

THE HONOURABLE
MICHAEL J. WOOD

CHIEF JUSTICE OF NOVA SCOTIA



THE LAW COURTS
1815 UPPER WATER ST.
HALIFAX, NS B3J 1S7
TEL: [REDACTED]

October 10, 2023

By Email: [REDACTED]@charteradvocates.ca

Mr. James Manson
Charter Advocates Canada
[REDACTED]
Toronto ON M5G 1Y8

Dear Mr. Manson:

Re: Nova Scotia Judicial Council – Brinton Complaint

I am writing to provide you with my decision pursuant to s. 17B of the *Provincial Court Act* in relation to the complaint by Judge Brinton which accompanied your letter of June 7, 2023.

I have reviewed the complaint and supporting materials and considered your supplemental submissions dated September 11, 2023. I also received and considered written comments from Chief Judge Williams concerning the allegations in the complaint. Finally, I conducted legal research and reviewed applicable decisions from courts and judicial conduct committees.

Principles Applied

Since Judge Brinton's complaint is against the Chief Judge of the Provincial Court, s. 17A(2) of the *Act* requires me, as Chief Justice, to exercise the power and duties set out in s. 17B. These are set out in ss. (1) and consist of the following:

- Dismiss the complaint and provide written reasons if: (i) the complaint is not within the jurisdiction of the Judicial Council, (ii) I consider the complaint to be frivolous or vexatious or (iii) there is no evidence to support the complaint.
- Attempt to resolve the complaint.
- Refer the complaint to a review committee for further investigation.

In your submissions on behalf of Judge Brinton, you urge me to refer the complaint to a review committee.

Given the nature of the complaint, I determined that a resolution was not feasible and, as a result, I did not pursue that option.

My role under s. 17B of the *Act* is to exercise a screening function which includes determining whether the complaint should be referred to a review committee for further investigation. I should only do so if there are reasonable grounds to believe the complaint raises issues of judicial misconduct of sufficient seriousness that could lead to one of the sanctions set out in s. 17K of the *Act* which are:

- Requiring the judge to obtain counselling, medical treatment or instruction.
- Imposing appropriate non-monetary sanctions including reprimand.
- Recommending the judge be removed from office as a result of inability to duly execute the function of their office.

The review committee appointed to investigate complaints against The Honourable Judge Gregory Lenehan conducted an extensive review of judicial misconduct jurisprudence and in their report described the test to be applied in reviewing complaints against Provincial Court judges as follows (para 45):

Whether the impugned conduct, if proven or admitted, could support a finding of judicial misconduct. That is, from the point of view of a reasonable, dispassionate, and informed public could it be found to be so seriously contrary to the impartiality, integrity and independence of the judiciary that it has undermined the public's confidence in the ability of the judge to perform the duties of office, or in the administration of justice generally, and that it warrants a disposition other than dismissal of the complaints in order to restore the confidence?

I have concluded I should apply the same test in determining whether further investigation by a review committee is warranted with respect to the complaint of Judge Brinton.

The review committee in *Lenehan* also commented on the distinction between legal errors and judicial misconduct in paragraph 46 of their report:

In considering this, the Review Committee must be mindful of the distinction between legal errors and judicial misconduct, as earlier referenced. Appellate courts exist to deal with the former; Judicial Council regimes exist to deal with the latter. While there are some cases where judicial error and judicial misconduct can co-exist, legal errors, without more, do not amount to judicial misconduct.

I believe this distinction is important and applicable, by analogy, to Judge Brinton's allegation that Chief Judge Williams made decisions or took actions which exceeded the scope of her authority as Chief Judge. Even if Chief Judge Williams acted in excess of her authority that, alone, would not amount to judicial misconduct. Something more would be required.

Application of Principles to Complaint

The allegations in Judge Brinton's complaint can be organized into the following categories:

- 1) Chief Judge Williams inappropriately pressured her to disclose her vaccinations status.
- 2) Chief Judge Williams unilaterally created a policy whereby only fully vaccinated judges would be assigned to sit in courtrooms which exceeded her authority as Chief Judge.
- 3) Chief Judge Williams threatened to suspend the complainant and refer the matter to the Judicial Council because she was unwilling to disclose her vaccination status.
- 4) Chief Judge Williams inappropriately contacted Judge Brinton's physician seeking medical information which she was not entitled to.
- 5) Chief Judge Williams failed to give Judge Brinton a meaningful opportunity to be heard following her letter of February 22, 2022.

The evidence provided to me establishes the following sequence of events:

- 1) In September 2021, Chief Judge Williams circulated an email to the Provincial Court judges inquiring whether they wished to advise the public of their vaccination status. At that time some Canadian courts were disclosing this information. Judge Brinton responded that she did not agree with doing so. No public announcement was made at that time.
- 2) On October 21, 2021, the Public Service Commission advised all government employees they would have to be fully vaccinated by the end of November, failing which they would be placed on unpaid leave. This would apply to all court staff. There were some limited exemptions permitted in the policy.
- 3) On October 25, 2021, Judge Brinton went on medical leave. Initially it was categorized as a short-term disability. In the spring of 2022, she was approved for long-term disability benefits. She has been on leave since October 25, 2021.
- 4) On November 1, 2021, following consultation with the judges of the Provincial Court, Chief Judge Williams decided only fully vaccinated judges would be assigned to sit in courtrooms for the foreseeable future. Although no public statement was issued, judges were advised that they could inform staff, lawyers, and members of the public of this decision.
- 5) Also on November 1, 2021, Chief Judge Williams wrote to Judge Brinton with respect to the issue of vaccination status. The letter acknowledges that she respects Judge Brinton's decision not to disclose her status. Chief Judge Williams noted that Provincial Court staff were obliged to be fully vaccinated by November 30th and expressed the belief that judges should be fully vaccinated to participate in court hearings as well. She advised that in the circumstances she could not assign Judge Brinton to sit in the courtroom. Chief Judge Williams identified two potential options. One was to have Judge Brinton conduct virtual hearings from home and assign other judges to preside in her courtroom. The other option Chief Williams identified was a suspension pursuant to s. 15(2) of the *Act* which would trigger the requirement to refer the matter to the Judicial Council pursuant to ss. (3).
- 6) On November 16, 2021, the Provincial Court judges held a virtual meeting. Judge Brinton did not participate. The topic was vaccination status of judges. Those in attendance agreed that only vaccinated judges should be presiding in court hearings.
- 7) By late November 2021, many courts in Canada were confirming the vaccination status of their judges or stating that only fully vaccinated judges were presiding in court. The three levels of court in Nova Scotia issued notices to this effect between November 24 and 26, 2021.

- 8) On November 15, 2021, Judge Brinton provided a "Proof of Illness" form signed by her physician to Chief Judge Williams indicating she would be absent from work from October 25 to November 15, 2021. No information concerning the illness or disability was provided. A similar Proof of Illness form was provided on December 16, 2021.
- 9) On February 22, 2022, Chief Judge Williams wrote to Judge Brinton indicating she had been contacted by the Public Service Commission concerning Judge Brinton's medical leave. She informed Judge Brinton that as Chief Judge she was responsible for approving short-term disability leaves and she required satisfactory evidence of disability to give this approval. She requested that Judge Brinton obtain this for her. The letter also repeated the advice that if Judge Brinton was medically cleared to return to work but not prepared to disclose her vaccination status, she would not be assigned to preside over in-person trials and sentencing. In that circumstance, Chief Judge Williams indicated she would have no recourse other than to suspend Judge Brinton and refer the matter to the Judicial Council as required by the *Act*.
- 10) On March 21, 2022, Judge Brinton provided another Proof of Illness form which was similar to those previously given. It did not contain any particulars of Judge Brinton's illness or disability. On March 28th, Chief Judge Williams wrote to Judge Brinton's physician (copied to her) requesting a medical report with respect to the period of her short-term leave. Judge Brinton did not consent to the disclosure of any additional medical information and so nothing further was provided to Chief Judge Williams.

Chief Judge Williams was responsible for assigning judicial duties, including which judges were to preside in which courtrooms. After consultation with the judges of her court, she decided she would only assign fully vaccinated judges to sit in court. This was consistent with the practice of other courts as well as the direction given to court staff by the government.

The decision to only assign fully vaccinated judges for court hearings was made while Judge Brinton was on medical leave. However, it would have applied to her if she had been cleared to return to work. Chief Judge Williams had several communications with Judge Brinton about what would happen in this circumstance. One possibility, which Chief Judge Williams identified, was to have Judge Brinton work virtually from home; although there were concerns about whether there was an adequate volume of this work as well as what would happen with respect to the in-person hearings in Judge Brinton's courtroom. If there was insufficient virtual work available, Chief Judge Williams felt she might have to suspend Judge Brinton under s. 15(2) of the *Act* and refer the issue to the Judicial Council as required by ss. (3). Since Judge Brinton was not cleared to return to work, Chief Judge Williams was never required to decide what work to assign to Judge Brinton and whether there might be other options to consider.

Chief Judge Williams was responsible for assessing the medical evidence and approving requests for short-term medical leave by Provincial Court judges. The forms submitted by Judge Brinton in the fall of 2021 contained no information concerning her illness or disability and Chief Judge Williams decided she needed additional information concerning this. She wrote to Judge Brinton on February 22nd requesting additional information and received a response on March 21st which did not include the requested information. On March 28th she wrote directly to Judge Brinton's doctor with a copy to Judge Brinton requesting the information. Judge Brinton, as she was entitled

to, did not consent to additional medical information being provided by her physician. That was the end of the issue.

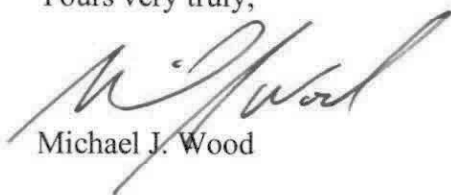
Judge Brinton says the sequence of events starting in the fall of 2022 were very difficult for her and created significant stress. She says she felt pressure as a result of the decisions made and actions taken by Chief Judge Williams and the other judges of the Provincial Court in response to the COVID pandemic. The question which I must decide is whether Chief Judge Williams engaged in judicial misconduct, as that term was defined in the *Lenahan* report. This requires actions which, viewed objectively, could seriously undermine the impartiality, integrity, and independence of the judiciary to the extent that the public's confidence in the ability of Chief Judge Williams to perform her judicial duties has been undermined. I must also be satisfied that the conduct in question could justify one of the dispositions other than dismissal set out in s. 17K of the *Act*.

Section 17B(1) contemplates that I could refer the matter to a review committee for further investigation. That path would lead to dismissal, resolution, or referral of the complaint to the Judicial Council for a hearing. On the information provided to me, I do not see any requirement for further investigation since the factual underpinning for the allegations is well documented and set out in detail in Judge Brinton's complaint. I am in as good a position as a review committee to apply the *Lenahan* test to the circumstances described by Judge Brinton.

Having considered all of the material provided to me as well as the applicable principles, I conclude that the actions of Chief Judge Williams could not support a finding of judicial misconduct as defined in *Lenahan*. Her decisions concerning how to assign judicial work and what medical information was required to support Judge Brinton's medical leave fall within her authority as Chief Judge. The reasons for these decisions and the methods of implementation would not warrant any of the sanctions found in s. 17K of the *Act*.

By virtue of the authority in s. 17B(1)(a) of the *Act* the complaint of Judge Brinton is dismissed.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'M. J. Wood', is written over the typed name.

Michael J. Wood