IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kaminski v. Association of Professional Engineers,* 2010 BCSC 468

Date: 20100407
Docket: S087105
Registry: Vancouver

Between:

Jerzy Kaminski

Appellant

And

Association of Professional Engineers and Geoscientists of British Columbia

Respondent

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Appellant:	A. S. Wallrap
Counsel for the Respondent:	R. W. Hunter M. J. Kleisinger
Place and Date of Hearing:	Vancouver, B.C. October 7, 2009
Further Written Submissions:	March 19, 24 and 31, 2010
Place and Date of Judgment:	Vancouver, B.C. April 7, 2010

INTRODUCTION

[1] The appellant, Mr. Kaminski, is a professional engineer. On June 20, 2008, a Discipline Committee Panel (the "Panel") of the respondent Association of Professional Engineers and Geoscientists of British Columbia (the "Association") found that he had demonstrated unprofessional conduct in relation to a structural concept review he had undertaken. The penalty and costs were assessed on August 29, 2008. The Panel subsequently rejected Mr. Kaminski's application to re-open the matter.

[2] Mr. Kaminski now appeals from the finding of unprofessional conduct against him, pursuant to s. 39 of the *Engineers and Geoscientists Act*, R.S.B.C.1996, c. 116 (the "*Act*"). The relevant portions of s. 39 read as follows:

> **39** (1) Any person who feels aggrieved by an order of the discipline committee under section 33(2) ... may appeal from the order ... to the Supreme Court within 42 days from the date of that order....
>
> ...
>
> (7) On hearing the appeal, the court may
>
> (a) sustain, reverse, alter or amend the order,
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> (b) remit the matter to the council or discipline committee for rehearing, or
>
> (c) make any order as to costs or otherwise as to the court seems right.
>
> (8) An appeal must be heard and determined on its merits, and must not be defeated merely because of a technical defect in the proceedings.

COMPLAINT AND INVESTIGATION

[3] This matter arises out of structural drawings for temporary structures for use in a one-day special event ("Red Bull Flugtag") in False Creek, Vancouver, on August 19, 2006. These structures included an approach ramp, ramp, a flight deck, judges' tower, speakers' tower and bleachers.

[4] The original drawings were sealed by the engineer of record on July 24, 2006, and submitted by her to the City of Vancouver (the "city") on July 27, 2006, together with a building permit application. No record of structural concept review

accompanied them, and so the city arranged for John Pao, P. Eng., to review the drawings. Mr. Pao provided a report to the city on July 31, 2006. He concluded that the drawings were inadequate.

[5] On August 8, 2006, the engineer of record sealed a revised set of structural drawings, which the city received on August 9, 2006. These, too, were rejected by the city after a review by United Pacific Geotechnical Engineering. The engineer of record made further adjustments and then engaged Mr. Kaminski for a structural concept review on the evening of August 10, 2006.

[6] Mr. Kaminski interviewed the engineer of record, and reviewed the revised drawings, the United Pacific Geotechnical Report, an information sheet from Advanced Scaffold Products Ltd. ("ASP") for specialist series beams, and undated literature from Etobicoke Ironworks Ltd. for its total scaffold system. On the basis of this review, Mr. Kaminski completed and sealed a Record of Structural Concept Review.

[7] The engineer of record submitted Mr. Kaminski's Record of Structural Concept Review to the city on August 11, 2006, but the city once again declined to grant a building permit, concluding that its concerns with the structural design had not been fully addressed.

[8] By letter dated August 15, 2006, Mr. Jeffery Mitchell, M. Eng., P. Eng., Building Code Specialist and Manager of Professional Programs for the City of Vancouver, wrote to the Association "to initiate a formal complaint against the structural engineer of record" (not Mr. Kaminski). In outlining the course of events relevant to the complaint, Mr. Mitchell noted that the last event took place on August 11, when the engineer of record provided a structural concept review letter completed by Mr. Kaminski, and was thereafter informed that the city's concerns with the structural design had not been adequately addressed. Attached to the letter were copies of Mr. Pao's original review report and Mr. Kaminski's letter of structural concept review. The drawings were forwarded under separate cover.

[9] On August 21, 2006, the Association's Associate Director of Regulatory Compliance, Geoff Thiele, P. Eng., wrote to Mr. Kaminski, stating:

> We have received a complaint concerning the professional conduct of [the engineer of record] from Mr. Jeffery Mitchell, P. Eng., of the City of Vancouver. Mr. Mitchell has also advised the Association of the City's concerns relating to your professional conduct, as concept reviewer of the design in question, and that the City wishes to make a complaint against you for inadequate concept review....
>
> Complaints are investigated by the Association in accordance with the provisions of the *Engineers and Geoscientists Act* (the "*Act*"), in particular Section 29, Subsections (1), (2) and (3), *Complaints and Investigations*, as outlined in our Complaint Procedure. Copies of the *Act* and the Complaint Procedure are enclosed for your guidance and information.
>
> Please explain how you failed to observe the deficiencies identified by John Pao, P. Eng., Struct. Eng., in [the engineer of record's] design when you did the concept review.
>
> ...

[10] Mr. Kaminski responded to this letter on September 18, 2006. On October 24, 2006, Mr. Thiele provided a report to Ross Rettie, P. Eng., the Association's Director of Professional Practice and Ethics, concluding as follows:

> I think this needs to be sent to the Investigation Committee, along with the complaint against [the engineer of record], and the subcommittee will have to look at the materials and see if the procedures followed by Mr. Kaminski and [the engineer of record] were appropriate and the design sound.

[11] The subcommittee's report, dated April 25, 2007, was prepared by Thomas Leung, P. Eng., Struct. Eng., MIStructE, who had this to say:

> Mr. Kaminski, P. Eng., is the review engineer for the project of Red Bull Flugtag event. In his response letter to the Association on September 16, 2006, [he] stated that "the drawings presented in the customary manner for this type of structure; only the schematic of the structures is shown".
>
> I take exception to this statement. Even if the drawings are presented in schematic form for these temporary structures, critical elements and forces should be indicated on the drawings. As a minimum, shop drawings and or erection drawings should be demanded from the contractor or supplier.
>
> Mr. Kaminski also stated that "the final compliance with the design and code is verified by a thorough field inspection". If the drawings and specifications are not adequately provided, the basis of a thorough inspection is questionable.

> It is my opinion that the drawings submitted to the city by [the engineer of record] do not meet the standard of care that a professional engineer should be providing. Mr. Kaminski, P. Eng. in his capacity as the review engineer, ought to have come to the same conclusion as Mr. Pao, P. Eng. or myself if he had closer scrutiny of the drawings rather than relying on the customary manner of schematic presentation for this type of structure.
>
> Based on the above, I am recommending that there are reasonable grounds to forward the file to the disciplinary committee for further action.

[12] On July 26, 2007, the Association served Mr. Kaminski with a Notice of Inquiry setting out the following allegation against him:

> ... contrary to the Act, you have demonstrated unprofessional conduct in your August 10, 2006 concept review, which you signed, sealed and submitted to the City of Vancouver, of the engineer of record's structural design drawings for temporary structures for the approach ramp, ramp, flight deck, judges tower and speaker towers ("August Drawings"), for a "Red Bull Flugtag" event on the shore of False Creek, Vancouver, B.C., because you failed to identify the many deficiencies in the August Drawings.

[13] On May 28, 2008, Mr. Kaminski requested further particulars of the alleged unprofessional conduct. Particulars were provided by correspondence dated June 3, 2008. By letter of June 5, 2008, counsel for the Association confirmed that those particulars were exhaustive.

HEARING AND DETERMINATION

[14] At the hearing, the Association called evidence from three professional engineers. The first was Mr. Pao, who testified concerning his conclusion that the July drawings were inadequate to support the issuance of the building permit. He subsequently reviewed the August Drawings and testified that they, too, were inadequate.

[15] The second was Mr. Leung, who gave the opinion that the August Drawings were incomplete and that a concept review, as required by the Association's "Guidelines for Professional Structural Concept Review", should have identified these deficiencies.

[16] The third witness, Mr. Mutrie, testified that there was insufficient detail on the August Drawings to permit a proper design review, but that he had been able to check the capacity of a few structural members and found them to be inadequate. He also noted that the design live load stated on the August Drawings was 100 psf, whereas on the final drawings ultimately accepted by the city, the design live load was reduced to 30 psf, further demonstrating that the design as shown on the August Drawings was inadequate.

[17] The witnesses called in defence of Mr. Kaminski consisted of two scaffolding suppliers/contractors and one professional engineer. Mr. Kaminski also testified on his own behalf.

[18] The two scaffolding suppliers/contractors testified that in their opinion, the August Drawings were adequate for an experienced scaffolding contractor to construct safe structures. One noted that the purpose of the August Drawings was to obtain the building permits, and that he normally constructed scaffolding without any drawings prepared by a professional engineer.

[19] The professional engineer, Mr. Sexsmith, testified that in his opinion, Mr. Kaminski's role in providing a concept review was to ensure that the structures were safe, and that experienced scaffolding contractors do not need all details on the drawings. It was his view that the conceptual review was adequate.

[20] Mr. Kaminski described how the review had been carried out, noting that his review had included product catalogues, the geotechnical report, and the structural and architectural drawings. He testified that he had done some check calculations, and that the engineer of record advised that she had been contracted to provide site inspection services during construction, and so would be in a position to verify the safety of the completed structures.

[21] In its Determination, the Panel offered the following analysis:

> The Panel carefully considered the evidence of the Association's three witnesses who testified that the August Drawings contained numerous deficiencies. The Panel accepts the evidence of these professional

> engineers; in the Panel's brief review of the August Drawings during the hearing, the many deficiencies were obvious.
>
> The Panel rejects the evidence of the two scaffolding suppliers/contractors that an experienced contractor could use the August Drawings as a basis to construct safe scaffolding structures. The Panel is aware that some scaffolding may be constructed without drawings prepared by a professional engineer; however the Panel considers that the structures shown on the August Drawings are very complex and so require designs prepared by a professional engineer. In addition, when conducting a concept review, a professional engineer cannot ignore deficiencies on drawings on the assumption that the contractor will make the necessary changes during construction.
>
> The Panel does not accept the evidence of Mr. Kaminski's witness that the concept review was adequate; the deficiencies of the August Drawings are so obvious that Mr. Kaminski's concept review should have identified them.
>
> The Panel also does not accept the argument of Mr. Kaminski's counsel that the Association's Guidelines are not clear.
>
> In addition, in a letter to the Association dated September 18, 2006, Mr. Kaminski stated that "The drawings and data I used for the concept review are essentially identical to the ones by --------- that were accepted and the permit issued by the City." The Panel observed that the drawings accepted by the City had significant differences which should have been identified in Mr. Kaminski's concept review.
>
> During evidence, Mr. Kaminski admitted to conducting a concept review, lasting some three hours, with the designer at her office. His signed and sealed checklist of this review indicated no areas of concern such as those described by the Association's witnesses. Mr. Kaminski further admitted to failing to retain on file any notes or check calculations related to this review.

[22] The Panel concluded that the charge that Mr. Kaminski had demonstrated unprofessional conduct had been proven to the requisite standard.

ISSUES ON APPEAL

[23] Mr. Kaminski has raised a number of issues for review, which come under the following headings:

A. Was there a breach of the principles of natural justice?

B. Did the Association exceed its jurisdiction?

C. What is the proper standard of review of the Panel's decision?

D. Did the Panel err in finding that Mr. Kaminski had demonstrated unprofessional conduct?

E. Did the Panel err by declining to re-hear, reconsider or re-open its decision?

DISCUSSION

A. <u>Was there a breach of the principles of natural justice?</u>

[24] Under this heading, the appellant first complained that the Association proceeded to an investigation and inquiry in the absence of any formal written complaint against him from a member independent of the Association. The appellant submitted that the Association had no jurisdiction to initiate a complaint on its own, to investigate its own complaint, or to prosecute its own complaint.

[25] Section 29 of the *Act* provides as follows:

> **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.
>
> (3) If an inquiry under section 32 is not held in response to a complaint, the council must have the complainant, and the member, licensee or certificate holder against whom the complaint was made, informed of the reasons.

[26] Section 30(3) of the *Act* states:

> **30** (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. [Emphasis added.]

[27] There is nothing in these statutory provisions that requires there to be a written complaint, or a complaint from someone outside the Association, before the Association may proceed with an investigation and inquiry. The submissions of the

appellant would, in my view, unduly restrain the Association in carrying out its duty to the public to set, maintain and enforce standards designed to protect the public.

[28] Here, on the evidence before the Panel, a complaint concerning Mr. Kaminski had in fact been received from Mr. Mitchell, and the statutory procedures were appropriately followed. I see no breach of natural justice or want of jurisdiction.

[29] The next complaint is that the Association failed to provide sufficient particulars. Counsel for the appellant was unable, however, to articulate any 'particulars' that he asserts were relied upon and which had not been disclosed in advance. The record discloses none. There is no merit to this ground of appeal.

[30] The appellant next argued that the guidelines by which he maintains he was judged were unclear. The Association had introduced a bylaw, 14(b), in 1992 requiring all members and licensees to establish quality management processes for their practices. These processes were to include, as a minimum, (1) retention of complete design and review files for a minimum period of 10 years, (2) in-house checks of their designs as is standard procedure, (3) concept reviews of their structural designs by members or licensees not originally involved in the designs, and (4) field reviews of their projects during construction. The bylaw provided that concept reviews under (3) were to be in addition to any in-house checks under (2).

[31] In August 1994, the Association produced a *Guideline for Professional Structural Concept Review* (the "Guideline"), in order "to assist members and licensees in applying and maintaining uniform standards of review" in accordance with bylaw 14(b). Among other things, the Guideline set out eight steps to be followed in a structural concept review process, and attached a Checklist for Professional Structural Concept Review which followed the steps referred to in the Guideline. After carrying out his structural concept review, Mr. Kaminski filled out the Guideline's checklist form, certifying that he had reviewed the items listed.

[32] This ground, too, must fail. The failure identified by the Panel was to identify deficiencies in the August Drawings. The evidence of the Association's experts was

that these deficiencies should have been readily apparent had Mr. Kaminski followed the Guideline, which in fact he purported to have done. But whether or not he followed the Guideline, the fact remains that he was found to have failed to identify deficiencies which, in the Panel's view, a professional engineer ought to have identified. In my view, there is nothing unclear about the Guideline; the issue was not whether it had been followed, but whether it was unprofessional for Mr. Kaminski to have failed to identify deficiencies, particularly given the purpose of structural review, which is to enhance public safety.

[33] The appellant's final submission under the heading of natural justice was that the Panel failed to provide adequate reasons for its decision. In particular, the appellant argued that the Panel's reasons failed to particularize or identify the "numerous deficiencies" which it held demonstrated unprofessional conduct. It was contended, in short, that the reasons were not "transparent and intelligible", and deprived the appellant of the right to a meaningful review.

[34] I find no substance to this submission. As the Supreme Court of Canada pointed out in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, regard must be had to the record *as a whole* in considering whether the reasons were so inadequate as to deprive the appellant of the right to meaningful appellate review. In the circumstances of this case, while it is correct that the Panel did not specifically identify the nature of the particular deficiencies in question, the record did identify those deficiencies. They are described in the evidence of the experts whose opinions were accepted by the Panel.

[35] I conclude that there were no breaches of the principles of natural justice in the conduct of this matter. To re-characterize the issue as the appellant did in its written submissions following the release by the Court of Appeal of its judgment in *Salway v. Association of Professional Engineers and Geoscientists of British Columbia*, 2010 BCCA 94, I find no want of justification, transparency and intelligibility in the process that was followed by the Association.

B. Did the Association exceed its jurisdiction?

[36] As I understand the appellant's position in this regard, it is that in establishing the Guideline, the Association exceeded its jurisdiction because the Guideline goes beyond what is stipulated in bylaw 14(b), discussed above. In the circumstances of this case, the appellant argued, this gave rise to an impermissible delegation of power, articulated in paragraphs 59 and 60 of the appellant's factum as follows:

> 59. It is submitted that the Association should not have discretion to interpret the meaning or intent of its Bylaw article 14b *and* the authority to establish the Structural Concept Review Guidelines thereunder since this would result in an impermissible delegation of power. The Association should not grant itself discretion to establish Structural Concept Guidelines and the discretion to impose the guidelines as a standard for unprofessional conduct, all under the banner of quality management, while at the same time providing itself with discretion to interpret the requirements for a concept review under Bylaw article 14b, and presumably the Guidelines. There is an inherent circularity and uncertainty in this process. As explained by Justice Johnston in [*Tchou-San-Da v. Association of Professional Engineers*, 2007 BCSC 1403, paras. 39-42], "to escape the prohibition against sub-delegation, the discretion passed back to the council by the bylaw would have to be relatively minor." The issue can be re-phrased as whether there is sufficient legislative guidance "to escape the conclusion that an unauthorized sub-delegation has occurred". Accordingly, it is submitted that either the Bylaw or the Guidelines are improperly constituted as falling beyond the powers of the Association.
>
> 60. For reasons previously discussed above, the Guidelines and the Bylaw create two different standards for a concept review, and therefore the Bylaw takes precedence and the exercise of power and authority by the Association in establishing the Guidelines is *ultra vires*.

[37] The application of this argument to the circumstances of this case was made a little clearer in oral argument by an example. Item 5 on the Guideline checklist filled out by Mr. Kaminski refers to "Drawing completeness and continuity of load paths". The appellant asserted that the Panel in effect found a lack of completeness in the drawings and therefore concluded that there was a deficiency on the basis of Item 5. The appellant argued that this conclusion was not open to the Panel because there is nothing in the bylaw (as opposed to the Guideline) that would support the imposition of such a standard.

[38] I am unable to accept this argument. In my view, the *Tchou-San-Da* case has no application. There, the *Act* authorized the Association to enact a bylaw

establishing what experience was necessary to support an application for membership. The bylaw that was passed referred to four years' experience that was "satisfactory to the Council". Mr. Justice Johnston considered this to be an unlawful sub-delegation to the Council of the power to establish by bylaw the experience required for admission to membership.

[39] In the case at bar, bylaw 14(b) made structural concept reviews mandatory, but gave no guidance on how they should be carried out. It did not purport to delegate anything to anyone. The Guideline was drafted to assist engineers in carrying out concept reviews and to aid in maintaining uniform standards. It thus provides a tool to engineers in the position of the appellant, a tool which in fact he used. But that is not the same as using the Guideline to impose a standard for unprofessional conduct by way of impermissible sub-delegation.

[40] In making his structural concept review report, the appellant confirmed that he had reviewed specific items. In doing so, he followed the Guideline. What the Panel found that he failed to do was something different. He failed to note various deficiencies identified by the expert witnesses as ones that he ought to have noted. I do not see how this can constitute an impermissible sub-delegation of power or excess of jurisdiction.

C. What is the proper standard of review?

[41] Much time was spent debating the applicability of the standards of correctness and reasonableness in the review of the decisions of administrative tribunals as articulated in cases such as *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[42] In the *Salway* case, decided after the hearing of this matter (with respect to which, as noted, the parties made further written submissions), the Court of Appeal confirmed at para. 22 that the *Dunsmuir* standard of review analysis applies to both judicial review and statutory appeals from decisions of administrative tribunals: see

also *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 21.

[43] As summarized in *Salway* at para. 20, determining the applicable standard of review in a statutory appeal requires the reviewing court to engage in the two-step process set out in *Dunsmuir* at para. 62. If the existing jurisprudence has already determined the standard of review to be applied to the category of question at issue, then the reviewing court will adopt that standard without the need for further inquiry. If the jurisprudence has not determined the standard of review to be applied to the category of question at issue, then the reviewing court must engage in a contextual standard of review analysis by considering the following factors: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by its enabling statute; (3) the nature of the question at issue; and (4) the tribunal's expertise. The Supreme Court in *Dunsmuir* also stated at para. 51 that certain issues, such as questions of fact, discretion and policy, and legal issues that cannot easily be separated from factual issues, will generally attract a standard of reasonableness.

[44] In *Salway*, as in this case, the respondent appealed a decision of the disciplinary committee of the Association pursuant to s. 39(1) of the *Act*. In determining the standard of review for this question, the court first inquired whether the existing jurisprudence had determined what degree of deference should be given to the question in issue. Though the court framed the question itself narrowly, it construed the category of question broadly, comparing it to findings of "unprofessional conduct" generally by professional organizations. The court then proceeded to review a number of appellate decisions that have applied a reasonableness standard of review in upholding findings of "unprofessional conduct" by professional organizations: *Goldberg v. Law Society of British Columbia*, 2009 BCCA 147; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; and *Coffey v. College of Licensed Practical Nurses of Manitoba*, 2008 MBCA 33.

[45] The court then set out its conclusion:

> [30] The jurisprudence, therefore, would seem to dictate that courts adopt a significant degree of deference to disciplinary decisions of professional tribunals concerning the interpretation of their professional standards, regardless of whether those standards are written or unwritten. This degree of deference accords with the reasonableness standard of review.

[46] Notwithstanding this resolution of the first step in the *Dunsmuir* analysis, the Court of Appeal went on to consider the second step. Its reasoning with respect to statutory appeals under the *Act* is equally applicable to the question at issue in Mr. Kaminski's case:

> [31] Although the *Act* does not contain a privative clause, and includes a statutory right of appeal, the remaining contextual factors in the analysis suggest that a high degree of deference should be given to the Determination (I note that in *Goldberg, Coffey*, and *Bishop* the statutes in question contained statutory rights of appeal). The purpose of the Association is to regulate the standards and practices of engineers and geoscientists in B.C. The disciplinary process plays a central role in enforcing the professional standards of the Association. The nature of the question to be determined by the Panel involved a highly fact-driven inquiry that was circumscribed only by the provisions of the *Act* relating to authority of a disciplinary committee (ss. 31 and 34), the scope of a disciplinary inquiry (s. 32), and the actions of a disciplinary committee (s. 33). The Panel was comprised of three professional engineers who are also subject to the professional standards set by the Association and therefore had the expertise and experience to make the necessary findings under the *Act*. Based on the *Dunsmuir* standard of review analysis it is clear that the standard of review to be applied in this case was that of reasonableness.

[47] In this case, the question was whether Mr. Kaminski had demonstrated unprofessional conduct in relation to a structural concept review he had undertaken. While this specific issue is different from that in *Salway*, the broader category of question at issue is the same: whether Mr. Kaminski demonstrated unprofessional conduct as determined by a disciplinary decision of the professional organization of which he is a member. *Salway* confirms that the degree of deference to be granted to disciplinary decisions of professional tribunals concerning this category of question, that is, the interpretation of their professional standards, accords with the reasonableness standard of review.

[48] On this basis alone, I am satisfied that the standard of review in this case should be reasonableness. As suggested in *Dunsmuir* at para. 57, an exhaustive

review is not required in every case to determine the proper standard of review. Any residual doubt about the proper standard of review is resolved by the Court of Appeal's conclusion in *Salway.* In short, existing jurisprudence has already determined the standard of review to be applied to the category of question at issue.

D. Did the Panel err in finding that Mr. Kaminski had demonstrated unprofessional conduct?

[49] The appellant argued that the Panel erred by accepting the opinions of the experts whose evidence was led by the Association, and further erred by wholly rejecting the opinions of his own experts. This argument was based principally on the proposition that the appellant's experts were very familiar with the sort of temporary scaffolding-type structures that were involved in this matter, whereas the Association's experts lacked specific expertise in that area.

[50] In my view, this is not a case where it would be appropriate for me to try to second-guess the conclusions of the members of the Panel as to what constituted deficiencies in the circumstances before it. As the Court of Appeal stated in *Salway*:

> [32] The reasonableness standard of review acknowledges that there is "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Reasonableness requires courts to give deference to a professional body's interpretation of its own professional standards so long as it is justified, transparent and intelligible.

[51] The Panel members heard the evidence of all of the experts in that regard, and made findings within the scope of their professional expertise. The experts upon whom the Association relied all had considerable experience and expertise in the field of structural engineering, and at least some experience in the specific area of temporary scaffolding-type structures. While it would not have been unreasonable for the Panel to have concluded that the evidence of the appellant's experts was more compelling in view of their particular experience, the Panel's conclusion to the contrary was certainly within the range of possible, acceptable outcomes, and it is not for me to substitute my own view should it differ. For the

reasons already articulated, I am satisfied that the Panel's interpretation of its own professional standards was "justified, transparent and intelligible".

[52] The appellant further argues that the Association failed to meet the high standard of proof required for findings of unprofessional conduct. Contrary to this submission, the law, as I understand it, is now clear that there is but one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.

[53] As the Supreme Court of Canada there pointed out, an appellate court must ensure that it does not substitute its own view of the facts for that of the trial judge in determining whether the correct standard of proof was applied. In every civil case, a judge should be mindful of, and depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof.

[54] In this case, the Panel, if anything, applied a higher standard of proof than was required.

[55] The appellant then argued that, even if the Panel did not err in finding that Mr. Kaminski's concept review failed to identify deficiencies in the August Drawings that ought to have been evident to him, this cannot in law amount to unprofessional conduct as the Panel concluded.

[56] Section 33(1) of the *Act* provides as follows:

> **33** (1) After an inquiry under section 32, the discipline committee may determine that the member, licensee or certificate holder
>
> ...
>
> (c) has demonstrated incompetence, negligence or unprofessional conduct.

[57] The appellant submitted that while the Panel's findings may be considered to have demonstrated incompetence or negligence, they cannot support a finding of unprofessional conduct. He relied upon the decision of the Yukon Court of Appeal in

Reddoch v. The Yukon Medical Council, 2001 YKCA 13, where Southin J.A. held that in order for the conduct of the physician in the case before her to constitute "unprofessional conduct", it must have about it "some quality of blatancy – some cavalier disregard for the patient and the patient's well being". That quality, in the appellant's submission, is missing in this case.

[58] The appellant's argument in this regard had the support of the trial judge's reasons in the *Salway* case. The issue therefore came squarely before the Court of Appeal, where the appellant's position was rejected. As the court there said:

> [32] ... The pre-*Dunsmuir* decisions relied on by the respondent, including *Reddoch*, no longer set the standard for professional misconduct as conduct that is dishonourable, disgraceful, blatant or cavalier. Rather, it is the disciplinary body of the professional organization that sets the professional standards for that organization. So long as its decision is within the range of reasonable outcomes—i.e., it is justified, transparent and intelligible—it is not for courts to substitute their view of whether a member's conduct amounts to professional misconduct.

[59] Accordingly, the appellant's argument that the identified deficiencies cannot in law constitute professional misconduct must fail.

E. <u>Did the Panel err by declining to re-hear, reconsider or re-open its decision?</u>

[60] The appellant submitted that the Panel had the "jurisdiction and authority to correct errors and re-open the matter as necessary for fairness and justice between the parties". That jurisdiction and authority, the appellant asserted, is inherent in the *Act*, or alternatively, in s. 53 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[61] The appellant then argued that the Panel erred by failing to exercise its discretion to re-open or re-hear the matter in order to correct jurisdictional defects or procedural errors, or correct other errors, omissions or mistakes.

[62] Once again, there is no merit to this argument.

[63] First, it is clear that the Panel was not a tribunal within the meaning of the *Administrative Tribunals Act,* and even if it were, s. 53 would not permit, let alone

mandate, the sort of wholesale reversal which the appellant seeks. Second, there is nothing within the *Act* that supports the appellant's argument. Third, the Panel's jurisdiction, if any, to review its own decisions would be at best discretionary, and the appellant has offered no basis upon which the Panel's refusal to re-open the matter could, as an exercise of discretion, be challenged.

CONCLUSION

[64] For the foregoing reasons, the appeal must be dismissed. The respondent is entitled to its party-and-party costs at Scale B.

"GRAUER J."