

At a hearing held over five days in February and March 2007, PEO's Discipline Committee heard allegations of professional misconduct against Rene G. Caskanette, P.Eng., Jeffrey D. Udall, P.Eng., and 1300904 Ontario Inc. [carrying on business as Caskanette and Udall Consulting Engineers (CACE)]. The hearing schedule, including the names of Caskanette, Udall and CACE, was published in Gazette on several occasions.

At the conclusion of the hearing, the discipline panel found Caskanette and CACE guilty of professional misconduct. Udall was found not guilty. The written decision of the discipline panel was issued on November 5, 2007. The penalty ordered against Caskanette and CACE included a reprimand, a requirement to write and pass the professional practice examination, and publication of the findings, including reference to names. The discipline panel also issued a cost order against Caskanette and CACE in the amount of \$5,000.

Caskanette appealed the decision to the Ontario Superior Court of Justice—divisional court. After hearing the appeal, the divisional court overturned the finding of professional misconduct against Caskanette and CACE and substituted a finding of not guilty. A cost order in the amount of \$15,000 was issued against PEO.

Following is the written decision of the divisional court.

ASSN. OF PROFESSIONAL ENGINEERS OF ONTARIO v. CASKANETTE

Between the Association of Professional Engineers of Ontario, complainant (respondent on appeal), and Rene G. Caskanette, P.Eng., and 1300904 Ontario Inc., carrying on business as Caskanette and Associates Consulting Engineers, defendants (appellants)

[2009] O.J. No. 3591

Court File No. 262/08

Ontario Superior Court of Justice
Divisional Court—Toronto, Ontario

J.M. Wilson, S.N. Lederman and
K.E. Swinton JJ

Heard: June 4, 2009
Judgment: August 28, 2009

(62 paras.)

Counsel:
Neil J. Perrier, for the complainant
(respondent on appeal)
David Waterhouse, for the
defendants (appellants)

The judgment of the court was delivered by K.E. Swinton J.

OVERVIEW

1. The appellants, Rene G. Caskanette and Caskanette and Associates Consulting Engineers (CACE), appeal the decision of the Disci-

pline Committee of the Association of Professional Engineers of Ontario (APEO) dated November 6, 2007, finding that they had engaged in unprofessional conduct.

BACKGROUND

- CACE is a consulting engineering firm that, among other things, provides forensic engineering services in litigation. It holds a Certificate of Authorization to offer and provide services to the public within the practice of professional engineering. Mr. Caskanette is a member of the APEO, and he is one of the professional engineers responsible for the services provided by CACE.
- The disciplinary proceedings arose after Mr. Caskanette prepared an accident reconstruction report (the report) for the Regional Municipality of Hamilton-Wentworth, a defendant in civil litigation arising from a motor vehicle accident on March 23, 1998. The 17-page report, dated September 18, 2003, was signed and sealed by Mr. Caskanette and another engineer, Jeff Udall. It was described as an "engineering assessment" in the letter sending it to legal counsel for the municipality.

4. The motor vehicle accident happened at an intersection in the City of Hamilton and involved a Pontiac Firefly and a Chevy Camaro. The Camaro collided with the Firefly as the Firefly proceeded to make a left-hand turn. A child in the Firefly suffered very serious head and other injuries as a result of the collision. A significant snowfall had occurred in the two previous days, and there were large snow banks that may have played a role in the accident.

5. The report described the scope of work as including review of documentation, research into lighting conditions, visibility testing, creation of snow bank models, a roadway survey, and acceleration testing.

6. With respect to speed assessment, the report stated (at p. 11),

Our calculations determined that the minimum speed of the Camaro immediately before impact with the Firefly was 90 kph. This analysis was based on the mathematical assumption that the Camaro slid to a stop without touching any of the snow-banks. We determined that the Camaro struck the snow on two occasions. This is shown in the attached drawing number 02, Post Impact Motion. Both times, some of the energy of motion would have been lost to the snow, slowing the car down. If the snow banks had not been present, the final resting point of the Camaro would have been further north on Upper Gage Avenue. The amount of speed lost to the snow cannot be determined. By using the straight line distance from the point of impact to the final rest position, the absolute minimum speed is determined.

Later, at p. 15, the report stated that the Camaro was greatly exceeding the speed limit of 50 kph, and “our calculations estimate the minimum speed of the Camaro as 90 kph.”

7. Finally, the conclusions were set out on p. 17: the Camaro was travelling at twilight without

headlights; it was travelling at 90 kph; and the snow banks did not create a visibility problem for drivers.

8. A written complaint was made by another professional engineer about the adequacy of the appellants’ report, and disciplinary proceedings ensued. Pursuant to s. 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, c. P.28 (the act), a member of the APEO may be found guilty of professional misconduct by a Discipline Committee if found guilty of professional misconduct as defined by the regulations. The relevant regulation is s. 72(2) of Reg. 941, R.R.O. 1990 (the regulation).

9. Despite the appellants’ objection to the jurisdiction of the Discipline Committee, the committee held that the report met the test for being part of the “practice of professional engineering,” as engineering principles were used in developing and supporting the conclusions (Reasons, p. 15).

10. The Discipline Committee found that the allegations of professional negligence were not made out, stating that there was “no evidence to support a finding that the approach to the work is inap-propriate” (Reasons, p. 16). Therefore, it dismissed the allegations of negligence under s. 72(2)(a) of the regulation.

11. It also dismissed the allegation under s. 72(2)(6), failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the practitioner’s work. The Discipline Committee found that there was no evidence that the shortcomings of the report affected the quantum of damages in the civil litigation, or that any parties’ interests were prejudiced.

12. However, it found that there were shortcomings in the report that amounted to “unprofessional conduct” pursuant to s. 72(2)(j). That provision defines professional misconduct to include 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.

13. The Discipline Committee’s reasons on this issue are found in the following paragraph (Reasons, p. 16):

The panel heard evidence that casts doubt on the validity of a locked wheel straight line trajectory and contact with the snow bank. The report and responses to critiques did not articulate how the assumptions used were substantiated by other physical evidence. There was no evidence to indicate the calculations in the report were in error, but the findings with respect to speed assessment were not stated with sufficient clarity to avoid confusion, and the report did not address alternatives or limitations. The guideline, *The Professional Engineer as an Expert Witness*, prescribes that reports be full, complete and impartial. Lack of clarity could contribute to confusion and misinterpretation. The panel determined that these shortcomings constituted unprofessional conduct pursuant to section 72(2)(j) of Regulation 941/90.

14. The Discipline Committee dismissed the complaint against Mr. Udall, as he had been acting under Mr. Caskanette's supervision. It ordered that the appellants be reprimanded, and that the reprimand remain on the register for 12 months. The findings were to be published in the official publication of the APEO, and Mr. Caskanette was required to write the professional practice examination within 12 months. The appellants were also to pay costs of \$5,000.

THE ISSUES

15. An appeal lies to this court on a question of fact or law or both pursuant to s. 31 of the act. The issues in this appeal are:
1. What is the appropriate standard of review?
 2. Did the Discipline Committee reach an unreasonable decision in finding that the report constituted the "practice of professional engineering"?
 3. Did the Discipline Committee reach an unreasonable decision in finding that the shortcomings in the report amounted to professional misconduct?

ANALYSIS

Issue No. 1: What is the appropriate standard of review?

16. The appellants submit that the appropriate standard of review is correctness for the issue concerning the practice of professional engineering and reasonableness for the issue of professional misconduct. The respondent submits that the standard of review for both issues is reasonableness.
17. In my view, the appropriate standard of review for both issues is reasonableness.
18. According to *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, there are only two standards of review of a decision of an administrative tribunal: correctness and reasonableness. Both parties agree that the standard of reasonableness applies to the determination of professional misconduct by a Discipline Committee, and I share their view (see, for example, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 29).
19. *Dunsmuir* states that a "true question of jurisdiction" is reviewable on a standard of correctness (at para. 59). By that phrase, the Supreme Court meant that "jurisdiction" encompasses "the narrow sense of whether or not the tribunal had the authority to make the inquiry."
20. The applicant submits that the determination of whether the conduct concerns the practice of professional engineering is such a jurisdictional question. I disagree. The Discipline Committee clearly had jurisdiction, in the narrow sense, to determine whether the appellants had committed professional misconduct.
21. In order to find a contravention of s. 72(2)(j) of the regulation, the Discipline Committee had to determine that the impugned conduct was relevant to the practice of professional engineering. The determination of whether the appellants' conduct fell within the definition of the "practice of professional engineering" or was

relevant thereto is a question of mixed fact and law. It requires interpretation of the Discipline Committee's home statute and the application of the committee members' expertise about engineering. In such circumstances, a court reviewing the committee's decision should show deference. Therefore, the standard of review for this question is also reasonableness.

22. In determining whether a decision is reasonable, the court should look at both the process of reasoning and the range of reasonable outcomes. As the Supreme Court of Canada stated in *Dunsmuir*, supra at para. 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Issue No. 2: Did the Discipline Committee reach an unreasonable decision in finding that the report constituted the "practice of professional engineering"?

23. The appellants submitted that the work done in the preparation of the accident reconstruction report did not constitute the "practice of professional engineering" as defined in s. 1 of the act. Accordingly, the Discipline Committee lacked jurisdiction to deal with the complaint.
24. The "practice of professional engineering" is defined in the act to mean any act of designing, composing, evaluating, advising, reporting, directing or supervising wherein the safeguarding of life, health, property or the public welfare is concerned and that requires the application of engineering principles, but does not include practising as a natural scientist.
25. The appellants submit that the work in this case involved nothing more than simple simulation-type testing, the application of simple physics

principles concerning the conservation of momentum, and hand calculations. There was no evidence that the work involved the application of engineering principles. Indeed, they argued that non-engineers, such as former police officers, perform accident reconstruction assessments. Moreover, there was no evidence that this work concerned the “safeguarding of the life, health, property or the public welfare.”

26. The Discipline Committee was of the view that engineering principles were used in developing and supporting the conclusions in the report. It noted that the report was to be used in the civil litigation process to determine compensation for a person who had suffered a disabling injury. Significantly for the committee, Mr. Caskanette and Mr. Udall both signed and sealed the report, thus presenting it as an engineering document to the client and to the public.
27. In my view, there was ample evidence upon which the Discipline Committee could reasonably conclude that the work related to the accident report fell within the definition of the practice of professional engineering. Mr. Caskanette had appended his seal to the report, which was described as an “engineering assessment.” Section 9.2.4 of the APEO’s *Professional Practice Guideline* from 1988, revised 1998, stipulates that a document without any engineering content should not bear the member’s seal.
28. Section 9 of the APEO’s guideline *Use of the Professional Engineer’s Seal* stipulates that s. 53 of Regulation 941 lays out two conditions for the use of the seal: the document must convey information conveying opinions or other content based on engineering judgment, and the document is provided to the public.
29. In cross-examination, Mr. Caskanette stated that he was “always of the opinion” that he should not apply his seal to documents that had no professional engineering content. He also acknowledged that in applying his seal to the report, he knew he was “assuming professional responsibility for the engineering contents of the report.”

30. Thus, the evidence shows that the appellants were engaged in the application of engineering principles and holding out the report as the product of engineering expertise.
31. The appellants submit that there was no evidence that this work concerned the safeguarding of life, health, property or the public welfare, as the report was prepared for civil litigation purposes only. I find this argument untenable. An expert’s report that is to be used in civil litigation is likely to affect the interests of the parties to the litigation and, therefore, the public welfare, whether it is used during mediation, settlement discussions or, finally, in a trial. As well, the report may have implications for the municipality in terms of road safety generally, and, in particular, snow removal, signage and intersection lighting.
32. Therefore, the Discipline Committee reasonably concluded that the report constituted the practice of professional engineering.

Issue No. 3: Did the Discipline Committee reach an unreasonable decision in finding that the shortcomings in the report amounted to professional misconduct?

33. This court must give deference to a Discipline Committee’s determination of what constitutes unprofessional conduct, given the committee members’ expertise in the field of engineering. In determining the reasonableness of the decision, this court must consider both the reasoning process and the outcome, as stated above in *Dunsmuir*.
34. Moreover, this court must not be overly critical of the reasons of the committee, given that it is a tribunal of lay persons [*Del Core v. College of Pharmacists (Ontario)* (1985), 19 D.L.R. (4th) 68 (C.A.) at para. 15].
35. The role of the Discipline Committee is an important and difficult one, as it has a responsibility to protect the public and the integrity of the profession. However, a finding of professional misconduct has potentially devastating effects for a member of the profession. Therefore, the Discipline Committee must make clear the analysis and the findings that underpin its conclusion that the member has committed professional misconduct.
36. In order to find professional misconduct on the basis of s. 72(2)(j) of the regulation, the Discipline Committee had to conclude that the appellants’ conduct “having regard to all the circumstances, would reasonably be regarded by the engineering profession as...unprofessional.” It found that the lack of “sufficient clarity” concerning the findings with respect to speed assessment and the failure to address alternatives or limitations constituted “unprofessional conduct.”
37. In the present case, it is difficult to follow the reasoning process of the Discipline Committee, as the reasons supporting the finding of unprofessional conduct are very brief. There is no discussion of the words of the particular regulation they are applying, and no explanation is given as to why the lack of clarity and failure to state limitations and alternatives would reasonably be regarded by the profession as unprofessional conduct.

38. The Discipline Committee failed to identify the particular deficiencies that caused it concern. While not particularized in the reasons, the lack of clarity appears to be the appellants' failure to explicitly state the assumption that the wheels were locked when the speed of the Camaro was calculated. Much was also made during cross-examination of Mr. Caskanette of the reference to 90 kph as an "absolute minimum" at one point in the report. This could be misleading, because it fails to consider the impact of the wheels rolling, which would result in a lower speed for the Camaro.
39. The Discipline Committee also failed to discuss the meaning of "unprofessional conduct." A finding of unprofessional conduct is a very serious finding against a member of a profession. Given that the words "unprofessional conduct" are found in association with "disgraceful" and "dishonourable" conduct, one can infer that the conduct to be caught is a departure from expected conduct that is so serious that it warrants professional discipline.
40. The words "disgraceful" and "dishonourable" suggest serious wrongdoing on the part of a member of the APEO that results from moral failure [White v. Association of Professional Engineers, 2006 CanLII 17320 (Div. Ct.) at para. 25]. The word "unprofessional" suggests conduct that breaches the Code of Ethics or falls outside the range of behaviour generally and reasonably expected of the profession.
41. In a recent case, this court upheld a finding of unprofessional and dishonourable conduct by an architect who had knowingly disregarded building code requirements and knowingly misled the Chief Building Official of Toronto [Cheung v. Ontario Association of Architects, 2009 CanLII 27817 (Div. Ct.) at para. 44].
42. Similarly, the British Columbia Supreme Court upheld a decision finding that an engineer had engaged in professional misconduct because he submitted structural drawings for a building permit that did not comply with the building code (Familariri v. Assn. of Professional Engineers and Geoscientists of British Columbia, 2004 BCSC 660 at paras. 75, 67).
43. In an earlier case involving a member of the APEO, the Divisional Court upheld a finding of unprofessional conduct where the member had written a highly intemperate letter criticizing the work of another member of the APEO [White v. Association of Professional Engineers, 2006 CanLII 17320 (Div. Ct.)]. The Discipline Committee in that case characterized the letter as showing a lack of judgment and a failure to act with the professional courtesy expected of members of the profession (at para. 59).
44. This court also upheld a finding of professional misconduct against an engineer who intentionally misled the Joint Practice Board about his architectural experience and competence [Conforzi v. Assn. of Professional Engineers of Ontario, [1987] O.J. No. 940 (Div. Ct.)].
45. In the present case, the Discipline Committee found that the report lacked sufficient clarity, yet it dismissed the complaint of professional negligence against the applicants. The regulation defines professional negligence as another form of professional misconduct in the following terms.
 an act or omission in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances. [Regulation 941, ss. 72(1) and 72(2)(a)].
 The committee rejected the arguments of the APEO that the work of the appellants did not meet professional standards, or that the approach was inappropriate.
46. Given that finding, it is difficult to understand why the Discipline Committee then found that the shortcomings in the report constituted unprofessional conduct and warranted disciplinary action. There was no finding, for example, that the appellants deliberately or recklessly misled anyone or acted in an intemperate manner, as in the cases referred to above.
47. The Discipline Committee expressed concern that the findings respecting speed assessment were not stated with sufficient clarity to avoid confusion. They also said that lack of clarity "could contribute to confusion and misinterpretation."
48. However, the Discipline Committee failed to address the fact that there was no evidence adduced at the hearing that anyone was confused by what the report said, or that anyone misinterpreted it. The committee expressly found that the other defendants and the client were not prejudiced by it.
49. Both the witness for the APEO, Peter Williamson, P.Eng., and the witness for the defence, Mr. Eddie, gave evidence that they understood the assumptions made in the report and how the assumptions would affect the assessment of speed. It is noteworthy that both inferred from the conclusion of a speed of 90 kph that the appellants were working on the assumption that the Camaro wheels were locked. They agreed

with the report's final conclusion on the speed of the Camaro, given the assumptions.

50. APEO submits that the Discipline Committee reached a reasonable decision, in part because Mr. Caskanette, in cross-examination, acknowledged that the words "absolute minimum" were not the best wording and should not have been used (Transcript, Vol. 2, p. 107). Subsequently, he agreed that the wording was "highly inaccurate" (p. 108).
51. I note that Mr. Caskanette did not refer to the "absolute minimum" in his conclusion section of the report. There, he gave the opinion that the speed of the Camaro was 90 kph.
52. In any event, there is no reference to those words in the committee's reasons. It was their responsibility to point out the precise failings in the appellants' conduct that led to their decision, and they did not do so.
53. Moreover, there is no finding by the Discipline Committee that Mr. Caskanette was either negligent in using those words, or that he sought to deceive, as in the earlier discipline cases to which I have referred. While he admitted the words should not have been used, an overstatement or a misstatement in one part of a lengthy document is not enough to support a finding of unprofessional conduct.
54. The Discipline Committee referred to an APEO guideline for *The Professional Engineer as an Expert Witness* (1993), stating in their reasons that the guideline prescribes that reports be complete and impartial." From this, it appears that they concluded that the report was required to state alternatives and limitations.
55. In fact, what the guideline states is that "any report prepared as engineering advice to a lawyer should be full and complete" (emphasis added). The guideline also states,

While it must be complete and impartial, conclusions about possible weaknesses in the client's position, or adverse effects of the report on that position, should likely be communicated to the client and his or her counsel separately, and not included in the report itself. (p. 11)

There is no requirement in the guideline that a report state alternatives or limitations. Indeed, the guideline speaks of the desirability of obtaining appropriate guidance from counsel as to what to include in the final report.

56. Moreover, the Rules of Civil Procedure do not require a statement of alternatives and limitations. Rather, they require that a report set out the substance of an expert witness' proposed testimony [rule 53.03(1)].
57. Finally, there was no evidence at the hearing that the standards of the profession require that an accident reconstruction report include alternatives and limitations. Nor did the committee address the question whether members of the profession would, in the circumstances, expect such a report to include alternatives and limitations.
58. In my view, the Discipline Committee's decision is unreasonable. Reasonableness is concerned with "justification, transparency and intelligibility" in the decision-making process (Dunsmuir, *supra* at para. 47). Here, the reasons fail to show how the committee reached its conclusion of unprofessional conduct, given its failure to articulate the deficiencies of the appellants' conduct or to examine the evidence before it, given the wording of the APEO guidelines and given its failure to discuss the expectations within the profession regarding the content of expert reports.
59. Moreover, the result does not fall within a range of reasonable outcomes, given the committee's finding that there was no professional negligence and the absence of express findings about the nature of the misconduct and the expectations of the profession with respect to such reports.

CONCLUSION

60. For these reasons, the appeal is allowed. The Discipline Committee's decision of November 6, 2007 finding that the appellants engaged in unprofessional conduct is set aside.
61. In my view, the evidence does not support a finding of unprofessional conduct, given the committee's other findings. Therefore, there is no reason to send this matter back to the committee. The complaint of professional misconduct is dismissed.
62. Costs to the appellants are fixed at \$15,000, the quantum agreed upon by the parties.

K.E. SWINTON J.
J.M. WILSON J.
S.N. LEDERMAN J.