Ontario Judicial Council

IN THE MATTER OF A HEARING UNDER SECTION 51.6 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. 43, AS AMENDED,

Concerning Complaints about the Conduct of the Honourable Justice Howard I. Chisvin

Before: The Honourable Justice Robert Sharpe, Chair
Court of Appeal for Ontario

The Honourable Justice Deborah K. Livingstone
Ontario Court of Justice

Mr. W. A. Derry Millar
WeirFoulds LLP
Lawyer Member

Mr. Anish Chopra
Community Member

Hearing Panel of the Ontario Judicial Council

Counsel:

Ms. Marie Henein Henein and Associates	Mr. Brian H. Greenspan Greenspan, Humphrey and Lavine
Presenting Counsel	Counsel for His Honour Howard I. Chisvin

REASONS FOR DECISION

[1] This is the hearing by a panel pursuant to ss. 51.4 (18) and 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to consider three complaints involving one incident regarding the conduct of the Honourable Justice Howard I. Chisvin.

[2] The facts giving rise to the complaints are fully set out in a Statement of Facts agreed to by Presenting Counsel and counsel for Justice Chisvin and signed by Justice Chisvin himself. The facts set out below are taken from that Agreed Statement of Facts.

A. FACTS

[3] Justice Chisvin, the subject of the complaint, is a judge of the Ontario Court of Justice assigned to preside in the Central East Region. Justice Chisvin has served in that capacity since February 18, 2004.

[4] The Ontario Judicial Council received three written complaints about his in-court conduct on July 21, 2011. The complaints were made by the Ministry of the Attorney General, a member of the public who was a lawyer that had practised in Ontario for over 50 years, and two members of the public who made a joint complaint.

[5] The allegations were investigated by a complaint subcommittee of the Council. On January 24, 2012, Justice Chisvin was provided with the opportunity to respond to the complaints. The subcommittee completed its investigation and reported to a review panel of the Council.

[6] After reviewing the information obtained through the investigation, including the response of Justice Chisvin, the review panel ordered a hearing into the allegations set out in the Notice of Hearing pursuant to s. 51.6 of the *Courts of Justice Act*.

Events of July 21, 2011

[7] On the morning of July 21, 2011, Justice Chisvin was presiding in plea court in Courtroom 202 in the Ontario Court of Justice at 50 Eagle Street West in Newmarket. Plea court is a specially designated court in which it is expected that matters set down in the court are scheduled for resolution including guilty pleas and pre-trial conferences. Individuals attending court, including accused and complainants, generally expect that final resolution of their matters will occur on a scheduled plea court date.

[8] On July 21, 2011, court commenced at 10:05:01 a.m.. At 10:14:00, the court took a brief recess to allow the judge to get some materials from his office. Court reconvened at 10:17:28. Having dealt with further matters until there was nothing ready to proceed, court recessed from 10:21:30 to 10:29:10.

[9] The court continued to deal with a number of matters. A recess was taken at 11:23:11. The clerk announced that the recess would be for 20 minutes.

[10] Crown counsel remained in the courtroom to discuss some matters with defence counsel. He then went downstairs to obtain a drink from the cafeteria where he observed the judge also in the cafeteria line. After buying a drink, Crown counsel returned to his

office and proceeded to read a psychiatric report pertaining to an accused person who was to be dealt with that day.

[11] At the time when the morning recess was taken, the provincial list had at least 33 criminal charges involving ten accused persons remaining on the docket.

[12] There were also federal matters on the docket.

[13] The clerk was the first to return to court from the break at approximately 11:40:00. She unlocked the doors and paged all persons to attend court. There was also a separate page for the Crown Attorney. The court reporter returned sometime later and activated the recording equipment at 11:45:21. At that time, all persons having business in Courtroom 202 were again paged to the courtroom, stating court was about to commence. The clerk again paged the Assistant Crown Attorney to the courtroom.

[14] Justice Chisvin heard the first page at approximately 11:40:00 and called the clerk to inquire if everyone was ready to proceed. The clerk responded that everyone was ready except for the Crown, and Justice Chisvin indicated that he would 'wander down' to the courtroom.

[15] At 11:46:21, court resumed and Justice Chisvin re-entered the courtroom. The Assistant Crown Attorney was not present and the courtroom clerk again paged the Assistant Crown Attorney.

[16] Justice Chisvin told the clerk to tell the Crown Attorney that "if there's not a prosecutor here within a minute, the list will go for want of prosecution".

[17] The clerk called the office of the Crown Attorney and spoke to a receptionist and said "I need a Crown in 202...". Justice Chisvin told the clerk, "Tell them they have 30 seconds. The list is about to go for want of prosecution, Madam Clerk".

[18] The clerk advised the judge that the Crown Attorney's office was sending a Crown Attorney to court. She paged the Assistant Crown Attorney again.

[19] A defence lawyer asked whether the clerk had called the Crown Attorney's office. Justice Chisvin responded, "It's not her function (a) to call the Crown's office, (b) the list is about to go for want of prosecution."

[20] The defence lawyer offered to personally attend the Crown Attorney's office in order to locate the Crown. Justice Chisvin responded: "Thirty seconds…that's all."

[21] At 11:47:48., one minute and 27 seconds after court had reconvened, Justice Chisvin dismissed all charges as follows: "All right, all provincial matters are dismissed for want of prosecution."

[22] As a result, individual accused and complainants who had expected matters to be dealt with on July 21, 2011 did not have their matters disposed of on the merits.

[23] Federal matters that were on the docket were not affected by Justice Chisvin's actions.

[24] At 11:53:44, the provincial Crown Attorney returned to the Courtroom. The following exchange occurred between the Crown Attorney and the Court:

> The Court: Mr. McCallion, all provincial matters have been dealt with by want of prosecution. There was no Crown in here for some 10 minutes and you were being paged and paged and paged. They've been dismissed for want of prosecution. We have only federal matters left on the list.
>
> Mr. McCallion: I apologize Your Honour. I was-I've just, I've received a report from Ontario Shores with respect to Mr. S[name redacted] who is …
>
> The Court: That might be. Court comes when court is back. You were paged. You were paged in the hallway, the Crown's office was called, no Crown. They're dismissed for want of prosecution.

[25] At approximately 11:53:44, Justice Chisvin said court would deal with the federal matters.

[26] Later in the day, Justice Chisvin recognized that he had made a significant error. He contacted the Regional Senior Justice and over the course of the next several days, arranged for a two week leave of absence to address various personal stresses that he was experiencing.

Attempts to remedy the dismissal of charges

[27] As a result of the dismissal of the charges for want of prosecution, steps had to be taken by the Ministry of the Attorney General to remedy the impacts of Justice Chisvin's actions, including obtaining the consent of the Deputy Attorney General to re-swear the

necessary informations, serving affected persons with new summons, and filing appeals to protect the right to proceed in the face of potential autrefois acquit defences.

[28] Resources were expended to re-swear informations and resummon accused persons. Individuals who had expected their matters to finally conclude on July 21, 2011 were required to re-attend court and have their matters protracted for weeks and in some cases months. Accused persons and victims who had anticipated that there would be decisions and finality in the cases were inconvenienced and left with uncertainty as to the outcomes of the court matters in which they were involved.

[29] One matter was appealed to the Court of Appeal of Ontario: *R. v. Siciliano*, 2012 ONCA 168. The Court allowed the appeal, quashed the dismissal for want of prosecution and restored the convictions stating, at para. 9:

> [9] It is clear that the trial judge had no power to make the order that he purported to make. It was illegal and an abuse of judicial authority. Furthermore, even if the power existed, there was no basis upon which to make the order on the facts of this case. The trial judge's actions were highhanded and did a real disservice to the proper administration of justice.

[30] The Court of Appeal remitted the matter to Justice Chisvin for sentencing. On March 30, 2012, the scheduled appearance by Mr. Siciliano, Justice Chisvin stated as follows:

> I want to express an apology to Mr. Siciliano, to you, to him, to the Crown, to the defence and to the public for the regrettable delay in the imposition of sentence in this matter. Mr. Siciliano last appeared before me on July 21, 2011, more

> than eight months ago at which time I unfortunately proceeded to dismiss charges against him and the remaining accused on the list that morning. I was clearly in error. I very much regret that decision. I trust the delay in having Mr. Siciliano return to court has not caused him any undue hardship. As I am sure you have explained to him, Mr. Goldglass, the Court of Appeal corrected my mistake and directed the matter to return before me for the imposition of sentence…

B. ADMISSIONS

[31] Justice Chisvin admits the following:

a) his actions were contrary to the standard of conduct expected of a judge and contrary to the *Principles of Judicial Office for Judges of the Ontario Court of Justice* that were established and approved pursuant to s. 51.9(1) of the *Courts of Justice Act*;

b) his conduct on July 21, 2011 constitutes judicial misconduct that warrants a disposition under s. 51.6(11) of the *Courts of Justice Act*; and

c) his actions negatively impacted the confidence of members of the public, including the accused parties, victims and counsel, in himself as a judge, in the judiciary in general and in the administration of justice.

C. ANALYSIS

[32] The first step for the hearing panel to determine is whether there has been judicial misconduct. We are satisfied on the basis of the Agreed Statement of Facts and Justice Chisvin's admission that the conduct at issue does constitute judicial misconduct.

[33] The central issue for this panel is to determine which of the dispositions set out in s. 51.6 (11) of the *Courts of Justice Act* are required to restore public confidence in the judiciary.

[34] That section provides that where there has been misconduct by the judge, the panel 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 that the judge take specified measures, such as receiving education or treatment, as a condition 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 of up to thirty days; or

g) recommend to the Attorney General that the judge be removed from office in accordance with s. 51.8.

[35] Pursuant to s. 51.6 (12), we may adopt any combination of those dispositions, except that a recommendation to the Attorney General that the judge be removed from office cannot be combined with any other disposition.

[36] We agree with the submission of Presenting Counsel that in determining the appropriate disposition it is necessary to focus on what is required to restore public confidence in the judge and in the judiciary. See *Re Douglas*, Ontario Judicial Council (March 6, 2006), at paras. 8-9:

> [8] Based on *Re: Baldwin* and *Re: Evans*, the test for judicial misconduct combines two related concerns: (1) public confidence; and (2) the integrity, impartiality and independence of the judge or the administration of justice. The first concern requires that the Hearing Panel be mindful not only of the conduct in question, but also of the appearance of that conduct in the eyes of the public. As noted in *Therrien*, the public will at least demand that a judge give the appearance of integrity, impartiality and independence. Thus, maintenance of public confidence in the judge personally, and in the administration of justice generally, are central considerations in evaluating impugned conduct. In addition, the conduct must be such that it implicates the integrity, impartiality or independence of the judiciary or the administration of justice.
>
> [9] Accordingly, a judge must be, and appear to be, impartial and independent. He or she must have, and appear to have, personal integrity. If a judge conducts himself or herself in a manner that displays a lack of any of these attributes, he or she may be found to have engaged in judicial misconduct.

[37] In *Re Baldwin*, Ontario Judicial Council, (May 10, 2002), at p. 6, the panel held:

> 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*. [Emphasis added]

[38] We also find helpful the list of factors identified by the Washington State Supreme Court in *In re Hammermaster*, 985 P.2d 924 (1999), at pp. 941-2, as being relevant to an assessment of the appropriate sanction for judicial misconduct:

i. Whether the misconduct is an isolated incident or evidenced a pattern of misconduct;

ii. The nature, extent and frequency of occurrence of the acts of misconduct;

iii. Whether the misconduct occurred in or out of the courtroom;

iv. Whether the misconduct occurred in the judge's official capacity or in his private life;

v. Whether the judge has acknowledged or recognized that the acts occurred;

vi. Whether the judge has evidenced an effort to change or modify his conduct;

vii. The length of service on the bench;

viii. Whether there have been prior complaints about this judge;

ix. The effect the misconduct has upon the integrity of and respect for the judiciary; and

x. The extent to which the judge exploited his position to satisfy his personal desires.

[39] In the present case, on the aggravating side, the misconduct here occurred in the courtroom in the judge's official capacity.

[40] In addition, the misconduct at issue was serious. It plainly had a detrimental effect upon public confidence in the administration of justice. It resulted in significant inconvenience to accused persons, to victims, to counsel, and to court administration. The matters dismissed could only be restored and dealt with appropriately at considerable public expense and after considerable delay.

[41] On the other hand, there are many mitigating factors.

[42] It is clear on the record before us, which includes some 45 letters of support written by Justice Chisvin's judicial colleagues and by counsel who regularly appear before him, that his misconduct was an "aberration" and an isolated incident.

[43] The incident occurred in a matter of minutes. Justice Chisvin acknowledged and recognized his misconduct. He recognized that he had made a serious error and, later in the day, he went to his Regional Senior Justice to report his mistake and to seek assistance.

[44] He has repeatedly expressed his regret over what occurred. Before us today at this hearing, he again expressed his profound regret for his actions and for the consequences for the administration of justice and the public.

[45] There is no suggestion that this isolated incident was preceded by or has been followed by any similar conduct on the part of the judge. Justice Chisvin has been a member of the bench for eight years. There have been no prior complaints made to the Ontario Judicial Council about his conduct.

[46] We observe as well that Justice Chisvin has taken steps to address and modify his behaviour. He immediately recognized that he had acted under unusual stress because of personal problems. He requested and was granted a short leave of absence to seek professional assistance.

[47] The letters of support from his immediate judicial colleagues, from other judges who know him, and from members of the bar who regularly appear in his court confirm

that Justice Chisvin is a hard-working, dedicated judge, committed to improving the administration of justice. His colleagues report that he is always willing to help by sitting extra hours during vacation or non-presiding time and that he is seen as a "go to" judge when some need or difficulty arises. His colleagues describe him as a self-deprecating, "low maintenance" judge. He is a frequent contributor to judicial education programs and to mock trial programs for law students. He has gone out of his way to encourage and mentor young lawyers.

[48] While Justice Chisvin's otherwise apparently exemplary behaviour does not excuse the conduct giving rise to this hearing, it is our view that it bears directly upon the disposition that must be imposed in order to restore public confidence in his ability to deliver justice and in the justice system as a whole.

[49] We conclude that the incident giving rise to this hearing was an aberration by a hard-working, dedicated judge who has fully acknowledged his misconduct and who does not minimize its impact. He has done what he can to redress his wrong by seeking personal assistance for himself and by proposing an educational program for other judges on "The Reality of Stress".

[50] In our view, the confidence in the administration of justice on the part of a member of the public apprised of all of these facts would be restored by the following disposition.

[51] Justice Chisvin is hereby formally reprimanded for his misconduct and warned that any repetition would have serious consequences for the administration of justice and for him as a judge.

[52] Given the steps that Justice Chisvin has already taken, including apologizing for his misconduct, seeking professional assistance, proposing an educational program on the issue of stress, which we strongly encourage him to pursue, and serving with integrity since this incident arose, we are of the view that no additional disposition is required.

Dated this 26th day of November, 2012.

HEARING PANEL:

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Court of Appeal for Ontario

The Honourable Justice Deborah K. Livingstone
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