

# **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 Six Complaints about the Conduct of Justice of the Peace Robert E. Whittaker**

**Before:** The Honourable Justice Ralph Carr  
Justice of the Peace Kathleen Bryant  
Dr. Michael Phillips, Community Member

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

## **DECISION ON THE REQUEST FOR A RECOMMENDATION FOR COMPENSATION OF LEGAL COSTS**

### **Counsel:**

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

Mr. Brian Irvine  
Barrister & Solicitor

Counsel for His Worship Robert E. Whittaker

## DECISION ON THE REQUEST FOR A RECOMMENDATION FOR COMPENSATION OF LEGAL COSTS

### Background

1. A hearing was ordered, pursuant to section 11.1 of the *Justices of the Peace Act* (the “*Act*”) into six complaints concerning the conduct of Justice of the Peace Robert Whittaker of the Ontario Court of Justice. The decision to order a hearing was taken following the investigation of the complaints in accordance with the Procedures of the Justices of the Peace Review Council (JPRC). A three-person complaints committee, consisting of a judge, a justice of the peace, and a community or lawyer member, investigated the complaints and ordered, pursuant to section 11(15)(c) of the *Act* that a formal hearing be held into all of the complaints and that they be heard together.
2. Pursuant to section 11.1(1) of the *Act*, then Chief Justice Annemarie E. Bonkalo, Chair of the Review Council, established this Hearing Panel to preside over the matter.
3. On December 16, 2014, Presenting Counsel, Ms. Marie Henein, filed the Notice of Hearing setting out the allegations about His Worship Whittaker’s conduct which are summarized below:

His Worship demonstrated a pattern of conduct that gave rise to a perception of bias and partiality; abused his judicial power by acting in a punitive and arbitrary manner to punish people in a manner inconsistent with the law; and acted in a manner unbecoming of a justice of the peace, causing a loss of confidence in his ability to act impartially and with integrity.

4. Counsel for His Worship, Mr. Brian Irvine, estimated that four days were required for the hearing. Presenting Counsel estimated that two days would be required. Three dates were scheduled for evidence, commencing on March 25, 2015. A pre-hearing conference was also ordered. The pre-hearing conference took place on January 21, 2015.
5. On January 28, 2015, His Worship submitted a letter to the Associate Chief Justice Coordinator of Justices of the Peace confirming his retirement from the office of Justice of the Peace, effective March 15, 2015. In the letter, he stated that he would not be revoking the letter of retirement.
6. The public interest in finality and certainty in the complaints process required the hearing date to be maintained until the retirement took effect. The retirement came into effect on March 15, 2015, less than two weeks before the dates scheduled for evidence to be presented to the Hearing Panel. On March 15<sup>th</sup>, with the termination of judicial office, the Panel lost jurisdiction to impose a

disposition under section 11.1 of the *Act*. After the retirement took effect, the dates that had been scheduled for the hearing were vacated.

7. Mr. Whittaker has submitted a request pursuant to section 11.1 of the *Act* for a recommendation to the Attorney General that he should be compensated for the costs of legal services incurred in connection with the hearing. Those section state:

Compensation

11.1(17) The panel may recommend that the justice of the peace be compensated for all or part of the cost of legal services incurred in connection with the hearing.

Maximum

(18) The amount of 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.

8. Mr. Whittaker has requested that he be compensated in the amount of \$5,737.50 for legal fees incurred for the hearing process, plus HST, for a total amount of \$6,482.87. He submitted in a letter, dated May 29, 2015 that the amount is fair and just. The legal services were set out in the account filed on July 16, 2015.
9. Presenting Counsel filed written submissions on August 5, 2015. In the submissions, they raised the question as to whether a Hearing Panel loses jurisdiction to consider a request for a recommendation for compensation of legal costs after a justice of the peace has retired from office. In their submissions, Presenting Counsel provided us with arguments of statutory interpretation that support the logical conclusion that a Panel has jurisdiction to recommend compensation even where the subject justice of the peace has retired. The costs were incurred while the justice of the peace was in office and it is our view that we have jurisdiction to consider the request and to make a recommendation under sections 11.1 (17) and (18).
10. The Panel considered the guidelines set out in the JPRC hearing in 2013 about the conduct of His Worship Tom Foulds. The Panel also considered the guidelines set out by the Hearing Panel that presided over the JPRC hearing about the conduct of former Justice of the Peace Santino Spadafora in 2014 and 2015 that apply in circumstances where a hearing has been ordered but the justice of the peace has retired before a decision was made, based on the merits, as to whether a justice of the peace's actions constituted judicial misconduct.
11. We agree the following principles that were recognized by the Hearing Panel in *Re Foulds* (JPRC, 2013) and followed in *Re Spadafora* (JPRC, 2015):
  - (i) Respondents to these hearings should be encouraged to retain counsel.

- (ii) Having complainants and other witnesses cross-examined by counsel, rather than by the judicial officer who is the subject of the complaint proceedings, adds to procedural fairness and the dignity of the process. It also avoids the unseemliness of a judicial officer directly pleading his case to his judicial peers.
  - (iii) Judicial officers should be fairly and adequately represented, but not at the cost of the administration of justice as a whole. A Hearing Panel of the JPRC must be mindful of the role of the complaints process in preserving and restoring public confidence in the judiciary, and of the fact that the public expects careful scrutiny when a request is made for public funds to pay the costs of a judicial disciplinary hearing.
- 12. In this case, the allegations were serious. There were six complaints. The Notice of Hearing, filed as Exhibit One, contains allegations that His Worship acted in a biased and partial manner that gave rise to a perception of bias and partiality; that he abused his power as a justice of the peace by acting in a punitive and arbitrary manner; that he acted in a manner inconsistent with the framework of the law and contrary to the interests of justice and the rights of the parties before the court; and, that he acted in a manner that was unbecoming of a justice of the peace. It is possible that following a hearing there would have been a finding of judicial misconduct and there may have been no recommendation for compensation. On the other hand, the process did not proceed to the stage where evidence was called and there was no determination on the merits.
- 13. We have concluded that a reasonable person properly informed would understand the principles that justices of the peace should be fairly and adequately represented at judicial disciplinary hearings and that having complainants and other witnesses cross-examined by counsel, rather than by the judicial officer who is the subject of the complaint proceedings, adds to procedural fairness and the dignity of the process.
- 14. Counsel is a senior and experienced lawyer. The time indicated for most of the legal services that have been itemized is modest. The exception is a general item indicating that 23 letters and/or emails were sent or received. That item is not well particularized, no dates are indicated in support of that aspect of the account and the number of pieces of correspondence appears to us to be excessive.
- 15. The most serious outcome that can occur after a full hearing is a removal under section 11.2 of the *Act* of the justice of the peace from office. The result of the retirement was the same: Mr. Whittaker is no longer a justice of the peace. We agree with Presenting Counsel's submission that there should be some recognition of the costs saved by his retirement. Members of the public would recognize that the retirement prior to the hearing of evidence resulted in the avoidance of costs. There would have been two or three days of evidence,

additional time and expense for our deliberations, and if there were findings of misconduct, further dates to hear submissions on disposition and impose the appropriate disposition(s).

16. However, as Presenting Counsel submitted, His Worship chose a retirement date that was post-dated to a time less than two weeks before the hearing date; members of the public could perceive that step as an attempt to manipulate the hearing process. We are mindful of the concern raised by Presenting Counsel that the compensation regime should not be applied in such a way that it can be perceived as encouraging judicial officers to retire at the latest opportunity – and thereby continue to receive a salary, benefits and accumulate a pension as long as possible – while ultimately avoiding a public hearing where evidence can be presented about the allegations and a determination would be made as to whether there was judicial misconduct. Recommendations for compensation should take into account whether the retirement is made at the earliest opportunity, or at least in a timely manner that would not contribute to a loss of public confidence.
17. Because of the delayed retirement date of March 15, 2015, uncertainty remained and finality was not yet achieved until that date. The Hearing Panel and Presenting Counsel had to continue to be available for the hearing, given that the retirement had not fully taken effect.
18. The Panel has concluded that the public should not bear the cost of legal expenses incurred after December 16, 2015. In our view, His Worship could have retired and left office at an earlier opportunity and avoided unnecessary expenditures of public funds. By December 16<sup>th</sup>, he had received the Notice of Hearing and had full disclosure of the evidence that would be called if the hearing proceeded. The account shows that his lawyer had carried out legal research and spoken with him a number of times about the matter prior to that date.
19. For all of those reasons, we are recommending to the Attorney General that Mr. Whittaker be compensated in the amount of \$4,668.75 for legal fees incurred up to and including December 16, 2014, plus HST, for part of the cost of the legal services provided by Mr. Irvine in relation to the hearing ordered into the complaints alleging judicial misconduct. We are not recommending compensation for legal services incurred after that date or for 2.3 hours claimed for 23 pieces of correspondence. Our recommendation is intended to balance the principles set out above while being mindful of the role of the complaints process in preserving and restoring public confidence in the judiciary.

Dated: September 8, 2015.

HEARING PANEL:

The Honourable Justice Ralph Carr, Chair  
Justice of the Peace Kathleen Bryant

Dr. Michael Phillips, Community Member