

# 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.

[33] Counsel for the petitioner sought to question Mr. Nakai and Mr. Thiele, but counsel for the respondent took the position that “both are individuals from whom I take instructions and whom I regard as key representatives of my client”.

[34] The Panel met on August 19, 2008, and heard submissions from counsel with respect to its jurisdiction and procedural issues, and delivered its decision on those matters on September 15, 2008. The petitioner’s jurisdictional and procedural complaints were dismissed.

### **The Statutory Framework**

[35] Section 29 of the **Act** deals with complaints against members, licensees and certificate holders. Under s. 29(1), once the Association receives a complaint it “must designate a member to review the complaint”. Subsection (2) sets out the procedure for the designated member to recommend further investigation by the Investigation Committee.

[36] Section 30(1) of the **Act** establishes the Investigation Committee, while s. 30(3) delineates its powers. Pursuant to s. 30(3), either the Investigation Committee as a whole or a subcommittee of one or more members of the Association may investigate a member. The same subsection states that the Investigation Committee may investigate “whenever it considers appropriate” or when recommended under s. 29 with respect to “any matter about which an inquiry may be held under section 32”. At the relevant time, s. 30(4) of the **Act** provided the Investigation Committee with jurisdiction to require a member who was being investigated to produce information or records in his or her possession. As I will

discuss below, subsection (4) has since been amended to add the requirement that the member being investigated answer any inquiries which the Investigation Committee or its subcommittee makes.

[37] Section 32 of the **Act** as it stood at the relevant time dealt with the prerequisites and procedure for inquiries by the Disciplinary Committee, including notice requirements in ss. 32(3)-(4).

### **Standard of Review**

[38] The **Administrative Tribunals Act**, S.B.C. 2004, c. 45, does not apply to the respondent.

[39] The standard of review of decisions of the respondent's Discipline Committee Panels is thus determined by the decision of the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9, [2008] 1 S.C.R. 190 [**Dunsmuir**]. Under **Dunsmuir**, reasonableness is the standard for questions of fact or matters within the expertise of the respondent, and correctness is the standard for matters of jurisdiction or law.

### **Legal Authorities**

[40] It is clear that, "where a statute confers jurisdiction upon a body of limited authority to regulate and discipline a class of persons", the statutory body must strictly comply with "the conditions and qualifications annexed by the statute to the exercise of that jurisdiction": **Hollenberg v. B.C. Optometric Association et al.** (1967), 61 D.L.R. (2d) 295 at 307 (B.C.C.A.).

[41] On the other hand, when considering the principles of fairness that should be followed by regulatory authorities in their investigatory processes, the duty of a regulatory body to protect the interests of the public must also inform any review of the conduct and of the decisions of the regulatory body: see ***Strauts v. College of Physicians & Surgeons (British Columbia)*** (1997), 36 B.C.L.R. (3d) 106, (*sub nom. Strauts v. College of Physicians and Surgeons (B.C.)*) 94 B.C.A.C. 254 at para. 6, per Hollinrake J.A.:

The appellant's argument would have the Court interpret the jurisdiction of the College in a strict manner that in my opinion would be contrary to "serve and protect the public". See s. 2(a) of the Act. The approach of the Courts with respect [to] the College has been to recognize its purpose and functions as being to serve and protect the public. That is clear from the statute itself. That end is not accomplished by imposing on the College in its investigative function the panoplies of administrative law that protect the members at the adjudicative stage of the College's proceedings. In my opinion the Court should not find itself cloaking the individual member of the College with rights at the stage of investigation - as is the case here - that would or could work contrary to the public interest. Where the stage is adjudicative the member is and must be protected by all of the principles which over the years have been developed by the Courts to ensure fairness at every stage of the adjudicative process.

[42] As Wood J.A. stated for a unanimous court in ***Cameron v. Law Society of British Columbia*** (1991), 81 D.L.R. (4th) 484 at 492, 58 B.C.L.R. (2d) 273 (C.A.):

Disciplinary proceedings expose a member of the Society to a range of punishments which include suspension of the right to practice and even disbarment. In addition, irrespective of their outcome, the very nature of the proceedings can have a devastating effect on a member's reputation, the single most valuable asset which any professional can possess. With the potential for such consequences in mind, I am of the view that the chambers judge was right when he applied the principle described in the authorities to which he referred, and gave a strict construction to Rule 466(1)(b)(ii).

[43] The applicability of these comments to the investigatory stage of proceedings was qualified by Wood J. A. at 496 D.L.R.:

It was not argued before us that any provision in either the Act or the Rules can or should be construed so as to deprive the Law Society of the jurisdiction to begin again when earlier disciplinary proceedings against a member have failed for want of procedural regularity. Nor was it argued that to proceed again in this case would result in prejudice to the member to such an extent as would affect the jurisdiction of the Law Society to continue the proceedings.

In *Hammond v. Assn. of British Columbia Professional Foresters*, [since reported at (1991), 47 Admin. L.R. 20 (B.C.S.C.)], one of the issues was whether the failure of the association's council to meet with the member before deciding to hold an inquiry into his conduct, as required by the guidelines found in the association's Manual of Disciplinary Procedures, had the effect of depriving the council of jurisdiction to recommend an inquiry. After concluding on the facts of that particular case that it did, Esson C.J.B.C. said this at p. [35 Admin. L.R.]:

It follows that the direction for an inquiry which resulted from that recommendation should also be quashed but it does not follow that the Association should be prohibited from conducting a hearing or taking any further steps. Having regard to the preliminary nature of the committee's determination, to prohibit all further proceedings would be to give inadequate weight to the public interest in professional bodies such as the Association carrying out their duty of ensuring that high standards be maintained in the profession.

I would apply that reasoning to this case. On the material before this court there is no basis upon which it could be argued, nor as I have said has it been argued, that the delay in the proceedings against the member, resulting from the procedural indiscretions of the Standing Discipline Committee, has prejudiced him to such an extent that the committee should now be prohibited from proceeding anew. That fact alone, of course, will not prevent him from moving for appropriate relief in the event that such prejudice can be shown at a later date. But it is a sufficient basis upon which to conclude that no order prohibiting further proceedings should be made in these proceedings.

[44] The respondent's jurisdiction was considered by Cullen J. in *Association of Professional Engineers and Geoscientists of British Columbia v. Visser et al*, 2004 BCSC 700, (*sub nom. Assn. of Professional Engineers & Geoscientists (British Columbia) v. Visser*) 28 B.C.L.R. (4th) 354 at paras 35, 36 and 38:

In the present case, there is by contrast, in the enabling legislation a separation of the investigative prosecutorial and adjudicative functions. The power to investigate by statute resides in the investigation committee. The power to conduct inquiries and impose discipline resides in the discipline committee. While the council of the Association has the authority to appoint its members (and in the case of the investigation committee, one non-member) to those committees, the committees themselves are mandatory entities under the legislation and are exclusively empowered to perform their respective duties under the **Act**. Section 31 of the **Act** further provides that no one who has conducted an initial review under s. 29(1), or participated in an investigation under s. 30 may act as a member of the discipline committee under s. 32.

Under the legislation, it is the investigation committee's recommendation for an inquiry based on reasonable and probable grounds that determines whether an inquiry is to be held. Neither the discipline committee nor the council of the Association has any discretion whether an inquiry is to be conducted and neither has any involvement in the decision to recommend one. There is no provision for either the discipline committee or the investigation committee to report to the Association or council.

...

The scheme under the **Act** for determining contraventions of its provisions and bylaws or the Association's code of ethics represents a separation of the investigative, prosecutorial and adjudicative functions in that process. The clear purpose of the **Act** is to establish the independence and impartiality of the three functions. Thus, the investigative function is represented by the investigation committee which has the exclusive power to conduct an investigation and, if appropriate, initiate a hearing; the adjudicative function is represented by the discipline committee which has the exclusive power to conduct a hearing and, if appropriate, determine sanctions; and the prosecutorial function is performed by counsel retained by the Association.

**ANALYSIS**

- a) **Was the petitioner given adequate notice of the respondent's investigation?**

[45] This issue is one of law that must meet a standard of correctness.

[46] There is no obligation on the respondent to give notice of any investigation that it chooses to conduct. While this does not appear to be a case where there was anything to be lost by advising the petitioner of the fact that he was the subject of an investigation, there may be circumstances where the respondent will wish to conduct an investigation without alerting the member in question of that fact.

[47] Certainly in conducting an investigation, there is a duty of fairness upon the respondent: *Netupsky v. Association of Professional Engineers and Geoscientists (British Columbia)*, [1996] B.C.J. No. 27 at para. 16 (S.C.), aff'd, [1997] B.C.J. No. 1694 (C.A.), leave to appeal ref'd (1997), 114 B.C.A.C. 320 (S.C.C.) [*Netupsky*]. However, I am unable to conclude that the duty extends so far as to require the respondent to warn or advise its members that it is investigating them, if it is doing so.

[48] The respondent's duty to notify a member of an investigation does not arise until its Discipline Committee authorizes a Notice of Inquiry. The petitioner was notified appropriately in this case, and I dismiss this ground for review.

b) Was the Tse Letter a complaint?

[49] The Panel concluded that the Tse Letter was not a complaint. In reaching that conclusion, they reasoned that the letter did not use the word “complaint”. They also referred to the evidence of Mr. Thiele’s discussion with Mr. Tse that the latter did not wish to make a formal complaint, but would do so “if it appears warranted”. Mr. Tse said that he did not recall such a comment to Mr. Thiele.

[50] Mr. O’Meara, another employee of the District, considered that the Tse Letter was a complaint; he said so in an email to Mr. Thiele, and he captioned correspondence to Mr. Thiele “*Re: Professional Practice Complaint Surinder Puar, P. Eng.*”.

[51] While I have concluded that the decision of the Panel on this matter must be reviewed on a standard of reasonableness, I cannot accept that their decision respecting the Tse Letter is reasonable. In ***College of Physicians and Surgeons (British Columbia) v. Barber*** (1993), 87 B.C.L.R. (2d) 362, (*sub nom. College of Physicians and Surgeons (B.C.) v. Barber and Neil*) 38 B.C.A.C. 39, Legg J.A., for a unanimous court, discussed certain letters written with respect to a particular aspect of medical practice. The letters did not contain the word “complaint”, but Legg J.A. concluded at para. 38 that as they were expressions of dissatisfaction with the use of the therapy in the practice, they were therefore complaints.

[52] In ***McIntosh v. College of Physicians and Surgeons of Ontario*** (1998), 169 D.L.R. (4th) 524, (*sub nom. McIntosh v. College of Physicians and Surgeons (Ont.)*) 116 O.A.C. 158 (Ont. Div. Ct.), Rosenberg J. considered the definition of the

term “complaint” and said at para. 20 that “[t]he 1989 Schwartz Review proposal suggested that a widely accepted, albeit informal, definition of a complaint is: (a) an expression of concern about the care provided or other aspects of the professional relationship, (b) which identifies a registrant of the governing body in question”. I accept that definition.

[53] Mr. Tse did not write the respondent for informational purposes. He clearly wrote to invoke the statutory power of the respondent with respect to the conduct of one of its members and specifically asked that the petitioner’s professional conduct be reviewed. The formality or otherwise of his request cannot alter what it was: a complaint.

[54] While I find that the letter of Mr. Tse was a complaint, I am unable to accept that such a finding entitles the petitioner to the relief sought. Whether the Tse letter was a complaint or not is an issue without potential consequences. If, as I have found, it should have been considered as a complaint, then s. 29 of the **Act** requires the respondent’s registrar to designate a member to review the complaint. That was not done in this case. I conclude that it ought to have been done in order for the respondent to meet its statutory obligations.

[55] The failure of the respondent’s registrar to designate a member to review the complaint did not, however, create any prejudice to the petitioner, as Mr. Thiele apparently concluded that the facts upon which Mr. Tse relied in his letter were incorrect. In the result, although the letter caused the respondent’s staff to look into the petitioner’s professional activities with respect to the Home, it was not relied

upon by the respondent's Investigation Committee in authorizing an investigation or the Discipline Committee in authorizing a Notice of Inquiry concerning the petitioner, nor in the allegations contained in the Notice of Inquiry. I dismiss this ground for review.

**c) Legislative Authority for the Thiele/Nakai Investigation from April 18, 2007 until May 31, 2007**

[56] This issue is one of law that must be reviewed on a standard of correctness.

[57] As the governing body for engineers and geoscientists in British Columbia, the respondent has a duty to the public to set, maintain and enforce standards designed to protect the public. In order to do so, it must act through its officers, employees, committees and subcommittees.

[58] The inquiries made by Mr. Thiele and Mr. Nakai from April 18, 2007 until May 31, 2007 were not authorized by s. 29 of the **Act**, as neither were appointed by the Registrar for the purpose of reviewing the subject matter of The Tse Letter.

However, the respondent's ability to fulfill its public duty cannot be so constrained by limiting its investigative functions in this way. To conclude otherwise would result in the inability of the respondent to meet its public duty, as absent a complaint and a resulting designation under s. 29 of the **Act**, there would be no triggering event for any reference to the respondent's Investigation Committee. Without a reference to the Investigation Committee, no inquiries other than a review pursuant to s. 29 of the **Act** would be permitted. The public would then be left unprotected from dangerous situations involving engineers or geoscientists except those that were the subject of

a complaint. Such a result would defeat one of the important purposes of the respondent's enabling legislation.

[59] I consider that an investigation pursuant to s. 29 of the **Act** is but one of a variety of means that can cause a matter to be considered by the Investigation Committee and generate a Notice of Inquiry. An investigation pursuant to s. 29 did not occur in the petitioner's case.

[60] I conclude, however, that the information provided by Mr. Thiele and Mr. Nakai to the Investigation Committee from their investigation during the period from April 18 to May 31, 2007 is another means by which the respondent's Investigation Committee can be persuaded to begin an investigation of its own pursuant to s. 30(3) of the **Act**. Section 30(3) of the **Act** provides that the respondent's Investigation Committee or a subcommittee composed of one or more of its members appointed by the Investigation Committee may investigate a member, licensee or certificate holder regarding any matter about which an inquiry may be held under s. 32, whenever it considers it appropriate to do so. That did occur in the petitioner's case, and it was that investigation, authorized by the Investigation Committee, that led to the Notice of Inquiry that the Discipline Committee later authorized. That, the Investigation Committee was entitled to do under the **Act** and in the manner that it did. I therefore find that the petitioner was not prejudiced by these inquiries and I dismiss this ground for review.

**d) The Collaboration of Mr. Thiele and Mr. Nakai up to May 31, 2007**

[61] I regard this issue as one of law that must meet a standard of correctness.

[62] Having determined that the inquiries by Mr. Thiele and Mr. Nakai between April 18 and May 31, 2007 did not prejudice the petitioner, it follows that their collaboration also caused no prejudice to him. I therefore dismiss this ground for review as well.

**e) Mr. Nakai's Report to the Investigation Committee**

[63] I regard this issue as one within the unique expertise of the respondent, and consider that it must therefore be reviewed on a standard of reasonableness.

[64] The petitioner argued that Mr. Nakai's expressed view that there were "questions that need to be answered about Mr. Puar's conduct in this matter" was an insufficient basis upon which to launch an investigation. However, if the Investigation Committee accepted the view expressed by Mr. Nakai, the only reasonable thing for it to do was to authorize an investigation. It must be remembered that the investigatory stage of the respondent's mandate is necessary to ensure that a Notice of Inquiry is not authorized unless an appropriate investigation has taken place.

[65] I dismiss this ground for review.

**f) Was the Investigation Directed on May 31, 2007 Authorized Under s. 30(3) of the Act?**

[66] I regard this issue as one of jurisdiction, and consider that it must therefore be reviewed on a standard of correctness.

[67] The petitioner argued that the Investigation Committee was not permitted to authorize a mere “fishing expedition” and before it could authorize an investigation, it had to have a reasonable basis upon which to do so.

[68] I do not agree that the Investigation Committee authorized a “fishing expedition”. The Investigation Committee focussed its authorization on the failure of a retaining wall, the petitioner’s role with respect to its design, and his monitoring of whether his recommendations respecting the construction for which he had provided the Letters of Assurance were being followed.

[69] Section 30(3) of the **Act** is qualified by the *proviso* that the Investigation Committee can authorize an investigation “regarding any matter about which an inquiry may be held under section 32”. The petitioner argued that s. 32 requires that there be “reasonable and probable grounds” to believe that a member has behaved in a specific and precluded manner before it must cause its recommendation for an inquiry to be delivered to the Discipline Committee. I do not agree with the petitioner on this point. His argument confuses two separate considerations: the grounds upon which the Investigation Committee can authorize an investigation and the grounds required before the Investigation Committee can recommend an inquiry to the Discipline Committee.

[70] The use of the permissive “may” in the reference to s. 32 found in s. 30(3) satisfies me that the investigation can be authorized in circumstances where an inquiry “might”, but not “will” be authorized. It was apparently the view of the

Investigation Committee that that was the case when they authorized the investigation on May 31, 2007, and I do not consider that conclusion to be incorrect.

[71] This conclusion is supported by the reasoning of Kirkpatrick J., as she then was, in *Finch v. Assn. of Professional Engineers and Geoscientists of the Province of British Columbia*, [1997] B.C.J. No. 2797 at para. 19-20 (S.C.), aff'd (1998), (*sub nom. Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*) 59 B.C.L.R. (3d) 327, (*sub nom. Finch v. Association of Professional Engineers and Geoscientists of British Columbia et al.*) 113 B.C.A.C. 137. I therefore dismiss this ground for review.

**g) Mr. Thiele's Involvement after May 31, 2007 in Mr. Nakai's Investigation**

[72] This issue is a finding of fact that must be reviewed on the standard of reasonableness.

[73] The petitioner argued that the Panel erred in concluding that although Mr. Thiele provided assistance and direction to Mr. Nakai, the assistance and direction was appropriate and permitted under the **Act**.

[74] The petitioner takes no issue with the finding that Mr. Thiele provided assistance and direction to Mr. Nakai. To the contrary, that is his complaint. That finding is therefore not challenged, and need not be reviewed.

[75] The petitioner's challenge on this issue is with respect to the conclusion of the Panel that the assistance and direction provided by Mr. Thiele to Mr. Nakai did not usurp the obligation of Mr. Nakai as a one-member subcommittee to come to his

own conclusion and make his own report, as required pursuant to the decision of Curtis J. in *Netupsky*.

[76] The petitioner argued that the involvement of Mr. Thiele, a lawyer, with Mr. Nakai, in his capacity as an investigator, improperly diluted the independence and impartiality of the respondent's process, contrary to the intention of the **Act**.

[77] Specifically, the petitioner argued that Mr. Thiele was involved throughout Mr. Nakai's entire investigation, exchanged his ideas with Mr. Nakai and made suggestions as to what was to be included in Mr. Nakai's report to the Investigation Committee. This was admitted by Mr. Nakai in response to Interrogatories made by the petitioner.

[78] The petitioner's submissions on this issue were all made to and rejected by the Panel. The petitioner argued that the rejection was based, in part, on the view that there was no evidence that the conclusions reached by Mr. Nakai were influenced by Mr. Thiele.

[79] The evidence before the Panel went beyond what was argued by the petitioner. It included the following questions and answers of Mr. Nakai to the petitioner's Interrogatories of him:

Q10. Did anyone other than you have any input or make any suggestions, edits, [or] changes to the Nakai report? If so, identify as fully as possible who had input, suggestions, edits or changes to the Nakai report.

A. No.

...

- Q13. Did anyone at the Association ever communicate with you in any way about the contents of your Report (the Nakai Report – Document #21)? If so, describe as fully as possible all such instances and the details of the communications and the persons involved.
- A. After delivery of the report of October 25, 2007 to Mr. Thiele in draft, I had a brief conversation with Mr. Thiele in which I confirmed that the report needed no further changes and could be presented to the Investigation Committee.

[80] It is apparent that the Panel must have accepted this evidence from Mr. Nakai. It was open to it to do so. I do not consider that it was unreasonable for the Panel to accept this evidence, and based upon it to conclude that Mr. Nakai's report and the conclusions in it were his own. I therefore dismiss this ground for review.

**h) The Appointment of Mr. Nakai as a Subcommittee of One**

[81] This matter involves both issues of fact, reviewed on a reasonableness standard, and issues of law, reviewed on a standard of correctness.

[82] The first two issues, whether Mr. Nakai had the required expertise to carry out the investigation and whether he was biased due to his prior involvement, are factual.

[83] Counsel for both parties agree that it was open to the Investigation Committee to appoint any one of the respondent's members other than Mr. Nakai as a subcommittee of one to conduct an investigation of the petitioner's role with respect to the design of the retaining wall that failed, and his monitoring of whether his recommendations respecting the construction for which he had provided Letters

of Assurance were being followed. It was also agreed that there were other members of the respondent who were geotechnical engineers. Mr. Nakai was therefore not the only suitable choice as an investigator to be appointed by the Investigation Committee.

[84] Nonetheless, I find that appointing the one geotechnical engineer on the Investigation Committee to be a subcommittee of one on this matter was not an unreasonable decision by the Investigation Committee.

[85] As I have indicated already, the grounds upon which an investigation can be authorized and the grounds required before an inquiry can be recommended are separate and distinct.

[86] As I have also indicated, Mr. Nakai's expressed view to the Investigation Committee was that there were "questions that need to be answered about Mr. Puar's conduct in this matter". The Investigation Committee accepted that view expressed by Mr. Nakai, and on that basis authorized an investigation in order to determine whether or not steps were necessary with respect to the petitioner for the respondent to fulfill its public protection duties.

[87] The Investigation Committee stated in its decision that there was no evidence that Mr. Nakai's involvement in the initial review resulted in any bias. That factual finding was the basis upon which the Committee made its decision to appoint Mr. Nakai as a one-member subcommittee. I find that this factual decision was not unreasonable.

[88] The Panel also found that it was reasonable for the Investigation Committee to appoint Mr. Nakai to conduct the investigation that it authorized, since he was the only geotechnical engineer sitting on the Investigation Committee. The Panel apparently recognized that Mr. Nakai had participated in some form of review prior to their consideration of whether or not to authorize an investigation, but concluded that there was no evidence that his prior involvement had resulted in any bias on the part of Mr. Nakai.

[89] While I consider that the Investigation Committee's appointment of Mr. Nakai as a subcommittee of one could reasonably lead to the very challenge that the petitioner has raised, and that could have been avoided, the question to be considered is whether the appointment of Mr. Nakai was inappropriate as a matter of law, once the Investigation Committee had made the factual decisions that he had the expertise and was not biased.

[90] Having made those factual findings, the decision to appoint Mr. Nakai as the investigator cannot be said to be incorrect.

**i) The Inquiries made by the Respondent of the Petitioner**

[91] This too, is a matter of law, and must be reviewed on a standard of correctness.

[92] The petitioner argued that the respondent acted without jurisdiction in delivering inquiries to him by letters of July 25 and September 24, 2007, following the authorization of an investigation on May 31, 2007.

[93] The wording of s. 30(4) of the **Act** at the relevant time provided that:

(4) A member, licensee or certificate holder that is being investigated under subsection (3) must 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.

[94] The petitioner argued that records or information are to be distinguished from asking for answers to inquiries from the respondent, on the basis that the latter is an interactive process, and not information or records in the possession or control of a member, and thus not within the ambit of s. 30(4) of the **Act**.

[95] The petitioner pointed to the amendment of that section on May 2, 2008.

Section 30(4) now reads:

- (4) A member, licensee or certificate holder being investigated under subsection (3) must
- (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
  - (b) answer, within a reasonable time and in the manner specified by the committee or subcommittee, any inquiries of the committee or subcommittee.

[96] The petitioner argued that prior to this amendment, there was no authority for the Investigation Committee to make inquiries of a member of the respondent, and that the inquiries that were made of him were without any authority. He relied upon the decision of Warren J. in ***Stefani v. College of Dental Surgeons (British Columbia)*** (1996), 27 B.C.L.R. (3d) 34, 44 Admin. L.R. (2d) 122 at para. 66 (S.C.):

... When a person in a position of authority such as that of the deputy registrar asks for agreement by the registrant to a process, it can hardly be said to be voluntary. A “request” for compliance coming from the registrar of the governing body of the respondent’s profession, can scarcely be considered a “request”. It was a coercive and improper attempt to get the petitioner to participate in a process that was not authorized by the *Act* or rules.

[97] The inquiries to which the petitioner responded were made of him after he was represented by counsel. The responses were apparently made without objection to any jurisdiction on the part of the Investigation Committee to solicit information from the petitioner.

[98] In the case of ***Familamiri v. The Association of Professional Engineers and Geoscientists of British Columbia***, 2004 BCSC 660, (*sub nom. Familamiri v. Assn. of Professional Engineers & Geoscientists (British Columbia)*) 18 Admin. L.R. (4th) 132, Masuhara J. held at para. 72 that the failure of Mr. Familamiri to object to the respondent’s failure to make full disclosure before or during his hearing was fatal to his ability to challenge the decision based upon inadequate disclosure.

[99] Here I find that the failure of the petitioner to object to the Committee’s jurisdiction before responding to their inquiries must, at this stage, bring about the same result, particularly as I have not been persuaded that the petitioner’s response to the inquiries has in any way prejudiced him. I therefore dismiss this ground for review.

[100] This conclusion does not, of course, prevent the petitioner from disputing the admissibility of any of the information that he provided in response to the inquiries,

as the scope of my review is more limited than the scope of the Panel who will hear the Notice of Inquiry on its merits.

**j) The Referral of the Petitioner by the Investigation Committee to the Discipline Committee**

[101] The Panel declined to resolve this issue on a preliminary basis, stating at para. 38 of its decision that:

The [Panel] is of the view that this can only be determined after hearing the evidence and therefore, the Panel concluded that this was not a proper issue to be dealt with at this stage of the hearing and therefore the Notice of Inquiry should not be dismissed.

[102] Whether there were reasonable and probable grounds upon which the Investigation Committee could recommend an inquiry to the Discipline Committee is an issue which is within the unique expertise of the respondent and its committees, and as such is subject to a standard of review of reasonableness.

[103] In *Netupsky*, the petitioner asked Curtis J. to overturn the finding that the Investigation Committee in that case had reasonable and probable grounds to support an inquiry. He declined to do so, and on appeal, Finch J.A., as he then was, concluded at para. 5:

In my respectful view, the learned chambers judge did not err in his disposition of the issues before him. It was not open to him on the application for judicial review, nor is it open to us, to decide the merits of Mr. Netupsky's bridge design. Whether it is deserving of professional censure is an issue which can only be addressed in a hearing. At that time Mr. Netupsky's allegations that his critics have

misapprehended the design criteria, are biased, or are otherwise in error, can be fully explored.

[104] Based upon that reasoning, I see no basis for finding that absent a hearing the Panel in this case acted unreasonably in declining to make a decision akin to that discussed in *Netupsky*. I therefore dismiss this ground of review.

**k) Other Grounds for Judicial Review Raised by the Petitioner**

[105] In addition to the grounds set out in his written submissions to this Court, the petitioner asserted further grounds in his petition, as follows:

- a) that the respondent improperly prevented the petitioner from speaking to witnesses;
- b) that the respondent failed to make full disclosure of its documents to the petitioner;
- c) that the respondent failed to make full disclosure of Mr. Nakai's documents; and
- d) that the respondent improperly proceeded against the petitioner when it knew or ought to have known that the allegations in the Notice of Inquiry were incorrect.

[106] The petitioner sought to interview Mr. Thiele and Mr. Nakai, and his counsel's requests to do so were rejected by counsel for the respondent on the basis that both were individuals from whom he took instructions and whom he regarded as key representatives of his client. Counsel for the respondent did, however, agree to have these two men respond to Interrogatories from the petitioner. The petitioner has not complained about the answers he received to the Interrogatories.

[107] I am unable to say on the evidence before me whether either of these two men is capable of providing evidence at the hearing of the Notice of Inquiry that

could assist the petitioner. That will be a matter for the Panel to consider, but it is premature for me to resolve the matter. For the present, I can only say that the issue remains open to the petitioner to pursue before the Panel.

[108] The respondent took the position before me that it was bound to make disclosure of documents to the petitioner consistent with the obligations of the Crown set out in the decision of the Supreme Court of Canada in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326. Obtaining disclosure of documents, and in particular, the disclosure of the Tse Letter, was not without challenge to the petitioner. In my view, it is no answer for the respondent to assert, as it did before me, that the petitioner did not respond as fully or as quickly as the respondent says he should have in the delivery of his file to the Investigation Committee. The two issues must be considered independently.

[109] The petitioner now has the disclosure to which he says he was entitled earlier than he received it. Again it will be for the Panel which hears the Notice of Inquiry on its merits to consider whether the petitioner has been disadvantaged by late disclosure in meeting the allegations in the Notice of Inquiry. At this juncture it is premature for me to resolve this matter too.

[110] Insofar as the complaint respecting production of Mr. Nakai's records is concerned, he did not retain copies of his documents, and thus was unable to produce them.

[111] Mr. Thiele, however, did retain copies of the emails he exchanged with Mr. Nakai, and these were produced by the respondent. As with the other

documents that the petitioner says he should have had earlier, and those which may have been destroyed by Mr. Nakai, it will be for the Panel which hears the Notice of Inquiry on its merits to consider whether the petitioner has been disadvantaged by the unavailability of any documents from Mr. Nakai in meeting the allegations in the Notice of Inquiry. At this juncture it is premature for me to resolve this matter as well.

[112] Finally there is the allegation that the respondent improperly proceeded against the petitioner when it knew or ought to have known that the allegations in the Notice of Inquiry were incorrect.

[113] For the reasons quoted above from Finch J.A. in *Netupsky*, I conclude that it is not open to me, at this juncture, to decide what is or is not incorrect in the Notice of Inquiry. That matter can only be addressed in a hearing by the Panel.

## **CONCLUSION**

[114] The petitioner has yet to have the Notice of Inquiry against him considered on its merits.

[115] There is no basis upon which I can reasonably conclude that the petitioner's ability to answer the Notice of Inquiry has in any way been impaired by any action by the respondent or its staff or committees.

[116] While it may be that the respondent, or one or more of its staff or committees might or even should have acted other than they did, the actions complained of have not impaired the ability of the petitioner to respond to the Notice of Inquiry.

[117] If, in the view of the Panel hearing the Notice of Inquiry on its merits, there were no reasonable and probable grounds for the authorization of the Notice of Inquiry, it has been conceded by counsel for the respondent that there may be a remedy to the petitioner in costs. But unless and until the Notice of Inquiry has been considered on its merits, the duty of the respondent to protect the interests of the public must be respected, and the proceedings authorized by the Panel must be allowed to proceed, absent proven prejudice by the petitioner.

[118] The petition is dismissed. The issue of costs may be addressed by counsel either before or after the Notice of Inquiry has been fully considered by the Panel.

“Hinkson J.”