**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:** Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member

**Hearing Panel of the Justices of the Peace Review**

**Council**

**Decision on Motion (#1) for Leave to respond to THE PANEL’s INQUIRY ON Mr. House’s letteR OF APRIL 21, 2017; Motion (#2) for Leave to Reply to Presenting Counsel’s submissions of May 1, 2017**

**Counsel:**

Ms. Marie Henein Mr. Ernest J. Guiste

Mr. Matthew Gourlay E. J. Guiste Professional Corporation

Henein Hutchison, LLP

Presenting Counsel Counsel for Mr. Errol Massiah

**Decision on Motion (#1) for Leave to Respond to the Panel’s Inquiry on Mr. House’s Letter of April 21, 2017; Motion (#2) for Leave to Reply to Presenting Counsel’s Submissions of May 1, 2017**

**Motion #1**

1. On May 3, 2017, the Panel received a motion brought by Mr. Guiste on behalf of Mr. Massiah, seeking leave to respond to a letter from Mr. House, dated April 21, 2017, (described in the motion as a letter on or about April 19, 2017) asking to be removed as counsel of record. In the motion, Mr. Guiste informed the Hearing Panel that on May 2, 2017, Mr. Massiah terminated his retainer with Mr. House.

1. By letter, dated May 5, 2017, Mr. House requested that his name be removed as counsel of record.
2. On May 9, 2017, Mr. Guiste faxed a Book of Authorities containing two cases. On May 10, 2017, Mr. Guiste sent an additional case by fax. On May 10, 2017, Mr. Guiste sent an amended page 3 to his motion, indicating that he seeks leave to file the amendment. The Panel has made its decision based upon the amended motion.

**DECISION**

1. The Panel has removed Mr. House as counsel of record on the basis that he is no longer retained. Leave to hear further submissions in that regard is unnecessary and is not granted.

**Motion #2**

1. Mr. Massiah seeks leave to file a reply to Presenting Counsel’s submissions of May 1, 2017, on the question of whether the Panel should make a recommendation for compensation of legal costs.

In our earlier direction to all counsel, we set out the process whereby each side would have an opportunity to provide written submissions on the issue of our re-consideration of whether there should be a recommendation for compensation of costs as ordered by the Divisional Court (see *Massiah v. Justices of the Peace Review Council, 2016 ONSC 6191*). The scope of the issue before us is a limited one. This Panel was of the view that it was not a case where reply submissions were needed. In that regard, we followed the same approach taken by the Divisional Court in the above noted decision.

1. Mr. Massiah now seeks leave to reply. The right to reply is not automatic. Gillese, J. A. explains in *Dennis v. Ontario Lottery and Gaming Corp,*2012 ONCA 368:

[7] As rule 61.03.1(11) makes clear, reply is not a matter of right. It is confined to responding to an issue raised by the responding party on which the moving party has not taken a position. In responding to the issues raised by the appellants, the respondent refers to facts and cases to which the appellants made no reference. However, this does not amount to raising an issue on which the appellants have not taken a position. It amounts to arguing the issues as raised by the appellants, with a focus on different facts and points of law.

[8] There is value in giving rule 61.03.1(11) its plain meaning and restricting reply factums to those in which the moving party responds to an issue raised by the responding party and on which the moving party has not taken a position. Self-evidently, the point of reply factums is to ensure that each party has had a fair and equal opportunity to argue the issues. A reply factum should not be permitted where it merely confirms or reinforces points already made or which could have been made in the moving party's initial factum.

Although that case was dealing with a reply in the context of rule 61.0301(11) of the *Rules of Civil Procedures*, the principles considered out by the Court in relation to when leave to reply should be granted are relevant here.

1. In his submissions on compensation, Mr. Massiah referred to the submissions of Presenting Counsel in 2015 in which they argued that the question is not whether counsel should be compensated for their work, but whether the public, rather than the client, should be required to “foot the bill”. As they have in their submissions filed on May 1, 2017, Presenting Counsel referred to the nature of the misconduct and the manner in which this case has proceeded. In the submissions filed on March 24, 2017, on behalf of Mr. Massiah, this is described by Mr. Massiah as Presenting Counsel’s “who should foot the bill test” and it is argued that judicial independence is *prima facie* compromised if the subject justice of the peace is circumscribed in the manner and extent of their defence of the complaint.
2. In effect, Mr. Massiah seeks leave to argue to address an issue already raised, and to express his disagreement with how Presenting Counsel has put forward their view on that issue. In our view, Mr. Massiah now seeks to use a reply factum to reinforce points already made or that could have been made in his initial submissions.
3. Mr. Massiah also seeks to argue that Presenting Counsel has no jurisdiction to make submissions on whether compensation should be recommended, that their comments were unfair and politicizing, and that they have breached the *Rules of Professional Conduct*. The issue before us is whether there should be a recommendation for compensation. We are not prepared to grant Mr. Massiah’s motion so that he can simply take umbrage with Presenting Counsel’s remarks.
4. The Panel notes the comments of the Court in *Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 2979 where the Court states:

[11]  Having carefully reviewed Canada Cartage’s original factum, Baroch’s responding factum and Canada Cartage’s reply factum, I accept the position advanced by Baroch. As in *Dennis, supra,* Baroch’s factum is entirely responsive to the issues raised by Canada Cartage in its original factum. While Baroch’s factum refers to cases and facts not mentioned in the Canada Cartage factum and places his own interpretation on cases which are mentioned, significantly Baroch has done so in the context of the issues raised by Canada Cartage. No new issues are raised. I agree with Baroch that essentially Canada Cartage has sought to re-argue the issues raised in its original factum in light of Baroch’s response to those issues. This is neither helpful nor permissible.

[12] In coming to the conclusion which I have reached I accept from *Dennis, supra*, that the point of a reply factum is to “ensure that each party has had a fair and equal opportunity to argue the issues” and thereby to ensure that the Court is not misled in circumstances where oral reply is not available. For those reasons I also accept the submission advanced by Canada Cartage that the Court should proceed cautiously to assess whether the responding party on a motion for leave to appeal has confined itself to the issues raised by the moving party in order to ensure that each party is able to present its case fairly and fully and also to prevent the Court from being misled. In determining whether the moving party should be permitted to submit a reply factum. I have sought to do so in the circumstances of this case.

[13] Accordingly, I would grant Baroch’s motion and strike the reply factum.

1. We are satisfied that both parties have had an opportunity to provide written submissions, that both have raised in their submissions the issue of how the Panel may or may not consider the manner in which the case has been litigated. In the circumstances of this case, there is no risk that the Panel will be misled. The Panel has direct knowledge of the history of the litigation of this case and will form its decision based on the facts and the law.
2. Mr. Massiah also refers to an email that his counsel, Mr. Guiste, received on May 3, 2017, from a reporter from the Toronto Star. Mr. Massiah asserts that there is concern that selective confidential information/documents are being provided to the media in an effort to galvanize public opinion and scorn against His Worship and his counsel. In a letter, dated February 22, 2017, all counsel were informed of the process for this phase of the hearing. They were informed that, in accordance with the Procedures, submissions, related documents and the decision of the Panel will be public documents. All counsel were asked to provide submissions and any related documentation in a hard copy version and in an electronic pdf version that could be posted on the JPRC website or provided to any person upon request. This Panel has no jurisdiction or influence over the questions raised by a reporter or the story the newspaper chooses to publish.

**DECISION**

1. Therefore, we deny Mr. Massiah leave to reply to Presenting Counsel’s submissions.

Dated: May 10, 2017

Hearing Panel: Justice of the Peace Michael Cuthbertson

Ms. Leonore Foster, Community Member