ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF a complaint respecting the Honourable Justice William G. Richards

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

Madam Justice P.H. Marjoh Agro

William James

Patricia D.S. Jackson

COUNSEL Andrew Burns, Presenting Counsel

J.J. Burke, Counsel to Mr. Justice W.G. Richards

REASONS FOR DECISION

This case concerns a complaint that Mr. Justice Richards improperly terminated the trial of a criminal proceeding over which he was presiding. At the conclusion of the hearing of the complaint the panel dismissed the complaint, indicating that its reasons would follow. These are the reasons for our decision.

History of Proceedings

The particulars of the complaint as set out in the Notice of Hearing are as follows:

1. It is alleged that on July 10, 1998 in Courtroom 124 at Old City Hall in the City of Toronto, the Honourable Mr. Justice William G. Richards ("Mr. Justice Richards") was scheduled to preside over, and did commence the hearing of a matter concerning charges against Mr. Edford Providence of two Counts of Threatening Bodily Harm contrary to the *Criminal Code*.

2. Mr. Providence had previously appeared on March 9, 1998 ready for trial, but the trial was postponed due to the failure of the Crown to produce a security videotape to the defence showing Mr. Providence in proximity to the complainant Ms. Adilman.

3. Mr. Providence was given a new trial date of July 10, 1998.

4. At the beginning of the hearing on July 10, 1998, Crown counsel Robin Flumerfelt called as its first witness Ms. Anna Adilman, the complainant in respect of the first of the two counts in respect of which Mr. Providence was charged.

5. The charges involved, *inter alia*, threats allegedly uttered on July 17, 1997 by Mr. Providence against Ms. Adilman at the William Ashley store where Ms. Adilman was working as a "greeter".

6. After Mr. Flumerfelt finished his examination-in-chief of Ms. Adilman, counsel for Mr. Providence, Mr. George N. Carter, commenced his cross-examination of Ms. Adilman.

7. At the beginning of his cross-examination, Mr. Carter indicated that he wished to play a security videotape recorded in the William Ashley store where Ms. Adilman was working at the time of the events that led to the charges against Mr. Providence.

8. Mr. Justice Richards, on hearing Mr. Carter state that he needed the videotape for his cross-examination of Ms. Adilman, remarked that it was "the Crown's videotape" and the Crown chose not to "put it in".

9. On hearing Mr. Carter's explanation that he wished to use the tape as part of his cross-examination, Mr. Justice Richards is alleged to have stated "all right. Hook it up and let's see it. I knew this . . . so, start cross-examining while it's getting hooked up."

10. During the cross-examination, Mr. Flumerfelt objected twice that no activity on the videotape was occurring. Mr. Carter continued his cross-examination.

11. After the cross-examination had proceeded for some time, at approximately 11:30 a.m., Mr. Justice Richards interrupted Mr. Carter and asked the police officer operating the video equipment to turn off the videotape player.

12. After asking that the player be turned off, Mr. Justice Richards is alleged to have spoken the following words: "This matter was marked for a day. I cannot be seized. This is my last

> day in Toronto. I am not going to hear it. Obviously, I have been acquainted with defence counsel before and he's very thorough and I guarantee I could not finish it today if I heard it . . . so, I'm going to strike the plea and stop the proceedings and . . . move it back to whatever court it came from . . .:.
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> 13. It is alleged that Mr. Providence was before Mr. Justice Richards for less than half an hour.
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> 14. It is alleged that Mr. Justice Richards asked neither the Crown counsel nor Mr. Carter how many witnesses either intended to call, and heard to substantive submissions before making his decision to terminate the proceedings.
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> 15. The above-noted conduct is incompatible with the due execution of the duties of the Honourable Mr. Justice William G. Richards.

The complaint was submitted by Mr. Providence and his counsel, Mr. Carter. Pursuant to ss.51.4(18) and 51.6 of the *Courts of Justice Act* (the "*Act*"), the Ontario Judicial Council (the "Council") directed the complaint to be heard by a panel of the Council. By virtue of the Council's procedures, established pursuant to the *Act*, a complaint is referred to hearing where there has been an allegation of judicial misconduct which has a basis in fact which, if believed by the finder of fact, could result in a finding of judicial misconduct. Such hearing is conducted by a panel established pursuant to s.49(16) and (17) of the *Act*.

Pursuant to ss.49.11 and 51.6(7) of the *Act*, Judicial Council hearings into complaints are open to the public unless the panel determines in accordance with criteria established under s.51.1(1) of the *Act* that exceptional circumstances exist and the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality. There was no suggestion of exceptional circumstances in this case. The hearing was therefore conducted in public.

The Facts

Mr. Justice Richards accepted the particulars set out above as substantially correct. The transcript of the proceedings before Mr. Justice Richards on July 10th was also filed in evidence, and confirms the particulars of the complaint.

Mr. Justice Richards' counsel outlined further facts relevant to the events surrounding the complaint. Those facts were not contested, and we accept them as correct.

Mr. Justice Richards sits as a *per diem* judge. That is to say he has retired, but pursuant to an Order-in-Council is authorized to sit as a judge and be paid, on a *per diem* basis, for a fixed number of days in the year. He is not permanently assigned to any jurisdiction. His assignments are controlled by a central administrator.

On the day in question he had been assigned to sit for one day only at Old City Hall. By mid-morning, he had completed the list of matters scheduled to be heard by him. He therefore asked if there were other matters, which he understood would be guilty pleas or other short matters, with which he could deal. The request for short matters was due to the fact that he was only sitting at Old City Hall for one day. It was also in accordance with the general instruction to *per diem* judges not to take on trials because there is no assurance of being able to complete them in the scheduled one day attendance.

Mr. Justice Richards' request for additional matters is consistent with his record as a judge who works hard, and one who effectively and efficiently deals with backlogs and guilty pleas. He is described by the local administrative justice in Brampton, Mr. Justice Cowan, in a letter filed as an exhibit in the following terms:

> Throughout all my years of knowing Judge Richards he has been and continues to be one of the hardest working, fairest judges that I know. This opinion is shared by a large number of counsel and his fellow judges.
>
> From a defence counsel's point of view they love to appear in front of him. He gets to the issues quickly, recognizes what the crux of the case is and deals with it in a fair and efficient manner.
>
> . . .
>
> On a daily basis we set 30 day hours per day of trial. I particularly appreciate the amount of work that he does because I know that he is not in good health and sometimes comes to court motivated only by the love of the job that he does so well.

When the Providence matter was brought before him on the morning in question Mr. Justice Richards did not make any inquiries before commencing the trial about the complexity or potential length of the matter, nor did he observe from the information that the matter was marked for a one day trial.

After the proceedings got underway, he realized that it was neither a guilty plea nor a similarly short matter. He observed, for the first time, the notation on the information that the matter was scheduled for a one day trial. The implication of counsel's outline of the facts is that Mr. Justice Richards judged from his experience with defence counsel that if there was more than one witness the case was likely to last two or three days. Because he was only scheduled to be at City Hall on that day and was not scheduled to return, Mr. Justice Richards realized that to allow the trial to continue would lead to an inevitable, and potentially very substantial delay. Without hearing from counsel, he suspended the proceedings and directed the matter to be re-assigned.

Mr. Justice Richards acknowledged that he was in error in commencing the trial, without making inquiries which would satisfy him about the length of the matter, and then terminating it. He explained that his actions were motivated by a desire to "move a list in overcrowded, understaffed courts" He acknowledged that "[moving] the list . . . may appear to the public along with the administration of justice to overshadow the appearance of justice". He acknowledged that this was wrong and apologized.

The Issue

The sole issue in this case is whether Mr. Justice Richards' conduct constitutes misconduct within the meaning of s.51.6(11) of the *Act.* That section provides:

> 51.6(11) After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge may,
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> (a) warn the judge;
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> (b) reprimand the judge;

> (c) order the judge to apologize to the complainant or to any other person;
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> (d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
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> (e) suspend the judge with pay, for any period;
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> (f) suspend the judge without pay, but with benefits, for a period up to 30 days; or
>
> (g) recommend to the Attorney General that the judge be removed from office in accordance with s.51.8.

Presenting Counsel submits that the conduct of Mr. Justice Richards, in striking the plea, apparently for reasons of his own administrative convenience and expressed antipathy towards defence counsel, could affect the reputation of the administration of justice so as to amount to judicial misconduct pursuant to s.51.6(11) of the *Act.*

Analysis

The terms of s.51.6(11) of the *Act* evince a clear intention by the Legislature that judicial misconduct may embrace a wide spectrum of conduct. Before the 1995 amendments to the *Act*, the Judicial Council was charged with the investigation of complaints against provincial judges but could dispose of them only by referring them to the Chief Judge, by recommending an inquiry into the question of whether the judge should be removed from office, or by recommending the judge be compensated for the costs of the investigation.

The current *Act* clearly contemplates the concept of judicial misconduct, and that such misconduct may include conduct of a more minor nature (meriting a warning or a reprimand), to conduct of the most extreme seriousness, meriting a removal from office. It is evident from the legislation that the intention is that judicial misconduct is not limited to actions warranting removal from office.

The Supreme Court of Canada has recently considered the issue of judicial misconduct in its determination of the standard of review applicable to a decision by the New Brunswick Judicial Council in *Moreau-Bérubè v. New Brunswick (Judicial Council),* [2002] S.C.J. No. 9. The New Brunswick statutory regime there under consideration is similar to the

one governing these proceedings. The New Brunswick Judicial Council is charged with review of allegations of judicial misconduct, neglect of duty or inability to perform the duties, and may dispose of such complaints through dismissal, a reprimand with conditions, or a recommendation of removal from office. The issue before the Judicial Council in the *Moreau-Bérubè* case was whether the judge's derogatory comments about Acadians made while presiding over a sentencing hearing amounted to an abuse of judicial independence such as to attract discipline. The Supreme Court of Canada described those cases which would attract a disciplinary process at paragraph 58:

> In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

In a recent decision of this Council, the panel considered the Supreme Court of Canada's decision in *Moreau-Bérubè* as well as its decision in *Therrien v. Minister of Justice et al.* (2001), 155 C.C.C. (3d) 1 and described the test under s.51.6(11) as follows:

> The purpose of judicial misconduct proceedings is essentially remedial. The dispositions in s.51.6(1) 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-Bérubè,* 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 confidence.

In this case there is no question that Mr. Justice Richards had become seized of the criminal trial when he began hearing evidence, and that his decision to terminate the trial without hearing from counsel was in error. Mr. Justice Richards concedes this, and in effect concedes that his conduct fell below the standard expected of a judge in those circumstances.

In general, a decision to terminate a trial which has already begun on the basis of personal or administrative concerns would bring the administration of justice into disrepute and could amount to judicial misconduct. The result is the inevitable delaying of the trial, with attendant prejudice, as well as the substantial inconvenience to the accused, and those witnesses in attendance. In most circumstances, such a decision would increase the likelihood that the accused's s.11(b) rights under the *Charter* had been violated. This is particularly so in a case, such as this one, where the trial had already been postponed because of the Crown's failure to produce apparently relevant evidence.

In our view, however, this case is an exception to the general rule. When we consider all of the facts, we are of the view that Justice Richards' conduct falls short of constituting judicial misconduct. There are a number of reasons:

1. The judge is known for his diligence. His reputation is not only that he does not avoid work, he seeks it out. He offered to take more cases that day.

2. The judge did not realize that the case was scheduled for more than one day when he started the trial.

3. The judge's assessment was that this counsel often caused cases to take more rather than less time.

4. The judge was a *per diem* judge, and as a matter of administration was not likely to be available for a considerable period of time -- perhaps causing a longer delay than if he aborted the trial.

5. The case would not have been reached in the other court in which it was originally scheduled.

6. The judge has been on the court for 25 years with an unsullied reputation. Indeed, his reputation is that of a diligent and hard working judge.

7. The judge demonstrated a clear understanding of the significance of his error in this case. His apology was sincere.

8. The dispositions in s.51.6(11) are in general prospective, not punitive. It is highly improbable that this judge would make the same kind of mistake again. (We do not, in making this observation, consider that the need to address the possibility of future misconduct is a *sine qua non* for a finding of judicial misconduct.)

9. The judge's conduct did constitute an error in judgement. He should have addressed the issue of the length of the trial before it started and once he decided to address it he should have asked counsel how long it was likely to take. However, a reasonable member of the public knowing all of the relevant facts would not view this as more than an error in judgement.

For all of these reasons, we consider that this admitted error in judgement falls short of constituting judicial misconduct. We therefore dismiss the complaint.

Compensation

Madam Justice Agro is a member and director of the Ontario Conference of Judges. The conference has a compensation fund for judges who appear before the Judicial Council. Accordingly, Madam Justice Agro recused herself from this portion of the decision.

Section 51.7(5) of the *Act* requires that in circumstances where a complaint is dismissed the Judicial Council must recommend to the Attorney General that the judge be compensated for the costs of legal services and must indicate the amount. Pursuant to s.51.7(7) the amount of the compensation may relate to all or a portion of the judge's costs for legal services and must be based on a rate which does not exceed the maximum rate normally paid for legal services by the Government of Ontario. In this case, counsel made a joint recommendation for costs in the amount of $3,000. It is evident from the hearing itself and the information provided to us that this is a substantial reduction from the amount that could be awarded. While we have concluded that there was no judicial misconduct, we are of the view that there was an error in judgement. The case was certainly an appropriate one to be brought forward to a hearing.

In all of the circumstances, we recommend to the Attorney General that Mr. Justice Richards be compensated for his legal costs in the amount of $3,000.

DATED at the City of Toronto, in the Province of Ontario, June 7th, 2002.

Associate Chief Justice Dennis R. O'Connor

Madam Justice P. H. Marjoh Agro

William James

Patricia D. S. Jackson