
The Discipline Committee of the Association of Professional Engineers of Ontario

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1980, Chapter P. 28

And in the matter of a complaint regarding the conduct of

A Member

of the Association of Professional Engineers of Ontario

BETWEEN:

The Association of Professional Engineers of Ontario and

A Member

Decision and Reasons

This matter came for hearing before a panel of the Discipline Committee on February 11, 2003, at the Association of Professional Engineers of Ontario at Toronto. The member was present and was represented by counsel.

The Allegations

The allegations against the member, as stated in the Fresh Notice of Hearing dated February 11, 2003, are as follows:

It is alleged that the member is guilty of professional misconduct, the particulars of which are as follows:

1. The member was at all material times a member of the Association of Professional Engineers of Ontario.
2. On February 14, 1990, Company A, Company B, and an entrepreneur (who was directly affiliated with Company A), entered into an agreement wherein Company B would acquire the exclusive right to use "secret processes, formulae and technical data" (secret technology) possessed by Company A and the entrepreneur for the production of specialty metals.
3. Under the terms of the agreement, Company A was to construct, or cause to be constructed, a turnkey furnace facility (plant) for the manufacture of the specialty metals using the secret technology. The plant was to be located on the property of Company B. Company A further agreed to supervise the start-up of the plant and train Company B personnel to operate the plant. In return for the services provided by Company A, Company B agreed to pay a royalty to Company A on all sales of the specialty metal produced at the plant for a period of 10 years.
4. In an amendment to the agreement dated September 9, 1991, Company B noted that the plant performance compliance established in the original agreement had been attained as of May 1, 1991. Company B further advised that payments of royalties would commence on May 1, 1991.
5. Company B made royalty payments as per the amended agreement beginning August 1, 1991, and continuing through to May 1, 1996.
6. By letter dated October 28, 1996, Company B gave notice of termination of the agreement alleging that no secret technology was provided to them. They refused to pay any further royalties to Company A, even though specialty metal continued to be produced at the plant.
7. In late 1996, Company A filed a lawsuit against Company B and Company C (a wholly owned subsidiary of Company B) for breach of contract and non-payment of royalties.
8. On July 8, 1997, the entrepreneur swore an affidavit in respect of the lawsuit filed by Company A.
9. On October 24, 1997, the member, who had been General Manager of Company C since September 1992, swore an affidavit in respect of the lawsuit filed by Company A and a counterclaim filed by Company B and Company C.
10. In Paragraph 18 of his sworn affidavit, the member stated that "Company C's personnel were deliberately excluded" from the plant construction project and that "Company C had no opportunity to discover whether or not any secrets were incorporated in the technology or the furnace modifications." The member stated this in spite of the fact that weekly project meetings were held at Company B and that the member, along with most of Company B's supervisory personnel, attended many of the meetings.
11. In paragraph 37 of his sworn affidavit, the member stated that "On many

occasions beginning in July of 1986, the entrepreneur told me he had tremendous knowledge of secret and unique processes relating to the production of specialty metal.” He stated this in spite of the fact that the member had had no discussions with the entrepreneur until August or even September of 1986 and that the entrepreneur’s access to Company C’s facility was by “invitation only” from August 1986 onwards.

12. In paragraph 41 of his sworn affidavit, the member stated that the intention of Company B and Company C “was to obtain worldwide exclusive rights to the unique technology which would give Company B and Company C a substantial and profitable advantage over their competitors, including those exempted in the agreement. Company B would never have agreed to make the substantial royalty payments set out in the agreement merely to render one furnace in the plant operational.” The former executive vice-president and treasurer of Company B and Company C has stated that there was no way that Company A or Company B could have any factual basis for determining if a substantial or profitable advantage was being gained. He has further stated that the agreement was based upon, among other things, the strategic desire of the Company B Board of Directors to have the company expand upon its product capabilities.

13. In paragraph 44 of his sworn affidavit, the member stated that the entrepreneur and Company A never delivered “any information, secret formulae or any other formulae, descriptions of secret processes or mix information, manuals, technical data, reports, specifications, blueprints of production processes or any drawings” to Company C. He stated this in spite of the fact that the member was the direct recipient of the transmittal of numerous plans, drawings, manuals, and instruction sheets from Company A to Company B between at least April and November 1990.

14. In paragraph 50 of his sworn affidavit, the member made reference to two letters from a former Company B employee sent to Company A, dated February 26, 1990, and May 18, 1990. These letters were attached to the affidavit in support of the member’s opinion that Company A was responsible for obtaining Ministry of Environment (MOE) approval of the plant changes.

The member attached “true copies” of these letters to his sworn affidavit as Exhibit I. He did this in spite of the fact that Company B, the MOE and others believed that these two letters were created fraudulently by the former Company B employee, and the member himself was aware that other documents and dealings involving that former employee were fraudulent. In paragraph 32 of his affidavit, the member notes that the former employee had pleaded guilty to three counts of fraud under the Criminal Code of Canada arising from his actions and conduct while at Company C.

15. In summary, the member:

- a) swore an affidavit containing several statements that he knew, or ought to have known, were false;
- b) swore an affidavit containing several statements that he knew, or ought to have known, would mislead the court in its consideration of this matter; and
- c) acted in a disgraceful, dishonourable and/or unprofessional manner.

16. By reason of the facts aforesaid, it is alleged that the member is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28.

17. The section of Regulation 941 made under the said Act and relevant to this misconduct is:

Section 72(2)(j): “conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.”

Plea by the Member

The member agreed that the facts set out in the Fresh Notice of Hearing were correct and he admitted the allegations of professional misconduct set out therein. The panel conducted a plea inquiry and was satisfied that the member’s admission was voluntary, informed and unequivocal.

Decision

The panel considered the agreed facts and finds that the facts support a finding of professional misconduct and, in particular, finds that the member committed an act of professional misconduct as alleged in paragraphs 16 and 17 of the Fresh Notice of Hearing in that he engaged in conduct relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable and unprofessional.

Reasons for decision

The facts were agreed upon by both the association and the member. It is the panel’s reasoning that the member did not show the vigilance expected of a professional engineer in reviewing his affidavit. Thus the panel accepted the agreed upon facts set out in the Fresh Notice of Hearing with the exception of summary allegation 15(c) where the panel found that the member’s conduct, having regard to all the circumstances, would be reasonably regarded as disgraceful, dishonourable, and unprofessional.

Penalty

Counsel for the association advised the panel that a Joint Submission as to Penalty had been agreed upon. The Joint Submission as to Penalty provided as follows:

- (a) that the member be reprimanded and the fact of the reprimand be recorded on the Register of the association;
- (b) that the member write and pass the Professional Practice Examination within a period of 12 months from the date

of this hearing, failing which his licence would be suspended for a period of three months; and

- (c) that the finding and order of the Discipline Committee be published in *Gazette* in detail, but without reference to names (noting, of course, that if the suspension noted in item (b) takes place, the finding and the order would have to be republished and would include names in accordance with section 28(5) of the Act).

The panel had a concern with Joint Submission as to Penalty item (b) in that, after the three-month suspension, the member could apply for reinstatement without having passed the Professional Practice Examination. This concern was communicated to the parties by independent legal counsel. As a result, an Amended Joint Submission as to Penalty was agreed upon by the parties as follows:

Amended Joint Submission as to Penalty

1. **The member is required to appear before the Discipline Panel to be reprimanded and the fact of the reprimand is to be recorded on the Register of the association.**
2. **The member shall write and pass both parts (Parts A and B) of the Professional Practice Examination within a period of 12 months from the date of this hearing, failing which his licence will be suspended for a period of three months.**
3. **The finding and order of the Discipline Panel will be published in *Gazette* in detail, but without reference to names. If, however, the member's licence is suspended as a result of his failure to pass both parts of the Professional Practice Examination, the Discipline Panel's Decision and Reasons will be republished with names in accordance with s. 28(5) of the Act.**
4. **If the member failed to pass Part A of the Professional Practice Exami-**

nation, his licence shall remain suspended until he passes Part A of that examination, for a period of up to two years from the date of this hearing. If by the end of that two-year period, the member has failed to pass Part A of the Professional Practice Examination, his licence shall be immediately revoked.

Penalty decision

It was recognized that the affidavit was drafted by company lawyers and used language that was over-enthusiastic and/or broader than should have been. However, this was accepted only as a reasonable explanation for the origin of the false affidavit claims, not as an excuse, since the member is ultimately responsible for the documents he signs. This goes to the point that integrity

must be demonstrated in all aspects, business as well as engineering. The panel also considered the fact that the member has cooperated with the association and, by agreeing to the facts and a proposed penalty, has accepted responsibility for his actions and has avoided unnecessary expense to the association.

The panel concluded that the proposed joint penalty is reasonable in the circumstances and in the public interest.

Accordingly, the panel makes a penalty order in accordance with the terms of the Amended Joint Submission as to Penalty.

The written Decision and Reasons in this matter were dated July 21, 2003, and were signed by the Chair of the Panel, Ed Rohacek, P.Eng., for and on behalf of the other members of the Discipline Panel: James Dunsmuir, P.Eng., Roydon Fraser, P.Eng., Lawrence McCall, P.Eng., and Tom Smith, P.Eng.

Note from the Regulatory Compliance department

The member waived his right of appeal in this matter and the Discipline Panel administered the reprimand at the conclusion of the hearing. The fact of the reprimand has been recorded on the Register of the association. The member wrote and passed the Professional Practice Examination in April 2003.

The Discipline Committee of the Association of Professional Engineers of Ontario

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And in the matter of a complaint regarding the conduct of

Company A

a holder of a Certificate of Authorization

BETWEEN:

The Association of Professional Engineers of Ontario and

Company A