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 ABUSE OF PROCESS

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(NOTE: There is a non-publication order regarding the names of witnesses in this proceeding.)

PART TWO - ABUSE OF PROCESS

The Prior Hearing:

1. HW Massiah had been the subject of a hearing under The Justices of the Peace Act with respect to allegations of gender-based discrimination. A hearing Panel headed by Justice Vaillancourt heard evidence concerning those allegations, **which had allegedly taken place between Justice Massiah's ascension to the bench in 2007, and August, 2010.** The allegations concerned staff at the courthouses at 150 Bond Street and 242 King Street in Oshawa, Municipal Region of Durham. The hearing occurred throughout the latter months of 2011. A decision was rendered in March 2012. A decision on disposition was rendered on April 12tth, 2012.

Possibility of more complaints recognized:

2. The complaint which gave rise to that hearing was a letter, dated August 27, 2010 and signed by a Senior Manager with the Ministry of the Attorney General for Ontario, for an area including the entirety of Durham Region. In her letter, she stated that the allegations involved "gender-based harassment" against court staff, and that **"While the fact-finding is continuing, I have been advised that more incidents may surface".**

Letter of Senior Manager dated August 27th, 2010
HW Massiah's Written Submissions - Tab B

3. The letter goes on to state that "...the attached incidents are considered serious enough to forward a complaint at this time. ***In the event that additional instances are brought to my attention, they will be distributed to the Justice of the Peace Review Council in a timely manner."***

ibid.

4. In a subsequent letter dated January 27th, 2011 Senior Manager added a complainant concerning an incident which took place at 242 King Street, and not 150 Bond Street, as in the other allegations she complained about.

Senior Manager's letter, ibid. - Tab B

5. On September 30th, 2011 HW Massiah exercised his right to testify in his own defence with respect to the allegations of gender-based harassment.

Reasons for Decision date March 1st 2012 at para 29

6. "During the hearing into the conduct of Justice of the Peace Massiah, the Law Times published an article dated October 10, 2011 entitled, "JP accused of sexually harassing six court clerks - and purporting to summarize Justice Massiah's testimony at his hearing. Shortly after publication, Presenting Counsel at the first hearing received telephone calls from staff who work at the courthouse located at 604 Rossland Road in Whitby".

Presenting Counsel's Motion Record - Tab A
Presenting Counsel's Report to JPRC
(jurisdiction/abuse of process)

7. These persons - who were interviewed by Presenting Counsel in the first proceeding made various allegations against Justice Massiah, most of which were dismissed by the current complaints committee. A single incident of gender- based harassment, the "lookin' good" allegation made by Ms. X was deemed by the complaints committee to require a response.

HW Massiah' Motion Record(June 28, 2013) - Tab 3
Complaints Committee letter dated Jan.2nd/13

8. In purportedly investigating previous Presenting Counsel's Report investigators interviewed all staff in the Rossland Courthouse. The allegations from some of the staff included very similar gender-based harassment allegations as had been the subject of the first hearing before the Panel led by Justice Vaillancourt.

Reasons for Decision dated March 1, 2012
Investigation Transcripts - Vol.1-5

HW Massiah's Response Dated Feb.27, 2013 to the allegations:

9. HW Massiah elected to provide the complaints committee with a written response dated February 27th, 2013 to the allegations. His Worship's response is comprehensive and reveals the following:

1. an adverse impact on his ability to answer some allegations on account of delay;

2. acknowledgements that in some instances the allegation was consistent with his manner of

greeting at that time and that "I would now not make any comment about a female appearance and apologize if such comment at the time made Ms. F felt uncomfortable";

3. acknowledging that he addressed Ms. B as "girl" however the greeting carried no sexual overtones and essentially he understood that he had a good relationship with her consistent with the letter which she wrote on his behalf with respect to the prior proceedings. (see Bhatacharya e mails)

4. acknowledging that the greeting to Ms F to the effect "looking good today" and "looking good today, Ms. F is consistent with his earlier manner of greeting some members of the court staff;

5. Denial of Ms. C's allegation.(confirmed by Ms. C)

6. Denial of allegation that he "eyeballed" a female justice of the peace and stared at her chest. (confirmed by W)

7. Denial of Ms. D's improper dress allegation with a promise to "establish and maintain strict boundaries with all court staff by ensuring that my door is closed and that I have completed my dressing before I respond or attend to my desk or court personnel."

8. Denial of the Ms.B state of undress allegation with an undertaking to "not engage her as a friend or equal team member based on added training and education."

9. An inability to recall who Ms. A is or the event. However, a candid acknowledgment that her account is plausible and he was unaware of her. "Going forward, I would ensure that my door is locked."

10. An inability to recall Ms. V and the incident specifically. Agreed that he has taken off his robes in the presence of court staff but he "remained fully dressed with black waist jacket, shirt and dickey or tab on."

11. "Looking good" comment to Ms. X. Explained that he was referring to the number of matters on the

daily Docket. "If Ms. X believes that my comment to her was disrespectful, I apologize, as it was not intended in the way it was received."

12. "Lady in red" comment to Ms. X. Does not recall the event or the alleged comment. If a comment was made it was not said in a sexually suggestive tone. Ms. X herself has no memory of the incident.

13. No specific recollection of the touching incident with Ms. F. No awareness of Ms. F attending his chambers or expressing any resistance to attend to deliver papers at any time.

14. **"It was made clear to me at the conclusion of that hearing that my overly friendly manner and seemingly relaxed behaviour in dealing with members of the court staff were not received in the manner intended and was considered to be unprofessional. Consequently, my intention is to go forward with a more serious and businesslike manner in the future, with firmly established boundaries for all persons I am required to interating (sic) with in and out of court. Further, I would remain mindful of all the allegations brought forward as I discharge my duties in the future".**

Applicant's Motion Record, June, 2013
HW Massiah Response to allegation - Tab 4

Notice of Hearing dated May 31, 2013:

10. A Notice of Hearing was issued and published by the Justices of the Peace Review Council alleging misconduct as follows:

"Between May 30, 2007 and August 23, 2010, you engaged in a course of conduct including comments and/or conduct, towards female court staff, prosecutors and defendants that was known or ought to have reasonably been known to be unwelcome or unwanted. The conduct resulted in a poisoned work environment that was not free of harassment."

Notice of Hearing, May 31, 2013
Exhibits 1A and 1B

11. Paragraph 14 of the Notice of Hearing states:

> "In light of the nature of the conduct set out above in paragraphs 1 to 13, the range of women who were recipients of your conduct, **and your history of judicial misconduct of a similar nature at a different courthouse, your conduct demonstrates a pattern of inappropriate conduct toward women in the justice system."**

As above - para 14

Procedural irregularities in the allegations:

Delay

12. The allegations which are the subject of this hearing span from His Worship Massiah's appointment to the Bench in 2007 to in and around August, 2010. The very first reporting of them occurred four years after the first incidents in the Hunt Report and are the subject of litigation some seven years after the fact in 2014.

13. Other than to offer a bald assertion of fear for reprisal - none of the witnesses proffered any credible explanation for the significant and inordinate delay in coming forward with their allegations.

14. Evidence at the hearing revealed that the staff bringing the allegations are covered by a collective agreement and a comprehensive anti-harassment workplace policy which not only prohibit such conduct but firmly articulate a policy advocating for prompt action without fear of reprisal.

Collective Agreement
Durham Region Harassment Policy - Ex.26

15. There is no evidence that any act or omission of the HW Massiah caused any delay in either the allegations coming forward or in them being the subject of litigation.

Lack of particularity in allegations:

16. The allegations brought against HW Massiah are wanting of the following particulars:

1. Material facts in support of the communications being unwelcome or unwanted;

2. Material facts in support of the alleged poisoned work environment created by HW Massiah;

3. "AA in 2007". Witness can not remember the other party present who did the introducing;

4. Material facts in support of a course of vexatious conduct;

5. Particulars of date, time and place for 7(a), (b), (c), (d), (e), (f), 8(a), (b), (c), (d), 9, 10, 11, 13.

Adverse impact of delay on ability to recall material points:

16. Several of the witnesses were unable to recall material points to the allegations such as date, the content of conversations, alleged occurrences themselves and some were quite forthright in acknowledging that the passage of time adversely impacted on their ability to recall material points.

Testimony of Ms. F - entire
Testimony of Ms. B - see p.6,22,23,26, 28, 30, 168, 181, 238, 240
Testimony of M - see
Testimony of P - see p.104, 126, 127,
Testimony of W - see p.22, 24, 25, 27,
Testimony of Ms. Q - see p.125, 130, 131, 133,
Testimony of Ms. G - see p.156, 157, 166
Testimony of HW Masiah

Failure to secure evidence:

17. Both M and P conceded that relevant evidence to make out their allegations regarding HW Massiah's in-court conduct such as notes and transcripts could have and should have been secured by them. P was candid in explaining that she did not do that because there was in fact no intention by her or management to move forward with any formal complaint at the time. Presenting Counsel did not call any members of the public who witnessed the alleged in-court conduct.

Testimony of M and P

Comments welcomed:

18. His Worship Massiah testified that he had no knowledge from his interactions with the court staff that his comments were offensive, vexatious or unwelcomed. He stated repeatedly in his testimony that he felt "well received" and had he received any hint of displeasure he would cease and adjust his conduct accordingly.

Testimony of HW Massiah – at p.22-24, 41

Durham Region Managerial Staff unaware of any harassment

19. Managerial staff who worked with the persons who brought the allegation testified and indicated that no complaints were brought to their attention pertaining to HW Massiah to deal with other than a complaint about HW Massiah's cologne, which some staff were uncomfortable with. Ms. Z testified that she conducted her own Inquiry when she heard of the allegations in the prior proceeding and that turned up no complaints.

Testimony of Z – at p. 167-176

Staff enjoyed protection of collective agreement & Durham Region Anti-Harassment Policy:

20. Managerial staff who worked with the staff who brought the allegations confirmed that the collective agreement between the Region of Durham and the bargaining agent for the staff members, CUPE, Local 1764 contained a non-discrimination clause and the Region's Harassment and Discrimination Prevention Policy which protected them for reprisals for exercising their rights under the Human Rights Code etc.

Testimony of Ms. Z – at p.160-61
Testimony of Ms.H – at p.46-52
Testimony of Ms. T – at p.18,19

Staff enjoyed working with HW Massiah:

20. Ms. Z testified that there was a general feeling that the court staff liked working with HW Massiah. "They enjoyed some of the camaraderie of working with him" she said at p.177. She went on to identify a number of the staff members from whom she felt that sentiment as Ms. U and Ms. D. While she did not remember at first instance when brought to her statement to the investigators she acknowledged that at the time of the interview she identified Ms. Y as among one of the court staff who enjoyed the camaraderie that they had with HW Massiah.

Testimony of Z – at p. 177-81
***Note adverse impact of delay on her memory – p.180-81**

21. On consent the parties agree that The Region received no grievance on this issue.

Admission (no grievance filed)

22. H one of the managers in the Court Services Area testified that HW Massiah had in the past complimented her on looking good and losing weight and she took no offence to his comments but saw them as a compliment.

Testimony of H – a p.45, 86

23. Ms. V, a witness called by Presenting Counsel, gave insightful evidence into HW Massiah's raport with the court staff. She said:

> "I thought he was very nice. I thought he was friendly, approachable, I thought he was nice. A lot of them, a lot of the justices, you feel nervous, you don't want to speak to them. He was more workable and friendly."

Testimony of V – at p.173

> "But people were happy to see him rather than some of The other ones that come in. Again, I don't know if that's Because he would be considered a good-looking older Man, or if's because he was friendly and approachable, People liked him, as opposed to some of the other Justices of the peace who talk to you like they're I don't know....just like they're much better than You, which may be the case, but you know, certain ones treat you like you're on the same level they are, which we do appreciate."

as above at p.178

> It didn't really bother me that much; I was(sic) really offended by it. I'm surprised everybody else was offended by it, because they never seemed to have a problem with it at the time."

As above at p.184

24. Ms. V also provided some insight into the work environment and the propensity and the standard of conduct with respect to sexual comments/jokes. She said:

> "just jokes, in particular, about all sorts of the worst kind of sex jokes, most inappropriate things you can possibly think of have been probably talked about, more than once a day I would say."

As above – a p.189

25. Ms. V testified that a comment she attributed to HW Massiah along the lines of "I am glad we are off the record so I can tell you you're looking good was welcomed as a compliment on her part.

As above – at p.189

26. Ms. V provided some evidence on the frequency of the statements or comments made by HW Massiah towards her appearance. She said:

> "I've only heard him say one other time to someone in the office that their hair was nice. Again, this is not like an everyday thing. We would see each other, not often, but I mean, sometimes we would see each other, it would(sic) be like every single time there would be a statement or a comment made towards my appearance."

As above at p.176

27. The following set of questions and answers from Ms. V provides some insight into the culture or standard of conduct of the work environment:

Q. Was he considered attractive ?

A. I'd say he was yes.

Q. **Was there talk to that effect amongst the staff ?**

A. **Yes.**

Q. Can you describe that for us ?

A. Um, well, um we would find out who the Justice of the Peace is, and You know, courtroom 105 that day, if was His Worship Massiah, we would say, um -- I don't know, we'd jus say "oh" -- **I don't remember* exact terms its been a long time.**

Q. **Sure**

A. But people were happy to see him.....

As above at p.177-78
***Adverse impact of delay on memory**

Ms. P:
"No intent to complain
about alleged court conduct"

28. Ms. P provided evidence on her state of mind at the time she alleges that HW Massiah was engaged in flirtatious conduct towards attractive female defendants in his court room. She said:

> "I suppose that in my mind, if there was a complaint going forward, or somebody wanted to appeal, that that effort would be necessary.(transcripts – notes) **But at the time when it was happening there wasn't any intention by me, or any movement in our office that I was aware of, by management, to take it any further."**

Testimony of Ms. P – at p.118

29. Ms. P expanded on her lack of intent to complain at the time of the allegations in her investigation interview in June 2012. This evidence was put before the Hearing Panel in re-examination. She said the following:

> "..The only time I would consider coming forward to complain about a judicial officer that I'm regularly in front of, is if I can demonstrate objectively by transcripts or something, a pattern of conduct. An isolated incident, I would never do, quite frankly....So as a prosecutor, quite frankly, I can't speak for my colleagues, but I would very

> much hesitate to either do an informal complaint or a formal complaint, unless it was so egrigous and such a pattern of conduct that I was personally aware of, or could obtain records about, before I would ever do that. Because I would be afraid of the retribution and it affected the cases that are before the court."

Testimony of Ms. P – at p.141-42

Evidence of improper purpose in initiating the subject allegations:

30. Ms. Y - (July 15, 2014 at p.101 - 117) testified that "we knew that the hearing was happening before it happened - she was "pissed off" when she read the Law Times article regarding HW Massiah's testimony, she was concerned that he would get a "slap on the wrist" and accordingly she decided to come forward after P called her, encouraged her an she then decided to "step up". Y testified that P provided her with a telephone number to call. P denied this.

31. M - (July 18, 2014 at p.33-35 testified that there was a lot of talk amongst his staff and that the Law Times article "was kind of the catalyst that increased the level of conversation amongst my staff and myself." He testified p.60) that that he too had a concern that the first Hearing Panel might not give an appropriate penalty.

32. X (July 17, 2014) testified that she too read the Law Times article and was angered or troubled by its content and in particular HW Massiah's suggestion that there may have been collusion. She felt the need to step up for the younger women coming up in the profession she said. Her will say to Presenting Counsel raised only the "looking good" incident.

33. Y was clear in her testimony that now P was the person who called her and pushed her to "come forward". Ms. Y testified that now P went so far as to provide her with the phone number for Presenting Counsel. P denied pushing Ms. Y to "come forward". Interestingly, it is P who remembers the "Lady in Red" issue.

34. The prosecutors' group had been following the first hearing through informal mechanisms for some time and Ms. Y candidly admitted that "We knew that the hearing was happening before it happened. They were aware of the fact that the hearing involved allegations of gender-based discrimination at a nearby courthouse.

35. Nonetheless, they made no effort to bring forward any allegation. However, After Justice Massiah testified in exercise of his right to full answer and defence, Ms. X of the Prosecutors' office became angered by the content of that testimony. She spoke to her supervisor and to Ms. P. The latter then called Ms. Y to encourage her to find instances which could be be brought forward. Clearly, Ms. B knew about the prior proceeding. She provided HW Massiah a positive character reference letter.

"We knew that the hearing was happening
before it happened.

Testimony of Y – at p.101
E mails between Mr. Bhatacharya and
Ms. B – Ex. 25

36. While Ms. X testified that her office was "in total lockdown" during the first hearing, her supervisor M testified quite differently, it is submitted. He stated that his office, "everybody in the office" followed the first hearing with interest as it occurred, and before the Law Times article was published. He said that information flowed from staff and admin staff both inside the courthouse and informally at social gatherings and elsewhere. He indicated that he personally knew some of the clerks who had complained in the first matter. He would not exclude the suggestion that information was flowing to him from these clerks in particular, though he could not say so definitely.

Testimony of Ms. X - July 17th, 2014
Testimony of M - July 18th, 2014

37. While he claimed in evidence that his statement to investigators "I felt a need to support the clerks" referred to some future feared transgressions against unspecified clerks, it is submitted that he actually made his call to Mr. Hunt to support the clerks at the first hearing, whose testimony had been disputed by Justice Massiah, and which came to his attention through Ms. X and her outrage over Justice Massiah's testimony.

Testimony of M, July 18th, p. 50-55;
Testimony of X, July 17th, p. 75, lines 3-25.

38. While M claimed that his statement to investigators, that he came forward because "I felt a need to support the clerks" referred to some future feared transgressions against clerks who had not yet complained, it is submitted that he actually made his call to Mr. Hunt to support the clerks at the first hearing, whose testimony had been disputed by Justice Massiah.

Testimony of M - July 18th, p. 54-56

39. If he made his call to support the clerks in his own building, who had not complained at that time, either formally or to him personally, it is submitted that he did so because he was concerned the first panel would give Justice Massiah a "slap on the wrist. He thought "those clerks were perhaps vulnerable and could be ending up in the same situation with His Worship."

Testimony of M - July 18th, 2014
Page 55, lines 5-10; and at page 61, lines 1-11

40. It is submitted that M was awaiting developments in the first hearing before stepping forward to make allegations; as well, he was concerned that the panel in the first hearing would not make an appropriate decision as to penalty (the slap on the wrist concern), and thus made his allegation to increase the likelihood that a more severe penalty would be imposed.

41. It is submitted that, had M truly believed that Justice Massiah's activity on the bench in the years 2007-2010 (the "ogling" allegations) brought the administration of justice into disrepute, he would most certainly raised the issue then. And, it is submitted, it would not have been "to support the clerks". As he stated to investigators:

> "It bothered me, but not to the extent that I felt I had to take action or go see one of his superiors or even bring it to the attention of my boss. I didn't do that. It bothered me, it seemed unusual inappropriate is probably another word to use, but not to the extent that I felt I had to take action or even take notes.".

42. Ms. X testified that "someone" sent her a copy of the Law Times article summarizing Justice Massiah's evidence at the first hearing. Prior to that, she clearly stated in her June 6, 2012 investigation interview, "Because truly in the whole scheme of things it was fairly minor in nature."

43. However, she disagreed with the testimony of Justice Massiah that there was no hierarchy in the court setting, and also that the clerks may have misunderstood or colluded in their allegations. His testimony "incensed" her.

44. She therefore talked with others in the prosecutors' office, and decided to bring forward her allegations. Each of the other prosecutors "independently" chose to bring forward a complaint at the same time.

45. She also testified that her intervention was caused in part by the concern that the first Panel would give Justice Massiah a "slap on the wrist", whereas she was motivated to "stop Massiah" for future generations of women clerks.

46. While Ms. X claimed to believe that her career would be in jeopardy were she to make a complaint against Justice Massiah, she also testified that she wouldn't bother going to her union for protection. She stated, wrongly, that a union complaint under the Collective Agreement couldn't touch Massiah. She stated that she doesn't go to the union in any event.

47. It is submitted that her testimony along with that of P that, if they had complained, other justices, misinformed by Justice Massiah, would retaliate against them in their judicial decisions or comportment, is the rankest speculation. If such retaliation had been their concern, it is unclear why it would not still be operative when she made the complaint days after the Law Times article, it is submitted. Their reference to fear of retaliation was not believable and should be rejected by the Panel.

Ms. F:

48. Sid not want to make a complaint against Justice Massiah. Eventually, when she was "pressured" by Y to do so, she went to management to complain about this pressure. She stated she did not remember what had occurred. She told one witness at the time that Justice Massiah had "touched her hair", something which could easily be accidental in a closed space. Later, she claimed that the incident involved an utterance and no touching, and she wanted to get on with her life.

49. She did not claim to be fearful of making a complaint, and in fact Ms. Z revealed that she had made a complaint against a different Justice of the Peace, evidence that she was aware of the procedures and could act if she felt it important.

50. It is submitted that, even if her interview by investigators is taken to be a "complaint" she cannot demonstrate good faith as required by human rights jurisprudence to overcome the dated nature of her allegations.

Ms. B:

51. Her viva voce evidence was entirely unreliable, and it is submitted, can be usefully compared to the emails sent to her and received by Mr. Bhattachuria, counsel at the previous hearing. Those provide a time- sensitive record of her feelings about Justice Massiah at the time. They show that she had many good things to say about Massiah in September 2011, things which essentially confirm Justice Massiah's testimony that he was well-received in the Rossland Courthouse.

52. The email record confirms that she would be unable to provide character evidence for Justice Massiah because of "pressure" within the office. Her email to that effect is dated just subsequent to the date of the Law Times article, and when the prosecutors group was seeking out complainants among staff there.

Ex - 25

53. She also told investigators that "the outcome" of the first case convinced her that she had been wrong to have believed that Justice Massiah's behaviour had been appropriate and simply a reflection of his culture, ie. "the islands".

Testimony of B – p.36-38 etc.

Legal Argument: Abuse of Process

1. We have argued in Part One that the failure of the JRPC to follow its own procedures and the clear requirements of the Act, resulted in a loss of jurisdiction.
A statutory amendment to the Act would be necessary in order for justices of the peace in Ontario to be investigated and disciplined in this manner.

Part One to this Memorandum, supra.

2. In the alternative, if the arguments set out in Part One above is not accepted that the Hearing Panel has the jurisdiction to prevent an abuse of process and fashion a remedy which it sees as fair and just in all of the circumstances to remedy the procedural irregularities which took place in this case.

**Allegations assert "sexual harassment",
"poisoned work environment" founded on
Human Rights Code, R.S.O.
1990 c H 19:**

3. As the alleged misconduct in this case is clearly founded upon rights and public policy articulated in the Ontario Human Rights Code the Hearing Panel is called upon in this case to adjudicate matters which require them to apply the Human Rights Code.

**Panel obligated
to apply whole law:**

4. In Tranchemontagne v. Ontario [2006] 1S.C.R. the Supreme Court made it very clear that "statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statues in order to apply the whole law to a matter properly before them.

9. **IT IS RESPECTFULLY SUBMITTED THAT**, when a statutory body such as this Hearing Panel is authorized to refer to human rights principles not specifically contained in its statute (here, the JPA), it must apply the Human Rights Code (hereinafter the Code) in its entirety, including the protective provisions which require that complaints be sufficiently particularized, and in accordance with the limitation period stipulated by the Code. Anything less would be inconsistent with the quasi-constitutional status and legislative supremacy which the Ontario Legislature stipulated for the Code.

Tranchemontagne, supra

4. The right to be free from sexual harassment under the Code places a duty on the employer, Durham Region, and not on a judicial officer like HW Massiah.

Relevant statutory provisions (below)
s.7(2) Human Rights Code

5. Both the Human Rights Code and the procedures of the HRTO provide for strict rules with respect to particulars and a limitation period.

6. The timeliness of a complaint concerning discrimination of any kind is always highly relevant. For that reason, both the Federal Human Rights Code and the Ontario Provincial Code include a limitation period, which can be overcome in very limited circumstances. .

Human Rights Code, s. 34

7. In Ontario, the Human Rights Code has quasi-constitutional authority. Where provisions of the Code conflict with other law, it is the provisions of the Code which are to be applied.

Ontario Human Rights Code, s. 47(2)

8. As the Supreme Court of Canada has stated with reference to s. 47(2):

> "This primacy provision has both similarities and differences with s. 52 of the *Constitution Act, 1982* , which announces the supremacy of the Constitution. In terms of similarities, both provisions function to eliminate the effects of inconsistent legislation. At the end of the day, whether there is a conflict with the Code or the Constitution, the ultimate effect is that the other provision is not followed and, for the purposes of that particular application, it is as if the legislation was never enacted."

Tranchemontagne *v.* Ontario (Director, Disability Support Program), [2006] 1 S.C.R. 513, 2006 SCC 14 at paragraph 35

10. Under the Ontario Human Rights Code, allegations of gender or other discrimination must be made in a timely fashion, absent a positive showing of good faith. While this hearing is being held under the Justices of the Peace Act, it is submitted that the underlying principles of human rights jurisprudence are fully applicable to this hearing otherwise HW Massiah is being denied a fundamental right to fairness.

11. S. 34(1) of the Human Rights Code sets out a one year limitation period for the laying of a complaint. S. 34(2) allows the waiver of this limitation where there is a demonstration of good faith, and there is no substantial prejudice occasioned. The section reads as follows:

34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

12.

Late applications

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith **and no substantial prejudice will result to any person affected by the delay**. 2006, c. 30, s. 5.

13. Human Rights Code jurisprudence identifies the underlying purpose of the limitation period as one of insuring *fairness:*

> "The overarching intention of the section has to be in large part to insure fairness between the parties, both in insuring these allegations are brought expeditiously, and equally, that Respondents need not respond to allegations from the distant past."
>
> **Wanigasekera v. Hydro One Networks**
> **2010 HRTO 2356 at paragraph 13**
> **Smith v. Rock Tenn et al 2014 HRTO 729**

14. It is submitted that a Justice of the Peace accused of the violation of human rights principles is entitled to "fairness between the parties" as well. It would be erroneous to provide a sitting Justice of the Peace or Provincial Court Judge with less procedural protection than is received by a landlord or an employer subject to a human rights complaint, it is submitted. He or she should not have judicial security of tenure put at risk because of claims that would not pass muster under the Human Rights Code, it is submitted.

15. None of the allegations which form the subject matter of the present hearing were made in a timely manner, even if they were "complaints" as defined by the Justices of the Peace Act., it is submitted. Some of the allegations refer to Justice Massiah's first few days in office, when he was being introduced to staff, ie. 2007. The latest allegation is that of Ms. X, who stated that Justice Massiah directed his "looking good" comment to her in early spring or summer of 2010. She first brought the matter to the attention of the authorities in October, 2011.

16**.** Where a complaint is made under the Human Rights Code in an untimely manner, the Board will reject the complaint unless there is a positive showing that the delay was occasioned "in good faith". Good faith does not mean an absence of bad faith.

> **"Furthermore, the requirement of good faith means that the person pursuing the** human rights complaint must show more that an absence of bad faith. **This is consistent with the policy objective that human rights claims should be dealt with expeditiously**". (emphasis added)

Miller v. Prudential Lifestyles Real Estate
2009 HRTO 1241 Canlii (see Tab 7 – Smith)

17. The test for good faith applied in human rights jurisprudence in Ontario can be desribed as follows:

"[45] In determining whether or not the applicant operated in good faith in this case, I take into account a number of factors. In *Lafleur v. Kimberley Scott*, 2009 HRTO 1141 (CanLII), 2009 HRTO 1141 (CanLII) at paragraph 8, the Tribunal said as follows:

> In another context, the Ontario courts have had occasion to interpret the phrase "delay that has been incurred in good faith". To establish that delay in pursuing one's rights has been incurred in good faith, it must be shown that the applicant acted honestly and with no ulterior motive. (*Hart v. Hart* (1990), 27 R.F.L. (3D) 419 (Ont. U.F.C.), cited in *Scherer v Scherer* 2002 CanLII 44920 (ON CA), 2002 CanLII 44920 (ON C.A.), (2002) 59 OR (3d) 393 (O.C.A.). Delay has been found not to have been incurred in good faith where it was due to wilful blindness to the need to make inquiries about one's rights: *Webster v Webster Estate*, [2006] OJ No. 2749 (ON S.C.). The courts have held that "failure to act in ignorance of one's rights may, in some circumstances, amount to "good

faith". However, it is not enough for a party who must establish good faith to say that he or she was ignorant of their rights. They must also establish that they had no reason to make enquiries about those rights." (*Busch v Amos*, [1994] OJ No. 2975 (Ct. J. (Gen. Div.), cited in *Scherer*, *supra*)."

Hunter v. Vermeer
2010 HRTO 669 at paragraph 45 (canlii)

18. Waiting for some other legal proceeding to conclude before pursuing ones' rights will not provide a valid explanation for making a complaint under the Code. Ignorance of one's rights similarly does not provide a valid explanation, unless the Applicant establishes that he or she had no reason to make inquiries about his or her rights.

Simon v. Peel Regional Police Services
2010 hrto 433 canlii

Delay not adequately explained:

19. IT IS RESPECTFULLY SUBMITTED THAT the evidentiary record is clear that there does not exist any good faith explanation for the delay in the court staff asserting their rights in all of the circumstances of this case and the evidentiary record confirms that HW Massiah suffers substantial prejudice on account of this delay. That prejudice manifests in the following manner:

1. He is called upon twice to answer to allegations which had they been initiated promptly would have been the subject of the proceedings before Justice Vaillencourt;

2. Senior Manager, the original complainant, was clear that based on her understanding further allegations may be forthcoming;

3. HW Massiah was the subject of a hearing where a Disposition was rendered which acknowledged that public confidence in the administration of justice was not last and that he had the capacity for rehabilitation and they were satisfied he would not re-offend;

4. The subject allegations not only mirror the alleged conduct on the first hearing but they also either pre-date them or take place at the same time;

5. Paragraph 14 of the Notice of Hearing HW Massiah makes it clear that a record of prior misconduct is being asserted against him for claims which could have and should have been the subject of the first hearing had the court staff asserted their rights as they were obligated in law so to do;(Angle – Tab15 – Grandview – Tab 16 – Bank of B.C. Tab 17 – Johnson – Tab 18)

6. Statutory enactments, collective agreement language and a comprehensive harassment prevention policy was in place to protect the court staff yet they sat on their rights;

7. The evidentiary record reveals that pretty much all of the witnesses in this hearing including HW Massiah laboured under an impediment to remember relevant points in the evidence; (Blencoe – Tab 14)

8. A substantial portion of the allegations were vague in terms of when they happened; (Smith – Tab7 –Renin Corp – Tab 8)

9. HW Massiah has been out of duty since the first set of allegations, August, 2010;

9. HW Massiah has had to incur substantial legal costs to respond to these two sets of allegation when he ought to have answered one.

20. Does the failure of the court staff to bring their allegations against HW Massiah in a timely manner so that they could have been litigated at the Vaillancourt hearing cause those allegations to be subsumed in the prior Disposition on the specific facts of this case or to otherwise invoke the legal doctrines of res judicata and cause of action estoppels ?

21. IT IS RESPECTFULLY SUBMITTED THAT it does.

22. The Supreme Court of Canada has set out the rule which applies in both criminal and civil cases, which prohibits the splitting of a case against an accused or respondent:

23. '…..The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), *per* Mackinnon J.A., at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (Ont. C.A.), *per*Schroeder J.A., at pp. 21‑ 22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence‑ ‑ as much as it deemed necessary at the outset‑ ‑ then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response."

R. v. Krause [1986] 2 SCR 466 at paragraph 15.

24. In the instant case, it is submitted that any proceeding against Justice of the Peace Massiah for gender-based harassment of office staff was required to produce all available evidence at the original hearing. In Johnston v. Law Society of P.E.I. , Chief Justice Carruthers of the P.E.L. Supreme Court--Appeal Division, summarized the law in this regard at paragraph 15:

> **"**The most recent judgment of the Supreme Court of Canada on the principle of res judicata in Town of Grandview v. Doering (1975), 61 D.L.R. (3d) 455, [1976]' 2 S.C.R. 621 , [1976] 1 W.W.R. 388, Ritchie, J. wrote the judgment of the majority of five, while Pigeon, J., wrote the dissent of the remaining four learned Supreme Court Justices.
>
> The legal rules I find applicable to these proceedings, and which I extract from the reasons of Ritchie, J., are as follows (pp. 455-62 D.L.R., pp. 630-9 S.C.R.):
>
> 1. Where a given matter becomes the subject of litigation the law requires the parties to bring forward their whole case.

> 2. This applies where the issue sought to be litigated anew was not pursued in the first action either through negligence, inadvertence or even accident and covers every point which properly belonged to the first action.
>
> 3. In special circumstances one party may be allowed to pursue the same matter in a second action but only if he can show that the new facts he has discovered could not have been ascertained by reasonable diligence on his part and presented by him in the first action.
>
> 4. The burden lies upon the party who brings the second action to at least allege the new facts could not have been ascertained by reasonable diligence in the first instance."

25 IT IS RESPECTFULLY SUBMITTED THAT any facts which are the subject of the present proceeding could have been discovered by reasonable diligence in the first instance, if in fact there were any such facts. There are no special circumstances here which could justify waiving of these rules, it is submitted.

Krause, supra

PREJUDICE

26. It is submitted that the failure to deal with all allegations of gender-based harassment of clerks and other staff in a single hearing resulted in prejudice to Justice Massiah separate and apart from that delineated above.

27. HW Massiah was cross-examined twice, which in itself gives rise to a perception of impropriety. Presenting Counsel, is given a second opportunity to cross examine as to character, and to use the testimony at the first hearing to attack the Respondent's character and credibility.

R. *v.* Biddle, [1995] 1 S.C.R. 761 paragraphs 21-25

28. Presenting Counsel at the first hearing, who was aware of the Rossland Road allegations against Justice Massiah, directed the Panel to considerations "at the upper end" of possible dispositions. Justice Massiah's counsel proposed counselling, written apologies, along with a 10 day period of suspension. In its disposition, the panel was of the view that a programme of counselling along with a short suspension and written apologies was appropriate**.**

Justice of the Peace Errol Massiah –

Reasons for Disposition

Paragraphs 1-4, 46

29. The evidentiary record shows that the allegations which were brought forward in October 2011 were made as a result of prosecutors' belief that Justice Massiah was not telling the truth and that he would get "a slap on the wrist" or "a kiss" from the first Panel.

30. This action constituted a collateral attack on the first Panel and its disposition, it is submitted. The counselling ordered as part of the first disposition was suspended, and Justice Massiah was unable to benefit from the full course of the ordered counselling. The splitting of the case in this manner also upended the first Disposition, which has not been completed as yet.

Testimony of Massiah, cite.

31. The prejudice suffered thereby is crystalized in paragraph 1 of Presenting Counsel's Argument to this panel and paragraph 14 of the Notice of Hearing, where Justice Massiah is faulted for not having learned from the earlier, interrupted counselling notwithstanding the clear evidence from as early as his response to the complaints committee that he did

Presenting Counsel Paragraph 1

32. "That His Worship continues to try to justify clearly inappropriate conduct – even after having been cited by a previous Hearing Panel for Similar conduct and undergone educational counselling to ensure future compliance – is deeply concerning.

His Worship's actions amount to a pattern of conduct which has harmed public confidence in himself as a judicial officer and the administration of justice.

As above – para 1-2

33. Presenting Counsel at this hearing may, if judicial misconduct is found, make a second recommendation. It is submitted that the ability of Presenting Counsel to make a second recommendation creates potential prejudice for Justice Massiah.

34. The lack of timeliness in the making of the complaints in the matter at bar has allowed collateral concerns to become operative, and to deny this panel timely evidence of how Justice Massiah was perceived and treated at the Rossland Courthouse at the time of the allegations. The changed attitude towards justice Massiah is evidenced by the testimony of the Supervisor, Z, that her informal investigation revealed no complaint against him and by the testimony of V, in evidence not contested by Mr. Gourlay and the evidence of B and the e mail chain along with HW Massiah's evidence on being "well received":

> **"I'm surprised that everybody else was offended by it (ie. Justice Massiah's behaviour) because they never seemed to have a problem with it at the time."**
>
> **Evidence of Ms. V– p. 185**

35. Given that consensual behaviour cannot amount to harassment, it is submitted that the loss of time-sensitive evidence of the attitudes of the staff towards Justice Massiah has caused him prejudice. In several instances, he cannot recall the incident which is alleged to have occurred; in others allegations made against him in 2011 (i.e. the chambers not-fully-dressed allegations) were entirely different. For example, Z testified that staff members thought Justice Massiah was "hot" and a man in very good physical shape; one staff member told her they liked to surprise him with his shirt off.

36. The prosecutors office (M, P, X) had informal access to the evidence of the first hearing, and discussed it among themselves. This allows witnesses to consciously or unconsciously tailor their evidence. Had their been a single proceeding, no such tailoring could take place, it is submitted.

Standard of Proof, Credibility and Reliability:

37. 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."

38. "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.

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

40. 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

41. 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

REMEDY:

42. IT IS RESPECTFULLY SUBMITTED THAT in applying the "whole law approach" mandated by the Supreme Court of Canada in Tranchmontangne (supra) with respect to the allegations of misconduct against HW Massiah the current proceedings invite a finding of abuse of process on the following grounds:

1. The rights asserted, namely, to be free from sexual harassment in the workplace and the right to a workplace free of sexual harassment are not common law rights but rights with their genesis in the Ontario Human Rights Code;

2. Under that statute it is the employer, the Region of Durham who has a duty to provide and safeguard these rights for their employees and not judicial officers;

3. The constitutional right to judicial independence is compromised by placing such a duty on a sitting judicial officer where the facts show that the employer had the proper policies and tools in place to safeguard these rights, including Z's preliminary investigation which turned up no complaints, Senior Manager's statement in her letter that more may come, evidence from management and HW Massiah that he was in fact "well received" at the material times;

4. The Human Rights Code's limitation period is applicable in the circumstances of this case and not invoking it results in substantial prejudice and unfairness to HW Massiah;

5. Under human rights jurisprudence the matters complained of are only unlawful in the absence of consent and the evidence shows consent or an inability to find on the basis of clear and convincing or cogent evidence that consent was lacking in light of the impact of delay on the memory of both witnesses and HW Massiah and the failure of the subject witnesses like P and Mr. M to secure what would have been relevant evidence on aspects of the case;

43. IT IS RESPECTFULLY SUBMITTED THAT on the grounds articulated above alone these proceedings ought to be stayed or such other remedy that counsel may speak to and the Hearing Panel may entertains as to continue them undermines the integrity of the process and the Rule of Law.

44. IN THE ALTERNATIVE, IT IS RESPECTFULLY SUBMITTED THAT the process by which the complaints against Justice Massiah were proffered, amount to an abuse of process in that the case against him was split, contrary to the holding in Town of Grandview v. Doering (supra) and the doctrines of res judicata an cause of action estoppel, causing the current allegations to be subsumed in the remedy ordered by the Hearing Panel chaired by Justice Vaillencourt. In light of his written response to the allegations, the similar nature of the allegations, the time-frame of the allegations and the prior Hearing Panel's Disposition the decision to send this matter to a hearing in the absence of reasons was arbitrary and devoid of natural justice and fairness.

45. **All of which is respectfully submitted.** The Applicant reserves the right to seek leave to respond to any submissions made by Presenting Counsel in their reply on the motions since they failed to address these matters in their submissions and not allowing HW Massiah to respond to them may create an unfairness to him.

September 30th, 2014.