

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 Paul Welsh

Before: The Honourable Justice Lisa Cameron (Chair)
Justice of the Peace Monique Seguin
Dr. Michael Phillips, Community Member

Hearing Panel of the Justices of the Peace Review Council

REASONS FOR DECISION

Ms. Marie Henein
Ms. Christine Mainville
Henein Hutchison LLP
Presenting Counsel

Mr. Eugene Bhattacharya
Ms. Mary C. Waters Rodriguez
Counsel for His Worship

INTRODUCTION:

[1] Following the investigation of a complaint received on April 5, 2016, a complaints committee of the Justices of the Peace Review Council (JPRC), ordered that the complaint, referenced below, regarding the conduct or actions of Justice of the Peace Paul Welsh, be referred to a Hearing Panel of the Review Council, for a formal hearing under section 11.1 of the *Justice of the Peace Act*, R.S.O. 1990, c. J.4, as amended (“the Act”). The Notice of Hearing was filed as Exhibit 1.

[2] The hearing commenced on December 4, 2017. An Agreed Statement of Facts was entered as Exhibit 2 at the hearing. The audio recording (Exhibit 3) of the incident giving rise to the complaint was played for the Panel. Justice of the Peace Welsh testified at the hearing and was cross-examined. No other witnesses were called by either counsel.

[3] Presenting Counsel, Ms. Henein, and Mr. Bhattacharya, Counsel for His Worship, made submissions on whether the conduct of Justice of the Peace Welsh, as admitted in the Agreed Statement of Facts, constituted judicial misconduct. The Panel reserved its decision until December 5, 2017. On that date, the Panel gave a brief oral decision, finding that the actions of His Worship constituted judicial misconduct; written reasons to follow. The reasons for our decision are included below, along with our decision on the dispositions that we have determined to be necessary to restore public confidence in His Worship, the judiciary, and the administration of justice. Also included is our decision on His Worship’s request for compensation for the legal costs he incurred as a result of this judicial disciplinary hearing.

[4] In large part, Justice of the Peace Welsh does not dispute his actions or conduct which led to the complaint. He acknowledges that his actions negatively impacted the confidence of members of the public in him as a justice of the peace, in the judiciary in general and in the administration of justice. He did not admit, however, that his actions rose to the level of judicial misconduct.

ANALYSIS OF THE FACTS:

[5] On Wednesday, October 16, 2013, Justice of the Peace Welsh was presiding in Courtroom #100 at 45 Main Street East, in Hamilton, Ontario. Multiple prosecutors, defence counsel, and self-represented accused persons, in addition to two court clerks and a court reporter, were present in the courtroom.

[6] This courtroom is known to be very busy – it's referred to as the "drug remand/assignment court" which commences at 9:00 a.m. and sits until all matters are completed.

[7] The matter that is the subject of the complaint is the proceeding related to Mr. Ian Silverthorne. On October 16, 2013, Mr. Silverthorne appeared in person with his lawyer, Mr. Carl Robertson. Mr. Robertson is an experienced criminal lawyer who appears frequently in Hamilton courts. At Mr. Robertson's request, the matter was adjourned to November 30, 2013 in order "to be spoken to". Mr. Silverthorne and his counsel then left the courtroom.

[8] Video remands began at 2:00 p.m. for in-custody accused persons.

[9] As captured by the audio recording of court proceedings, while the cases of accused persons appearing by way of video were being addressed in open court, the Clerk Registrar informed Justice of the Peace Paul Welsh that one of the remands from the morning list had gone over to November 30th. November 30th, 2013 was a Saturday, a non-judicial day.

[10] The audio recording clearly confirms the following dialogue between His Worship and the Clerk Registrar after His Worship was made aware that the Silverthorne matter was (mistakenly) adjourned to Saturday, November 30th:

Clerk Registrar: Apparently [indiscernible] from the morning list to November 30th, it's a Saturday.

The Court: Well, we can change that.

Clerk Registrar: [indiscernible]

The Court: Thanks.

[11] The audio shows that there is a second exchange:

The Court: Well, clearly that was supposed to be the 30th of October, so we'll just change them.

Clerk Registrar: [indiscernible] I don't know what the accused thought.

[Indiscernible]

The Court: Too bad.

[12] Later the audio shows a third exchange between them about the matter:

The Court: Those infos, regarding the 30th, whoever told you about that...

Clerk Registrar: I changed it.

The Court: You're the best. Good, good, good.

[13] At the request of Justice of the Peace Welsh, Presenting Counsel arranged for a professionally enhanced version of the audio recording of this segment of the proceeding (also Exhibit 3). The particular sounds surrounding the comment "Too bad" on this enhanced audio version were still indiscernible. The short exchange appeared to occur only between the Clerk Registrar and Justice of the Peace Welsh in the midst of addressing matters by way of video and there was a lot of background noise. Although the audio captured Justice of the Peace Welsh saying the words, "Too bad", His Worship's evidence was that something else must have been going on that is indiscernible or inaudible on the audio recording, which prompted him to say "too bad". He testified that he would not have made that remark in relation to Mr. Silverthorne's interest in the matter. The context for those words was not clear on the evidence.

[14] The Clerk Registrar then endorsed the Information for a remand date of October 30th, as directed by Justice of the Peace Welsh who continued to deal with the in-custody remand list.

[15] Justice of the Peace Welsh testified that he has a memory of the day when Mr. Silverthorne's matter was adjourned, although he does not remember the day vividly.

[16] According to his testimony at this hearing, Justice of the Peace Welsh presumed that Mr. Robertson had meant to say October 30th as opposed to November 30th, which was a Saturday; thus His Worship had the remand changed to October 30th.

[17] Evidence was presented to the Panel in the Agreed Statement of Facts that it is common practice for His Worship “to take steps to personally contact counsel outside of the courtroom regarding court appearances in an effort to ensure that accused persons and their lawyers are afforded an opportunity to appear in court before issuing a warrant for failing to attend.” His Worship agrees that he “has also been known to stop counsel in the hallway, to pass a message to counsel through the Clerk, to page counsel into court, and to contact counsel by email, text message or telephone to advise them that a client had been dealt with in their absence and to update counsel on the scheduled return date.” When asked by Mr. Bhattacharya whether this is something he continues to do, His Worship responded, “It is.”

[18] His Worship confirms that none of these steps were taken in the matter of Mr. Silverthorne, perhaps due to the impact of personal issues His Worship was experiencing at the time.

[19] When asked by Mr. Bhattacharya whether following-up with Mr. Robertson would have been something he would have done, His Worship said, “yes”. He testified that “my thought process was, we can fix this, I’ll get the information to the appropriate people.”

[20] When asked why he did not follow up, His Worship said that it was a busy day and there were other things going on in his personal life that were at the forefront of his mind at that time. He was an only child and his mother was in the hospital. He was visiting her at lunchtime. There were other personal issues involving him and his spouse that have since been resolved. He testified “I dropped the ball here, there’s no question about it. But I would not, nor did I have any intention to step on Mr. Silverthorne’s rights.”

[21] In cross-examination His Worship indicated that in his courtroom, matters are remanded to an incorrect day “on a regular basis”.

[22] His Worship acknowledged that he “absolutely” understood the consequences of unilaterally changing a future court date for Mr. Silverthorne, and the subsequent consequences to Mr. Silverthorne of not appearing. He agreed with Presenting Counsel in cross-examination that as a very experienced justice of the peace (appointed in 2001), he was very alive to the significant consequences that people face when arrested.

[23] In cross-examination, His Worship agreed with Presenting Counsel that when he was invited by the complaints committee to respond to the complaint, he indicated that his explanation was that October 16, 2013 was a busy day. He also said in that response that Mr. Robertson was in error in requesting that the matter be adjourned to November 30th. His Worship agreed with Presenting Counsel that he had experience with very many busy days in that court and that he had three occasions on October 16th to address the Silverthorne matter.

[24] His Worship’s evidence on his current practice was inconsistent. He testified that if such a situation arises, he is now paging for the lawyer, asking Duty Counsel to contact the lawyer, or having special constables radio to their colleagues in other courtrooms to see whether that counsel is in another courtroom. However, when asked by Mr. Bhattacharya whether he still discusses with defence counsel in Hamilton issues with clients, with setting dates, His Worship said that he does; he still maintains that type of relationship.

[25] As a result of Justice of the Peace Welsh's actions in unilaterally changing the future court date for Mr. Silverthorne, on October 30th that Information was before another justice of the peace who was informed that Mr. Silverthorne had been present on the last court date (October 16th) and was remanded to October 30, 2013 but failed to appear. Neither the Crown Attorney nor the justice of the peace who were in the courtroom on October 30th were aware of the actions of Justice of the Peace Welsh on October 16, 2013. A bench warrant was issued for Mr. Silverthorne's arrest when neither he nor his counsel appeared.

[26] On November 5, 2013, police attended at a motel to execute the warrant and arrest Mr. Silverthorne. In the course of the execution of the warrant, the police made certain observations of him and charged Mr. Silverthorne with a drug-related offence.

[27] At the bail hearing on November 29, 2013, Mr. Robertson, who appeared as counsel for Mr. Silverthorne, informed the presiding judicial officer that Mr. Silverthorne was a marginalized and indigent person who had difficulty producing a surety in order to obtain his release.¹ At this point Mr. Silverthorne had been in custody for 24 days. The transcript shows Mr. Robertson's views about the actions of His Worship in relation to Mr. Silverthorne and the impacts on his liberty²:

Mr. Robertson: And, I can tell you this I've done my due diligence with respect to speaking to the, the appropriate clerks and I understand my friend's content with this explanation because it's been verified by the Crown's office as well. Best of my, my understanding and based on the information I have is that what had happened was that at the end of the juridical day, or the time in court,

¹ Transcript of Proceedings November 29th, 2013, Presenting Counsel's Joint Document Book, Exhibit 2.

² *R. v Silverthorne* (Bail Proceedings on November 29, 2013, page 11)

outside of court, not on the record, the presiding Justice of the Peace on his own accord decided to direct the clerk to change the date realizing that November 30th was a Saturday therefore there was a mistake and creatively directed the clerk to change the date to October 30th. Regrettably the next step wasn't done; counsel was not notified; the accused wasn't notified. And, obviously, nobody showed up on October 30th. So, you have a – now, a transcript of October 30th and, Your Worship, if [sic] fact was the presiding Justice on October 30th and I'm sure that's disturbing to you that you would issue a warrant for a person not realizing that person was in fact not actually adjourned to that date. So, I'm not here to allege – I'm not here to cast judgement on what was done, but I draw it to your attention because ultimately, Your Worship, when a case goes to trial, good faith on the part of the police is not the only variable under Section 24(2) of the *Charter*. The administration of justice being brought into disrepute is also, is the test. And, in my respectful submission, there is a strong argument that when a warrant is issued based on this type of procedure which is not in accordance with proper jurisprudence and a decision is made unilaterally to change a date on an information without alerting defence, crown, or the accused, it can't be tolerated.

[28] The failure to appear charge was eventually withdrawn. Mr. Silverthorne entered a guilty plea to a different offence with consideration given for his time spent in custody as a result of Justice of the Peace Welsh's actions.

[29] Although Justice of the Peace Welsh testified that he did not intend to cause any grief to Mr. Silverthorne, he admits in the Agreed Statement of Facts that his actions negatively impacted the confidence of members of the public in him as a justice of the peace, in the judiciary in general and in the administration of justice. He testified that "My actions on that day, clearly created this set of circumstances for which I am very, very sorry about with respect to Mr. Silverthorne."

[30] His Worship indicates that he will not repeat such conduct in the future, mindful of the potential harm that such conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

THE ROLE OF THE HEARING PANEL

[31] The Hearing Panel is to determine whether the action or conduct of Justice of the Peace Welsh in the Silverthorne matter on October 16, 2013 rises to the level of judicial misconduct: was the conduct 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 justice of the peace to perform his duties, or in the administration of justice more generally, such that one or more of the range of dispositions set out in section 11.1(10) of the *Act* is required to restore public confidence in the judiciary in general. Those dispositions are:

- (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 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 of up to thirty days; or
- (g) recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2.

EXPECTATIONS OF A JUDICIAL OFFICER

[32] The Hearing Panel in *Re Massiah, Reasons for Decision* (JPRC, January 12, 2015) expresses the expectations for the conduct of a judicial officer, referring to the remarks of the Supreme Court of Canada in *Re Therrien*³ set out in that decision under the heading “The Role of the Judge: A Place Apart”:

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. 110-111:

The Role of the Judge: “A Place Apart”

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,

³ *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3

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.

....

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/

[33] In the *Report of a Judicial Inquiry Re: His Worship Benjamin Sinai, A Justice of the Peace*, 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.”

[34] As set out above, by the mere nature of what they do (bail hearings, *Provincial Offences Act* trials, first appearance courts, bench warrants etc.), justices of the peace are the most common point of contact for members of the public. In fact, for the vast majority of society who have contact with the court system, justices of the peace are their first contact and often their only contact. Thus, the actions of a justice of the peace are vital in the perception held by the public of the administration of justice.

PRINCIPLES OF JUDICIAL OFFICE

[35] The Justices of the Peace Review Council approved 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.

[36] The Principles also include the following:

- 1.1 Justices of the peace must be impartial and objective in the discharge of their judicial duties.
- 1.2 Justices of the peace have a duty to follow the law.
- 2.2 Justices of the peace should conduct court business with due diligence and dispose of all matters before them promptly and efficiently having regard, at all times, to the interest of justice and the rights of the parties before the court.

[37] As the Canadian Judicial Council explained in its Report to the Minister of Justice in relation to the conduct of the Honourable Justice P. Theodore Matlow of the Superior Court of Justice⁴, in Canada ethical principles established for the judiciary set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judicial officer. The fact that the alleged conduct is inconsistent with or in breach of established ethical principles is a factor in assessing whether the conduct complained of constituted sanctionable conduct.

THE LAW

The Standard of Proof

[38] The Panel must be satisfied that there is clear and convincing proof which establishes judicial misconduct on a balance of probabilities.

⁴ *Report of the Canadian Judicial Council to the Minister of Justice in the Matter of the Honourable Justice Theodore Matlow*, December 3, 2008

Judicial Misconduct

[39] The terms “judicial misconduct” and “upholding a complaint” are not defined in the *Act*; however, all parties agreed that the decisions of the Canadian Judicial Council, the Ontario Judicial Council and the Review Council that determine whether a judge has engaged in judicial misconduct are apposite to the test we have to apply in determining whether to “uphold” a complaint (pursuant to s. 11.1(10) of the *Act*) and, if so, whether to apply one or more of the dispositions set out in that subsection which mirrors the same dispositions available to the Ontario Judicial Council under subsection 51.6(11) of the *Courts of Justice Act*, R.S.O. 1990 c.43.

[40] In *Re Baldwin*, the Panel considered the issue as follows:

In *Moreau-Bérubé v. New Brunswick* (Judicial Council), the Supreme Court discussed the tension between judicial accountability and judicial independence. Judges must be accountable for their judicial and extra-judicial conduct so that the public has [sic] confidence in their capacity to perform the duties of office impartially, independently and with integrity. When public confidence is undermined by a judge’s conduct there must be a process for remedying the harm that has been occasioned by that conduct...

Paraphrasing the test set out by the Supreme Court in *Therrien* and *Moreau-Bérubé*, 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.

Re: Baldwin (OJC, 2002) at p. 6

[41] In *Re Douglas* (OJC, 2006), a judicial disciplinary hearing before a Hearing Panel of the Ontario Judicial Council, the Panel wrote at paragraphs 8-9:

[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.

[9] Accordingly, a judge must be, and appear to be, impartial and independent. He or she must have, and appear to have, personal integrity. If a judge conducts himself, or herself, in a manner that displays a lack of any of these attributes, he or she may be found to have engaged in judicial misconduct.

[42] Hearing Panels established by the Ontario Judicial Council have adopted the principles set out in *Re Therrien* in assessing whether judges of the Ontario Court of Justice have engaged in judicial misconduct. The 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); *Reasons for Decision re Massiah* (JPRC, 2015).

[43] Public confidence in the justice system is a touchstone principle in the context of considering the issue of judicial misconduct. The important role of public confidence has been addressed by the Supreme Court of Canada in *Re Therrien*, [2001] 2 SCR 3 (SCC) at paragraphs 108-112; and, by the Quebec Court of Appeal in *Ruffo (Re)* [2005] Q.J. No. 17953.

FINDINGS OF FACT AND CONCLUSIONS

[44] After listening carefully to the enhanced audio of the proceeding on October 16, 2013 before His Worship, the Panel found it was not clear in which context the words “too bad” were spoken by His Worship. There was some indiscernible background noise and the Panel was not satisfied on a balance of probabilities that His Worship made the remark in response to the Clerk Registrar’s comment that she didn’t know what the accused thought.

[45] For the most part, Justice of the Peace Welsh does not dispute the facts. He agrees that he changed the return date that had been set in court for Mr. Silverthorne, and did so when the matter was no longer before the Court. Further, His Worship agrees that he did so without notice to the accused person and/or counsel. His Worship admits that no further action was taken to notify counsel for Mr. Silverthorne or Mr. Silverthorne himself of the new remand date. As a result of the conduct of His Worship, on October 30th, 2013 when the Silverthorne matter was addressed by the presiding justice of the peace and no one attended to speak to it, a bench warrant was issued for the arrest of Mr. Silverthorne.

[46] There is no evidence to show that Justice of the Peace Welsh intended to cause harm to Mr. Silverthorne when he unilaterally changed the remand date, that he did so out of malice, or for some personal gain. The Panel accepts that His Worship may have forgotten an intention to advise counsel of the change of date, and that it was a very busy and demanding court. It is human nature to sometimes get tired, overwhelmed or distracted in such circumstances.

[47] It is disturbing, however, that Justice of the Peace Welsh, an experienced and competent judicial officer, had a “common practice” with respect to remands that inherently put the liberty of accused persons at risk. Making changes to Informations no longer before the Court, i.e. without the jurisdiction to do so, compounded by doing so without advance notice to the accused person or counsel, is improper procedure, and not made better by the “common practice” of after-the-fact out-of-court communications with counsel to advise them of such changes.

[48] The Panel notes that the justice system is founded on the “open courts” principle which requires transparency and accountability in the administration of justice to foster public confidence in it. Communications about court dates are expected to take place in the courtroom, where the public and the parties know what is taking place between a judicial officer and a litigant/accused person and where that person has the protections that should be afforded to him or her. In this instance, His Worship’s improper practice and failure to follow proper procedure resulted in a significant deprivation of liberty for Mr. Silverthorne: 24 days.

[49] It is the position of His Worship that he made a regrettable but understandable human error as a result of the demands of the day and the impact upon him of his personal circumstances at the time. Further, his submission is that it is mitigating that his usual practice of following-up with counsel in circumstances such as these would have averted the error with respect to the bench warrant issued and the resulting harm to Mr. Silverthorne.

[50] Presenting Counsel takes a different position. It is helpful to note that the role of Presenting Counsel at this hearing is analogous to that of *amicus curiae*. In accordance with the Procedures of the Review Council, her role is to operate independently of the Panel and assist the Panel by presenting the case against His Worship so that the complaint is evaluated fairly and dispassionately to the end of achieving a just result. Presenting Counsel's duty is not to seek a particular disposition.

[51] It is the position of Presenting Counsel that His Worship's conduct reflected a cavalier disregard for Mr. Silverthorne; despite being a routine remand matter, the improper procedure adopted by His Worship created a legal obligation upon Mr. Silverthorne without notice to him. When he failed to meet that obligation, he was subject to a process which resulted in his incarceration. Further, His Worship had to have known that the manner in which he dealt with this matter could have very serious consequences. His Worship did testify that as an experienced justice of the peace, he was "absolutely" aware of the consequences of a court date being scheduled, the accused not showing up in court on that date, and a bench warrant being issued for their arrest. He understood that, once arrested on the strength of the bench warrant, an accused could be detained and held for a bail hearing. He acknowledged that as a result of his actions, there were significant consequences to a member of the public.

[52] The Panel notes that the role of a justice of the peace regularly involves heavy demands and large dockets. It is the view of this Panel that regardless of how busy a court is, there is an obligation on every justice of the peace to follow the law and to comply with the steps and processes that govern criminal justice and provide protection for the accused. A justice of the peace is expected to uphold the rights of accused persons and

respect their liberty even when working in a fast-paced environment dealing with a high volume of cases.

[53] As stated in our brief oral decision, we find on a balance of probabilities that His Worship Welsh's behaviour constitutes judicial misconduct, in light of the *Principles of Judicial Office of Justices of the Peace of the Ontario Court of Justice* and in light of the test set out by the Supreme Court of Canada in *Re Therrien and Moreau-Bérubé*. We found that His Worship's conduct was seriously contrary to the impartiality and integrity of the judiciary and it has undermined the public's confidence in the judiciary and in the administration of justice. We find that Justice of the Peace Welsh acted in a careless and negligent manner.

[54] In the case at hand, the matter ought not to have been readdressed in the absence of the accused and/or counsel once it had been dealt with and completed, albeit with a Saturday return date scheduled in error. Perhaps the matter could have been readdressed to correct the error in setting the date, but only with notice to the accused person and/or counsel and the attendance by either of them or a properly instructed agent. Otherwise, as happened here, a legal obligation to attend court was created without notice to the accused person.

[55] Even in the circumstances as they transpired here, there were various options open to Justice of the Peace Welsh to try to safeguard the interests of the accused person such as: requesting that Duty Counsel or the Crown Attorney contact Mr. Robertson or Mr. Silverthorne, or, having either Mr. Robertson or Mr. Silverthorne paged to the courtroom; yet Justice of the Peace Welsh did none of these nor did he follow up on his

own (presumed) intention to contact counsel himself. Any one of these actions might have averted the arrest of Mr. Silverthorne. The very serious consequences occasioned by Justice of the Peace Welsh's directions to the Clerk Registrar to change the date of the next court appearance, and his negligence, seriously compromised the integrity of the judiciary and has undermined the public's confidence in the administration of justice. The fact that Justice of the Peace Welsh did not intend ill-will, that he is remorseful and that he admits to his error does not change that fact.

[56] We find that Justice of the Peace Welsh acted without jurisdiction by dealing with a matter no longer before the Court. His negligent and careless actions created a legal obligation upon the accused person, without notice to that person or his counsel, which subsequently resulted in his incarceration. His Worship's actions also impacted on counsel and court administration, and resulted in the additional expense of public funds and delay to the court proceedings. Policing, custodial and court resources were impacted. This complaints process resulted.

DISPOSITION

[57] Because we have found that Justice of the Peace Welsh's actions constitute judicial misconduct, it is therefore necessary to consider which of the dispositions available in section 11.1(10) of the *Act*, is required to restore public confidence in the judiciary.

[58] "The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in s. 51.6 (11) should be invoked, when necessary, in order to restore a loss

of public confidence arising from the judicial conduct in issue.” (The Ontario Judicial Council Hearing Panel in *Re Baldwin* (OJC, 2002) at page 6.)

[59] The legislative framework discussed by that Panel is parallel to the legislative framework governing the decision of this Panel. Once it is determined that a disposition under s. 11.1(10) is required, we should first consider the least serious – a warning – and move sequentially to the most serious – a recommendation for removal – and order what is necessary to restore the public confidence in the justice of the peace and in the administration of justice generally.

[60] At the far end of the spectrum, 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:

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:

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.

[61] The Panel has noted the Supreme Court of Canada decision of *Ruffo v. Conseil de la magistrature*, [1995] 4 SCR 267 (SCC) 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.

[62] When applying the principles set out by Mr. Justice Gonthier in *Re Therrien*, one must be ever mindful that judicial officers are not perfect; they are human beings.

Factors Considered in Assessing an Appropriate Disposition

[63] While the Silverthorne matter was spoken of by Justice of the Peace Welsh and the Clerk Registrar three times regarding the incorrect date, this happened in fairly rapid succession in a short period of time. We consider it to be one event relating to one accused person.

[64] The misconduct took place in court while His Worship was the presiding judicial officer. The incident occurred in the context of a very busy court, while addressing a number of matters in quick succession. While His Worship had the option of slowing the proceedings down to address the issue, he also had to contend with his duty to address all matters that were on the day's docket in a prompt and efficient fashion. The overly heavy burden that was placed on justices of the peace and the court administration in that jurisdiction at the relevant time is evidenced by the fact that the number of video remands on any given day has since been reduced.

[65] His Worship has admitted to the facts by way of an Agreed Statement of Facts. He has also recognized that his actions negatively impacted the confidence of members of the public in him as a justice of the peace, in the judiciary in general and in the administration of justice.

[66] Through counsel, Justice of the Peace Welsh acknowledges that his then usual practices regarding extra-judicial communication were inappropriate and submits that he

has learned from this experience. We are aware of no further incidents or complaints regarding his conduct since this event in 2013. His Worship Welsh has recognized the extent of the damage done, i.e. Mr. Silverthorne's imprisonment for 24 days.

[67] Justice of the Peace Welsh has taken steps, as has the local court administration, to reduce the possibility of error in setting proper return dates and advises that he no longer changes court dates in the absence of the accused person or counsel.

[68] Justice of the Peace Welsh is an experienced judicial officer: he has served on the bench since 2001. He has filed many very positive character references at this hearing that praise his integrity and work ethic, his contributions to the administration of justice and respect for the rights of accused persons.

[69] There has been a prior finding of serious misconduct against Justice of the Peace Welsh. In 2009, a Hearing Panel of the Review Council found that His Worship Welsh engaged in misconduct when he reduced the fine on a Certificate of Offence for a vehicle registered to a judge. His Worship took the unusual step of notifying the judge of the charge and suggested ways to reduce the fine. The judge insisted that she pay the full fine; however, His Worship reduced the fine. He subsequently entered a guilty plea to a criminal charge of obstruction of justice in relation to his actions and received an absolute discharge. The Hearing Panel ordered judicial education or training, as a condition of continuing to sit as a justice of the peace, in the areas of judicial independence and impartiality.

[70] This Panel has a concern that the previous Review Council proceeding did not have the salutary impact believed and expected by that Hearing Panel (in paragraph 87

of that Panel's decision). We note as well that the previous Hearing Panel was also provided with "exceedingly strong testimonial evidence" in His Worship's favour.

[71] His Worship's misconduct in this matter, although relating to a more routine, administrative court appearance, had a very negative impact on the integrity of, and respect for, the judiciary and the administration of justice as a whole in that it resulted in the deprivation of a person's liberty. As His Worship would have known, even 'routine' tasks can have far-reaching consequences.

Positions of Counsel

[72] Counsel for Justice of the Peace Welsh takes the position that in light of all the factors before this Panel, the strong combination of a reprimand, apology, education and a suspension of 14-30 days (with pay and benefits) would be an appropriate disposition.

[73] Presenting Counsel submits that there appears to be a pattern of conduct on the part of Justice of the Peace Welsh, "a certain carelessness in his understanding of the import of his judicial office and the requirement of formality, and ... restraint." We agree. Lack of respect for proper court processes and inappropriate interactions with other justice system participants are two themes that are unfortunately repeated in the present matter.

[74] It is the position of Presenting Counsel that the Panel should consider a combination of reprimand, apology, education (on the role of a justice of the peace, proper procedure and case management), and a suspension, the latter being necessary to

recognize the extent of the harm done to Mr. Silverthorne and as a means of restoring public confidence by reassuring the public that the conduct is taken seriously.

Disposition

[75] The Panel finds that in order to restore public confidence in this justice of the peace and in the administration of justice generally, the appropriate disposition in this matter is:

- A formal reprimand of Justice of the Peace Welsh. This formal censure is intended as a clear indication of this Panel's disapproval of his conduct.
- A requirement that Justice of the Peace Welsh apologize in writing to Mr. Ian Silverthorne; the letter is to be delivered through the Registrar of the Review Council.
- Additional judicial education or training as deemed appropriate by the Chief Justice of the Ontario Court of Justice or her designate in order to restore the public's confidence in Justice of the Peace Welsh and in the judiciary. He is to receive education or undertake training that reinforces his awareness of appropriate judicial boundaries and relationships, and formal management of courtroom processes and communication with justice partners, as a condition of continuing to sit as a justice of the peace.
- A suspension without pay, but with benefits, for a period of ten (10) juridical days. This is necessary as a reflection of the harm done to a member of the public as well as the public's confidence in the judiciary and in the administration of justice.

REQUEST FOR COMPENSATION OF LEGAL COSTS

[76] Justice of the Peace Welsh has requested, pursuant to s. 11.1(17) of the *Act*, that this Panel make a recommendation that he be compensated in the amount of \$39,338.36 including \$33,663.00 for legal fees, HST and disbursements incurred during this hearing process. Written submissions with respect to this request were provided by both counsel

for His Worship and Presenting Counsel. Presenting Counsel took the position that partial compensation is appropriate.

[77] In considering such a request, the Panel is mindful of the recent decisions of *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 (Divisional Court) and *Re Keast*, Ontario Judicial Council, February 6, 2018.

[78] As explained in *Massiah*, (at paragraphs 48-56) there is no presumption, when there has been a finding of judicial misconduct, that compensation will not be made. At paragraph 56, the Court states:

“For these reasons, adjudicative bodies, dealing with complaints against judicial office holders, ought to start from the premise that it is always in the best interests of the administration of justice, to ensure that persons, who are subject to such complaints, have the benefit of counsel. Consequently, the costs of ensuring a fair, full and complete process, ought usually to be borne by the public purse, because it is the interests of the public, first and foremost, that are being advanced and maintained through the complaint process.”

[79] At paragraph 57, the Court continues:

“It is a decision that must be made separately in each case and only after a consideration of the particular circumstances of the case viewed in the context of the objective of the process. Chief among those circumstances will be the nature of the misconduct and its connection to the judicial function. For example, misconduct that is more directly related to the judicial function may be more deserving of a compensation order than conduct that is less directly related. In contrast, conduct that any person ought to have known was inappropriate will be less deserving of a compensation decision than would conduct that is only determined to be inappropriate as a result of the ultimate decision in a particular case. Further, misconduct where there are multiple instances may be less deserving of a compensation recommendation than would a single instance of misconduct. Similarly, repeated instances of misconduct may be less deserving of a compensation recommendation than one isolated incident.”

[80] And at paragraph 60, the Court indicates:

“It is open to a hearing panel to include in its recommendation for compensation that such compensation should not include the costs associated with steps taken that, in the view of the hearing panel, were unmeritorious or unnecessary.”

[81] In the present case, the misconduct related to a core judicial function – His Worship was presiding in court.

[82] As discussed earlier, this was one incident of misconduct although it was set against the backdrop of an on-going, inappropriate “common practice” with respect to remand matters and out-of-court communications.

[83] The misconduct is conduct that any person ought to have known was inappropriate. Any person would expect a justice of the peace to follow the processes in place in the criminal justice system to protect the rights of an accused person so that his or her right to liberty is not wrongfully denied. The consequences of Justice of the Peace Welsh’s misconduct were very serious as Mr. Silverthorne was deprived of his liberty, for three weeks. The risk of potentially serious consequences would have been obvious to anyone but especially to an experienced judicial officer. Public funds were expended as a result of the misconduct in relation to Mr. Silverthorne’s arrest, the resulting court process and his incarceration.

[84] We accept, as canvassed in the written submissions of both counsel, that there was a live issue in this hearing with respect to whether or not His Worship’s actions amounted to misconduct. This was otherwise a fairly straight-forward hearing process. The Panel does not accept, as urged by counsel for His Worship, that this hearing has somehow clarified expectations with respect to judicial conduct and adjournment

processes. Those expectations have always been based on compliance with the law and proper court procedure. There is nothing new here.

[85] Justice of the Peace Welsh, with the assistance of his counsel, did take steps to expedite the hearing through a judicial pre-trial process, continuing discussions with Presenting Counsel and an Agreed Statement of Facts.

[86] There is a previous finding of misconduct against His Worship with a disposition that included education. This Panel has already indicated that we consider there to be in this case a troublesome repetition of the themes of lack of respect for necessary and proper court processes and inappropriate interactions with other justice system participants.

[87] The Panel notes that, by statute, section 11.1(18) of the *Act* requires that compensation recommended under subsection (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.

[88] The Panel takes no issue with the nature of the services for which fees were charged.

[89] This Panel will recommend that compensation be awarded for legal costs, but for something less than the total amount billed in light of the criteria set out by the Divisional Court in the *Massiah* case, including the 2009 Hearing Panel's previous finding of judicial misconduct in relation to His Worship, and the nature of his conduct in this instance that

anyone would have known was inappropriate and which resulted in a public cost and serious personal consequences to Mr. Silverthorne.

[90] This Panel recommends compensation in the amount of \$20,000.00.

Dated this 15th day of February, 2018

HEARING PANEL:

The Honourable Justice Lisa Cameron, Chair

Her Worship Monique Seguin, Justice of the Peace Member

Dr. Michael Phillips, Community Member