

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 M. Mercer
Lawyer Member

Mr. Victor Royce
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION

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REASONS FOR DECISION

[1] These are reasons for a ruling made on December 17, 2020. This Panel held that a February 19, 2018 audio recording (the “audio recording” or “recording”) is admissible at this hearing into a complaint against the conduct of Justice Donald McLeod.

Background

[2] Justice McLeod is a judge of the Ontario Court of Justice assigned to preside in the Central West Region, in Brampton.

[3] The Particulars of the Complaint¹ (“The Particulars”) concerning Justice McLeod’s conduct make four allegations. The February 19, 2018 audio recording is relevant to the first allegation: namely, that Justice McLeod committed perjury and/or misled a previous Hearing Panel that dismissed a prior complaint about his conduct (the “First Complaint”).

[4] The First Complaint arose from Justice McLeod’s involvement in and leadership of an organization called the Federation of Black Canadians (the “FBC”).

[5] The Particulars assert that, during the hearing of the First Complaint, Justice McLeod “gave evidence that he had removed himself from any involvement in FBC’s advocacy work relating to the deportation of a Somali refugee named

¹ The Particulars of the Complaint are set out in Appendix “A” to the February 20, 2020 Notice of Hearing under which this hearing is being conducted.

Abdoulkader Abdi” (the “Abdi case”). The Particulars also assert that, contrary to his evidence at the hearing of the First Complaint, Justice McLeod “was involved in the FBC’s efforts in this regard, including arranging and/or participating in a meeting with the Minister of Immigration, Refugees and Citizenship, the Honourable Ahmed Hussen, on behalf of the FBC.” At this hearing, Presenting Counsel also led evidence that the FBC sent a letter to the Minister on February 28, 2018 relating, at least in part, to the Abdi case.

[6] The audio recording memorializes a lengthy telephone conversation between Justice McLeod and Professor Idil Abdillahi, that occurred on February 19, 2018. Professor Abdillahi is a community activist and assistant professor at Ryerson University. Justice McLeod arranged the call through his sister, also a Ryerson professor, apparently to discuss community reaction to the FBC’s response (or lack of response) to the Abdi case. In the recording, Professor Abdillahi and Justice McLeod each refer to: Justice McLeod having had a meeting with the Minister in January 2018; the prospect of a letter being sent to the Minister concerning the Abdi case; and the possibility of Professor Abdillahi contacting Mr. Abdi’s lawyer to obtain information that could assist the FBC.

[7] It is undisputed that Professor Abdillahi recorded the telephone conversation without Justice McLeod’s knowledge or consent. In fact, as the recording reveals, she expressly agreed, on more than one occasion, that the conversation was “off the record”. Further, not only did Professor Abdillahi surreptitiously record the

telephone conversation, she permitted at least one other person to listen in on the conversation while it was taking place, again, without Justice McLeod's knowledge or consent. Finally, Professor Abdillahi allowed an activist associate to listen to – or have – at least portions of the recording. That associate later used the contents of the call to make comments on social media about both Justice McLeod and his sister, through whom the call had been arranged.

Justice McLeod's Position on the Admissibility Issue

[8] Justice McLeod does not dispute that Professor Abdillahi's evidence satisfies the low bar for establishing threshold authenticity of the audio recording sufficient to support its admissibility. However, he argues that, on the facts of this case, the potential prejudicial effect of admitting the recording outweighs its probative value such that we should invoke our residual discretion to decline to admit it.

[9] Justice McLeod's argument rests on four main pillars. First, he submits that Professor Abdillahi's extreme dishonesty before, during and after the February 19, 2018 telephone conversation should lead this Panel to disassociate itself from the audio recording.

[10] Professor Abdillahi's conduct was dishonest in three ways, says Justice McLeod. First, she lied about the conversation being off the record. Second, she deceived Justice McLeod by permitting eavesdropping by other(s). Third, as evidenced by her subsequent anonymous participation in the unauthorized use of

the recording to publicly embarrass Justice McLeod and his family, her purpose in surreptitiously recording the conversation was never about her own protection as she claims.

[11] Further, Justice McLeod submits such dishonesty was premeditated, prolonged and extreme. Professor Abdillahi set up the recording and the potential for eavesdropping before commencing the call. She persisted in this surreptitious conduct even after giving assurances that the conversation was confidential. And she participated in the subsequent public use of the recording, when she knew the conversation recorded was intended to be confidential.

[12] Because integrity is a core principle of the judicial system and foundational to the Judicial Council, a forum designed to uphold public trust in the judiciary, Justice McLeod submits that such extreme dishonesty should lead this Panel of the Judicial Council to disassociate itself from the recording.

[13] The second pillar of Justice McLeod's argument is that Professor Abdillah's manipulative behaviour on the call, together with inaudibles and gaps in the recording, taint the reliability of the recording. Moreover, Professor Abdillahi's manipulative behaviour, as exemplified on the call, is said to bely her purported justifications for engaging in surreptitious recording.

[14] Although Professor Abdillahi claims to have recorded the call to protect herself from the judge, he asserts that she obviously manipulated the conversation using a variety of techniques, demonstrating that she ultimately intended the

recording for use, not as a shield, but as a sword. These techniques included: i) inflammatory statements designed to incite a response (for example, “this [the FBC website] looks like a goddamn sham”; “the person at the head of [the FBC] is a damn judge; right?”); and ii) probing, obviously prepared and sometimes leading questioning aimed at eliciting information that might reflect badly on the organization or the judge (for example, questions about the FBC’s connections to the Liberal party; whether the FBC received government money; the involvement of a federal government minister’s wife in the FBC; the propriety of political involvement and donations to a political party by a judge; and concerning who at the FBC might have made political donations). This questioning culminated in a more conciliatory discussion during the latter part of the approximately 2 hour and 40-minute conversation in which Professor Abdillahi made suggestions to Justice McLeod about how the FBC should go forward. It is these suggestions, and more particularly Justice McLeod’s responses to them, that form the primary basis for the alleged relevance of the recording.

[15] Finally, Justice McLeod points to two gaps and various inaudibles in the recording as being significant to its reliability. First, the recording appears to end abruptly without capturing the conclusion of the conversation. A submission may be made that the preceding conversation points to Justice McLeod having agreed that the FBC would write a letter to the Minister concerning the Abdi case. However, Professor Abdillahi was unable to provide any explanation for this gap –

a gap that occurs at what is said to be a critical point in the conversation – therefore depriving this Panel of important context for assessing the ultimate value of the recording.

[16] An earlier gap in the call (about 50 missing seconds between 2 hours, 10 minutes and 12 seconds into the call and 2 hours, 11 minutes and 02 seconds) may be explained by Professor Abdillahi's evidence that she walked away from her computer (the device making the recording). Nonetheless, the gap demonstrates that the recording is incomplete, creating an obvious risk to the Panel's ability to evaluate the recording.

[17] Although Justice McLeod acknowledges that some inaudibles in the recording are inconsequential, he says others occur in the most relevant portions of the recording, demonstrating again the incompleteness of the recording: for example, inaudibles noted at pages 161 – 164 of the transcript of the recording.²

[18] The third pillar of Justice McLeod's argument is that public policy favours excluding the call from evidence both to denounce the practice of unjustified surreptitious recording and to preserve the integrity of this proceeding.

[19] While not illegal, the practice of surreptitious recording has been described in emerging caselaw as odious, and to be discouraged: *Seddon v. Seddon*, [1994] B.C.J. No. 1729, at para. 25; see also *Sordi v. Sordi*, 2011 ONCA 665, 283 O.A.C.

² A transcript of the audio recording was filed on consent, not as evidence, but as an aide memoire. These inaudibles are identified by referring to the transcript for convenience only.

287, at para. 12. Further, the practice violates privacy rights and respect for dignity. Here, the recording was not only surreptitious, but also premeditated. The scheming and dishonest conduct continued even in the face of assurances of the confidentiality of the conversation. Particularly in light of Professor Abdillahi's manipulation of the conversation, it is said that the Panel should be concerned about the long-term consequences of admitting this type of evidence in a forum designed to ensure public confidence in the administration of justice. Moreover, surreptitious recording is not only deceitful and self-serving, it has the potential to mislead, or at least complicate the task of, the trier of fact: *Paftali v. Paftali*, 2020 ONSC 5325, at para. 63; *R. v. Parsons*, 2017 NLTD(G) 160, at para 41.

[20] Finally, the fourth pillar of Justice McLeod's argument is that the probative value of the evidence is minimal. The Notice of Hearing is dated February 2020, meaning that a preliminary investigation had been completed and a hearing ordered. Presenting Counsel did not obtain the audio recording until several months later, in June 2020. Presenting Counsel's case can clearly proceed without the evidence of the audio recording, which relies for its relevance on inferences to be drawn from a manipulated conversation. At best, the audio recording provides only circumstantial evidence that is tainted both by deceit and reliability concerns.

[21] We did not accept these submissions for several reasons.

[22] As a starting point, we note that the evidence was not obtained illegally;³ that courts have admitted evidence of surreptitious recordings in a variety of circumstances;⁴ and that this situation does not fall within any of the categories of cases where, to date, courts or tribunals have excluded this type of evidence (for example, family law cases, as exemplified by Justice McLeod's authorities; and cases involving intrusions on deliberative secrecy, e.g. *Taylor v. WSIB*, 2017 ONSC 1223, at paras. 61-64, aff'd 2018 ONCA 108, at para. 19, leave to appeal to S.C.C. refused, 38980 (April 16, 2020)).

[23] Second, we observe that the audio recording, which is approximately 2 hours and 40 minutes in duration, is real evidence – and therefore the best evidence – of the conversation that took place between Professor Abdillahi and Justice McLeod on February 19, 2018. Although not made at the hearing, Justice McLeod's statements on that date are admissible for the truth of their contents as a recognized exception to the hearsay rule.

[24] Third, even accepting that Professor Abdillahi had an agenda in participating in the conversation and that there are certain gaps and inaudibles in the recording, except where a court or tribunal might exercise its residual discretion to exclude

³ *Cook v. Kang*, 2020 BCSC 575, 38 B.C.L.R. (6th) 144, at para. 51; *Criminal Code*, R.S.C. 1985, c. C-46, s. 184(2)(a).

⁴ See the following cases cited in *Cook v. Kang*, at para. 51: *Evans v. Teamsters Local Union No. 31*, 2006 YKCA 14 at para. 8; *Palkovics v. Barta*, 2012 BCSC 399, at paras. 51-54, 81; *Finch v. Finch*, 2014 BCSC 653 at para. 62; *Lam v. Chiu*, 2012 BCSC 440, at paras. 20-32.

evidence, those matters generally go to the weight of the evidence and not its admissibility: *R. v. Parsons*, (1977) 17 O.R. (2d) 465 (C.A.), aff'd *Charette v. R.* [1980] 1 SCR 785. Here, while not complete, the audio recording is a substantially complete record of a lengthy conversation in which Justice McLeod discusses, among other things, the possibility of the FBC sending a letter to the Minister concerning the Abdi case and Professor Abdillahi contacting Mr. Abdi's lawyer to obtain certain information. Whether the discussion relates to the letter that was actually sent; whether and why Justice McLeod took any information obtained from Mr. Abdi's lawyer to the FBC; and how any of this alleged conduct relates to his evidence at the hearing of the First Complaint are issues Justice McLeod can address in his evidence. The same can be said for what happened during the gaps and inaudibles in the recording.

[25] We conclude that, on the facts of this case, the issues Justice McLeod has identified as affecting the reliability of the recording are not so significant as to deprive it of sufficient probative value to render it inadmissible.

[26] Fourth, it is unclear from the recording why Justice McLeod asked that the conversation be "off the record" or precisely what that agreement meant. Personal information was not discussed. Moreover, there is some evidence before this Panel that Justice McLeod did not keep the fact of the conversation confidential and may not have kept the content confidential: see Document 66, Joint Document Brief, p.443, February 19, 2018 message at 6:32 p.m. Justice McLeod will have a

full opportunity to address these matters in his evidence and his explanation may ultimately affect the weight to be afforded to the audio recording.

[27] Fifth, and perhaps most important, the nature of this proceeding demands that the audio recording be admitted. The purpose of this proceeding is remedial. Its aim is to restore public confidence in the judiciary and in the administration of justice: Ontario Judicial Council, “Procedures Document” (September 2020), Procedural Rules 15.1 and 15.2.⁵ Whatever the provenance of the audio recording, its threshold authenticity is not challenged, and it contains real evidence relevant to the first allegation. In these circumstances, public confidence could not be restored if the audio recording were ruled inadmissible. Persons attending proceedings over which Justice McLeod might preside – and the public at large – are entitled to be satisfied that this Panel considered all evidence relevant to the question of whether he engaged in judicial misconduct, and if so, what remedial measures should be imposed to preserve public confidence in him and/or in the judiciary. See also: *Re Keast* (2017), Ontario Judicial Council, at para. 40.

Conclusion

[28] Based on the foregoing reasons, we ruled the audio recording admissible.

⁵ Procedural Rule 15.2 states:

The Hearing Panel’s mandate is to inquire into the facts to determine whether there has been judicial misconduct, and where judicial misconduct is found, determine the appropriate disposition or dispositions that will preserve or restore public confidence in the judiciary.

[29] Released: this 30th day of December, 2020.

“Justice Janet Simmons”, Chair

“Justice Michael J. Epstein”

“Mr. Malcolm M. Mercer”

“Mr. Victor Royce”