

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
Donald McLeod**

Before:

Justice Janet Simmons, Chair
Court of Appeal for Ontario

Justice Michael J. Epstein,
Ontario Court of Justice

Mr. Malcolm Mercer,
Lawyer Member

Mr. Victor Royce,
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION RE COMPENSATION FOR LEGAL COSTS

Counsel:

Borden Ladner Gervais LLP: Guy J. Pratte, Nadia Effendi, Christine Muir,
Veronica Sjolín, Mannu Chowdhury
Presenting Counsel

Torys LLP: Sheila R. Block, Irfan Kara, R. Craig Gilchrist, Rebecca Amoah;
Addario Law Group LLP: Frank Addario, Wes Dutcher-Walls; Mirza Kwok |
Criminal Defence Lawyers: Faisal Mirza; Gates Criminal Law: Kelly Gates
Counsel for The Honourable Justice Donald McLeod

I. Introduction

[1] In Reasons for Decision released on June 2, 2021, we dismissed a March 27, 2019 complaint against Justice Donald McLeod. Given that the complaint was dismissed, s. 51.7(5) of the *Courts of Justice Act*, R.S.O. 1980, c. C43 (the “CJA”), requires that we recommend to the Attorney General that Justice McLeod be compensated for his costs for legal services and indicate the amount.

[2] Under s. 51.7(7) of the CJA, the amount we recommend may relate to all or part of such costs and “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.”

[3] The legal costs for which Justice McLeod seeks compensation are substantial. He claims a total of \$1,097,037.58 for fees, disbursements and HST.

[4] Presenting Counsel takes no position on the quantum of compensation.

[5] For the reasons that follow, we recommend to the Attorney General that Justice McLeod be compensated for these costs in full.

II. Ontario Judicial Council Billing Rate Guidelines

[6] The Ontario Judicial Council’s guidelines on the maximum hourly rates that may be charged by Presenting Counsel or counsel for a judge subject to a complaint are as follows:

Expert/Lead counsel	Up to \$450 per hour
Senior Lawyer (9+ yrs)	Up to \$350 per hour
Intermediate Lawyer (3-8 yrs)	Up to \$275 per hour
Junior Lawyer (up to 3 yrs)	Up to \$175 per hour
Student/Law Clerk/Paralegal	Up to \$100 per hour

III. Background to the Hearing and Justice McLeod's Legal Representation

[7] As indicated, the complaint in this matter was filed on March 27, 2019. While the complaint was under investigation, in early August 2019, the complaint subcommittee recommended that Justice McLeod be suspended with pay. Following completion of the investigation and a review by a Review Panel, a Notice of Hearing setting out four allegations against Justice McLeod was issued on February 20, 2020.

[8] This matter was originally scheduled to be heard in July 2020. Prior to the original hearing date, it was adjourned to August 2020. It was subsequently adjourned to December 2020. Various circumstances contributed to the adjournments. Disclosure was voluminous and still continuing in June and July 2020. Perhaps the most significant factor leading to the adjournments was the Covid-19 pandemic and the desire of all counsel to hold an in-person hearing if possible.

[9] Ultimately, an in-person hearing was not feasible, and the matter proceeded by video conference beginning on December 8, 2020. Although the hearing was

originally scheduled to be completed within 11 days in December 2020, the evidence was heard over 10 days in December 2020 and five days in February 2021; oral submissions were made over two days in March 2021 and written submissions were filed in April 2021. Thirteen witnesses testified at the hearing. The Agreed Statement of Facts filed at the hearing addressed allegations two through four and comprised 2,017 pages. In addition, a 639-page Joint Document Brief was filed. Presenting Counsel's closing submissions totaled 322 pages.

[10] Over the course of this proceeding, Justice McLeod was represented by four law firms and eight lawyers.

[11] Upon learning of his suspension in August 2019, Justice McLeod retained Mr. Addario (36 years' experience) of the Addario Law Group. Mr. Addario was assisted by Mr. Dutcher-Walls (two years' experience). Because of a previously scheduled lengthy hearing, Mr. Addario was unable to participate in disclosure review and negotiation of the Agreed Statement of Facts that occurred between August and November 2020. In the result, Ms. Block (1974 call) of Torys LLP was retained. She was assisted by Mr. Kara (2014 call), Mr. Gilchrist (2019 call), and Ms. Amoah (2021 call). Ms. Block sought the assistance of Mr. Mirza (19 years' experience) of Mirza Kwok Criminal Defence lawyers concerning the criminal aspects of the allegations against Justice McLeod. Mr. Mirza engaged the assistance of Ms. Gates (three years' experience) of Gates Criminal Law.

[12] The fees claimed in counsel's Costs Submissions are calculated in accordance with the Ontario Judicial Council Guidelines. Save for a portion of Mr. Mirza's time charged at the Lead Counsel rate of \$450 per hour (approximately 200 of 365 hours) Senior Counsel's time has been charged at \$350 per hour. Intermediate counsel fees are billed at either \$250 or \$275 per hour; junior counsel fees at \$150 and \$175 per hour; an articling student at \$90 per hour and law clerks/paralegals at \$100 per hour. The fees are broken down as follows, first as a grand total and second by category of work:

i) Grand total

Total Fees	\$924,034.50
Total Taxable Disbursements	<u>\$33,554.06</u>
Subtotal	\$957,588.56
Total HST (13%)	\$124,486.52
Non-taxable disbursements	<u>\$14,962.50</u>
Total	\$1,097,037.58

ii) By Category of Work

Pre-disclosure, submissions and response to notice of hearing	\$60,095
Introduction to file (Torys LLP)	\$5860
General file consideration strategy and research	\$37,762.50

Document discovery and disclosure	\$78,042
Witness interviews and preparation	\$48,583
Agreed statement of facts	\$97,890
Case conference preparation	\$2335
Case conference attendance	\$6285
Hearing preparation	\$319,356.75
Hearing attendance	\$184,230
Post hearing work (including preparation of written submissions)	\$83,597
Total fees	\$924,036.25 ¹

IV. Presenting Counsel's Legal Fees

[13] Prior to finalizing their Costs Submissions, Justice McLeod's counsel requested disclosure of Presenting Counsel's fees. This request was made for the purpose of ensuring that the fees sought by counsel for Justice McLeod were reasonable and on the understanding that they would not seek any increase in the preliminary amount requested. We accepted that request.

¹ Our total for fees (exclusive of disbursements and HST), when calculated based on the figures submitted by each law firm by category, is \$1.75 more than the total for fees (exclusive of disbursements and HST) set out in Justice McLeod's costs submissions summary. Given the minor nature of this discrepancy, we have not made inquiries of counsel and simply recommend that the total claimed for fees, disbursements and HST in the summary be paid.

[14] Presenting Counsel calculated their fees on the basis of two Lead Counsel, billing at the rate of \$450 per hour; one Senior Counsel, billing at the rate of \$350 per hour; one intermediate counsel, billing at the rate of \$275 per hour and one junior counsel billing at the rate of \$175 per hour. Law clerks and students are billed at \$100 per hour; associates at \$175 per hour and consulting partners at \$350 per hour. The breakdown of Presenting Counsel's fees as a grand total and by category of work is as follows:

i) Grand total

Total Fees	\$1,978,920.00
Total Taxable Disbursements	<u>\$58,789.00</u>
Subtotal	\$2,037,709.00
Total HST (13%)	\$264,902.17
Non-taxable disbursements	<u>\$93.00</u>
Total	\$2,302,704.17

ii) By Category of Work

General file consideration	\$129,115.00
Strategy and research	\$140,612.50
Summonses/interprovincial summonses and review of documents and disclosures	\$197,672.50
Witness interviews and preparation of witness summaries	\$48,583.00

Agreed statement of facts	\$128,092.50
Case conference preparation and attendance	\$7,797.50
Hearing preparation	\$757,255.00
Hearing attendance	\$214,182.50
Oral and written closing submissions including reply	\$173,802.50
Decision/costs submissions	\$12,892.50
Total fees	\$1,978,920.00

V. Discussion

[15] As we have said, the legal fees for which Justice McLeod seeks compensation are substantial. We have found no precedent for a recommendation for compensation of this magnitude in other Ontario Judicial Council or Justices of the Peace Review Council cases. By the same token, we have found no case of similar length and document volume in which compensation has been mandatory.

[16] We begin with the observation that this case involved important issues that were significant not only to Justice McLeod but to the administration of justice and the public at large. The issues included allegations that Justice McLeod perjured himself or misled the Hearing Panel at a prior hearing. The importance of a full public airing of such significant allegations cannot be overstated.

[17] As we said in our reasons for decision, the purpose of judicial conduct proceedings is essentially remedial: it is to maintain or restore public confidence in the judiciary and the administration of justice generally. Whatever the outcome, absent a full public hearing into such serious allegations, public confidence in the administration of justice would inevitably suffer. It is no doubt for that reason that Presenting Counsel presented the allegations in a meticulous manner, with voluminous documentation and submissions.

[18] For Justice McLeod, this case was the equivalent of a capital offence. Had we found that he committed perjury, there can be little doubt that we would have been compelled to recommend his removal from office. In that context, and in the context of the voluminous case put against him, we can see no reasonable basis on which to recommend a reduction in the amount of compensation for legal fees he is claiming. Counsel for Justice McLeod were required to respond to the case put against him – and they were required to respond in kind. The case demanded that significant time be spent. Undoubtedly, responding to, and presenting, a case in electronic and videoconference format presented additional formidable challenges.

[19] We have considered that Justice McLeod retained three Senior Counsel, one of whom charged Lead Counsel rates for a significant portion of his time. However, set against that is the fact that Presenting Counsel included three Senior Counsel, two of whom charged Lead Counsel rates. Justice McLeod cannot be

faulted for retaining Senior Counsel to fulfill Mr. Addario's role when the matter had to be adjourned to December 2020 and Mr. Addario was unavailable to carry out necessary tasks in the intervening period.

[20] Although Presenting Counsel were undoubtedly required to carry out investigative and administrative tasks in addition to tasks required of counsel for Justice McLeod, Presenting Counsel's fees are more than double the fees for which Justice McLeod is claiming compensation.

[21] We have also considered that although we did not find Justice McLeod had engaged in judicial misconduct, we did find two aspects of his conduct to be incompatible with judicial office (attendance at two Employment and Social Development Canada meetings – June 20, 2018 telephone meeting, July 23, 2019 in person meeting; participation in a February 7, 2019 telephone call with youth delegates concerning a racial profiling incident).

[22] We note that at least in one previous decision of an Ontario Judicial Council Hearing Panel, an agreed upon reduction in compensation was recommended, taking into account an error in judgment that did not rise to the level of judicial misconduct: *Re Richards*, (OJC, June 7, 2002).

[23] However, that case predated *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 (Div. Ct.), in which the Divisional Court held, at paras. 50-57, that, due to the significant public interest in the process, even where a

complaint against a judicial office holder is successful, the adjudicative body ought to start from the premise that it is in the best interests of the administration of justice to ensure that judicial office holders subject to complaints have the benefit of counsel. However, where a complaint is successful, each case must be assessed having regard to its own facts:

[A]djudicative bodies, dealing with complaints against judicial office holders, ought to start from the premise that it is always in the best interests of the administration of justice, to ensure that persons, who are subject to such complaints, have the benefit of counsel. Consequently, the costs of ensuring a fair, full and complete process, ought usually to be borne by the public purse, because it is the interests of the public, first and foremost, that are being advanced and maintained through the complaint process. Again, this reflects the public interest nature of the process.

All of that is not to say that, in every case where a judicial officer holder is subject to a successful complaint, that judicial officer holder can expect that his or her legal expenses will be compensated. It is a decision that must be made separately in each case and only after a consideration of the particular circumstances of the case viewed in the context of the objective of the process....

[24] Although *Massiah* involved a justice of the peace, the *Massiah* principles were adopted by the Ontario Judicial Council in *Re Keast*, (OJC, February 6, 2018).

[25] *Massiah* does not, of course, override s. 51.7(7) of the CJA, which allows us to recommend that all or part of the costs claimed be paid. But it does establish a starting premise even where a complaint is successful. Here, we made no finding

of judicial misconduct. Further, we observe that the bulk of counsel's time and effort at the Hearing was expended on the first two allegations in the Notice of Hearing, which we concluded were not made out. Moreover, we observe that counsel for Justice McLeod devoted countless hours to defending this case, and in particular, the "capital offence" allegations put against him, at rates well below their usual hourly rates. In all the circumstances, we are not satisfied we should reduce the compensation requested.

VI. Disposition

[26] We therefore recommend that Justice McLeod be compensated for his costs for legal services as claimed in full, namely \$1,097,037.58. This recommendation is made based on the understanding that \$30,000 advanced by the Association of Ontario Judges will be repaid to that body and \$29,482.50 advanced by Justice McLeod will be repaid to him, which counsel should confirm prior to these reasons being publicly released.

Released: this 29th day of July, 2021

"Justice Janet Simmons", Chair

"Justice Michael J. Epstein"

"Mr. Malcolm M. Mercer"

"Mr. Victor Royce"