File No. 05-22-041/1PD2

JUSTICES OF THE PEACE REVIEW COUNCIL

IN THE MATTER OF COMPLAINT(S)
REGARDING HIS WORSHIP ERROL MASSIAH
Justice of the Peace in the
Central East Region

SUBMISSIONS ON BEHALF OF HIS WORSHIP MASSIAH

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PRELIMINARY MOTIONS:

1. The Applicant Justice of the Peace Massiah has made two preliminary objections which should, it is submitted, be decided prior to any determination on the merits of the case.

2. First, it is submitted that the Panel has no jurisdiction to hear the case; it is submitted that no "complaint" has been made as required by the Justice of the Peace Act as a foundation for jurisdiction. The Applicant's argument on this point is found as Part One of these Written Submissions.

3. Second, and in the alternative, it is submitted that the Panel should exercise its jurisdiction under s. 23 (1) of the Statutory Procedures Act to prevent abuse of its processes and impose an appropriate remedy. Argument on this point is found in Part Two of these Written Submissions.

4. Should the Panel find no merit in either Part One or Part Two of this Memorandum, Justice Massiah, Respondent on the merits, submits that the evidence at the hearing does not support an allegation of judicial misconduct, and this Panel should so find. Argument for this proposition is to be found at Part Three to this Memorandum.

PART ONE: JURISDICTION

5. The Panel has permitted argument on the question of whether any of the complaints before it comply with the requirement set out in section 10.2(2) of the Justice of the Peace Act that a complaint be "in writing".

Panel Decision on Grounds to be Argued on the Motion Alleging Abuse of Process - June 19/04, Paragraph 8 and 18

A Has there been a "complaint" made sufficient to provide a foundation for urisdiction for a hearing under the Justices of the Peace Act ?

6. Neither the panel nor the Applicant know the date, nor the contents of the first telephone calls to Mr. Hunt, presenting counsel on the previous proceeding, which resulted from newspaper articles reporting on that earlier proceeding.

Presenting Counsel Motion Record - June, 2013
Report to the Justices of the Peace Review Council
dated November 1, 2011 in prior proceedings
Affidavit of HW Errol Massiah sworn March 25th, 2014

7. The Report to the Justices of the Peace Council received by them on November 2nd, 2011 is proffered as the "complaint in writing" required by the Act. That report presents summarized "will-state" statements, commonly prepared for witnesses in a proceeding. They do not identify either the maker or the transcriber as a complainant. They are not sworn, nor are they signed. There is no indication on their face that they represent a complaint to the Review Council.

Presenting Counsel's Motion Record dated - Tab A
Report of Prior Presenting Counsel to JPRC and enclosures

8. In a letter dated November 3rd, 2011, the Registrar, Ms. Marilyn King responded to Presenting Counsel's delivery of his Report asking whether it should be treated as a new complaint. Mr. Hunt, hardly an unsophisticated party, it is submitted, replied that the Report constitutes "the information we have received" and is being forwarded to the Council "for its consideration." He **does not** indicate that it is a "complaint" under the Act.

Applicant's Motion Record (as above)

Registrar's letter dated Nov.3, 2011 - Tab B
Presenting Counsel's response dated Nov.3/11 - Tab A

9. In Mackin v. Judicial Council, the Court of Appeal for New Brunswick had occasion to consider the proper meaning of "complaint" in a proceeding involving the Judicial Council, a body analogous to the Justice of the Peace Review Council in the proceedings at bar., The court held that a body with oversight over the judiciary may investigate a "written complaint", but not a written "report".

Mackin v. Judicial Council 1987 Canii 138 at page 2;
and page 15 (NBCA)

10. The Complaints Committee determined, without any legal basis, it is submitted, that it would treat the Hunt Report as a complaint under the Act. The Committee conducted a wide-ranging investigation in which "everybody in the office" at the Rossland Courthouse was called in to be interviewed by investigators.

Testimony of Presenting Counsel witnesses - June 15 -18/2014
Complaints Committee Investigation
Transcripts - Vol.1-5

11. In a letter dated January 2, 2013, the Complaints Committee appears to dismiss four of the five allegations, which it treated as complaints, leaving only one allegation to go forward, namely, the "looking good" comment made by Ms. X .

Applicant's Motion Record (as above)
JPRC letter dated January 2, 2013 p.4-7
Exhibit 11

12. However, Ms. X was clear in her testimony that she made her telephone call to Mr. Hunt on the theory that she might be called as a witness in reply at the first hearing.

Hearing Transcript July 17, 2014
Testimony in chief of Ms. X
page 36, lines 11-13;
cross-examination page 81
Evidence of insufficiency of "complaint":

13. Nor did any of the other witnesses heard by the Committee affirmatively state that they had intended to make a “complaint” under the Justices of the Peace Act. Some witnesses testified that they did not know what counsel was talking about in making a complaint, others said that they were simply told that everyone in the office was to be interviewed, and some simply stated that they had never made a complaint against Justice Massiah.

Hearing Transcript - July 15 - 18, 2014
Testimony of B - July 16th (p.29-35)
Testimony of D - July 16th (p.180-82)
Testimony of Q - July 17th (p.133-34)
Testimony of P - July 18th at p. 137-43
Testimony of W - July 18th (received notice of investigation)
Testimony of M - July 18th (p.90-93)
Presenting Counsel Report - Nov.1st, 2011
(see M interview - did not want to testify)
Testimony of V - July 17th (p.189)
Testimony of A - July 17th (p.144)
Testimony of F - July 16th p. 89, lines 8-10

14. Y testified that she was “pissed off” when she read the Law Times article and was concerned that HW Massiah would “only get a slap on the writst”. She testified that P encouraged her “to come forward” and provided her with Presenting Counsel’s phone number for her to contact their office. P denied Ms. Y’s claim that she encouraged her to “come forward.”

Testimony of Y - p.102, 104, 106, 107, 113

15. Y clearly testified that she personally did not have any interactions with HW Massiah which were sexually inappropriate. The first matters she raised in her will-say in the Hunt Report focussed on her daughter. An incident allegedly involving the touching of her daughter was dismissed by the complaints committee on the basis of “no direct evidence.” Surprisingly, her mere mention of what turned out to be the F incident in the same will-say was pursued notwithstanding the serious irregularities with F’s evidence during the investigation. During cross-examination at the hearing Ms. Y confirmed that she testified during the investigation to saying “His hands are, to me, looked like was on her shoulder” and she conceded that she did not in fact observe HW Massiah touching her shoulder. (see p. 135) The other incidents referenced in her Hunt Report will-say involved hearsay involving a co-worker telling her of the W seminar incident and attending on HW and finding him shirtless.

Relevant and corroborating evidence
not secured and produced:

16. Both M and P clearly conceded their failure to secure what would have been relevant and corroborating evidence in support of their allegations involving HW Massiah's conduct in the courtroom. P testified that she did not secure transcripts and the like because according to her knowledge there was no complaint going forward at the time and "there wasn't intention by me, or any movement in our office that I was aware of, by management to take it any further.".(see p.118)

Testimony of M and P

17. It is submitted that the common sense meaning of the words "a complaint …must be in writing" as set out in s. 10.2(2) of the Justice of the Peace Act does not include the broader meaning "capable of being written down" or "capable of being reduced to writing". Had the Legislature intended the broader meaning, it would have said so, it is submitted.

Justice of the Peace Act, s. 10.2(2)

18. As is stated in Cote, The Interpretation of Statutes in Canada:

> "Since the judge's task is to interpret the statute, not create it, interpretations should not add to the terms of the law. Legislation is deemed to be well-drafted and express completely what the legislature wanted to say."

P. Cote, The Interpretation of Statutes in Canada,
3rd ed. (Toronto: Carswell, 2000) p. 276

19. It is further submitted that a contextual analysis of the statute yields the same answer as a literal reading: "a complaint must…be made in writing" does not include the purported complaints which are before this panel. The proper interpretative principle is set out in Driedger on Statutes:

> "Today, there is only one principle or approach, namely, the words of an act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act, and the intention of Parliament."

Driedger, Construction of Statutes, 2nd ed. 1983
Re Rizzo & Rizzo Shoes Ltd. 1998 S. C. R. 27
Bell Express Vu LP v. Rex (2002) 2 S.C.R. 559

20. Driedger indicates that the “grammatical and ordinary sense” of the word or phrase to be interpreted must not contradict the scheme and object of the enactment. Further, it must not be contrary to the intention of the legislative body which has passed the legislation.

21. It is submitted that the scheme and object of The Justices of the Peace Act is to create and enable an oversight body for Justices of the Peace which is intended to play an important part in the administration of justice in Ontario, and which will be seen as independent and legitimate by the citizens of this province.

Ell v Alberta [2003] 1 SCR 857; 2003 SCC 35 at paragraphs 18-24
Criminal Code of Canada, s. 2, definition of “Justice” includes Justice of the Peace.

22. In order to meet this objective, the statute envisages the selection of persons of proven merit and integrity, with appropriate skills and abilities, community awareness, and personal characteristics, able to administer the law within the terms of the jurisdiction of Justices of the Peace.

Justices of the Peace Act, s. 12(2)

23. As well, the objects of the statute include the recognition that persons selected to serve as Justices of the Peace reflect the diversity of Ontario’s population.

Justices of the Peace Act, s. 12(6)

24. The scheme of the statute also contemplates the removal of a Justice of the Peace who has become “incapacitated or disabled” from performing the duties of the office.

Justices of the Peace Act, s. 11.(2)(2)

25. It is submitted that, in interpreting any provision of the Justices of the Peace Act, a high degree of procedural protection is implicit, given that a Justice of the Peace is a judicial officer whose office is included in the constitutional principle of the independence of the judiciary. As was stated by the Supreme Court in Ell, with reference to the office of Justice of the Peace:

> "In light of these bases of judicial independence, impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice-it is clear the principle extends to the judicial office held by the Respondents".

Ell v. Alberta 2003 SCC 35 at paragraph 24

26. It is submitted that the importance of the judicial office requires a high degree of procedural protection, to insure that justices are not removable without full procedural rights:

> "Judicial independence connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly in the Executive Branch, that rests on objective conditions or guarantees."

LeDain, J. in Valente v. The Queen [1985] 2 S.C.R. 673 at 678; see also Ell v. Alberta, supra, paragraph 18

27. Accordingly, it is submitted that this high standard of procedural protection is part of the object and scheme of the Justices of the Peace Act. Under the Act, any person may make "a complaint" to the Review Council, but it must be "in writing". The Complaints Committee shall investigate "the complaint", and "dispose of it" as provided in s. 11 (15).

Justice of the Peace Act. supra

28. Should "the complaint" be referred to a complaints committee, the committee **must** report to the complainant that it has received "the complaint". It **must** also report to "the complainant" as to its disposition of the matter. It is submitted that **none** of the witnesses testified that they had received communication from the complaints committee that their "complaint" had been received, or as to the manner in which the complaints committee disposed of their "complaint", contrary to the requirements of the statute.

Justices of the Peace Act, s. 11(3)
Hearing transcripts - July 15-18

29. The legislation mandates that, upon receiving a complaint, the complaints committee is required to investigate it, and when its investigation is complete, shall either dismiss “the complaint” , counsel the justice concerning issues raised in “the complaint”, order a hearing into “the complaint”, or refer “the complaint” to the Chief Justice of Ontario. It is submitted that there is no statutory authority for identifying new complaints or broadening the scope of the inquiry beyond the original complaint.

Justices of the Peace Act, s. 11(15)

30. In the case at bar, a hearing panel has been convened. The hearing panel has jurisdiction either to dismiss “the complaint” or uphold “the complaint”. It may make appropriate orders in consequence of its determination.

Justices of the Peace Act, s.11(3)

31. It is therefore submitted that the scheme of the Act does not allow the complaints committee, or any other statutory entity of the Justice of the Peace Review Committee, to create complaints on its own motion, or to investigate anything other than “the complaint” made in writing. Had the legislature wished to create such a body, capable of inquiring broadly into the entirety of the activities of a Justice, on the basis of a single, not necessarily- related “complaint”, it would have said so clearly, it is submitted.

Justices of the Peace Act, supra.

32. It is submitted that the “objective conditions and guarantees” held by the Supreme Court to be necessary elements of judicial tenure, do not extend to the phone calls reduced to writing, intended to be considered as reply evidence, which brought Justice Massiah before this Honourable Panel.

Valente v. R (as above)
Evidence of Patricia Anne Best, supra.

33. The Applicant submits that the intention of the legislature was that a potential complainant would sign a letter-like document, indicating that he or she believed the information therein to be true and worthy of further examination by those in authority. The requirement that a complaint be in writing was intended to provide a level of solemnity and clarity which a telephone conversation or summary thereof would not. Such protection is set out explicitly in the Criminal Code for those accused of either summary and indictable offences, and, it is submitted, provides by analogy a level of required procedural fairness for a complaint against a sitting member of the judiciary. No proceeding under the Criminal Code has ever been legitimately initiated by telephone call reduced to writing, it is submitted. The “written complaint” requirement in the Justices of the Peace Act should not be watered down to remove this protection through

interpretation, it is submitted. Such change call for an amendment by the Legislature of Ontario.

Criminal Code ss. 504 and 789
R. v. Southwick, ex parte Gilbert Steel (1968) 2 CRNS 46

34. This interpretation is also that of the Justices of the Peace Review Council itself. The JRPC website under the heading "Making a Complaint" states:

> "If you have a complaint of misconduct about a provincial judge or justice of the peace, **<u>you must state your complaint in a signed letter."</u>**

Exhibit - 10 Making a Complaint JPR Website

35. Nor, it is submitted, do the transcripts of witness interviews undertaken by the Complaints Committee in 2012 constitute written complaints under the Act. Each and every one of the individual certified transcripts includes as a cover page an Exhibit A. That exhibit is directed to "the witness being interviewed by investigative counsel" and explains to that witness that witnesses are potentially compellable in an eventual proceeding. The Exhibit letter does not state that the interview itself is to be considered a complaint. In fact, it states that the interview is in furtherance of "a complaint which has been received by the Review Committee".

Complaints Committee Investigation
Transcripts - Vol. 1 - 5 Exhibit "A" to each witness statement

36. It is therefore submitted that the Notice of Hearing dated May 31, 2013 with an appended document purporting to give particulars to "the complaint" has no relationship to "the complaint in writing" required under the Justice of the Peace Act. Indeed, it is submitted that the Legislature has nowhere authorized the creation of a "Notice of Hearing" with the effect of providing a foundation for the jurisdiction of a Panel constituted under the Act.

Notice of Hearing - Exhibits 1A, 1B
Justices of the Peace Act, s. 11

37. It is submitted that the Justices of the Peace Act does not authorize a general investigation of a sitting Justice; its investigation must be relevant to "the complaint" if any. While all queries relevant to "the complaint" are appropriate, the Review Council does not have independent investigatory powers, and is not permitted to broaden an investigation to seek out new complaints.

HW Massiah's Writtens Submissions
Fifth Annual Report 2011 JPRC at p.11, Tab B

38. It is submitted that other sections of the Act contribute to the conclusion proposed here that a "complaint in writing" under the Act was intended to be a formal step, not to be modified to include statements reducible to writing. For example, s. 9(4) of the Act requires that the Review Council provide "Province-wide free telephone access" in order to provide information to the public about itself and its role in the justice system. There is no reference to the proposal that complaints could be taken by telephone and reduced to writing by the Complaints Committee, the Review Committee, or by Presenting Counsel. It is submitted that, had this been the intention of the legislature, it would have so provided.

Justices of the Peace Act, s. 9(4)

39. Further, 9(3) of the Act directs that, "where required", members of the public are to be "assisted" in the "making" of the documents necessary for making complaints. It is submitted that this subsection envisages documents made by members of the public. It does not provide authority for the Review Committee to take oral statements and reduce them to writing on its own authority, much less to constitute them as complaints. There is no evidence that any of the witnesses "required" assistance in the making of any document, it is submitted.

Justices of the Peace Act, s. 9(3)

40. Pursuant to s. 9(1) of the Act , the Review Council is required to provide information in courthouses and elsewhere about its role in the justice system, and specially to include information about how to make a complaint. No doubt in response to this statutory duty, the Review Council website includes the following legal information:

> "If you have a complaint of misconduct about a provincial judge or justice of the peace, you must state your complaint in a signed letter. The letter of complaint should include the date, time and place of the court hearing, and as much detail as possible as to why you feel there was misconduct."

Exhibit 11
Complaint in writing standard practice in other jurisdictions:

41. The complaint in-writing requirement for complaints against judicial officers is a standard practice in virtually every jurisdiction in Canada and the U.S.A. The following institutions all have this basic requirement: The Ontario Judicial Council, The Justices of the Peace Review Council, The Canadian Judicial Council, Provincial Court of British Columbia, New York State Commission on Judicial Conduct, Commission on Judicial Conduct(California) and Washington State Commission on Judicial Conduct.

Applicant's Written Submissions - Tab A
(Complaint Process from each jurisdiction website)

42. In Ontario College of Pharmacists v. Katzman the Court of Appeal for Ontario had opportunity to deal with the jurisdiction issue which is raised here in the context of an investigation and subsequent hearing under the enabling legislation regulating pharmacists. In that case the Complaints Committee was to investigate two complaints relating to dispensing errors involving two persons(Cole and Yellen). In the course of the investigation of the two matters other allegations of misconduct were discovered and referred to the Discipline Committee (Hearing Panel). Mr. Katzman was convicted and sought leave to appeal. Leave to appeal was granted on the question of the jurisdiction of the Complaints Committee to refer allegations of professional misconduct to the Discipline Committee of the the Ontario College of Pharmacists.

43. The Court of Appeal for Ontario unanimously ruled that the Complaints Committee in that case lacked jurisdiction to seek out and refer additional complaints to adjudication. They stated the following:

> [37] In summary, given the design of the Code, the jurisdiction given to the Complaints Committee by s.26(2) paragraph 1 is to refer to discipline a specified allegation which concerns, in some way, the matter complained of. Section 26(2) paragraph 1 does not give the Complaints Committee jurisdiction to refer to discipline allegations of other misconduct uncovered during the investigation of the complaint.
>
> [38] In this case, there is no need to test the outer limits of what can properly be referred under s.26(2) paragraph 1. Here the alleged dispensing errors involving other individuals, but not Ms. Cole or Mr. Yellen, came to light during the investigation of the Yellen complaint. They do not concern the Cole and Yellen complaints

at all. They were not themselves the subject of complaints to the Complaints Committee. Thus the could not be referred to discipline by the Complaints Committee pursuant to s.26(2) paragraph 1.

[42] In conclusion we find that the Complaints Committee did not have jurisdiction to refer to discipline allegations of dispensing errors having nothing to do with the Cole and Yellen complaints. Hence those allegations were not properly placed before the Discipline Committee and the findings of misconduct based on them must be set aside.

44. IT IS RESPECTFULLY SUBMITTED THAT the question of law raised by HW Massiah on the question of jurisdiction here is clearly governed and answered by the Court of Appeal's decision in Katzman supra and accordingly the Hearing Panel lacks jurisdiction to entertain any of the allegations on the Notice of Hearing as a result of the evidentiary record before it.

Katzman v. Onatrio College of Pharmacists 2002 Canlii 16887 (Ont.C.A.)
Mackin v. Judicial Concil...1987 Canlii 138 (NB CA)
NB Institute of Chartered Accountants v. Nicholson, 1993 Canlii 5404 (NB CA)
In the matter of the Legal Profession Act 2011 LSBC 10

Standard of Proof, Credibility and Reliability:

45. IT IS RESPECTFULLY SUBMITTED THAT the proper adjudication of this case is governed by the Supreme Court of Canada's decision in F.H. McDougall, 2008 SCC 53 which confirmed that the "balance of probabilities standard of proof applies to all civil cases, and, in order to satisfy this standard, evidence must be "sufficiently clear, convincing and cogent."

46. "Credibility" and "reliability" of evidence are distinct concepts which play a fundamental role in the proper adjudication of this case since HW Massiah testified in this case, provided a written response following the investigation and the testimony of the witnesses and their evidence is at odds on some points.

47. Credibility relates to the witness's honesty and sincerity, while reliability encompasses the accuracy and fallibility of the evidence.

48. The traditional test set out by the British Columbia Court of Appeal in Faryna v. Chorney [1952] 2 D.L.R. 354 is applicable here:

> "Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...Again, a witness may testify to what he sincerely believes to be true, but he may quite honestly mistaken."

Lavoie v. Calaboie Peaks et al 2012 HRTO 1237

49. The following factors assist in the assessment of reliability and credibility and the application of the "preponderance of the probabilities' test:

- the internal consistency or inconsistency of evidence
- the witness's ability and/or capacity to apprehend and recollect
- the witness's opportunity and/or inclination to tailor evidence
- the witness's opportunity and/or inclination to embellish evidence
- the existence of corroborative and/or confirmatory evidence
- the motives of the witnesses and/or their relationship with the parties
- the failure to call or produce material evidence

50. IT IS RESPECTFULLY SUBMITTED THAT the evidentiary record fails to support a finding that the provisions of s.10.2 of the Act was complied with. Accordingly, these matters are not properly before the Hearing Panel and ought to be dismissed on this basis.