re Therrien*, [2001] 2 S.C.R. 3, 2001 SCC 35 at paragraph 108 Justice Gonthier commented on the role of the judge and the manner in which the public perceives that role as follows:

> [108] The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, supra, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, supra, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

> [109] If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of the entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Melanges Jean Beetz* (1995), at pp. 70-71).
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> [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:
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> > 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)
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> [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 ….

[11] When applying the aforementioned principles, one must be ever mindful that judicial officers are not perfect. Justice Mocha reminds us of that principle in her reasons in the

Report of a Judicial Inquiry Re: His Worship G. Leonard Obokata, A Justice of the Peace (2003), when she stated at page 6:

> It must be remembered that judicial officers are human beings with all the frailties that entails. Mistakes will be made. The question is the gravity of the misconduct and whether it is a correctible error. The magnitude of the misconduct and its effect must be weighed in light of the circumstances in which it is committed.

Factors to Consider When Assessing Appropriate Disposition

[12] It is not the intention of the Panel to repeat the findings of fact as determined in the Reasons delivered on March 1st, 2012. However, we would like to address some issues that have been addressed by counsel in their submissions.

[13] Presenting Counsel noted that Justice of the Peace Massiah did not make any admission of fact or misconduct with respect to any of the conduct alleged in the Particulars and required a full hearing in respect of each of the complainants thereby requiring the complainants to testify.

[14] The Panel recognizes that in criminal and quasi-criminal proceedings "falling on one's sword" and admitting one's liability is considered a mitigating factor when it comes to the issue of disposition.

[15] However, in the matter before us, we are of the view that it would have been most difficult to make any preliminary concessions. Credibility and reliability certainly were live issues in this hearing and it was imperative that these matters were the subject matter of examination and cross-examination.

[16] Since His Worship, Justice of the Peace Massiah, alleged possible collusion among the court staff arising from his reputation at the courthouse, it was important to assess whether or not there was the possibility of any collusion between the complainants. The hearing of evidence allowed us to conclude that in fact there was no collusion. Nor was there any improper motive on the part of the complainants.

[17] A number of the complainants had more than one allegation. It was paramount that each witness gave her evidence in a contextual package for ease of understanding.

[18] It must be remembered that at the end of the day, six of thirteen allegations were found not to be proven on the balance of probabilities. In particular, the ones alleging physical contact were found not to be proven.

[19] The Panel also recognizes that during the narrative of Justice of the Peace Massiah he did acknowledge a number of points raised by the complainants.

[20] The Panel appreciated the fact that Mr. Bhattacharya approached his cross-examination in a very professional and civilized manner thereby reducing the tension of the complainants.

[21] In assessing an appropriate disposition, the Panel must be mindful of the fact that there was more than a single incident of judicial misconduct and more than one complainant was involved and that the events occurred over a period of time.

[22] The Panel has concluded that the comments made by Justice of the Peace Massiah to the various staff members amounted to judicial misconduct. However, the conduct did not include inappropriate touching. There was never any hint that Justice of the Peace Massiah's conduct was intended by him to be taken as an invitation or suggestion for any personal interaction between the parties. Although the Panel accepts that Justice of the Peace Massiah's comments were intended by him to encourage team building and offered in a jocular fashion, it absolutely rejects that this concept has any air of reality. Comments regarding physical attributes by a person in authority to employees under their watch are unacceptable - period.

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

[24] However, Justice of the Peace Massiah did not appreciate that his conduct was inappropriate and unacceptable. A question for this Panel is whether he does in fact fully understand now.

[25] Any misunderstanding that he may have had about his position of authority vis-à-vis the court staff surely has been brought home to him through this public hearing.

[26] The Panel recognizes that the public nature of this hearing in and of itself will act as a reminder that a repetition of the conduct of this nature toward court staff will not be tolerated.

[27] The Panel acknowledges that the individuals called on behalf of Justice of the Peace Massiah demonstrated that he is held in high regard in the community at large.

[28] We are confident that His Worship Massiah will not engage in this type of conduct in the future.

[29] Subsequent to the release of the Panel's Reasons, Justice of the Peace Massiah has prepared draft letters of apology to each of the complainants herein. In those letters, there is an unequivocal apology to the aggrieved parties. The Panel appreciates the fact that

Justice of the Peace Massiah included letters to all of the complainants including the one complainant whose allegations we found unproven on the balance of probabilities.

[30] Justice of the Peace Massiah also attended a one-to-one remedial human rights and sensitivity training session with David A. Griffin, an independent consultant, workplace investigator and corporate trainer. A review of the report provided by Mr. Griffin was very useful. Justice of the Peace Massiah seems motivated and prepared to follow up on this counselling.

[31] The Panel does not agree with Presenting Counsel's submission that the efforts by Justice of the Peace Massiah since the release of our Reasons are too little, too late.

[32] We are of the view that Justice of the Peace Massiah's efforts are an important first step in addressing his "profound and fundamental problem" regarding the power imbalance that exits in a courthouse setting and the appropriate boundaries that must be recognized and respected regarding female staff in the work place.

[33] The Panel finds that Justice of the Peace Massiah has demonstrated his willingness to address the aforementioned concerns and is capable of rehabilitation.

[34] We accept Justice of the Peace Massiah's efforts as the beginning of an ongoing process and not the ending.

[35] Justice of the Peace Massiah has also sought out counselling from his Pastor and an e-mail from this Pastor to Mr. Bhattacharya outlines a course of counselling that should assist Justice of the Peace as he moves forward.

[36] It is noted that Justice of the Peace Massiah does not have any previous findings of judicial misconduct.

Dispositions in Other Misconduct Cases

[37] The Panel appreciated Presenting Counsel's efforts in compiling cases in which dispositions were made regarding judicial misconduct. These decisions assisted the Panel when it attempted to fashion a disposition that included the restoration of public confidence in the administration of justice and the guidance for the rehabilitation of the justice of the peace.

[38] In the hearing *In the Matter of the Complaint Concerning the Conduct of Justice of the Peace Paul Kowarsky*, (2011) J.P.R.C. there was a disposition of a reprimand for one occurrence of a sexually inappropriate comment.

[39] In the *Report of a Judicial Inquiry Re: His Worship G. Leonard Obokata, A Justice of the Peace* (2003) there was a disposition of suspension without pay for a period of thirty days. Justice of the Peace Obokata, while under the influence of alcohol, sexually assaulted a colleague by grabbing her breast twice on one occasion following a dinner that they had attended during a conference.

[40] In the *Report of a Judicial Inquiry Re: His Worship Leonard Blackburn, A Justice of the Peace* (1994) there was a recommendation of removal from office regarding several inappropriate comments of a sexual nature to two young women of sixteen and twenty-one years of age respectively.

[41] In the case *In the Matter of Warren M. Doolittle, a Judge of the District Court* Nassau (1985), State of New York Commission on Judicial Misconduct, a disposition of admonition was made with respect of the judge making comments to female attorneys in respect of their appearance and physical attributes.

[42] In the *Report of a Judicial Inquiry Re: His Worship Rick C. Romain, A Justice of the Peace* (2003), a recommendation for removal was made after findings of judicial misconduct on the part of the justice of the peace for (1) refusing to permit an articling student to exit his court; (2) banning an agent he deemed to be incompetent from appearing in his court; and (3) refusing to permit an accused to defend a traffic violation on the basis that he would not remove a religious head covering.

[43] In the *Report of a Judicial Inquiry Re: His Worship Benjamin Sinai, A Justice of the Peace* (2008), a recommendation for removal was made where the justice of the peace (a) refused to assist an unrepresented accused who was charged with a traffic violation but, instead, (i) advised the accused to plead guilty, (ii) chastised the accused for not knowing his rights, (iii) refused to permit the accused to comment on the facts as alleged, and (iv) failed to provide the accused with sufficient information to appropriately deal with the matter of disposition; and, (b) in circumstances where the justice of the peace took a leave of absence following the commencement of a review of the aforementioned conduct, made requests to the Regional Senior Justice of the Peace that if she could make the complaint "go away" he would return to work as his "stress level" would be reduced such that he would be able to render judgment in two outstanding matters.

The Issue of Assignment of Justices of the Peace

[44] The Hearing Panel is aware that *In the Matter of a Hearing Concerning a Complaint about the Conduct of Justice of the Peace Paul Kowarsky* (2011) the justice of the peace took the step of voluntarily having his assignment adjusted to accommodate the complainant. This was recognized by the Hearing Panel that presided over that case to be a step that assisted in restoring public confidence.

[45] However, it is to be noted that the Justices of the Peace Review Council has no jurisdiction over assignment of justices of the peace.

Disposition

[46] For the reasons contained herein, the Panel finds that the appropriate disposition in this matter to restore public confidence in this justice of the peace and in the administration of justice generally is:

(1) A reprimand of Justice of the Peace Massiah.

(2) Justice of the Peace Massiah is to forward to the Registrar the letters of apology to the complainants signed by him so that the Registrar may forward them to the complainants.

(3) We believe that the public's confidence in Justice of the Peace Massiah would be strengthened if he were to have additional counselling or judicial training that reinforces his understanding of gender sensitivity and professional boundaries. In accordance with 11.1(10)(d) of the *Justices of the Peace Act*, the Panel orders that Justice of Peace Massiah undergo specific judicial education or counselling in gender sensitivity and professional boundaries, as a condition of continuing to sit as a justice of the peace, such education or counselling as deemed appropriate by the Chief Justice or her designate.

(4) Lastly, Justice of the Peace Massiah shall be suspended without pay, but with benefits, for a period of ten (10) days.

Dated this 12th day of April, 2012.

HEARING PANEL:

The Honourable Justice Charles H. Vaillancourt

Her Worship Louise Rozon

Dr. Michael Phillips, Community Member