

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Puar v. The Association of Professional
Engineers and Geoscientists*,
2009 BCSC 21

Date: 20090113
Docket: S087039
Registry: Vancouver

Between:

Surinder Puar

Petitioner

And

The Association of Professional Engineers and Geoscientists

Respondent

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Petitioner

Glenn A Urquhart, Q.C.
S. Lesiuk

Counsel for the Respondent

David Wende

Date and Place of Hearing:

December 15 and 16, 2008
Vancouver, B.C.

INTRODUCTION

[1] The petitioner is a geotechnical engineer and a member of the respondent Association.

[2] The respondent, the Association of Professional Engineers and Geoscientists (the "Association"), is constituted pursuant to s. 3 of the **Engineers and Geoscientists Act**, R.S.B.C. 1996, c. 116 [the "**Act**"]. It is the governing body for those engaged in the practice of professional engineering in British Columbia. The Association has the power to investigate, and where appropriate to discipline, its members, subject to its enabling legislation and any bylaws passed pursuant to that legislation.

[3] In July 2005, the petitioner was retained by a general contractor (the "General Contractor") to provide limited geotechnical engineering services with respect to the construction of a home of some 30,000 square feet in West Vancouver, British Columbia (the "Home").

[4] On July 26, 2005, the petitioner provided two Letters of Assurance to the District of West Vancouver (the "District") respecting the Home. These Letters are in fact Schedules created under s. 2.6 of the *British Columbia Building Code 1998* (the "*B.C. Building Code*"), established pursuant to the **British Columbia Building Code Regulation**, B.C. Reg. 295/98, itself established under the **Local Government Act**, R.S.B.C. 1996, c. 323.

[5] During construction of the Home, certain difficulties were encountered. In October 2005, a portion of the excavated slope to the north of the construction sloughed. In November 2005 and January 2006, the General Contractor took only limited steps to stabilize the area. In November 2006, further sloughing occurred in the same area, and a lock block wall included in the construction collapsed.

[6] On April 17, 2007, Mr. Tony Tse, a professional engineer employed by the District as a Land Development Engineer for Planning, Lands and Permits wrote to the respondent "to request a review of [the petitioner's] practice as a Professional Engineer related to a failure of [*sic*] retaining wall" at the location of the construction of the Home (the "Tse Letter").

[7] On February 6, 2008, the Chair of the respondent's Discipline Committee signed a Notice of Inquiry advising the petitioner that on April 17, 2008 the respondent's Discipline Committee would conduct an inquiry into specific allegations concerning the petitioner.

[8] The hearing did not proceed as scheduled, and the petitioner, through his counsel, raised a number of procedural and jurisdictional objections to the steps taken by the respondent's staff and Investigation Committee members. Written submissions on behalf of both the petitioner and the respondent were provided to the Panel of the respondent's Discipline Committee (the "Panel") struck to hear the Notice of Inquiry. The Panel met to hear oral submissions from counsel for the petitioner and the respondent concerning their jurisdiction on August 19, 2008. The

Panel did not hear evidence or submissions with respect to the merits of the Notice of Inquiry, and adjourned to consider the submission with respect to their jurisdiction.

[9] On September 12, 2008, the Panel released its decision respecting its jurisdiction. The petitioner seeks a review of that decision pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241. He seeks relief in the nature of *certiorari* to quash the decision of the Panel, a declaration that the Panel's actions or proceedings against him were without jurisdiction, and an order prohibiting the respondent from conducting further disciplinary proceedings or investigations against him respecting the matters related to the respondent's proceedings against him to date.

ISSUES

[10] The petitioner raised numerous complaints and criticisms of the respondent's conduct following its receipt of the Tse Letter which he maintains entitle him to the relief he seeks. These include the following:

- a) Was the petitioner given adequate notice of the respondent's investigation of him?
- b) Was the letter of April 17, 2007 from Mr. Tse a complaint?
- c) Was the investigation of him by Mr. Geoff Thiele and Mr. Brian Nakai from April 18, 2007 until May 31, 2007 authorized by the respondent's enabling legislation?
- d) Did Mr. Thiele and Mr. Nakai collaborate in an inappropriate way?
- e) Was the report of Mr. Nakai to the respondent's Investigation Committee a proper basis for initiating an investigation of the petitioner?

- f) Did the respondent's Investigation Committee have the authority to investigate the petitioner on May 31, 2007 under s. 30(3) of the **Act**?
- g) Did Mr. Thiele and Mr. Nakai have the authority to investigate the petitioner without the approval of the respondent's Investigation Committee?
- h) Was the appointment of Mr. Nakai as a one-member subcommittee of the Investigation Committee appropriate?
- i) Were the inquiries made of the petitioner authorized?
- j) Did the Investigation Committee have reasonable and probable grounds to refer the petitioner to the Discipline Committee?

BACKGROUND

[11] The Home was part of a subdivision within which concrete retaining walls had been utilized to support generally small grade differences, typically of less than 2.4 meters in height, around the perimeter area of new home construction.

[12] The Letters of Assurance stated in part that the petitioner gave assurances that the design of specified aspects of the temporary and permanent components of the plans of the Home were prepared by him in support of the building permit, as outlined on an attached schedule, and substantially complied with the *B.C. Building Code* and other applicable enactments respecting safety except for construction safety aspects. The Letters of Assurance also stated that the petitioner undertook to be responsible for field reviews of those components during construction as indicated on a second attached schedule.

[13] The second attached schedule to the Letters of Assurance signed by the petitioner excluded the temporary geotechnical work pertaining to shoring, underpinning and temporary construction, dewatering and the permanent

geotechnical work relating to geotechnical aspects of deep foundations, backfill, permanent dewatering, and permanent underpinning.

[14] The Letters of Assurance did apply to reinforced-concrete retaining walls up to 1.7 meters tall adjacent to the north and east sides of the construction.

[15] On or about October 6, 2005, a portion of the slope at the north boundary of the property experienced sloughing during a period of heavy rain. The sloughing occurred within the east half of the slope adjacent to the north boundary of the property. As a result, the District issued a stop work order with respect to the construction on October 15, 2005.

[16] The petitioner learned of the sloughing from the Planning Department of the District after it stopped, and visited the construction site. He observed an unusual concentrated seepage flow discharging from the west half of the North Slope with clear crushed gravel near the base of the road-side fill profile. The petitioner considered that the flows might be related to a road-side storm water retention feature, and thus wrote a memorandum dated October 20, 2005 to the District requesting information with respect to the source of the flow. The memorandum stated that it was imperative that the District provide the requested information.

[17] On October 22, 2005, the petitioner sent a further memorandum to the General Contractor with copies to two of the District's departments outlining the observations that concerned him, and expressing concern about the significant concentrated water flows he had observed in the north-west corner of the excavation. He repeated that it was imperative that the District provide him with the

requested information. In this memorandum, the petitioner made certain recommendations pertaining to the "East Half" of the north bank.

[18] Over the ensuing months, the petitioner received no written response and only a limited verbal response from the District, and thus asked the General Contractor to seek the information that the petitioner had requested. The General Contractor did not report any greater success to the petitioner with respect to obtaining the requested information.

[19] On October 19, 2005, representatives of the District had requested a Sediment Control design which the petitioner provided to the General Contractor on October 24, 2005.

[20] After these events, the petitioner argued that without his knowledge, his client obtained the District's approval of a structure that differed from the structure that was the subject of the petitioner's Letters of Assurance. The petitioner argues that his client then proceeded to construct a lock block wall structure of the client's own design, and that this wall structure is the structure that ultimately failed. The petitioner argued that he had recommended against this lock block wall.

[21] The lock block wall on the north side of the excavated area was installed by the General Contractor without any apparent input from the petitioner. On November 3, 2006, in order to install this wall, the petitioner's client cut back the north extremity of the west bank. When he learned of the further excavation and the installation of the lock block wall, the petitioner prepared a memorandum to the General Contractor and the District dated November 4, 2006. The memorandum provided the

petitioner's recommendations with respect to the lock block wall. Before these recommendations were considered, a portion of the lock block wall collapsed.

[22] At some time prior to April 18, 2007, Mr. Tse contacted the respondent by telephone with regard to the petitioner. On April 18, 2007, Mr. Tse met with Mr. Thiele, the respondent's Associate Director. Mr. Tse provided Mr. Thiele with a letter dated April 17, 2007 requesting a review of the petitioner's practice as a professional engineer; alleging certain conduct by the petitioner, in his professional capacity relating to the failure of a retaining wall at the Home; and enclosing materials to support his allegations. The Tse Letter was not disclosed nor provided to the petitioner until March 28, 2008.

[23] Mr. Nakai is a geotechnical engineer, and was, at the relevant times, a member of the respondent's Investigation Committee. On approximately April 19, 2007, Mr. Thiele requested that Mr. Nakai review the materials provided by Mr. Tse to determine whether in Mr. Nakai's view as a fellow geotechnical engineer, the petitioner had conducted himself appropriately with respect to his professional services and advice. Thereafter, until May 31, 2007, Mr. Thiele and Mr. Nakai reviewed and discussed the petitioner's services and advice.

[24] By May 24, 2007, Mr. Nakai concluded that "definitely some questions need to be answered", and asked Mr. Thiele to prepare a report to the Investigation Committee with the recommendations that an investigation be commenced with respect to the petitioner, that Mr. Nakai be appointed as a subcommittee of one to

conduct the investigation, and that the petitioner be asked to produce his entire file with respect to the Home.

[25] Mr. Thiele prepared a report to the Investigation Committee dated May 25, 2007 stating that “there are questions that need to be answered about Mr. Puar’s conduct in this matter”. On May 31, 2007, the Investigation Committee directed an investigation of the petitioner pursuant to its powers under s. 30(3) of the **Act**; appointed Mr. Nakai as a subcommittee of one, pursuant to s. 30(4) of the **Act** and directed the respondent’s staff to request the petitioner’s complete file for the Home.

[26] After Mr. Nakai’s appointment, Mr. Thiele continued his discussions with Mr. Nakai with respect to the petitioner and Mr. Nakai discussed his views and recommendations with Mr. Thiele.

[27] On June 6, 2007, the respondent provided its first notice to the petitioner that it was conducting an investigation of his services at the Home, but not any specifics of what it was investigating until it authorized and issued a Notice of Inquiry dated February 6, 2008.

[28] The petitioner wrote to the respondent on June 25, 2007, enclosing his file, and providing a synopsis of the construction of the Home. Mr. Thiele wrote the petitioner on July 25, 2007, asking for information in response to specific questions, and again on September 24, 2007, asking the petitioner to outline his understanding of his obligations with respect to specific items on a schedule to the Letters of Assurance of July 26, 2005.

[29] Before Mr. Nakai submitted his investigation report; he sent a draft of the report to Mr. Thiele for the latter's comments. Mr. Thiele reviewed the draft, and suggested that "we may want to remind the members of Code of Ethics principle 8, which requires members to 'present clearly to employers and clients the possible consequences if professional decisions or judgments are overruled or disregarded'".

[30] On November 8, 2007, the respondent's Investigation Committee met and passed a resolution authorizing the preparation of a Notice of Inquiry with respect to the petitioner. The Investigation Committee met again on January 18, 2008 and approved amendments to the Notice of Inquiry, which was delivered to the petitioner in the amended form by letter of February 6, 2008.

[31] The Notice of Inquiry alleged that the petitioner had contravened paragraphs 1 and 8 of the respondent's Code of Ethics and had demonstrated unprofessional conduct in failing to:

(a) hold paramount the safety, health and welfare of the public, the protection of the environment and failing to promote safety in the work place by permitting such obligations to be secondary to the decision of your client to not complete remedial works to an unstable excavation; and

(b) present clearly to your client and the District of West Vancouver the possible consequences upon your professional judgment being disregarded by your client.

Particulars of the aforesaid allegations of unprofessional conduct are set out in numbered paragraphs below.

1. That on or about July 26, 2005, you did permit to be delivered to the District of West Vancouver, (the "District"), Schedules B-1 and B-2 bearing your signature and seal for the proposed residence (the "Residence") and reinforced concrete retaining walls to be constructed at or about 2288 Lythe Court (the "Property") within the District.

2. The aforesaid Schedules B-1 and B-2 were provided pursuant to an engagement to provide geotechnical engineering services to the developer/contractor (the "Client") for the Property.

3. In the aforesaid Schedules B-1 and B-2, you gave assurance to the District that you would undertake the necessary design and field reviews for the temporary and permanent geotechnical components to be constructed on the Property, and that the design would be in substantial compliance with the British Columbia Building Code and all other enactments respecting safety, except for construction safety aspects.

4. In or about October 2005, the excavated slope comprising the northern perimeter to the Property (the "North Cut") failed, at which time you did recommend in writing to the Client and the District measures for the temporary stabilization of the North Cut until permanent stabilization of the slope could be completed.

5. In or about November 2005 and January 2006, the Client took only limited remedial steps in order to stabilize the North Cut. Thereafter, the Client continued to your knowledge to proceed with the construction of the Residence immediately below the North Cut.

6. At all material times between November 2005 and November 2006, you were aware that the Client had failed to complete the temporary stabilization of the North Cut as recommended by you.

7. Despite your knowledge of the prolonged failure of the Client to implement your recommendations to properly stabilize the North Cut during construction of the Residence, you failed to take adequate measures to alert the District of both the Client's failure to comply with your recommendations and the danger posed by the continued potential failure of the North Cut.

8. In or about November 2006, the North Cut failed by reason of the Client's failure to complete the slope stabilization measures recommended by you in October 2005.

[32] After he received the Notice of Inquiry, the petitioner retained counsel, who, in March 2008, asked the respondent for a copy of the complaint respecting the petitioner. Despite repeated requests for disclosure of documents by counsel for the petitioner, the Tse Letter was not produced to counsel for the petitioner until March 28, 2008.

