

Date: 20010917  
Docket: S. H. No. 167828

**IN THE SUPREME COURT OF NOVA SCOTIA**  
[Cite: Pouliot v. Nova Scotia Real Estate Appraisers Association, 2001 NSSC 132]

**BETWEEN:**

**ANDRE POULIOT and PHILIP JEFFERSON**

**APPLICANTS**

**- and -**

**NOVA SCOTIA REAL ESTATE APPRAISERS ASSOCIATION**

**RESPONDENT**

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**D E C I S I O N**

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**HEARD:** At Halifax, Nova Scotia, before the Honourable Justice C. Richard Coughlan on May 17th, 2001

**DATE OF  
DECISION:** September 17th, 2001

**COUNSEL:** Robert L. Barnes, Q.C. and Meaghan Beaton (Law Student),  
for the Applicants  
Graham D. Walker, Q.C., for the Respondent

**COUGHLAN, J.:**

- [1] Andre Pouliot and Philip Jefferson applied to be members of the Nova Scotia Real Estate Appraisers Association. Their applications were denied by the Association's Committee of Examiners. They appealed the decision to the Association's Board of Directors. The Board of Directors directed the Committee of Examiners to register them as regular members of the Association on certain terms and conditions. Messrs. Pouliot and Jefferson now seek a declaration that By-law XIX 4(a) of the Nova Scotia Real Estate Appraisers Association By-laws is *ultra vires* the authority of the powers of the Nova Scotia Real Estate Appraisers Association to make by-laws pursuant to s. 7 of the **Nova Scotia Real Estate Appraisers Act**, S.N.S. 1998 c. 25 and an order in the nature of *certiorari* quashing directions 3 and 4 of the decision of the Board of Directors dated August 14th, 2000, which impose additional qualifications and conditions on their enrollment as members of the Association.

## **FACTS**

[2] The facts are as follows:

- Both applicants are employed with the firm of Turner Drake and Partners
  - Mr. Pouliot working toward being qualified as a real estate appraiser and Mr. Jefferson a certified real estate appraiser.
- Both are enrolled in the four year Urban Land Economics Program offered through the University of British Columbia.
- Both applied for membership in the Association pursuant to s. 15 of the **Act** - Mr. Jefferson on February 10th, 2000 and Mr. Pouliot on February 11th, 2000.
- Approximately March 10th, 2000, they were informed their applications for membership had been denied by the Committee of Examiners.
- On or about March 23rd, 2000, the applicants' solicitor advised the Committee of Examiners that the applicants were appealing the Committee's decision to the Association's Board of Directors.
- The appeals were heard on August 2nd, 2000 and the Board gave its decision on August 14th, 2000.
- The applicants have brought this application for relief as set out above.

## **STATUTORY FRAMEWORK**

[3] The **Real Estate Appraisers Act** sets out the statutory framework. The objects of the Association provide wide powers to regulate the practice of real estate appraisal.

5 The objects of the Association are to

- (a) regulate the practice of real estate appraisal and govern its members in accordance with this Act and the by-laws, in order to serve and protect the public interest;
- (b) establish, promote and advance the interests of persons engaged in the practice of real estate appraisal;
- (c) establish, maintain and develop standards of knowledge, skill and efficiency for the practice of real estate appraisal;
- (d) establish, maintain, develop and enforce standards of professional ethics for its members;

- (e) promote public awareness of the role of the Association and real estate appraisal, and communicate and co-operate with other professional associations in order to serve and protect the public interest;
- (f) encourage studies in real estate appraisal and provide assistance for special studies and research; and
- (g) administer this Act and perform such duties and exercise such powers as are imposed or conferred on the Association by this or any other Act.

[4] The Association has given extensive authority to regulate the practice, including the type of education and practical experience required before being registered, mandatory continuing education and establishing categories of membership and prescribing conditions of membership. The Association may also make by-laws that are not inconsistent with the **Act**.

[5] The role of the Committee of Examiners in registering a member of the Association is set out in s. 15:

- 15
- (1) Every person who is approved by the Committee of Examiners for registration in accordance with the by-laws or in accordance with subsection 17(2) is authorized to practise real estate appraisal in the Province and every person who is not so approved but who is a member of the Association pursuant to clause 3(2)(a) is authorized to practice real estate appraisal in the Province subject to such restrictions as to practice as apply to that person's registration and designation referred to in clause 3(2)(a) unless further changed by by-law.
  - (2) The Committee of Examiners may approve for registration a person of good character who
    - (a) has passed examinations prescribed by or acceptable to the Committee and, in the opinion of the Committee, has sufficient experience in real estate appraisal to qualify for registration pursuant to this Act;
    - (b) is a registered real estate appraiser in good standing in another province; or

- (c) is the holder of the designation of Market Value Appraiser - Residential from the Canadian Real Estate Association.

and can provide proof of professional liability insurance or, in lieu thereof, a bond of indemnity in an amount prescribed by the by-laws and has filed with the Committee proof of qualifications as prescribed by its by-laws.

....

[6] Section 16 provides for appeal from a refusal of the Committee of Examiners to approve a person for registration:

- 16 (1) Where the Committee of Examiners refuses to approve a person for registration that person may appeal to the Board, in writing, within thirty days of receipt of notification of the decision of the Committee.
- (2) Where an appeal is taken pursuant to subsection (1), the Board, after considering all relevant factors, may
  - (a) direct that the person who took the appeal be registered;
  - (b) refer the matter back to the Committee of Examiners for reconsideration with such directions as the Board considers necessary; or
  - (c) dismiss the appeal and uphold the decision of the Committee.
- (3) No member of the Board who is also a member of the Committee of Examiners shall participate in the hearing or consideration of an appeal taken pursuant to this Section.

[7] Section 3(2)(b) of the **Act** provides that a person who becomes a member pursuant to the by-laws is part of the Association.

[8] In the by-laws made pursuant to the **Act** “member” means “regular member” and “associate member” as defined under Part III of subparas. (a) and (b) of these by-laws.

[9] Classes of membership for fees are set out in By-law III Membership as follows:

- 4. For the purpose of fees payable under subsection 19(1) of the Act, members shall be divided into two classes:

- a) Regular Member, being a person who is required to register under the Act to engage in the practice of real estate appraisal. Such person shall pay the annual fees and annual registration fees, and shall have the right to exercise full privileges in the Association;
- b) Associate Member, being a person who is qualified to engage in the practice of real estate appraisal but who is not required to register under the Act to engage in practice or does not intend to engage in practice. Such person shall pay only the annual fees, and shall have the right to exercise full voting privileges, the right to hold office, and to engage in the affairs of the Association.

**[10] By-law XIX deals with the Committee of Examiners:**

The Board shall appoint five members of the Committee of Examiners in accordance with Section 14(1) of the Act. The majority of the members of the Committee of Examiners shall be Regular Members. Any committee set for any hearing of the Committee of Examiners shall comprise a majority of Regular Members. These members of the Committee of Examiners shall constitute a quorum. Members are appointed for a term of one year which may be renewed.

These by-laws apply, where indicated, to all persons seeking registration under Section 15 of the Act.

**Application for Registration Under Subsection 15(2) of the Act**

1. A person applying for registration under clause 15(2)(a) of the Act shall provide to the Committee:
  - (a) completed Application for Registration to Practice Form as provided by the Association.
  - (b) confirmation of the person's designation from the Appraisal Institute of Canada (Institute) if applicable
  - (c) proof of membership in good standing in the Institute if applicable
  - (d) confirmation that the applicant has the required professional liability insurance
2. A person applying for registration under clause 15(2)(a) of the Act and who does not have the designation of AACI or CRA shall provide to the Committee:

- (a) completed Application for Registration to Practice Form as provided by the Association;
- (b) confirmation of the person's designation from the granting institution;
- (c) proof of membership in good standing from the granting institution;
- (d) confirmation that the applicant has the required professional liability insurance, or bond of indemnity;
- (e) in cases where the Committee is required by paragraphs 15(2)(a) of the Act to consider equivalent designations, written proof satisfactory to the Committee of the courses successfully completed by the person.

....

- 4. For the purpose of clause 15(2)(a) and 15(2)(b) of the Act:
  - (a) Any person enrolled as a candidate member of an Institute or MVA program; or equivalent program as determined by the Committee may be registered and may practice as a candidate (student). All reports prepared by candidates shall be cosigned by a registered member of the Association in the relevant category of membership.
- 5. For the purpose of clause 15(2)(a) of the Act
  - (a) the prescribed examinations are to be taken from the then current academic requirement of the Institute for qualification for designation, or the equivalent, as determined by the Committee;
  - (b) sufficient experience in real estate appraisal shall be subject to the determination of the Committee, but in no event be less than three full years experience in the last five years immediately prior to the time the person applies to be registered.
- 6. In prescribing what examinations a person shall take for the purpose of clause 15(2)(a) of the Act, the Committee may give credit for the same or equivalent courses the person has already successfully completed.

### **COMMITTEE OF EXAMINERS**

[11] The Committee of Examiners denied the applications for registration. It held there is no provision for the class of “candidate member” either in the **Act** or the By-laws. The membership categories are regular member and associate member. The Committee referred to By-law XIX 4(a) and held the applicants do not hold an appraisal designation to be candidate members in an appraisal organization which sponsors an appraisal designation.

### **BOARD OF DIRECTORS**

[12] An appeal from the decision of the Committee of Examiners was made to the Board of Directors. The Board referred the applications back to the Committee of Examiners with the following directions:

1. The Committee of Examiners shall register the said Andre Pouliot and Philip Jefferson as Regular Members of the Nova Scotia Real Estate Appraisers Association.
2. All appraisal work performed by the applicants shall be monitored and co-signed, within the applicants’ firm of employment, by a member in good standing of the Nova Scotia Real Estate Appraisers Association, holding the accreditation of AACI, MAI or FRICS, who is qualified to carry out such assignments.
3. The applicants shall continue with current courses of educational studies at the University of British Columbia. Upon completion of these studies, or no later than 12 months (in the case of Andre Pouliot) or 24 months (in the case of Philip Jefferson) from the date of this appeal decision, whichever comes first, they shall become candidate members of the Appraisal Institute of Canada. The candidates shall then continue that course of studies until such time as they achieve designation with the Appraisal Institute of Canada. Once designated, they may apply to the Committee of Examiners for Regular membership in the Nova Scotia Real Estate Appraisers Association without restriction.
4. The applicants shall attend the Appraisal Standards Seminar as required by the Appraisal Institute of Canada when next offered in Nova Scotia, or no later than 12 months from the date of this appeal decision, whichever comes first.



5. The applicants shall comply with the By-laws and Regulations of the Nova Scotia Real Estate Appraisers Association.

### **ISSUES**

**[13]** There are a number of issues that must be addressed in this application:

- (1) Is By-law XIX 4(a) *intra vires* the authority of the Association pursuant to the **Act**?
- (2) Does the Board of Directors have the authority to place conditions on the applicants as regular members?
- (3) What is the appropriate standard of review?

## ANALYSIS

### **IS BY-LAW XIX 4(a) *INTRA VIRES*?**

- [14] The **Act** in s. 5 gives the objects of the Association which provide for the regulation of the practice of real estate appraisal. The objects set out a broad mandate. The **Act** then provides extensive powers to the Association to regulate the practice and carry out the objects of the **Act**, including power to establish categories of membership and prescribe the privileges, obligations, restrictions and conditions of membership (s. 6(s)). The **Act** then provides the Association with authority to make by-laws that are not inconsistent with the **Act** (s. 7(1)).
- [15] The regulations were made pursuant to the **Act**. By-law XIX 4(a) provide for registration of a person as a candidate (student). It sets out requirements for a person to be registered as a candidate (student) and restrictions on the person so registered.
- [16] I find By-Law XIX 4(a) is *intra vires*. The **Act** provides the Association is to regulate the practice. Categories of membership can be established and the Association may make by-laws not inconsistent with the **Act**. The by-law does establish a class of membership of candidate (student) and places restrictions on such a member. The Association has the authority to make such a by-law.

### STANDARD OF REVIEW

- [17] The first issue for the court to decide in determining the appropriate standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed. As Sopinka, J. stated in **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at para. 18: "was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?"
- [18] The factors to be considered in determining the appropriate standard were set out by Bastarache, J. in **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 as privative clauses, expertise of the tribunal, purpose of the **Act** as a whole and a provision in particular, and the nature of the problem, whether it relates to a determination of law or facts.
- [19] The first factor is the presence or absence of a privative clause. There is no privative clause dealing with registration and practice in the **Act**.

- [20] The second factor is the expertise of the Board of Directors. The Board is charged with the carrying out of the objects of the **Act** and, for the most part, are persons experienced in real estate appraisal. The Board does not have particular expertise in statutory interpretation and has no relative expertise in the matter under review.
- [21] The third factor is the purpose of the **Act** as a whole and the provision in particular. The **Act** establishes a broad scheme for the regulation of the practice of real estate appraisal. The particular provision at issue is the requirement for membership in the Association, which is a basic requirement of the regulation proposed by the **Act**.
- [22] The fourth factor, the nature of the problem - whether it is a question of law or fact. Here the “problem” is the interpretation of the **Act** and the by-laws made pursuant to it to determine whether the statutory scheme allows the restrictions the Board placed on the applicants as regular members.
- [23] The lack of a privative clause, the expertise of the Board of Directors and the nature of the problem tend toward less deference being given the Board’s decision. The nature of the decision - membership - tends toward more deference being given to the decision.
- [24] After considering all of the factors involved, I conclude that the decision of the Board in this case is subject to a standard of correctness.
- [25] The Board directed the applicants be registered as regular members. It then placed restrictions on the applicants’ ability to practice real estate appraisal. The **Act** gives the Association the authority to establish categories of membership and prescribe the privileges, obligations, restrictions and conditions of membership. In By-Law XIX 4(a) the Association established the category of candidate (student). Restrictions were placed on the category. It was within the Association’s power to do so. However, the Association has not made by-laws that provide for restrictions to be placed on regular members. The framework required to impose restrictions on the applicants’ regular membership is not present. In the absence of the necessary by-laws, the Board erred in determining it could place restrictions on Mr. Pouliot and Mr. Jefferson as regular members. I therefore quash the Board’s decision.
- [26] I will hear the parties as to costs.

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C. Richard Coughlan, J.