

Ontario Judicial Council

IN THE MATTER OF A HEARING UNDER SECTION 51.6 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. 43, AS AMENDED,

Concerning a Complaint about the Conduct of the Honourable Justice Dianne M. Nicholas

Decision of the Panel Following Notice of the Pending Retirement of Justice Nicholas

Before: The Honourable Justice Eileen Gillese, Chair
Court of Appeal for Ontario

Regional Senior Justice Martin Lambert
Ontario Court of Justice

Mr. Paul R. Sweeny
Evans Sweeny Bordin LLP
Lawyer Member

Mr. Farsad Kiani
Community Member

Hearing Panel of the Ontario Judicial Council

Counsel:

Ms. Marie Henein and
Matthew Gourlay
Henein Hutchison LLP

Mr. Richard H. Shekter
Shekter Dychtenberg LLP

Presenting Counsel

Counsel for Justice Dianne M. Nicholas

OVERVIEW

1. The Ontario Judicial Council ordered a hearing under section 51.6 of the *Courts of Justice Act* into a complaint about the conduct of Justice Dianne M. Nicholas. This Hearing Panel was appointed to look into the allegations of judicial misconduct of Justice Nicholas and to determine the appropriate disposition of the complaint.
2. On December 3, 2014, through counsel, Justice Nicholas formally advised the Hearing Panel that she had elected to take retirement, effective December 31, 2014. In light of that information, the Hearing Panel adjourned the proceedings until January 14, 2015, a date which had been scheduled for the hearing to resume for the purposes of hearing evidence.
3. On December 3, 2014, the Hearing Panel also invited counsel to provide written submissions on whether it should issue an order staying the proceedings. Counsel for Justice Nicholas indicated that he would not be making written submissions on the matter and that he would not be taking any position on that issue.
4. After receiving and considering the written submissions of Presenting Counsel, the Hearing Panel re-affirms its decision to adjourn this hearing to January 14, 2015. It does so because through the adjournment the Hearing Panel will retain jurisdiction in this matter until Justice Nicholas' retirement takes effect. If for any reason, Justice Nicholas' retirement does not take effect on December 31, 2014, this proceeding will continue, as previously scheduled, beginning on January 14, 2015.
5. If Justice Nicholas' retirement takes effect on December 31, 2104, then this proceeding will come to an end by operation of law because the Ontario Judicial Council and the Hearing Panel will cease to have jurisdiction over Justice Nicholas who will no longer be a judge. Accordingly, no further order is needed to ensure that the public interest is protected and that the matter has been fully concluded.

BACKGROUND IN BRIEF

6. The Ontario Judicial Council received a complaint about the conduct of Justice Nicholas. After an investigation by a complaint subcommittee, pursuant to sections 51.4(18) and 51.6 of the *Courts of Justice Act*, a review panel of the Judicial Council directed that the complaint regarding the conduct or actions of Justice Nicholas be referred for a hearing. It was alleged that Justice Nicholas had conducted herself in a manner that was incompatible with the due execution of the duties of her office.

7. A Notice of Hearing was issued on October 1, 2013. The particulars of the complaint, which were attached to the Notice of Hearing, can be briefly summarized as follows:

In October, 2012, Justice Nicholas posted comments on the Facebook wall of an Assistant Crown Attorney in which she criticized judgments rendered by two other judges in criminal driving cases and disclosed personal information about one of the judges. The posting was seen by persons working in the justice system. These actions and comments were alleged to be a failure to meet the high standard of conduct expected of judges and may have resulted in the perception that Justice Nicholas would not be impartial in the adjudication and sentencing of criminal driving cases.

8. Prior to convening on December 3, 2014, the Hearing Panel had last convened on August 20, 2014. At that time, Mr. Shekter, counsel for Justice Nicholas, moved for an adjournment of the hearing dates that had been scheduled for September 25 and 26, 2014. The grounds for the requested adjournment were that Justice Nicholas' former counsel had taken steps to have himself removed as her counsel, Mr. Shekter was newly retained and needed time to properly prepare, and the scheduled dates conflicted with a religious holiday which he observed.
9. The Hearing Panel granted the motion and took steps to ensure that the hearing would resume in a timely fashion. The hearing was scheduled to resume in Ottawa, Ontario, on January 14, 15, 16, 19, 20 and 21, 2015. Counsel for Justice Nicholas and Presenting Counsel were advised to be ready to present all of their evidence and witnesses, with the possible exception of medical witnesses, during that period. The Hearing Panel indicated that it was prepared to sit early and late on the scheduled hearing dates, and over the weekend dates of January 17 and 18, 2015, if necessary, to accommodate witnesses and complete the hearing of evidence.
10. The Hearing Panel scheduled additional hearing dates of March 10, 11, and 12, and April 14, 15 and 16, 2015, to be used as necessary to complete the hearing of evidence, including medical evidence.
11. The Hearing Panel also established timelines by which both counsel were to advise: (1) whether the matter would proceed by way of an agreed statement of facts, in full or in part; and (2) the number of witnesses they intended to call and the amount of time they needed to present their respective cases. In addition, a deadline was established for counsel to Justice Nicholas to advise Presenting Counsel as to any medical reports that he intended to rely upon.

12. Subsequently, counsel for Justice Nicholas indicated, through the Registrar, that Justice Nicholas intended to retire by December 31, 2014. He later advised that Justice Nicholas wished to bring a motion asking that the Hearing Panel make a recommendation to the Attorney General that she should be compensated for the costs of legal services that she had incurred in connection with the complaints process.
13. The matter was scheduled to be spoken to on December 3, 2014.
14. On November 19, 2014, counsel for Justice Nicholas advised that she would not be proceeding with a motion for compensation of her costs of legal services incurred in connection with the complaints process.
15. On December 3, 2014, counsel for Justice Nicholas formally confirmed to the Hearing Panel that Justice Nicholas was not seeking compensation for the legal costs that she incurred in connection with the complaints process. He also formally confirmed that Justice Nicholas had submitted an unconditional letter of full retirement to Chief Justice Bonkalo, effective December 31, 2014.

THE STATUTORY SCHEME

16. The Council derives its jurisdiction over provincially-appointed judges through the *Courts of Justice Act*. Section 51.3 requires that the complaint be about the conduct of a provincial judge:
 - 51.3(1) Any person may make a complaint to the Judicial Council alleging misconduct by a **provincial judge**. [Emphasis added.]
 - 51.3(4) Once a complaint has been made to the Judicial Council, the Council has carriage of the matter.
17. Section 51.6 of the *Act* is similarly predicated on the subject of the complaint being a judge at the time of disposition:
 - 51.6(11) After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge, may,
 - (a) warn the judge;
 - (b) reprimand the judge;
 - (c) order the judge to apologize to the complainant or to any other person;

- (d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
 - (e) suspend the judge with pay, for any period;
 - (f) suspend the judge without pay, but with benefits, for a period up to thirty days; or
 - (g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.
18. Once a judge retires, he or she is no longer a “judge” or “provincial judge” and the Council no longer has jurisdiction to hold a hearing or impose a disposition. Though not made explicit by the legislation, this limit on the Council’s jurisdiction is implicit in the statutory language.

DISPOSITION

19. Accordingly, the Hearing Panel affirms that this matter is adjourned to January 14, 2015. If, for whatever reason, Justice Nicholas’ retirement is not effective as at December 31, 2014, the matter shall resume in Ottawa, on the scheduled dates and in accordance with the Hearing Panel’s prior directions.
20. The Hearing Panel directs the Registrar to cancel the scheduled hearing dates upon confirmation that Justice Nicholas’ retirement is effective.
21. The Hearing Panel concludes by noting that should Justice Nicholas attempt to return to office as a judge, the Ontario Judicial Council would regain jurisdiction over her and this hearing would resume.

Date: December 18, 2014

Members of the Hearing Panel:

The Honourable Justice Eileen Gillese, Chair
Court of Appeal for Ontario

Regional Senior Justice Martin Lambert
Ontario Court of Justice

Mr. Paul Sweeny
Lawyer Member

Mr. Farsad Kiani
Community Member