CITATION: Houghton v. Association of Ontario Land Surveyors, 2020 ONSC 863
DIVISIONAL COURT FILE NOs.: 033/19 and 277/19
DATE: 20200210

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BACKHOUSE, D.L. CORBETT, and MYERS JJ.

BETWEEN:	)	
WARD I. HOUGHTON	)	
Appellant	)	*Robert C. Taylor*, lawyer for the Appellant
– and –	)	
ASSOCIATION OF ONTARIO LAND SURVEYORS	)	
Respondent	)	*Robert J. Fenn*, for the Respondent
	)	**HEARD at Toronto:** December 16, 2019

REASONS FOR DECISION

F.L. Myers J.:

The Appeal

[1] Mr. Houghton appeals from the decision of the Discipline Committee of the Association of Ontario Land Surveyors dated December 18, 2018 holding that Mr. Houghton committed multiple acts of professional misconduct under the *Surveyors Act*, R.S.O. 1990, c. S.29 and associated regulations. He also appeals from the decision of the Discipline Committee dated May 21, 2019 imposing a penalty consisting of the following:

a. Immediate revocation of Mr. Houghton's licence to practise as a surveyor;

b. An order to pay $3,500 within 90 days to two complainants;

c. An order that he pay a fine of $5,000; and

d. An order that he pay the costs of the Association fixed in the amount of $250,000.

[2] The hearing before the Discipline Committee lasted 21 days as Mr. Houghton raised many procedural and "jurisdictional" objections under the statute. He raised many of the same issues on this appeal. For the reasons that follow, the appeal is dismissed.

Background

[3] The respondent is a statutory regulator governing the surveyors' profession in Ontario. It has approximately 600 members.

[4] Mr. Houghton has been a licenced surveyor since 1991. He is married with two children. He continues a family tradition as surveyors that dates back to the late 1880s. Mr. Houghton teaches surveying courses at a community college. His professional income has provided the sole means of financial support for his family.

[5] In March, 2015, the Registrar of the Association served three notices on Mr. Houghton accusing him of professional misconduct in relation to a number of clients. One allegation was that Mr. Houghton had counselled a client to make a complaint against a fellow surveyor for malicious reasons. The other complaints essentially related to Mr. Houghton's alleged practice of:

a. failing to quote a fee before signing the clients to an unlimited time and disbursements retainer agreement;

b. taking a modest monetary retainer at the outset of an assignment that the clients believed to be the full fee;

c. then claiming to have performed research resulting in additional fee charges incurred without the client's prior approval; and finally

d. charging the clients' credit cards with the unapproved fees pursuant to credit card authorizations that Mr. Houghton had obtained previously from each of the clients.

[6] The Association alleged further that the "research" for which Mr. Houghton charged his clients without approval was unnecessary and, in some cases, it was likely not even performed.

[7] In all, the Association alleged that the clients were left feeling that they had been abused by Mr. Houghton's practices.

[8] Many of the individual excess fee charges alleged were for somewhat modest amounts. But one was quite large. In any event, as much as each was an issue in its own right, each was also seen as an example of a broader, systemic issue with the way in which Mr. Houghton approached his professional obligations.

[9] I will deal with the facts as necessary as I deal with the issues raised in the appeal below.

Jurisdiction

[10] Mr. Houghton appeals pursuant to s.28 of the *Surveyors Act* that provides, in part:

> **Appeal to court**
>
> 28 (1) A party to proceedings before the Registration Committee or the Discipline Committee may appeal to the Divisional Court, in accordance with the rules of court, from the decision or order of the committee.
>
> * * *
>
> **Powers of court on appeal**
>
> (3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or may rescind the decision of the committee appealed from and may exercise all powers of the committee

> and may direct the committee to take any action which the committee may take and as the court considers proper, and for such purposes the court may substitute its opinion for that of the committee or the court may refer the matter back to the committee for rehearing in whole or in part, in accordance with such directions as the court considers proper.

Standard of review

[11] The court heard argument in this appeal just a few days prior to the release of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII). In that case, the Supreme Court revised and clarified the standard of review applicable when courts hear appeals from decisions of administrative tribunals.

[12] In *Vavilov*, the Supreme Court directed courts to adopt a standard of review with close regard to the statutory language used by the Legislature respecting the appeal. In this case, the statute provides that the parties have a right to appeal to this court. Moreover, the scope of the appeal provided by the Legislature in s. 28(3) of the statute is very wide. That is, all issues of fact, law, and mixed fact and law are open for review by this court. In addition, the court is granted broad remedial powers to take all actions as the tribunal was entitled to take or to send the matter back to the tribunal for reconsideration as the court deems proper.

[13] At para. 37 of the decision, *Vavilov* directs that the following standard of review applies:

> Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[14] The remedial authority of the court under s. 28(3) of the *Surveyors Act* is very similar to appellate authority under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that applies when an appellate court in Ontario hears an appeal from a lower court. While *Vavilov* recognizes that the Legislature is free to prescribe a different standard of review from that which applies in court proceedings, the Legislature has not done so in the *Surveyors Act*. Given that the scope of appeal is the same as in civil court cases and given the lack of a specifically set standard of review in the statute, it follows that the *Housen* prescription for appeals from a court is the appropriate standard of review in this case.

[15] Mr. Houghton's counsel submits that the court ought to develop a less deferential approach to the "palpable and overriding error" standard in statutory appeals from administrative decision makers. He argues that this is required to ensure that the standard of review on appeals remains distinct and less deferential than the "robust" reasonableness standard espoused by the Supreme Court of Canada. I do not agree. In *Vavilov*, as quoted above, the Supreme Court of Canada expressly directed that in the absence of a specific alternative provided by the Legislature, the *Housen v. Nikolaisen* standard of review applies to statutory appeals. The standard of review applies in accordance with its terms. It does not draw meaning or strength from a comparison to the reasonableness standard that may apply in other cases.

Mr. Houghton's Submissions

[16] While making numerous technical arguments that will be mentioned below, Mr. Houghton's overall submission is that he did nothing wrong and that none of the allegations, even if true, could amount to the type of grossly culpable wrongdoing necessary to base a finding of professional misconduct against him. Counsel was clear in his submissions, for example, that if reinstated, Mr. Houghton will continue to perform the research on Crown patents that the Discipline Committee expressly found to be unnecessary.[1]

---

[1] I note that counsel indicated that Mr. Houghton would recommend the research to his clients, presumably before incurring the cost of doing it, which is different than what he has been found to have been doing previously.

[17] The Registrar sent notices of the disciplinary proceedings to Mr. Houghton as a result of decisions made by the Council of the Association to refer the allegations to the Discipline Committee. Mr. Houghton submits that Council had no jurisdiction to make those referrals and they were therefore nullities. He argues that Council was deprived of jurisdiction because of the procedural route by which each of the counts alleged against him reached Council. Two of the complaints, he argued, had been dismissed by the Complaints Committee and could not be acted upon further as a matter of law. Two, he argued, had been improperly delegated by the Complaints Committee to an investigation conducted by the Registrar (which is discussed further in the next paragraph). The final two were referred to Council by the Complaints Committee, but Mr. Houghton submits that the Complaints Committee wrongfully provided written reasons for making its recommendation and in doing so tainted the subsequent proceedings before the Council.

[18] Mr. Houghton then notes that the Registrar appointed an Investigator to inquire into his practice under s.30 of the statute. He submits that the Registrar did not have lawful grounds to appoint the Investigator. He argues as well that the scope of the investigation was overbroad as the Registrar failed to identify the specific acts that were to be subject to investigation. Finally, he argued that the Investigator was biased as his ultimate report makes numerous derogatory statements against Mr. Houghton. The report, containing allegedly derogatory and incorrect statements, was then placed before Council without prior input from Mr. Houghton and formed the basis for some of the charges that were levelled against him.

[19] Mr. Houghton also argues that the Discipline Committee failed to mention that each of his clients received the services they sought. In addition, Mr. Houghton's counsel undertook to the Discipline Committee that Mr. Houghton would refund all of the amounts he had been paid by the complainant clients. He submitted that not only did he cure any failings in his billing practices, but the clients received real value for free.

[20] Mr. Houghton argued further that there was nothing wrong with working on an hourly fee basis without a fixed fee and that this was plainly set out in his written retainer agreement with each client.

[21] Mr. Houghton also challenges the severity of the penalty imposed by the Association. He argues that it was capital punishment for minor offences that were cured by his refunds to the clients and his agreement to

discontinue his use of his form of retainer agreement. He argues that the penalty is disproportionate in all the circumstances. He also submits that the Discipline Committee erred in law by treating his lack of remorse as an aggravating factor. Remorse can be a mitigating factor in sentence. But, Mr. Houghton argues, that the Discipline Committee wrongly used his spirited defence of the charges as an aggravating factor in setting a penalty.

[22] Mr. Houghton also challenges the propriety of the Discipline Committee's disapproval of his use of non-disclosure agreements obtained from complaining clients. Mr. Houghton acknowledges that in refunding fees to each client he required them to sign releases that not only released their rights against him but also required them to refrain from cooperating with the respondent Association except as compelled by law. This required the Association to obtain subpoenas to compel each of the clients to testify. Then, although testifying before the Discipline Committee under the compulsion of subpoenas, Mr. Houghton's counsel accused the clients of breaching their agreements, not being good to their word in effect, and he used the releases to try to dissuade the clients from providing their evidence. Counsel for Mr. Houghton argued that releases with non-disclosure terms are common and promote the policy of the law in favour of settlement of disputes.

Analysis

[23] I will review the issues raised by Mr. Houghton on the merits first and then on penalty.

The Findings of Professional Misconduct in the December 18, 2018 Decision

Jurisdiction of Council – Dismissed Complaints

[24] The Discipline Committee considered all of Mr. Houghton's arguments concerning the jurisdiction of Council.

[25] It found that the Complaints Committee had not finally dismissed the first two complaints as alleged. Rather, the Complaints Committee found that the complaints related to fee disputes were beyond its mandate. In any event, the Discipline Committee held that the Complaints Committee conducts a screening function only. It does not hold hearings or make decisions on evidence and submissions with final or preclusive effect.

[26] Mr. Houghton relies on a decision of this court in *Kupeyan v Royal College of Dental Surgeons Ontario,* 1982 CarswellOnt 938 (Div Ct). In that case, the court held that the failure of a discipline committee to carry out its authority in the manner required by the applicable regulatory scheme deprived the executive committee of "jurisdiction" to exercise its disciplinary powers under the statute. At para. 37 of the decision, the court expressed its concern that there be no doubt in the manner of proceeding when a professional person's standing, pecuniary interest, and right to practice the profession are at stake.

[27] At para. 143 of *Vavilov,* the Supreme Court of Canada noted that in the field of administrative law, the applicable legal principles have evolved. It counselled courts to be cautious relying on precedents that were written under a legal regime that no longer applies:

> On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force.

[28] The Court was speaking principally to differences between the current law and the standard applied under its 2008 decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII). Here, the decision relied upon by Mr. Houghton, *Kupeyan,* was decided in 1982 under the pre-*Dunsmuir* regime that applied after the Supreme Court of Canada's decision in *C.U.P.E. v. N.B. Liquor Corporation,* 1979 CanLII 23 (SCC).

[29] In 1982, the law still recognized a category of issues that were said to go to a tribunal's "jurisdiction" on which the court would intervene on a correctness standard. Moreover, the law at the time gave very substantial weight to concerns for a professional person's standing and correspondingly less weight to the public interest at stake in the regulatory scheme. Today, the Supreme Court of Canada has confirmed that there is no longer a recognized category of jurisdictional errors. See: *Vavilov,* at para. 77. In addition, while the law of procedural fairness remains concerned with the process applied during a hearing in which a person's livelihood is at stake, the delineation of a tribunal's authority is a question of statutory

interpretation. Since the late 1990s statutory interpretation in Canada has been approached under Prof. Driedger's modern rule that gives primacy to the statutory purpose as gleaned principally from the wording and legislative intention of an enactment rather than from professional status of a participant. See: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21.

[30] I can find no error in the analysis performed by the Discipline Committee concerning the assessment of the role and outcome of the Complaints Committee. It found that it could not rule on the fee aspects of the issues raised before it. It made no finding of fact or law that could have preclusive effect on any party. I can see no error in the interpretation performed by the Discipline Committee either of the Complaint's Committee's role or of its own entitlement to proceed on the issues referred to it.

The Investigation

[31] The Discipline Committee conducted a review of the statutory mandates of the Complaints Committee and the Registrar – both of whom have the statutory authority to investigate and refer matters to Council for discipline. The Discipline Committee held that the Complaints Committee had not delegated its decision-making authority to the Registrar for investigation. Rather, it concluded its review and invited the Registrar to consider an investigation to obtain further or better information. The Registrar then commenced an investigation pursuant to his powers under s. 30 of the statute. It was not a continuation of the Complaints Committee process. The result of the investigation was reported to the Registrar who provided it to Council himself. The Complaints Committee had no further involvement once it determined that it could not assess the fee issues before it.

[32] I agree with this analysis. The Complaints Committee made no finding on the two complaints referred back to the Registrar. Rather, it left the disciplinary issues in the hands of the Registrar if he was inclined to proceed further under his own statutory authority.

[33] In dealing with the investigation, the Discipline Committee noted that in order to appoint an Investigator under s. 30 of the statute, the Registrar was required to have reasonable and probable grounds to believe that a member may have committed an act or acts of professional misconduct or incompetence. The Registrar testified before the Discipline Committee for a

full day. At page 18 of its decision, the Discipline Committee discussed the Registrar's testimony concerning his grounds for appointing an Investigator:

> The Registrar became involved in this matter following two complaints, the Huras complaint and the Metcalfe complaint which were referred directly to him by the Complaints Committee. He looked at the history of the complaints and discipline history of the Member. As already noted above, he observed that from 2000 to 2013 there were a total of 15 complaints against the Member which significantly exceeded any other member. Two more complaints had been lodged since 2013. The Registrar referenced paragraph 39, page 12 of Exhibit 10. This is the chart that he had prepared for all Members of the Association during that time frame.
>
> Many of the complaints against this Member related to overcharging or unauthorized charges to client's credit cards, not advising clients that the work was going to cost more than they initially thought it was, contrary to the Code of Ethics and Standards of Practice. The Registrar testified that the Member had the most complaints of any Member from 2000 to 2015. This was in stark contrast to 80% of the Members who did not have any complaints. The Member with the second most complaints had a total of eight complaints. This was half the number of complaints attributed to this Member. That there were 15 or 17 complaints in and of itself was identified by the Registrar as grounds to look at the whole history of the Member's complaints. Many of the complaints were from members of the public and independent from one another. The Registrar noted an escalation in number of complaints from 2012 to 2015. He testified to the striking similarity of the nature of complaints.

[34] At p.19 of its decision, the Discipline Committee made the following findings:

> The Panel determined based on his testimony and the documentary evidence that the Registrar had reasonable and probable grounds to believe that the Member had committed an act of professional misconduct or incompetence. The complaint chart for all Members was strong evidence by which to measure the objective grounds of this belief. We found that the grounds upon which the Registrar formed the belief were ample on both subjective and objective grounds

[35] These findings were grounded in the evidence before the Discipline Committee. I see no palpable or overriding error in its assessment of the evidence before it.

[36] The Discipline Committee noted that the scope of the investigation ought to have been more focused. It expressly declined to consider two points referenced in the Investigator's report - one relating to conversations with other surveyors about Mr. Houghton and the other regarding a client in respect of whom the Discipline Committee dismissed the charges.

[37] The Investigator gave oral testimony before the Discipline Committee for three days. He was thoroughly cross-examined by Mr. Houghton's counsel on all of the points of concern including his alleged bias against Mr. Houghton. The Discipline Committee made the following findings at pp. 17 and 18 of its decision:

> We acknowledge that the parameters of the...investigation were broad and not as specifically defined as possible. However, there was no evidence that [the Investigator] was instructed by the Registrar – explicitly or implicitly – to go out and "dig up some dirt" on the Member. Quite the contrary, the Panel was inclined to view the Investigation as an independent review which served to safeguard the Member's rights and provide a counterbalance to the authority of the Registrar. During the course of the Hearing the Panel also accepted the Member's argument that it should not hear evidence on all of the files referenced in the [Investigator's] Report, and limited the evidence to the files referenced below, being only those specifically referenced in Schedules A to Exhibits 1, 2, and 3, the Notices of Hearing.
>
> The Panel does not accept that the [Investigator's] Appointment constituted an unrestrained investigation or a "fishing expedition".

[38] The Discipline Committee paid heed to the concerns expressed by Mr. Houghton's counsel as to the contents of the Investigator's report and the use that might properly be made of it. At p.20 of its decision, the Discipline Committee ruled:

> The Member submitted that the Report was severely flawed because it was not restricted to factual reporting and included [the Investigator's] opinion and in one case unsubstantiated rumour. The Panel was able to

> identify opinion and conjecture on the part of the Investigator and separate this from factual information.
>
> In the final analysis, the...Report did not materially add to the information which was already in the possession of the Registrar. It is noteworthy that the only previously unknown information brought to the Registrar's attention was the Mills case which was almost entirely based on information in the public domain through Small Claims Court documentation.
>
> The Panel accepts that the parameters of the Hearing are found in the Notices. Accordingly the determination of relevance of evidence is based on the allegations in the Notices. The extent to which the Investigation Report touched on matters outside the allegations factored in the weight accorded the Report and the evidence of the Investigator.
>
> We considered that the evidence of the Registrar and the Investigator provided the context or factual background by which the Member was referred to discipline. It is against this backdrop that the Panel considered the evidence of the civilian witnesses.

[39] That is, the Discipline Committee used the evidence of the Registrar and the Investigator to provide the background and assess Mr. Houghton's procedural and jurisdictional arguments. However, for its own assessment of the substance of the complaints, it heard evidence from witnesses directly. Any procedural shortcomings in the investigation process were the subject of evidence and argument before the Discipline Committee. The committee did not admit or rely on the Investigator's report as evidence concerning the charges levelled against Mr. Houghton.

Bias

[40] Concerning Mr. Houghton's allegation that the Investigator and the Complaints Committee exhibited bias against him, the Discipline Committee made the following findings at p.23 of its decision:

> With respect to [the Investigator] and the Complaints Committee, we saw no evidence of bias. However, even if there were such evidence, [the Investigator] was called as a witness where he was very comprehensively cross-examined by the Member's Counsel, including with respect to portions of his evidence suggesting, in Counsel's view, bias against the Member. The Panel gave little weight to any aspects of

> [the Investigator] evidence that was not otherwise supported by the documentary evidence otherwise before it. For example, [the Investigator's] comments about his personal way of doing things in comparison to the Member were of no assistance to the Panel and were disregarded. That does not, however, in the Panel's view, mean that none of the documentary evidence he collected can be heard and considered by the Panel.
>
> Similarly, it was the Panel's responsibility to assess the substance of the allegations based on the evidence before it, and without reference to any commentary or conclusions of the Complaints Committee.

[41] The panel therefore dismissed all of Mr. Houghton's jurisdictional challenges and then proceeded to review the merits of each allegation specifically.

[42] Bias is generally considered as a branch of natural justice or procedural fairness rather than as its own substantive basis for review. Once again there was evidence before the Discipline Committee on which it was entitled to rely to make its findings of fact and mixed fact and law. I see no palpable or overriding error in those findings. Moreover, I see no error of law in how it approached or decided the question of bias.

[43] Furthermore, in my view, the hearing before the Discipline Committee was a new proceeding before an unbiased adjudicator with full procedural rights afforded to Mr. Houghton. Unlike the case of *Newfoundland Telephone Co. v Nfld (Public Utilities Board)*, 1992 CarswellNfld 170, the Discipline Committee membership did not include the Registrar or Investigator whom Mr. Houghton alleges were biased. Rather, Mr. Houghton was able to air his concerns and make a full answer to the disciplinary complaints on fresh evidence before an independent tribunal. As such, I find that the *de novo* hearing before the Discipline Committee cured any and all of Mr. Houghton's concerns with the process issues that preceded it.

Unnecessary Research and Title Filings on Crown Patents

[44] Mr. Houghton argued that the Discipline Committee erred in law in finding that his research on Crown patents was unnecessary. He relied on a legal opinion obtained from the government to support his view. The Discipline Committee recited the evidence of both parties and found:

> There is no evidence Crown Patents are routinely registered against Land Titles PINs in Houghton's area of practice. Contrarily, it is exceedingly rare, if ever, done and unnecessary, as any effect is covered off with a standard statement about lands being subject to Section 44(1) of the Land Titles Act.
>
> Both by Section 44(1) of the Land Titles Act being noted on the PIN and accepted practice in the Ontario Land Titles system that Crown Patents are not registered on PINs in this area of practice it was not necessary for Houghton to have registered it. The effect of having a Crown Patent as a new registration on a PIN would potentially cloud title and draw unnecessary attention to it from any interested parties, lawyers or title searchers. This would be particularly detrimental given that Prespa Homes was in the process of applying for absolute title and that application was likely to result in a contested hearing.

[45] The Discipline Committee found that in proceeding as he did, to cloud his own client's title, Mr. Houghton violated s.33(2)(a) of Reg. 1026 under the *Surveyors Act* by failing to "conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession." This is a question of mixed fact and law and the Discipline Committee was applying the law to the facts as found on the evidence. As such, the court may intervene only if the committee made a palpable and overriding error. As the Discipline Committee had evidence before it to support the findings, I see no palpable or overriding error.

Improper Billing of Research Claimed to have been Performed by Mr. Houghton

[46] In dealing with the complaint that Mr. Houghton had billed $55,000 for unapproved research regarding a Crown patent, the Discipline Committee noted the absence of any real evidence in Mr. Houghton's files to show that he had actually conducted the research for which he billed. It discussed the evidence at p.28:

> The Panel was provided with little evidence to show this research was ever done and no evidence was presented of the research documents, plans, photographs or other material that it would have generated. Houghton provided an excerpt from a calendar and a calculation of estimated hours (Exhibit 13, Vol.2 Tab 105) however no calendar for the complete dates covering this research was provided nor were any

> invoices for copy charges, parking, hotels or other charges that were said to be incurred. Oral evidence given by Sherifi of Prespa Homes (April 10, 2018) was compelling in convincing the panel that Houghton did not advise Sherifi of the proposed research nor seek his approval. Houghton claims his instructions came from Prespa Homes/Sherifi's lawyers, and even if this were true, it doesn't absolve Houghton of his responsibility to keep his client informed. There is no evidence of a direction from Prespa Homes/Sherifi (written or oral) to Houghton for Houghton to take his instructions from Prespa's/Sherifi's agents, nor is there documented evidence of the numerous meetings with Prespa's/Sherifi's lawyers as claimed by Houghton. Contrarily a letter from Prespa's/Sherifi's lawyer, Don Ferguson, refers to participation by Houghton of 1.5 to 2 hours office time and approximately 2 hours of evidence at the hearing (Exhibit 6, Vol.3, Appendix 4, p.0866). The research claimed as completed by Houghton resulted in an invoice of over $55,000 which, given the large amount, would suggest a strong obligation on Mr. Houghton's part to document the research and make clear to and obtain written permission from his client before doing so. To the contrary, the Panel heard evidence that the billable hours the Member charged as part of the $55,000 invoice were based on a weekly estimate extrapolated over time and the only written documentation was sparse notations and coloured highlights on a paper calendar. Clearly this is not adequate documentation to support an invoice for this amount, especially since the Member indicated that his retainer agreement was established to bill by the hour. The supporting documentation on which he relies falls far below the standard expected of a professional serving the public

[47] The Discipline Committee made the following finding on this point at p.29 of its decision:

> The Panel was not provided with sufficient evidence to persuade it that the research in question for which Prespa Homes was invoiced had been done in whole or in part for another client.
>
> * * *
>
> ...We do find however that the other allegations have been proven: specifically that Houghton did not advise Prespa/Sherifi or seek permission from it to conduct additional research; that such research was in any case necessary or required, and that Houghton was well

aware of what he perceived to be potential title issues in this area prior to conducting the survey. As such we agree that Houghton has contravened Sections 33(2)(a) and (e) of Regulation 1026.

Section 33(2)(a) is already set out above. Sections 33(2)(e) is as follows:

> The code of ethics of the Association requires that every member shall:
>
> (e) ensure that clients are aware of the complexity of a project and the nature of fees for service.

[48] A professional who bills a client for hundreds of hours of research ought to be able to produce at least a single piece of paper evidencing the substance of the work performed. The Discipline Committee's findings were grounded in evidence properly before it. I see no palpable error in its conclusions.

Malicious Injury to another Surveyor

[49] Subsection 35(15) of the regulation defines professional misconduct to include:

> Making a false or malicious statement or publication that injures the professional reputation, prospects or the practice of professional surveying of another member.

[50] Mr. Houghton submits that the Discipline Committee made no specific findings that he made a false or malicious statement or that if he did so, it caused actual injury to the other surveyor.

[51] The Discipline Committee accepted Mr. Sherifi's evidence that Mr. Houghton approached him and told him that another surveyor had registered a survey reference plan on a neighbouring piece of land that "killed" the client's proposed condominium development. Mr. Houghton then persuaded Mr. Sherifi to make a complaint about the competitor to the Association. Mr. Houghton drafted the letter of complaint for the client. The Discipline Committee continued:

> Sherifi's testimony of the [competitor] complaint was detailed and consistent with what he wrote to the Registrar and what he told [the Investigator]. Sherifi testified that the Member had attended Prespa Homes' office and stood over him while he signed the letter of complaint

> on his letterhead. Sherifi came to regret his involvement in the [competitor] complaint and concluded that he had been manipulated by the Member. Late in 2012 Sherifi attended the office of [the competitor] to apologize. Sherifi expressed to the Panel his belief the Member wanted to eliminate a competitor. From his demeanour and tone of voice, the Panel observed that Sherifi continued to be distressed about his role in the [competitor] complaint.

[52] The Discipline Committee found expressly that Mr. Houghton's "purpose in urging Sherifi to file the complaint was to injure [the competitor's] professional reputation and his practice of professional surveying." That is a finding of fact of malice. On that basis it found Mr. Houghton to have committed a breach of s.35(15) of the regulation.

[53] Mr. Houghton submits that the Discipline Committee erred in failing to find expressly that his competitor had suffered tangible injury under s. 35(15). I see no error in the committee's findings. *Vavilov*, at para. 91, confirms that it remains the law that a tribunal and a court need not set out absolutely every single finding made to reach a result. Here it is perfectly obvious that where one surveyor is found to have acted expressly to injure another surveyor's reputation by having a client file a groundless complaint and the client did as he was urged to do, injury is self-evident. It was the very injury that Mr. Houghton intended to inflict as much or as little as that might have been.

Billing Mr. Huras

[54] In respect of another client, the Discipline Committee found that Mr. Houghton was retained to provide a survey and provided only an unsigned draft. He had taken a retainer of $2,500 and billed the client an additional approximately $1,500 for extra research. He also subcontracted some of the work on the project to another surveyor without telling the client. Mr. Houghton then treated the other surveyor's invoice as a disbursement that he doubled in his billing to the client.

[55] Mr. Houghton argued that there is no prohibition against subcontracting work. Moreover, he says that he refused to complete the sketch as requested because the client refused to pay his full fee.

[56] The Discipline Committee discussed the facts as follows:

> Houghton's practice of doubling the disbursement amounts does not maintain public trust and confidence in the profession. A disbursement, by definition, is an amount paid for a specific expenditure for which reimbursement from the client is sought. The disbursements in question were for Benedict Raithby's field vehicle, field equipment and office equipment: none of Houghton + Houghton's equipment or vehicle was used. The concept of disbursements being a profit centre is contrary to maintaining the public trust and confidence in the profession.
>
> Mr. Huras testified he believed Houghton had taken advantage of him.

[57] On p.35 of the decision, the Discipline Committee concluded:

> ...Section 35 (12) specified that professional misconduct also includes charging a fee for professional surveying services not performed or knowingly submitting a false or misleading estimate, account or charge for professional surveying services rendered to a client.
>
> Houghton invoiced his client for disbursements that were not his expenditures; they were Benedict Raithby disbursements. Houghton simply took the disbursement total from Benedict Raithby and doubled it.
>
> The Panel concludes that the AOLS has established that Houghton is guilty of professional misconduct for his conduct in this regard.

[58] While Mr. Houghton's retainer agreement did not prohibit the practice of subcontracting work, it also did not notify the client that the practice might be undertaken. I cannot see a basis why it was not open to the Discipline Committee to find that professionals should be expected to notify the client who retains them if the work is to be performed by another professional whom the client did not retain. Moreover, the practices of doubling a professional fee or any disbursement without disclosure is dishonest on its face. A disbursement is money spent by a professional on goods or services on the client's behalf. Mr. Houghton billed the client for money that he said he spent on the client's behalf when he actually only spent 50% of the amount that he claimed. The Discipline Committee had many stronger words available to it that could have been properly applied to such a practice. I see no error and much restraint in its findings.

Metcalfe

[59] Numerous allegations were made against Mr. Houghton regarding a small project that he undertook for Mr. & Mrs. Metcalfe. He agreed to provide a survey for use by the Metcalfes concerning their application for a minor variance. A $2,500 retainer was agreed upon. But the Metcalfes did not provide a credit card authorization to Mr. Houghton.

[60] Mr. Houghton prepared a draft survey and then asked to do additional research. The Metcalfes declined and asked for their survey. Mr. Houghton refused to provide a final version. He gave an estimate for an additional $50,000 of work. The Metcalfes did not pay the $2,500 as agreed and made use of the draft survey in their municipal application.

[61] Mr. Houghton argued that he was entitled to withhold the final survey as the Metcalfes had not paid their bill.

[62] The Discipline Committee made the following findings:

> While there does not appear to be deliberate intent to mislead the Metcalfes on the fees required to complete the SRPR there was no indication on the part of Houghton that he prepared a detailed cost estimate for the work but instead provided a ball park number. Mr. Houghton failed to make suitable disclosure to his client on the possible difficulties and increased fees he may encounter given his prior work experience in the subject and adjoining County.
>
> There was no evidence provided to the Panel of any indication on the part of Houghton that he made timely and complete disclosure to his client prior to or during the preparation of the survey. Evidence provided to the Panel indicted that the bulk of the survey work was subcontracted to another firm thus leaving Mr. Houghton somewhat removed from the details of the survey and not in direct supervision of the work being undertaken. The subcontracting of work was not disclosed to the client.
>
> It is the duty and responsibility of the surveyor as a professional to prepare detailed estimates and provide accurate and complete disclosure so that a client is aware and understands the nature and associated costs of survey work to be undertaken on their behalf. Should the nature and cost of the survey change once the work is underway it is the responsibility of the managing surveyor to be aware

> of the impact of the changes and advise his client at the first opportunity.
>
> Based on this evidence, the Panel concludes that the allegation of professional misconduct is proven.

[63] The Discipline Committee's findings are based on evidence properly before it. It made no palpable error of fact and mixed fact and law nor any error of law.

Sloan

[64] A similar complaint was advanced by Mr. Sloan. The Discipline Committee reviewed the evidence before it and concluded as follows:

> As with almost all of the complainants who appeared before the Panel, when Sloan signed the retainer agreement he believed that he was agreeing to have reasonably straightforward survey work done for a maximum of $2,500. He said that he thought that if it turned out to be more complex than anticipated, and that the work would therefore be more costly, that he would be notified and there would be a discussion about how to proceed. Houghton, on the other hand, points to the wording in the retainer agreement, and says that Sloan, like the others, are competent adults who signed it: on its straight wording it says that the $2,500 is a deposit on account of fees and disbursements to be incurred, meaning there was no upper limit to what might be charged.
>
> The scope of work is identified solely as a "Survey of the [identified] lands". As the work progressed, there was no contact with Sloan by Houghton or anyone else regarding the complexity of the work: he was simply billed without explanation after the work was completed for, in total, about 3 times the $2,500 Sloan expected would be the maximum. Houghton's evidence was that there were some unexpected grading issues.
>
> In the Panel's view, Houghton provided a one sided and self-serving retainer agreement for signature without fully explaining the nature of the agreement and the extent of work to be undertaken.
>
> Specifically, Houghton failed to advise Sloan in advance of any significant issues or difficulties as they arose. By failing to advise Sloan of the escalating fees incurred as the project progressed Sloan was

> thereby denied the opportunity to understand the level of additional work or complexity of the work and was denied the opportunity to stop the work. Sloan was misled by Houghton's failure to provide an adequate explanation, in advance, of the complexity of the work and the fees that would result.
>
> If the work turned out to be more complex than anticipated, Houghton had an obligation to ensure that Sloan was aware of the complexity of the work and the nature of the resulting fees for providing the surveying services: s. 33(2)(e) of the Code of Ethics as set out in Regulation 1026. A failure to comply with the Code of Ethics is professional misconduct pursuant to section 35.3 of Regulation 1026.

[65] These are findings of fact and mixed fact and law based on the evidence that was adduced before the committee. There is no palpable or overriding error.

Mr. Salhani

[66] Mr. Salhani wanted Mr. Houghton to sketch a proposed condominium onto an older survey already in Mr. Houghton's files. Mr. Houghton refused to provide a quotation. He had Mr. Salhani's agent sign his normal time and materials retainer agreement and provide a $500 deposit. To protect against further charges, Mr. Salhani had the following specifically noted in the retainer agreement:

> I am requesting a sketch (draft) of a survey that is in your possession changing the right of way and building envelope: as per [the agent's] instruction. At this point there is no need for any opinion on title or further work required until a review by the municipality of the draft is complete."

[67] In addition to producing the sketch requested, Mr. Houghton pulled seven additional adjoining parcel registers and billed Mr. Salhani's credit card for this work. There was disputed evidence between the parties as to whether Mr. Salhani's agent requested further work be performed on the sketch and about the content of a meeting between Mr. Houghton and Mr. Salhani. No confirmatory documentary evidence or contemporaneous notes were produced by Mr. Houghton.

[68] The Discipline Committee found that Mr. Houghton had failed to adequately advise Mr. Salhani concerning the scope of the work that he proposed to undertake. The Discipline Committee also found that Mr. Houghton had misled Mr. Salhani about fees:

> Houghton provided Salhani with an estimate of 2-3 hours of CAD work, which provided Salhani with an approximate financial budget based on the hourly rates listed on the retainer. This budget was comparable to the $500.00 retainer fee. The Panel's review of the evidence suggests that Houghton misled the client by providing a retainer fee that was essentially equivalent to the estimated cost, but then refused to recognize it as a quote.
>
> Houghton maintained that all work that he deemed relatable to the retainer would be billed hourly. This created an opportunity for continuous billing and was a clear misrepresentation to Salhani of what the expected costs would be.
>
> When additional work was requested more than two months after the original sketch had been provided, Houghton did not seek authorization from Salhani, however, he did continue to bill Salhani hourly. The panel believes Houghton was aware the scope had increased beyond the original (sketch) contract work, and that he decided to take advantage of what he believed to be an open-ended unlimited retainer, rather than obtaining further approval from his client.
>
> The Panel also concludes that Houghton misrepresented his public road dedication suggestion as an opinion on title, allowing him to charge Salhani his higher "title opinion" hourly rate. In the Panel's opinion, that planning advice, on the evidence in this case, does not constitute title opinion services.

[69] The Discipline Committee went on to find that Mr. Houghton had billed Mr. Salhani's credit card for work beyond the sketch to which the retainer agreement had been limited. It ultimately concluded as follows:

> Houghton disregarded the client's express instructions and instead, in the opinion of the Panel, conducted himself in a way that was solely in his interests, and not in the interests of the client. Members of the public seek the expertise of surveyors to guide their projects towards the best possible outcome. Instead Houghton took advantage of his

> position by, for example, claiming his suggestion for a subdivision plan constituted an "opinion on title." He repeatedly sought instructions to start work on the first application reference plan, even though the municipality's approval for the condominium had not yet been received. In the Panel's view, it appears on the evidence that Houghton was trying to increase his billable hours and solicit more work, neither of which was to the benefit of the client, at this early stage in the project.

[70] These too are findings of fact and mixed fact and law based on the evidence that was adduced before the committee. There is no palpable or overriding error.

The Penalty Assessed in the May 21, 2019 Decision

[71] At the penalty hearing, the Association sought the revocation of Mr. Houghton's licence. Its fallback was to ask that Mr. Houghton be suspended from practice for two years and that he thereafter be severely restricted in his practice for another four years. Mr. Houghton, by contrast, sought a reprimand, payment of $3,500 to a client, and an order for remediation – that he be required to take courses in any areas in which his knowledge was deficient.

[72] The Discipline Committee held that its primary obligation to protect the public required revocation of Mr. Houghton's licence. The Discipline Committee balanced several different issues to arrive at the appropriate penalties. It considered: Mr. Houghton's likelihood to reoffend, the nature of the harm that he inflicted on clients and the profession, his efforts to silence witnesses, and, ultimately, his lack of accountability for his actions.

Likelihood to Reoffend

[73] The Discipline Committee noted that Mr. Houghton's prior disciplinary record included a charge, to which he had pleaded guilty, in which he had sought to induce a competitor surveyor to agree with him to rig a bidding process for a piece of work. The Discipline Committee noted that this scheme involved overtly dishonest behaviour by Mr. Houghton. It drew an analogy to the cases before it and concluded:

> Both cases share a common denominator of attempting to inflate and collect fees charged to the public without properly supervising the work and claiming it to be his own. The Member showed no recognition that

> his business practices were objectionable beyond saying that he had stopped using the retainer agreement and credit card authorization in question and would agree to take courses necessary to correct any 'gaps' in his client management practices.

[74] Next, the Discipline Committee noted some common themes among the charges. First, it looked at how Mr. Houghton dealt with clients in some of the cases:

> The variation on this theme is the "chicken little" scare tactic. In this scheme the client is warned that they may not own their property because it is situated on the bed of Lake Erie. The solution to the client's apparent problem is to retain the Member who will conduct hundreds of hours of research. Exorbitant fees were quoted to clients (the Metcalfe's for example) who were advised to make a claim to title insurance. The basic flaw in this scenario is that the presumed owner of the land – the Crown- did not at any time assert a claim. Some of these properties have been in existence for more than a hundred years. Giving the Member the benefit of the doubt that an issue existed, the surveyors on the Panel agreed that a statement on the Land Transfer Document "subject to Crown reserve" could have addressed the issue. They saw no justification for a court application. In the Huras case, for example the 'problem' identified by the Member was solved by another OLS, who was able to provide a survey to Mr. Huras.

[75] The Discipline Committee then considered the type of work that Mr. Houghton sought to sell to his clients:

> Additionally, in the Panel's view, the Member repeatedly focused on providing 'quality of title' opinions rather than 'quantity of title' advice. While there may be a fine line between the two when it comes to matters of accretion, erosion, and reliction, for example, in the Panel's view the Member went beyond his duty to opine on extent of title to opine on matters that were outside of his responsibilities. The role of the surveyor is to demark the limits of those 'quality of title' rights, not their meaning. *He showed no willingness to restrict his practice in future to extent of title issues. In the Panel's opinion he is likely to continue to reoffend in this fashion.* [Emphasis added.]

[76] The Discipline Committee concluded that on the facts, Mr. Houghton presented a continued risk of reoffending. I see no errors of fact, mixed fact and law, or law in these findings.

Harm to Clients and the Public Interest

[77] The Discipline Committee discussed the evidence of harm Mr. Houghton inflicted on his clients, including emotional harm, and made the following findings:

> It is difficult to place a dollar value on the harm inflicted on these people. Many expressed distrust of land surveyors and avoidance of retaining these services in the future. There has been significant damage to the reputation of the profession as a whole and to the public confidence in the profession.

[78] These are findings of fact on the evidence. I see no palpable or overriding errors in them.

Mr. Houghton's Attempts to Silence Witnesses

[79] There is nothing wrong with buying a release to settle a dispute. There is generally nothing wrong with seeking nondisclosure terms as well. However, Mr. Houghton's counsel produced no precedent for a nondisclosure agreement that explicitly prevented clients from participating in known, existing, and identified regulatory proceedings except as required by law. Professionals are no more entitled to buy the silence of clients in regulatory proceedings than those charged with criminal offences are entitled to buy witnesses' silence. Mr. Houghton's efforts to do so obstructed the public interest in regulating the profession under the statute. His efforts brought the following commentary from the Discipline Committee:

> The Panel concluded that the NDAs proffered to the victims at the courthouse door appear to be an attempt to silence them and thwart the discipline process, or at least make it more difficult. On their face, the Releases prevented the Association from questioning the witnesses about their complaints unless and until they were served with summonses.

[80] This reading of the NDAs was available to the Discipline Committee: indeed, it was the reading placed upon these agreements by Mr. Houghton's counsel, who suggested to the witnesses that they were breaching their agreements by testifying under summons in the discipline proceedings

Mr. Houghton's Lack of Accountability

[81] The Discipline Panel correctly instructed itself that a member is entitled to defend himself and that doing so is not an aggravating factor for the purpose of assessing penalty. However, it expressed an overriding concern as follows:

> The caselaw provided to the Panel makes it clear that remorse can be considered a mitigating factor in assessing the appropriate penalty, but a lack of remorse cannot be considered an aggravating factor. The Panel accepts this principle.
>
> However, the Member's perception of his conduct goes beyond a lack of remorse and continues to be a concern regarding his risk of reoffending and the necessity of protecting the public from his business practices. The Member continues to maintain that he has done very little that was wrong and denies that he harmed his clients. Frequently, the Member presented himself as a victim at the hands of his clients in that he did not receive compensation for all the work he did. The Member disregarded the fact that all of these clients received little or no benefit from the Member or that his involvement was somewhat detrimental to their interests.

[82] I have commented above on counsel's repetition before the court of Mr. Houghton's intention to continue to at least recommend research that the Discipline Committee has found to be unnecessary. He also submitted that the clients received the services they sought despite the Discipline Committee's express findings to the contrary. Mr. Houghton asked for a minor penalty in light of what he saw as minor billing issues. He relied before us on the apparent sophistication of his clients and on the wording of his retainer agreement as justification for the multitude of misconduct identified by the Discipline Committee. He had no explanation for his routine failure to provide accurate fee estimates to clients in advance, his failure to explain the

scope of the work being undertaken in advance, his billing for work that he could not show that he performed, his billing for work in excess of the scope of the project without advising the client, his subcontracting work to others without disclosure to the client, and his doubling of the subcontractor's disbursements in his own invoices.

[83] The Discipline Committee did not use the fact that Mr. Houghton provided a defence of the charges as an aggravating factor in sentencing. Rather, it found that throughout the proceedings, he demonstrated a profound lack of understanding of ethical expectations and conduct, which continued during the penalty phase of the hearing.

[84] One can readily argue that "I do not believe that I did wrong" and then, on conviction, say "Now that I have been told that it was wrong, I will not do it again." While Mr. Houghton says he has discontinued his use of his retainer agreement, the Discipline Committee made an express finding that he was evasive when questioned about the number of clients that he has served since doing so.

[85] The Discipline Committee considered appropriate sentencing principles including the likelihood of harm to the public and the need for specific and general deterrence. It was entitled to include in its consideration Mr. Houghton's lack of recognition and lack of accountability for his actions as factors that weighed on the risk of repetition, the need to protect the public, and deterrence. It ultimately made the following findings:

> The Member's perception of his conduct also raises concern to the Panel that he is a high risk of reoffending, and that his continued registration is a risk to the public and the reputation of the profession.
>
> **DENUNCIATION AND DETERENCE**
>
> This penalty needs to send a clear message to the membership that the conduct of the Member falls far below that which is expected of a member of a regulated profession. There also needs to be a message to the public and future clients that if an OLS behaves discreditably that the Association will take serious measures.

PENALTY OF REVOCATION

> Regrettably, in all the circumstances of this case, we have come to the conclusion that the Member is fundamentally dishonest, unethical and unprofessional and cannot be governed in a way that would protect the public interest. His licence should be revoked.

[86] While it is no doubt true that this small profession does not have precedents for this penalty, it also has no precedent for a professional who so pervasively behaves so unethically. As a small profession, the Association is a volunteer body with few resources to police its members. Mr. Houghton points to cases of acts of misconduct in other professions that have been penalized by lesser punishments. In his judgment these other acts were more blameworthy than his misconduct. In light of the findings of fact against Mr. Houghton of overt dishonesty and ungovernability, I cannot agree with his assessment of relative culpability. I can find no error in the statement of the relevant principles, nor in the application of those principles to the facts.

[87] While the costs award below was objectively significant, the length of the hearing was largely driven by Mr. Houghton's approach to challenge the proceedings with multiple days of motions and allegations against Association personnel. The costs were but a fraction of the actual legal fees and disbursements incurred by the Association in prosecuting the proceedings. Costs are highly discretionary and are subject to review only if there is an error in principle or they are plainly wrong. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), at para. 27. Neither ground applies here.

[88] Therefore, the appeal is dismissed.

[89] The parties agreed that costs of the appeal fixed at $12,500 should be ordered in favour of the successful party. Therefore Mr. Houghton will pay costs to the Association fixed at $12,500.

F.L. Myers J.

I agree

Backhouse J.

I agree

D.L. Corbett J.

Release Date: February 10 2020

CITATION: Houghton v. Association of Ontario Land Surveyors, 2020 ONSC 863
DIVISIONAL COURT FILE NOs.: 033/19 and 277/19
DATE: 20200210

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BACKHOUSE, D.L. CORBETT, and MYERS JJ.

BETWEEN:

WARD I. HOUGHTON

Appellant

– and –

ASSOCIATION OF ONTARIO LAND SURVEYORS

Respondent

REASONS FOR DECISION

F.L. Myers J.

Released: February 10, 2020