

COMPILED BY BRUCE MATTHEWS, P.ENG.

This matter came on for hearing before a panel of the Discipline Committee on February 22, 2005, at the offices of the Association of Professional Engineers of Ontario at Toronto. The association was represented by Neil Perrier of Perrier Law Professional Corporation. Tony E. Kahil, P.Eng., was represented by Jasmine Ghons.

### The Allegations

The allegations against Tony E. Kahil, P.Eng. (“Kahil” or “the member”), as stated in the Fresh Notice of Hearing dated February 21, 2005, were as follows:

It is alleged that Tony E. Kahil, P.Eng., is guilty of professional misconduct, the particulars of which are as follows:

1. Kahil was at all material times a member of the Association of Professional Engineers of Ontario.
2. Kahil was employed by Terrafix Geosynthetics Inc. (“Terrafix”) as a sales engineer during the period September 15, 1997 to August 5, 2003. The business of Terrafix included, among other things, the supply, installation and certification of engineered retaining walls, slope retention systems, and structures and geosynthetic products, including the sale of the products and systems of Tensar Technologies Inc. (“Tensar”) in Ontario.
3. Kahil was primarily responsible for promoting and selling Terrafix products, focusing on Tensar products and systems, project tracking, followup and customer service. Kahil’s business card designated him as “project engineer” at Terrafix.
4. Terrafix relied on the expertise, knowledge, skills and professional standing of their sales engineers, including Kahil, for the purpose of promoting their engineered products and for project development and followup.

## 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:

**Tony E. Kahil, P.Eng.**

a member of the Association of Professional Engineers of Ontario.

5. In his capacity as sales engineer, Kahil owed a professional and ethical duty to Terrafix to make prompt, voluntary and complete disclosure of an interest, direct or indirect, that might in any way be, or be construed as, prejudicial to his professional judgment in performing his obligations to Terrafix.
6. At all material times, the business of Terrafix included the supply, installation and certification of engineered retaining walls, slope retention systems, and structures and geosynthetic products.
7. On or about February 12, 2001, Kahil caused the engineering seal of another engineer, Gerry Kehler, P.Eng. (“Kehler”), project manager for Tensar Earth Technologies Inc. (“Tensar Inc.”), to be electronically affixed (using AutoCAD) to detail preliminary drawings referred to as “Proposed Retaining Wall—788 Marlee Avenue” (“Detail Drawings”), without Kehler’s prior knowledge, authorization, or consent.
8. By facsimile transmission dated February 26, 2001 re: Misuse of Kehler Engineering Seal, Kehler notified Dennis Hewitt (“Hewitt”), president of Terrafix, that he had concerns about the misuse of his seal by Terrafix and requested a response.
9. By letter dated March 1, 2001, Hewitt responded to Kehler on the issue of the misuse of his engineering seal stating that he had “discussed the issue with Tony Kahil and expressed to Tony the seriousness of his action and we have taken steps to ensure that this will not happen again.”
10. By memorandum dated March 1, 2001 from Hewitt to all Terrafix engineers, reference was made to section 9.2 of the 1988 Professional Practice Guidelines regarding Use of the Seal, and was distributed with a caution. In addition, Terrafix instructed all of its engineers to remove any and all electronic engineering seals from their computer systems, and a new procedure on the use of engineering seals was put in place for Terrafix engineers. The said drawing had not been distributed to members of the public.
11. In the fall of 2001, the Greater Toronto Airports Authority (“GTAA”) tendered a project for Dufferin job number 9960, Satellite Maintenance Depot, Phase 1 (“Satellite Maintenance Depot”). Kahil entered into negotiations on behalf of Terrafix for the supply and installation of a retaining wall.
12. On December 7, 2001, Mr. and Mrs. Kahil incorporated Ontario Corporation No. 1503713 in the Province of Ontario under the corporate name Alexa Construction Inc. (“Alexa”).

Kahil did not notify management of Terrafix of the incorporation of Alexa, nor his relationship with it. At all material times, Kahil was a director and officer of Alexa.

13. On December 13, 2001, Alexa entered into a subcontract with Dufferin Construction Company (“Dufferin”) to install a RECO retaining wall for the Satellite Maintenance Depot. RECO products have never been sold or installed by Terrafix.
14. Kahil did not provide voluntary and complete disclosure to Terrafix regarding the contract between Alexa and Dufferin for the Satellite Maintenance Depot project.
15. In the winter of 2002, Kahil entered into negotiations on behalf of Terrafix for the supply and installation of retaining walls for Dufferin job number 9091, M.T.O. #2001-3011, Highway 8 & Kitchener-Waterloo Expressway (“Kitchener-Waterloo Project”).
16. On May 13, 2002, Alexa entered into a subcontract with Dufferin to install RECO retaining walls required for the Kitchener-Waterloo Project. The products used were supplied directly by RECO. Kahil did not provide voluntary and complete disclosure to Terrafix of this subcontract between Alexa and Dufferin.
17. On or before August 9, 2002, Kahil introduced his brother, Charles Kahil, to the management of Terrafix and assisted his brother in obtaining employment with Terrafix in the position of a site technical assistant for the period of August 9, 2002 to July 30, 2003. During this period of employment, Kahil had the responsibility of reviewing and approving time sheets and travel expenses submitted by Charles Kahil.
18. Shortly after May 30, 2003, Kahil reviewed and approved a site technical

assistant invoice submitted by Charles Kahil for Project #: 2002-2005 at Highway 400 & Major Mackenzie for the period of May 26 to May 30, 2003. The subcontractor at the site was Trinity Contracting & Landscaping Ltd. (“Trinity”).

19. Kahil reviewed and approved payment to Charles Kahil of \$731.00 for the “hours” and \$110.25 for “kilometers” traveled submitted by Charles Kahil for the period of May 26 through May 30, 2003. In a memorandum dated October 15, 2003, Trinity notified Hewitt that the last day of work on site at the Highway 400 & Major Mackenzie project for Terrafix was May 22, 2003.
20. In June 2003, Kahil ordered supplies and rented equipment on Terrafix accounts for the purpose of building a driveway at his rental property located at 4880 Yorkshire Avenue, Mississauga, Ontario. On or about June 6, 2003, Kahil ordered supplies from Halton Crushed Stone Ltd. (“Halton”) and requested that they be delivered to 4880 Yorkshire Avenue.
21. In or about June 2003, Kahil instructed Newtonbrook Block & Supply Co. Ltd. (“Newtonbrook”) to supply 15 skids of paving stone materials to the Kahil rental property. Kahil instructed Newtonbrook to invoice the materials to a Terrafix project for CP Rail located at Thickson Road & 401 in Whitby, Ontario.

Kahil instructed Halton to invoice the materials to a Terrafix job located at Highway 400 & Major Mackenzie. Pursuant to Kahil’s instructions, invoices were delivered to Terrafix from Halton totaling the sum of \$1,233.17 and dated June 7 and 14, 2003 for the materials supplied to the Kahil property.

Pursuant to Kahil’s instructions, Newtonbrook invoiced Terrafix in

the sum of \$4,326.00 for the delivered materials on or about June 4 and June 18, 2003 and issued a credit note in the sum of \$256.00 to Terrafix on June 30, 2003 after picking up the empty skids from the Kahil property.

22. Kahil did not disclose the above transactions to Terrafix. Kahil did not reimburse Terrafix for the other invoices from Newtonbrook and Halton until the civil lawsuit between Kahil and Terrafix was settled in February 2004.
23. By reason of the facts 1 through 22 aforesaid, it is alleged that Tony E. Kahil, P.Eng.:
  - (a) failed to make prompt, voluntary and/or complete disclosure of his interests in Alexa that might be construed as prejudicial to his professional judgment relative to his employment with Terrafix;
  - (b) approved work hour and travel expense reports that had been submitted for payment to Terrafix by his brother, Charles Kahil, that were false;
  - (c) used the engineering seal of Gerry Kehler, P.Eng., on Detail Drawings without his prior knowledge, authorization or consent;
  - (d) caused invoices for materials delivered to Kahil at his residence to be directed to Terrafix for payment without the knowledge or authorization of Terrafix; and
  - (e) acted in an unprofessional manner.
24. By reason of the facts aforesaid, it is alleged that Tony E. Kahil, P.Eng., is guilty of professional misconduct as defined in Section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28 as follows:
  - (b) the member or holder has been guilty in the opinion of the Discipline Com-

mittee of professional misconduct as defined in the regulations. R.S.O. 1990, c. P. 28, s. 28(2); 2001, c. 9, Sched. B, s. 11(36).

25. The sections of Regulation 941 made under the Act and relevant to the alleged professional misconduct are:
- (a) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable standards and rules in connection with work being undertaken by or under the responsibility of the practitioner;
  - (b) *Section 72(2)(i)*: failure to make prompt, voluntary and complete disclosure of an interest, direct or indirect, that might in any way be, or be construed as, prejudicial to the professional judgment of the practitioner in rendering service to the public, to an employer or to a client; and
  - (c) *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 unprofessional.

### Plea by Member

The member admitted the allegations set out in paragraphs numbered 1 through 25 in the Fresh Notice of Hearing.

The panel conducted a plea inquiry and was satisfied that the member's admission was voluntary, informed and unequivocal.

### Agreed Statement of Facts

Counsel for the association advised the panel that agreement had been reached on the facts and introduced an Agreed Statement of Facts ("ASF") that provided as follows:

#### Background

26. Kahil was at all material times a member of the Association of Professional Engineers of Ontario.
27. For a six-year period between September 15, 1997 and August 5, 2003, Kahil was employed by Terrafix Geosynthetics Inc. ("Terrafix") as a sales engineer. Among other things, Terrafix was in the business of selling the products and systems of Tensar Technologies Inc.

("Tensar"), including the sale of retaining wall systems in Ontario.

28. Kahil was primarily responsible for promoting and selling Terrafix products, focusing on Tensar products and systems, project tracking, follow up and customer service. A copy of Kahil's Terrafix contracts of employment and business card (which designated him as "project engineer") was included.
29. The complainant in this matter is Kahil's former employer, Dennis Hewitt (owner of Terrafix). Hewitt is not a professional engineer and has never been a member of PEO. At all material times Terrafix did not hold a certificate of authorization and, as such, did not offer or provide professional engineering services to the public. Terrafix did, however, rely upon the expertise, knowledge, skills and professional standing of their sales engineers for the purpose of promoting their engineered products and for project development and followup.
30. In his capacity as sales engineer, Kahil owed a professional and ethical duty to Terrafix to make prompt, voluntary and complete disclosure of an interest, direct or indirect, that might in any way be, or be construed as, prejudicial to his professional judgment in performing his obligations to Terrafix.
31. At all material times, the business of Terrafix included the supply, installation and certification of engineered retaining walls, slope retention systems, and structures and geosynthetic products. Terrafix was never in the business of supplying or installing the patented products of a competitor company called Reinforced Earth Company Ltd. (RECO).

#### Facts Relevant to Allegation re: Misuse of Engineering Seal

32. On or about February 12, 2001, Kahil's assistant at Terrafix caused the engineering seal of another engineer, Gerry Kehler, P.Eng. ("Kehler"), project manager for Tensar Earth Technologies Inc. ("Tensar Inc."), to

be electronically affixed (using AutoCAD) to detail preliminary drawings referred to as "Proposed Retaining Wall-788 Marlee Avenue" ("Detail Drawings"), under the assumption that both Kehler and Tensar Inc. had authorized and consented to this practice when, in fact, that was not the case. It is agreed that no one caused a signature to be placed atop the seal. Copies of the Detail Drawings with Kehler's seal were provided.

33. By facsimile transmission dated February 26, 2001 re: Misuse of Kehler Engineering Seal, Kehler notified Hewitt, president of Terrafix, that he had concerns about the misuse of his seal by Terrafix and requested a response. At this period of time, Kehler was a new engineer at Tensar, and had taken over management of the engineering department there.
34. By letter dated March 1, 2001, Hewitt responded to Kehler on the issue of the misuse of his engineering seal stating that he had "discussed the issue with Tony Kahil and expressed to Tony the seriousness of his action and we have taken steps to ensure that this will not happen again."
35. By memorandum dated March 1, 2001 from Hewitt to all Terrafix engineers, reference was made to section 9.2 of the 1988 Professional Practice Guidelines regarding Use of the Seal, and was distributed with a caution. In addition, Terrafix instructed all of its engineers to remove any and all electronic engineering seals from their computer systems, and a new procedure on the use of engineering seals was put in place for Terrafix engineers.
36. It is agreed that the drawing was not distributed to members of the public.

#### Facts Relevant to Allegation re: Conflict of Interest

37. In the fall of 2001, the Greater Toronto Airports Authority ("GTAA") tendered a project for Dufferin job number 9960, Satellite Maintenance

Depot, Phase 1 (“Satellite Maintenance Depot”). Kahil entered into negotiations on behalf of Terrafix for the supply and installation of a retaining wall. The GTAA offered Terrafix the project. Hewitt declined to do the project.

38. On December 7, 2001, Mr. and Mrs. Kahil incorporated Ontario Corporation No. 1503713 in the Province of Ontario under the corporate name Alexa Construction Inc. (“Alexa”). Kahil did not notify management of Terrafix of the incorporation of Alexa or his relationship with it. At all material times, Kahil was a director and officer of Alexa.
39. On December 13, 2001, Alexa entered into a subcontract with Dufferin Construction Company (“Dufferin”) to install a RECO retaining wall for the Satellite Maintenance Depot. RECO products have never been sold or installed by Terrafix.
40. Kahil did not provide voluntary and complete disclosure to Terrafix regarding the contract between Alexa and Dufferin for the Satellite Maintenance Depot project.
41. In the winter of 2002, Kahil entered into negotiations on behalf of Terrafix for the supply and installation of retaining walls for Dufferin job number 9091, M.T.O. #2001-3011, Highway 8 & Kitchener-Waterloo Expressway (“Kitchener-Waterloo Project”). Terrafix products did not meet the Ministry’s specifications for this project, as reflected in the Ministry’s documents.
42. On May 13, 2002, Alexa entered into a subcontract with Dufferin to install RECO retaining walls required for the Kitchener-Waterloo Project. The products used were supplied directly by RECO. Kahil did not provide voluntary and complete dis-

closure to Terrafix of this subcontract between Alexa and Dufferin.

#### **Facts Relevant to Allegation of Misleading Invoice**

43. On or before August 9, 2002, Kahil introduced his brother, Charles Kahil, to the management of Terrafix and assisted his brother in obtaining employment with Terrafix in the position of a site technical assistant for the period August 9, 2002 to July 30, 2003. During this period of employment, Kahil had the responsibility of reviewing and approving time sheets and travel expenses submitted by Charles Kahil.
44. Shortly after May 30, 2003, Kahil reviewed and approved a site technical assistant invoice submitted by Charles Kahil for Project #: 2002-2005 at Highway 400 & Major Mackenzie for the period May 26 to May 30, 2003. The subcontractor at the site was Trinity Contracting & Landscaping Ltd. (“Trinity”). A copy of the site technical assistant invoice, containing information relevant to Charles Kahil’s hours and attendance at the site, was provided.
45. Kahil reviewed and approved payment to Charles Kahil of \$731.00 for the “hours” and \$110.25 for “kilometers” traveled submitted by Charles Kahil for the period May 26 through May 30, 2003. In a memorandum dated October 15, 2003, Trinity notified Hewitt that the last day of work on site at the Highway 400 & Major Mackenzie project for Terrafix was May 22, 2003.

#### **Facts Relevant to Allegations of Personal Use of Supplies by Kahil to Build a Driveway**

46. In June 2003, Kahil ordered supplies and rented equipment on Terrafix accounts for the purpose of building a driveway at his rental property located at 4880 Yorkshire Avenue, Mississauga, Ontario. On or about

June 6, 2003, Mr. Kahil ordered supplies from Halton Crushed Stone Ltd. (“Halton”) and requested that they be delivered to 4880 Yorkshire Avenue. Mr. Kahil instructed Halton to invoice the materials to a Terrafix job located at Highway 400 & Major Mackenzie. Copies of the invoices delivered to Terrafix from Halton totaling the sum of \$1,233.17 and dated June 7 and 14, 2003 for the materials supplied to the Kahil property, were provided.

47. In or about June 2003, Kahil instructed Newtonbrook to supply 15 skids of paving stone materials to the Kahil rental property. Kahil instructed Newtonbrook to invoice the materials to a Terrafix project for CP Rail located at Thickson Road & 401 in Whitby, Ontario. Newtonbrook invoiced Terrafix in the sum of \$4,326.00 for the delivered materials on or about June 4 and June 18, 2003 and issued a credit note in the sum of \$256.00 to Terrafix on June 30, 2003 after picking up the empty skids from the Kahil property. The invoices relevant to this matter were provided.
48. In or about June 2003, Kahil also rented equipment from Battlefield Equipment Rental (“Battlefield”) on the Terrafix account. Battlefield invoiced Terrafix for this equipment rental.
49. Kahil paid the full amount of the Battlefield invoice using his personal VISA card within a day or so before his employment was terminated at Terrafix.
50. Kahil did not disclose the above transactions to Terrafix. Kahil did not reimburse Terrafix for the other invoices from Newtonbrook and Halton until the civil lawsuit between Kahil and Terrafix was settled in February 2004, as Kahil was of the view that Terrafix owed him approximately \$10,000 in unpaid commission.

### Termination of Kahil

51. On August 1, 2003, Kahil was notified that his employment with Terrafix had been terminated for cause. A copy of a letter dated August 5, 2003 from Hewitt to Kahil confirming his termination was provided to the panel.

### No Intention to Misappropriate Terrafix Funds

52. The parties agree that the above referenced invoices submitted by Kahil to Terrafix, while reckless and unprofessional, were not submitted with the intention to misappropriate Terrafix funds.

### Decision

The panel considered the Agreed Statement of Facts and the member's plea and found that the facts support a finding of professional misconduct and, in particular, found that the member committed an act of professional misconduct as alleged in paragraphs 23 to 24 of the Fresh Notice of Hearing in that by reason of the facts aforesaid, the member:

- (a) failed to make prompt, voluntary and/or complete disclosure of his interests in Alexa that might be construed as prejudicial to his professional judgment relative to his employment with Terrafix;
- (b) approved work hour and travel expense reports that had been submitted for payment to Terrafix by his brother, Charles Kahil, which were false;
- (c) used the engineering seal of Gerry Kehler, P.Eng., on Detail Drawings without Kehler's prior knowledge, authorization, or consent;
- (d) caused invoices for materials delivered to Kahil at his residence to be directed to Terrafix for payment without the knowledge or authorization of Terrafix; and
- (e) acted in an unprofessional manner.

### Penalty

Counsel for the association advised the panel that a Joint Submission as to Penalty ("JSP") had been agreed upon. In speaking to the JSP, Counsel indicated that the panel should be cognizant of three main factors, namely, "use of the seal," "voluntary disclosure," and

"good business practices," as well as the mitigating circumstances that cooperation and remorse had been demonstrated by Kahil through the Agreed Statement of Facts.

Counsel for the association, supported by Counsel for the member, outlined the following points as to why the Discipline panel should accept the JSP:

The penalty should reflect:

1. protection of the public;
2. maintenance of the reputation of the profession;
3. the provision of general deterrence;
4. the provision of specific deterrence;
5. rehabilitation.

In addition, it was noted by Counsel that the member had no previous record of discipline and that the member had pleaded guilty to the charges, thereby minimizing the associated expenses, time and requirement for witnesses to appear, which would have been the case otherwise.

### Penalty Decision

The panel deliberated and accepted the JSP and accordingly ordered:

1. that the member be reprimanded and that the reprimand be recorded on the register for a minimum of 12 months, with the reprimand to remain on the register until such time as the member writes and successfully completes the Professional Practice Examinations ("PPE");
2. that the decision and reasons of the panel shall be published with the name of the member in Gazette;
3. that the member shall write and successfully complete the PPE

**within 12 months from the date of the hearing, failing which the member's licence shall be suspended until he writes and successfully completes the PPE;**

4. **that in the event that the member fails to write and successfully complete the PPE within 24 months from the date of the hearing, his licence to engage in the practice of professional engineering shall be revoked; and**
5. **that the member shall pay the costs of the disciplinary proceeding fixed in the sum of \$5,000 and payable forthwith.**

### Reasons for Penalty

The panel concluded that the proposed penalty was reasonable and in the public interest. The member had cooperated with the association and, by agreeing to the facts and a proposed penalty, had accepted responsibility for his actions and had avoided unnecessary expense to the association.

Having waived his right to appeal by submission of a signed written waiver, an oral reprimand was administered to the member immediately following adjournment of the formal hearing.

The panel also noted that the *Guideline on the Use of the Professional Engineer's Seal* had recently been revised, and recommended that the importance of strict adherence to these requirements be brought to the attention of all members of the association.

The written Decision and Reasons in this matter were dated November 16, 2005, and were signed by the Chair of the panel, Anne Poschmann, P.Eng., on behalf of the other members of the panel: Edward Aziz, P.Eng., James Dunsmuir, P.Eng., David Robinson, P.Eng., and Richard Weldon, P.Eng.

### Note from the Regulatory Compliance department

Kahil did not write and pass the PPE within 12 months of the date of the discipline hearing. His licence was therefore suspended effective February 23, 2006 and the reprimand remains on the register of the association. The \$5,000 cost award has been paid.