

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

**ARIE KEPPEL**

Applicant

- and -

**THE ASSOCIATION OF PROFESSIONAL ENGINEERS, GEOLOGISTS,  
AND GEOPHYSICISTS OF THE NORTHWEST TERRITORIES**

Respondent

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**Judicial review application for an order prohibiting the Respondent from proceeding with a discipline hearing.**

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**REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. SCHULER**

Heard at Yellowknife, Northwest Territories  
on July 3 & 4, 1996

Reasons filed: August 7, 1996

Counsel for the Applicant: Austin Marshall

Counsel for the Respondent: Gerard Phillips

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**REASONS FOR JUDGMENT**

1           The Applicant brings this application for judicial review, seeking an order prohibiting the Respondent (the "Association") from proceeding with a discipline hearing against him until such time as a civil trial involving similar, if not identical, issues, is completed or, in the alternative, prohibiting the Association from proceeding with the said hearing at all.

2           The grounds upon which the Applicant seeks the latter permanent relief are (i) that the Association has already disciplined the Applicant for the matters in question; (ii) that the Association has no jurisdiction to discipline him because he was not a member of the Association when the events which gave rise to the discipline proceedings occurred; (iii) that the complaints on which the discipline proceedings are based do not involve engineering issues, but rather construction issues; and, (iv) that there is an apprehension of, if not actual, bias on the part of the Association.

3           A hearing was scheduled in the discipline proceedings but has been adjourned pending the outcome of this application.

### **Jurisdiction**

4           The first issue I will deal with is the one involving jurisdiction. Does the Association have jurisdiction to discipline the Applicant for things he did while he was not a member? If not, the discipline proceedings cannot go ahead.

### **Background**

5           The Association derives its existence from the Engineering, Geological and Geophysical Professions Act, R.S.N.W.T. 1988, c. E-6 (the "Act"). The objects of the Association are the regulation of the practices of professional engineering, professional geology and professional geophysics and the governance of those professions as well as the establishment of various standards among its members, all in order that the interests of the public may be served and protected (s. 3 of the Act).

6           It is common ground between the parties that the Applicant was not a member of the Association from June 8, 1993 until October, 1995. During that time, Liric Construction Ltd., a company owned by the Applicant and his wife, built a house for Mr. and Mrs. Naidoo. By letter dated December 20, 1994, the Naidoos lodged a complaint about the Applicant with the Association.

7           The complaint was based on a number of deficiencies alleged by the Naidoos in the construction of the house. I will refer to these as housebuilding complaints. The Naidoos also said that the Applicant had represented himself to them as a member of the Association and had used his engineering stamp on the plans for their house, but they questioned whether he was a member.

8           The Applicant's membership in the Association had in fact lapsed on June 8, 1993. In early December, 1994, sometime prior to the Naidoo complaint being made, the Applicant applied for reinstatement as a member of the Association. By letter dated January 16, 1995, the Association advised the Applicant that his application had been referred to the Association's Discipline Committee because of information received that he had held himself out as a professional engineer since June 8, 1993, because of the Naidoo complaint and because of a complaint received from the City of Yellowknife. The latter complaint was that, with respect to two residences (one being the Naidoo's), the Applicant had represented himself to the City's Inspections Division as a registered professional engineer during the time that he was not registered with the Association.

9           The Applicant responded to the Association by letter dated January 23, 1995, explaining that he had let his membership lapse because his employer was no longer paying the fees and he was becoming increasingly removed from the engineering field in his work. He said that he then used his stamp in the building of two houses in 1994 without remembering that he had allowed his membership to expire. He had been a member of the Association since at least 1982.

10           The Applicant admits that he held himself out as a member of the Association and used his stamp in connection with the building of the Naidoo residence during the time when his membership had in fact lapsed.

11           With knowledge of the above circumstances, the Association dealt with the Applicant's application for reinstatement. I will go into more detail about the process later in these reasons. It will suffice at this point to say that the Applicant was reinstated as a member in October of 1995. Subsequently, the Association pursued discipline proceedings against him based on the complaints referred to above.

**Jurisdiction to Discipline for Matters That Occurred When the Applicant Was Not A Member:**

12           In order to determine whether the Association has the jurisdiction to discipline a member for matters that occurred when he was not a member, it is necessary to look closely at the relevant provisions of the Act.

13           Section 9(1) of the Act provides as follows:

9. (1) Subject to this Act, no person other than a member, licensee or permit holder shall
  - (a) practise or offer to practise professional engineering, professional geology or professional geophysics;
  - (b) use, orally or otherwise, the title "professional engineer", "professional geologist" or "professional geophysicist" or any abbreviation of these titles;
  - (c) use, orally or otherwise, any name, title, occupational designation or position description in which the term "engineer", "geologist" or "geophysicist" appears or use any abbreviation of any such name, title, designation or description in a manner that would lead any person to believe that he or she
    - (i) is a professional engineer, professional geologist or professional geophysicist, or
    - (ii) is a person qualified to practise professional engineering, professional geology or professional geophysics; or

- (d) advertise himself or herself as, hold himself or herself out as, or act in such a manner as to create or induce in the mind of any reasonable person the belief that he or she is a professional engineer, professional geologist or professional geophysicist or a person so qualified.

14 Under section 9(4), a person who contravenes section 9(1) may be restrained by injunction:

(4) Where a person contravenes subsection (1) or (3), a judge of the Supreme Court may, on the application of the Association, grant an injunction restraining that person from further contravening that subsection.

15 Section 43 of the Act provides that contravention of section 9 is a summary conviction offence:

43. Every person who contravenes section 9 is guilty of an offence and liable on summary conviction

- (a) for the first offence, to a fine not exceeding \$2,000; and
- (b) for each subsequent offence, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding six months or to both.

16 It is worth noting that in his affidavit, filed May 2, 1996, the Applicant states:

14. That, in July, 1995, I was charged with the offence of holding myself out as an engineer while not licensed under the *NAPEGG Act*, contrary to s.9(d) of the *NAPEGG Act*. I do not know who instituted this prosecution. The Crown withdrew the charge on September 7, 1995.

17 The injunction and the summary conviction offence are the only sanctions provided for in the Act in the case of a person who is not registered under the Act.

18 The Act provides for the registration of members and of licensees. The only difference between the two appears to be the requirement that a member be a resident

of the Northwest Territories, which a licensee need not be. The only relevant registration status for purposes of this case is that of member.

19           The discipline provisions are found in sections 24 to 40 of the Act. Section 24 provides for the establishment of a Discipline Committee by the council that manages the affairs of the Association pursuant to section 6. Sections 25, 26 and 27 of the Act deal with the institution of discipline proceedings:

25 (1) The question of whether a person is guilty of conduct unbecoming a registrant or permit holder shall be determined by the council or, on appeal, by the Supreme Court.

(2) For the purposes of this Act, conduct that, in the judgment of the council, or the Supreme Court on appeal, constitutes professional misconduct, gross negligence, incompetence or misrepresentation or that is contrary to the best interests of the public or the profession of engineering, geology or geophysics shall be deemed to be conduct unbecoming a registrant or permit holder.

26 (1) Subject to subsection (2), the Discipline Committee shall conduct a preliminary investigation of all complaints received against registrants or permit holders or other matters that, in the opinion of the council or the Discipline Committee, ought to be investigated.

(2) ...

(3) ...

27 (1) Before any preliminary investigation is commenced, the Discipline Committee shall give the registrant or permit holder whose conduct is under investigation at least 10 days notice in writing that an investigation will be conducted.

(2) The notice must specify in general terms the complaint or matter to be investigated and must be served either personally or by registered mail, addressed and mailed to the registrant or permit holder at the latest post office address on the register or the record of permit holders.

(3) The registrant or permit holder whose conduct is to be investigated shall be given a reasonable opportunity to submit to the Discipline Committee a written statement respecting the complaint or matter under investigation.

20           The phrases "conduct unbecoming a registrant" (section 25(1)) and "complaints received against registrants" (section 26(1)) indicate that status as a registrant is required in order for these sections to apply to an individual.

21           Similarly, subsections 27(1) and (3) refer to "the registrant ... whose conduct is to be investigated".

22           The sections of the Act that I have quoted above clearly indicate that the process of investigation is initiated by and founded on the receipt of a complaint against a registrant. Section 1(1) of the Act defines registrant as "a member, licensee, student or person in training". The Applicant was none of these at the time the complaint was received.

23           A review of other cases indicates that, absent statutory jurisdiction, it is only in certain circumstances that a professional body will have jurisdiction to deal with events occurring prior to an individual becoming a member.

24           In *Re Harcourt and Association of Professional Engineers of the Province of Ontario* (1930), 38 O.W.N. 275, the Ontario High Court dealt with a finding of unprofessional conduct against an engineer. The finding was based on his having made an untrue statement about his experience when applying for membership in the Association. The



High Court held that because the statement was made before he became a member of the Association, it could not be unprofessional conduct. On appeal, however, reported at (1931), 39 O.W.N. 462, the Divisional Court held that the procuring of membership by a false representation was unprofessional conduct which occurred not only before membership, but continued thereafter, when the engineer retained the membership falsely procured.

25           In *Re Knox; a Solicitor* (1914), 20 D.L.R. 546 (Alta. S.C.), the Court dealt with an application to strike a solicitor off the rolls of the Law Society. The application was based on misconduct while the solicitor was a solicitor in Scotland, prior to his admission in Alberta. The Court distinguished between discipline or punishment of a solicitor and fitness of a solicitor and dealt with the matter on the basis of fitness. If the issue were discipline or punishment, the Court said, it might have been argued that the Court could not concern itself with conduct of the solicitor except in Alberta.

26           In *Harcourt*, as in *Knox*, the conduct complained of clearly occurred prior to the individual becoming a member of the professional organization in question. In both cases, it appears that the conduct was not known to the professional organization at the time it admitted the individual to membership. In both cases the conduct continued after membership in that it involved either the act of maintaining a status obtained by fraud and thus the fraud itself or the fitness of the individual to perform his professional obligations.

27            In this case the issue is not continuing conduct or fitness. The Association was well aware of the allegations against the Applicant when it admitted him to membership. The Association is not bringing the proceedings complained of in order to determine whether the Applicant is fit to practise as an engineer; rather, they are brought in order to discipline him for the specific acts complained about should it be established that they do amount to conduct unbecoming a registrant.

28            I would adopt the following words from the High Court decision in *Harcourt* concerning the interpretation of discipline provisions:

One of the purposes of the Act was, no doubt, to afford protection to the public against ignorant, unqualified, and unworthy practitioners of the engineering profession. Another purpose, undoubtedly, was to protect the engineering profession against the intrusion of unqualified and undesirable persons, and the Act ought to have a liberal construction. But, when it comes to the enforcement of penalties by disciplinary proceedings, the Court must see to it that the proceedings are in strict conformity with the statute. That is the purpose of the section which gives the right of appeal.

29            Counsel for the Association also referred to *Stolen v. College of Teachers* (British Columbia) (1994), 2 B.C.L.R. (3d) 44 (S.C.). In that case, the issue was whether, in dealing with a complaint against one of its members arising out of an assault he committed on his wife, the College could investigate and consider assaults committed by him against other women prior to the date he became a member of the College.

Holmes J. stated in *Stolen*:

Membership is not, however, in my view, a bar to the Respondent's ability to consider pre-membership events in a proper circumstance. Membership does not give rise to immunity nor provide a shield against all past conduct. An exaggerated example would be a person who was an undetected serial killer who gained membership, but was later caught and convicted. I have no doubt that a proceeding properly initiated under s.28 would ultimately lead to termination of membership.

I am of the view, therefore, that the Respondent in proper circumstances may have a jurisdiction to inquire into a pre-membership event or conduct, however, in the present circumstance its inquiry into the Petitioner's past conduct may not be within their jurisdiction. The key lies largely in the nature of the initiating complaint or report made under s.28 of the Act that gives rise to the Respondent's power to discipline.

30            Holmes J. held that the College had acted beyond its jurisdiction in investigating the pre-membership conduct because that particular aspect of the investigation had not been properly initiated under the provisions of the relevant legislation.

31            On appeal, (1995), 64 B.C.A.C. 1, the Court of Appeal decided that the complaint based on the assault on Stolen's wife, which was properly initiated, raised the issue of whether Stolen was a man given to violence against women. Therefore, an investigation into other instances of alleged violence was, the Court held, within the scope of the conduct to be investigated.

32            It is important to note that in *Stolen*, the Court was dealing with a preliminary investigation by the College into the assaults which occurred before Stolen became a member of the College (in fact, before the College came into existence). The investigating committee had issued a citation containing six allegations of conduct unbecoming a member, three of which were based on pre-membership assaults. The citation would lead to a hearing under the applicable legislation. The court did not go on to deal with whether any disciplinary sanction could be imposed for the pre-membership events. In my view, *Stolen* is a case dealing with fitness and, as stated by the Court of Appeal, the relevance of the pre-membership assaults was on the issue of the fitness for teaching of an individual alleged to have a history of violence towards women.

33           As I have said, this case does not involve fitness, nor does it involve a sudden revelation of conduct which might affect the Applicant's suitability or fitness as an engineer.

34           The Act clearly sets out sanctions for members who are charged with conduct unbecoming a registrant and quite distinct sanctions for non-members who are charged with contravening the Act. Since the Applicant was not a member when the actions giving rise to the complaints and the discipline proceedings occurred, he cannot be disciplined as a member for those actions.

35           If one asks the question, to what sanctions was the Applicant liable at the time the events complained of occurred, the answer is clear: to only those sanctions which, under the Act, were then applicable, being those found in sections 9 and 43.

36           Counsel for the Association argued that because the Applicant had been a member and believed himself to be a member at the relevant time, he should still be subject to the discipline process under the Act. I do not agree that the Applicant's belief is relevant. The issue is not whether he believed himself to be a member, but whether he was in fact a member. His belief cannot confer jurisdiction where there is none. In any event, it is clear from the materials filed, specifically the Association's letter of April 12, 1995, attached as Exhibit "H" to the Applicant's affidavit, that the Association did not accept the Applicant's explanation that he believed he was a member and so I am not prepared to accept his belief as an established fact.

37           Accordingly, I conclude that the Association does not have jurisdiction to proceed with the complaints which are the subject matter of the current discipline proceedings. Although the Applicant in his Originating Notice asks for a permanent injunction, I think the proper order to make is one prohibiting the Association from proceeding with the discipline hearing with respect to the Naidoo complaints and the City of Yellowknife complaints.

38           Since I have decided that prohibition should issue on the jurisdictional ground, I will deal only briefly with the other grounds argued:

**Has the Association Already Disciplined the Applicant?**

39           By letter dated January 16, 1995, the Applicant was advised by the Association that his application for reinstatement as a member had been referred by the Membership and Enforcement Committee to the Discipline Committee. The letter stated that this was done in light of the Applicant's contravention of section 9 of the Act, the Naidoo complaint and the City of Yellowknife complaints. The letter asked for a written response from the Applicant and stated that the allegations and the written response would be considered by the Discipline Committee at its next regular meeting and the Applicant would be advised of the Committee's decision at that time.

40           The Applicant responded by letter dated January 23, 1995, on the section 9 issue.

41           By letter dated February 2, 1995, the Association gave the Applicant further details about the complaints and again asked for a written response. It indicated that, "When

your application comes before Council you will be given an opportunity to make an oral presentation in support of your application for membership in the Association ...". The Discipline Committee was not mentioned.

42           The Applicant responded by letter dated February 8, 1995 with his position on the Naidoo complaint.

43           By letter dated March 29, 1995, the Association advised the Applicant that his application for admission would be addressed by Council on April 3, 1995. The following was stated about the subject matter of the meeting:

As has been previously discussed with you, the Council will be primarily interested in addressing the issue of your unauthorized practice over the past year and a half. Attached please find all of the background correspondence from the various complainants and related documents. This meeting with Council is not a discipline hearing under the relevant sections of the *Engineering, Geological and Geophysical Professions Act*. The Council simply wishes to hear your explanation of why you engaged in the practice of engineering while not being registered with the Association. The members of the Council have reviewed your written explanations but a number of questions remain outstanding. Accordingly, Council wishes to discuss this issue with you further before making a decision on whether or not to re-instate you in the Association.

44 In his affidavit, the Applicant states that he attended the meeting on April 3, 1995 and gave his explanation for the lapsing of his membership as well as his answer to the various housebuilding issues raised in the complaints and the issue of the use of his seal while unregistered.

45 The Applicant was advised of the result of the hearing by letter dated April 12, 1995. The letter said that Council found his explanation about his unauthorized practice unacceptable and stated:

Your answers to Council members' questions concerning the use of your stamp to stamp drawings while not a member leads the Council to believe that you may not fully recognize the significance of your responsibilities as a professional engineers (sic).

Accordingly, in order to better assess your understanding of those responsibilities, the Council has unanimously decided that you be required to write a professional practice examination pursuant to section 13(3) of [the Act].

Upon successful completion of the said exam, Council will reinstate your registration ....

46 The Applicant wrote the examination and by letter dated October 10, 1995, was advised that he had been reinstated as a member. The letter went on to say:

You should be aware that your reinstatement should in no way be taken as an indication from the Association that we will not be proceeding with a preliminary investigation into the allegations made by Mr. and Mrs. Naidoo made prior to your reinstatement.

You should also be aware that the allegations have in fact been referred to the Discipline Committee at this time. The committee will be contacting you further in this regard.

47 Section 13(3) of the Act is found in the section on Registration, not Discipline.

It reads as follows:

(3) Notwithstanding anything in this Act, the council may require an applicant for registration to write the professional practice examinations that the council considers necessary, and the council may refuse to register as a member or licensee any person who fails the examinations.

48 Although it is clear from the materials filed, particularly the minutes of a Special Council Meeting held on March 1, 1995, that the Association was very much interested in the prospect of disciplining the Applicant, the steps just referred to were not, in my view, discipline. No findings were made with respect to the complaints. In my view, the Association went so far only as to establish that it had grounds to consider the examination necessary within section 13(3).

49 In saying this, I do not in any way suggest that the Association was acting appropriately in admitting the Applicant to membership and then attempting to discipline him, quite apart from the fact that the discipline proceedings were based on matters that occurred while he was not a member.

**Engineering or Construction Issues:**

50 The evidence presented to me is not sufficient as a basis to determine whether the complaints against the Applicant involved construction problems rather than engineering issues. I would think that in order to make that determination, expert evidence might be necessary.



**Apprehension of Bias or Actual Bias:**

51           The Applicant argues that in instituting the discipline proceedings, the Association is now making its third attempt to prosecute him, the first two attempts being, he says, the reinstatement meeting and the section 9 prosecution, which was eventually withdrawn. He argues also that the Association has broadened the complaint and has been unwilling to particularize it. I am not satisfied that these grounds have been established and in any event I do not think that either individually or in combination they would lead a reasonably informed and objective observer to perceive bias.

52           The ground most strongly urged is that Dan Levert, a member of the Association, was also a senior official in the employment of the City of Yellowknife, one of the complainants. Mr. Levert was the Director of Public Works and Engineering for the City of Yellowknife. He was also the Chairman of the Association's Membership and Enforcement Committee and a member of the Association's Council.

53           The Discipline Committee Report of Preliminary Investigation, which is undated but was included at Tab 3 of the Record filed in this matter does not include Mr. Levert's name as one of the members of the Discipline Committee who actively participated in the investigation. At meetings on January 18, 1995 and December 13, 1995, Mr. Levert responded to questions by members of the Discipline Committee in his capacity as a representative of the City of Yellowknife.

54           Mr. Levert also attended a special Council meeting on March 1, 1995 in his capacity as Chair of the Membership and Enforcement Committee. At that meeting, various options with respect to the Applicant's request for reinstatement were reviewed. There was considerable discussion about whether the Applicant could be reinstated and then disciplined.

55           There was no evidence however, that Mr. Levert took part in the actual discipline investigation other than as witness and no evidence that he played a part in the Discipline Committee's decision to refer the complaints to a hearing after the preliminary investigation. The mere fact that he held a position of some responsibility as the Chair of the Membership and Enforcement Committee, which was involved when the Applicant was reinstated, does not, without more, support a conclusion of real or apprehended bias on the part of the Association.

**The Civil Suit:**

56           As indicated above, the Applicant put forward a claim for a temporary injunction to prevent the discipline proceedings from continuing pending the resolution of a civil suit between the Applicant's company and the Naidoos. The civil suit was commenced by the Applicant's company, Liric Construction Ltd., against the Naidoos for the balance owing for the construction of their house. A statement of defence and counterclaim were filed by the Naidoos and raise essentially the same issues as are raised in their complaint to the Association. The case, I am told, may proceed to trial this fall.

57 Counsel for the Applicant points to the cost to his client of dealing with both the discipline proceeding and the civil trial, particularly in bringing an expert forward to testify on the housebuilding issues. He also raises concerns that if the Association does discipline the Applicant, the Naidoos may seek to have that fact admitted in the civil action. He relies largely on the dissenting judgment in *Howe v. Institute of Chartered Accountants* (Ontario) (1994), 31 Admin. L.R. (2d) 119 (Ont. Gen. Div.)

58 Both the majority and dissenting judgments in *Howe* agreed that the governing principle is that set out in *R. v. Institute of Chartered Accountants in England, Wales; Ex parte Brindle* (unreported December 21, 1993) by the Court of Appeal. The principle is that the court's power to intervene to prevent proceedings from continuing must be exercised with great care and only where there is a real risk of serious prejudice to the trial of other proceedings which may lead to injustice.

59 I am not satisfied in this case that the cost of the two proceedings or the possibility that the Naidoos might use in the civil suit information gained in the discipline matter or even seek to have admitted the results of the discipline proceedings amounts to a real risk of serious prejudice or injustice. There is a public interest component in any discipline proceedings which must be recognized and which will in most cases prevail. I would not, therefore, have granted an injunction on this ground.

**Order:**

60 To summarize, I find that the Association does not have jurisdiction to proceed with discipline proceedings arising out of events which occurred when the Applicant was not a member of the Association. An order will therefore issue prohibiting the Association from proceeding with the hearing into the Naidoo complaints. Counsel for the Association advised that his client does not intend to proceed with the hearing into the City of Yellowknife complaints at this time but the order will obviously apply to those complaints as well.

61 Costs normally follow the event; however, if counsel wish to speak to that issue they may do so.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 7th day of August, 1996.

Counsel for the Applicant: Austin Marshall

Counsel for the Respondent: Gerard K. Phillips

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