

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

SUBHASH CHAND KHANDELWAL

- and -

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THE LAW SOCIETY OF MANITOBA

Hearing Date: February 20, 2019

Appearances: Subhash Chand Khandelwal, Self Represented
Rocky Kravetsky, Counsel for the Law Society of Manitoba

REASONS ON PRELIMINARY MOTION FOR STAY OF PROCEEDINGS

On April 3, 2018 the Law Society of Manitoba issued a citation against Subhash Khandelwal, a member of the Law Society, charging him with professional misconduct. Mr. Khandelwal has brought a preliminary motion under *Law Society Rule 5-93(3)* for an order authorizing Vibhu Jhanji, a suspended lawyer, to assist him in the conduct of his defence of these charges. Alternatively, he seeks a stay of proceedings pending the outcome of Mr. Jhanji's appeal from his suspension.

For the reasons that follow, I have concluded that Mr. Khandelwal's motion must be dismissed.

Jurisdiction

The Chair of the Discipline Committee, Mr. Richard Scott, appointed me to hear this matter as his designate pursuant to *Law Society Rule 5-93*.

The Facts

In support of his motion, Mr. Khandelwal filed an affidavit sworn by him on February 11, 2019. In reply, the Law Society filed the affidavit of Anna Brown sworn February 15, 2019. Ms Brown is the legal assistant to the Law Society's general counsel, Rocky

Kravetsky. Based on the evidence contained in those affidavits, I understand the facts to be as follows.

Charges of professional misconduct were directed to be laid against Mr. Khandelwal by the Complaints Investigation Committee ("CIC") in respect of three complaint matters on January 17, 2018. Mr. Khandelwal was given notice that these charges had been directed by letter dated January 18, 2018. By January 29, 2018 he had retained Gavin Wood, a Winnipeg lawyer.

The citation was issued on April 3, 2018 and delivered to Mr. Wood the following day. Mr. Wood admitted service of the citation on behalf of Mr. Khandelwal. Mr. Wood continued to act for Mr. Khandelwal in respect of this matter until September 6, 2018. On that day, Mr. Wood appeared at the Set Down Meeting and withdrew as counsel for Mr. Khandelwal. Mr. Khandelwal advised that he wished to consult new counsel and the matter was therefore adjourned to the October 11, 2018 Set Down Meeting.

Allan Fineblit, Q.C., another Winnipeg lawyer, was then consulted by Mr. Khandelwal. Between September 25 and October 25, 2018 Mr. Fineblit and Mr. Kravetsky communicated about the matter. On October 25, 2018 Mr. Fineblit informed Mr. Kravetsky that he would not be acting for Mr. Khandelwal.

By email dated October 29, 2018 Mr. Khandelwal provided a document to Mr. Kravetsky described as a notice of motion marked "draft" and "without prejudice", ostensibly prepared by Vlbhu Jhanji. Mr. Jhanji and Mr. Kravetsky then had further communications about this matter. At the Set Down Meeting on December 11, 2018 Mr. Jhanji appeared with Mr. Khandelwal. Mr. Jhanji indicated that he intended to proceed with a preliminary motion. The Discipline Committee Chair, Mr. Scott, directed Mr. Jhanji to provide a notice of motion with supporting evidence by February 12, 2019. The matter was then adjourned to the Set Down Meeting scheduled for February 12, 2019.

The next day, December 12, 2018, Mr. Jhanji was suspended from practising law by order of the CIC. He has appealed his interim suspension to the Court of Queen's Bench by notice of application filed January 11, 2019. No date for the hearing of that application has yet been set and it will not be heard until June 2019 at the earliest.

Mr. Khandelwal has made attempts to find another lawyer, but thus far has not found anyone, either in Manitoba or outside, who is prepared to advance "the grounds taken by [his] former counsel, Mr. Jhanji."

This has led Mr. Khandelwal to bring this motion for an order authorizing Mr. Jhanji to assist him in the further conduct of this matter or, alternatively, staying these proceedings pending the outcome of Mr. Jhanji's appeal of the CIC's interim suspension order.

Mr. Khandelwal's Position

In his argument, Mr. Khandelwal informed me that Mr. Jhanji had been assisting him in connection with the matters giving rise to the charges against him since 2017. Mr. Khandelwal argued that Mr. Jhanji is thoroughly familiar with this matter, and possesses litigation expertise that Mr. Khandelwal does not have. Mr. Khandelwal disputes the charges, but says that he is not "competent" to defend himself. To force him to proceed without counsel in these circumstances would be very unfair to him. By contrast, staying these proceedings until the disposition of Mr. Jhanji's appeal would not cause any prejudice to the Law Society.

Mr. Khandelwal argued that he finds himself in "exceptional circumstances" that should permit him to engage a non-lawyer to provide him with limited assistance. In support of his proposition he relies particularly on the decision in *Moss v. NN Life Insurance Company of Canada*, 2004 MBCA 10.

The Law Society's Position

Mr. Kravetsky noted that Mr. Khandelwal has been represented by competent counsel, and he is aware that there are other lawyers in Winnipeg who practise in the area of professional discipline. The problem, it seems, is that no other lawyer is prepared to act for him to advance the arguments that Mr. Jhanji is prepared to advance in defence of this matter, and Mr. Khandelwal's apparent insistence that those arguments be advanced on his behalf. Furthermore, Mr. Khandelwal's request for a stay pending the disposition of Mr. Jhanji's appeal amounts to a request for an indefinite stay of proceedings, as there is no indication when, or if, Mr. Jhanji will be permitted to resume the practise of law.

There are considerable legal obstacles that prevent Mr. Jhanji from acting in this matter while he is suspended. To begin, s. 20(2) of *The Legal Profession Act*, CCSM c. L107 prohibits anyone from carrying on the practice of law "[e]xcept as permitted by or under this Act." Section 26 of the Act expressly prohibits the employment or engagement of a suspended lawyer: "No person shall employ or engage ... a member who is suspended from practice to perform, in any capacity whatsoever, services that constitute the practice of law, unless the employment or engagement is approved by the benchers." That prohibition is reinforced by Rule 6-1.4 of the *Code of Professional Conduct*, which provides:

6.1-4 Without the express approval of the Society, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred and struck off the Rolls, suspend, undertaken not to practise or who has been involved in

the disciplinary action and been permitted to resign and had not been reinstated or readmitted.

Mr. Kravetsky referred me to various relevant authorities, which stand for the proposition that a suspended lawyer may not do in a non-professional capacity that which he cannot do in a professional capacity (*Kopyto v. Ontario*, 1997 CanLII 17831 (ON SCDC)); where a statute authorizes a person who is not a lawyer to act in a matter, that authorization does not extend to a suspended lawyer (*Law Society of Upper Canada v. Isaac*, 2017 ONLSTH 161); a suspended lawyer cannot take on the separate designation of "agent" and provide legal services on that basis (*Law Society of Alberta v. Shawn Beaver*, 2016 ABCA 290).

Even if the Discipline Committee of the Law Society has the discretion to permit Mr. Jhanji to assist Mr. Khandelwal, it should not exercise that discretion. Mr. Jhanji has been suspended by the CIC for the protection of the public; it would be illogical for the Discipline Committee to ignore that order and expose Mr. Khandelwal to the very risk that prompted the CIC to make its order against Mr. Jhanji.

On the issue of prejudice, Mr. Kravetsky argued that an indefinite stay of proceedings would prejudice the public's interest in the timely determination of disciplinary charges. The public generally, and Mr. Khandelwal's current and future clients specifically, are entitled to know in timely fashion whether or not he has failed to conduct himself to the standard required by his governing body.

Analysis and Disposition

I wholly accept Mr. Kravetsky's arguments in opposition to Mr. Khandelwal's motion.

Mr. Khandelwal's right to counsel of his choice is not absolute. Section 26 of *The Legal Profession Act* and Rule 6.1-4 of *The Code of Professional Conduct* explicitly prohibit him from engaging a suspended lawyer. Mr. Jhanji has been suspended by the CIC. When, or if, Mr. Jhanji will be permitted to resume the practise of law is uncertain.

In these circumstances, Mr. Khandelwal has no right to insist that Mr. Jhanji represent him in these proceedings while he is suspended, or to insist that these proceedings be stayed until Mr. Jhanji is entitled to resume the practise of law. The Discipline Committee of the Law Society is bound to respect the CIC's suspension order against Mr. Jhanji, and the prohibition against the engagement of a suspended lawyer in s. 26 of *The Legal Profession Act* and Rule 6.1-4 of the *Code of Professional Conduct*.

Even if the Discipline Committee had the discretion to permit Mr. Jhanji to assist Mr. Khandelwal, I would not exercise it for the simple reason that the evidence before me indicates that Mr. Jhanji's further involvement in this matter is more likely to harm, and not help, Mr. Khandelwal. Although Mr. Khandelwal argued before me that he does not consider himself competent to defend himself, the evidence – particularly the notice of application filed by Mr. Jhanji on the appeal of the interim suspension order, attached as

Exhibit "A" to the affidavit of Anna Brown - indicates that Mr. Khandelwal would probably be in an even worse position if Mr. Jhanji were to assist him.

In the course of these proceedings, Mr. Khandelwal has exercised his right to be represented by competent counsel. For one reason or another, each of those retainers came to an end. That said, there are still many lawyers in Winnipeg who are qualified by experience and expertise to act for Mr. Khandelwal in defence of the charges against him. It would appear that the only thing preventing Mr. Khandelwal from retaining another lawyer in place of Mr. Jhanji is his determination that Mr. Jhanji's successor follow the course set by Mr. Jhanji. That no one seems prepared to accept a retainer to follow such instructions may be an indication that the course set by Mr. Jhanji is ill-advised, but that is for Mr. Khandelwal to determine.

I therefore order that Mr. Khandelwal's motion be dismissed. This matter will therefore return before the Discipline Committee at the next Set Down Meeting on March 12, 2019.

Dated at the City of Winnipeg, in the Province of Manitoba, this 27th day of February 2019.



Ted E. Bock
Discipline Committee Chair-Designate