THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

PAUL SYDNEY VYAMUCHARO-SHAWA

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

REASONS FOR DECISION – PRELIMINARY MOTION

Hearing Date: August 28, 2024

Presiding: Heather Leonoff, K.C.

Counsel: Rocky Kravetsky/Ayli Klein for the Law Society of Manitoba
Jean-Rene Dominique Kwilu for the Member
Jim Koch/Hannah Cameron for the Attorney General of Manitoba

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

PAUL SYDNEY VYAMUCHARO-SHAWA

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing Date:	August 28, 2024
Presiding:	Heather Leonoff, K.C.
Counsel:	Rocky Kravetsky/Ayli Klein for the Law Society of Manitoba Jean-Rene Dominique Kwilu for the Member Jim Koch/Hannah Cameron for the Attorney General of Manitoba

REASONS FOR DECISION – PRELIMINARY MOTION

Introduction

1. Paul Sydney Vyamucharo-Shawa has been charged in a citation, dated February 26, 2024, with four counts of professional misconduct. The matter has been set to be heard by a panel of the Law Society of Manitoba Discipline Committee. In advance of that hearing, Mr. Shawa ("the member") has brought a motion for the issuance of a subpoena to compel the attendance of Justice H. Rempel of the Manitoba Court of King's Bench ("the judge") to testify at the discipline hearing. The Law Society opposed the motion and, as will be discussed in greater depth below, took the position that the judge was neither a competent nor compellable witness. The Attorney General

of Manitoba sought leave to intervene in the motion to raise matters related to administration of justice and judicial independence. The member opposed the intervention.

2. After hearing the arguments, I advised the Attorney General that I was refusing his motion to intervene and that I would provide my reasons in a written decision.

3. My ruling on the issuance of the subpoena was reserved for consideration. Having now reviewed and considered the submissions and supporting materials, I am declining to issue the subpoena, for the reasons set out below.

Background

4. In order to understand the member's request for a subpoena and the Attorney General's request to intervene, it is necessary to set out some of the background facts. There is a need for caution in doing this, as the discipline case is still pending, and not all of the material that was referred to in the motion may subsequently be tendered or deemed admissible at the hearing. Further, the allegations in the citation are unproved. Nevertheless, some background information is essential to appreciate and resolve the issues.

5. The facts that give rise to the citation arose out of a complex litigation file being managed in the Court of King's Bench. The member acted for one of the parties to the litigation and there was counsel representing the other parties. A case management conference, presided over by Justice Rempel, was held on March 20, 2023. The conference took place over a videoconferencing platform, operated by the court. The member recorded the conference. The Law Society alleges in count 1 of the citation, that the making of the recording was contrary to a court direction and was made without the "assent or knowledge" of the judge.

6. A second case management conference was held on May 9, 2023, and was not recorded. At this conference, an affidavit of documents prepared by the member was filed and the recording of the March 20, 2023 case management conference was listed. The judge took exception to the case management conference having been recorded and, by letter dated May 12, 2023, sent a complaint to the Law Society, with a copy to the member.

7. Following receipt of the judge's letter and in accordance with its standard procedure, the Law Society began an investigation and requested a written response from the member. The Society also sought and obtained a copy of the recording from the member. Having reviewed the recording, the Law Society formed the opinion that an exchange that took place between the member and the judge at the March 20th case conference constituted a breach of the duty of integrity (R 2.1-1) and a breach of the duty to treat the court with candour, fairness, courtesy and respect (R. 5.1-1). This alleged breach is set out in count 2 of the citation.

8. Once the member was aware that the judge had made a complaint against him, he wrote to the judge on June 1, 2023, asking the judge to recuse himself. There was a subsequent case management conference held on June 9, 2023. This was recorded by the court. The transcript shows that the judge declined to discuss anything related to the Law Society complaint and indicated that he would not address recusal without a Notice of Motion and proper supporting materials being filed. A subsequent case management conference was held on June 23rd and at that hearing the member filed a motion seeking recusal. This was then set down for a hearing to be held on September 15th. The hearing was subsequently adjourned to no fixed date.

9. On September 8, 2023, the member wrote to the judge and copied several people including the Chief Executive Officer of the Society. Some of the statements in the letter describe the judge as a "hog" and an "accused"; he is stated to have

"improper[ly] interfere[ed] with access to justice" and that this had prevented the appeal of his "needless odd orders"; he is said to have acted in a manner that is "despicable and unbecoming." This letter forms the basis of the third count in the citation which alleges a breach of the duty to treat the court with candour, fairness courtesy and respect (R 5.1-1).

10. Following its receipt of the copy of the September 8th letter, the Law Society wrote to the member seeking an explanation. In his reply, dated November 27, 2023, the member asserts that Justice Rempel had said several things to the member during the unrecorded May 9, 2023 case conference, (and perhaps on other occasions), that were humiliating, embarrassing and discriminatory. For example, one complaint is that the judge "insulted my gender enquiring as to whether I was a he or she." This letter forms the basis for the fourth count in the citation which alleges a breach of the duty of candour, fairness, courtesy and respect, as well as a breach of the duty to not communicate in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of professional communication from a lawyer (R 7.2-4).

The Intervention Motion

11. *The Legal Profession Act* and the *Rules of the Law Society of Manitoba* set out the procedure to be followed in discipline hearings. In accordance with Rule 5-93(9)(g), the chairperson of the committee may "hear and determine preliminary motions". There is no specific rule regarding an intervention motion.

12. In *Pressad v. Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560, the Supreme Court commented on the powers of administrative tribunals to set their own procedures: Sopinka, J., for the majority stated at p. 568:

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures

> subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

13. Based on this statement, I determined that I did have the authority to entertain the motion to intervene.

14. The overarching test in considering a motion to intervene is whether the proposed submissions will bring a new or unique prospective that will aid the decision-maker, without causing undue prejudice to the parties. In the present case, the Attorney General sought intervention status to oppose the issuance of the subpoena to Justice Rempel based on arguments related to the administration of justice and the importance of judicial independence. While I fully respect the important role that the Attorney General has in preserving the integrity of the administration of justice in the province, I concluded that there was significant overlap between the arguments being advanced by the Attorney General and the Law Society. Thus, the Attorney General's participation in the hearing was not sufficiently new or unique to justify intervention. Further, I concluded that it would be unfair to require the member to respond to two sets of arguments. Thus, in order to ensure no prejudice to the member and in order to keep the proceedings focused so that they could be completed in the time allotted, I declined the motion to intervene.

The Subpoena Motion

(i) Jurisdiction

15. *The Legal Profession Act,* s.71(1)-1, gives the chair of the discipline committee the authority to issue a subpoena to compel the attendance of a witness. Normally this is a routine matter, and the subpoenas are issued on request. However, in this case, the Law Society objected to the issuance of the subpoena and asserted that Justice Rempel was neither competent nor compellable to testify. Thus, the matter proceeded to a contested motion.

(ii) The Test for Issuing a Subpoena

16. The test for issuing a subpoena is whether the witness would probably have evidence relevant to the issues raised: *R. v. Harris,* (1994), 93 CCC (3d) 478 at 480 (Ont. C.A.); *Seagrove Capital Corp. v. Leader Mining International Inc.,* 2000 SKQB 230. However, in this case, the subpoena is requested for a Justice of the Court of King's Bench. This then raises for consideration whether the judge is immune from testifying based on the principle of judicial independence. Thus, in determining whether to grant the request for the subpoena it is necessary to consider both aspects of this test.

(iii) Relevance

17. Before embarking on a relevance analysis, it is necessary to consider what the discipline hearing will address, and more importantly, what it will NOT address.

18. The discipline hearing will focus on the member's statements and actions as measured against the Code of Professional Conduct. This trite statement is necessary, given what appears to be the focus of the member's argument. At paragraphs 36 and 37 of the member's brief is the following assertion:

> The writer's submission is that the determinative issue giving rise to the whole Citation, regardless of other wrongful conducts the Society is alleging against Counsel-Charged is whether a CMC is indeed a formal court proceeding of a Superior Court of record requiring permanent records to be kept or a mere conversation between the court, the parties and their counsels. If it is indeed a formal court proceeding of a Superior Court of Record requiring permanent records to be kept, then the Society, on the substantive law, does not have a case against Counsel-Charged. The same logic extends to the KB with its policy prohibiting recordings of a formal court proceeding whilst itself not monitoring and keeping records.
>
> It is on this important substantive point of law that Justice Rempel and the KB must answer to.

19. Justice Rempel and the King's Bench have nothing to answer in a Law Society discipline hearing. The only person being called upon to answer the citation is the member. Moreover, a discipline hearing is not a forum to resolve a legal question regarding King's Bench procedure. It is an everyday occurrence for lawyers to be confronted with legal decisions being taken by judges and courts with which they disagree. There are well-accepted paths for resolving such disputes. Policies can be changed and rulings can be appealed. The issue that the discipline panel will consider in this case is how the member chose to deal with a decision with which he disagreed.

20. Thus, a subpoena will not be issued for the purpose of having Justice Rempel answer any questions regarding the court policy. Such evidence is entirely irrelevant and inadmissible.

21. The member's counsel offered three other areas upon which he sought to question Justice Rempel. While the witness would be subpoenaed by the member, I am prepared to accept for the purposes of this motion, that the member would be granted permission to cross-examine the witness at the hearing. If the witness does testify, this issue would have to be fully canvassed by the panel.

22. The first count in the citation alleges that the recording was done without the "assent or knowledge of the presiding judge".

23. The onus rests on the Law Society to prove the allegations in the citation. The clear and obvious method to prove what the judge knew or didn't know would be for the Society to call him as a witness. But the Society declines to do this, on the basis that it accepts that the judge is immune from testifying. Presumably, it will seek to prove this averment in another way.

24. The member's position is that the judge did know that the recording was taking place. So very unusually, the member seeks to call a witness in order to counter evidence that would not exist without him first calling the witness.

25. In the circumstances, I do not accept that Justice Rempel has relevant evidence to give for the member regarding his assent and knowledge. The witness' silence is the best evidence that the member can have on this point.

26. The second area that the witness wishes to explore with Justice Rempel are statements allegedly made by Justice Rempel that the member describes as humiliating, embarrassing and discriminatory towards him.

27. The evidence in support of this allegation is vague. The statements attributed to Justice Rempel are set out in a letter that the member wrote to the Society on November 27, 2023. The letter was admitted on the motion for proof of authenticity only; (M-3, Tab 54). The letter is the subject of count 4 of the citation.

28. In the face of these vague allegations, it is difficult to understand what evidence Justice Rempel could give to aid in the member's defence. Without Justice Rempel in attendance, the member is able to put forward his version of the events, under oath and subject to cross-examination, but the Society is unable to counter the evidence by calling the judge. There may be other witnesses to the events who can support or refute the member's claims, such as other counsel who were present. At the end of the day, the issue for the panel will be the member's conduct, not the judge's.

29. Finally, the member sought to call the judge to cross-examine him on an exchange that occurred regarding the recusal motion during the case management conference on June 9, 2023. This case conference was recorded,

and the transcript speaks for itself. The discipline panel can read the transcript and draw whatever inferences it deems warranted. The member argues that the exchange shows malice and bias on the part of the judge, and this overrides any claim of judicial immunity. I will say more on this later in these reasons.

30. In conclusion, it is my finding that the member has not satisfied his onus to show that the proposed witness probably has evidence relevant to the member's defence. However, even if I am wrong in that conclusion, I would decline to issue the subpoena based on the law discussed below.

(iv) Judicial Immunity from Testifying

31. Judicial immunity from testifying is a well-established constitutional principle, dating back centuries. The governing authority regarding testimonial immunity is *MacKeigan v. Hickman,* [1989] 2 SCR 796. The Supreme Court unanimously agreed that judges are immune from testifying in relation to matters undertaken in their adjudicative capacity. The majority held that the immunity extended to administrative acts.

32. In her reasons, McLachlin, J. (as she then was) explained the basis for judicial testimonial immunity (at pages 828, 830):

> The immunity of judges from testifying on the grounds for their decisions is established by the authorities and by the general principles of judicial independence summarized in *Valente v. The Queen* and *Beauregard v. Canada*.
>
> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v. The Queen*, *supra*; *Beauregard v. Canada*, *supra*. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence. As stated by Dickson C.J. in *Beauregard v.*

> *Canada*, the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.

33. The immunity from testimony is not the judge's to waive. It exists to protect the administration of justice and the constitutional principle of judicial independence. The Quebec Court of Appeal explained the importance of holding judges incompetent to testify in *Kosko v. Bijimine,* [2006] QCCA 671 at paras 43, 44 (authorities omitted):

> Judges may not voluntarily waive this immunity and agree to testify. Immunity belongs neither to judges nor to the parties before them. Rather, it exists to protect the institution of the judiciary and the public's confidence in it. Consequently, it may not be waived by either the judges or the parties.
>
> Imagine for a moment the consequences if judges were to testify on cases on which they had worked. How could a credible judicial system function if judges, those neutral arbiters, could testify voluntarily or be compelled to testify, or if their testimony could be used by one party against another? The judicial institution and the underlying principles of independence and impartiality cannot permit judges—arbiters who must be, and be perceived to be, independent and impartial—to set aside their judicial reserve and testify on an aspect of a specific case over which they presided.

34. Judicial testimonial immunity has been held to apply to:

- A judge's decision to report a lawyer's conduct to the law society; *Hamalengwa v. Duncan,* 2005 CanLII 33575 (Ont. CA); leave to appeal refused [2006] 1 SCR ix.
- Testimony from a judge presiding over a settlement conference; and *Kosko*, supra
- Testimony from a judge presiding over a pre-trial conference. *Condessa Z* Holdings *Ltd. v. Rusnak,* 1993 CanLII 5526 (Sask. CA)

35. Based on these authorities, it is clear that the Law Society, a body emanating from the legislature (to paraphrase MacLachlin, J.) has no power to compel testimony from Justice Rempel to explain or justify how he reached his decisions. The Law Society cannot compel Justice Rempel to answer questions regarding his decision not to record case management conferences over which he presided. It cannot compel testimony on his decision to decline to voluntarily recuse himself from the file. It cannot compel evidence from him on his refusal to address recusal at the June 9th case conference. All of these decisions fall squarely within his judicial functions.

36. However, the member goes further. He argues that there is an exception to the general rule of judicial immunity where the judge acts with bias, bad faith and malice.

37. I do not accept that there is an exception to judicial immunity in the face of bad faith or malice allegations. In *R. v. Hahn,* [2013] SKQB 295, Ottenbreit, J.A. was asked to consider the issuance of a subpoena to a judge where the allegation was that the judge was biased. After reviewing the authorities establishing testimonial immunity for adjudicative acts, Justice Ottenbreit considered the issue of bias. He stated (at paras, 36, 39, 44, 45):

> [36] What is clear ... is that an argument of reasonable apprehension of bias, no matter what the basis for it may be, is an attack directly or indirectly on the mental processes of the judge related to his decision.
>
> [39] I turn then to the crux of the issue. The majority Supreme Court in *MacKeigan* makes it very clear that a judge enjoys immunity with respect to his judicial role both as to his adjudicative and administrative functions. The relevant case law indicates at most a judge may be compelled to testify about collateral incidents that have nothing to do with his judicial role. A determination of whether there is judicial immunity from testifying depends on whether there is a nexus between the testimony sought to be elicited and the function of the judge *qua* judge, or more specifically in this case whether that testimony is part of an inquiry into or a challenge of that judge's thought processes respecting his

> adjudication.
>
> [44] Put simply, any testimony Mr. Hahn seeks to elicit from the Chief Justice is referable to his role *qua* judge.
>
> [45] However, apart from issues of adjudicative or administrative acts or duties and attacks on the judge's thought processes, there is a more fundamental bar to the Chief Justice testifying. Based on the case law set forth earlier, it is my view that judges are absolutely immune from testifying respecting proceedings on which they have earlier presided. Public confidence in our judicial system would be diminished if, harkening back to the words of Dickson C.J. in *Beauregard*, the judge as "resolver of disputes" and "interpreter of the law" is no longer separate in "authority and function from all other participants in the justice system" and is compelled to give evidence on an aspect of the very proceeding on which they earlier sat as judge but which is still ongoing. Judicial immunity in this kind of situation ensures that the judge has peace of mind that they will never be called to be a witness in the very case in which they were earlier required to rule on independently and impartially. If judges were compellable to testify in this circumstance, both their independence and impartiality would be compromised. The credibility of our judicial system would suffer and the public's confidence that it is independent and impartial would be substantially eroded, if not extinguished.

38. While the comments of Ottenbreit, J.A. were made in the context of an apprehension of bias, I find that they apply equally to allegations of malice and bad faith. In the current context, the member alleges that the judge was wrong in not recording the case conference; that the judge made improper and racist comments during a court proceeding; and that the judge acted in bad faith and with malice in how he handled the issue of recusal. Thus, the testimony that the member seeks to elicit relate to actions taken by the judge *qua* judge. These are precisely the matters protected by judicial testimonial immunity.

39. There is a strong policy reason for not recognizing any exceptions to testimonial immunity for actions taken by judges *qua* judges. Going back more than 100 years, Lord Esher, MR in *Anderson v. Gorrie,* [1895] 1 QB 668 at 670 offered this justification (as quoted in *Morier v. Rivard,* [1985] 2 SCR 716 at para. 101):

> The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

40. This policy reason remains sound today. Judicial independence, which is a cornerstone of our constitutional democracy, is too important to allow it to be undermined by requiring testimony on allegations of improper conduct. There are other ways to address judicial misconduct without requiring the judge to testify in collateral proceedings.

41. Thus, in conclusion, I am satisfied that there are no exceptions to judicial testimonial immunity for any actions taken by a judge while acting within their judicial capacity. Therefore, Justice Rempel is neither competent nor compellable to testify in the Law Society discipline hearing.

Judicial Complaints to the Law Society

42. The member argues in his brief, that if judges enjoy absolute immunity from testifying, then they should be barred from filing complaints against lawyers with the Society. While it is not necessary for deciding the subpoena motion, I think it is important to address this issue.

43. The Law Society's mandate, as set out in s. 3 of *The Legal Profession Act,* is to "protect the public interest in the delivery of legal services with competence, integrity and independence."

44. Judges play an important role in helping the Law Society to fulfil this mandate. Judges regularly encounter lawyers and may become aware of ethical issues or competence issues. Alerting the Society then permits the Society to deal with the complaint in accordance with its ordinary practices.

45. A report to the Law Society is one way that judges have to control their courtrooms. Other options that a judge can consider include:

- Dealing with the matter informally in chambers or more formally on the record;
- Ordering costs against a lawyer; and
- In extreme situations, proceeding with a formal contempt hearing.

46. By reporting the matter to the Law Society, the judge is able to transfer consideration of the matter to an independent body for follow-up. The report is part of the adjudicative function and constitutes a decision by the judge on how to address a particular concern that arose within the judicial setting.

47. Having made the complaint, the judge should not have any further involvement in the Law Society matter. The judge should not be considered by the Law Society as an ordinary public complainant. There should be no follow-up or questions by the Society directed to the judge. In this regard, Justice Rempel was right in declining to respond to any Law Society correspondence after his initial complaint. Since the judge is immune from testifying, the Law Society must always be cognizant that any disciplinary action it chooses to take must be taken without any further involvement by the judge.

48. Thus, contrary to the member's assertion, I consider it essential that judges have the Law Society complaints process as one of the tools to manage the conduct within

their courtrooms. Their unique position allows them to bring matters to the attention of the Society. The Society is then able to fulfill its mandate to protect the public interest through the delivery of legal services with competence, integrity and independence.

Conclusion

49. For the reasons set out above. I decline to issue the subpoena. Justice Rempel is neither competent nor compellable to testify at the discipline hearing.

DATED this 5th day of September, 2024.

Heather Leonoff

Heather Leonoff, K.C.
Independent Chair of Discipline,
The Law Society of Manitoba