

This matter came on for hearing before a panel of the Discipline Committee on June 7, 2005, at the offices of the Association of Professional Engineers of Ontario in Toronto. The association was represented by Neil Perrier of Perrier Law Professional Corporation. Nicholas M. Upton, P.Eng., was represented by Kris Hutton of Stieber, Berlach, Gibbs LLP.

The Allegations

The allegations against Nicholas Martin Upton, P.Eng. (“Upton” or “the member”), in the Fresh Notice of Hearing dated June 3, 2005 (Exhibit 1) (“Fresh Notice of Hearing”), were as follows:

It is alleged that Nicholas Martin Upton, P.Eng., is guilty of professional misconduct, the particulars of which are as follows:

1. Upton was at all material times a member of the Association of Professional Engineers of Ontario.
2. Upton and his company, Upton Design Building Inc., were at no time the holders of a certificate of authorization to offer and provide to the public services within the practice of professional engineering.
3. By letter dated November 25, 1999, from the City of Owen Sound (“city”), **** * (****), the owner of a two-storey, single-family residential rental property at **** * in Owen Sound (“House”), was notified of numerous property standards violations, including the deterioration of foundation walls to a structurally unsafe condition. Consequently, the city requested a report by a professional engineer regarding the condition of the foundation wall.
4. **** provided the city with a reporting letter by Upton of Upton Design Building Inc., dated August 16, 2000, stating, among other things, that he had inspected the foundation of the House and that the “foundation walls appear to be stable and adequate to support the

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:

Nicholas M. Upton, P.Eng.

a member of the Association of Professional Engineers of Ontario.

structure for many years. There should be no concern that this foundation is unstable” (“Upton Letter”). Upton signed and affixed his seal to the Upton Letter.

5. By letter to Upton dated October 24, 2000, the city noted deterioration of the foundation and significant water infiltration. The letter contained illustrative photographs of the city’s observations and requested a reassessment of the foundations by Upton and that he inform them of his progress within 14 days. Upton failed or refused to respond to the city’s request.
6. On June 6, 2001, the city issued a letter to **** requesting that she address the numerous property standards violations and that Upton respond with a reassessment of the condition of the foundation wall.
7. Upton responded to the city by letter dated June 15, 2001, stating that during his initial visit to the House he did not have access to the interior areas of the foundation walls and was not aware of any deterioration. Upton concluded that it was apparent from the photographs of the interior foundation walls provided by the City that

the foundation was structurally unstable. No further comments were provided by Upton.

8. It is alleged that Upton:
 - (a) breached section 12(2) of the *Professional Engineers Act* by engaging in the business of providing to the public services within the practice of professional engineering without a certificate of authorization;
 - (b) failed to make reasonable provision for the safeguarding of life or property of a person who may be affected by the work for which the practitioner is responsible;
 - (c) failed to make responsible provision for complying with applicable statutes, standards, codes and by-laws in connection with work being undertaken by the practitioner;
 - (d) breached the Act or regulation other than an action that was solely a breach of the code of ethics; and
 - (e) acted in an unprofessional manner.
9. “Professional misconduct” is defined in section 28(2)(b) as:

“The member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations.”
10. The sections of Regulation 941 made under the said Act and relevant to this misconduct are:

- (a) *Section 72(2)(a)*: negligence as defined at section 72(1): In this section “negligence” means an act or an 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;
- (b) *Section 72(2)(b)*: failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work for which the practitioner is responsible;
- (c) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of a practitioner;
- (d) *Section 72(2)(g)*: breach of the Act or regulations, other than an action that is solely a breach of the code of ethics; and
- (e) *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.

Neil Perrier, counsel for the association, advised the panel that the association had agreed to withdraw the allegation of incompetence as stated in the Fresh Notice of Hearing.

Perrier noted that the member took the position that he does not contest any of the facts set out in the Fresh Notice of Hearing, as revised.

Plea by Member

The member admitted the allegations of professional misconduct set out in the Fresh Notice of Hearing, as revised. The panel conducted a plea inquiry and was satisfied that the member’s admission was voluntary, informed and unequivocal.

Agreed Facts

Counsel for the association and counsel for the member advised the panel that agreement had been reached on the facts and that the factual allegations as set out in paragraphs 1 through 7 of the Fresh Notice of Hearing were accepted as accurate by the member.

Decision

The panel considered the Agreed Facts and found that the facts support a finding of professional misconduct and, in particular, found the member guilty of breaching s. 12(2) of the Act and sections 72(2)(a), 72(2)(b), 72(2)(d), 72(2)(g) and 72(2)(j) of Regulation 941 of the Act.

Reasons for Decision

The panel accepted the Agreed Facts and the member’s admission, which substantiated the findings of professional misconduct on the basis that there was no difference of opinion between counsel for the association and counsel for the member.

With respect to breach of s. 12(2) of the Act, the panel found the member did engage in providing service to the public within the practice of professional engineering, as described by facts set out in paragraphs 3 and 4, without the requisite certification, as set out in paragraph 2 of the Fresh Notice of Hearing, as revised. As such, the panel found the actions of the member to be other than solely a breach of the code of ethics as under s. 72(2)(g) of Regulation 941 of the Act.

The panel found that the member was negligent, under s. 72(2)(a) of Regulation 941 of the Act, in not completing a reasonably thorough inspection of the property, as evident in the facts set out in paragraph 7, and thereby failing to observe the deterioration evident in the facts set out in paragraphs 3 and 5, prior to providing the sealed letter denying the deterioration, as set out in the facts of paragraph 4 of the Fresh Notice of Hearing, as revised.

By not completing a reasonably thorough inspection of the property, the member failed to make reasonable provisions under s. 72(2)(b) and 72(2)(d) of Regulation 941 of the Act. The panel found the member’s conduct to be unprofessional under s. 72(2)(j) of Regulation 941 of the Act in failing or refusing to respond to a request to reassess, based on facts set out in paragraph 5.

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:

The parties to this proceeding, the Association of Professional Engineers of Ontario (“PEO”) and Nicholas Martin Upton, P.Eng. (“Upton”), jointly submit the following terms of order based on the plea of professional misconduct by Upton:

That the Discipline Committee orders:

1. that Upton appear for a reprimand and that the fact of the reprimand be recorded on the register of PEO for a period of one year;
2. that the results of the hearing be published in Gazette with names;
3. that the licence of Upton to engage in the practice of professional engineering be suspended for a fixed period of three months on the proviso that Upton writes and successfully completes the Professional Practice Examinations, Parts A and B (“Examination”), within 12 months of the date of the order of the Discipline Committee;
4. that in the event Upton fails to write and successfully complete the Examination within a 12-month period commencing on the date of the order of the Discipline Committee, his licence to engage in the practice of professional engineering again be suspended until such time as Upton writes and successfully completes the Examination;
5. that in the event Upton fails to write and successfully complete the Examination within 24 months from the commencement date of the order of the Discipline Committee, his licence to engage in the practice of professional engineering be revoked; and
6. that Upton forthwith pay the costs of the disciplinary proceeding fixed in the sum of \$3,000.

Counsel for the association advised that the association was satisfied that the Joint Submission was fair and reasonable. Perrier stated that the penalty was in line with similar PEO cases.

Counsel for the member admitted that all matters are agreed.

Penalty Decision

After deliberation, the panel accepted the Joint Submission as to Penalty as received on June 7, 2005 and therefore ordered:

1. that Upton appear for a reprimand and that the fact of the reprimand be recorded on the register of the PEO for a period of one year;
2. that the results of the hearing be published in Gazette with names;
3. that the licence of Upton to engage in the practice of professional engineering be suspended for a fixed period of three months on the proviso that Upton writes and successfully completes the Professional Practice Examinations, Parts

A and B (“Examination”), within 12 months of the date of the order of the Discipline Committee;

4. that in the event Upton fails to write and successfully complete the Examination within a 12-month period commencing on the date of the order of the Discipline Committee, his licence to engage in the practice of professional engineering again be suspended until such time as Upton writes and successfully completes the Examination;
5. that in the event Upton fails to write and successfully complete the Examination within 24 months from the commencement date of the order of the Discipline Committee, his licence to engage in the practice of professional engineering be revoked; and

6. that Upton forthwith pay the costs of the disciplinary proceeding fixed in the sum of \$3,000.

Waiver of Appeal

Counsel for the member advised the panel that the member would not be appealing the decision of the panel and filed with the panel a waiver of appeal, following which the panel administered an oral reprimand.

Publication

The decision of the panel and reasons shall be published in the official publication of the association together with the name of the member pursuant to s. 28(5) of the Act.

The written Decision and Reasons in this matter were dated August 9, 2005, and were signed by the Chair of the panel, Ed Rohacek, P.Eng., on behalf of the other members of the panel: Ken Lopez, P.Eng., Richard Emode, P.Eng., John Vieth, P.Eng., and Derek Wilson, P.Eng.

This matter came on for hearing before a panel of the Discipline Committee on July 4, 2005, at the offices of the Association of Professional Engineers of Ontario in Toronto. The association was represented by Neil Perrier of Perrier Law Professional Corporation. John Yat-Man Kwan, P.Eng., and K.O. & Partners Limited were represented by David Waterhouse of Forbes Chochla LLP.

The Allegations

The allegations against John Yat-Man Kwan, P.Eng. (“Kwan”), and K.O. Partners Ltd., (“K.O.”) in the Fresh Notice of Hearing dated September 30, 2004, were as follows:

It is alleged that John Yat-Man Kwan, P.Eng., and K.O. Partners Ltd. are guilty of professional misconduct as defined in the *Professional Engineers Act*, R.S.O. 1990, Chapter P. 28 as follows:

1. Kwan was at all material times a member of the Association of Professional Engineers of Ontario.
2. K.O. was at all material times the holder of a certificate of authorization to offer and provide to the public serv-

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:

John Yat-Man Kwan, P.Eng.

a member of the Association of Professional Engineers of Ontario, and

K.O. & Partners Limited

a holder of a Certificate of Authorization.

ices within the practice of professional engineering and was responsible for supervising the conduct of its employ-