COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Puar v. Association of Professional Engineers and Geoscientists (British Columbia),* 2009 BCCA 487

Date: 20091105
Docket: CA036824

Between:

Surinder Puar

Appellant
(Petitioner)

And

The Association of Professional Engineers and Geoscientists

Respondent
(Respondent)

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, January 13, 2009,
(*Puar v. The Association of Professional Engineers and Geoscientists,*
2009 BCSC 21, Docket S087039)

Appearing on his own behalf: S. Puar

Counsel for the Respondent: D. B. Wende

Place and Date of Hearing: Vancouver, British Columbia
October 15, 2009

Place and Date of Judgment: Vancouver, British Columbia
November 5, 2009

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

VANCOUVER
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COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] Surinder Puar is a professional engineer and a member of The Association of Professional Engineers and Geoscientists. In February 2008, the Association's Discipline Committee issued a Notice of Inquiry to him, as provided for under the *Engineers and Geoscientists Act,* R.S.B.C. 1996, c. 116, concerning geotechnical services he provided in respect of a residential property on which a large house was being constructed in the District of West Vancouver. The notice was published on the Association's website. At a hearing of the Discipline Committee, he challenged the committee's jurisdiction on an extensive range of grounds. All were rejected. He sought judicial review of the committee's decision, before Mr. Justice Hinkson, on ten grounds. His application was dismissed for reasons indexed as 2009 BCSC 21. He now appeals the judge's decision on essentially three grounds. His underlying concern is that he was denied disclosure he says would have afforded him an opportunity, to which he maintains he was entitled, to address and defeat the allegation against him before the notice was published.

The Allegation

[2] The origin of the Notice of Inquiry lies in recommendations made by Mr. Puar to the contractor who retained him, and to the municipality, to remedy sloughing caused by heavy rains, of a slope on a part of the site. In October 2005, he proposed a Lock-Block retaining wall for the east half of the slope and ground anchors with shotcrete facing and horizontal drains for the west half. The remedy for the east half was quickly effected; the remedy for the west half was not effected at all. In November 2006, without consulting Mr. Puar, the contractor proceeded to further excavate the west half and constructed another Lock-Block retaining wall which, shortly thereafter, collapsed. In April 2007, the District wrote to the Association, to the attention of the Associate Director of Regulatory Compliance, Geoff Thiele, to "request a review" of Mr. Puar's practice related to the failure of the retaining wall, which, apparently unknown to the municipality, had nothing to do with

services rendered by Mr. Puar. When the District's letter was delivered to Mr. Thiele, he was informed there was no wish make a complaint against Mr. Puar unless it was warranted.

[3] Mr. Thiele asked Brian Nakai, a member of the Association's Investigation Committee, and the only member practising in the field of geotechnical engineering, to consider whether an investigation was warranted. In May, based on additional information obtained from the District, Mr. Nakai advised that it was warranted. Mr. Thiele recommended to the Investigation Committee that Mr. Nakai be appointed as a subcommittee of one to conduct an investigation, and the appointment was made at the end of that month. The committee instructed Mr. Thiele to inform Mr. Puar that his geotechnical engineering services at the West Vancouver site were to be investigated and that production of his file was required. Mr. Thiele did so in June and Mr. Puar promptly responded by submitting his file with an accompanying memorandum summarizing the services he had rendered. In July and September, Mr. Nakai posed a series of questions for Mr. Puar related to his services, which were forwarded to him by Mr. Thiele, and which he answered promptly. In October, Mr. Nakai submitted a draft report to Mr. Thiele. Mr. Nakai presented his October report to the Investigation Committee at its meeting November 8. The committee concluded there were reasonable and probable grounds for an inquiry to be conducted by the Discipline Committee. In January 2008, the Investigation Committee finalized the Notice of Inquiry, which was recommended to the Discipline Committee and issued to Mr. Puar. He then retained counsel.

[4] The notice alleges Mr. Puar breached the Association's code of ethics in that he knew, for a period of a year, November 2005 to November 2006, his recommendation to remedy the sloughing on the west half of the slope had not been carried out, but he took no adequate measures to alert the District or to make clear to the contractor and the District the danger posed to the public and those employed on the work site. While the investigation was clearly prompted by the District's letter requesting a review, the subject of the letter, being the collapsed Lock-Block wall

constructed by the contractor, is not the subject of the inquiry and cannot be said to have played any part in the Investigation Committee recommending the Notice of Inquiry should be issued. It cannot be said to have been seen or considered by the committee at all.

[5] I proceed to consider in turn each of the grounds Mr. Puar advances in support of his appeal whereby he seeks to have the Notice of Inquiry quashed.

Non-compliance with s. 29 of the Act

[6] The *Act* in effect at the relevant time provided two avenues of investigation in respect of a member's conduct being questioned:

> Complaints and investigations
>
> 29 (1) If the association receives a complaint against a member, licensee or certificate holder, the registrar must designate a member to review the complaint.
>
> (2) If after the review the member designated under subsection (1) considers that further investigation is warranted, the member must submit a report to the investigation committee recommending further investigation and stating the reasons for the recommendation.
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> * * *
>
> Investigation committee
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> 30 (1) The council must appoint an investigation committee of at least 5 persons, of whom one may be a non-member of the association, to hold office for a term determined by the council.
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> * * *
>
> (3) The investigation committee or a subcommittee composed of one or more of its members appointed by the investigation committee may, on receipt of a report under section 29 or whenever it considers it appropriate, investigate a member, licensee or certificate holder regarding any matter about which an inquiry may be held under section 32.
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> * * *
>
> Disciplinary inquiry
>
> 32 (1) If the investigation committee has reasonable and probable grounds to believe that a member, licensee or certificate holder
>
> * * *
>
> (c) has demonstrated incompetence, negligence or unprofessional conduct,

> the investigation committee must cause its recommendation for an inquiry to be delivered to the discipline committee.

[Section 32(1) has since been repealed and replaced by s. 30(9), which is almost identical to s. 32(1).]

[7] The judge found the District's request for a review to be a "complaint" within the meaning of s. 29(1) but concluded the Association's failure to treat it as such to have been, in the circumstances, inconsequential. He found it was open to the Association to proceed to conduct an investigation under s. 30(3) and recommend an inquiry under s. 32(1) on reasonable and probable grounds, as it did.

[8] The Association has a published Complaint Investigation Procedure. It requires a complaint to be reviewed by the Designated Member or Designated Reviewer appointed by the Association's Registrar, who is assisted in gathering information by the Associate Director, Regulatory Compliance. The Reviewer may determine it would not be appropriate to entertain the complaint, particularly where no breach of the *Act* is disclosed. Otherwise, the Associate Director is to inform the member involved of the complaint, in writing, enclosing the complaint materials and asking for a response within a prescribed time. The response will then be sent to the complainant for comment and the Reviewer will submit a report to the Investigation Committee to consider further investigation and submission of a recommendation to the Discipline Committee. Had the procedure been followed in this instance, Mr. Puar would have been entitled to see the District's letter, and other materials obtained by Mr. Thiele, soon after the letter was received in April 2007. As it was, despite requests he made, he received nothing the District had given the Association until after the Notice of Inquiry was issued.

[9] Mr. Puar contends that, because the District's letter was a complaint, the Association was required to treat it as such: the Registrar was required to designate a member to review it, which the Registrar did not do. He says administrative bodies must comply strictly with their empowering legislation to maintain jurisdiction, citing

Hollenberg v. British Columbia Optometric Association (1967), 61 D.L.R. (2d) 295 at 304 (B.C.C.A.), and *Reddy v. Association of Professional Engineers and Geoscientists of British Columbia,* 2001 BCCA 237, 9 C.L.R. (3d) 167.

[10] The question, however, is whether, in the circumstances, the investigation undertaken was statutorily authorized under s. 30(3) of the *Act* which, quite apart from authorizing the investigation of s. 29 complaints, authorizes investigations whenever the Association's Investigation Committee considers it appropriate. What the judge found to have been a "complaint" within the meaning of s. 29 was a letter seeking a review, accompanied by a statement that the District did not want to make a complaint. The concern raised was, in fact, ill-founded; it was premised on Mr. Puar having contributed in some way to the collapse of the Lock-Block retaining wall when he knew nothing of it having been constructed. Neither the Notice of Inquiry Mr. Puar seeks to have quashed, nor the recommendation that it be issued, were premised on the District's letter. It did no more than prompt the investigation and there is no reason to suggest the result would have been any different had the Registrar, instead of Mr. Thiele, appointed Mr. Nakai or some other member to undertake the initial review. The District's letter was not disclosed to Mr. Puar until after he received the Notice of Inquiry, but there is no basis on which it can be said he has been disadvantaged in being able to answer the allegation ultimately made against him by virtue of his not knowing the nature of the District's request soon after it was made.

[11] The Association's mandate is to serve the public interest. It faces a difficult dilemma in meeting that objective when, upon being asked to review the conduct of one of its members, it is told there is no wish to make a complaint. It may be that strict compliance with the *Act* required the District's letter to be investigated pursuant to s. 29 for it to retain jurisdiction over what the judge found to be a complaint, but like the judge, I do not consider the fact the Association did not proceed in that way, but was prompted to undertake a s. 30(3) investigation, was, in the circumstances, of any consequence to the issuance of the Notice of Inquiry or of any prejudice to

Mr. Puar. Statutory authorization for the investigation that led to the issuance of the notice was not impaired.

Request for Information

[12] Before the judge, Mr. Puar contended there was no statutory provision for the questions asked of him in July and September 2007, and when such were posed by Mr. Nakai, the Association lost jurisdiction to further investigate his services in respect of the remedial measures he recommended. The judge rejected the contention on the basis Mr. Puar was at the time represented by counsel, he was not prejudiced by the information he provided, and he can be taken to have waived any objection.

[13] Section 30(4) of the *Act* now provides:

> A member, licensee or certificate holder being investigated under subsection (3) must
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> (a) provide the committee or subcommittee conducting the investigation with any information or records in the possession or control of the member, licensee or certificate holder that the committee or subcommittee may require, and
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> (b) answer, within a reasonable time and in the manner specified by the committee or subcommittee, any inquiries of the committee or subcommittee.

At the material time, clause (b) had not been enacted. Section 30(4) was amended in May 2008 by the *Miscellaneous Statutes Amendment Act, 2007*, S.B.C. 2007, c. 8, s. 33 (B.C. Reg. 89/08).

[14] Mr. Puar argues here, as he did before the judge, that, prior to the amendment, the Association had no statutory authority to compel him to do more than produce any relevant documentation he had. It could not require him to answer inquiries. As I understand him, he says requiring a member to produce information or records in the member's possession or control must be different from requiring the member to respond to inquiries; the amendment would otherwise serve no purpose. "Information" then cannot be interpreted to include a response to "inquiries" because

s. 30(4)(b) would offend the principle of tautology. Mr. Puar then says his responses were conscripted and, to the extent they informed the Investigation Committee's decision to recommend an inquiry to the Discipline Committee, the Association lost jurisdiction over him.

[15] Mr. Puar points out the judge was in error in saying he was represented by counsel at the time of the inquiries and contends that he cannot be taken to have knowingly waived the Association's commission of a jurisdictional error. He says consent or waiver cannot, in any event, confer jurisdiction upon an administrative body.

[16] I am, however, unable to accept the interpretation Mr. Puar would give to s. 30(4) before it was amended. It required Mr. Puar to provide any information or records in his possession or control. As defined in the *Interpretation Act,* R.S.B.C. 1996, c. 238, s. 29, "record" includes "any other thing on which information is recorded or stored". Information is, of course, a broader term and can include that which is recorded and unrecorded. It appears the purpose of the amendment was simply to require that a member provide information and records sought in "a reasonable time and in the manner specified".

[17] I consider the questions posed by Mr. Nakai were authorized by s. 30(4) of the *Act* in force at the time. There was no jurisdictional error.

Breach of the Duty of Procedural Fairness

[18] The judge recognized that an administrative body that undertakes an investigation into the conduct of a member owes the member a general duty of fairness in the way it proceeds, but he concluded the duty owed to Mr. Puar did not extend to giving him notice of the nature of the investigation undertaken by the Association's Investigation Committee prior to issuing the Notice of Inquiry. Mr. Puar maintains the judge erred in his conclusion. He says fairness required that he be given an opportunity to address the allegation against him before the notice was