

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 Neil Kozloff, Chair
 Her Worship Kristine Diaz, Justice of the Peace Member
 Ms. Jenny Gumbs, Community Member

**DECISION ON THE REQUEST FOR A RECOMMENDATION THAT HIS
WORSHIP SHOULD BE COMPENSATED FOR HIS LEGAL COSTS
INCURRED BY THE HEARING**

Counsel:

Mr. Ian Smith
Presenting Counsel

Mr. Eugene Bhattacharya
Counsel for His Worship

ORDER

1. Justice of the Peace Welsh is requesting that the Panel make a recommendation to the Attorney General that he be compensated for the legal costs that he incurred as a result of the hearing. If the legal costs were calculated on the basis of the standard hourly rate typically charged by his lawyer, Mr. Bhattacharya, he would be seeking compensation in the amount of \$79,278.07. However, in his submissions, he notes that section 11.1(18) of the *Justices of the Peace Act* states that compensation “shall be based on a rate of legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.” The total amount of compensation requested by His Worship has, therefore, been reduced to a total of \$63,189.69.
2. Presenting Counsel agrees with His Worship that compensation reflecting the nature of counsel’s participation in the hearing would be appropriate. Presenting Counsel notes that the alleged misconduct was related to His Worship’s core judicial functions and that His Worship successfully defended the matter. Presenting Counsel takes no position on quantum.

The Principles

3. The Hearing Panel in *Re Guthrie* (JPRC, 2019) set out the principles for be followed by a Hearing Panel in deciding whether to make a recommendation that a justice of the peace should be compensated for the costs incurred by a hearing in circumstances where there was not a finding of misconduct. First, the Panel referred to the principles in *Massiah v. Justice of the Peace Review Council*, 2016 ONSC 6191:
 4. The Divisional Court has set out the principles we must follow in *Massiah v. Justice of the Peace Review Council*, 2016 ONSC 6191. In that case, a panel convened under s. 11.1 of the *Act* found that former Justice of the Peace Massiah had committed judicial misconduct and recommended that he be removed from office. The panel dismissed his request for compensation for his legal costs, holding that there was a presumption that compensation should not be made where there has been a finding of judicial misconduct and “it is only in exceptional circumstances that the public purse should bear the legal costs of a judicial officer who has engaged in judicial misconduct.”
 5. The Divisional Court upheld the hearing panel’s decision recommending removal from office. However, it reversed the decision denying Justice of the Peace Massiah his costs, sending the issue back to the hearing panel for fresh determination of the issue in accordance with its decision.

6. Nordheimer J. wrote:

50 I do not accept that any such presumption exists nor do I find any cogent reasons why such a presumption should exist. Rather, there are compelling reasons for the opposite approach.

51 First, and as noted above, dismissal of a judicial officer is a matter of public importance. The considerations to be taken into account in dismissing a judicial officer include not only the conduct of the individual, but its effect on the justice system as a whole. The principal objective of the complaint process is to restore and maintain public confidence in the integrity of the judiciary, not to punish the judicial officer holder, although punishment may result.

52 Second, where a Provincial Attorney General makes a complaint against a federally appointed judicial officer, a hearing is mandatory. While the same provision does not apply in the case of judges of the Ontario Court of Justice or of justices of the peace, the prospect of a complaint emanating from the Government is, nonetheless, a real one. This possibility is of some significance given that one of the most important roles performed by a judicial officer is to stand between the state and the citizen, in terms of the application of government powers. This role is referenced in the earlier statement I quoted above from *Re Therrien*. Judicial officers are therefore exposed not only to the vagaries of complaints by citizens but also to those of government.

53 Thirdly, judicial office holders, by the very nature of their duties, and the decisions that they make, naturally attract criticism and animosity. It is an easy matter for someone, or some group, to make a complaint regarding something that a person, who holds judicial office, does, says, or decides. While there are screening mechanisms to ensure that only complaints that appear to have a requisite degree of validity, and that are related to judicial conduct rather than judicial decisions, are permitted to proceed beyond the stage of the initial complaint, the impact on the holder of a judicial office, where a hearing is called, is significant, as this case and others have amply demonstrated.

54 Fourthly, there is a serious risk that, if we hold to a presumption that a judicial officer holder will not be compensated for their legal expenses, where a finding of misconduct is made, those persons will then face the judicial equivalent of the Gordian Knot. On the one hand, the person can choose to defend themselves but with the knowledge that, if the adjudicator decides against them, they will not only lose their position but may effectively bankrupt themselves and their family in the

process. That result arises from the reality that the legal expenses associated with responding to a complaint, and participating in such a hearing, are likely to be significant. Few judicial office holders would be able to self-fund those expenses. On the other hand, that same person, in order to avoid those dire financial consequences, may simply decide that it is easier, and financially safer, to simply resign their office. In doing so, though, they leave the allegations unanswered and consequently, in most persons' minds, admitted to. If that is the knot that a judicial officer holder faces, it means that the mere fact of a complaint becomes, in and of itself, a threat to judicial independence, because it may lead to one of two undesirable results. Either the judicial office holder, for reasons other than the merits of a particular complaint, acquiesces in their removal from office or they may choose to avoid decisions that will subject them to criticism.

55 The legal expenses issue is not a fanciful one. In this case, for example, the applicant incurred legal fees in excess of \$600,000. In setting out that fact, I do not, for a moment, mean to suggest that that level of legal fees was either appropriate or justified for what took place in this case. I merely use it as an example of the type of financial consequence that may arise for a judicial officer holder, who finds her/himself in the position of having to decide whether s/he can actually afford to respond to a complaint.

56 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. Again, this reflects the public interest nature of the process.

57 All of that is not to say that, in every case where a judicial officer holder is subject to a successful complaint, that judicial officer holder can expect that his or her legal expenses will be compensated. 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.

...

60 Before leaving this issue, I would make one further point. It should be clear that just because a hearing panel makes a recommendation for compensation for legal expenses does not carry with it any requirement that the compensation cover whatever legal expenses were incurred and at whatever level.

4. The Hearing Panel in *Re Guthrie* also noted, in paragraph 7 of its decision, that an additional consideration is the manner in which the hearing was conducted:
 7. Another hearing panel of this Council, in its decision of July 17, 2017 in *Re Bisson*, added “the conduct of the hearing” to the factors set out by the Divisional Court, noting that compensation should not include costs associated with steps that the decision-maker views to be unmeritorious or unnecessary.

Publication Ban

5. On November 28, 2018 this Panel made an order pursuant to Section 11.1(9) of the *Justices of the Peace Act*, R.S.O., c.J-4 as amended, that the names of the parties involved in the court proceedings - namely all persons who appear in any *Provincial Offence Act* (hereinafter “POA”) Certificate of Offence or Information that is a subject matter of this hearing - shall not be published, nor shall any information that might identify them be published. Names of witnesses have accordingly been redacted.

Application of the Principles to This Case

6. The Notice of Hearing alleging judicial misconduct was submitted by Presenting Counsel and filed on March 15, 2018. The allegations are as follows:
 - A. His Worship engaged in a pattern of behaviour in which he failed to follow the well-established administrative processes and procedures in place at the Hamilton Courthouse for persons applying for trial reopening’s and for extensions of time to pay fines.
 - B. As a result of His Worship’s failure to follow the established administrative processes and procedures, His Worship rendered decisions on matters without having all the required legal documentation before him to properly adjudicate and support

judicial decision-making concerning the matters at hand. With respect to the June reopening of J.M.W's application for a trial reopening, His Worship made a judicial decision in the absence of a proper record, and in circumstances where it was not permitted by law.

C. His Worship's conduct, in accepting and deciding the above-noted applications outside of the courtroom and in an informal, off-the-record fashion, in the absence of a proper record, and without adhering to the administrative processes and procedures established in the Hamilton Courthouse, demonstrated actual preferential treatment or favouritism, and/or gave rise to a perception of preferential treatment or favouritism, towards the applicant in question.

D. His Worship demonstrated a pattern of disregard for the administration of justice, negatively impacting the public's confidence in the integrity, independence and impartiality of the judiciary in general, and in His Worship in particular as a judicial officer.

7. Both Presenting Counsel and Counsel for His Worship agree that having legal representation to assist him with this hearing was necessary. What is at issue is the quantum of coverage of legal costs.
8. His Worship's actions, as noted in the majority decision of Justice Kozloff and Her Worship Diaz, found that the actions of His Worship, while being "ill-considered, inappropriate and short-sighted", did not rise to the level of judicial misconduct.
9. The dissenting opinion of the Community Member, Ms. Gumbs, stated the following; "a reasonable, fair-minded informed member of the public would conclude that His Worship's acts failed to give the appearance of being an example of impartiality, independence and integrity and that his conduct did not ensure the public's trust and confidence in him as a Justice of the Peace."
10. Accordingly the complaint was dismissed.
11. Applying the principle set out by the Divisional Court in *Massiah* that when a complaint is dismissed, "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, this Panel grants His Worship's request for a recommendation to the Attorney General that he receive compensation for his legal fees incurred by the hearing.

12. The Panel has carefully reviewed the itemized statement of fees submitted by His Worship's Counsel. The Panel does not find any evidence of unnecessary costs.
13. The Panel is guided by Section 11.1 of the *Justice of the Peace Act*, including the following:

Compensation

(17) The panel may recommend that the justice of the peace be compensated for all or part of the cost for legal services incurred in connection with the hearing.

(18) The amount of compensation recommended under section (17) shall be based on a rate for legal services that does not exceed the maximum paid by the Government of Ontario for similar services.

14. The maximum rate determined by the Justice of the Peace Review Council to be permissible under section 11.1(18) is \$450.00 per hour.

Conclusion

15. The Panel recommends the following compensation for Counsel, Mr. Bhattacharya:

Fees: submitted hours of representation at \$450.00 per hour:
Fees plus HST - \$57,918.15

16. With regard to junior Counsel, Ms. Waters Rodriguez (called to the Bar in 2018), who has less than 3 years experience, the Panel recommends the following compensation based on \$175.00 per hour:

Fees: submitted hours of representation at \$175.00 per hour:
Fees plus HST - \$4,825.10.

17. The Panel recommends compensation for disbursements in the amount of \$273.08.
18. The total amount recommended is \$63,016.33, inclusive of HST and disbursements.

Dated at the City of Toronto in the Province of Ontario, December 4, 2019.

HEARING PANEL:

The Honourable Justice Neil Kozloff, Chair

Her Worship Kristine Diaz

Ms. Jenny Gumbs, Community Member