Citation: Jhanji v The Law Society of Manitoba, 2022 MBCA 78
Date: 20220929
Dockets: AI20-30-09490;
AI20-30-09522

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

	)	***V. R. Jhanji***
VIBHU RAJ JHANJI	)	*on his own behalf*
	)	
(Member) Appellant	)	***R. H. Kravetsky***
	)	*for the Respondent*
- and -	)	
	)	*Appeals heard:*
THE LAW SOCIETY OF MANITOBA	)	***May 10, 2022***
	)	
Respondent	)	*Judgment delivered:*
	)	***September 29, 2022***

Corrected Judgment: A corrigendum was issued on October 4, 2022; the corrections have been made to the text and the corrigendum is appended to this judgment.

On appeal from 2020 MBLS 1

MAINELLA JA

Introduction

[1] The two appeals and a motion before the Court arise from a professional discipline proceeding in relation to the competence of the appellant to practise law in Manitoba.

[2] On May 20, 2015, the appellant, an internationally trained lawyer, was admitted into the practice of law in Manitoba after successfully completing the accreditation process. He worked in Winnipeg as a sole practitioner, primarily as a barrister, until concerns as to his competence as a lawyer were raised. An investigation and practice review followed. On December 12, 2018, the complaints investigation committee of the respondent (the CIC) suspended the appellant from the practice of law pending completion of the discipline proceeding (the interim suspension). The interim suspension was upheld on appeal (see *Jhanji v The Law Society of Manitoba*, 2020 MBCA 48 (*Jhanji CA*)).

[3] In the main appeal, the appellant challenges a decision of a panel of the discipline committee of the respondent (the panel), which found that he was not competent to practise law in Manitoba and ordered that he be suspended from practising law until he can demonstrate, after a minimum of three years, that he is competent.

[4] The notice of appeal on the main appeal is prolix and unfocused. It raises at least 60 grounds of appeal, many of them repetitive. The best sense that can be made of the main appeal from the oral and written submissions is that the issues fall into three general areas: the finding of incompetence, disqualification of counsel for the respondent and the fairness of the professional discipline proceeding. As this is a statutory appeal as of right (see section 76(1) of *The Legal Profession Act*, CCSM c L107 (the *Act*)), the normal appellate standard of review discussed in *Housen v Nikolaisen*, 2002 SCC 33 applies, depending on the nature of the question in issue (see *Histed v Law Society of Manitoba*, 2021 MBCA 70 at paras 34-35 (*Histed 2021*); and *The Law Society of Manitoba v Brian A Langford*, 2021 MBCA 87 at para 11).

[5] The appellant filed a chambers motion in this Court to disqualify counsel for the respondent from acting on the two appeals. This motion duplicates his appeal of the panel's decision refusing the same relief. The motion was adjourned by a chambers judge for this Court to decide in conjunction with the main appeal.

[6] The secondary appeal arises from a dispute as to preparation of the record on the main appeal. A chambers judge refused to excuse the appellant from the requirement under r 16(1) of the MB, *Court of Appeal Rules*, MR 555/88R (the *CA Rules*), of ordering a transcript of the evidence of the hearing before the panel.

[7] An appeal from a chambers order pursuant to r 46(1) of the *CA Rules* is not a rehearing; the standard of review is highly deferential. The discretion of a chambers judge will not be reversed on appeal absent a misdirection or the decision reached is so clearly wrong as to amount to an injustice (see *Brandt v Brandt*, 2000 MBCA 46 at para 4; and *Lenko v Government of Manitoba et al*, 2016 MBCA 84 at para 8).

[8] For the following reasons, I would dismiss both appeals and the motion.

[9] Before discussing the appellant's main appeal, there are three preliminary matters to be addressed: the appellant's attempt to file further argument prior to the hearing of the appeals, his notice on constitutional questions (the Notice) and his attempt to file post-hearing materials.

Leave to File Further Argument

[10] In accordance with the *CA Rules*, the appellant filed a factum on both of his appeals, as well as a memorandum on his chambers motion. After

the two appeals were perfected, he attempted to file a further 20-page document entitled "Questions on Respondent Factum (By way of Interrogatories QB rule 35)" (the further argument).

[11] The further argument is an unusual document. It is addressed to counsel for the respondent, not the Court. It says that the respondent's counsel is "called upon to specify pleadings in [the respondent's] Factum by answering below questions pursuant to code 5.1-2." The further argument raises a series of rhetorical questions and critiques of the respondent's written submissions on the two appeals. The registrar refused to accept the further argument as the timelines for the appellant to file his written submissions had expired and there is no automatic right of a party under the *CA Rules* to file what I would describe as a reply factum.

[12] At the hearing of the appeals, the Court accepted the further argument for consideration and notified the parties that it would take the matter under advisement and decide what would be done with it in deciding the two appeals and the motion.

[13] The starting point is first principles. The orderly conduct of an appeal is of importance, not just to the parties, but to the Court itself and to the administration of justice generally. More broadly, the public expects that disputes are litigated efficiently and resolved according to the rule of law. That cannot occur if the appellate process is chaotic. Both *The Court of Appeal Act*, CCSM c C240 (the *CA Act*); and the *CA Rules* seek to ensure the orderly conduct of an appeal by balancing the principles of fairness, proportionality and finality.

[14] While written advocacy is at the core of the modern appeal, there is no automatic right in this Court for an appellant to file a reply factum; leave is required. Rule 30 of the *CA Rules* provides:

> **Arguments at hearing**
> **30** Notwithstanding subrule 29(1), counsel may, by leave of the court, on the hearing of an appeal, use arguments and raise points of law that are not set out in the factum.

[15] The apparent premise underlying the appellant's further argument is deeply flawed. With respect, the appellant has no right to interrogate counsel for the respondent on the meaning of his factum, particularly in a tone that was, at times, uncivil. Leaving aside the fact that the further argument is largely an incoherent document, it cannot be accepted pursuant to r 35 of the MB, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*), for two reasons.

[16] Section 36 of the *CA Act* is a gap rule. It addresses the situation where a matter arises that is not addressed in the practice and procedure of this Court:

> **Queen's Bench practice to apply where procedure not provided**
> **36(1)** In all matters not expressly provided for in this Act or the rules, the practice and procedure of the Court of Queen's Bench, in so far as applicable, may be adopted and applied.
>
> **Practice by analogy**
> **36(2)** The practice and procedure in all matters for which provision is not made in this Act and the rules shall be regulated by analogy hereto.

[17] The difficulty for the appellant is, according to the plain meaning of the legislation, the gap rule in section 36 only applies to situations "not expressly provided for" in the *CA Act* or *CA Rules*. Analogy to the practice

and procedure in the Court of King's Bench is not permissible where either the *CA Act* or the *CA Rules* expressly provide for a practice and procedure to be followed in this Court on a particular matter (see *2272539 Manitoba Ltd v Manitoba (Liquor Control Commission)* (1996), 139 DLR (4th) 9 at 12 (Man CA)). Because there is a specific rule—r 30 of the *CA Rules*—governing the filing of further written submissions in this Court, such as here in the form of a reply, analogy to the *QB Rules* is not available to the appellant. He requires leave to file the further argument.

[18] Furthermore, the wording of section 36(1) of the *CA Act* makes clear that analogy to the practice and procedure of the Court of King's Bench can only be "in so far as applicable". This means that the practice and procedure looked to in the lower court by analogy must be relevant. Rule 35 of the *QB Rules* is a form of examination for discovery of a party (see *Manitoba Hydro Electric Board v John Inglis Co Limited et al*, 2001 MBQB 289 at paras 18-19). It has no relevance to written advocacy and certainly is not a vehicle to allow parties to file further written submissions than is normally allowed. The appellant is attempting to fit a square peg into a round hole.

[19] The right to reply is always a matter of the Court's discretion. Parties are expected to put their best case forward at the first opportunity. The Court will not lightly countenance litigation by installment. The situation here is simply not one where written reply might be appropriate given the nature of the respondent's factum, a feature of a cross-appeal, or a need, before the oral hearing, of clarification of an important point in the appellant's factum (see *Prism Resources Inc v Detour Gold Corporation*, 2022 ONCA 4 at para 7). The further argument is entirely repetitive of the appellant's written and oral submissions.

[20] I have not been satisfied that it is in the interests of justice to grant the appellant leave under r 30 of the *CA Rules* to file the further argument. I would deny leave.

The Notice—Allegation of Systemic Discrimination

[21] After the appeals had been perfected and set for hearing, the appellant filed the Notice under *The Constitutional Questions Act*, CCSM c C180, challenging the disciplinary process under the *Act* on the basis of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[22] The Notice casts the alleged unconstitutional conduct by the respondent in broad and systemic language. The Notice and the oral submissions of the appellant were replete with accusations of racism by the respondent against him and other internationally trained lawyers.

[23] These constitutional issues are raised for the first time on appeal and, therefore, this Court does not have the benefit of the reasons of the panel on the points raised by the appellant. Moreover, constitutional issues should not be decided "in a vacuum" (*McDiarmid Lumber Ltd v God's Lake First Nation*, 2005 MBCA 22 at para 135).

[24] The allegation of systemic discrimination by the body charged with the self-regulation of lawyers is a serious one that is consequential to the legal profession, the administration of justice, the respondent and the public generally. A remedy to address any constitutional deficiency would be far reaching. However, the necessary evidentiary record to properly adjudicate such a matter is entirely absent. For example, the record before the Court has no expert evidence or admissible evidence as to the respondent's treatment of other internationally trained lawyers. Such an inadequate record makes

impossible the legal analysis required, which would be a "complex, multi-factored, contextual inquiry" (*Bekker v Canada*, 2004 FCA 186 at para 13).

[25] I also have a concern as to procedural prejudice. The respondent vigorously disputes the appellant's broad assertions and would be prejudiced if this appeal was radically transformed at this late hour. This case is simply not a suitable one for decision of the constitutional issues the appellant has framed in the Notice (see *MacKay v Manitoba*, [1989] 2 SCR 357 at 361-62).

[26] Taking into consideration all of the circumstances, I am not persuaded that this is one of those rare cases where the discretion should be exercised to determine a newly raised constitutional question for the first time on appeal (see *Guindon v Canada*, 2015 SCC 41 at paras 15-23; and *R v JF*, 2022 SCC 17 at paras 40-42).

Leave to File Post-Hearing Materials

[27] Approximately one month after the appeals were heard and reserved, the appellant contacted the registry and made a written request for leave to file further materials (see r 39.1(c) of the *CA Rules*). The registry received a seven-page email with submissions and copies of the decisions of *Wiswell v Metro Corp Greater Winnipeg* (1964), 45 DLR (2d) 348 (Man CA), rev'd [1965] SCR 512; and *Green v Law Society of Manitoba*, 2017 SCC 20 (*Green SC)* (which had been referred to previously in oral and written submissions). The respondent opposed the request and filed a nine-page response. The appellant responded with two emails containing eight pages of further submissions. The registrar provided the Court with all the materials received.

[28] Rule 39.1 of the *CA Rules* provides as follows:

> **Limitation re filing post-hearing materials**
> **39.1** After an appeal has been heard and before a decision has been given, no party shall file any material with the court in respect of the appeal except in the following circumstances:
>
> (a) the court which heard the appeal stated during the hearing of the appeal that the material could be filed;
>
> (b) the court requests that the material be filed;
>
> (c) the court gives leave for the material to be filed, on written request to the registrar by the party wishing to make the filing, with notice of the request to all other parties to the appeal.

[29] A party to an appeal is expected to put their "best foot forward" on the first occasion; r 39.1 is not "an invitation for litigation by instalment" (*Hancock v College of Registered Nurses of Manitoba*, 2021 MBCA 20 at para 74; see also *Aquila v Aquila*, 2016 MBCA 33 at paras 33-34).

[30] In my view, the appellant has failed to demonstrate that there are exceptional circumstances that would justify granting him leave to rely on a further submission while the case is under reserve. This is not a situation where either r 39.1(a) or r 39.1(b) is applicable. Nor is it a case where a decision from the Supreme Court of Canada bearing on an issue in the case was released after the hearing (see *Hyra v Manitoba et al*, 2015 MBCA 55). When the post-hearing materials of the appellant are carefully reviewed, they are largely nothing more than a repetition of arguments he has previously made in his oral and written submissions or points that he could have made. Fundamentally, nothing the appellant says in his post-hearing materials assists him as to the merits of his appeals. I would deny leave to file post-hearing materials.

Main Appeal

The Panel's Finding of Incompetence

[31] The citation issued against the appellant charged him with being incompetent to practise law contrary to the Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011, ch 3 (the *Code*). It was alleged that, by his conduct, he had demonstrated that he was unable or unwilling to perform all legal services undertaken for clients to the standard of a competent lawyer.

[32] Rule 3.1-2 of the *Code* sets out a lawyer's obligation to provide competent service to a client:

> **Competence**
> **3.1-2** A lawyer must perform all legal services undertaken on the client's behalf to the standard of a competent lawyer.

[33] A "competent lawyer" is defined as follows in r 3.1-1 of the *Code*:

> **Definitions**
> **3.1-1** In this section,
>
> **"competent lawyer"** means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
>
> (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
>
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

i. legal research;

ii. analysis;

iii. application of the law to the relevant facts;

iv. writing and drafting;

v. negotiation;

vi. alternative dispute resolution;

vii. advocacy; and

viii. problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

> (k) otherwise adapting to changing professional requirements, standards, techniques and practices.

[34] The record before the panel consisted of almost 3,000 pages of documents generated primarily in litigation in which the appellant was counsel for 17 different clients, together with evidence from two experienced lawyers who conducted the practice review of the appellant (the practice reviewers) and the testimony of the appellant.

[35] While this is not an appropriate case to consider broad constitutional issues as to admission into the practice of law in Manitoba, throughout the disciplinary process, the appellant has claimed discrimination because he is a visible minority and recent immigrant to Canada. He says the respondent has not properly accommodated him and was too quick to turn to discipline because of racism. The panel rejected this submission.

[36] In concluding that the appellant was incompetent to practise law (see 2020 MBLS 1 (*Jhanji LS #1*)), the panel made several findings (at pp 8-9):

> . . .
>
> . . . [The appellant] was ultimately unable to provide the Panel with even one example of work that he had performed competently. There is no evidence of [the appellant's] competence, and overwhelming evidence of his incompetence.
>
> . . .
>
> . . . The Panel is left with no doubt that anyone retaining [the appellant] would be at serious risk of harm from his incompetence.
>
> The harmful effects of [the appellant's] incompetence extend beyond those who might retain him as their lawyer. The evidence before the Panel reveals that his incompetence frustrated the orderly conduct of proceedings before the courts. . . .

. . .

[37] The interests to be considered in a disciplinary proceeding in a self-regulated profession are much broader than just the rights of the professional facing an allegation (see *Green v College of Physicians & Surgeons*, 1986 CarswellSask 564 at para 95 (CA); and *Hancock* at paras 22-23).

[38] Incompetence is a broad concept because the *Act* underlines the importance to the public interest of the regulation of the competent practice of lawyers. As observed in *Green SC*, the *Act* "obligates" the respondent "to act in the public interest" (at para 29). Section 3 requires the respondent to serve and protect the public interest as follows:

> **Purpose**
> **3(1)** The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.
>
> **Duties**
> **3(2)** In pursuing its purpose, the society must
>
> (a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and
>
> (b) regulate the practice of law in Manitoba.

[39] Given the importance of the public interest in the regulation of the competent practice of lawyers under the *Act*, and the wording of r 3.1-1 of the *Code*, the controlling question is whether there is a want of ability suitable to the task (see *Re Mason and Registered Nurses' Ass'n of BC* (1979), 102 DLR (3d) 225 at 234-39 (BCSC)).

[40] The expected professional standard of practice and whether it was observed is "inextricably fact-based" (*Histed v Law Society of Manitoba*, 2006 MBCA 89 at para 42 (*Histed 2006*)). Accordingly, no two cases of incompetence are alike. In some cases, want of ability suitable to the task can arise from the member's natural qualities or experience and, in others, from deficiencies in their disposition to use their ability and experience properly (see James T Casey, *The Regulation of Professions in Canada* (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021, release 5), vol 2 at 13-18). Like questions of misconduct, it is well-accepted that a panel of the discipline committee of the respondent is the body best suited to determine issues relating to the incompetence of lawyers (see *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 880; and *Green SC* at para 31).

[41] The appellant draws the analogy to public welfare offences suggesting that he had a defence of due diligence which the panel should have considered (see generally *The Queen v Sault Ste Marie*, [1978] 2 SCR 1299; and *Anthony Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, leave to appeal to SCC refused, 33156 (23 July 2009)). I reject this submission.

[42] This is an incompetence case, not a case of professional misconduct or conduct unbecoming. The appellant's argument ignores the *Act*'s central purpose of protecting the public, maintaining high professional standards and preserving public confidence in the legal profession. It matters little to the public interest in the competent practice of law that the appellant provided incompetent service with integrity or that he tried his best in providing incompetent service. As the respondent submitted, "no amount of diligence, if exercised incompetently, answers that very incompetence."

[43] The panel clearly understood that the allegation here was one of general incompetence. It stated that the appellant was "a sincere person of good character and with good intentions" (*Jhanji LS #1* at p 9); however, "there was no evidence . . . that [he] was ever competent to practise law in Manitoba" (*ibid*).

[44] The expected standard of professional practice and whether a professional met that standard are questions of mixed fact and law (see *Histed 2021* at para 36), reviewable on a standard of palpable and overriding error.

[45] In reaching its decision, the panel accepted the opinion evidence of the practice reviewers that the appellant demonstrated a lack of knowledge, skill and judgment. According to the panel, the practice reviewers each have "deep and broad knowledge and experience in the practice of law" in Manitoba and possessed "special insight into the context" of the appellant, a "sole practitioner with a mixed practice involving both litigation and commercial matters" (*Jhanji LS #1* at p 2). Their opinions were based on interviews of the appellant and first-hand observations of his practice. There is no reason to have a concern as to their independence, impartiality or bias (see *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 32). Both practice reviewers were eminently qualified to opine on the appellant's competence to practise law in Manitoba.

[46] The evidence of the practice reviewers was concerning. The appellant had no office management systems; his files were "in disarray" (*Jhanji LS #1* at p 3). The appellant was practising without mentoring or any practice supports from other lawyers. According to the practice reviewers, the appellant's pleadings were often rambling and unintelligible. His legal work displayed "significant gaps in his knowledge of the applicable law" (at

p 4) and the taking of positions on files that were "nonsensical" and "plain wrong" (*ibid*). He failed to comply with trust conditions.

[47] The record here is unusual because absent from it are instances of reasonable differences of opinion that are common in discussions about the exercise of professional judgment. Rather, the situation here is a stark one; the appellant lacks the minimum qualities needed to give effective professional services as a lawyer in Manitoba (see *Re Crandell and Manitoba Ass'n of Reg Nurses* (1976), 72 DLR (3d) 602 at 606 (Man QB)).

[48] The panel considered the testimony of the appellant where he disputed the opinions of the practice reviewers and said he was a diligent and fearless advocate who took on hard and complicated matters. In his evidence, the appellant pointed out that he had sought assistance from other lawyers on occasion and was open to being placed under the supervision of another lawyer if that was necessary. He advised, and was never challenged, that he always acted in good faith.

[49] In preferring the evidence of the practice reviewers over that of the appellant, the panel cited seven examples of incompetent conduct by the appellant as counsel in different cases in the documentary record. It also noted that the appellant's conduct in the disciplinary proceeding displayed disorganization, distraction with irrelevancies and a basic lack of understanding of the applicable law. The same can be said for the appellant's appearance in this Court. As I will explain later, the positions taken by the appellant on his disqualification litigation against counsel for the respondent are further proof of his incompetence to practise law (see *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 96, 193).

[50] The Latin term "sui generis" refers to a situation that is "[o]f its own kind or class" (Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, Minn: Thomson Reuters, 2019) sub verbo "sui generis"). The situation of the appellant is indeed peculiar and unique—the panel found he has never possessed the requisite skill to practise law in Manitoba. The essence of the panel's decision is that the appellant should not have been admitted into the profession of law in Manitoba in the first place.

[51] After a careful consideration of the record and the submissions on the appeal, I am satisfied that the finding of general incompetence against the appellant was reasonably available to the panel on the totality of the evidence. I would have been surprised had any other conclusion been reached by the panel based on the record before it. This is not a situation of a professional who had "a bad day" (*Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 40). The appellant's professional incompetence is not an isolated, or even a pattern of, gross mistake or the breakdown of previous competent practice; it is more egregious. The appellant is not a dishonest lawyer or negligent lawyer; he lacks the capacity to be a lawyer in Manitoba because he is incompetent.

[52] I am sensitive to the fact that the appellant says that discrimination has played a significant part in the professional discipline proceeding against him. Discrimination can take many forms and does not require discriminatory intent to occur (see *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 24). The difficulty for the appellant is that the record in no way supports his claim that his race and/or ethnicity was a factor in his disciplinary proceeding. It is readily apparent from reading the appellant's written materials that there is a competency concern without knowing any of the appellant's personal characteristics.

[53] In summary, I have not been persuaded that the panel committed a palpable and overriding error in deciding that the appellant was incompetent to practise law in Manitoba.

Disqualification of Counsel for the Respondent

[54] The appellant refuses to accept this Court's decision in *Jhanji CA*. In that decision, it was decided that the CIC's interim suspension of him for incompetence was lawful, necessary to protect the public and was arrived at by a fair procedure. This Court also dismissed an appeal of an order refusing to disqualify counsel for the respondent in the professional discipline proceeding. That did not end the appellant's attempts to have counsel for the respondent disqualified.

[55] On July 19, 2019, the panel dismissed a preliminary motion of the appellant to disqualify counsel for the respondent (see 2019 MBLS 5 (*Jhanji LS #2*)). It stated (at p 4):

> . . .
>
> [The appellant's] motion to disqualify [counsel for the respondent] from prosecuting the charges against him fails for the very reason identified by [the respondent] in its argument: there is no evidence to support the conclusion that [counsel for the respondent] is in a position that disqualifies him from continuing to act for [the respondent]. He is not in a conflict of interest; he has not demonstrated any bias; there is no legal reason on the facts before us to disqualify him. Not only does the evidence not support [the appellant's] assertion, but it reveals that throughout these proceedings [counsel for the respondent] has cooperated with [the appellant], and treated [the appellant] with patience and civility. On the basis of the evidence filed by [the appellant] in particular, this Panel finds that he has no cause for complaint with respect to [counsel for the respondent's] conduct of these proceedings to date.
>
> . . .

[56] Despite the panel's decision, the appellant continued his quest. The appellant then moved to introduce fresh evidence of prosecutorial misconduct as a basis to reconsider *Jhanji LS #2*. The new evidence consisted primarily of a without prejudice settlement proposal made by the respondent to the appellant that was communicated to him after the *Jhanji LS #2* decision. By agreement of the parties, the matter was heard by the chairperson of the discipline committee at a pre-hearing conference.

[57] On October 24, 2019, the chairperson of the discipline committee dismissed the appellant's motion to reconsider *Jhanji LS #2* (see 2019 MBLS 10 (*Jhanji LS #3*)). He described the application to introduce fresh evidence as "without merit" (at para 12). He also said there was no basis to challenge the panel's decision refusing to disqualify counsel for the respondent on the basis of bias and improper conduct (*ibid*).

[58] The appellant was not satisfied. When the discipline hearing formally commenced on November 26, 2019, the appellant again moved to disqualify counsel for the respondent. In dismissing the appellant's motion, the panel noted that the appellant had no "new evidence" to reconsider its prior decision and the mere fact the respondent had sent the appellant a settlement proposal was not, by itself, evidence of bias.

[59] At the hearing of the appeal, the appellant engaged in a personal and, at times, vindictive verbal attack against counsel for the respondent. It was not lost on me that the appellant went so far as to challenge the bona fides of counsel for the respondent in his litigation strategy in cases he litigated in his private practice almost two decades ago. It is apparent that the appellant has no understanding of the need for prosecutorial discretion to be exercised, not

only fairly, but firmly, in order to ensure that the public interest is protected and served properly.

[60] A decision whether to disqualify counsel due to an alleged conflict of interest is discretionary in nature (see *Ontario v Chartis Insurance Company of Canada*, 2017 ONCA 59 at para 57).

[61] There is no merit to the appellant's argument that the panel erred in refusing to disqualify counsel for the respondent for an alleged conflict of interest. It is undisputed that counsel for the respondent has never represented the appellant or been privy to confidential information attributable to a solicitor and client relationship relevant to the matter at hand (see *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1260). There is not a scintilla of evidence or reason to justify disqualifying counsel for the respondent.

[62] Allegations of prosecutorial misconduct require a proper evidentiary foundation; in its absence, such allegations should be summarily dismissed (see *Groia* at para 87). That is what the panel did here. There was no evidence before the panel of illegality, dishonesty or other serious impropriety in the prosecution of the appellant to provide a reasonable basis to his claim. The appellant's accusations are entirely frivolous. I would, however, go further.

[63] A submission bearing on a lawyer's reputation is a delicate matter because words can wound reputations even when they have no reasonable basis. The law as set out in *Groia* required the appellant not to make a claim of prosecutorial misconduct lightly and, if pursued, to do so in a cautious and appropriate manner. The appellant completely ignored the requirements of *Groia*. By pursuing his baseless claim on several occasions during the professional disciplinary process and in this Court, without any reasonable

basis, the appellant has acted with incivility and further demonstrated his incompetence to practise law (see *Groia* at paras 96, 193).

[64] In conclusion, the panel did not err or reach an unjust result in dismissing the appellant's motion to disqualify counsel for the respondent.

Fairness of the Professional Discipline Proceeding

Initiation of the Professional Discipline Process

[65] The issues as to the lawfulness of the appellant's interim suspension and whether he was treated fairly throughout the interim suspension process by the CIC are now *res judicata* (see *Jhanji CA*).

[66] Nevertheless, the appellant made several submissions attempting to revisit what was already decided in *Jhanji CA* in relation to his interim suspension. This is not appropriate. The conditions for the doctrine of issue estoppel apply and there is no principled reason why it would be unjust to apply the doctrine in the given circumstances (see *Waraich v Director of Employment Standards*, 2021 MBCA 82 at paras 14, 17-19). Finality is particularly important in this matter because, regardless of what happened in the appellant's professional discipline proceeding prior to the citation, he ultimately received a full and fair hearing before the panel (see *Histed 2006* at paras 48-61).

Quorum of the Panel

[67] Section 70 of the *Act* provides as follows:

> **Discipline committee**
> **70** The benchers must establish a discipline committee and make rules about its duties and powers that are consistent with this Act. The rules

> (a) must require disciplinary hearings to be conducted by a panel of committee members;
>
> (b) may permit preliminary disciplinary proceedings to be conducted by a panel or a single committee member; and
>
> (c) may permit any other duties and powers given to the discipline committee under the Act or the rules to be carried out by a panel or a single committee member.

[68] At the time of the appellant's disciplinary hearing, the composition of discipline panels was governed by r 5-94(1) (since repealed) of the *Rules of the Law Society of Manitoba* (the *LS Rules*), which provided:

> **Composition of discipline panels**
> **5-94(1)** Subject to rule 5093(2.2), the duties of the committee under rule 5-93(3) must be exercised by a panel of three members of the committee. One of the panel members must be a public representative. Two of the three panel members must have current practising certificates, unless it is not reasonably practicable to have two practising members on the panel, in which case the chairperson may appoint one practising member and one non-practising or inactive member to sit on the panel.

[69] The panel that heard the appellant's professional disciplinary proceeding was composed of two practising members and one public representative on the discipline committee.

[70] After hearing evidence and releasing its decision finding the appellant guilty of incompetence, but before the consequences phase commenced, one of the practising members of the panel was appointed a judge of the Court of Queen's Bench and, therefore, was unable to continue.

[71] The two remaining panel members decided that, on the basis of *The Interpretation Act*, CCSM c I80 (the *IA Act*), they could continue to hear the matter and retained jurisdiction over it. Section 19 of the *IA Act* states as follows:

> **Quorum**
> **19** If an Act or regulation requires or authorizes a body consisting of three or more members to do anything, the following rules apply:
>
> 1. If the body has a fixed number of members, a majority of that number is a quorum.
>
> 2. If the body has a minimum or maximum number of members rather than a fixed number, a majority of the members in office is a quorum.
>
> 3. Anything done by a majority of the members present at a meeting, as long as a quorum is present, is deemed to have been done by the body.
>
> 4. As long as a quorum is present, a vacancy on the body does not affect the body's power or jurisdiction, or impair the right of the members remaining in office to act or make a decision.

[72] The three-member panel, as originally constituted, met the qualification requirements of r 5-94(1) (since repealed) of the *LS Rules*, which distinguishes the situation here from *Inter-City Freightlines Ltd v Swan River-The Pas Transfer Ltd*, 1971 CarswellMan 79 (CA), where the administrative tribunal was never properly constituted as required by the governing administrative scheme. As was explained in *Re Ballard and Arkin* (1973), 34 DLR (3d) 758 (Man CA) (*Ballard*), when an unforeseen vacancy arises on an administrative tribunal, the "remaining members of the body can continue to act for it, provided that their numbers are at all times sufficient to satisfy the requirements of the applicable quorum" (at pp 760-61; see also *Unicity*

Taxi Ltd v Taxicab Board, 1992 CarswellMan 129 at para 18 (QB), aff'd 1992 CarswellMan 421 (CA)).

[73] Neither the *Act* nor the *LS Rules* in force at the relevant time specify a quorum for a meeting of a panel of the discipline committee. Accordingly, the provisions of the *IA Act* as to a quorum of the panel apply (see section 2 of the *IA Act*).

[74] By virtue of section 19 of the *IA Act*, the remaining two members of the panel constituted a quorum. The two remaining members of the panel reached a unanimous decision as to the consequences for the earlier finding of incompetence. Therefore, the consequences phase of the appellant's disciplinary proceeding was heard and determined by a quorum of the panel.

[75] The panel was correct in law that, as a result of the *IA Act*, the unforeseen vacancy created by the third member's judicial appointment mid-way through the professional disciplinary proceeding did not impact its jurisdiction or invalidate the legality of its decision in any way (see *Ballard*).

Motion to Disqualify Counsel for the Respondent

[76] The basis of the appellant's chambers motion to disqualify counsel for the respondent, that was adjourned to this Court to decide, is the same alleged conflict of interest and professional misconduct raised that was rejected by the panel. The motion is entirely without merit and is dismissed.

Secondary Appeal

[77] Rule 16(1) of the *CA Rules* states:

> **Transcript of evidence**
> **16(1)** Subject to rule 17, where oral evidence was tendered in the court appealed from, the appellant shall file with the notice of appeal confirmation satisfactory to the registrar that a transcript of evidence has been ordered for the court, unless a judge otherwise orders.

[78] The appellant argued to the chambers judge that he was not required to order a transcript of the proceedings before the panel to prosecute his appeal. As he put it, the respondent had the obligation to "produce the record" for his appeal because of rr 5-96(9) and 5-96(10) of the *LS Rules*, which provided at the time:

> **Public access to record of hearing**
> **5-96(9)** The chief executive officer may disclose the record of the hearing to the members of the society and to the public, except for any parts of the record pertaining to proceedings held in camera.
>
> **Record of hearing**
> **5-96(10)** The record of the hearing must include, but is not limited to:
>
> (a) the citation of the charges laid under rule 5-78(1);
>
> (b) the exhibits submitted in evidence at the hearing;
>
> (c) the transcript of the hearing; and
>
> (d) the written reasons of the discipline panel or the transcript of the panel's oral reasons.

[79] The chambers judge concluded that these *LS Rules* are of no relevance to the perfection of an appeal and that the appellant was otherwise required to order a transcript of the proceedings before the panel pursuant to r 16 of the *CA Rules*.

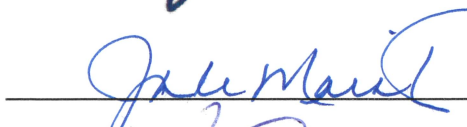
[80] The chambers judge did not misdirect himself and the result he reached is not an unjust one. Absent a judge's order, r 16 of the *CA Rules* obligated the appellant to order a transcript of the proceedings before the panel. The *LS Rules* cited by the appellant are of no relevance to the practice and procedure of this Court. The rules as to the perfection of a civil appeal are matters governed by the *CA Act* and *CA Rules*. Nothing more need be said about the meaning of these *LS Rules* to decide this case.

Disposition

[81] In the result, I would dismiss the appeals and motion to disqualify counsel for the respondent with costs.

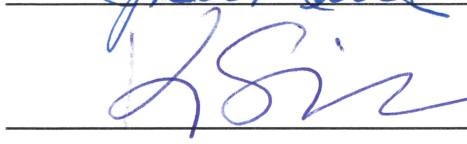
JA

I agree:



JA

I agree:



JA

COURT OF APPEAL
PROVINCE OF MANITOBA
WINNIPEG
R3C OP9

CORRIGENDUM

October 4, 2022

TO WHOM IT MAY CONCERN:

Re: ***Jhanji v The Law Society of Manitoba***
2022 MBCA 78
Docket Nos. AI20-30-09490 & AI20-30-09522
Released: September 29, 2022

The attached decision replaces the previous decision which was released on September 29, 2022. Paragraph 78 has been replaced with the following:

[78] The appellant argued to the chambers judge that he was not required to order a transcript of the proceedings before the panel to prosecute his appeal. As he put it, the respondent had the obligation to "produce the record" for his appeal because of rr 5-96(9) and 5-96(10) of the *LS Rules*, which provided at the time:

> **Public access to record of hearing**
> **5-96(9)** The chief executive officer may disclose the record of the hearing to the members of the society and to the public, except for any parts of the record pertaining to proceedings held in camera.

Record of hearing

5-96(10) The record of the hearing must include, but is not limited to:

(a) the citation of the charges laid under rule 5-78(1);

(b) the exhibits submitted in evidence at the hearing;

(c) the transcript of the hearing; and

(d) the written reasons of the discipline panel or the transcript of the panel's oral reasons.