

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

VAUGHN DEL VALLE

Applicant

-and-

LAW SOCIETY OF THE NORTHWEST TERRITORIES

Respondent

MEMORANDUM OF JUDGMENT

BACKGROUND:

[1] This matter has a long and informative history.

[2] After approximately 14 years of employment with the Government of the Northwest Territories (GNWT), the Applicant Vaughn Del Valle was given notice of an impending layoff on January 23, 2001. On April 23, 2001, his employment was terminated. At the time of termination, his position was that of Coordinator of Facilities and Assets in the Parks and Tourism Division of the Resources, Wildlife and Economic Development Ministry. This was a senior position within the bargaining unit of the Union of Northern Workers.

[3] A grievance was filed on Mr. Del Valle's behalf by the Union of Northern Workers (UNW) on September 29, 2003. The claim was essentially two-fold. First, Mr. Del Valle claimed that his employer had breached the Collective

Agreement by not providing for priority staffing status for a period of time after his layoff; second and connected to the first issue, was a claim that the applications he had submitted for re-employment had been unfairly rejected.

[4] The GNWT took the position that the Collective Agreement had not been breached and that, in any event, the approximately two and a half year delay in filing the grievance was so far beyond the 30 days required by the Collective Agreement that the grievance should fail for that reason alone.

[5] On May 26, 27 and 28 2004 an arbitration hearing was held in front of H. Allan Hope, QC. Counsel for the GNWT was John Holden. The Union of Northern Workers was represented by counsel for the Public Service Alliance of Canada (PSAC), Laurin Mair.

[6] In a ruling issued October 6, 2004, the arbitrator found that the Union had failed to establish a breach of the Collective Agreement on the merits of the dispute and that a waiver of the time limits would not have been warranted in any event. The grievance was dismissed.

[7] On November 5, 2004, PSAC filed an originating notice seeking judicial review.

[8] On November 19, 2004, counsel for PSAC informed the Court in Supreme Court Chambers that PSAC would not be proceeding with the application, that the application had only been filed to preserve the appeal period, and PSAC would be allowing Mr. Del Valle to proceed as an unrepresented litigant.

[9] In September of 2006, Mr. Del Valle filed a notice of motion entitled Application for Judicial Review in which further grounds and relief sought were set out.

[10] In October of 2006, the GNWT filed an application for dismissal. The grounds and relief sought in the application were addressed, but the overarching position of the GNWT was that Mr. Del Valle did not have standing to pursue review without representation from the Union.

[11] The application for dismissal was heard on January 11, 2007 in front of Justice V.A. Schuler. Counsel for the GNWT was John Holden. Mr. Del Valle represented himself.

[12] Reasons were filed on March 12, 2007. The application for dismissal by the GNWT was granted on the basis of lack of standing. Justice Schuler found that, absent a clear indication that PSAC intended Mr. Del Valle to act on its behalf, it would not be in the interests of justice to allow him to do so. Justice Schuler considered the Supreme Court of Canada decision of *Noël v Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2. S.C.R. 207, wherein the court held that under collective agreements employees do not have the necessary interest to pursue review on their own.

[13] Mr. Del Valle appealed Justice Schuler's decision. I have relied on the Court of Appeal decision for the background to this process; while some of the details are not clear, it was noted that Mr. Del Valle advanced 20 separate grounds of appeal, supported by a 163 page factum. The Court found that most of the grounds were essentially an attempt to re-litigate the underlying issues and that the appropriate issues for consideration were; first, whether Mr. Del Valle had standing to seek judicial review of the arbitration decision and, second, whether he should have been allowed to act for the Union in so doing.

[14] The appeal was heard on June 14, 2011 with a decision released on June 20, 2011. The GNWT was represented by John Holden and Mr. Del Valle represented himself. The Court found as follows, at paragraphs 15 and 16:

The appellant is not a party to the Collective Agreement and cannot legally represent PSAC except if the interests of justice would permit his doing so. The chambers judge concluded that they did not. That decision is discretionary and is reviewed on the reasonableness standard.

The chambers judge set out her reasons for reaching her conclusion and those reasons meet this standard. In fact, the length and nature of the appellant's factum buttress her conclusion. The appellant is now attempting to attach claims to his proposed judicial review of the arbitration decision that cannot possibly be dealt with under the rubric of judicial review. It is not in the interests of justice to permit the appellant to "represent" PSAC in the pursuit of the remedies he now advances.

Del Valle v Government of the Northwest Territories, 2011 NWTCA 03

[15] Pursuant to Section 24 of the *Legal Profession Act* S.N.W.T. 2008 (the *Act*), Mr. Del Valle, on November 25, 2014, made a complaint to the Law Society of the Northwest Territories concerning John Holden, counsel for the GNWT. The complaint was 97 pages long and concerned all three levels of court at which Mr.

Holden had been opposing counsel. I have reviewed this complaint. It is difficult to compress into a manageable list of grievances, however it essentially alleges that Mr. Holden (1) willfully misled three levels of court about the standing of PSAC to represent the UNW in matters relating to the Collective Agreement; (2) colluded with PSAC on a number of evidentiary issues; (3) led false evidence at the arbitration; and (4) failed to inform the Courts of relevant case law.

[16] The complaint found itself in front of Glenn Tait, the chairperson of the Discipline Committee of the Law Society of the Northwest Territories. Mr. Tait designated senior lawyer and Law Society member Sheila McPherson to investigate the complaint.

[17] Mr. Holden was given an opportunity to respond by Ms. McPherson, which he did in writing on December 15, 2014. Mr. Holden responded with a categorical denial of any fraud, collusion, misrepresentation or inappropriate conduct. He suggested that Mr. Del Valle is under the mistaken impression that opposing counsel has a duty to make arguments that he, either acting for himself or through counsel, could have made.

[18] Ms. McPherson, as required by section 24.4(1) of the *Act*, provided a detailed, written investigative report to Mr. Tait on October 10, 2015. The report contained the conclusion that no professional misconduct had occurred, that no reasonable prospect of conviction existed and recommended that the complaint be dismissed.

[19] Mr. Tait, acting under section 24(2), by letter on October 21, 2015, indicated that the Law Society would be taking no further action.

[20] On December 21, 2015, Mr. Del Valle filed an Originating Notice requesting Judicial Review of the actions taken by the Law Society.

APPLICATION FOR JUDICIAL REVIEW:

[21] While there were eight paragraphs of relief sought, the Application for Judicial Review sought essentially three items of relief:

(1) “An order quashing the decision (of the Law Society)”;

(2) “An order in the nature of mandamus directing the Discipline Committee...to convene a three member Committee of Inquiry and to

expedite a hearing, in accordance with section 24.4(6)(a) and (b) of the *Legal Professions Act*”;

- (3) “To help avoid further natural justice violations, in accordance with section 25(1) of the *Legal Professions Act* and section 284(1)(e) and (m) of the *Rules of the Supreme Court of the Northwest Territories*, for an order in the nature of mandamus directing that section 24.6(3)(a) and (b) of the *Legal Professions Act* be amended, so that the Committee of Inquiry is composed only of individuals with no current or previous direct or indirect association with the *Government of the Northwest Territories*, with one member being a *Government of Canada* lawyer”.

[22] The Notice contained seven grounds, which are as follows:

- (1) Reasonable apprehension of bias – violation of natural justice...Investigator and Discipline Chair are not impartial decision makers;
- (2) The preliminary Investigator committed errors of law by abbreviating cited provisions of the *Code of Professional Conduct* and redacting critical content;
- (3) The preliminary Investigator committed errors of law by ignoring and failing to consider all cited violations of the *Code of Professional Conduct*;
- (4) The preliminary Investigator committed errors of law by ignoring, failing to consider and misapprehending violated cited case law;
- (5) The preliminary Investigator committed errors of law by ignoring and failing to consider all evidence and assessing evidence on the basis of wrong legal principles;
- (6) The preliminary Investigator committed unreasonable errors of fact by misapprehending or ignoring the actual nature and detail of the complaint;
- (7) Violation of natural justice – Unreasonable Delay.

[23] The Law Society raises four arguments in response:

- (1) Ms. McPherson's report is neither an order by a tribunal nor an omission to act within Rule 591 of the Rules of the Supreme Court of the Northwest Territories;
- (2) Mr. Tait's opinion that there was no professional misconduct is neither an order by a tribunal nor an omission to act;
- (3) Mr. Del Valle does not have standing to bring this judicial review application;
- (4) The relief sought by Mr. Del Valle is either not proper or not within the jurisdiction of the Court to grant.

ANALYSIS:

Was the Decision(s) of the Law Society Reviewable?

[24] The Law Society takes the position that neither the recommendations of Ms. McPherson in her report, nor Mr. Tait's opinion that there was no professional misconduct and his decision to take no further action constitute an order by a tribunal or an omission to act within *Rule 591* of the *Rules of the Supreme Court of the Northwest Territories*.

[25] Mr. Tait was exercising decision making authority as a public officer. Ms. McPherson's report, in and of itself, is not reviewable, but Mr. Tait's decision is without context unless the report is considered. Mr. Tait's decision to act upon Ms. McPherson's recommendations is a reviewable decision. If Mr. Tate had decided to proceed with disciplinary action despite the recommendations in the report, his decision would have been reviewable. I fail to see how his decision to follow the recommendations is any less reviewable, from a purely jurisdictional point of view.

The Relief Sought

[26] Section 24.4 and 24.5 of the *Legal Profession Act*, R.S.N.W.T. 1988,c.L-2, sets out the circumstances in which the Discipline Chair of the Law Society may order a member to appear before a three member Committee of Inquiry. The decision flows from the findings of an investigative report and is discretionary, in that certain conclusions have to be arrived at before the order is made.

[27] The Law Society owes a duty to respond to complaints. It does not owe a duty to respond in the particular way that a complainant wishes. Mandamus is not available in the absence of a duty to act. Thus Mr. Del Valle's request that a three member Committee of Inquiry be convened is not relief which is available.

[28] Likewise, this Court does not have the jurisdiction to compel the Government of the Northwest Territories to amend the legislation governing the practice of law, nor do I have the jurisdiction to amend the *Legal Profession Act*. Mr. Del Valle's request for an amendment to the *Legal Professions Act* is not relief which is available.

[29] Of the items of relief sought, the only one which is theoretically available would be a setting aside of the decision of the Discipline Chair and a direction that the Law Society of the Northwest Territories consider the complaint again. This relief could only be considered if I come to the conclusion that Mr. Del Valle, as a complainant to a Law Society discipline matter, has standing to bring an application for Judicial Review.

Does the Applicant Have Standing to Bring an Application for Judicial Review?

(1) As a Party to the Proceedings:

[30] The Legal Profession Act provides a specific method for members of the public to make a complaint against members of the Law Society of the Northwest Territories. It does not, however, give a complainant status as a party to the proceedings. This appears to be the case in most if not all statutes dealing with discipline of members of professional associations.

[31] In *Friends of the Old Man River Society v Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, the Alberta Court of Appeal considered this issue, in the context of a complaint against engineers, as follows at paragraph 41:

The Act makes it clear that the disciplinary process is a matter between the Association and the individual member whose conduct has been questioned. The Act is directed solely to the Association and its members; the rights, duties and responsibilities contained in the Act relate only to them. Under the investigative process contained in Part 5, a complainant is not made a party either to the investigation or the disciplinary process itself. The only parties are the

Association and the member whose conduct is under investigation. Council's decision to terminate the investigation of the Engineers could have no detrimental impact on either FOR or Opron. It did not affect their personal or economic rights or obligations. They have no more interest in the conduct of the Engineers than any other member of the public. There is no *lis inter partes* between FOR and Opron, on the one hand, and the Association or the Engineers, on the other. Judicial review is not available in these circumstances.

[32] As recently as 2010, the Alberta Court of Appeal had reason to consider this issue again. In *Mitten v College of Alberta Psychologists*, 2010 ABCA 159, as considered by Belzil J. in *Davidoff v Law Society of Alberta*, 2014 ABQB 370, the Court again took the position that while a complainant has the right to procedural fairness, a complainant who is not a party does not have the right to appeal a decision on its merits.

[33] Mr. Del Valle was not a party to the complaint process at the Law Society. The professional and economic interests of Mr. Holden, as the member under investigation, were obviously directly impacted by the decision of Mr. Tate. Mr. Del Valle's were not.

[34] An ongoing theme in this process, at every level, has been Mr. Del Valle's desire to re-litigate the original issue under the guise of appeal and review proceedings. I will have more to say about this at the conclusion of these reasons. A complaint to the Law Society is not a path to compensation for the complainant.

(2) Public Interest:

[35] Mr. Del Valle argued that he should be granted standing even if he was not found to be a party under the courts discretion to grant standing as a matter of public interest. The test is three part, as stated by the Supreme Court of Canada in *Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 2:

In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court...

[36] This case does not raise a serious justiciable issue. The only issue under review is whether or not the actions of the Law Society were appropriate in the context of the complaint against the member. While there may well have been

some justiciable issues at earlier points in the history of Mr. Del Valle's matters before the courts, there is none in this particular case.

[37] Mr. Del Valle also does not have a real stake in the outcome of the discipline process as regards the member. Nor are his interests genuinely effected.

[38] The third part of the test, whether granting Mr. Del Valle standing is a reasonable and effective means to bring the case to court, warrants a longer comment. This case is about the response of the Law Society to a complaint about one of its members. It is not about whether or not the GNWT acted in good faith to assist Mr. Del Valle in obtaining equivalent employment after he was laid off. It is not about whether or not PSAC had legitimate standing to represent the UNW. It is a simple matter of reviewing the appropriateness of the discipline process in regards to a single complaint against a single member, and granting Mr. Del Valle standing will not make this process more reasonable or effective.

Procedural Fairness

[39] Was the Law Society fair in the way it responded to Mr. Del Valle's complaint? In *Carter v Northwest Territories Power Corp*, 2014 NWTSC 19 (CanLII), Shaner J. succinctly lays out what a court should consider in assessing procedural fairness at paragraphs 81 and 82, referencing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC):

What is required to fulfil the duty of fairness in a proceeding varies with the specific context of the case...

In *Baker*, the Supreme Court sets out a non-exhaustive list of considerations to be used in determining the contents of the duty of fairness in a given context. These are:

- a. the nature of the decision and the process followed in making it;
- b. the nature of the statutory scheme;
- c. the importance of the decision to those affected;
- d. the legitimate expectations of those challenging the decision; and
- e. the tribunal's choice of procedure.

[40] Mr. Del Valle claimed there was a reasonable apprehension of bias in that both Mr. Tait and Ms. McPherson, while private practitioners, had in the past done legal work for the Government of the Northwest Territories. I do not believe there is any merit in this assertion, as I will explain shortly, but as a result I thought it

prudent to review the actual complaint and the Law Society's response to it from the point of view of the merits rather than simply the process.

[41] Mr. Del Valle's concerns about the process, essentially the grounds laid out in the notice of motion, bear repeating:

- (1) Reasonable apprehension of bias – violation of natural justice... Investigator and Discipline Chair are not impartial decision makers;
- (2) The preliminary Investigator committed errors of law by abbreviating cited provisions of the *Code of Professional Conduct* and redacting critical content;
- (3) The preliminary Investigator committed errors of law by ignoring and failing to consider all cited violations of the *Code of Professional Conduct*;
- (4) The preliminary Investigator committed errors of law by ignoring, failing to consider and misapprehending violated cited case law;
- (5) The preliminary Investigator committed errors of law by ignoring and failing to consider all evidence and assessing evidence on the basis of wrong legal principles;
- (6) The preliminary Investigator committed unreasonable errors of fact by misapprehending or ignoring the actual nature and detail of the complaint;
- (7) Violation of natural justice – Unreasonable Delay.

[42] I could not help but note that these issues are similar, though far less voluminous, than the allegations against Mr. Holden in the complaint to the Law Society. Ms. McPherson's report is condemned because it does not accord with Mr. Del Valle's assessment of what law should apply, how it should be interpreted, and the conclusions that should be drawn from it.

[43] I found that Ms. McPherson clearly and correctly stated the law. She fairly summarized the allegations contained in the complaint, which were extreme in both volume and complexity. Mr. Del Valle takes the position that each allegation and concern raised in his complaint is unique and requiring of a specific response.

I read the complaint differently. The theme of collusion with opposite parties and misrepresentation of the law flowed throughout.

[44] Mr. Holden's response to the allegations against him was likewise measured and fair.

[45] Mr. Tait was also more than fair in the manner in which he responded to the complaint. The nature of the allegations against the member were such that he could have exercised his winnowing function and rejected it as meritless from the outset. Instead, he appointed Ms. McPherson to investigate the complaint.

[46] All of this was done in a transparent and open way.

[47] If I am mistaken on the issue of standing, I should also state the following: the decision making process undertaken by the Law Society was not just procedurally fair, the decision itself was right. No matter which standard of review I apply, the decision should stand. The decision to take no further action against the member was not just the only reasonable decision that could be made, it was entirely correct.

[48] The fact that Mr. Del Valle raised the issue of bias reveals perhaps the most fundamental difficulty with this action. This is an application for review of a Law Society discipline decision in relation to the conduct of one member. It is not a lawsuit against the Government of the Northwest Territories. The fact that both Mr. Tait and Ms. McPherson had acted for the GNWT in the past would not put them in a position of conflict as regards the conduct of a member who happens to be an employee of the GNWT. Any sanctions the Law Society could have considered imposing would have had an impact only on the member, not on the GNWT.

CONCLUSION

[49] Mr. Del Valle clearly believes that the GNWT acted in bad faith when he was laid off 16 years ago and he was not re-hired in an equivalent position. He believes that he has suffered an injustice. This may or may not be true. I have no way of knowing. His belief that it is true, however, is obviously passionately held.

[50] When he attempted to redress this perceived injustice, at the level of arbitration and at two levels of court afterward, his efforts were resisted by the

GNWT. The lawyer representing the GNWT at all three levels was Mr. Holden, the member at issue in this review.

[51] While Mr. Del Valle framed this particular matter in the form of a complaint to the Law Society, his real interest is and has always been to redress the injustice he believes he has suffered at the hands of his former employer. This became absolutely clear during his submissions to the court on this review.

[52] This is not the forum in which to address Mr. Del Valle's concerns with the GNWT. This is and can only be about the response of the Law Society to a complaint about one of its members, and who can or cannot ask for a review of that response.

DECISION

[53] Mr. Del Valle was the complainant in this matter. He is not a party to the proceedings and thus does not have standing to bring an application for review. His application also does not fall into the category of matters which could be held to be in the public interest such that standing could be granted in the absence of standing as a party.

[54] The Law Society treated Mr. Del Valle's complaint respectfully and seriously. The process was open and transparent. Mr. Del Valle was provided with procedural fairness.

[55] In the event that I am held to be incorrect on this issue of standing, or procedural fairness, I find that Mr. Del Valle's application fails on the merits. The decision by the Law Society was both reasonable and correct.

[56] The application is dismissed.

[57] The respondent has not sought costs and therefore no order for costs will be made.

A.M. Mahar
J.S.C.

Dated at Yellowknife, NT, this

9th day of May, 2017

Counsel for Vaughn Del Valle:
Counsel for Law Society of the
Northwest Territories:

Self-Represented

Molly Naber-Sykes QC

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE A.M. MAHAR
