

ONTARIO JUDICIAL COUNCIL

IN THE MATTER OF 81 complaints respecting

The Honourable Justice Bernd Zabel

A Judge of the Ontario Court of Justice in the Central West Region

REASONS FOR DECISION

Before:

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

The Honourable Justice Leslie Pringle
Ontario Court of Justice

Mr. Christopher D. Bredt
Borden Ladner Gervais LLP
Lawyer Member

Mr. Farsad Kiani
Community Member

Hearing Panel of the Ontario Judicial Council

Counsel:

Ms. Linda Rothstein and Mr. Michael Fenrick
Paliare Roland Rosenberg Rothstein LLP
Presenting Counsel

Mr. Ricardo G. Federico and Ms. Giulia B. Gambacorta
Counsel for the Honourable Justice Bernd Zabel

REASONS FOR DECISION

[1] On November 9, 2016, the day after the United States presidential election, Justice Bernd Zabel went into court wearing a red “MAKE AMERICA GREAT AGAIN” baseball hat, the campaign signature of the successful candidate, Donald Trump. The incident attracted media attention and public criticism of Justice Zabel. On November 15, 2016, Justice Zabel apologized and acknowledged that he should not have worn the hat in court.

[2] Eighty-one complaints concerning Justice Zabel’s conduct were filed after the incident. This panel of the Ontario Judicial Council (“OJC”) was convened to hear the allegations of Justice Zabel’s misconduct pursuant to s. 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “Act”).

[3] There is no real dispute as to the facts giving rise to these complaints. The essential facts are set out in an Agreed Statement of Facts signed by Presenting Counsel and Justice Zabel. At the hearing, Justice Zabel testified and two additional witnesses were called on his behalf. The panel was also provided with the 81 complaints, a brief of media articles and opinions, and 63 letters and two cards written in support of Justice Zabel.

[4] Justice Zabel admits that 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, established and approved pursuant to s.

51.9 of the *Act*. Justice Zabel also admits that his conduct constitutes judicial misconduct that warrants the imposition of one or more of the sanctions under s. 51.6(11).

FACTS

[5] Justice Zabel is a judge of the Ontario Court of Justice assigned to preside in the Central West Region. Justice Zabel, now 69 years old, immigrated to Canada from Germany as a young child in 1953. In his evidence, he described himself as a refugee from communism. He was appointed to the Ontario Court of Justice on April 2, 1990 and has served as a judge in Hamilton for 27 years. Prior to his appointment to the bench, he practised criminal and family law for 11 years. There have been no previous findings of judicial misconduct against him. The record before us demonstrates that he is highly regarded by his judicial colleagues and by members of the Hamilton bar and considered to be a valued, hardworking, fair minded and impartial judge.

Events of November 9, 2016

[6] Justice Zabel testified that he ordered six red baseball hats with the phrase “MAKE AMERICA GREAT AGAIN” inscribed in white on the front from Amazon in June 2016. These hats were associated with Donald Trump’s presidential election campaign. When Justice Zabel purchased the hats, Donald Trump was on his way to securing the Republican Party’s nomination but was not expected to win the presidency. He returned one of the hats that was defective, gave four of the hats

to friends, and put one in a desk drawer in his office. He testified that he purchased the hats as historical memorabilia and not as a Trump supporter. He also stated that he has a portrait of former president John F. Kennedy hanging in his office.

[7] Justice Zabel testified that he once wore the hat in the judges' common room. His colleagues laughed and he put the hat back in his desk. As the presidential election campaign progressed, Justice Zabel formed the view that Trump was likely to win the presidency.

[8] On November 8, 2016, the day of the U.S. presidential election, Justice Zabel watched the live televised election results until late into the night.

[9] Justice Zabel testified that, on the morning of November 9, 2016, he thought people in the courtroom would be discussing Trump's stunning victory. He stated that he thought "it would add a bit of humour by starting off the day with the hat, which was very ill-fitting – it looks very silly on me". He put on his "MAKE AMERICA GREAT AGAIN" hat as he left his chambers. On the way to court, he encountered two of his fellow judges, Justices Culver and Agro. Both commented adversely on the fact that he was going into court wearing the hat. Justice Agro testified that she told him: "Are you out of your mind?" Justice Zabel said that he was wearing the hat as a joke to mark a moment in history.

[10] There were several criminal matters on Justice Zabel's list and ten lawyers made appearances as the morning progressed. Members of the public and court

staff were also present in the courtroom. There was some laughter when Justice Zabel entered the courtroom wearing the hat. After the clerk registrar announced that court was in session, Justice Zabel stated: "Just in celebration of a historic night in the United States. Unprecedented." He took off the hat and placed it on the dais with the phrase "MAKE AMERICA GREAT AGAIN" visible to those in the courtroom. Crown counsel responded "Yes." One of the defence counsel, Michael Wendl, stated "I should have worn my shirt, Your Honour."

[11] Justice Zabel proceeded to deal with the first matter on the scheduling list. Mr. Wendl appeared for the accused and noted that the proposed date was the U.S. Inauguration Day. Justice Zabel stated: "...when is that? Were you planning on being down there, Mr. Wendl?" Mr. Wendl replied: "I am not going to the United States for four years, Your Honour." Justice Zabel responded: "Uh oh, I won't get into that."

[12] Justice Zabel then dealt with several matters in a routine fashion without further incident or reference to the hat. Five accused persons entered guilty pleas. Contrary to media reports, Justice Zabel took the hat when he left the courtroom for the morning break and did not wear or bring the hat after the break.

[13] By lunch time Justice Zabel had completed his list. He asked the clerk registrar to see whether any other court needed assistance and was informed that none did. Justice Zabel adjourned court until after lunch so that a further check could be made to see if there was any other need for assistance in other courts.

[14] He went back into court at 2:20 p.m. and was advised that no other court needed assistance. The clerk registrar called “All rise” and as Justice Zabel was leaving the court room, Crown counsel stated: “You’ve lost your hat.” There was some laughter. Justice Zabel replied: “Brief appearance for the hat. Pissed off the rest of the judges because they all voted for Hillary, so [sic]. I was the only Trump supporter up there, but that’s okay.” Justice Zabel testified that he did not mean to say he was a Trump supporter, but rather that he was the only one among his colleagues who had predicted that Trump would win.

[15] We do not accept Justice Zabel’s submission that this exchange should be regarded as an “off the record” exchange with Crown counsel. While the court had completed its business, Justice Zabel was still in court and wearing his gown. He was expected to conduct himself accordingly.

The Events of November 15, 2016

[16] On Friday, November 11, 2016, the *Globe and Mail* published a story reporting what had occurred in Justice Zabel’s court on November 9. The *Globe* story reported that Kim Stanton, the legal director of the Women’s Legal Education and Action Fund (“LEAF”), had expressed serious concerns that Justice Zabel had associated himself with Trump’s campaign. Ms. Stanton stated that she was concerned about Justice Zabel’s capacity to judge fairly since Trump made derogatory comments during his campaign about women, proposed a temporary ban on Muslims from entering the U.S., the deportation of undocumented

immigrants, and planned to build a wall along the Mexican border. A Muslim lawyer was quoted as stating that many in his community would fear bias if they appeared in front of Justice Zabel. The Dean of Osgoode Hall Law School was quoted as stating that the incident did not amount to misconduct but required a warning. A prominent criminal lawyer indicated that Justice Zabel was a fine judge and suggested that the matter should be dealt with internally.

[17] Justice Zabel testified that the *Globe* article was the first indication he had that his conduct had given rise to concern. He stated that he was “surprised and shocked at the response to my ill-considered joke” and that he reviewed the audio tape of the day’s proceedings.

[18] On Tuesday, November 15, 2016, his first day in court after the *Globe* story, Justice Zabel went into court, observed that there were members of the press present, and made the following statement:

This is the first time I’ve presided since the *Globe and Mail* article on Friday, November 11th, reporting that on Wednesday, November 9, I opened court wearing Mr. Trump’s signature campaign hat. The article was factually correct except that I did not come back with the hat after the morning break.

What I did was wrong. I wish to apologize for my misguided attempt to mark a moment in history by humour in the courtroom, following the surprising result in the United States election. This gesture is not intended in any way as a political statement or endorsement of any political views, and in particular, the views and comments of Donald Trump. I very much regret that it has been taken as such. I apologize for any offence or hurt caused by my thoughtlessness. I acknowledge that wearing the hat is a breach of the principles of judicial office and a lapse in judgment that I sincerely regret. I apologize for my actions to the public

I serve, the institution I represent, my judicial colleagues, members of the bar, and all persons serving the administration of justice. I will humbly continue to treat all persons that appear before me fairly and impartially as I have done since my appointment to this honourable bench in 1990.

The Complaints

[19] Following the media coverage of the events of November 9 and 15, 2016, the OJC received 81 complaints with respect to Justice Zabel's conduct. The complaints came from public interest organizations, law professors, lawyers, paralegals, and members of the public. Nine complaints came from legal organizations: LEAF; the Ontario Bar Association; the Canadian Bar Association of Black Lawyers; the Criminal Lawyers' Association; the South Asian Bar Association of Toronto; the Canadian Muslim Lawyers Association jointly with the Canadian Association of Muslim Women in the Law; the Rights Advocacy Coalition for Equality; the HIV & Aids Legal Aid Clinic of Ontario jointly with the Canadian HIV/AIDS Legal Network; and the Roundtable of Diversity Associations.

[20] The common theme of all these complaints is that Justice Zabel's conduct represented an unacceptable expression of partisan political views by a judge. Most complainants indicate a heightened concern as they perceive many of the things Trump said during his campaign to indicate misogynistic, racist, homophobic, and anti-Muslim attitudes. The complainants state that Justice Zabel has associated himself with those views by his conduct and that women and members of various vulnerable groups would reasonably fear that they would not be treated fairly and impartially by Justice Zabel.

[21] None of the complaints came from any of the people in Justice Zabel's court on November 9, 2016, which included representatives of both the provincial and federal Attorneys General. Michael Wendl, one of the defence counsel who was before Justice Zabel on that date, wrote one of the many letters of support. He describes Justice Zabel as "the paradigm of judicial deportment" and adds:

I am in the unique position that I was in the courtroom the day of the hat incident. It is my view that Justice Zabel was joking. In fact, I was joking with him. It is my view that Justice Zabel's conduct was likely just a bi-product of the collegial atmosphere that exists in Hamilton. I have no concerns running any of my future matters in front of Justice Zabel, I have no concerns about his impartiality, nor do I have any concerns about having a fair hearing.

Ontario Judicial Council Proceedings

[22] In December 2016, the Regional Senior Justice suspended Justice Zabel with pay pursuant to s. 51.4(8) on the recommendation of an OJC Complaints Subcommittee pending the resolution of the complaints against him.

[23] Pursuant to its complaints procedures, the OJC provided Justice Zabel with copies of the complaints and gave him the opportunity to respond. Through his legal counsel, Justice Zabel responded very briefly and stated that he made a public apology on November 15, 2016, that he remained contrite, and that he was looking forward to resuming his judicial duties.

[24] The OJC Complaints Subcommittee ordered that the complaints be the subject of a hearing pursuant to s. 51.6 of the *Act*. Presenting Counsel served and filed a Notice of Hearing summarizing the events of November 9 and 15, 2016 and

alleging that Justice Zabel's actions: were contrary to the standard of conduct expected of a judge; had negatively impacted on public confidence in the administration of justice; had compromised the public's perception of the independence of the judiciary from politics and constituted an expression of his own and his colleagues' political views. It is also alleged that his November 15 explanation was not consistent with the comments he made in court on November 9. The Notice of Hearing alleges that Justice Zabel's actions constitute judicial misconduct that warrants a disposition under s. 51.6(11) of the *Act* to preserve public confidence in the judiciary.

ANALYSIS

Judicial Misconduct

[25] This panel must first determine whether Justice Zabel's actions constitute judicial misconduct. We are satisfied on the basis of the Agreed Statement of Facts, Justice Zabel's admissions, and the additional evidence we have heard that they do.

[26] Canadian judges are held to a high standard. In *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 108, the Supreme Court of Canada described the judicial function as "absolutely unique." Judges resolve disputes, determine rights, and defend the fundamental rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. As the Supreme Court stated at para. 109, the "judge is the pillar of our entire justice system".

[27] Maintaining confidence in the judiciary is essential to our democratic form of government. This means that “[t]he public will ... demand virtually irreproachable conduct from anyone performing a judicial function” and that judges “must be and must give the appearance of being an example of impartiality, independence and integrity”: *Re Therrien*, at para. 111.

[28] The separation of politics from the judiciary is a cornerstone of the rule of law and our democratic system of government. One of the most basic and fundamental principles of our justice system is that the judiciary is independent from politics. Judges must, at all times, remain above the political fray and they must conduct themselves so as to avoid any perception that the administration of justice will be influenced by their political views. Citizens must feel secure that the judge will decide their fate according to the law and the evidence. The expression of political views by judges, particularly in the courtroom, is inimical to these basic values.

[29] These principles are well-known and clearly stated in ethical guidelines for judges. The *Principles of Judicial Office* for judges of the Ontario Court of Justice state:

3.1 Judges should maintain their personal conduct at a level which will ensure the public’s trust and confidence.

3.2 Judges must avoid any conflict of interest, or the appearance of any conflict of interest, in the performance of their duties.

Commentaries

Judges must not participate in any partisan political activity.

Judges must not contribute financially to any political party.

[30] A similar statement can be found in the Canadian Judicial Council's *Ethical Principles for Judges*, at p. 28: "All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity."

[31] Justice Zabel made no comment on Canadian politics and Canadians have no say and cannot vote in U.S. elections. However, given our proximity to the U.S. and the enormous impact that our powerful neighbour has upon our daily lives, Canadians take a very lively interest in American politics. Our economic well-being and our sense of peace and security is affected by the President of the United States. Canadians have strong views on who should be elected to that office.

[32] The 2016 U.S. presidential election campaign was highly partisan and bitter. The candidates advocated strongly divergent policies. Many of Trump's positions were provocative and controversial. If adopted, his policies on matters such as free trade, climate change, immigration, and national security would affect the daily lives of many Canadians. His views attracted wide attention in Canada and many Canadians expressed their strong disagreement with his policies. It was often stated that Trump's policies were contrary to Canada's interests and contrary to

basic Canadian values. Many Canadians found his views on women, racialized minorities, and other vulnerable groups to be highly offensive. For a judge to appear to endorse Trump's views would be perceived by the public to be an expression of opinion on issues of profound importance to Canadians.

[33] Justice Zabel insists that he did not intend to indicate his support for Donald Trump. He testified that he was trying to make a joke about a result few had expected and that he was not expressing support for Trump, but rather celebrating his prediction that Trump would win the election.

[34] While Justice Zabel's intentions are relevant, his conduct must be measured by an objective test. As the Canadian Judicial Council states at p. 27 of its *Ethical Principles for Judges*: "The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person."

[35] What would a reasonable member of the public think upon seeing Justice Zabel enter the courtroom wearing Trump's signature red "MAKE AMERICA GREAT AGAIN" hat and state that he did so "in celebration of an historic event"? In our view, and indeed as Justice Zabel himself now acknowledges, a reasonable member of the public would think that Justice Zabel was making a political statement and endorsing Donald Trump's campaign.

[36] We agree with Presenting Counsel's submission that the 2016 decision of the Chairperson of the Canadian Judicial Council's Judicial Conduct Committee

not to proceed with a complaint against a judge who wore a Trump t-shirt while shopping is distinguishable from the case before us. In that case, the conduct occurred out of court, there was nothing to indicate to the public that the person wearing the t-shirt was a judge, the judge said nothing to indicate support for Trump, and he had apparently put on the t-shirt earlier in the day and went shopping without giving it more thought.

[37] We have no hesitation in finding that Justice Zabel's actions amounted to a serious breach of the standards of judicial conduct, that it had an adverse impact upon public confidence in the judiciary and the administration of justice, and that it warrants a disposition under s. 51.6(11) of the *Act*.

Appropriate Disposition

[38] This brings us to the most difficult issue that we must decide: what is the appropriate disposition in the circumstances of this case?

[39] Section 51.6(11) defines the possible sanctions this panel can order to restore public confidence in the administration of justice:

- (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.

[40] Section 51.6(12) provides that our order may include any combination of these sanctions, except that a recommendation that the judge be removed from office cannot be combined with any other sanction.

[41] In *Re Chisvin*, (OJC, November 26, 2012), at para. 38, the following list of factors was identified as being relevant to the 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.

[42] In addition to these factors, we must also be mindful of two principles, identified in *Re Baldwin*, (OJC, May 10, 2002), that should guide the choice of the appropriate sanction or disposition.

[43] The first principle is that the purpose of judicial misconduct proceedings is “essentially remedial”. When determining the appropriate sanction, the OJC should focus on what is “necessary in order to restore a loss of public confidence arising from the judicial conduct in issue.” The object is not to punish the judge. Rather, the purpose is to repair any damage to the integrity and repute of the administration of justice.

[44] The second principle is proportionality. *Re Baldwin* holds that “the Council should first consider the least serious [disposition] – 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.”

[45] In this case, there are both aggravating and mitigating factors.

[46] The aggravating factors are that the judicial misconduct occurred in the courtroom while Justice Zabel was acting in his official capacity. As we have

already observed, we consider this misconduct to be serious. It contravened the fundamental principle that judges must not express political views and that the administration of justice must remain separate from and above the fray of political debate. Justice Zabel's conduct attracted wide attention in the media, in the public and in the legal profession and it has harmed the reputation of justice in this province.

[47] There are, however, several mitigating factors.

[48] Justice Zabel acknowledged that he violated the expected standard of judicial conduct. He publicly apologized for his conduct on November 15, 2016 and he apologized again before this panel: "I wish to say to the panel that I find it very difficult to find the words to express my profound regret about what I did that day and the effect it had on the administration of justice. It was ill-considered, ill-thought out and I've obviously learned a lot from that." He added that he understands how his attempt at humour was construed by many Ontarians as an endorsement of Donald Trump and an expression of support for his controversial views. He also agreed that his conduct had a negative impact on the administration of justice.

[49] That said, we agree with Presenting Counsel's submission that there are lingering concerns about the adequacy of Justice Zabel's November 15 apology. In that statement, Justice Zabel insisted that his conduct was a misguided attempt at humour and was not intended to show support for Donald Trump's views. Whatever Justice Zabel may have intended, his statement as he entered court on

November 9 that he was wearing the hat “in celebration of an historic event” and his statement as he left court at the end of the day that he was the only Trump supporter amongst his fellow judges was bound to be taken as expression of support for Donald Trump’s campaign.

[50] We also agree with Presenting Counsel’s submission that Justice Zabel should have explicitly apologized for attributing political views to his colleagues when he stated that they had “voted” for Hillary Clinton. He had listened to the tape of the November 9 proceedings before he made his November 15 statement and he should have included an apology for that aspect of his conduct.

[51] We are, however, satisfied that Justice Zabel now recognizes and accepts that his conduct was perceived as an expression of support for a controversial political candidate despite whatever intentions he had when he wore the hat into court. He realizes that his conduct was unacceptable and inconsistent with the standard expected of a judge. He profoundly regrets his actions on November 9 and we are satisfied that there is no risk that he will engage in similar conduct in the future.

[52] We are also satisfied that Justice Zabel has shown an effort to change or modify his conduct. He attempted to take a course on judicial ethics and when he learned that the course was not available in 2017, he asked Justice James Turnbull, a senior member of the Superior Court of Justice, to provide him with one-on-one training based on the materials prepared for the course. Justice

Turnbull has written a letter of support indicating the nature of his mentorship with Justice Zabel, stating that he is satisfied that Justice Zabel clearly understands the ethical principles applicable to judges and that his conduct breached those principles. Justice Turnbull concluded that he is fully confident that Justice Zabel will never again be the subject of an OJC complaint for breach of judicial ethics.

[53] This brings us to what we regard as the most significant mitigating factor – Justice Zabel’s 27 year record of unblemished and exemplary service on the bench. He has not been the subject of any prior OJC proceedings. It is clear from the 63 letters of support from his judicial colleagues, members of the bar, court staff, and members of the public that he enjoys an enviable reputation as a highly professional, competent, courteous, fair minded, and compassionate judge.

[54] Justice Zabel is praised for his hard work, professionalism, integrity, and for being helpful to other judges and to counsel. Young lawyers praise him for his help and encouragement. The president of the Hamilton Criminal Lawyers’ Association states that her group does not support the Criminal Lawyers’ Association complaint, that she has frequently appeared before Justice Zabel, and that she has always found him to be fair and impartial. Female colleagues say that he encouraged them when they were at the bar and has been entirely supportive since they joined him on the bench. Fellow judges and members of the bar insist that he is an open minded and impartial judge who does not exhibit polarized, misogynistic, racist or homophobic views.

[55] Justice Marjoh Agro testified before the panel and explained how Justice Zabel helped her when she was a young female lawyer at a time when she was one of a very few female litigators in Hamilton. He encouraged her to apply for the bench and he has supported her since her appointment. She recognizes that Justice Zabel made a very bad mistake but she is anxious to see him return to the bench.

[56] Lidia Narozniak, a retired Assistant Crown Attorney, testified that she had prosecuted many difficult cases before Justice Zabel involving domestic violence, child abuse, and sexual assaults involving accused, complainants, and witnesses from a variety of socio-economic levels, nationalities, races, sexual orientations, and gender identities. At no time did she witness a whisper of racism, sexism, misogyny, or lack of impartiality. She testified that Justice Zabel treated those before him with courtesy and respect at all times. Those comments are echoed in many other letters of support, including letters from a South Asian lawyer and a number of female lawyers.

[57] A number of the complaints reflect the fears of litigants who are susceptible to discrimination because of their gender, race, (dis)ability, sexual orientation, national origin, or immigration status. It is suggested that Donald Trump made many well-publicized statements perceived to indicate misogynistic, racist, anti-Muslim, anti-immigrant, and homophobic views, which are completely at odds with Canadian values. The complainants submit that individuals who might suffer

discrimination would fear that they would not be fairly treated by a judge who expressed support for Donald Trump's candidacy.

[58] Here we are faced with a stark contrast between the perception created by the November 9 incident and the reality of an experienced and fair minded judge. Justice Zabel's conduct that day gave rise to a perception by many that he was a Trump supporter and that he agreed with Trump's views and policies. In doing so, he violated a fundamental principle of judicial ethics and, particularly in view of the controversy surrounding Donald Trump's campaign, engaged in serious misconduct when he wore the "MAKE AMERICA GREAT AGAIN" hat into court on November 9, 2016.

[59] On the other hand, we have the reality of the person Justice Zabel is. His conduct on November 9, 2016 was completely at odds with the exemplary judge he has been for the past 27 years. We are satisfied that Justice Zabel does not hold any of the discriminatory views that the complainants attribute to Donald Trump. We are satisfied that members of vulnerable groups need have no fear about the treatment they would receive from Justice Zabel. Whatever Justice Zabel may have thought about the U.S. presidential election, and however serious his actions of November 9, 2016 may have been, his record on the bench and his reputation with his judicial colleagues and the bar demonstrates that he is an entirely fair minded and impartial judge who is dedicated to the highest ideals of his calling.

[60] Perceptions matter. It is a long-standing principle that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”: *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256 at 259.

[61] But reality also matters. The test for judicial bias laid down by the Supreme Court of Canada is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude”: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394-95; and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 31. The reasonable observer is not “very sensitive or scrupulous”: *S. (R.D.)*, at para. 36. Rather, as one leading English decision puts it, the reasonable observer is the “sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument” and “who takes the trouble to read the text of an article as well as the headlines.” *Helow (AP) v. Secretary of State for the Home Department and another*, [2008] U.K.H.L. 62, at paras. 2 and 3.

[62] The reader of the headline – “Judge wears ‘MAKE AMERICA GREAT AGAIN’ hat into court” – would be very concerned about the capacity of that judge to carry out his judicial duties in an acceptable manner. But the reader of the whole story of the judge’s exemplary 27 year career, his sensitivity to matters such as race and gender, and the absence of any indication of prejudice or bias, might well see things differently.

[63] The choice of the appropriate disposition is a difficult one. On the one hand, Justice Zabel's conduct on November 9 was a serious breach of judicial ethics. On the other hand, it is difficult to imagine how or why a judge of Justice Zabel's experience and record of service conducted himself as he did and there appears to be no risk that he would ever be motivated by any of the political views that he appeared to endorse.

[64] Given the gravity of Justice Zabel's conduct, it is our view that none of the less serious sanctions – warning, reprimand, ordering an apology, ordering remedial measures, or suspension with pay – are adequate. The choice we face is between the second most serious sanction, suspension without pay for 30 days, perhaps combined with other less serious sanctions, and recommending removal from office.

[65] The Supreme Court of Canada stated in *Re Therrien*, at para. 147 (citing Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: 1995), a report prepared for the Canadian Judicial Council, at pp. 80-81):

[B]efore 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.

[66] After giving careful consideration to our difficult decision, we have come to the conclusion that a recommendation for removal from office is neither appropriate nor necessary in the circumstances of this case

[67] In this case, a judge with a lengthy and stellar record of service committed a single aberrant and inexplicable act of judicial misconduct. A reasonable and informed member of the public, considering Justice Zabel's conduct in the context of his entire career, and in the context of the evidence we have heard, would not think it necessary to remove him from office because of this single transgression in order to restore public confidence in the justice system. We add that absent the strong evidence of Justice Zabel's long record of impeccable service as a fair and impartial judge, the result may well have been different.

[68] We make the following disposition.

[69] We impose the most serious sanction permitted by law short of removal from office and suspend Justice Zabel without pay for 30 days.

[70] Combined with the suspension, we also reprimand Justice Zabel for his breach of the fundamental principle of judicial conduct that judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

[71] We note that Justice Zabel has already been suspended from his judicial duties since December 2016. He has been deeply affected by the public shame

he has brought upon himself and the justice system he serves. He is a man proud of his professional achievements and his record of judicial service, and he is paying a very public price for his transgression.

DISPOSITION

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

1. Justice Zabel is reprimanded for his breach of the standards of judicial conduct;
2. Justice Zabel is suspended for 30 days without pay.

[73] Justice Zabel, quite appropriately in our view, did not request compensation for the costs of these proceedings.

Date: September 11, 2017

Hearing Panel of the Ontario Judicial Council:

The Honourable Justice Robert Sharpe, Chair
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