IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Janzen v. The Society of Notaries Public of British Columbia,* 2015 BCSC 2485

Date: 20151202
Docket: S145984
Registry: Vancouver

Between:

Timothy Janzen

Appellant

And

The Society of Notaries Public of British Columbia

Respondent

Before: The Honourable Mr. Justice Sewell

On appeal from: Decision of Board of Directors of The Society of Notaries Public of British Columbia, September 9, 2014

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant:	I.G. Schildt
Counsel for the Respondent:	C. Harvey, Q.C. I.M. Knapp
Place and Date of Hearing:	Vancouver, B.C. November 4, 2015
Place and Date of Judgment:	Vancouver, B.C. December 2, 2015

[1] The appellant, Timothy Janzen, appeals from a decision of the Board of Directors of the respondent, Society of Notaries Public (the "Society"), which was issued on September 9, 2014, imposing a fine of $5,000 and a one-month suspension from practice on him. Mr. Janzen does not appeal the imposition of the fine, but does appeal the imposition of the one-month suspension.

[2] The grounds of appeal are set out in Mr. Janzen's written argument filed in court as follows:

> a) the panel erred in finding the Appellant guilty of professional misconduct for conduct falling outside the scope of his activities as a notary public; or
>
> b) alternatively, the panel considered issues, and found the Appellant guilty of misconduct, on the basis of matters falling outside the scope of the Notice of Inquiry; and
>
> c) the penalty imposed was excessive in the circumstances.

[3] The parties agree on the history of what happened in this matter, as set out in the decision of the Board of Directors, and it is therefore unnecessary to set it out in detail. However it may be briefly outlined as follows.

[4] Mr. Janzen is a notary public and is therefore a member of the Society and subject to its lawful rules and regulations, and to the provisions of the *Notaries Act*, R.S.B.C. 1996, c. 334 [*Act*]. Mr. Janzen is one of two owners of Janzen & Caisley Notary Corporation. He manages the business of this corporation that has its head office in Kelowna.

[5] In 1999, Mr. Janzen helped to prepare a will for Jean Carlson. At her request, he agreed to be named as executor of her estate. Ms. Carlson died in February 2005, and Mr. Janzen took up his duties as executor of her estate in March 2005. Mr. Janzen had not previously acted as an executor of an estate. It is common ground between the parties that acting as an executor is not one of the activities set out in s. 18 of the *Act*. Mr. Janzen has maintained throughout that his activities as executor of the estate were private activities and that his conduct with respect to those activities is not subject to the jurisdiction of the Society.

[6] In March 2006, Mr. Janzen obtained letters probate for the estate, and in August of that year made an initial distribution of $15,000 to each of the beneficiaries of the estate.

[7] On May 22, 2007, Mr. Janzen made a further distribution to the beneficiaries. After that second distribution, there was approximately $13,000 remaining in the estate. Due to the pressure of work, Mr. Janzen did not complete the administration of the estate by the end of 2007. Towards the end of November 2008, Mr. Janzen prepared what he believed to be the documentation necessary to wind up the estate and, at the request of one of the beneficiaries, sent that documentation to her lawyer for review. The lawyer identified some errors in Mr. Janzen's calculations and, more importantly, identified that Mr. Janzen had neglected to apply for Canada Pension Plan death benefits to which the estate was entitled.

[8] In or about July 2010, Mr. Janzen sent out another copy of the final documents to another beneficiary, although what he describes as the CPP issue had not been resolved by that time. In that same month, Mr. Janzen learned that a beneficiary had made a complaint about his conduct to the Society. Mr. Janzen made an initial reply to correspondence from the Society relating to the complaint, but thereafter stopped communicating with the Society about that complaint, because he was of the view that his conduct as executor was outside the scope of his duties as a notary and he had no obligation to communicate with the Society about that conduct.

[9] The Society took a different view of the matter and in early 2011 delivered a notice of inquiry to Mr. Janzen, asserting that he had failed to reply properly to communications from the Society. On March 9, 2011, the Society and Mr. Janzen entered into an Agreed Statement of Facts, Admissions, and Proposed Penalty with respect to this first notice of inquiry.

[10] Paragraph 7 of the Agreed Statement of Facts states as follows, in part:

> . . . Beginning in July 2010, the Society asked the Member for reports in the matter and the Member did not reply in a timely manner or at all to the following communications from the Society:
>
> a. Email from the Society of July 19, 2010;
> b. Email from the Society of August 4, 2010;
> c. Letter from the Society to the Member on September 17, 2010;
> d. Email from the Society to the Member dated November 16, 2010;
> e. Email from the Society to the Member dated November 25, 2010;
>
> The member responded to the July 19th and August 4th, 2010 communications on August 17, 2010. The Member did not respond to the communications in c), d), and e) until after the Inquiry was commenced.

[11] Mr. Janzen also agreed that he had failed to respond or respond in a timely way to inquiries from the Society. However, he did not agree that his failure to respond constituted professional misconduct pursuant to s. 28(1)(c) of the *Act* because, as I have already stated, in his view those communications related to a personal appointment.

[12] Notwithstanding the position taken by Mr. Janzen, the Society decided on May 16, 2011, that Mr. Janzen had been guilty of professional misconduct in failing to respond to the Society's communications, even though those communications related to matters outside of his profession as a notary.

[13] The Board of Directors of the Society reprimanded Mr. Janzen, imposed a fine of $1,000, and directed that he attend a course in executorship as soon as one was available. Mr. Janzen accepted the penalty and did not appeal the 2011 decision.

[14] Despite the 2011 decision and the penalty imposed, by 2014, Mr. Janzen still had failed to wind up the affairs of the estate. This led to a second complaint to the Society about Mr. Janzen. On January 16, 2014, the Society notified Mr. Janzen about the complaint by email. He did not respond to that email until February, after the Society had followed up on the original email. Mr. Janzen's explanation for failing to respond to the initial communication was that he had overlooked it and it had not come to his attention.

[15] On May 8, 2014, the Society issued a notice of inquiry with respect to Mr. Janzen's conduct subsequent to the disposition of the 2011 complaint. The subject matter of the 2014 notice was as follows:

> **YOU ARE HEREBY GIVEN NOTICE** that the Discipline Committee of the Society of Notaries Public of British Columbia, has directed that an Inquiry under Section 27 of the *Notaries Act* be undertaken to determine whether or not you are or have been guilty of any infraction under Section 28 of the *Notaries Act* and more specifically whether the following conduct is contrary to the best interests of the public or the notarial profession or tends to harm the standing of the notarial profession.
>
> That in your capacity as Executor of the Estate of Jean Monnington Carlson (the "Carlson Estate"), you breached Section 28(1)(c) of the *Notaries Act* by:
>
> a. Failing to report to the beneficiaries as promised and as required;
> b. Failing to keep the beneficiaries reasonably informed;
> c. Failing to answer reasonable requests for information;
> d. Informing the beneficiaries that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;
> e. Informing the Society of Notaries Public that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;
>
> All of which is contrary to Principle 4 of the Society's Principles for Ethical & Professional Conduct.

[16] On June 20, 2014, an Inquiry Panel of the Society found that the allegations set out in the complaint were made out and, at Mr. Janzen's request, provided him with the following guidance in paragraph 14 of their decision:

> In order to provide the guidance the member requested, the Panel's view is that the member should follow up immediately within at a maximum the next three weeks (if he has not already done so) and forward to the beneficiaries a closing package for the Estate, which we understand is essentially already available. If necessary, we recommend the member get some assistance to do that if he cannot get it done in that time frame. Updating the Society on his progress will certainly assist in making any further proceedings smoother. In addition, it was the Panel's view that the member ought to take steps to see the beneficiaries view the cost of the member's services as in keeping with the quality of service provided.

[17] The complaint was then referred to the Board of Directors of the Society and on September 9, 2014, the Board found Mr. Janzen guilty of professional misconduct. The Board's reasons are set out in paragraphs 18 to 23 of its decision. I will read only paragraph 23:

> Even had the matter of this estate not taken on what we have characterized as greater importance owing to the previous disciplinary proceeding, in this matter it is still clear that the member was not diligent in responding to the Society's requests for information, particularly insofar as completing the estate was concerned. On that basis alone, the Board would have found the member to have been in breach of the Rules and guilty of professional misconduct as his actions represent a marked departure from the Board's conception of normal and expected conduct of a member.

[18] Mr. Janzen brings this appeal pursuant to s. 41 of the *Act*:

> 41 (1) If it is alleged by a member or former member that the directors have erred in a disciplinary action taken against the person, an appeal lies to the court.
>
> (2) The member or former member must, within 14 days after the decision or order complained of, give written notice of the appeal to the directors.
>
> (3) The appeal is a new hearing and the member or former member and the directors or their respective counsel are entitled to appear, present evidence and be heard.
>
> (4) The court may affirm the decision or order and dismiss the appeal or make another order, as may seem just.

Position of the Parties

[19] As indicated at the outset of these reasons, the principal ground of appeal Mr. Janzen advances with respect to the findings of professional misconduct is that the directors relied almost exclusively on the manner in which he carried out his duties as executor in arriving at their decision, activities that both parties acknowledge are not contained in s. 18 of the *Act* and that Mr. Janzen maintains are outside of the normal duties of a notary.

[20] Mr. Janzen submits that the directors failed to appreciate that his actions as executor could not form the basis of any finding of professional misconduct. Mr. Janzen also submits that the penalty imposed on him was unduly harsh, given the only possible basis on which he could have been found guilty of misconduct; that

is, his somewhat erratic and unpredictable method of responding to communications from the Society.

[21] Counsel on behalf of the Society submits that the decision of the Board of Directors was reasonable and, in particular, it was reasonable for the directors to take all of the circumstances before them into account in reaching the conclusion that Mr. Janzen's conduct represented a marked departure from the Board's conception of normal and expected conduct of a member.

Standard of Review

[22] The parties do not agree on the standard of review applicable to decisions of the Board of Directors of the Society. On behalf of the appellant, Mr. Schildt submits that the decision should be reviewed on a correctness standard. He acknowledges that three decisions of this court have held that decisions of the Board in disciplinary matters should be reviewed on a reasonableness standard: *Bailey v. Society of Notaries Public*, 2004 BCSC 444; *Re Farrell*, 2003 BCSC 1380; and *Evans v. The Society of Notaries Public*, 2010 BCSC 1232.

[23] However, Mr. Schildt submits that *Bailey* and *Farrell* were decided prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, in which the Court held that there are only two standards of review of decisions of administrative tribunals or statutory bodies; reasonableness and correctness, and that there was no longer a patently unreasonable standard as had been the case when *Bailey* and *Farrell* were decided.

[24] As I understand Mr. Schildt's submission, it is that the earlier decisions must be read in light of the pragmatic and functional approach mandated by the Supreme Court in *Dunsmuir*, and that the finding in the earlier cases that the applicable standard was reasonableness *simpliciter* does not preclude a finding that, post-*Dunsmuir*, a correctness standard should be applied.

[25] In support of this argument, Mr. Schildt points to the fact that this is a statutory appeal in which the parties are free to submit further evidence, that s. 38 of

the *Notaries Act* permits direct applications to this court to suspend or terminate membership in the Society, and the fact that discipline decisions are not polycentric in nature and, of course, have a significant impact on the person on whom the discipline is imposed.

[26] Notwithstanding Mr. Schildt's able submissions, I conclude that the appropriate standard of review in this case is reasonableness. While Savage J. in *Evans* did seem to express some reservations about that standard of review, he did finally conclude that he should follow the earlier decisions of this court that applied a reasonableness standard.

[27] In addition, in *Dunsmuir*, the Supreme Court made it clear that the imposition of a single reasonableness standard did not pave the way to a more intrusive review by the courts (paragraph 48). *Dunsmuir* also directs that courts initially ascertain whether the jurisprudence has already satisfactorily established the appropriate level of deference to be given to a tribunal or administrative body decision (paragraph 62).

[28] Given the basis of the Board's decision in this case, that is that Mr. Janzen's conduct was a marked departure from normal and expected conduct of a member of the Society, I conclude that deference should be given to the Board's decision and that it should be reviewed on a reasonableness standard.

[29] In addition, in my view, the principles set out in *Re Hansard Spruce Mills*, [1953] B.C.J. No. 142, mandate that I should follow previous decisions of this court on questions of law. As three previous decisions of this court have applied a reasonableness standard of review, *Re Hansard Spruce Mills* directs that I should accept that those decisions are correct and apply the same standard.

Was the Decision Unreasonable?

[30] I turn now to consider the question of whether the decision was unreasonable.

[31] In *Dunsmuir*, the Supreme Court held that a decision can be reasonable, even if the tribunal commits an error of law. The applicable principles with respect to reasonableness are set out in paragraphs 47 to 48 of *Dunsmuir* as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L'Heureux-Dubé J.; *Ryan*, at para. 49).

[32] In this case, it appears to have been agreed or at least acknowledged that, acting as an executor, *per se*, is not one of the acts that a notary may perform, that is, is legally entitled to perform, pursuant to s. 18 of the *Notaries Act*. However, the Board was clearly of the view that there was a sufficient connection between

Mr. Janzen's conduct with respect to the estate and his office of a notary to engage the Society's Principles for Ethical and Professional Conduct.

[33] Mr. Janzen relies on the decision of our Court of Appeal in *Li v. College of Pharmacists of British Columbia*, [1994] B.C.J. No. 1830, for the proposition that conduct with respect to matters outside of the scope of professional duties should not form the basis for disciplinary measures against a professional. However, in my view, *Li* is distinguishable from the facts of this case. In *Li*, Mr. Li's alleged misconduct did not demonstrate any lack of professional competence. Mr. Li was found by the chambers judge to simply have been rude. In this case, Mr. Janzen was found by the Board to have demonstrated an inability, or perhaps an unwillingness, to prioritize his affairs to undertake the steps necessary to rectify the matter that gave rise to the public complaints to the Society. The Board concluded that that inability gave rise to a concern with respect to his professional competence.

[34] In addition, I note that *Li* was a case in which the conduct in question was close to the line and on which the Court of Appeal was divided. At paragraph 19 of the majority reasons, Madam Justice Rowles points out that the respondent's position, that is Mr. Li's position, was that there must be a rational connection between the conduct complained of and professional matters. She went on to cite the complaint against Mr. Li, that is:

> . . . [he] treated six of his "patients in an extremely rude, condescending and . . . unreasonable manner".

[35] The majority concluded that such conduct could not give rise to any professional conduct issue.

[36] However, in this case, the Board was faced with conduct of Mr. Janzen which demonstrated an inability to conclude a professional engagement, albeit not one which involved duties set out in s. 18 of the *Act*, and an inability to or unwillingness to communicate properly with the Society with respect to that matter. In addition, Mr. Janzen showed an inability or unwillingness to follow the directions given to him by the Review Panel prior to the matter coming before the Board.

[37] The difficult question before me is whether there was a sufficient connection between Mr. Janzen's conduct and his status as a notary to permit the Board to reasonably reach the conclusion that it did; that is, that he was in breach of s. 4 of the Principles and his conduct did give rise to professional conduct issues.

[38] After considering the matter, I have concluded that the Board could reasonably have so concluded for the following reasons.

[39] Firstly, Mr. Janzen did accept that his conduct in 2010 in failing to answer communications from the Society with respect the estate was a valid basis for discipline. As I read the Board's decision, it concluded that Mr. Janzen's conduct in his dealings with the Society with respect the estate under consideration in 2014 was a continuation of a pattern of neglect that demonstrated a lack of professional competence. The Board, in my view quite properly, concluded that Mr. Janzen's continued neglect of his duties as an executor and his failure to follow the directions of the Review Panel with respect to rectifying consequences of his past neglect demonstrated a lack of professional competence.

[40] The fact that the services in question did not fall within s. 18 of the *Notaries Act* does not detract from the close connection between Mr. Janzen's status as a notary and the estate matter. Mr. Janzen had prepared Ms. Carlson's will and continued to use his notary company's office address and describe himself as a notary on all correspondence relating to the estate.

[41] I conclude that the Board was entitled to take these facts into account in deciding whether Mr. Janzen's actions demonstrated a lack of professional competence that would reflect badly on the notarial profession.

[42] In summary, I find that the conclusion of the Board that Mr. Janzen demonstrated a lack of professional competence falls within a reasonable range of outcomes in the circumstances and would not intervene in that decision.

Penalty

[43] I turn now to the question of penalty.

[44] Mr. Janzen submits that the 30-day suspension imposed by the Board was unduly harsh. In my view, a court should intervene with respect to a penalty only if it is satisfied that the tribunal failed to take a material matter into account or erred in principle. In this case, Mr. Janzen relies on authorities that have held that a suspension from practice should be reserved for only the most serious cases. I agree with that submission. However, I am also of the view that the Board is better placed than the court to assess the seriousness of Mr. Janzen's conduct. In this case, the Board found that Mr. Janzen had demonstrated a lack of professionalism that required that a significant penalty be imposed on him.

[45] I also note that the Board concluded that Mr. Janzen's conduct did give rise to a concern about his ability to function effectively in his current environment. The board clearly concluded that this was a serious matter and took into account that earlier less-stringent sanctions against Mr. Janzen had not succeeded in changing his behaviour.

[46] In all the circumstances, I do not find that the Board erred in principle or overlooked any material circumstance in imposing a 30-day suspension, and accordingly also dismiss the appeal as to penalty.

Disposition

[47] In summary, Mr. Janzen's appeal is dismissed.

[48] Anything further, gentlemen?

[49] MR. HARVEY: Just that I apply for costs in the normal way following the event.

[50] MR. SCHILDT: That is fine, My Lord.

[51] THE COURT: All right. Yes, this is not strictly speaking a judicial review, it is a contest between two parties, and in my view the Society is entitled to its costs on Scale B.

"Sewell J."