NOVA SCOTIA COURT OF APPEAL

Citation: Nolan v. Association of Nova Scotia Land Surveyors, 2003 NSCA 145

Date: 20031216
Docket: CA 192085
Registry: Halifax

Between:

Fred G. Nolan

Appellant

v.

The Association of Nova Scotia Land Surveyors Respondent

Judges:	Roscoe, Chipman, and Freeman, JJ.A.
Appeal Heard:	December 4, 2003, in Halifax, Nova Scotia
Held:	Appeal is dismissed as per reasons of Roscoe, J.A.; Chipman and Freeman JJ.A. concurring.
Counsel:	W. Augustus Richardson, for the appellant Alan J. Stern, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal from decisions of a Discipline Committee of the Nova Scotia Land Surveyors Association, finding the appellant guilty of professional misconduct and suspending him from practice for three months. As well, the appellant was ordered to pay the costs of the hearings in the amount of $2,000 and publication of the order of suspension was directed. The appeal is pursuant to s. 28 of the **Land Surveyors Act**, R.S.N.S. 1989, c. 249:

> **28 (1)** Any person who has been found guilty of professional misconduct by the Discipline Committee pursuant to Section 26 may appeal from the decision to the Appeal Division of the Supreme Court within thirty days from the date on which the decision is served.
>
> **(2)** Any person who has been disciplined by the Discipline Committee pursuant to Section 26 may appeal from the order to the Appeal Division of the Supreme Court within thirty days from the date on which the order is served.
>
> ...
>
> **(6)** Upon the hearing of an appeal under this Section, the Appeal Division of the Supreme Court may make such order as the Court considers proper or may refer the matter or any part thereof back to the Discipline Committee with such directions as the Court considers proper.

[2] The complaint against the appellant was made by Daniel Blankenship, who owned land adjacent to the appellant's property on Oak Island, Nova Scotia. There had been previous disputes between them which resulted in litigation. (See **Tobias et al. v. Nolan** (1987), 78 N.S.R. (2d) 271; 193 A.P.R. 271 (C.A.).) As a consequence of the litigation, the appellant was declared to be the owner of lot 5 and lots 9 to 14 and Mr. Blankenship and his associates were found to be the owners of lots 15 to 19 and lot 32 as shown on an 1818 plan of Oak Island. Prior to the litigation Mr. Errol Hebb, N.S.L.S., retained by Mr. Blankenship had surveyed the line between lots 14 and 15, and Mr. Blankenship had erected a fence based on that plan. According to the Hebb plan, a road long used by Mr. Blakenship did not encroach on lot 14 owned by the appellant.

[3] It appears from the record that after the order of this court in 1987, the disagreements between the appellant and his neighbours were somewhat repressed. The recent dispute began when the appellant carried out a survey

of the boundary between lots 14 and 15 in the summer 2001. He states that he found new evidence of ancient markers and that in his opinion, the boundary is 60 feet east of the line set by Mr. Hebb. However, he set new survey markers 35 feet east of the Hebb line, that is, showing that the width of lot 15, owned by Mr. Blankenship is 35 feet smaller than previously found by Mr. Hebb. The appellant testified before the Committee that he did not set the new markers in the precise positions he considers they should be because he was afraid that Mr. Blankenship would destroy the evidence he found.

[4] The Discipline Committee made the following findings:

> While he was a landowner involved in a significant boundary dispute with a neighbouring landowner, he investigated the issue and proceeded to set his own survey markers in an advantageous position and erected a barricade to block off a long used access road. Fred G. Nolan, NSLS, No. 84, therefore used his position as a Nova Scotia Land Surveyor to the disadvantage of his neighbour, contrary to the provisions of Articles V and VII of the Code of Ethics of the Association of Nova Scotia Land Surveyors.
>
> *The Discipline Committee finds Mr. Frederick Nolan, NSLS, **guilty** of breaching the provision of Articles V and VII of the Code of Ethics of the Association of Nova Scotia Land Surveyors regulations.*
>
> *While under oath, Mr. Nolan testified that the placement of his survey markers were intentionally put in the wrong place with a view to mislead his adjoiner in the hopes that his adjoiner would be satisfied with the placement of the survey markers and not pursue further action against Mr. Nolan. The Discipline Committee viewed this in direct violation of Article V 83 (1), which states the surveyor shall avoid even the appearance of professional impropriety.*
>
> *As well, Mr. Nolan has been in a long-term boundary dispute with his adjoiner, and the Committee believes while performing the survey of his own lands under duress, Mr. Nolan could not exercise unbiased independent professional judgment which is in direct violation of Article VII, 85 (1), which states the surveyor shall exercise unbiased independent professional judgment on behalf of a client and shall represent a client competently.*
>
> *Mr. Nolan testified under oath that when he monumented his land, it was a [sic] like a game. He stated that Oak Island was built on secrecy. The Committee viewed Mr. Nolan's actions to be in a direct violation of Article VII, 85 (2)(a) which states the surveyor shall disregard compromising interest and loyalties in performance of his duties.*

Of the allegations presented in this hearing against Mr. Nolan, the Discipline Committee viewed that the breaches of the Code of Ethics above-noted to be the most serious of the allegations.

[5] The appellant was also found guilty of failing to keep detailed field notes and failing to record the ordinary high water mark on his plan of survey. He was found not guilty of the other minor allegations. The Committee concluded their first decision as follows:

Conclusion:

The Discipline Committee is satisfied that the foregoing has proven professional misconduct against Mr. Fred Nolan and hereby finds Mr. Fred Nolan, NSLS, No. 84, guilty of "Professional misconduct".

The Nova Scotia Land Surveyors Regulations under Section 2 makes the following definition:

> 2 For the purpose of the Act and the(se) regulations, "professional misconduct" means infamous, disgraceful, or improper conduct on the part of a member, student member, or holder of a certification of authorization and, without restricting the generality of the foregoing, includes:
>
> (a) gross negligence in the discharge of duties;
>
> (b) technical incompetence in the practice of professional land surveying;
>
> (c) a breach of the Code of Ethics (Part III of the(se) regulations), the Act, the(se) regulations or the by-laws;
>
> (d) a conviction for an indictable offence under the Criminal Code of Canada or under any other statute of the Parliament of Canada;
>
> (e) wilful and malicious conduct which causes the Association to be brought into disrepute; or
>
> (f) failure to respond within a reasonable period of time to official correspondence from the Association.

[6] The appellant states the issues on appeal as:

a. what is the standard of review on an appeal pursuant to s.28 of the Act?

b. was the Discipline Committee correct in finding Mr Nolan guilty of unprofessional conduct:

i. in respect of surveying activities carried out on his own behalf as a landowner rather than on behalf of a client; and

ii. in respect of surveying activities carried out in respect of a boundary dispute between himself and an abutting neighbour when:

(1) the Committee made no attempt to determine where the boundary line actually was; and

(2) the Committee did not challenge or hear evidence contrary to Mr. Nolan's opinion, based on evidence, as to the location of that line.

[7] The parties agree, as do I, that the standard of review on this appeal is one of reasonableness simpliciter, as recently established by the Supreme Court of Canada in **Law Society of New Brunswick v. Ryan**, [2003] S.C.J. 17, 2003 SCC 20. The following passages from the court's decision, written by Justice Iacobucci, are particularly helpful in this case:

¶ 46 Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did (see Southam, supra, at paras. 78-80). If the standard of reasonableness could "float" this would remove the discipline involved in judicial review: courts could hold that decisions were unreasonable by adjusting the standard towards correctness instead of explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.

¶ 47 The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in Pushpanathan, supra, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker,

rather than inviting the court to engage de novo in its own reasoning on the matter. ...

...

¶ 50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

¶ 51 There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

...

¶ 53 A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (Southam, supra, at paras. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

¶ 54 How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.

¶ 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a

> somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, supra, at paras. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, supra, at paras. 79).
>
> ¶ 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> [emphasis added]

[8] Although counsel for the appellant has ably argued that the Committee should not have made a finding of professional misconduct in this situation, where the appellant was acting on his own behalf, not in a professional capacity for a client, and without first attempting to determine where the boundary between lots 14 and 15 actually is, my review of the Committee's decisions leads me to the conclusion that they are reasonable. The question is not whether the decisions are correct, but whether, after a probing examination, they are supported by reasons that could reasonably lead the Committee from the evidence to the conclusions reached. Here the Committee's decisions are supported by tenable explanations. There are findings of fact amply supported by the evidence, such as, that the appellant was acting as a professional surveyor, establishing a boundary line.

[9] Although technically the appellant was not "acting on behalf of a client" other than himself, the other findings of the Committee that he did not avoid "even the appearance of professional impropriety" and that he did not "disregard compromising interests and loyalties" in light of the appellant's admission that he intentionally placed survey markers in an incorrect position in order to achieve a personal advantage, are not unreasonable conclusions. We agree with the respondent's counsel that the finding of professional misconduct was not based on the accuracy of the appellant's survey but on the wilfully deceptive nature of his conduct.

[10] The penalty of a three month suspension is likewise not unreasonable in the circumstances and therefore it should not be disturbed. It is noted that

pursuant to s. 27(1) of the **Land Surveyor's Act**, the Committee had authority to require the appellant to apply for reinstatement:

> 27 (1) Where a member has been suspended from practising under Section 26, he may, at the expiry of the period of suspension and upon payment of all dues owed by him to the Association, apply to the Discipline Committee to be reinstated as a member and the Discipline Committee may terminate the suspension of such member upon such terms as it considers proper.

[11] In my opinion, both decisions of the Committee demonstrate a line of analysis that reasonably leads to the conclusions, and therefore the appeal should accordingly be dismissed. The appellant should pay the costs of appeal in the amount of $1200 plus reasonable disbursements.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.