

ONTARIO JUDICIAL COUNCIL

WARNING

The Hearing Panel hearing this matter under section 51.6 of the *Courts of Justice Act* directs that the following notice be attached to the file:

The Hearing Panel has ordered that there shall be no publication of any information that identifies or tends to identify the child or children or any family member involved in any child protection matter.

ONTARIO JUDICIAL COUNCIL

**IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, as amended**

**Concerning a Complaint about the Conduct of
the Honourable Justice John Keast**

Before:

Justice Eileen E. Gillese, Chair
Court of Appeal for Ontario

Justice Lise S. Parent
Ontario Court of Justice

Mr. Christopher D. Bredt
Lawyer Member

Ms. Judith A. LaRocque
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION

Counsel:

Ms. Marie Henein, Mr. Scott Hutchison and Ms. Christine Mainville,
Presenting Counsel

Mr. Paul Stern, counsel for Justice Keast

Mr. Chris Kinnear Hunter, counsel for the Children's Aid Society of the Districts of
Sudbury and Manitoulin

Mr. Sean A. Moreman, counsel for the Canadian Broadcasting Corporation

REASONS FOR DECISION

OVERVIEW

[1] Justice John Keast was appointed to the Ontario Court of Justice (OCJ) in the North East Region in July 2001. At the time of his appointment, he had a reputation as a person of integrity who worked tirelessly for both his clients and the greater community. Justice Keast rapidly gained a similar reputation for his work as a judge.

[2] And yet, between January 8 and March 17, 2016, Justice Keast exchanged text messages with a friend in which he undeniably acted contrary to the standard of conduct expected of a judge and to the Principles of Judicial Office for Judges of the OCJ, established and approved pursuant to section 51.9 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “Act”).

[3] The Children’s Aid Society for the District of Sudbury and Manitoulin (the “CAS”) came into possession of the text messages. The CAS made a complaint to the Ontario Judicial Council (the “Council”), attaching to it a copy of the text messages. In the complaint, the CAS alleged that Justice Keast had engaged in conduct and acted in a manner contrary to the impartiality, integrity and independence of the judiciary.

[4] After investigating the complaint, pursuant to s. 51.6 of the Act, the Council ordered a hearing into the allegations. This panel of the Council was convened to conduct the hearing (the "Hearing Panel").

[5] Justice Keast admits that his actions between January 8 and March 17, 2016, constitute judicial misconduct.

[6] Based on a consideration of the totality of the evidence, including the Agreed Statement of Facts filed in this hearing and Justice Keast's admissions, the Hearing Panel had no hesitation in finding that Justice Keast's actions amounted to misconduct. Further, it found that the misconduct was a serious breach of the standards of judicial conduct that had an adverse impact upon public confidence in the judiciary and the administration of justice. Consequently, the Hearing Panel found that the misconduct warranted a disposition under s. 51.6(11) of the Act.

[7] After announcing these findings, the Hearing Panel heard submissions on the difficult question of disposition.

[8] Presenting Counsel submitted that an appropriate disposition was to suspend Justice Keast, without pay, for a period of 15 days.

[9] Counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition.

[10] For the reasons that follow, the Hearing Panel has concluded that the following sanctions are the appropriate disposition: a reprimand; an order that

Justice Keast make certain apologies; and, an order suspending Justice Keast, without pay, for a period of 30 days.

BACKGROUND

[11] Before the Notice of Hearing was filed in this matter, Justice Keast brought a motion in which he sought, among other things: to have the hearing held in private; and to treat as confidential his name, the details of the complaint, and all related documents. He contended that unless such steps were taken, privacy interests recognized in s. 45(8) of the *Child and Family Services Act*, R.S.O. 1990, c. 11, would be violated.

[12] Presenting Counsel did not agree that the hearing should be held in private and that all aspects of the proceeding should be cloaked by confidentiality. Presenting Counsel did agree, however, that measures had to be taken to protect those with affected privacy interests.

[13] The Hearing Panel recognized the strong presumption in favour of openness and public accessibility in the hearing of the complaint. At the same time, we recognized that the privacy interests of one or more children involved in child protection matters were engaged by these proceedings and warranted protection.

[14] We concluded that the openness principle required that the hearing be held in public, and that Justice Keast's name and the nature of the alleged misconduct had to be made public. However, we took steps to protect the privacy interests in

question. Among other things, we ordered that the particulars of the complaint, contained in Appendix “A” to the Notice of Hearing, be redacted in such a fashion that matters that might identify a child or children in child protection matters were removed.

[15] We also granted interim relief in respect of the confidentiality aspects of the motion. We ordered that all documentation filed in the proceeding up to the filing of the Notice of Motion, including all materials filed on the motion and submitted at the oral hearing of the motion (the “Materials”), were to be treated by all parties as confidential for all purposes. In addition, we ordered that the Materials were to be sealed and not form part of the public record.

[16] Justice Keast was informed that if he wished to pursue his request that the hearing be conducted in private, he would have to bring a motion on notice to the media. He pursued the motion, on proper notice to the media. Notice of the motion was also posted on the Council’s website.

[17] Later in these proceedings, on the consent of all parties, including the sole media intervenor, the Canadian Broadcasting Corporation (the “CBC”), the Hearing Panel made a publication ban (the “Publication Ban”). The Publication Ban was made to protect the privacy interests engaged by these proceedings.

[18] The Publication Ban reads as follows:

There shall be no publication of any information that identifies or tends to identify the child or children of any family member involved in any child protection matter.

[19] Later yet in these proceedings, Justice Keast brought a motion asking that the interim sealing order remain in effect and that all the materials filed after that order be sealed and not form part of the public record. The CBC objected.

[20] The Hearing Panel dismissed the motion, noting again the strong presumption in favour of openness and public accessibility in the hearing of a complaint involving alleged judicial misconduct. Further, we found that clear and convincing evidence had not been adduced to show that restrictions in addition to the Publication Ban were necessary. Accordingly, we made an order lifting the sealing order.

[21] The Publication Ban remains in effect. It is designed to protect the privacy interests of vulnerable persons. In light of that ban, the following description of the events which led to the complaint has been, of necessity, significantly curtailed.

[22] In early January 2016, Justice Keast learned that a young person whom he knows was at immediate risk of harm. He had faced similar situations three times before (the “prior situations”). As before, Justice Keast turned for help and advice from a long-time friend who had training and experience with such matters. He reached out to his friend, who worked for the CAS, in a text message. It is the series of text messages that the two exchanged over the following 3 months that lies at the heart of these proceedings.

[23] In the prior situations, Justice Keast and his friend worked openly to resolve the situation. This time was different, however. Justice Keast was seized of a CAS case that itself was pressing and at a critical stage. He was concerned that the witnesses in the case before him might also become involved in resolving his personal situation. He hoped that he could both assist in resolving his own personal situation and see the case before him through to completion. Consequently, Justice Keast and his friend did not disclose their ongoing text communications.

[24] Within two or three days, Justice Keast went to his Regional Senior Justice (the "RSJ") for advice. He told the RSJ something of the challenging personal situation in which he found himself. However, he did not fully disclose all that was going on and how it might impact on the case over which he was presiding.

[25] As time passed and nothing appeared to have been done in relation to his personal situation, Justice Keast got increasingly frustrated. In his text messages to his friend, he "vented", saying intemperate and inappropriate things about two individuals and the CAS, all of whom he thought were not doing their jobs.

[26] Ultimately, an individual became suspicious about Justice Keast's personal situation and what he might be doing in relation to it. That individual took copies of the text messages on Justice Keast's cell phone. This was done without Justice Keast's knowledge or consent.

[27] The individual then went to the CAS and gave them copies of the text messages. Based on the text messages, the CAS filed the complaint giving rise to these proceedings.

[28] The improprieties revealed through the text messages can be summarized as follows. Justice Keast improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about the CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[29] During this hearing, Justice Keast moved to have the text messages excluded from evidence. The Hearing Panel dismissed the motion and advised that reasons would follow. The promised reasons are set out later in these reasons.

[30] Once the text messages were ruled admissible, the matter proceeded by way of an Agreed Statement of Facts. In the Agreed Statement of Facts, Justice Keast admits the content of the text messages and their authenticity. He also admits that his actions between January 8 and March 17, 2016, constitute judicial misconduct.

[31] Based on the Agreed Statement of Facts and Justice Keast's admissions, the Hearing Panel made a finding of judicial misconduct warranting a disposition. We then heard submissions on the appropriate disposition.

[32] As indicated above, Presenting Counsel submitted that an appropriate disposition was a suspension, without pay, for a period of 15 days. Counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition. He also advised that Justice Keast is seeking compensation for the legal costs of these proceedings.

[33] Before turning to the issue of disposition, the Hearing Panel will give its reasons for admitting the text messages.

ADMISSIBILITY OF THE TEXT MESSAGES

[34] Justice Keast's argument in favour of excluding the text messages can be summarized as follows. The individual who made a copy of the text messages on Justice Keast's cellphone did so without his consent. In making the copy, the individual acted unlawfully and/or illegally. At the time that the CAS received the

copy of the text messages from the individual, it knew that the text messages had been “stolen” from Justice Keast’s cell phone. Further, the CAS made assurances to the individual that the text messages would not be disclosed outside the CAS without the individual’s consent. The CAS is a state agent. When the CAS provided the text messages to the Council, it breached both its undertaking to the individual and Justice Keast’s *Charter* rights. As the text messages were obtained in a manner that infringed the *Charter*, pursuant to s. 24(2) of the *Charter*, the text messages should be excluded from evidence because its admission would bring the administration of justice into disrepute.

[35] The Hearing Panel rejects this submission. We see no basis on which to exclude the text messages from evidence.

[36] The initial search of Justice Keast’s cellphone and subsequent seizure of the text messages (by copying) was carried out by an individual, acting in his or her private capacity. The state did not search or seize Justice Keast’s cellphone. Any reasonable expectation of privacy that Justice Keast had in the contents of his cell phone was intruded on by the individual who copied the text messages, not by a state actor.

[37] The CAS had nothing to do with the search and seizure of the text messages. There was no state action involved in the initial copying of the text messages or in their voluntary provision to the CAS. The CAS’s only action was

to receive the text messages and - acting upon legal advice – to provide them to the Council when it filed the complaint.

[38] Section 32 of the *Charter* stipulates that its provisions apply to the Parliament and government of Canada, and to the legislature and government of the provinces. Accordingly, for Justice Keast to succeed in excluding the text messages on the basis that they had been obtained in breach of his *Charter* rights, he had to establish that the search or seizure of the text message was performed by the government or someone acting on behalf of the government. See *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 25. He fails in this regard.

[39] Therefore, it cannot be said that the text messages were obtained in a manner that infringed Justice Keast's *Charter* rights and s. 24(2) of the *Charter* is not engaged.

[40] We would conclude on this issue by observing that, in any event, in a hearing to determine whether judicial misconduct took place, it is virtually inconceivable that the administration of justice would be better served by excluding the evidence of the alleged misconduct, rather than admitting it.

[41] The Hearing Panel wishes to make two further points.

[42] First, the record does not support the allegation that the CAS made assurances to the individual that the text messages would not be disclosed outside of it. On the contrary, the transcription of the meetings in which the text messages

were given to the CAS makes it clear that the individual voluntarily gave the CAS the text messages despite the absence of such assurances and with the express recognition that release of the text messages might have an adverse impact on Justice Keast's judicial position.

[43] Second, the CAS's conduct throughout this matter has been exemplary. From the moment that the individual first approached it, with the text messages in hand, through and including the filing of its complaint with the Council, the CAS discharged its obligations with the utmost integrity. The CAS has continued to display that same level of integrity and sensitivity to the various competing considerations and interests throughout this hearing.

ANALYSIS

1. The Relevant Legal Principles

[44] Where, as here, the Judicial Council finds misconduct by the judge, s. 51.6(11) of the Act empowers it to:

- (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 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.

[45] Section 51.6(12) permits the Council to make any combination of the dispositions in clauses (a) to (f). However, a recommendation for removal pursuant to clause (g) cannot be combined with any other disposition.

[46] *Re Chisvin*, (OJC, November 26, 2012), at para. 38, identifies the following factors as 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.

[47] In considering the approach to be taken to disposition, *Re Baldwin*, (OJC, May 10, 2002), at p. 8, said this:

Once it is determined that a disposition order 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.

[48] In *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 68, the Supreme Court of Canada stressed that the role of a body dealing with matters of judicial misconduct is remedial in nature. The object is not to punish the judge but to repair any damage done to the integrity and repute of the administration of justice. See also *Baldwin*, at p. 8, to the same effect.

[49] Case law establishes that a recommendation for removal from office is to be resorted to only in circumstances where the judge's ability to discharge the duties of office is irreparably compromised such that he or she is incapable of executing judicial office. In *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 147, the Supreme Court of Canada explained:

The public's invaluable confidence in the justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

2. Application of the Legal Principles

[50] Public confidence in the justice system is at the heart of a hearing into judicial misconduct. In determining the appropriate disposition, the Hearing Panel's focus must be on what sanction, or combination of sanctions, is sufficient to restore public confidence both in Justice Keast and in the administration of justice generally. At the same time, we must consider Justice Keast's actions in context.

[51] That contextual assessment is provided through the following consideration of the factors set out in *Chisvin*.

- i. The misconduct was not isolated, in that it took place over a three-month period. However, there is no evidence of a pattern of misconduct by Justice Keast because the text messages all flowed from a single, albeit ongoing, personal situation;

- ii. The nature and extent of the misconduct is set out above as part of the background and need not be repeated here. Suffice to say that the text messages amounted to a number of types of misconduct, including the creation of an appearance of bias in relation to the CAS, an institution that regularly appears before Justice Keast;
- iii. While Justice Keast's actions did not take place in the courtroom, they traversed his judicial role and his personal life;
- iv. The misconduct did not occur in Justice Keast's official capacity. However, the text messages were made in a situation that blurred his official and personal lives;
- v. When Justice Keast was made aware of the complaint, his response was a full acknowledgment, in writing, of his actions and their impropriety. That same acknowledgment and recognition is evident in the Agreed Statement of Facts filed in this hearing;
- vi. Justice Keast has demonstrated an effort to change his behaviour. He sought out – and completed – a period of counselling. Those who did the counselling provided the Hearing Panel with a report (the "Counselling Report") which concludes with the following:

We believe that Justice Keast, with the benefit of psychological counselling, our discussions with him, and by far most importantly, with his own objective and deep self-reflection, fully appreciates

the errors in his conduct. He fully recognizes and has insight into the requirement to separate the judicial obligation of actual and perceived impartiality and independence from his personal circumstances. He has an abiding respect for the system of justice that he serves. He deeply regrets and is distressed by his conduct and its many and varied ramifications for others. We are confident that he will not again put himself in such a compromising situation;

- vii. Justice Keast has a 17-year record of unblemished, exemplary service on the Bench;
- viii. Justice Keast has no prior incidents of judicial misconduct;
- ix. In assessing the effect of the misconduct on respect for Justice Keast and the judiciary, the Hearing Panel had regard to a dossier containing 60 letters of support for Justice Keast. We return below to a discussion of the dossier; and
- x. Justice Keast's actions were not an exploitation of his judicial position nor were they done to satisfy his personal desires.

[52] After due consideration of the above, the Hearing Panel was unable to accept the submission of either Presenting Counsel or counsel for Justice Keast as to the appropriate disposition. It will be recalled that Presenting Counsel submitted that the appropriate disposition was to suspend Justice Keast, without pay, for a period of 15 days, and counsel for Justice Keast submitted that a warning or reprimand was the appropriate disposition.

[53] In our view, given the nature and extent of the misconduct, the real choice was between the second most serious sanction available – suspension without pay for 30 days – and recommending that Justice Keast be removed from office.

[54] In the end, we concluded that a recommendation for removal was not necessary to restore public confidence in Justice Keast and in the administration of justice generally. Justice Keast has been an exemplary judge for 17 years. His conduct in the text messages is at odds with the balance of his career, both before and after he was appointed to the Bench. We are satisfied that conduct of this sort will never occur again. We are also satisfied that his reputation as an entirely fair-minded and impartial judge dedicated to the highest ideals of judicial conduct is warranted.

[55] Our understanding of Justice Keast's reputation was informed by the dossier of 60 letters of support from judicial colleagues and superiors, members of the Bar, members of the court staff, and community members filed with the Hearing Panel. The authors of these letters make it clear that they understand the nature and extent of Justice Keast's actions. Yet they praise him for his hard work on the Bench and in judicial education, his professionalism, his integrity, and his impartiality. To a person, they offer the view that the misconduct arose from Justice Keast's desire to protect a young person who was at immediate risk of harm. His concern for the person at risk, coupled with his long-time friendship with

the recipient of the text messages, led him to lose judgment and inappropriately blur boundaries between his judicial role and his personal life.

[56] The text messages are an isolated incident within a 17-year unblemished judicial career. They were the product of exceptional, difficult personal circumstances, in which Justice Keast was striving to protect a vulnerable person. The acts did not take place in the courtroom or in public. While the text messages reflect a serious lack of judgment, no one questions that Justice Keast was well-intentioned throughout. And, Justice Keast did take steps to try and address some of the apparent conflict of interest concerns by approaching his RSJ and seeking advice on how to handle his ongoing cases.

[57] On his initiative, Justice Keast undertook – and completed – counselling which has given him the necessary insight and tools to prevent such actions from occurring again.

[58] In the circumstances, we are satisfied that Justice Keast will not repeat this sort of conduct and that the CAS need have no fear about the treatment it would receive from Justice Keast.

[59] As indicated above, the Hearing Panel concluded that the following sanctions are the appropriate disposition: a reprimand; an order that Justice Keast make certain apologies; and, an order suspending Justice Keast, without pay, for a period of 30 days. We note that these sanctions are in addition to Justice Keast

having been non-assigned for fifteen months and that the non-assignment has caused Justice Keast much anguish.

[60] A reprimand is warranted, given the gravity of the misconduct.

[61] And, while Justice Keast has apologized in writing for his inappropriate and disparaging comments and has again offered those apologies during this hearing, in our view, he should make those apologies directly both to the two individuals unfairly treated by him in the text messages and to the CAS.

[62] Further, while removal from office is not warranted, in our view, imposition of the most serious sanction permitted by law short of removal is. For that reason, we would also impose the sanction of a suspension, without pay, for 30 days.

DISPOSITION

[63] Accordingly, we make the following order, pursuant to s. 51.6(11) of the Act:

- a. Justice Keast is reprimanded for his breach of the standards of judicial conduct;
- b. Justice Keast shall apologize in writing to the two individuals unfairly treated by him in the text messages and to the CAS. The letters of apology shall be delivered to the Council's Registrar who will transmit them to counsel for the CAS for delivery to the intended recipients; and,

c. Justice Keast is suspended for 30 days, without pay.

Released: this 15th day of December 2017.

“Justice Eileen E. Gillese”

“Justice Lise S. Parent”

“Mr. Christopher D. Bredt”

“Ms. Judith A. Larocque”