

Before the Building Practitioners Board

	BPB Complaint No. C2-01861
Licensed Building Practitioner:	Ching Mar (the Respondent)
Licence Number:	BP 102359
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Auckland
Hearing Type:	In Person
Hearing Date:	16 October 2018
Decision Date:	12 November 2018

Board Members Present:

Chris Preston (Presiding)
Richard Merrifield, LBP, Carpentry Site AOP 2
Mel Orange, Legal Member
Faye Pearson-Green, LBP Design AOP 2

Appearances:

John (Chengxi) Tian, Barrister and Solicitor, for the Respondent

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed disciplinary offences under sections 317(1)(b) and 317(1)(d) of the Act.

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Introduction

[1] The hearing resulted from a Complaint into the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

Function of Disciplinary Action

[2] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

- [3] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [4] The Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. It does not have any jurisdiction over contractual matters.

Evidence

- [5] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

- [6] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.

- [7] In addition to the documentary evidence before the Board heard evidence at the hearing from:

Ching (Jimmy) Mar	Respondent
[Omitted]	Complainant
[Omitted]	Witness, [Omitted]

- [8] The complaint was made by an adjoining property owner to a new build development. The Respondent was involved in the build as a subcontractor to the owner/developer [Omitted]. The complaint set out that excavations and building work on the boundary between the new build and the Complainant’s property were carried out in a negligent manner and in manner that was contrary to the building consent issued. In particular the complaint noted:

- (a) a 3-metre-deep cut along the property boundary on 21 June 2016 which exposed large trees and a timber fence along the boundary and subsequent damage to the boundary fence and vegetation;
- (b) a failure to retain excavations while building work proceeded;

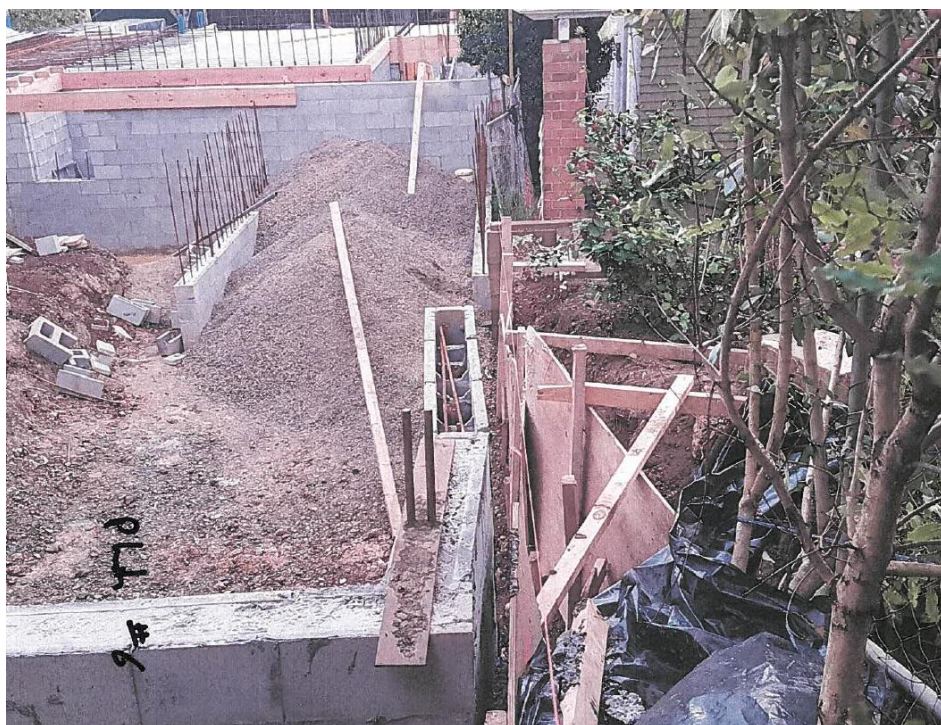
⁴ [2016] HZHC 2276 at para 164

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- (c) an excavation encroachment into the Complainant's property of approximately 1 metre and the construction of a pool foundation that encroached;
- (d) boundary excavations which included the removal of a section of concrete wall and a historical concrete foundation;
- (e) unauthorised encroachment to brace and support building work;
- (f) a failure to take remedial action despite repeated requests to do so; and
- (g) a failure to implement silt management as per the requirements of a building consent and resource consent issued for the build.

[9] The complaint was supported by photographs and newspaper articles. The photographs and articles showed the subsidence complained about:





- [10] The Respondent provided a written response to the complaint through his lawyer. In the main the response noted that the Respondent was a labour only contractor and that he was not responsible for much of what was complained about. Specifically the response noted:
- (a) the Respondent had no authority onsite to address the issues raised by the complainant and that he believed the Complainant was in direct communication with the head contractor;
 - (b) the boundary excavations complained about were undertaken prior to the Respondent's engagement on the site;
 - (c) the Respondent's work was dictated by the main contractors' requirements;
 - (d) that the main contractor entered into commercial arrangements with the Complainant to resolve matters between them; and
 - (e) the building consent authority did not impose a stop work.
- [11] The Board heard further evidence at the hearing.
- [12] The Complainant gave evidence that the Respondent was present at the time of the excavations complained about and the Respondent accepted that he was one of the two persons in the first of the photographs above. He also gave evidence that he set out the profiles for the excavations. Building Consent Authority inspection records noted that the Respondent was the licensed building practitioner on site for inspections associated with the foundations.
- [13] The documentary evidence before the Board included the building consent. The consent, which was required to be on site at all times, included the following provision:

Erosion and Sediment Control

Effective erosion and sediment control measures must be provided on site to ensure that runoff from construction minimises the discharge of silt or sediment as required by the erosion and sediment control plan of the Auckland Council ...

Producer Statement Construction Review (PS4) Excavation near boundary

Producer statement construction review (PS4) is to be submitted by the geotechnical engineer for the observation of excavations near the boundary confirming that the site excavation has not adversely affected the adjoining property and any building thereon. Confirmation is also required that the work complies with the design approved by this building consent and is in accordance with any relevant New Zealand Building Code clauses

Producer Statement Construction Review (PS4) Geotechnical

Producer statement construction review (PS4) is to be submitted by the geotechnical engineer for the observation and construction of the building platform, including site excavations, the installation of any sub soil drainage and placement of compacted fill as necessary to form the building platform. Confirmation is also required that the work complies with the design approved by this building consent and meets the requirements and/or recommendations of the geotechnical report submitted at building consent

- [14] The building consent also required surveyor certification at the time of set out. The Respondent stated he did not engage the surveyor and was not present when the surveyor attended the site and set out the building points.
- [15] The consented plans showed that the excavation cuts were not in the correct place in that they were closer to the boundary than was allowed.
- [16] The Respondent was questioned as to his knowledge of the building consent requirements. He stated the consent was on site but that he only had knowledge of those aspects that he considered he was responsible for. He had not noted the consent conditions. He had no knowledge of the resource consent that was issued. The resource consent also required erosion and sediment control.
- [17] The Respondent was questioned as regards what actions he took when the Complainant brought the issues complained about to his attention. He said he referred the matter to [Omitted] who said someone would attend to it. He said he called them once or twice about the issues. The matters were attended to post his involvement in the project which was in late August 2016.
- [18] The Respondent was questioned with regard to the pool foundations. He accepted that he had set out the formwork but that he had not poured the foundations.
- [19] The Respondent gave evidence as to his contractual engagement with [Omitted]. He stated there was no written contract between him and [Omitted] and he produced invoices from his company Building Master Limited to [Omitted] for his labour and for the labour of two other persons who were working for him. The Respondent was not able to provide details of the two other persons whom he described as contractors to him. The Respondent stated he had assisted [Omitted] with the build of three houses. He gave evidence that [Omitted] provides a manager with whom he deals.
- [20] Counsel for the Respondent provided submissions which reiterated the original response to the complaint. The submissions noted that the Respondent was not the project manager and does not hold a Site Licence and therefore was not responsible for the matters complained about.

Board's Conclusion and Reasoning

[21] The Board has decided that the Respondent **has**:

- (a) carried out or supervised building work or building inspection work in a negligent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act)

and should be disciplined.

[22] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[23] Negligence and incompetence are not the same. In *Beattie v Far North Council*⁶ Judge McElrea noted:

[43] Section 317 of the Act uses the phrase "in a negligent or incompetent manner", so it is clear that those adjectives cannot be treated as synonymous.

[24] Negligence is the departure by a licensed building practitioner, whilst carrying out or supervising building work, from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the *Bolam*⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[25] Incompetence is a lack of ability, skill or knowledge to carry out or supervise building work to an acceptable standard. *Beattie* put it as "*a demonstrated lack of the reasonably expected ability or skill level*". In *Ali v Kumar and Others*⁹ it was stated as "*an inability to do the job*".

[26] The New Zealand Courts have stated that assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[27] When considering what an acceptable standard is the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one and in this respect it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

⁶ Judge McElrea, DC Whangarei, CIV-2011-088-313

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

⁹ *Ali v Kumar and Others* [2017] NZDC 23582 at [30]

¹⁰ *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

¹¹ *Martin v Director of Proceedings* [2010] NZAR 333 at p.33

standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².

[28] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[29] The Board also notes, as regards acceptable standards, that all building work must comply with the Building Code¹³ and be carried out in accordance with a building consent¹⁴. As such, when considering what is and is not an acceptable standard, the Building Code and any building consent issued must be taken into account.

[30] Turning to seriousness in *Collie v Nursing Council of New Zealand*¹⁵ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[31] The Board did not accept the Respondent's evidence and submission that he was not involved with, nor responsible for, the excavations that were complained about. Whilst the excavation work was subcontracted the Respondent was the licensed building practitioner on site and he was the licensed building practitioner noted in the building consent. He was responsible for the building work that was being carried out and for making sure it was carried out in a competent manner. He was

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ Section 17 of the Building Act 2004

¹⁴ Section 40(1) of the Building Act 2004

¹⁵ [2001] NZAR 74

also responsible for ensuring the excavations met the requirements of the building consent and the Building Code.

- [32] The New Zealand Building Code includes, in Clause F5.2 a Functional Requirement that:

Construction and demolition work on buildings shall be performed in a manner that avoids the likelihood of:

(c) Other hazards arising on the site affecting people off the site and other property

- [33] The excavations did not meet that Functional Requirement. Nor were they completed in accordance with the consented plans or the conditions of the building consent noted above in paragraph [13].
- [34] The matters were brought to the Respondent's attention both before and after the cuts failed. He referred the matter but took no action himself to retain the cuts, make them safe, or prevent erosion. No steps were taken to control sediment. Some temporary propping of the fence was installed. That propping failed.
- [35] The Board, which includes persons with extensive experience and expertise in the building industry, considered that the Respondent had a duty to do more than just refer the matter. It further considered that it should have been apparent to the Respondent from the type and nature of the excavations that there was a very real risk of collapse or deterioration and that he had a duty to take immediate steps to protect the cuts and the neighbour's property. As it was he simply ignored the matter including when it was brought to his attention and after failure had occurred.
- [36] Given the above the board has decided that the Respondent has departed from what the Board considers to be an accepted standard of conduct and that the conduct was sufficiently serious enough to warrant a disciplinary outcome.

Contrary to a Building Consent

- [37] Under section 40 of the Act all building work must be carried out in accordance with the building consent issued. This ensures that there is independent verification that the Building Code has been complied with and the building work will meet any required performance criteria. A failure to adhere to a building consent is also an offence under section 40.
- [38] In *Tan v Auckland Council*¹⁶ the High Court, whilst dealing with a situation where no building consent had been obtained, stated the importance of the consenting process as follows:

[35] The building consent application process ensures that the Council can check that any proposed building work is sufficient to meet the purposes

¹⁶ [2015] NZHC 3299 [18 December 2015]

described in s 3 (of the Act). If a person fails to obtain a building consent that deprives the Council of its ability to check any proposed building work.

- [39] The building consent contained specific provision as regards the manner in which excavations were to be carried out and as regards erosions and sediment control. There was no evidence for the Board that those conditions were met, especially as regards erosion and sediment control.
- [40] The Respondent also completed formwork for the pool that did not meet the requirements of the building consent.
- [41] The Board therefore finds that the Respondent did carry out building work that was contrary to a building consent.

Penalty, Costs and Publication

- [42] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [43] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [44] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁷ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [45] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*¹⁸ the court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The court recommended adopting a starting point for penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁸ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [46] The Board was concerned that the Respondent appeared to be ignorant of his responsibilities as a licensed building practitioner. His position was that he just does what he is told and that he should not have to take responsibility for what occurs on a site as he is not the main contractor. That is not how the licensed building practitioner regime works.
- [47] Licensing was introduced to lift standards and ensure that licensed building practitioners were held accountable for their work. It is not acceptable for them to simply abdicate their responsibilities as the Respondent has done.
- [48] The Board therefore considers that the Respondent should undergo training and that his licence should be suspended until such time as he has successfully completed that training. The specified training the Respondent is to complete is the BRANZ E-Learning Modules:
- (a) Introduction to the LBP Scheme;
 - (b) The Building Consent Process; and
 - (c) Restricted Building Work.
- [49] The Board also strongly recommends that the Respondent obtain and study a copy of the Understanding the Regulatory Environment Handbook available at:

<https://www.lbp.govt.nz/assets/documents/understanding-regulatory-environment.pdf>

Costs

- [50] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”
- [51] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁹.
- [52] In *Collie v Nursing Council of New Zealand*²⁰ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [53] Based on the above the Board’s costs order is that the Respondent is to pay the sum of \$2,000 toward the costs of and incidental to the Board’s inquiry.

¹⁹ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²⁰ [2001] NZAR 74

Publication

[54] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act²¹. The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

[55] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

[56] Within New Zealand there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990²². The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²³. Within the disciplinary hearing jurisdiction the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁴. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁵.

[57] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁶. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.

[58] Based on the above the Board will not order further publication.

Section 318 Order

[59] For the reasons set out above, the Board directs that:

Penalty: Pursuant to s 318(1)(b) of the Act, the Respondent's licence is suspended until the earlier of the Respondent completing, to the satisfaction of the Registrar, the following specified training under 318(1)(e) of the Act:

(a) BRANZ E-Learning Module – Introduction to the LBP Scheme;

²¹ Refer sections 298, 299 and 301 of the Act

²² Section 14 of the Act

²³ Refer sections 200 and 202 of the Criminal Procedure Act

²⁴ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁵ *ibid*

²⁶ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- (b) **BRANZ E-Learning Module – The Building Consent Process; and**
- (c) **BRANZ E-Learning Module – Restricted Building Work.**

or the expiry of a period of 12 months and the Registrar is directed to record the suspension in the register of Licensed Building Practitioners

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board’s action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board’s action, except for the note in the Register and the Respondent being named in this decision.

- [60] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner’s licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

- [61] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **4 December 2018**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received then this decision will become final. If submissions are received then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.
- [62] In calling for submissions on penalty, costs and mitigation the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board’s findings of fact and and/or its decision that the Respondent has committed a disciplinary offence the Respondent can appeal the Board’s decision.

Right of Appeal

- [63] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 12th day of November 2018



Chris Preston
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*