

DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, and in the matter of a complaint regarding the conduct of A MEMBER of the Association of Professional Engineers of Ontario and A HOLDER of a Certificate of Authorization.

This matter was heard before a panel of the Discipline Committee on September 21, 2009, at the offices of the Association of Professional Engineers of Ontario (association) in Toronto. The association was represented by Aviva R. Harari. The member and Certificate of Authorization holder were represented by Christopher J. Edwards. David P. Jacobs acted as independent legal counsel.

In the Statement of Allegations of the association dated January 27, 2009, against the member and the Certificate of Authorization holder, it was alleged that the member and holder are guilty of professional misconduct for failing to maintain professional engineering liability insurance when so required.

THE ALLEGATIONS

The association filed a Statement of Allegations alleging that the member and holder are guilty of professional misconduct. The Statement of Allegations is appended in Annex 1 to this decision.

The association alleged that the member and holder are guilty of professional misconduct on the following basis:

In or about March 2001, the member and Certificate of Authorization holder were retained by an Ontario automobile dealership (dealership) to conduct a phase I environmental assessment of its property. Later in year 2001, they were asked again to conduct further investigative work and to oversee the remedial work for the removal of all contaminated soils.

During this 2001 retainer, the holder was insured against professional liability claims in accordance with subsection 74(1) of O. Regulation 941 (regulation) made under the *Professional Engineers Act*, R.S.O. 1990, c. P-28 (act).

In February 2006, the member and holder were retained once again by the dealership to prepare an updated phase I audit report for the same property. During this period, the member and/or the holder were not insured against professional liability as required by subsection 74 of the regulation

made under the act. They did not receive written authority from the dealership to provide services without insurance.

It is alleged that the member and holder breached subsection 74(1) of Regulation 941 made under the act by offering and engaging in the business of providing services to the public that were within the practice of engineering at a time when they were not insured against professional liability.

It is alleged that the member and holder are guilty of professional misconduct as defined in section 28(2)(b) of the act.

AGREED STATEMENT OF FACTS

At the hearing, the parties submitted an Agreed Statement of Facts to the panel as follows:

- The member has been licensed as a professional engineer since on or about February 10, 1984;
- The member has been licensed as a professional geoscientist in the Province of Ontario since on or about November 6, 2002;
- The member is a licensed well technician in the Province of Ontario;
- The member has worked in the field of hydrogeology since 1982;
- The holder has held a Certificate of Authorization since on or about September 13, 1990;
- In or about March 2001, the member and holder were retained by the dealership to conduct a phase I environmental audit report of its property. Later in 2001, the member and holder were retained for further work with respect to the property, and completed a phase III site assessment report;
- At all material times, in 2001, the member and holder had professional liability insurance as required by the *Professional Engineers Act*, Regulation 941, section 74(1);
- On or about August 24, 2005, the member and holder completed a renewal application for the Certificate of Authorization. On the renewal application, the member

completed section “G” and checked off box “E” confirming the obligation to make compulsory written disclosure regarding insurance;

- In or about February 2006, the member and holder were again retained by the dealership to complete certain reports with respect to the above referred to property. In particular, they were retained to update the 2001 phase I environmental audit report;
- At the time of undertaking the work in 2006 and completing the report, the member and holder were not insured against professional liability as required by the *Professional Engineers Act*, Regulation 941, section 74(1);
- At the time of being retained by the dealership, the member and holder failed to notify the client that they were not insured as required by the *Professional Engineers Act*, Regulation 941, section 74(1), and failed to obtain written confirmation from the client to provide the services without insurance;
- In or about February 2006, with respect to the work referred to above, on behalf of the dealer, the member and holder offered and engaged in the business of providing services within the practice of professional engineering;
- A lawsuit was initiated on behalf of the dealership. On or about May 23, 2008, the plaintiffs obtained judgment in the amount of \$278,755.57, plus interest and costs, against the member and holder. The claim related to the February 2006 work performed by the member and holder on behalf of the dealership;
- When the holder undertook the work in 2001, the member was insured pursuant to a “claims based” policy. The insurance would not respond to the claim issued in May 2008 as the member did not have “trail off” insurance; and
- To date, the judgment remains outstanding.

PLEA INQUIRY

The member and holder pled guilty to allegations of professional misconduct as set out in the Agreed Statement of Facts. The panel finds such admission to have been free and voluntary. The panel reviewed the Agreed Statement of Facts and finds that the facts support a finding of professional misconduct.

SUBMISSIONS ON PENALTY

The parties’ joint submissions as to penalty were as follows:

The parties to this proceeding, the Association of Professional Engineers of Ontario and the member, make the following joint submission on penalty:

- (a) The member shall be reprimanded and that the fact of the reprimand be recorded on the register for one year;
- (b) It shall be a term and condition of the member’s licence and Certificate of Authorization that the member write the environmental impact and risk assessment exam (98-Env-A6), at the member’s own expense, within 12 months of the date of the hearing;
- (c) There shall be publication of a summary of the Decision and Reasons of the panel; however, the parties shall make submissions with respect to publication with names;
- (d) The member’s Certificate of Authorization be suspended for three months from the date of the hearing; and
- (e) There shall be no order with respect to costs.

The member has had independent legal advice, or has had the opportunity to obtain independent legal advice, with respect to the member’s agreement to the penalty set out herein.

Counsel for the defendants asked that, if the panel determines to order publication, the name of the engineer be omitted.

PANEL’S DECISION ON PENALTY

The panel delivered its decision on penalty orally at the hearing, and did not accept the parties’ joint submissions on penalty. Instead, the panel ordered the following sanction, with reasons for not imposing the requested penalties in the joint submissions to the panel. The panel was of the view that, on the facts, the penalty proposed in the joint submission was sufficiently beyond the range of appropriate penalties in all of the circumstances and that it should be rejected and the following imposed:

- (a) An oral reprimand to follow the requirements of the regulation made under the act on professional liability insurance was considered as an appropriate sanction;
- (b) The panel was of the view that the member was highly qualified in the field and, therefore, exam 98-Env-A6 was not necessary. The panel determined that publication of the decision without names was an appropriate, fair and sufficient way to bring the concerns of the Discipline Committee to the public and serve the principle of general deterrence;
- (c) A cost penalty was not appropriate in this case; and
- (d) An appropriate waiver of appeal has been obtained, which reduces any future cost related to the disposition of the matter.

The written Decision and Reasons was signed by Gina Cody, P.Eng., as chair on behalf of the other members of the discipline panel: Corneliu Chisu, P.Eng., Santosh Gupta, P.Eng., Ken Lopez, P.Eng., and Nick Monsour, P.Eng.

ANNEX 1—STATEMENT OF ALLEGATIONS

In the matter of a complaint regarding the actions and conduct of a member of the Association of Professional Engineers of Ontario and a holder of a Certificate of Authorization issued by the Association of Professional Engineers of Ontario.

STATEMENT OF ALLEGATIONS

Pursuant to its powers under sections 24(2)(a) and 28(1)(a) of the *Professional Engineers Act*, the Complaints Committee of the Association of Professional Engineers of Ontario has referred the allegations of professional misconduct and incompetence contained within the Statement of Allegations to a hearing of the Discipline Committee.

It is alleged that the member and holder are 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 (association).
2. The holder was, at all material times, the holder of a Certificate of Authorization to offer and provide to the public services that are within the practice of professional engineering and was responsible for supervising the conduct of its employees and taking all reasonable steps to ensure that its employees, including the member, carried on the practice of professional engineering in a proper and lawful manner.
3. In or about March 2001, the member and holder were retained by an Ontario automobile dealership (dealership) to conduct a phase I environmental site assessment of its property. Later in the year 2001, they were retained again to conduct further investigative work and to oversee the remedial work for the removal of all contaminated soils. The member and holder did, in fact, perform a phase I environmental site assessment and provide a phase III site assessment report in respect to the property.
4. During the period of the 2001 retainer, the holder was the holder of a Certificate of Authorization and was insured against professional liability in accordance with subsection 74(1) of the *Professional Engineers Act*.
5. In or about February 2006, the member and holder were retained once again by the dealership to prepare an updated phase I environmental audit report with respect to the same property.
6. During the period of the 2006 retainer, the member and/or the holder was the holder of a Certificate of Authorization; however, neither were insured against professional liability in accordance with subsection 74(1) of the *Professional Engineers Act*. At the time of the retainer, the member and holder failed to notify the dealership that they were not insured in accordance with the minimum requirements and failed to obtain written authority from the dealership to provide these services without that insurance.
7. In 2006, the member and holder offered and engaged in the business of providing to the dealership services that were within the practice of professional engineering in regards to the work related to their phase I environmental audit update dated February 13, 2006.
8. On May 23, 2008, in an Ontario Superior Court civil action, a judgment was awarded against the member and holder in the sum of \$278,755.57 plus interest and costs in relation to a claim of negligence against the member and holder arising from their work related to the above-mentioned environmental assessments.
9. It is alleged that the member and holder:
 - (a) breached subsection 74(1) of Regulation 941 made under the *Professional Engineers Act*, R.S.O. 1990, c. P-28 (act), by offering and engaging in the business of providing to the public services that were within the practice of professional engineering at a time when they were not insured against professional liability;
 - (b) breached subsection 74(2)(d) of Regulation 941, by failing to notify the person to whom they intended to provide professional engineering services, namely the dealership, that they were not insured in accordance with the minimum requirements of section 74 of Regulation 941 and by failing to obtain written authority from the dealership to provide these services without that insurance; and
 - (c) acted in an unprofessional manner.

It is alleged that the member and holder are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*.

The Statement of Allegations was signed by M. Jane Phillips, PhD, P.Eng., chair, Complaints Committee, Association of Professional Engineers of Ontario.