

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 Claire Winchester**

Before: The Honourable Justice Martin Lambert, Chair
Her Worship Kristine Diaz, Justice of the Peace Member
Ms. Leonore Foster, Community Member

**DECISION ON THE MOTION FOR AN ORDER
THAT PARTICULARS OF THE COMPLAINT ARE
OUTSIDE THE JURISDICTION OF THE HEARING PANEL**

Counsel:

Mr. Matthew Gourlay
Presenting Counsel

Mr. Donald Bayne
Ms. Michelle O'Doherty
Counsel for Her Worship

- [1] On October 15, 2019, Her Worship filed a motion for an Order that some of the allegations, set out in paragraphs 2B and 2D(B) of the Notice of Hearing, filed as Exhibit One in the hearing, are outside the jurisdiction of this Hearing Panel.
- [2] Given the time constraints on October 15, 2019, we provided brief oral reasons for dismissing the motion and indicated that we may supplement our reasons in writing later in the hearing process. These are our written reasons.
- [3] The timing of this pre-hearing motion was unfortunate. An earlier date prior to the date scheduled for the evidence to begin should have been sought for argument in order to allow us to provide more fulsome reasons prior to the commencement of the hearing.
- [4] The Notice of Hearing focuses on two separate allegations which include:
1. An allegation that Her Worship Winchester abandoned her judicial duties on May 23, 2018 when she failed to remain in Intake Court in L'Original, with the result that a member of the public could not have his bail conditions varied; and
 2. An allegation that Her Worship failed to uphold her judicial duties on June 27, 2018 when she closed bail court early in Cornwall with the knowledge that there was someone in custody, whom, the Crown Attorney advised the court, was releasable.
- [5] The Notice of Hearing alleges that Her Worship's conduct during the two incidents set out show a pattern of conduct that was inappropriate. It alleges that these two incidents display:
- “a flippant, dismissive attitude toward the liberty and rights of persons appearing before the court; a disrespect for the important role of the justice of the peace in the administration of justice and a disregard for the impact of judicial conduct on persons in the justice system and in public confidence in the judiciary”.
- [6] In the Notice of Motion, Her Worship Winchester states that paragraphs 2B and 2D(b), which form part of the Notice of Hearing and which deal with the June 27th allegation, are outside of the jurisdiction of the Council because what Her Worship did on June 27, 2018 constituted judicial decision-making in open court proceedings.

- [7] Her Worship takes the position that closing court early, after considering the Cornwall bail protocol, the *Criminal Code* and the submissions of Crown Counsel, amounted to “a decision of the justice of the peace” which this Panel has no jurisdiction to review.” She made the decision within the scope of the constitutionally-protected judicial independence which she enjoys, and which judicial independence includes her decision-making responsibilities.
- [8] Rule 4.4 of the JPRC Rules of Procedure provides as follows:
- “The jurisdiction of the Council is limited to the investigation and review of complaints about conduct. The Council does not have the legal authority to change a decision of a justice of the peace.”
- [9] Her Worship argues that this Panel does not have jurisdiction to deal with the June 27, 2018 allegations set out in the Notice of Hearing because she made a “judicial decision” which is subject to review by an appellate court if, in fact, she was wrong.
- [10] Her Worship’s argument is that this Panel has no jurisdiction to deal with this part of the complaint because the allegation really attacks a judicial decision which she made, and not her conduct.
- [11] The Supreme Court of Canada’s decision in *Moreau-Bérubé v. New Brunswick (Judicial Council)* [2002] 1 SCR 249 is important because it addresses in detail the tension that exists between judicial accountability and judicial independence. It makes it clear that “while acting in a judicial capacity judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen.”
- [12] Madame Justice Arbour reiterates that judicial independence is constitutionally protected, and she explains why at paragraph 46 of her Judgment:
- “yet it also relates to constitutional guarantees of judicial independence which includes security of tenure and the freedom to speak and deliver judgments free from external pressures and influences of any kind.”
- [13] Essentially, a judicial officer is entitled to make good faith legal errors or decisions without having to fear discipline proceedings. A judicial officer must not feel pressure or constraint from any outside influences when making decisions; that is the core of judicial independence.

- [14] However, judicial independence does not mean that a judicial officer may say or do anything that he or she wants as part of the decision-making process in open court; there are constraints and sometimes the line is crossed into the sphere of judicial misconduct, which is what occurred in *Moreau-Bérubé* when the judge engaged in a long diatribe against the people of the Acadian Peninsula as part of a sentencing hearing. The Supreme Court of Canada concluded that those comments, even though a part of the decision-making process, amounted to judicial misconduct.
- [15] The Supreme Court of Canada recognized that many complaints received by various judicial councils across the country relate to decision-making and thus are reviewable by an appellate court and not a judicial council. This has been referred to as “the right to be wrong”. It goes on to say, however:
- “There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council.”
- [16] In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, Arbour, J. explains that a discretionary judicial decision is not immune from review for judicial misconduct because an appeal right exists (at para. 58):
58. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.
- [17] Accordingly, the possibility of an appellate remedy for a particular judicial act does not automatically or necessarily divest the judicial discipline authority of jurisdiction to review the same conduct.
- [18] Cases such as *Re Chisvin* (OJC, 2012), *Re Johnston* (JPRC, 2014) and *Re Welsh* (JPRC, 2018) are examples where it has been found that judicial decisions made in court may be a component of findings of judicial misconduct.

- [19] In *Re Chisvin*, His Honour dismissed all charges on his docket for want of prosecution, as Crown Counsel was several minutes late returning after a break and His Honour then closed court. He made a “judicial decision” in dismissing all charges for want of prosecution but, in the particular context, was still found to have been engaging in judicial misconduct.
- [20] Some of the charges dismissed by Justice Chisvin resulted in both a successful appeal to the Court of Appeal and a finding of judicial misconduct by a Hearing Panel of the Ontario Judicial Council.
- [21] A similar situation occurred in *Re Johnston* where His Worship dismissed all charges on a POA docket for want of prosecution. Four of the charges were appealed successfully to the Ontario Court of Justice and there was a finding of judicial misconduct by the Justices of the Peace Review Council.
- [22] In *Re Welsh* (JPRC, 2018), after a defendant and his lawyer left the courtroom, the clerk informed His Worship that the next court date had been inadvertently scheduled for a Saturday. His Worship, without notice to the defendant or his lawyer, unilaterally decided to change the date to an earlier date. Consequently, the accused was arrested on a bench warrant for failing to appear in court on the new date and was held in custody.
- [23] Although the decision of Justice of the Peace Welsh to deal with a matter no longer before the Court could have been reviewed by a higher court, his conduct resulted in a hearing before the Justices of the Peace Review Council. The Hearing Panel found that His Worship acted in a careless and negligent manner and made a finding of judicial misconduct.
- [24] We agree with Her Worship to the extent that *Dunsmuir v. New Brunswick* [2008] 1 SCR 190, section 4.6 of the *Statutory Powers Procedures Act* and Rule 16.11 of the JPRC Rules of Procedure, taken together, make it clear that we should not embark on the hearing if we do not have the jurisdiction to do so.
- [25] Her Worship argues that Presenting Counsel bears the onus of establishing jurisdiction at this stage, notwithstanding the fact that this is her motion. We disagree. This is a motion brought by Her Worship and the onus is upon her to establish a lack of jurisdiction.
- [26] In the hearing, of course, Her Worship does not bear the onus of proving that there was no judicial misconduct. At this stage, however, Presenting Counsel can

simply rely on the allegations in the Notice of Hearing that the investigating complaints committee ordered to a hearing to argue that this Panel does have jurisdiction.

- [27] We do not agree with the position of Presenting Counsel that, in examining the issue of jurisdiction, we are in fact reviewing the decision of the complaints committee. The question of the Panel's jurisdiction has been raised, and it is up to this Panel to satisfy itself that it has jurisdiction before proceeding to a hearing.
- [28] Likewise, we do not agree with Presenting Counsel that we need to defer this decision until the end of the hearing so that we will have had the benefit of hearing all of the evidence.
- [29] Her Worship argues that this is not a motion for summary judgment or speedy justice but, in fact, a motion that deals only with jurisdiction. She argues that she is not seeking a decision on the merits of the application; that would be a decision that the Panel would have to make at the end of the hearing, if it has jurisdiction to proceed to a hearing. She argues that we have no jurisdiction to proceed to a hearing because her conduct in-court was conduct in which she engaged as part of her decision-making responsibilities.
- [30] While she argues that this is not a decision on the merits, and we agree, she nevertheless examines in detail what happened in court on June 27, 2018 to come to the conclusion that her conduct on that date could not amount to judicial misconduct. In a sense, this is circular reasoning.
- [31] We are by no means deciding the case on its merits today but in light of *Moreau-Bérubé*, *Chisvin*, *Johnston* and *Welsh*, we agree with the complaints committee to the extent that the allegations in paragraph 2B and 2D(b) are allegations which, if supported by the evidence at a full hearing, could result in findings of judicial misconduct. It is obviously premature to determine whether Her Worship engaged in judicial misconduct.
- [32] In our view, we need not defer our decision on jurisdiction to the end of the hearing. We have evidence from the transcript filed by Her Worship on her motion that requires a determination of whether Her Worship's actions, including closing court early on June 27, 2018, could, in the circumstances, be found to amount to judicial misconduct.
- [33] We are satisfied that there is jurisdiction to embark on a hearing into this question.

- [34] A justice of the peace is not immune from a judicial misconduct finding just because his or her conduct was in-court conduct that was part and parcel of the decision-making process. As we discussed above, sometimes the line is crossed, and we have already referred to examples of that with *Moreau-Bérubé*, *Chisvin*, *Johnston* and *Welsh*. It is for this Hearing Panel to decide, after it has had the benefit of hearing all the evidence, whether the line has in fact been crossed in this case and whether there should be a finding of judicial misconduct.
- [35] We agree that a decision on jurisdiction and a decision on the merits are two distinct matters and we also agree with Her Worship that she is entitled to a decision on jurisdiction before embarking on a hearing. As we have said, we are by no means deciding the merits today; we are only deciding that, based on what is contained in the transcript itself, which is self-explanatory, there may be a path to a finding of judicial misconduct depending on the evidence which we will hear.
- [36] As Her Worship argues in her factum, context is important, and the totality of the evidence will provide us with the context in which she acted on June 27, 2018.
- [37] In addition, there is an allegation in the Notice of Hearing that Her Worship engaged in a pattern of conduct, showing “a flippant, dismissive attitude toward the liberty and rights of persons appearing before the court; a disrespect for the important role of the justice of the peace in the administration of justice and a disregard for the impact of judicial conduct on persons in the justice system and in public confidence in the judiciary”. It is for this Hearing Panel to decide whether the evidence supports a finding that on May 23, 2018 and June 27, 2018, Her Worship’s conduct constituted a pattern of judicial misconduct.
- [38] For these reasons, Her Worship’s Motion is dismissed.

Dated at the city of Toronto in the Province of Ontario, November 22, 2019.

HEARING PANEL:

The Honourable Justice Martin Lambert, Chair

Her Worship Kristine Diaz, Justice of the Peace Member

Ms. Leonore Foster, Community Member