ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF a complaint respecting
The Honourable Madam Justice Lesley M. Baldwin

The Ontario Judicial Council (the "Council"), pursuant to sections 51.4(18) and 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended, conducted a hearing in relation to The Honourable Madam Justice Lesley M. Baldwin on April 3, 2002.

In addition to the evidence and the oral submissions of counsel on that date, written submissions were filed by Presenting Counsel, Mr. Hunt, and Counsel for Madam Justice Baldwin, Mr. Levy.

The Facts

An agreed statement of facts was filed at the hearing.

Those facts are summarized as follows:

In November of 1998, the Attorney General, on behalf of the Government of Ontario, announced the establishment of a Joint Committee on Domestic Violence ("the Committee"). The Committee was struck in response to the recommendations arising from the Coroner's Inquest into the murder of Arlene May, a victim of domestic violence, and the suicide of Randy Iles, the perpetrator of that violence.

The Attorney-General Charles Harnick established the following terms of reference for the Committee:

The Joint Committee on the Inquest touching the deaths of Arlene May and Randy Iles is established in accordance with the following terms of reference:

1) To review the jury recommendations and advise the Attorney General on their implementation which will include:

a) providing advice to the Attorney General on setting priorities relating to the creation of domestic violence services and programs;

b) providing advice to the Attorney General on the extent to which existing and planned programs are in keeping with the jury's recommendations;

c) providing advice to the Attorney General on the extent to which existing and planned programs serve to provide a seamless domestic violence program across Ontario;

d) providing advice to the Attorney General on mechanisms required to provide ongoing monitoring of the programs and services developed in response to the jury's recommendations.

2) To consult with experts, victims, members of culturally and regionally diverse groups and other stakeholders and service providers as required to fulfill these terms of reference.

In the fall of 1998, Attorney General Harnick contacted then Chief Judge Sidney Linden and specifically requested that Chief Judge Linden permit Justice Baldwin to serve as Chair of the Committee. After speaking with Justice Baldwin, Chief Judge Linden gave his permission for Justice Baldwin to take a temporary leave of absence as a sitting Judge to Chair the Committee. Justice Baldwin accepted the position.

Former Chief Judge Sidney Linden, former Associate Chief Judge – Coordinator of Justices of the Peace Marietta Roberts and former Regional Senior Judge Anton Zuraw met with Justice Baldwin to discuss the request that she serve as Chair of the Committee. They cautioned her as they would caution any judge in her position that she would have to be careful with respect to what she said as a member and as Chair of the Committee because of her role as a judge.

Justice Baldwin was granted a temporary leave of absence as a sitting judge of the Ontario Court of Justice from January 1999, for a period of approximately six months, and then extended to nine months, in order to serve as Chair of the Committee. Justice Baldwin's leave of absence commenced on January 8, 1999 and ended in mid-August 1999. During this period the Ministry of the Attorney General provided special funding to the Ontario Court of Justice to support a *per diem* sitting judge to replace Justice Baldwin.

In addition to Justice Baldwin, the Committee was composed of community experts in the field of domestic violence prevention and senior government officials. The community experts on the Committee were Marilyn Struthers, Vivien Green, Dr. Peter

Jaffe, and Roz Roach. The Government members of the Joint Committee were Assistant Deputy Ministers from the Ministry of the Attorney General, the Ministry of the Solicitor General, the Ministry of Correctional Services, the Ministry of Community and Social Services, and the Ontario Women's Directorate.

In fulfilling its terms of reference, the Committee worked with staff of various government ministries, heard about a wide range of domestic violence initiatives that are currently in place, and provided advice on initiatives that were in the process of development or implementation. The Committee consulted with a number of stakeholders and invited various community experts to meetings to share their knowledge and insights regarding specific jury recommendations.

The Committee's final report (the "Report") was signed and was formally submitted to Attorney General James Flaherty on behalf of the Government of Ontario, on August 12, 1999.

The Report was signed by the members of the Committee including Justice Baldwin. Justice Baldwin signed the report personally above the following "Judge Lesley Baldwin (Chair)".

The Report identified strategies for implementing the 213 recommendations of the jury in the May/Iles inquest, organized under four categories: 1) Essential Common Services; 2) Effective Justice System Response; 3) Achieving Seamlessness; 4) Funding and Planning Priorities.

Subsequent to the submission of the Report, Justice Baldwin returned to her duties as a sitting judge and the Ministry of the Attorney General ceased providing special funding to the Ontario Court of Justice to support Justice Baldwin's replacement.

In or about September 1999, Justice Baldwin sought permission from the Attorney General to refer to the Report at an international conference on domestic violence. The Assistant Deputy Minister of Family Justice Services, Angela Longo, granted permission to Justice Baldwin, on behalf of the Attorney General.

In or about May 2000, Justice Baldwin contacted the Acting Director of the Domestic Violence Work Team at the Ministry of the Attorney General, Linda Spears, seeking an electronic copy of the Report. Justice Baldwin indicated that she understood

that funding was going to be sought from the Trillium Foundation for the printing of the Report in an easy to read format.

By letter dated July 5, 2000, four former members of the Committee, Roz Roach, Marilyn Struthers, Vivien Green and Dr. Peter Jaffe, wrote to Justice Baldwin as ". . . community members of the Joint Committee on Domestic Violence to request immediate action." (the "July 5th Letter").

In the July 5th Letter the former members made the following request:

> "We respectfully request that you approach the Minister of the Attorney General as our Chair, in order to ask for two immediate actions:
>
> I The first initiative relates to a reprinting and re-release of 2,000 copies of the Joint Committee Report. (We would be prepared to undertake this reprinting with a printer in London, who has costed this work.) This action would include:
>
> - reformatting the report to make it easier to read, more user-friendly, with a new cover
> - reprinting 2,000 copies of the report in the new format
> - distributing the report to all organizations throughout the province affected by the implementation plan.
>
> II Secondly, we would like to explore the possibility of the Attorney General joining as a partner with a number of other charitable foundations and private sector companies to host a Summit on Woman Abuse in October/November 2000. Given the extensive research and documentation that has been contemplated in the last few years, yet the ongoing risk/abuse and murder that woman victims and their children continue to experience, the purpose of the Summit is to continue to highlight the issue of abuse and to promote actions and implementation of necessary changes. At this point we are looking at pulling together two representatives (one from the criminal justice system and one from a community service) from each of the 54 court catchments areas. The agenda for this Summit would be to discuss progress and issues related to woman abuse in each community in order to maintain a public focus on the critically important issue.

> We are very interested in creating an opportunity for collaborative analysis and planning to take place through a provincial gathering such as the summit and already know of a least one foundation that is very interested in participating.

By letter dated July 7, 2000, on judicial letterhead, Justice Baldwin forwarded the July 5th Letter to the Attorney General for Ontario, The Honourable James M. Flaherty. Justice Baldwin copied the letter to Trinela Cane, Murray Segal, Dr. Peter G. Jaffe, Vivien Green, Marilyn Struthers and Roz Roach. The letter states as follows:

> Re: Work of the Joint Committee on Domestic Violence
>
> Please find attached a letter I received from the community members of the Joint Committee on Domestic Violence.
>
> I endorse their requests and can add parenthetically, that I have observed no noticeable change in the manner in which counsel are approaching these difficult cases in the criminal courts in which I preside.
>
> I am willing to meet with you again to discuss the 5 year plan our committee prepared if this would be of assistance.

By letter stamped July 24, 2002, The Honourable James Flaherty responded to the July 7th Letter of Justice Baldwin. His letter states, in part:

> ". . . Thank you again for raising these issues with me. My scheduler, Agnes Vanya, will contact your office directly to arrange a meeting for us. I look forward to discussing the proposals put forward on behalf of the community members of the Joint Committee."

On or about July 31, 2000, Justice Baldwin and three members of the former Committee, Trinela Cane (ADM Planning and Policy, Solicitor General and Correctional Services and Executive Lead, Victim Strategy), Dr. Peter Jaffe and Vivien Green, met with Attorney General Flaherty and Joanna Kuras, the Executive Lead, Victim Services Division, Ministry of the Attorney General. The purpose of the meeting with to re-brief the Attorney General on the work of the Committee.

The Complaint

The complaint is that Madam Justice Baldwin acted in a manner which was incompatible with the due execution of the duties of her office, and by such misconduct brought the administration of justice into disrepute.

Specifically, the misconduct is described by Presenting Counsel Mr. Hunt to be the continuing contact with Executive Branch over matters of government policy affecting the area of criminal justice administration beyond the time frame during which permission had been granted for Justice Baldwin to assist the Executive Branch – thereby aligning herself with initiatives or strategies that were being presented by a particular group. Such conduct raised questions with respect to her ability to remain impartial and independent on issues that might come before her.

Misconduct

"Judicial Misconduct" is not defined in the *Courts of Justice Act*.

Presenting Counsel, Mr. Hunt, has submitted, in our view correctly, that a determination of judicial misconduct must be made by way of a legal analysis.

One source for such an analysis would be the *Principles of Judicial Office* – a document prepared under the auspices of the Chief Justice of the Ontario Court of Justice.

This document is not a set of rules. Rather it is a guide to assist judges in addressing ethical and professional dilemmas – as well as in assisting the public to understand the reasonable expectations which the public may have of judges in the performance of judicial duties and in the conduct of their professional lives.

At page 4, under the heading *The Judge in the Community*, it notes, under 3.2:

> Judges must avoid any conflicts of interest or the appearance of any conflict of interest in the performance of their judicial duties.

And the commentary states:

> Judges must not participate in any partisan political activity.

Both counsel also referred to *Ethical Principles for Judges* published by the Canadian Judicial Council.

It, too, is a set of "principles" which addresses ethical issues for judges as they live and work in their communities.

Under the heading *Impartiality* the "Statement" reads:

> Judges must be and should appear to be impartial with respect to their decisions and decision-making.

The third "General Principle" under that heading states:

> The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

Under the heading *Judicial Independence* the "Statement" is:

> An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and procedural aspects.

Commentary number five under that heading states as follows:

> Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence . . . Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

Commentary number eight reads:

> Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of

reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.

In keeping with these principles, and the commentaries, Mr. Hunt submits that the test for misconduct must be a broadly similar test to that which the courts have developed to protect judicial independence – because judicial independence and impartiality are the two cornerstones which underlie statements made by courts, and by judicial regulatory bodies in which the issue of conduct, or misconduct, is discussed.

Section 51.6(11) of the *Courts of Justice Act* authorizes the Council to make a broad range of dispositions if it finds that a judge has been guilty of misconduct.

The Council may:

a) warn the judge;
b) reprimand the judge;
c) order the judge to apologize to the complainant or to any other person;
d) order the judge to take specified measures such a receiving education or treatment, as a condition of continuing to sit as a judge;
e) suspend the judge with pay, for any period;
f) suspend the judge without pay, but with benefits, for a period up to thirty days; or
g) recommend to the Attorney General that the judge be removed from office (in accordance with section 51.8).

The issue is – what is necessary to constitute misconduct within the meaning of that section.

In two recent cases, *Therrien v. Minister of Justice et al.* (2001), 155 C.C.C. (3d) 1, and *Moreau – Berube v. New Brunswick (Judicial Council),* 2002 S.C.C. 11, the Supreme Court of Canada considered the requirements for judicial misconduct albeit in the context of statutes in other provinces that did not have the full range of alternative dispositions found in s. 51.6(11). Nonetheless, in our view the test set out by the Supreme Court is applicable to findings of misconduct under the Ontario Statute.

In *Moreau – Berube 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 have 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. It is important to recognize, however, that the manner in which complaints of judicial misconduct are addressed can have an inhibiting or chilling effect on judicial action. The process for reviewing allegations of judicial misconduct must therefore provide for accountability without inappropriately curtailing the independence or integrity of judicial thought and decision-making.

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.

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

It is only when the conduct complained of crosses this threshold that the range of dispositions in s. 51.6(11) is to be considered. Once it is determined that a disposition under s. 51.6(11) is required, the Council should first consider the least serious – a warning – and move sequentially to the most serious – a recommendation for removal – and order only what is necessary to restore the public confidence in the judge and in the administration of justice generally.

Has there been misconduct here?

The complaint relates specifically to the July 7th Letter from Madam Justice Baldwin, on judicial letterhead, to the Attorney-General.

The issue is therefore whether the "sending" of the letter and its contents are so seriously contrary to the impartiality, integrity and independence of the judiciary that they would undermine the public's confidence in the ability of the judge to perform the duties of her office, or the public's confidence, generally, in the administration of justice, and necessitate a disposition under s. 51.6(11) of the Act.

From the perspective of public confidence – these facts are relevant:

- Madam Justice Baldwin was given permission by her Chief Justice to serve as Chair of the Committee.
- Nothing in the Report submitted by the Committee indicates that specific sentences should be imposed in domestic violence cases.
- Nothing in the Report says that the presumption of innocence or the doctrine of reasonable doubt should be any different with respect to cases alleging domestic abuse.
- Nothing in the Report suggests changes to the rules of evidence to make it easier for the Crown to obtain a conviction.
- The July 7th Letter does not add anything to, or advocate anything different from the contents of the Report in relation to the administration of justice. The comment by Justice Baldwin that ". . . she has observed no noticeable change in the manner in which counsel are approaching these difficult cases in the criminal courts in which I preside" does not make reference to anything specific – either in relation to the contents of the Report, or to the administration of justice generally.
- Madam Justice Baldwin, through her counsel, has expressed her regret that the July 7th Letter has been interpreted by anyone as an indication that there would be partiality on her part in domestic abuse cases. She has stated to the Council that this was not her intention.

We note as well that Justice Baldwin did not intend that the letter receive public notice. It was not written with a view to bringing public pressure on the government. There is no effort by Justice Baldwin to politically embarrass the government for not acting on the Committee's report. The fact that the letter did reach the public domain was not the result of Justice Baldwin's actions. In our view, the writing of the letter was more in the nature of a reaffirmation by Justice Baldwin of the views earlier expressed in the Committee's report.

Having reviewed the specific details of the complaint from the perspective of the "reasonable, fair-minded, informed member of the public", in the context of the *Principles of Judicial Office*, and the test set out above, the Council concludes there has been no misconduct.

We note that forwarding the letter from her Committee members on her judicial stationery may not have been the most appropriate way for the Committee to follow-up with the Attorney-General. The Council determines therefore that the complaint was not altogether unfounded, but in our view, neither the use of judicial stationery to attach the Committee members' requests nor the parenthetical comment by Madam Justice Baldwin is so seriously contrary to the impartiality, integrity and independence of the judiciary that a finding of misconduct is warranted.

The complaint is, therefore, dismissed.

Having regard to section 51.7(5) of the *Courts of Justice Act*, we shall recommend to the Attorney General that Madam Justice Baldwin be compensated for her costs for legal services.

We wish to receive written submissions from counsel on the issue of the amount of compensation, pursuant to section 51.7(7) of the Act. Counsel for Madam Justice Baldwin will present written submissions within seven (7) days of the release of this decision, and the response from Presenting Counsel, if any, will be provided within seven (7) days thereafter.

DATED at the City of Toronto, in the Province of Ontario this 10th day of May, 2002.

The Honourable Dennis R. O'Connor
Associate Chief Justice of Ontario

The Honourable Madam Justice D.K. Livingstone
Ontario Court of Justice

Mr. Henry Grant Wetelainen

Mr. Julian Porter, Q.C.