Justices of the Peace Review Council

IN THE MATTER OF A HEARING UNDER SECTION 11.1 OF THE *JUSTICES OF THE PEACE ACT*, R.S.O. 1990, c. J.4, AS AMENDED

Concerning a Complaint about the Conduct of Justice of the Peace Errol Massiah

Before: The Honourable Justice Deborah K. Livingstone, Chair

Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member

Hearing Panel of the Justices of the Peace Review Council

DECISION ON THE MOTION ALLEGING BIAS

Counsel:

Ms. Marie Henein
Matthew Gourlay
Henein Hutchison, LLP
Presenting Counsel

Mr. Ernest J. Guiste
Trial and Appeal Lawyer
Osborne G. Barnwell
Counsel for His Worship Errol Massiah

DECISION:

1. The Justice of the Peace Review Council, on May 31, 2013, issued a Notice of Hearing that a complaint regarding conduct or actions of Justice of the Peace Errol Massiah be referred to a Hearing Panel of the Review Council for a formal hearing under section 11.1 of the *Justices of the Peace Act* (*JPA*).

2. Since the retainer of present counsel, Mr. Guiste, His Worship Massiah has advanced numerous motions in relation to this proceeding.

3. One of the most recent motions and the one we are ruling on today, was served on the Review Council on May 6, 2014. This motion alleges both a disqualifying bias by the Hearing Panel and, it would appear, from the somewhat confusing motion material, the entire discipline process in relation to justices of the peace as set out in the *JPA*.

4. The Relief sought is:

    1. An order that the Hearing Panel recuse itself;

    2. Alternatively, an order quashing the Notice of Hearing as the Chief Justice has exceeded her jurisdiction in replacing Ms. Blight;

    3. Alternatively, an order quashing the Notice of Hearing as the Hearing Panel has exceeded its jurisdiction in retaining counsel contrary to the enabling legislation;

    4. Alternatively, an order quashing the Notice of Hearing as the Hearing Panel improperly interfered with the Applicant's right to counsel under the enabling legislation and the *Charter of Rights and Freedoms* in the particular circumstances; and,

    5. Such other remedy as the Hearing Panel deems just.

5. An allegation of bias, or an apprehension of bias is a serious accusation. The threshold is a high one and the onus is on the Applicant. The test is as set out in *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369 at p. 394

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information … [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude …"

6. There is a strong presumption of judicial impartiality, as restated recently by the Court of Appeal in *Martin v. Sansome,* 2014 ONCA14, at paras. 31-32:

> [31] Bias is a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind open and impartial: *Wewaykum Indian Band v. Canada,* 2003 SCC 45, [2003] 2 SCR. 259, at para. 58. <u>The burden of establishing bias is on the party arguing that it exists.</u> The test, found in *Wewaykum*, at para. 60 is long established:
>
> > [W]hat would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude [?] Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly [?]
>
> <u>[32] There is a strong presumption of judicial impartiality. The threshold is high for finding an apprehension of bias</u>: *Wewaykum*, at para. 76.
>
> (Emphasis added.)

The Recusal of the Hearing Panel

7. The Applicant has referred to comments made by the Panel members during the course of the proceedings so far in support of his allegation that the Hearing Panel is biased and should recuse itself. There has been no legal argument, no foundational underpinning presented by the Applicant which could assist us, or a "reasonable and right-minded person" in understanding how such comments could amount to bias.

8. In his Affidavit filed in support of the Motion, His Worship states at paragraph 4:

> I am concerned that the panel appears to have a closed mind or demonstrated a reasonable apprehension of bias on the preliminary motion and the overall conduct of the proceedings to date notwithstanding the objective evidence in support of the substance of the jurisdictional issue I raise.

9. There has been only one preliminary motion concluded in this proceeding so far, an application for a publication ban. Without any specific reference by the Applicant to the record from that part of the proceeding, it is impossible for us to assess what exactly the Applicant is alleging we did or said in that decision that demonstrates closed minds.

10. His Worship gave *viva voce* evidence on the motion. His testimony was equivocal. For example, at one point early in his examination in chief he testified that "he had no concern that I cannot get a fair hearing". In cross-examination, he stated he had "concerns with regards to the exchanges between his representative who has advanced his rights and the Hearing Panel", that the Hearing Panel appears not to act evenhandedly and that his perception is that the Panel seems to be giving Presenting Counsel more weight.

11. His Worship's perceptions are not relevant to our considerations here, as the correct perspective in law, as already stated, is that of the reasonable person informed of all of the circumstances. His Worship's stated concerns are,

nevertheless, surprising. As a justice of the peace he is a judicial officer of a statutory court, just as this Hearing Panel is a statutory body. A justice of the peace is always required to ensure that he has jurisdiction before he exercises his authority. Yet in his testimony, His Worship expressed how he was "troubled, deeply troubled" that the Hearing Panel was biased when one of the Panel members asked Mr. Guiste to show the Hearing Panel where in the statute governing them they had jurisdiction to do as the Applicant sought.

12. In relation to the overall conduct of the proceedings so far, there is a record, and transcripts, Exhibit 14, are available, of everything that has transpired in the hearing. Indeed, the Panel agrees that there have been many instances where the members of the Hearing Panel have interrupted counsel for the Applicant in the course of his submissions, or voiced disagreement with him on a point of fact or law, or asked him to return to the issue at hand.

13. We refer again to the Court of Appeal's decision in *Martin v. Sansome* (supra) at paras. 33-34:

> [33] In *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47, 265 OA.C. 247, leave to appeal to S.C.C. refused, 33613, [2010] S.C.C.A. No. 91 (July 18, 2010), at para. 230, this court provided additional guidance:
>
> > [230] A determination of whether a trial judge's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed in relation to the facts and circumstances of a particular trial. The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial.
>
> [34] And again at para. 233:

> [233] The reason a trial judge may properly intervene include (sic) the need to focus the evidence on the matters in issue, to clarify evidence, to avoid irrelevant or repetitive evidence, to dispense with proof of obvious or agreed matters and to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.

14. If, here, the Applicant has perceived that there have been frequent interruptions of his counsel's submissions, the record of this proceeding assessed in its totality provides a clear explanation. In the context of what the Court in *Chippewas of Mnjikaning First Nation* sets out, the Panel has intervened to focus or clarify submissions, to avoid irrelevant evidence. It has attempted to exercise trial, or in this case, hearing management powers as described by Justice Rosenberg of the Court of Appeal of Ontario in *R. v. Felderhof* [2003] O.J.No.4819; 2003 CanLII 37346 (ON CA), at para. 40:

> [40] Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.

15. At paragraph 41 of the *Felderhof* decision, the Court held that same implied power extends to statutory tribunals, such as this Hearing Panel today.

16. On many occasions the Hearing Panel interrupted Applicant's counsel in an attempt to prevent Mr. Guiste from crossing the line of professional civility. The transcript of the proceedings on April 9, 2014, at pages 72-73, provides one such example. Ironically, Mr. Guiste referred to this very passage, arguing that it was an example of the Panel's inappropriate behaviour:

> JUSTICE LIVINGSTONE: Well, I appreciate you're saying it makes no sense, but I just want to reiterate, Mr. Guiste, that, as you stated at the outset of your argument, we are created by statute, as you know.
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> MR. GUISTE: Yes.
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> JUSTICE LIVINGSTONE: We have a home statute as you have described it. And what we are given once the Hearing Panel exists, is the documentation filed at the motion. Now I have His Worship's affidavit which is part of your material in relation to this motion, but even it refers to the fact that once the second, I'll call it that investigation which resulted in this second Hearing Panel being created was conducted, he was allowed an opportunity to respond in the way the process is prescribed in the Act.
>
> So I think I am misunderstanding your point that he wasn't allowed a response.
>
> MR. GUISTE: I think you are fundamentally misunderstanding. I would ask that you work a little harder and try to understand me. I'm going to speak very slowly.

JUSTICE LIVINGSTONE: You don't have to speak slowly, Mr. Guiste. I'm not in grade three. I believe I have read all the material that you have provided. I believe I understand what the statute says. My request to you, and if I'm not being clear, please let me know, I appreciate not being demeaned, I know what the statute says. Can you show me where in the statute it gives this Hearing Panel the power to go where you're asking us to go?

17. Another frivolous allegation by the Applicant is that the Chair of the Hearing Panel demonstrated bias by refusing his lawyer a half-hour accommodation in the start time, on account of his "parental obligations" to "bring my daughter to school". (Transcript April 9, pp. 164-165). The record in this proceeding demonstrates that on each and every day on which his matter has proceeded, the start time was 10:00 a.m. or even later. On one occasion, April 9, 2014, a start time of 9:30 a.m. was requested by the Chair but subsequently, before the next date scheduled, the Hearing Panel, through the Registrar, communicated to the Applicant, through Mr. Guiste that the start time, in fact, would be 10:00 a.m. His Worship testified that his counsel failed to give him that information before the next court date of April 28, 2014. The record and the evidence on this motion therefore confirm that the start date of each date of these proceedings has in fact been 10:00 a.m.

18. Despite this finding, in the context of the Hearing Panel setting start times, for example, the law is clear. Tribunals, like courts, are entitled to control their own processes.

> Administrative tribunals and agencies have control over the conduct of their proceedings and this includes the ability to place limits on the right of parties to adduce evidence and to make submissions in support of their position. Without such authority, decision makers would be in the thrall of

> anyone anxious to disrupt the timely operation of the administrative process.
>
> David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 291

19. The Applicant submitted that an exchange with the Hearing Panel on November 4, 2013 regarding whether Mr. Bhattacharya remained as co-counsel to His Worship indicated a reasonable apprehension of bias on the part of the Panel. As Mr. Guiste had a scheduling conflict, the Hearing Panel sought agreement that Mr. Bhattacharya would continue in Mr. Guiste's absence. This scenario had been committed to by both co-counsel on July 4, 2013. Mr. Guiste advised that Mr. Bhattacharya was no longer co-counsel, and therefore the hearing could not continue in his absence. This statement surprised the Panel as Mr. Bhattacharya had not sought to be removed from the record. The Panel asked His Worship to clarify the situation. His Worship Massiah advised that Mr. Bhattacharya was still his co-counsel but a meeting was scheduled for November 11, 2013 with Mr. Bhattacharya, after which the Panel would be advised of Mr. Bhattacharya's future status.

20. The Panel's attempt to ascertain Mr. Bhattacharya's status cannot, by any reasonable person, be construed as exhibiting bias.

21. The most egregious allegation of apprehension of bias was asserted by the Applicant's counsel against the Chair of the Hearing Panel in the oral submissions on May 28, 2014. He referred to the transcript of April 9, 2014. On that day, in the course of submissions by Mr. Guiste on the issue of the Hearing Panel's jurisdiction, he suggested an apprehension of bias of the Panel. He is invited to briefly explain his concerns (Transcript April 9, 2014, p. 147). He provides a lengthy, broad-ranging explanation (Transcript, April 9, 2014, pp. 148-153), which includes the statement:

> I apologize if the panel feels or presenting counsel feels that I am bringing too many legal issues, but I see that as my duty and I don't think

> I have to apologize, but if you feel that I'm giving you too much work, I apologize for that. (Transcript April 9, 2014, p. 152)

22. At the conclusion of Mr. Guiste's explanation, the Chair of the Hearing Panel states:

> Thank you, Mr. Guiste, for that speech. (Transcript April 9, 2014, p. 153)

23. Mr. Guiste now alleges that the use of the word "speech", by way of a sarcastic comment to him, would cause a reasonable observer to believe that the Chair of the Hearing Panel was biased – demonstrating disrespect to both His Worship and his counsel and their racial heritage, stereotyping Mr. Guiste as a black man on a soap box. The Hearing Panel finds such an assertion completely offensive.

24. In the Hearing Panel's view, the Applicant raises a valid point regarding a letter sent to Mr. Justice Ducharme on November 4, 2013 by the then Panel. The issue was one of scheduling dates around an ongoing trial in which Mr. Guiste was counsel. The Panel stated in its letter, "We and Presenting Counsel Marie Henein are confident only one day will be required for this motion…". Mr. Guiste submitted that statement shows bias by the Panel by aligning itself with Presenting Counsel. A review of the record of November 4, 2013 (see p. 180, line 12-17) shows that in fact the Chair of the Panel stated that the motion would be heard on November 19, 2013 with a conclusion if required on November 21, 2013. Neither Presenting Counsel nor Counsel for the Applicant disagreed with the Chair. While the statement in the letter was factually incorrect, we see no basis upon which a reasonable person could find that it shows bias. In any event, when this error by the Panel is considered in the context of the cumulative effect of all of the assertions of bias, no reasonable right-minded individual would view the Panel as having a reasonable apprehension of bias.

25. The Panel concludes that there is no merit to His Worship's allegation of apprehension of bias of the Hearing Panel. We will not recuse ourselves.

Ms. Blight

26. His Worship curiously seeks an order to quash the Notice of Hearing, alleging that the Chief Justice exceeded her jurisdiction in replacing Ms. Margot Blight, who recused herself from the Hearing Panel. We use the term “curiously” intentionally as the record demonstrates that on November 19, 2013 counsel for the Applicant requested that Ms. Blight recuse herself from the Hearing Panel.

27. A letter, dated February 12, 2014, advised the Hearing Panel that both Mr. Guiste, counsel for the Applicant, and Ms. Henein, Presenting Counsel, would accept that a new Hearing Panel member could be appointed to replace Ms. Blight if she were to recuse herself voluntarily; Ms. Blight agreed to step down. The transcript of April 09, 2014 at pp. 5-6 is clear. The Applicant was sitting in the Hearing Room at the time when that letter advised the Hearing Panel that both Ms. Henein and Mr. Guiste agreed that if Ms. Blight were to recuse herself, they would accept that a new Panel member could be appointed who could have an opportunity to review all of the material that had been provided to that date, review the submissions with respect to the ban on publication, and basically catch up and stand in the place of Ms. Blight.

The Applicant now alleges that the Chief Justice has exceeded her jurisdiction in appointing a new member to the Panel, when in fact that result is exactly as the Applicant desired.

28. A review of the applicable law will assist with this issue. The *JPA* sets out the following:

Hearing panels

> 11.1 (1) When a hearing is ordered under subsection 11 (15), the chair of the Review Council shall establish a hearing panel from among the members of the Review Council to hold a hearing in accordance with this section. 2006, c. 21, Sched. B, s. 10.

Composition

(2) A hearing panel shall be composed of,

(a) a judge who shall chair the panel;

(b) a justice of the peace; and

(c) a member who is a judge, a lawyer or a member of the public. 2006, c. 21, Sched. B, s. 10.

Quorum

(3) All the members of the panel constitute a quorum. 2006, c. 21, Sched. B, s. 10.

Application of *SPPA*

(4) The *Statutory Powers Procedure Act*, except sections 4 and 28, applies to the hearing. 2006, c. 21, Sched. B, s. 10.

29. This section, therefore, not only provides the Chief Justice, as Chair of the Review Council, the authority to appoint members of a Panel, it also dictates that a quorum consists of all three members of a Hearing Panel.

30. The *Statutory Powers Procedures Act (SPPA)* provides authority to the Chief Justice when a Panel is reduced by one member. It states:

Panel of one, reduced panel

Panel of one

4.2.1(1) The chair of a tribunal may decide that a proceeding be heard by a panel of one person and assign the person to hear the proceeding unless there is a statutory requirement in another Act that the proceeding be heard by a panel of more than one person.

Reduction in number of panel members

(2) Where there is a statutory requirement in another Act that a proceeding be heard by a panel of a specified number of persons, the chair of the tribunal may assign to the panel one person or any lesser number of persons than the number specified in the other Act if all parties to the proceeding consent. 1999, c. 12, Sched. B, s. 16 (2).

31. Therefore, pursuant to s. 4.2.1(2) of the *SPPA*, having received the consent of both parties to appoint a new Panel member when Ms. Blight recused herself, the Chief Justice acted within the statutory authority, when she appointed Ms. Foster to this Hearing Panel, so it could continue with a quorum.

32. The Applicant also argues that he was denied an opportunity to have the record reflect the fact that he could not have known whether or not the other members of the Panel "were aware of the Blight conflict". In fact, the transcript of November 19, 2013 shows that the Chair said, "As a result of Ms. Blight explaining to us that she now recalled after you raised that complaint which we knew nothing about…" and "this is a new issue to all of us." (Transcript November 19, pp. 42 and 43)

33. Further, in circumstances where the Applicant agrees that Ms. Blight was not biased, there was in his view only a perception of bias, and where the record is clear that the other two members of the Panel had no knowledge of the former complaint, a reasonable person who was knowledgeable of the facts would not conclude that the other members were biased against His Worship.

Appointment of Independent Legal Counsel

34. Similarly, we find no merit in the Applicant's submission that the retainer of Independent Legal Counsel to assist the Hearing Panel is a jurisdictional error.

35. After the proceeding of April 9, 2014, the Hearing Panel decided to request that the Review Council retain Independent Legal Counsel to assist us, pursuant to s.8(15) of the *JPA*, which provides that:

> Expert assistance
> (15) The Review Council may engage persons, including counsel, to assist it and its complaints committees and hearing panels. 2006, c. 21, Sched. B, s.7.

36. The Review Council, through the Registrar, Ms. King, retained Mr. Brian Gover to assist the Panel and the Chair of the Hearing Panel so advised the parties that the opinion would be provided to counsel for a response, once received from Mr. Gover (Transcript April 28, 2014, pp. 4, 5, 6 and 26).

37. On April 28, 2014, Mr. Guiste indicated that there was no issue with the Panel having independent counsel and states that "I think that's a good thing, the statute provides for it. I think in this circumstances (sic) that would be helpful." (Transcript April 28, 2014, p. 17)

38. Nevertheless, Mr. Guiste also expressed a serious concern that Mr. Gover was the counsel retained and suggested that the hiring of this particular person would in some way result in an unfair hearing before an independent tribunal (Transcript April 28, 2014, p. 18). He stated: "It's my duty to say look, this fellow has too close of a relationship to presenting counsel and to Mr. Hutchison and the Ministry of the Attorney General. It's not a position I take lightly. Why would I bring a frivolous, light objection? I think it's a very serious matter."

39. A date was scheduled for motion materials to be filed. No motion was filed. (Transcript April 28, 2014, p. 18)

40. From Presenting Counsel's submissions on this motion, paragraph 21, we also learned that the Applicant's counsel had previously indicated to both the Registrar and Presenting Counsel that he would favour the appointment of independent counsel. The text of an email message, dated April 12, 2014, from

Mr. Guiste to Ms. Henein, to Ms. King the Registrar, and to the Applicant, His Worship Massiah reads as follows:

> Ms. Henein:
>
> I found a very helpful little piece on administrative law that I feel would be helpful to the panel in discharging their adjudicative responsibilities in this case.
>
> The Panel initiated the motion on whether or not they have jurisdiction to entertain the Applicant's motion. The Procedures clearly give them the right to entertain such motions.
>
> Is there any possibility of retaining counsel for the express purpose of advising the Panel of the administrative law principles that they must deal with in this case? I feel it would be very helpful and would ensure fairness in the process and reliability in any rulings they made henceforth.
>
> I request a written response to this request.
>
> Sincerely
> Ernest J. Guiste

41. The Applicant also relied on s. 11.1(6) of the *JPA* to submit that the Hearing Panel had an obligation to seek input from counsel before it requested the Review Council to retain Independent Legal Counsel to assist it.

42. That section of the *JPA* states:

> Communication re subject-matter of hearing
> (6) The members of the panel participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any party, counsel, agent or other person, unless all the parties and their counsel or agents receive notice and have an opportunity to participate. 2006, c. 21, Sched. B, s. 10.

However, the Applicant seemingly overlooked the next section, namely s. 11.1(7) of the *JPA,* which states:

> Exception
> (7) Subsection (6) does not preclude the Review Council from engaging counsel to assist the panel in accordance with subsection 8 (15). 2006, c. 21, Sched. B, s. 10.

43. Clearly, the Hearing Panel had no obligation to hear from either counsel prior to making its request of the Review Council to retain Independent Legal Counsel.

44. Once again, the Applicant now seeks an order that is not only unsupported in law and evidence, but is also the antithesis of what his own lawyer had proposed and had said was a good thing. It is impossible to conclude anything other than that the Applicant, by making such allegations wholly without merit, and in a manner inconsistent with his earlier positions, as evidenced through his lawyer, Mr. Guiste, is attempting to delay the ultimate hearing, or obscure the real issues in this matter.

45. An atrocious suggestion was made by Mr. Guiste in oral argument on May 28, 2014 that the Hearing Panel colluded with Presenting Counsel over the issue of hiring of Independent Legal Counsel. His comments were based on the coincidence of the timing of the Hearing Panel's request to the Review Council to retain counsel on its behalf, after the proceedings of April 9, 2014. The Hearing Panel learned through the documents submitted on this motion that Mr. Guiste had suggested to Ms. Henein in an e-mail of April 12, 2014 (referred to earlier) that indeed Independent Legal Counsel should be retained. Mr. Guiste's suggestion of collusion was made without evidence and with no air of reality. The suggestion was deeply offensive to this Hearing Panel. No reasonable person could consider his suggestion as forming a reasonable apprehension of bias.

Enabling Legislation

46. The Applicant alleges that “the enabling legislation and procedures raises a reasonable apprehension of bias.” The legal authority or evidentiary basis for such an assertion (it is not clear which is intended), is set out at paras 45 and 46 of his Factum which states as follows:

> The enabling legislation and procedures raise a reasonable apprehension of bias by virtue of the following:
>
> 1. Review Council received complaints
> 2. Review Council passes them off to its subset complaints committee
> 3. Complaints committee is supposed to investigate but here it delegated to a hired third party
> 4. Chief Justice had the applicant take a 9 hour Gender Sensitivity & Professional Boundaries course but did not disclose this to the complains (sic) committee;
> 5. Ms. Blight stepped down on account of concerns with a reasonable apprehension of bias;
> 6. Chief Justice replaced her;
> 7. Review Council retained Presenting Counsel;
> 8. Review Council appear to amend its Procedures to suit itself and without fair notice;
> 9. Alternatively, the multitude of issues raised in the NOA and the transcripts support a finding of a reasonable apprehension of bias in accordance with the established legal principles.

47. The Hearing Panel considers this allegation, purportedly proven by the eight points listed in the Factum, to be yet another spurious submission.

48. The enabling legislation was duly enacted by the legislature. The procedures were adopted and established by the Review Council under the express authority of s 10 of the *JPA*. We, as statutory decision-makers, are bound to apply the enabling statute and the Procedures that govern the Review Council. We rely on the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2S.C.R. 781 at para. 19-20:

> 19. The appellant, with the support of the intervening Attorneys General, argues that this reasoning disregards a fundamental principle of law: absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice. The Act expressly provides for the appointment of Board members at the pleasure of the Lieutenant Governor in Council. The decision of the Court of Appeal, the appellant contends, effectively struck down this validly enacted provision without reference to constitutional principle or authority. In essence, the Court of Appeal elevated a principle of natural justice to constitutional status. In so doing, it committed a clear error of law.
>
> 20. The conclusion, in my view, is inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended. (Emphasis added.)

49. The Applicant also makes allegations in his Factum on this motion about the inherent unfairness of the complaints process in this case, and that it “gives rise

to a reasonable apprehension of bias - generally - such that it violates the constitutional doctrine of judicial independence."

50. Again, no authority is provided by the Applicant in support of this assertion. As a justice of the peace, the Applicant, presumably, is aware that each level of court in Canada has a judicial conduct regime. To suggest that a process to provide accountability for judicial conduct gives rise to an apprehension of bias, without any legal basis for such a statement is, in fact, a hollow assertion. As was stated by Justice Sharlow of the Federal Court of Appeal in *Cosgrove v. Canadian Judicial Council (F.C.A.)*, [2007] 4 F.C.R. 714 at para. 32:

> 32. However, judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 R.C.R. 249, at paragraphs 58-59.

51. The Applicant appears to suggest that the members of this Hearing Panel were members of the complaints committee that ordered this hearing. Subsection 8(13) of the *JPA* states:

> 8.(13) The members of the Review Council who were members of a complaints committee dealing with a complaint shall not participate in a hearing of the complaint under section 11.1.

The Applicant makes this allegation in the absence of evidence. In any event, no member of this Panel has previously adjudicated upon any complaint about the conduct of His Worship.

53. The Applicant has raised several objections about Presenting Counsel and asserted that both Ms. Henein and Mr. Gourlay have exceeded their jurisdiction and have made inappropriate comments. The JPRC Procedures describe the duty of Presenting Counsel:

2. The Review Council shall, on the making of an order for a hearing in respect of a complaint against a justice of the peace, engage legal counsel for the purposes of preparing and presenting the case against the respondent.

3. Legal counsel engaged by the Review Council shall operate independently of the Review Council.

4. The duty of legal counsel engaged under this Part shall not be to seek a particular order against a respondent, but to see that the complaint against the justice of the peace is evaluated fairly and dispassionately to the end of achieving a just result.

54. This responsibility, in the Panel's view, must be viewed in the context of the role of the JPRC and this Hearing Panel. In *Moreau–Bérubé v. New Brunswick Judicial Council* [2002]1S.C.R. 249, the Supreme Court of Canada held at para. 45:

> 45. On the one hand, the Judicial Council is in a sense a highly specialized tribunal required to deal with constitutionally protected rights -- such as judicial independence and security of tenure of judges and the right of persons who come before the courts to a fair trial by an impartial tribunal -- in the overall public interest.

55. In serving that public interest, the Hearing Panel has a responsibility to carry out an active search for the truth. Cross-examination and submissions from Presenting Counsel are essential, in the Panel's view, to assist the Panel in its active search for the truth. The cross-examination of a witness, including the justice of the peace who is the subject of the complaint, can have an impact on an open-minded unbiased adjudicator searching for the certainty of facts upon which to base his or her decision.

Preserving and restoring public confidence in the judiciary process is the objective of the judicial disciplinary process. Submissions from Presenting

Counsel expressing concern that the public's confidence and the public interest may be impacted by events taking place during the judicial disciplinary process would not exceed his or her jurisdiction, and will be assessed in due course by this Hearing Panel.

56. The Applicant has filed another motion that there was no valid complaint and that there has been an abuse of process ("Motion for Abuse of Process"). The Applicant has inserted some of the grounds raised in that motion in his factum on this motion. A decision from the Panel is pending on its jurisdiction to consider the grounds raised in the Motion for Abuse of Process. It would, therefore, be inappropriate for the Panel to proceed to adjudicate upon grounds raised in the Motion for Abuse of Process as if that decision were not pending.

57. In conclusion, having considered the submissions of counsel, the Panel can find no basis, on any of the grounds asserted by the Applicant, to quash the Notice of Hearing or to recuse itself. In fact, it is this Panel's view that this motion is completely without merit. It is therefore dismissed.

Dated May 29, 2014

Hearing Panel:

The Honourable Justice Deborah K. Livingstone, Chair
His Worship Michael Cuthbertson
Ms. Leonore Foster, Community Member