Deans v. Assoc. of Prof. Engs., 2007 NWTSC 66 Date: 17 08 2007
Docket: S-1-CV 2007000078

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TYLER DEANS

Appellant

-and-

THE ASSOCIATION OF PROFESSIONAL ENGINEERS, GEOLOGISTS AND GEOPHYSICISTS OF THE NORTHWEST TERRITORIES

Respondent

Appeal under s.39(1) of the *Engineering, Geological and Geophysical Professions Act*, R.S.N.W.T. 1988, c. E-6.

Heard at Yellowknife, NT on July 31, 2007

Reasons filed: August 17, 2007

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A.SCHULER

Counsel for the Appellant: Austin F. Marshall
Counsel for the Respondent: Gerard Phillips

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REASONS FOR JUDGMENT

[1] The Appellant, a professional engineer, appeals a finding by the Council of the Respondent Association of Professional Engineers, Geologists and Geophysicists that he breached three rules of professional conduct, resulting in suspension of his right to practice among other sanctions. The appeal is taken pursuant to s. 39(1) of the *Engineering, Geological and Geophysical Professions Act*, R.S.N.W.T. 1988, c. E - 6.

Factual Background

[2] The Appellant, and Mr. Tymstra, who is not an engineer, were at the relevant time the owners of a company, 5163 (NWT) Ltd. ("5163"), that entered into a contract with Aboriginal Engineering Ltd. ("AEL"). Although no formal contract was signed, there is no dispute as to the terms that 5163 and AEL agreed on. The initial term of that contract was to run from March 2003 to March 31, 2005, with an option for extension. Throughout, the Appellant's contact with AEL was mainly through Mr. Johnson, AEL's vice-president and office manager, who is also a professional engineer.

[3] Under the contract, 5163 was to pursue clients and contracts for AEL and also provide engineering services to AEL. One of the contracts that 5163 negotiated was between AEL and Diavik Diamond Mines Inc. ("Diavik"),for the provisionby AEL of construction management services at the Diavik mine site from June 1, 2004 to October 31, 2004. At the same time, pursuant to the contract between AEL and 5163, 5163 was to provide engineering services to AEL for the project at the mine site.

[4] The Appellant and Tymstra had a pre-existing relationship with Diavik, having worked at the mine site for an unrelated company at an earlier time.

[5] By July 2004, only weeks after the Appellant signed the AEL - Diavik contract for AEL, the Appellant and Tymstra had become dissatisfied in their dealings with AEL. In mid-July, they advised Diavik that they intended to terminate 5163's contract with AEL. Diavik, however, wanted the Appellant and Tymstra to continue to do the engineering work at the mine site. The Appellant and Tymstra entered into negotiations with Diavik, which they kept secret from AEL. The negotiationsresulted in a contract between 5163 and Diavik for the same construction management work that was the subject of the AEL - Diavik contract. The 5163 - Diavik contract came into effect on July 21, 2004. The Appellant and Tymstra directed Diavik to make payments to AEL for the work to July 20 and thereafter to 5163.

[6] AEL was not made aware of these events until July 30, 2004, when 5163 gave it 30 days notice of termination of the 5163 - AEL contract pursuant to the terms of that contract. The notice also stated that 5163 had secured the contract for construction management at the Diavik mine site as of July 21 and that AEL would be paid to July 20.

[7] Shortly thereafter, AEL advised 5163 that it was in breach of their contract. AEL terminated the contract and did not make payments owing to 5163. There is litigation ongoing between AEL and 5163 as a result. Although Diavik did not terminate its contract with AEL, and there was discussionabout AEL doing other work for Diavik, ultimately AEL did not obtain further work from Diavik and 5163 continued with the construction management contract.

[8] AEL filed a complaint with the Respondent against the Appellant. After a hearing, the Council of the Respondent found that the basic facts of the complaintwere proven, as follows:

> NAPEGG member D. Tyler Deans, P. Eng did cause his company, 5163 N.W.T.Ltd. (5163), to enter into a contract with Diavik Diamond Mines Inc. (Diavik) to provide construction management services at the Diavik Diamond Mine Site that in effect replaced the existing AEL contract for much the same services. Mr. Deans had earlier negotiated the AEL/Diavik contact (*sic*) on behalf of AEL while he was acting for, and his company was being remunerated by, AEL.
>
> At the time of arranging for and obtaining its contact (*sic*) with Diavik for the provision of construction management services, Mr. Deans' company, 5163, was still under contract to AEL.

[9] The Council found as a result that the Appellant had breached Rules 4, 5 and 10 of the Respondent's Code of Ethics:

> 4. Faithful Agent or Trustee
>
> Professional engineers, geologists and geophysicists shall act for their clients or employers as faithful agents or trustees; always acting independently and with fairness and justice to all parties.
>
> 5. Conflict of Interest
>
> Professional engineers, geologists and geophysicists shall not engage in activities or accept remuneration for services rendered that may create a conflict of interest with their clients or employers, without the knowledge and consent of their clients or employers.
>
> 10. Conduct Towards Others
>
> Professional engineers, geologists and geophysicists shall conduct themselves toward other professional engineers, geologists and geophysicists and toward employees and others with fairness and good faith.

[10] Having found that the Appellant breached the foregoing rules, the Council censured him and ordered that he be suspended from practice for four weeks, pay one-third of the costs of the hearing and rewrite and pass the professional practice

examination. Although the Council's decisiondoes not explicitlystate that it found the Appellant's conduct unbecoming, it is clear from the decision that it did so find.

[11] By agreement between the parties,the suspensionimposed on the Appellantwas stayed pending the outcome of this appeal.

Standard of Review

[12] At the hearing of this appeal, both counsel took the position that the standard on which this Court should review the Council's decision is one of reasonableness, based on *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[13] I agree that on the pragmatic and functional approach required by *Ryan*, reasonableness is the standard. The right of appeal under the statute is a broad one, which usually indicates that less deference is due to a tribunal. However, the expertise of the Council in assessing the Respondent's members' conduct, the purpose of the statute in providing for the Respondent to regulate the practice of professional engineering and to establish standards of professional ethics so that the interests of the public may be served and protected (s. 3 of the *Act*) and the nature of the question before the Council, being a factual one, all indicate that deference should be accorded to the Council and that its decision should be reviewed on a standard of reasonableness. Therefore, the question to be asked in reviewing the decision is whether, after a somewhat probing examination, the reasons given, when taken as a whole, support the decision. 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: *Ryan.* If the decision is not unreasonable, the reviewing court is not to interfere.

[14] To the extent that the pre-*Ryan* cases of *Re Lesk*, [1947] 3 D.L.R. 326 (B.C.S.C.), *Re Davidson and Royal College of Dental Surgeons of Ontario* (1925), 57 O.L.R. 222 (C.A.) and *Heagy v. Council of Chartered Accountants of Sask.* (1985), 40 Sask. R. 211 (Q.B.) cited by the Appellant suggest that some other or additional approach may be appropriate, in my view they are no longer relevant in light of *Ryan*.

The Council's decision about the Appellant's conduct

[15] The Appellant submits that both the decision as to his conduct and the suspension imposed are unreasonable.

[16] With regard to the decision as to his conduct, the Appellant submits that the Council made a number of findings of fact that are inconsistent with its ultimate decision. The findings of fact may be summarized as follows: the Appellant was free to withdraw his services from AEL; Diavik was a client of both 5163 and AEL; Diavik wanted the Appellant and Tymstra to perform the construction management work; problems in the relationship between 5163 and AEL were the reason for terminationof their contract; after 5163 terminated its contract with AEL, AEL did not have other resources to perform the work that was being done under the Diavik contract and did not present Diavik with a proposal for that work.

[17] In my view, the findings of fact are not inconsistent with the Council'sdecision. At the heart of the Council's decision was the conflict of interest the Appellant was in and failed to disclose when negotiating to take over the work being done under the AEL - Diavik contract while his company, 5163, was still under contract to AEL . The Appellant's interest in obtaining that work was clearly in conflict with AEL's interest in maintaining the work. As the Council pointed out in its decision, although the Appellant was free to withdraw his services from AEL and to offer his services to Diavik, he was not "free to offer his services to replace those being provided under the terms of the existing contract in the manner that he did." It is important to keep in mind that the focus of the inquiry was the Appellant's conduct while the 5163 - AEL contract was still in place and not what Diavik wanted or what AEL did or did not do after 5163 gave notice of termination of the contract.

[18] The Appellant also submits that in dealing with Rule 4, the Council imposed an additional duty on him not contained in the Rule. Rule 4 requires that a professional engineer act for his clients or employers as a faithful agent or trustee, always acting independently and with fairness and justice to all parties. In finding that the Appellant breached Rule 4, the Council stated that he "should have contacted AEL prior to July 21 and advised them of their pending termination and their interest in competing for the work under contract to AEL *and workedout a suitableformula that was acceptable to all parties*" (emphasis added). The Appellant submits that the italicized portion creates a duty that does not appear in that Rule or elsewhere in the Rules of Conduct, that being a duty to work out an acceptable formula with the other parties. The Appellant also argues that this part of the ruling cannot be reconciled with the

Council's finding that Diavik wanted him and Tymstra to do the work, whereas AEL wanted to retain the work. In other words, the Appellant says there could be no solution acceptable to all parties.

[19] The foregoing portion of the ruling must be read in the context of the entire written decision. Earlier on in its decision, the Council referred to an argument by the Appellant that he had Diavik's concerns foremost in his mind, whereas AEL did not. The Council addressed that argument as follows:

> The panel does agree that Diavik is the client of both 5163 and AEL; and because of that position both 5163 and AEL had to act to meet the concerns of their common client. Had 5163 given proper notice to AEL, it would have then been incumbent on both AEL and 5163 to work out a course of action to ensure that Diavik's projects were taken care of. This might have been done by AEL finding new people. If they could not, then in all likelihood they would have passed the work on to 5163. Unfortunately, AEL was not given a chance to find a solution suitable to Diavik as 5163's secret negotiations effectively ended their work with Diavik on this Contract.

[20] When read in the context of the above comments, the ruling challenged by the Appellant clearly does not impose on the Appellant alone a duty to work out an agreement. It does point out that both 5163 and AEL would have had a duty to ensure that the work of their common client, Diavik, was done. Whether they could have come to an agreement on how to do that is speculation, but in any event is not material to the breach by the Appellant of the duty to disclose to AEL what he was planning. The last sentence of the paragraph quoted above makes it clear that the failure to disclose is the crux of the breach of Rule 4. In not disclosing, the Appellant did not act fairly and effectively prevented any chance for a resolution of the issues as between 5163, AEL and Diavik. Fairness would have required that he disclose and then try to resolve the issues. In my view, that is what the Council was saying.

[21] The Appellant also submits that in finding that he breached Rule 5, the Council treated the Appellant's right to compete with AEL as a conflict of interest. The Appellant takes the view that the conflict in this case is the result of the termination of a contractual relationship (the 5163 - AEL contract) and market forces at work and does not involve ethical issues. In particular, the Appellant points to the following paragraphs in the Council's decision:

> Paragraph 54 argues that had 5163 given notice of its intention before it contracted with Diavik, there could be no suggestion that the Rules had been violated. We agree

> that, had 5163 informed AEL of their intention to negotiate with Diavik before opening negotiations, the Rules would not have been violated. The negotiation without informing AEL is the crux of the ethical breech (*sic*). 5163 acted in a manner harmful to AEL without AEL's knowledge.
>
> Paragraph 55 argues that had 5163 given notice of its intention, then AEL would not have consented to giving up the Contract. It is clear from the testimony that AEL would have tried to retain the work. It is not clear that AEL would have had resources suitable to Diavik to have kept the work. It is clear that AEL was not given any chance to find alternate means to satisfy Diavik on this Contract. Had 5163 acted in another manner, perhaps AEL could have found the resources to adequately complete the work.

[22] The above paragraphs address written submissions by the Appellantthat if 5163 had given notice of its intentions before it contracted with Diavik, there could be no suggestion that the Rules had been violated and that it was clear that AEL would not have consented to what 5163 planned to do.

[23] The Appellant interprets these paragraphs as saying that any competition by 5163 for the work under the AEL - Diavik contract is a conflict of interest; he says that such a finding goes too far. At the same time, I understand his argument to be that since the Council said that all the Appellant had to do was tell AEL that he was going to negotiate with Diavik, and since AEL would not have consented to what he was doing, there was no point in him telling AEL.

[24] What AEL would have done had the Appellantdisclosed his intentionsis largely speculation. The Council in effect acknowledged that in the second of the above-quoted paragraphs and in the paragraph quoted earlier where it refers to AEL not being given a chance to find a solution. The point the Council has made very clearly, however, is that the Appellant breached the Rules by not disclosing his negotiations with Diavik. It is that conduct that resulted in the breach. The Appellant's argument seeks to justify that conduct by speculating as to what would or would not have happened if he had not breached the Rule. That argument cannot succeed. The Council correctly focused on the Appellant's conduct as it was and not on what might have happened had the facts been different.

[25] I also find no merit in the argument that the Council's finding is that any competition by 5163 for the work done by AEL was a conflict of interest. The Council specifically addressed that argument in a paragraph I have already referred to but will

repeat here and which commented on the Appellant's submission that he was always free to withdraw his services from AEL and offer them to Diavik:

> The panel agrees that Mr. Deans was always free to withdraw his services. The panel agrees that Mr. Deans was always free to offer his services to Diavik for other work. The panel does not agree that he was free to offer his services to replace those being provided under the terms of the existing contract in the manner that he did.

[26] The above makes it clear that it is the way the Appellant conducted himself that is the problem, not the mere fact that he wanted to compete with AEL.

[27] The Appellant also put considerable emphasis on the ongoing litigation arising out of the contractual issues. He submits that the issues dealt with by the Council are more properly the subject of that litigation. I have no doubt that many of the issues arising from the contractual relations between the various parties belong in that forum. However, whether the Appellant's actions constituted a conflict of interest that he should have disclosed and whether he breached the applicable Rules of Conduct are matters properly the subject of disciplinary proceedings under the *Engineering, Geological and Geophysical Professions Act*; see *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.* (1999), 170 D.L.R. (4th) 405 (Alta. C.A.).

[28] No issue was raised on the appeal about the Council's finding that Rule 10 had been breached other than the submission, which I have dealt with above, that the circumstances involve contractual, and not ethical, issues.

[29] In my view, the Council's decision was reasonable. The evidence was not in dispute in any material respect and showed clearly that the Appellant had negotiated for 5163 to take over the work that AEL was doing for Diavik without disclosingthose negotiations to AEL or Mr. Johnson while 5163 was still under contract with AEL. The Council's conclusion that in doing so the Appellant breached Rules 4, 5 and 10 is founded in the evidence and is supported by the careful analysis in the reasons given. I find no merit in the appeal from this aspect of the Council's decision.

The Council's decision about penalty

[30] The sanction or penalty imposed on the Appellant included a four week suspension from the practice of engineering. He submits that the suspension, which is

at the upper end of the disciplinary penalties prescribed by the *Act*, is harsh and unreasonable. He submits that a reprimand would suffice considering the circumstances of the case and the fact that he is a young engineer without any prior record of infractions.

[31] The Respondent submits that the suspension is reasonable in the circumstances. It says that the Appellant's breach of the Rules is a serious matter and points to resulting harm to AEL in that it did not receive any further work from Diavik.

[32] Although the Council gave detailed reasons for its decision that the Appellant breached the Rules of Conduct, it did not give reasons for imposing a suspension as requested by the Respondent rather than the reprimand requested by the Appellant. The absence of reasons means that the Court is unable to undertake the analysis required by the *Ryan* case. *Ryan* would require considerationof whether the Council's reasons support its decision on penalty.

[33] Under s. 35 of the *Act*, the possible penalties for a finding of professional misconduct are a reprimand,a suspensionfrom the practiceof professionalengineering for the period the Council considers proper or the striking of the Appellant's name from the register of members. Suspension and being struck from the register are available only if, under s. 35(3)(b), the Council "considers the conduct to be sufficiently grave" to merit either of those options. Conversely, a reprimand is available only if, under s. 35(2)(b), the Council "considers that the conduct is not of such gravity or importance" to warrant suspension or being struck from the register.

[34] Clearly the Council must have found the Appellant's conduct to be sufficiently grave to merit a suspension, but that does not tell me why the Council came to that conclusion. Nor do the reasons given for finding the Appellant in breach of the Rules of Conduct tell me why a suspension was deemed appropriate instead of a reprimand.

[35] The Supreme Court of Canada has indicated that where a decisionhas important significance to the individual involved and there is a statutory right of appeal, some form of reasons should be required as part of the duty of procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. Both of those circumstances apply in this case. The penalty to be imposedon a professionalengineer for his or her conduct will have important significance to that individual and his or her professional future. There is a statutory right of appeal, which means that the

Council's decision is subject to scrutiny by the Court. Quite apart from the duty of procedural fairness to the individual affected by the decision, in order to determine in this case whether the Council's decision is a reasonable one, the Court needs to know why and how the decision was reached.

[36] Although procedural unfairness was not among the grounds of appeal, counsel for the Appellant also indicated in argument that the disciplinary hearing summaries contained at Tab 26 of the Record were not disclosed to him prior to the Council reserving its decision; thus he had no opportunity to address them. The summaries appear to have been taken from a website and provided to the Council by its staff after the hearing was over and before the decision was rendered. The summaries contain very little detail about the professional misconduct at issue and the reasons why a particular penalty was imposed. The Council's decision does not indicatewhat, if any, use was made of this material.

[37] In some cases, non-disclosure of information considered by a tribunal has been characterized as procedural unfairness and resulted in a decision being quashed: *Perry v. Northwest Territories (Commissioner),* [1998] N.W.T.J. No. 125 (S.C.) and cases cited therein.

[38] By way of a Memorandum filed August 10, 2007, I asked counsel for their submissions on how I should deal with the lack of reasons and the non-disclosure of the summaries and whether the appropriate recourse is to remit the matter of penaltyto the Council for a new hearing. I also raised at that time the Council's lack of jurisdiction under s. 35(4) of the *Act* to require the Appellant to rewrite the practice examination, which was part of the penalty imposed.

[39] Counsel responded in a joint Memorandum filed August 16, 2007, indicating that they agree with the following course of action. Considering in particular the problem posed by the lack of reasons, I am of the view that it is appropriate to quash the penalty imposed and remit that issue to the Council (the same panel that heard the matter on September 13, 2006) for a new hearing. Reasons should, of course, be provided and recorded for whatever penaltythe Councildetermines is appropriate after the new hearing.

[40] This direction is not to be taken as a comment on whether the suspension was reasonable; I cannot say whether it was or not without knowing why the Councilchose to impose it.

Summary of decision on appeal

[41] In the result, the appeal from the Council'sfinding of professionalmisconduct is dismissed. The appeal from the penalty imposed is allowed. The penaltyin its entirety is quashed and the issue of penalty is remitted to the Council for a new hearing in accordance with the directions set out above.

[42] Should counsel wish to speak to the costs of the appeal, they may obtain a date to appear before me for that purpose. Alternatively, if they both agree, they may file written submissions on costs within 30 days of the date this decision is filed. If they require directions as to when within that time frame each party is to file its submissions, they may forward a letter seeking those directions.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 17th day of August, 2007.

Counsel for the Appellant: Austin F. Marshall
Counsel for the Respondent: Gerard Phillips