

# **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 Two Complaints about the Conduct of Justice of the Peace Paul Welsh**

**Before:** The Honourable Neil L. Kozloff, Chair  
Her Worship Justice of the Peace Kristine Diaz

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

## **REASONS FOR RULING ON MOTION TO ADJOURN PROCEEDINGS**

**Counsel:**

Mr. Scott Fenton  
Mr. Ian R. Smith  
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Mr. Eugene Bhattacharya  
Ms. Mary C. Waters Rodriguez  
Barristers and Solicitors

Presenting Counsel

Counsel on behalf of His Worship Justice  
of the Peace Paul Welsh

## **PUBLICATION BAN**

On September 28, 2020, this Panel made a temporary order pursuant to Rule 15 of the Justices of the Peace Review Council Procedures Document that the details of the medical condition of His Worship Justice of the Peace Welsh, including diagnoses and prognoses, shall not be published. That temporary order is to continue pending our consideration of that application on its merits and pending our ruling on the motion to adjourn.

## **OVERVIEW**

[1] This is a ruling on an application by Justice of the Peace Paul Welsh (also “Justice of the Peace Welsh”, “His Worship Welsh”, “His Worship”, and “the Applicant”) to adjourn a hearing into the matter of two complaints regarding the conduct or actions of Justice of the Peace Welsh that were referred to a Hearing Panel of the Review Council (the “Panel”) for a formal hearing under section 11.1 of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4 as amended (“the Act”) by Notice of Hearing dated February 28, 2019.

[2] On November 5, 2019, dates for the hearing were scheduled; the hearing was to commence on March 23, 2020.

[3] By Notice of Motion dated March 12, 2020, Justice of the Peace Welsh brought an application to adjourn the hearing due to his medical condition. Counsel for the Applicant asked for the hearing of the motion to be scheduled in advance of the March 23<sup>rd</sup> start date so that a ruling could be received prior to the date for which witnesses had already been summonsed.

[4] Before a hearing of the adjournment motion could take place, the COVID-19 pandemic intervened. Consistent with the approach taken by the Ontario Court of Justice and the Ontario Superior Court of Justice in non-custodial criminal matters, the scheduling of a date for the hearing of the motion was adjourned and the matter was put over to March 17, 2020 for a teleconference, following which it was adjourned to June 1, 2020.

[5] During the June 1, 2020 appearance, Counsel for His Worship, Mr. Bhattacharya, was not able to confirm whether His Worship still intended to proceed with the adjournment motion. This Panel ordered that if His Worship intended to proceed with his motion, his updated motion materials should be filed by July 31, 2020 and the motion would proceed on August 25, 2020. Alternatively, if His Worship decided to abandon his motion, subject to the restrictions associated with COVID-19, dates for the hearing would be scheduled on the August 25 return date. This Panel also confirmed its earlier request that His Worship’s physician be available to give evidence at the motion regarding His Worship’s medical condition.

[6] His Worship filed updated motion materials. On August 25, 2020, Mr. Bhattacharya advised that he had been unable to get in touch with His Worship's physician. The matter was adjourned for two days to give Mr. Bhattacharya an opportunity to contact the doctor and obtain his availability for the motion. At the appearance on August 27, Mr. Bhattacharya confirmed that he was still unable to get through to the doctor as his clinic was closed. Counsel for His Worship requested additional time to obtain the physician's availability. The matter was put over to August 31, 2020.

[7] On August 31, 2020, Mr. Bhattacharya advised this Panel that he had obtained the physician's availability to attend for the motion and that a summons would be issued to compel the doctor's attendance. The adjournment motion was scheduled for September 28, 2020.

[8] The motion to adjourn was heard by the Panel on September 28, 2020. His Worship was not "in attendance" but Mr. Bhattacharya confirmed that he had instructions to proceed in his absence.

[9] With the consent of the parties, the proceedings were conducted by way of a "Zoom Meeting" videoconference.

[10] At the outset of the proceedings, Mr. Bhattacharya made a "request on His Worship's behalf, and that is for a publication ban that details of his medical circumstances including his medical condition, diagnosis and prognosis shall not be published by any media or posted on any social media as it pertains to his personal specific medical circumstances".

[11] In the course of the hearing, the Panel heard testimony from His Worship's family physician, Dr. Anoop Nayar, followed by the submissions of Counsel on behalf of His Worship Justice of the Peace Welsh (Mr. Bhattacharya) and Presenting Counsel (Mr. Smith).

[12] At the conclusion of the hearing, the Panel ordered a temporary ban on publication (of the details of His Worship's medical circumstances) pending our consideration of that application on its merits and pending our ruling on the motion to adjourn.

[13] The matter was adjourned to October 19, 2020 at 8:30 a.m. by Zoom Conference.

[14] These are the reasons for our ruling on the motion for an adjournment.

## HISTORY OF THE PROCEEDINGS

[15] These proceedings have a long and somewhat complicated history. In order to fully and fairly consider the application before us, it is necessary and appropriate that the salient details of that history leading up to the hearing of this motion be set out.

[16] Pursuant to Section 11(15)(c) of the *Justices of the Peace Act*, R.S.O. 1990, c. J.4, as amended (hereinafter “the *Act*”), a complaints committee of the Justices of the Peace Review Council ordered that a formal hearing into a complaint regarding the conduct of Justice of the Peace Paul Welsh be held by a Hearing Panel of the Review Council under Section 11.1 of the *Act*. A Notice of Hearing setting out the allegations ordered to a hearing was issued on March 15, 2018.

[17] Before the evidence had concluded in that hearing, another formal hearing into two (new) complaints regarding the conduct of Justice of the Peace Paul Welsh was ordered under Section 11.1 of the *Act*. By Notice of Hearing dated February 28, 2019, the parties were informed that the Hearing Panel would convene on March 12, 2019 to set dates for the hearing into the two new complaints.

[18] On April 9, 2019, Presenting Counsel brought a Motion to Combine Proceedings pursuant to section 9.1 of the *Statutory Powers Procedures Act*; that is, for an Order combining the proceedings commenced by Notice of Hearing dated March 15, 2018 (“the first hearing”) with the proceedings commenced by Notice of Hearing dated February 28, 2019 (“the second hearing”).

[19] At the same time, Counsel for His Worship Welsh brought a Cross-Motion and Response on behalf of His Worship Welsh seeking an Order staying the proceedings relating to the Notice of Hearing dated February 28, 2019 (the “second hearing”) until the completion of the proceedings relating to the Notice of Hearing dated March 15, 2018 (the “first hearing”), and an Order that the second hearing be conducted before a new Panel of the Justices of the Peace Review Council.

[20] The Cross-Motion and Response alleged an absence of jurisdiction with reference to certain of the allegations of misconduct set out in Appendix “A” of the Notice of Hearing dated February 28, 2019 on the basis that they “were never the subject of a written complaint made to the Review Council.”

[21] During the course of oral submissions, Counsel for His Worship Welsh agreed that the jurisdictional argument could be held in abeyance until the commencement of the second hearing.

[22] On completion of oral submissions, the Chair of the Hearing Panel announced the ruling on behalf of the Hearing Panel:

The Panel has determined that we will be conducting a consecutive hearing on

the new allegations, and that we will complete the first hearing by way of hearing your remaining evidence, your final submissions. We will make a finding with respect to whether judicial misconduct is made out, and if we so find judicial misconduct, we will make a recommendation.

[23] The first hearing was adjourned to May 8, 2019 so that the *vive voce* testimony of two witnesses could be heard.

[24] By Notice of Motion dated the 2<sup>nd</sup> day of May 2019, His Worship Justice of the Peace Paul Welsh brought an application to adjourn the first hearing. In support of his motion for adjournment, the Applicant relied upon the sworn Affidavit of Georgia Hughes, legal assistant in the office of his counsel Eugene Bhattacharya.

[25] In her affidavit, Ms. Hughes deposed as follows:

Recently, His Worship became aware that his son had been diagnosed with cancer. Treatment options were not available in Canada and he was advised that his son would be treated by way of palliative care. His Worship was able to research and find a medical treatment available in the United States at the Mayo Clinic in Minnesota that would provide treatment options for his son.

Attached and marked as Exhibit “A” to this my Affidavit is a copy of correspondence dated May 2, 2019 from Justice of the Peace Paul Welsh’s Doctor that confirms that His Worship is in a medical condition such that he is unable to assist in the preparation of his defence.

In the circumstances, His Worship Justice of the Peace Paul Welsh is seeking an adjournment of the evidence of the Hearing. The matter has been scheduled to continue on May 30, 2019 and His Worship would request that the evidence that is anticipated to be taken on the date of May 8, 2019 be adjourned and taken on the following date of May 30, 2019.

[26] On May 3, 2019, Presenting Counsel wrote to the Registrar of the Justices of the Peace Review Council advising that he was consenting to His Worship’s adjournment request and proposing that the matter of future dates be spoken to before the Hearing Panel on the next scheduled date (May 8, 2019).

[27] On May 8, 2019, the matter was spoken to and adjourned to June 29, 2019 for continuation.

[28] Formal written reasons for the Panel’s ruling(s) on the Motion to Combine Proceedings (and Cross-Motion) were released by the Panel on May 10, 2019. The rulings – extracted from those written reasons – are set out below:

The motion brought by the Applicant, Presenting Counsel in the hearing

pertaining to the Notice of Hearing dated March 15, 2018, is granted.

The Hearing Panel orders that:

1. the proceeding pertaining to the Notice of Hearing dated March 15, 2018 and the proceeding pertaining to the Notice of Hearing dated February 28, 2019 will be heard consecutively; and
2. the proceeding pertaining to the Notice of Hearing dated March 15, 2018 will be concluded in its entirety, including any and all finding(s) and disposition(s), before the commencement of the proceeding pertaining to the Notice of Hearing dated February 28, 2019.
3. The cross-motion brought by the Respondent, His Worship Justice of the Peace Paul Welsh, for an Order staying the proceedings relating to the Notice of Hearing dated February 28, 2019 until the completion of the proceedings relating to Notice of Hearing dated March 15, 2018, and for an Order that the Notice of Hearing dated February 28, 2019 be put before a new Panel of the Justices of the Peace Review Council, is dismissed.
4. The cross-motion brought by the Respondent, His Worship Justice of the Peace Paul Welsh, in relation to an alleged absence of jurisdiction based upon the purported absence of a formal written complaint to support allegations of misconduct set out in Appendix “A” to the Notice of Hearing dated February 28, 2019, is adjourned until the completion of the proceeding pertaining to the Notice of Hearing dated March 15, 2018 and commencement of the proceeding pertaining to the Notice of Hearing dated February 28, 2019.

[29] On June 28, 2019, the first hearing resumed.

[30] On October 2, 2019, the Panel released its decision in the first hearing. A majority of the panel (Justice Kozloff and Justice of the Peace Diaz) dismissed the complaint. In her minority reasons, the community member, Ms. Gumbs, found that the actions of His Worship constituted judicial misconduct.

[31] On November 5, 2019, the matter of costs was addressed and, with due regard for the schedules of Presenting Counsel (Mr. Smith) and Counsel on behalf of His Worship Justice of the Peace Welsh (Mr. Bhattacharya) as well as of the remaining Panel members (the appointment of Ms. Gumbs was not renewed by the government of the day), the following dates were scheduled for the commencement of the second hearing: March 23, 24, 25, 2020 and April 3, 6, 7, 8, 9, 2020.

[32] By Notice of Motion dated the 12<sup>th</sup> day of March 2020, Justice of the Peace Welsh brought an application to adjourn the second hearing that was scheduled to commence on March 23, 2020.

[33] In support of that motion for adjournment, the Applicant relied upon the sworn Affidavit of Georgia Hughes, legal assistant in the office of his counsel Eugene Bhattacharya.

[34] In her affidavit, Ms. Hughes deposed as follows:

A medical report has been provided by Dr. Angela Carol dated March 10<sup>th</sup>, 2020 and is attached and marked as Exhibit “A” to this my Affidavit. The medical report indicates that his health issues including his physical and mental health circumstances have continued to worsen since the passing of his son in November, 2019 and his health would be jeopardized if he were compelled to proceed with the hearing as currently scheduled.

The presenting counsel has provided four volumes of disclosure that constitute the information to obtain and other documentation regarding the allegations. This voluminous material contains hand written notes and information from Justice of the Peace Paul Welsh that requires him to review that documentation in anticipation of the witness evidence regarding the completion of these warrants. It is essential that His Worship have sufficient capacity to be able to assist in the preparation of his defence. This is the position taken by Mr. Bhattacharya in the preparation of his defence for his client.

Attached to and marked as Exhibit “B” to this my Affidavit is a copy of a medical report dated May 2, 2019 that was relied upon in respect to an earlier issue involving Justice of the Peace Paul Welsh’s health and circumstances. This evidence is provided to illustrate that his condition has not improved and, in fact, it has declined since the circumstances of his son’s passing and his health in relation to the upcoming hearing.

[35] Also filed in support of the motion to adjourn the Hearing is the Supplementary Affidavit of Mary C. Waters Rodriguez sworn the 31<sup>st</sup> day of July, 2020. Ms. Waters Rodriguez is an associate counsel with the office of Mr. Bhattacharya. In her Supplementary affidavit, she deposed:

His Worship continues to experience significant physical and mental health issues that have impacted his ability to participate in the subject public inquiry. His Worship’s physical and mental health circumstances have continued to worsen since the passing of his son in November 2019, and would be put in further jeopardy if he were compelled to proceed with the hearing as currently scheduled.

Attached and marked as Exhibit “A” to this my Supplementary Affidavit is a copy of correspondence dated July 29, 2020 from Justice of the Peace Paul Welsh’s Doctor that confirms that His Worship is in a medical condition such that he is unable to assist in the preparation of his defence or to participate in his defence in any meaningful way.

## **THE MEDICAL EVIDENCE**

### **1. The letter of Dr. Angela Carol dated May 2, 2019**

[36] In May 2019, the Panel was provided with a letter from Dr. Angela Carol dated May 2, 2019.

[37] This letter was attached to the affidavit of Ms. Hughes and marked as Exhibit “A”. The full text of her letter (which is addressed to the members of this Panel) reads as follows:

RE: Paul Alexander Welsh, D.O.B. March 10, 1949

Members of the Panel:

I understand that the above-named is scheduled to attend a continuation of a hearing on May 8, 2019. It is my medical opinion that Paul Welsh is unable to meaningfully participate in preparation for or attendance at the hearing due to stress.

His 46-year-old son was just diagnosed as having a particularly aggressive form of stage 4 stomach cancer with metastasis to the peritoneum. There is no treatment, except palliative chemotherapy, available for him in Canada.

However, his son was referred to the Mayo Clinic in Rochester, Minnesota on Monday, April 29, 2019 & yesterday it was confirmed that he will have surgery on Tuesday, May 7, 2019. If this surgery has a successful outcome his son will require a further major surgery that is expected to occur within a matter of weeks to months.

Paul Welsh has recently been diagnosed with hypertension and is receiving treatment for this. Given these extenuating circumstances it is my opinion that the anxiety he is suffering from would put his health at risk if he is required to proceed with the hearing at this time.

Regards,

Dr. Angela Carol, MD, CCFP, FCFP



Medical Advisor, Quality Management Division, College of Physicians and Surgeons of Ontario; Assistant Clinical Professor, Department of Family Medicine, McMaster University; Lead Physician, Hamilton Urban Core Community Health Centre.

[38] The letter in effect sets out two reasons for adjourning the matter:

His Worship is unable to meaningfully participate in preparation for or attendance at the hearing due to stress; and

His Worship's health would be put at risk if he is required to proceed with the hearing *at this time*. (Emphasis added)

[39] Notwithstanding that Dr. Carol is referred to in the Affidavit of Ms. Hughes as "Justice of the Peace Paul Welsh's Doctor", there is nothing in this correspondence that discloses the nature (i.e. doctor-patient) or duration of their relationship.

[40] There is nothing in the letter (beyond the information below her signature regarding her various titles) regarding Dr. Carol's expert professional qualifications to render those opinions.

[41] Nor is there any indication of the source(s) of information, material(s) such as medical records, medical reports, letters from other physicians, and the like, testing, or reasoning that Dr. Carol relies upon as a basis for either opinion. The opinions on their face are, effectively, stated conclusions connecting the dots, namely:

His Worship's son has just received a horrible diagnosis; therefore, he is unable to "meaningfully participate" in preparation for or attendance at the hearing due to stress; and

His Worship has been recently diagnosed with hypertension and is receiving treatment for this; therefore, the anxiety that he is suffering from would put his health at risk if he is required to proceed with the hearing at this time.

[42] In fairness, the letter was intended to be relied upon in support of a four-week adjournment request – brought on short notice and under exigent circumstances – that was reasonable on its face and that in any event was consented to by Presenting Counsel prior to the hearing of the Motion.

[43] That said, the letter is of little assistance to the Panel on this application.

## **2. The letter of Dr. Angela Carol dated March 10, 2020**

[44] In March 2020, the Panel was provided with a letter from Dr. Angela Carol dated March 10, 2020.

[45] In her letter (which is also addressed to the members of this Panel), Dr. Carol writes:

It is my medical opinion that Justice of the Peace Paul Welsh is unable to meaningfully participate in preparation for or attendance at the hearing due to his anxiety/depression. He has an inability to concentrate sufficiently to allow him to complete tasks and has difficulty with problem solving. He has significant lack of energy and motivation to complete tasks. He has difficulty regulating his moods and emotions. Despite the fact that he is taking several medications for his hypertension his blood pressure remains high and during times of stress it is unacceptably high.

As you are aware from my earlier letter to you, his son was diagnosed with stage 4 stomach cancer in April of 2019. Unfortunately, his son passed away in November of 2019 after months of suffering with terminal cancer. In my opinion this is a significant factor in his diagnosis of depression.

He advises me that he faced another judicial complaint hearing in January of this year (sic). In my opinion he would not have been able to testify at that hearing had it been necessary due to his then present and continuing mental health circumstances. He also advises me that he endured many weeks of stress awaiting the decision & only learned one week ago (sic) that his complaint was dismissed. In my opinion this has significantly impacted his anxiety.

I have recommended that he take a leave of absence from his employment for 6-12 months & he has agreed to do so. I have prepared the necessary documentation for him to provide to his employer.

It is my opinion that if he is compelled to proceed with the hearing that it would put both his physical and mental health in jeopardy.

[46] As was the case with the earlier letter from Dr. Carol, there is nothing in this second letter that discloses the nature (i.e. doctor-patient) or duration of their relationship, and there is nothing in the letter (beyond the information below her signature regarding her various titles) regarding Dr. Carol's expert professional qualifications to render those opinions. Nor is there any indication of the source(s) of information, material(s) such as medical records, medical reports, letters from other physicians, and the like, testing, or reasoning that she relies upon as a basis for any of the opinions she expresses.

[47] Moreover, there is no indication of when and/or by whom His Worship was diagnosed with anxiety, nor is there any indication of when and/or by whom he was diagnosed with depression. There is no indication of whether he is being treated for either/both and if so by whom. There is no indication of whether he has been prescribed and/or is on medication for either or both. There isn't any prognosis provided.

[48] In the result, that letter and more particularly the medical opinions it expresses are of limited assistance to the Panel on this application.

### **3. The letter of Dr. Anoop Nayar dated July 29, 2020**

[49] At the end of July 2020, the Panel was provided with a letter from Dr. Anoop Nayar dated July 29, 2020. The full text of his letter (which is addressed to Mr. Bhattacharya) follows:

Re Paul Welsh

I am a family physician licenced to practice in Ontario since 1986.

Mr. Welsh has been my patient since 1995.

I believe Mr. Welsh is due to attend a tribunal fairly soon. I would recommend that he avoid the tribunal as yet. Mr. welsh (sic) is in fragile mental state and is undergoing psychotherapy. I feel he is not in a state of mind to be able to deal with a tribunal. His issues with concentration, with memory retention and mood lability will interfere with his ability to participate in a meaningful way.

Mr. Welsh is dealing with the tragic loss of his son due to an illness. He also suffers from high blood pressure and recently has been diagnosed with osteoporosis and spinal fractures.

In my opinion Mr. Welsh should be allowed to delay the tribunal till he is a stage that he is mentally stable enough to be able to participate.

[50] While this letter identifies a long-standing doctor-patient relationship between Dr. Nayar and His Worship, there is nothing in the letter regarding Dr. Nayar's expert professional qualifications to render those opinions.

[51] Nor is there any indication of the source(s) of information, material(s) such as medical records, medical reports, letters from other physicians, and the like, testing, or reasoning that Dr. Nayar relies upon as a basis for any of the recommendations, feelings, or opinions he expresses.

[52] While Dr. Nayar states that His Worship is undergoing psychotherapy, the letter does not contain any information regarding who is providing it, what form of

psychotherapy His Worship is receiving, its duration or the prognosis.

[53] Moreover, there is a lack of detail concerning His Worship's issues with concentration, memory retention and mood lability. We are not told when those issues arose, when and by whom they were diagnosed, their degree of severity, what if any medication he has been prescribed, and how and why those issues would interfere with his ability to participate in the hearing in a meaningful way.

[54] In the result, that letter and more particularly the medical opinions it expresses are of limited assistance to the Panel on this application.

#### **4. The testimony of Dr. Nayar on September 28, 2020**

[55] Dr. Nayar has been His Worship's family physician since 1995.

[56] During his examination-in-chief, the following exchange took place between Mr. Bhattacharya and Dr. Nayar:

Q: Now, if I can just ask you in terms of your experience, do you have any specific qualifications involving providing psychotherapy to your patients?

A: As a family physician, I think that's the qualification. I do that often with patients, yes.

Q: And you've indicated, sir, in your medical note that Mr. Welsh, is he actually involved in psychotherapy with you now?

A: Not with me, no. But he's seeing someone, I believe.

Q: And is that a referral that you've made for him?

A: No. No. I think it's through his own sort of referral.

Q: Okay. Now you've indicated that your assessment of Mr. Welsh is that he's in a fragile mental state?

A: Yes.

Q: Is that correct?

A: Yes.

Q: And you've indicated that one of the issues is his difficulty with concentration?

A: Yes, that's right.

Q: Can you tell me the basis for that conclusion? How do you know that?

A: Okay. So I think back in March I did talk to Mr. Welsh about his condition; we assessed his – the symptoms. And then I got him to fill in some questionnaires that he filled in for himself and sent them out to me. And these are PHQs. They are forms which are quite standardized for depression. And in that, when I went through them, you know, it confirmed my sort of initial diagnosis that he was going through depression, anxiety. And the forms seemed to confirm that.

Q: Okay. But just very specifically on his ability to concentrate, was there a specific test, or how did you end up coming up with that particular diagnosis for the patient?

A: From talking to him and from the forms that I have here.

Q: Okay. You've also indicated that you're concerned about his memory retention?

A: Right. Right.

Q: Can you give us a bit more detail? Is that his long-term memory? His short-term memory? Is it both? And how would you describe that difficulty with the patient?

A: So I think simply put, it's to do with his mood, his depression. That often affects memory. And then we're talking about immediate memory, we're talking about able to put things together. And that's where I would sort of – that's where I would get the feeling that the memory is not there. There's no specific testing that I have done beyond this.

Q: Okay. And to what degree do you think that's an issue with the patient, that is his memory retention?

A: I mean, I think when he's actually filled the forms up he's put down concentration and memory as quite severe. And I would accept that as severe issues with memory, yes.

[57] Dr. Nayar was then asked if memory issues are something that will improve or deteriorate or remain stable, and whether he had any anticipation regarding how they might progress. He responded that he could not comment on progression “as I am not an expert on this.” He then added:

I would state that I'm not sure what will happen with his memory down the road. He is in therapy and I think that's helpful. And if need be, he may need

medication; he may need further help.

[58] After Dr. Nayar opined that anti-depressant medication would help with regard to depression and issues of concentration, memory, and mood lability, the following exchange took place:

Q: And to your knowledge, sir, is the patient, Mr. Welsh, on medication now for depression?

A: No, no he's not. Not that I know of, no.

[59] Dr. Nayar was asked how the issues of concentration, memory, and mood lability "work in respect to the patient's ability to participate in a disciplinary process". He replied:

... any stressful situation may make these conditions worse. So he may not be able to concentrate; he may not be able to put things together; he may find it difficult concentrating even worse than what it is now.

[60] Dr. Nayar was asked about and confirmed His Worship's diagnoses of hypertension, spinal fractures and osteoporosis.

[61] Asked how each might impact on His Worship's mental health or his ability to participate in a disciplinary proceeding, he replied:

Blood pressure can be labile, it can go up and down. And of course stress may make the blood pressure up, I mean, simply put. So any form of stress may make it go up. As far as his spinal fractures, they were diagnosed I think in January of 2020, if I'm right. And this is due to his ongoing osteoporosis. So that's pain. That can be severe pain. And that can affect one's memory or concentration. Yeah.

[62] Asked whether the death of His Worship's son is "still an issue" in respect of his medical diagnosis, Dr. Nayar responded:

Okay. So yeah, I think the son died in November, if I'm right. And I think this is part of the whole reaction, he's having a grief reaction maybe with depression. And I think it's ongoing. March was the son's birthday, if I'm right. I may be wrong, but I think it's his birthday. And that sort of made things a lot worse for Mr. Welsh. Yeah. So I think it's really we are dealing with depression; we're dealing with anxiety; we're dealing with an ongoing grief reaction as well...

[63] Asked if he still maintained the opinion "as a physician to Mr. Welsh" in respect to his ability to participate in a disciplinary proceeding now, he opined:

Yes. Yes I think so. Yeah. When you look at all the symptoms, yes. I would. Yeah.

[64] Dr. Nayar said he would “recommend” that His Worship not proceed with the disciplinary proceeding now. The following exchange ensued:

Q: Can you assist us when you may be in a position to provide an update as to when he could participate, time frame?

A: Yeah, I’d like to see him again in a month or so. I think he’s still in counselling. And I’m trying to get a psychiatric referral done for Mr. Welsh. But yeah, maybe in a few months maybe I will talk to him and see what can be done, yes, and see if there is any improvement. \*

[65] Under cross-examination, Dr. Nayar, elaborated regarding a psychiatric referral:

Q: With respect to the mental health issues, you are not the primary person treating those issues, is that right?

A: I’m not an expert on psychiatry, yeah, but I’m a family physician. I tend to deal with these. But yes, if situations don’t improve, then I often will get help, ask for help.

Q: So you were talking just a few moments ago about getting a referral to a psychiatrist for His Worship?

A: That’s right, yes. Yes.

Q: And why is it that that hasn’t happened yet?

A: You know, and I’m so sorry, if I may just look through the charts. When I had written the letter I’d made a suggestion that I think from the time I’d met Mr. Welsh ‘til now, if things were not better I think we should get a psychiatrist involved.

JUSTICE KOZLOFF: Can I just interrupt to ask you, when was that?

A: I’m so sorry. Yes. I would think, so I wrote the letter in July. So it would have been at that stage in July. So often we don’t get a response very quickly and often we just have to re-apply or re-refer. But it was sent sometime in July, early August.

MR. SMITH: To whom?

A: August 27<sup>th</sup>, my apologies. August 27<sup>th</sup>.

JUSTICE KOZLOFF: I'd like a little more detail.

A: Okay. Yes.

JUSTICE KOZLOFF: So in August of 2020, what did you do?

A: So August 27, a referral was sent off to the Joseph Brant Hospital, and it was sent off to us for a review of Mr. Welsh, if we could.

JUSTICE KOZLOFF: A review?

A: A referral was sent to have Mr. Welsh seen to help us with his management.

MR. SMITH: Does your letter, Dr. Nayar, asking for the referral say why you are asking for the referral?

A: Yes. Yes. We've had issue – usually what we do is we will enclose all the forms that he filled in for us, the PHQ forms, et cetera. So we would send them in with underlying reasons and ask for a referral. As I said, the only problem is, and I'm looking for that, the only problem is I know sometimes if there's any legal issues, the psychiatrists tend to not see or they tend to defer seeing patients. And then that becomes a problem because then we need to find – we have a difficulty finding psychiatrists in our community who will do that for us.

[66] Dr. Nayar was then asked about the causes of His Worship's mental health issues and the psychotherapy he has been receiving:

Q: Is it your view, Dr. Nayar, that these mental health issues are largely caused by or related to His Worship's legal proceedings?

A: I think there's two issues, if I may. One is, of course, the legal proceedings have caused a lot of stress from my discussions with him. And then I believe and I think as far as the son, that has been a major, major impact on him as well. Seeing his son go through the illness and of course him dying in November, I think, of last year. And it sort of compounded everything, and that's what made the symptoms a lot worsen. (sic)

Q: And I take it that's why His Worship is getting psychotherapy?

A: Yes. That's right. Yeah.

Q: But he's not getting that psychotherapy from you, it's from someone else. Right?

A: Right. I believe it's through EAP, employee assistance program. I think



that's what it's through. I don't have the information from the therapist.

Q: So you can't help us with whether or not that's going well or otherwise?

A: No, I can't. I'm so sorry. I can't. I mean when I last talked to him, things weren't any better.

Q: And you have not prescribed any medication for any mental illness or psychiatric condition?

A: No. No.

[67] When Dr. Nayar explained that he had diagnosed His Worship "in March, April, when we first got the forms filled in", this exchange followed:

Q: And that diagnosis was made on the basis of His Worship's self report in those forms?

A: So two issues, sir. One was my initial meeting with him, getting his symptoms. So it's really to do with my clinical judgment on that time, plus the forms that he filled in, which are fairly well sort of validated for various population groups, the PHQ and the GAD scales. So they were both filled in by him. And when you put them together, you sort of come with the score of a moderate depression with severe anxiety.

[68] Dr. Nayar added that depression and anxiety are often linked.

[69] When Presenting Counsel suggested to Dr. Nayar that depression is not an uncommon condition in our society and that there are people with depression who operate as successful human beings, Dr. Nayar went on to explain that "when you look at the scales, when you look at the concentration, etcetera, that's where I wrote the letter, because he scores very highly on those issues, poor concentration and memory."

[70] When Presenting Counsel asked him if he has conducted any other testing of His Worship's ability to concentrate, Dr. Nayar responded that: (a) he was not aware of any specific testing for concentration that one can do; and (b) usually you want to give three or four months of therapy to see what the benefits are before you go further. He agreed with the suggestion that a psychiatrist – to whom he hoped to make a referral for His Worship – might look into his ability to concentrate and "help us with it".

[71] With respect to his relevant contact with the Applicant, Dr. Nayar said that he had seen him in early March "when we did all the assessments", seen him again in April (which we take to be a reference to their telephone conversation), and "... then the next time we saw each other was in July when he had wanted a letter from me, if I could help him with a letter, if I could write a letter. And then that's when this decision was made to

go further.” (We take “this decision” to be a reference to writing the letter to Joseph Brant Hospital seeking a psychiatric referral for His Worship).

[72] With regard to His Worship’s difficulties with memory, Dr. Nayar acknowledged that he had not tested the Applicant’s memory. He advised that depression is related to psychomotor retardation, and then explained why no testing had been done:

People slow down, think slowly, and don’t put things together. That’s part of depression...

The problem with COVID is to get people in and do testing. At the moment, we’re trying not to see patients in the office, to spend the time to do what they call an MCQ test, a memory test.

[73] Dr. Nayar acknowledged that he has no idea how long His Worship’s symptoms will persist.

[74] Asked if he knew that His Worship “has also been under the care of Dr. Angela Carol, Dr. Nayar replied:

A: Yes, I believe so. I believe he had – from what I know she’s a friend and – so I think he’s seen her on and off, yes.

[75] When it was put to him that Dr. Carol had provided a letter in March 2020 in which she recommended that His Worship take a leave of absence from six to twelve months, Dr. Nayar said that was a recommendation he would have endorsed in March of 2020.

[76] With regard to His Worship’s high blood pressure, Dr. Nayar said that it was first diagnosed in January 2020 and that it was being well-managed by medication.

[77] With respect to His Worship’s osteoporosis, Dr. Nayar said that “he’s had that for a while” and that “in January when he ended up I think in hospital, there was some x-rays done. And that’s when they noticed the cracks in the bone and we followed up with that.”

[78] Dr. Nayar then explained that His Worship “went in with chest pains in January to the hospital.” Asked if there have been any issues related to chest pains since January he replied, “Not that I’m aware of, no.”

[79] Upon completion of the examinations of the witness by counsel, Justice of the Peace Diaz asked Dr. Nayar some follow-up questions:

Q: Dr. Nayar, you told us that you saw His Worship Welsh in March of 2020. Is that correct?

A: Yes...

Q: ...And at that time, you had him do two questionnaires, the PHQ and the GAD?

A: And something called a – and sorry, this, I should have mentioned. This third one is called an MDQ which is a mood disorder thing, yes.

[80] Dr. Nayar explained that the GAD is a “general anxiety sort of scale” and that the PHQ (Personal Health Questionnaire) “is basically a scale that is done for depression”.

[81] Justice of the Peace Diaz asked Dr. Nayar how often he has seen His Worship in person since March 2020. Dr. Nayar replied that he had telephoned His Worship in April i.e. “Once I got the forms in, I called him back...” and that he had seen His Worship again on July 27<sup>th</sup>.

[82] Dr. Nayar telephoned His Worship in April when he got the questionnaire results and saw the Applicant in July 2020 when he provided His Worship with the requested letter in support of the motion for adjournment.

[83] While it is apparent from his testimony that he met with His Worship in July to provide him with the letter dated July 29<sup>th</sup>, 2020, it is not clear whether Dr. Nayar has seen or spoken to His Worship for the purpose of assessing, reassessing, or updating his medical condition – in particular his depression and anxiety – since March/April of 2020.

[84] Dr. Nayar has provided no treatment and prescribed no medication to His Worship for anxiety or depression. He has not (as yet) made a referral for His Worship to be assessed or treated by a qualified mental health professional.

[85] We are told by Dr. Nayar that he believes His Worship is or has engaged in some form of psychotherapy through an employee assistance program. We are not told the basis for that belief. It is apparent that Dr. Nayar – His Worship’s family physician – does not know who is providing His Worship with psychotherapy and that Dr. Nayar has not been provided with any reports, updates, or even confirmation that it is ongoing.

[86] More to the point, the Panel has not been provided with any confirmation or details regarding the type of psychotherapy, the treatment plan, the name of the provider, the start date, the frequency of the sessions, the quality of His Worship’s participation, or the prospects for improvement.

[87] The mental health issues identified by Dr. Carol in early 2019 and referenced by Dr. Nayar in his letter of July 29, 2020 and his testimony on September 28, 2020 appear to be based on the self-reporting of His Worship and the clinical judgment of his family physician. As I understand Dr. Nayar’s testimony, the PHQ, MDQ, and GAD are all questionnaires that elicit answers from the subject to the questions they pose.

[88] His Worship's depression and anxiety were apparently driven by a combination of the effects on him of the judicial discipline hearing that concluded in latter part of 2019 (i.e. the first hearing) and the illness and death of his son.

[89] It is submitted that the medical evidence tendered on his behalf demonstrates that His Worship's memory and concentration – and therefore his ability to prepare for and participate in an (as yet) unscheduled hearing – are adversely impacted by his mental health diagnoses of depression and anxiety, as well as by the pain associated with his osteoporosis and spinal fractures.

[90] It is also submitted that the evidence also suggests that his physical health may be jeopardized by the adverse effects of the stress of a hearing on his hypertension.

## ANALYSIS

### THE GOVERNING PRINCIPLES

[91] The decision of a tribunal to grant (or deny) an adjournment is discretionary.

[92] In coming to our decision, we must balance fairness to the Applicant with the public interest in the timely and efficient administration of justice.

[93] In *Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484, Weiler J.A. sets out a non-exhaustive list of procedural and substantive factors to consider in deciding whether to grant or refuse an adjournment, at paragraph 37:

A non-exhaustive list of procedural and substantive considerations in deciding whether to grant or refuse an adjournment can be derived from these cases. Factors which may support the denial of an adjournment may include a lack of compliance with prior court orders, previous adjournments that have been granted to the applicant, previous peremptory hearing dates, the desirability of having the matter decided and a finding that the applicant is seeking to manipulate the system by orchestrating delay. Factors which may favour the granting of an adjournment include the fact that the consequences of the hearing are serious, that the applicant would be prejudiced if the request were not granted, and a finding that the applicant was honestly seeking to exercise his right to counsel, and had been represented in the proceedings up until the time of the adjournment request. In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered.

[94] To that list I would add the relevant considerations enumerated by Perell J. of the

Ontario Superior Court of Justice in *Ariston Realty Corp. v. Elcarim*, 2007 CanLII 13360 (ON SC) at paragraph 34:

- the overall objective of a determination of the matter on its substantive merits;
- the principles of natural justice;
- that justice not only be done but appear to be done;
- the particular circumstances of the request for an adjournment and the reasons and justification for the request;
- the practical effect or consequences of an adjournment on both substantive and procedural justice;
- the competing interests of the parties in advancing or delaying the progress of the litigation; and
- whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused.

#### **APPLICATION OF THE PRINCIPLES TO THIS CASE**

[95] Among the relevant factors considered by the Panel on this application are the following:

1. the fact that previous adjournments that have been granted to the applicant;
2. the fact that the consequences of the hearing are serious;
3. the applicant's reasons for being unable to proceed;
4. the evidence tendered in support of the motion to adjourn; the length of the requested adjournment and the practical effect or consequences of an adjournment on both substantive and procedural justice;
5. the overall objective of a timely determination of the matter on its substantive merits;
6. whether or not the applicant will be prejudiced if the request is not granted; and
7. the principles of natural justice.

[96] We are not unsympathetic to His Worship’s personal loss or his medical condition.

[97] However, the information provided to the Panel regarding his mental health issues is relatively thin, largely unsubstantiated, and for the most part stale-dated.

[98] Dr. Nayar candidly acknowledges that he is not an expert in psychiatry, and that if “situations don’t improve”, he will often seek the assistance of a psychiatrist.

[99] We have not been provided with a psychiatric report from a qualified mental health expert to address the causes, degree of severity, and potential effects of His Worship’s depression and anxiety on his ability to prepare for and participate in a hearing.

[100] Nor have we been provided with any evidence (or even information) that the Applicant is receiving treatment from a qualified mental health professional to address his depression and anxiety, or that the Applicant has been prescribed and is on medication to treat his depression and/or his anxiety.

[101] Any judicial officer who is the subject of a judicial discipline hearing would logically experience stress and anxiety.

[102] In the result, the evidence provided to the Panel is insufficient to justify the result sought by His Worship, which is in effect an adjournment *sine die*.

[103] Because of a number of factors including the COVID-19 pandemic and the various schedules of the participants, seven months have passed since the Notice of Motion to adjourn the second hearing was served in March of 2020.

[104] If we take the recommendation contained in Dr. Carol’s letter of March 10, 2020 on its face, i.e. that a six to twelve month leave of absence was appropriate at that time, and we apply the reasonable timeline for setting dates posited by Mr. Smith in his submissions, then setting dates for a hearing in early 2021 - it would likely be February 2021 at the earliest before this hearing could commence - is in keeping with that recommendation.

[105] The complaints in this matter are contained in the Notice of Hearing dated February 28, 2019. The allegations concern events that are now two years and more removed.

[106] We note that His Worship was “non-assigned” effective September 20, 2018 pending the final disposition of the complaint(s) after being so advised by (then) Regional Senior Justice Nicklas on September 19, 2018, and that his “non-assigned” status has not changed.

[107] The objective of the disciplinary process to preserve (and to restore if necessary)

public confidence in the judiciary.

**[108]** Balancing fairness to the Applicant with the public interest in the timely and efficient administration of justice, we are satisfied that is in the interests of the administration of justice that hearing dates be set at this time.

**RULING**

[109] The motion for adjournment is denied.

Dated at the city of Toronto in the Province of Ontario, October 15, 2020.

HEARING PANEL:

The Honourable Justice Neil Kozloff, Chair

Her Worship Kristine Diaz