

## DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, c. P.28; and in the matter of a complaint regarding the conduct of PAUL D. REW, P.ENG., a member of the Association of Professional Engineers of Ontario, and RUBICON ENVIRONMENTAL INC., a holder of a Certificate of Authorization.

The panel met by teleconference on September 10, 2013 to consider the written submissions on costs provided by the parties. The panel received the following:

- (a) submissions on costs on behalf of Paul Rew, P.Eng. (Rew), dated July 5, 2013;
- (b) responding submissions of Professional Engineers Ontario (the association), dated August 7, 2013;
- (c) legal advice from the independent legal counsel regarding the above, dated September 9, 2013.

### OVERVIEW

Rew and Rubicon were charged with professional misconduct in a previous hearing. The discipline panel found them not guilty after an extensive hearing lasting five days. Counsel for Rew and Rubicon submitted claims for their costs, which the association opposed.

Section 28(7) of the *Professional Engineers Act* gives the discipline panel the power to award costs, only under the following circumstances:

“Where the Discipline Committee is of the opinion that the commencement of the proceedings was unwarranted, the Committee may order that the Association reimburse the member of the Association or the holder of the certificate of authorization, temporary licence, provisional licence or limited licence for the person’s costs or such portion thereof as the Discipline Committee fixes.”

The issues for the panel to decide are:

- whether the commencement of the proceedings was unwarranted;
- if so, whether an award of costs is appropriate; and
- if so, the appropriate amount of cost.

### REW’S SUBMISSIONS

Counsel for Rew argued that the commencement of the hearing was unwarranted as Rew and Rubicon had done nothing wrong. He argued that all the association’s investigator did was to read a letter from Phillip Bye on the Ministry of the Environment letterhead, accepted all the facts stated there, and concluded that a disciplinary action was warranted.

Counsel for Rew also argued that there were five witnesses (Norm Prince, Bruce Thom, Barry Hatt, Harold Sutherland, and Kevin Prentice), who should have been interviewed by the investigator and would have given evidence favourable to his client, such that the matter would not have proceeded. Why did the prosecution not call the investigator as a witness? Why did the prosecution accept Phillip Bye’s letter without further investigation, especially as Rew had previously filed a complaint against Ian Mitchell of the Owen Sound office of the Ministry of the Environment? Clearly, Bye’s complaint was retaliation for the complaint laid by his client.

Counsel argued that the discipline panel’s decision, finding Rew and Rubicon not guilty of the allegations, supported his contention that the commencement of proceedings was unwarranted.

### ASSOCIATION’S SUBMISSIONS

Counsel for the association argued that the Complaints Committee had seven documents before it, not just Bye’s letter, as Robertson alleged. These were:

- (a) a detailed written complaint from a government agency, the Ministry of the Environment (MOE);
- (b) a letter (the letter), which appeared to have been authored by Rew, which made serious allegations about contamination in the local water wells;
- (c) evidence that Rew had alleged, at a public meeting, that there was contamination in the local water wells;

- (d) evidence that Rew had refused to provide the MOE with his back-up data or report in connection with the allegations made in the letter and at the public meeting, despite numerous requests;
- (e) evidence that the foregoing allegations (concerning contamination in the water wells) were unsupported by the data in Rew's own report;
- (f) a written "Phase II Environmental Site Assessment" report from the respondent, Rubicon Environmental Inc., signed and sealed by Rew; and
- (g) an expert opinion to the effect that the Phase II Environmental Site Assessment Report contained a large number of deficiencies, and that:
  - (i) "the work performed by Rew and Rubicon did not meet industry standards outlined in documents available from CSA and MOE", and that
  - (ii) "the conduct of Rew did not meet the minimum standard of practice for engineering work of this type."

An order for costs cannot be made unless it is found that the proceeding should never have been initiated in the first place. The Complaints Committee has no power to hold a hearing, and is not in a position to conduct a detailed evaluation of the credibility of witnesses nor to determine disputed facts. The onus is on the member or holder to not only establish that the commencement of the proceedings was "unwarranted" but also that the panel should award costs because the panel retains a discretion to refuse costs, even if it finds that the proceedings were "unwarranted." Further, the *Professional Engineers Act* requires that all complaints be investigated by the Complaints Committee. The committee cannot simply ignore a complaint made by a member of the public.

Counsel for Rew referred to a number of individuals who (he asserts) could have been interviewed as potential witnesses, and claimed that their evidence would have been helpful to the respondent's case. None of these witnesses testified, and counsel provided no sworn affidavits from any of them. Counsel's assertions regarding what these people would have said is not evidence and cannot be considered by the panel. The panel is required to act solely on evidence properly admitted before it. It cannot take into account the unsubstantiated

assertions of counsel. Moreover, it is inappropriate for counsel to give evidence after the fact, and in a way that prevents the association from cross-examining the witnesses. In any event, the various things counsel for Rew alleges various people "would have" said do not relate to the issue of whether the referral was warranted.

#### AMOUNT OF COSTS CLAIMED

The total costs claimed for Rew's defence amounted to \$64,768.03. This included legal fees of \$43,620.00, disbursements of \$13,697.32, and HST of \$7,450.71. Rew also asked for lost opportunity costs of \$40,950.00. These costs were based on time spent addressing the allegations that he (Rew) asserted could have been spent on billable work.

#### ASSOCIATION'S RESPONSE

Counsel for the association submitted that:

- Rew and Rubicon are not entitled to any costs as they do not meet the test under section 28(7) of the *Professional Engineers Act* (that the commencement of the proceedings was unwarranted);
- The amount of legal costs sought is excessive in all the circumstances; and
- There is no jurisdiction to grant "lost opportunity costs."

#### DECISION

In order for a claim for costs to be considered, Rew must prove that the commencement of proceedings was unwarranted. The test for determining whether proceedings were unwarranted, applied by the Discipline Committee in the case of *PEO v. Lim*, is as follows:

The meaning of the word "unwarranted," as used in a disciplinary proceeding, is considered in *Re Anthony Michael Speciale*, Decision of the Law Society of Upper Canada, February 25, 1994. In *Speciale*, the tribunal ruled that, "The term 'unwarranted' means 'without reasonable justification, patently unreasonable, malicious, taken in bad faith, or for a collateral purpose.'" The tribunal further stated, "Hindsight, while often instructive, should not be slavishly relied upon when determining whether disciplinary proceedings were unwarranted." The panel is not convinced on the evidence that the Complaints Committee decided to refer the matter to the Discipline Committee without reasonable justification, patently unreasonably, maliciously, in bad faith or for a collateral purpose."

Having considered the arguments of both parties and the advice of the independent legal counsel, the panel finds that Rew's submissions fail to prove this. The panel, therefore, declines to award costs. Accordingly, there is no need to further consider the arguments regarding the quantity of the costs.

#### REASONS FOR THE DECISION

Counsel for Rew asserts that the Complaints Committee proceeded based on the sole evidence of a letter on Ministry of the Environment letterhead read by the association's investigator.

The association asserts that it proceeded based on seven documents before the Complaints Committee:

- (a) a detailed written complaint from a government agency, the Ministry of the Environment (MOE);
- (b) a letter (the letter), which appeared to have been authored by Rew, which made serious allegations about contamination in the local water wells;
- (c) evidence that Rew had alleged, at a public meeting, that there was contamination in the local water wells;
- (d) evidence that Rew had refused to provide the MOE with his back-up data or report in connection with the allegations made in the letter and at the public meeting, despite numerous requests;
- (e) evidence that the foregoing allegations (concerning contamination in the water wells) were unsupported by the data in Rew's own report;
- (f) a written "Phase II Environmental Site Assessment" report from the respondent, Rubicon Environmental Inc., signed and sealed by Rew; and
- (g) an expert opinion to the effect that the Phase II Environmental Site Assessment report contained a large number of deficiencies, and that:
  - (i) the work performed by Rew and Rubicon did not meet industry standards outlined in documents available from CSA and MOE, and that
  - (ii) the conduct of Rew did not meet the minimum standard of practice for engineering work of this type.

The panel finds the association's submission, particularly the list of documents before the Complaints Committee, entirely credible and convincing, providing sufficient reason to refer the matter to the Discipline Committee.

Rew further argued that the investigator should have interviewed five witnesses (Norm Prince, Bruce Thom, Barry Hatt, Harold Sutherland, and Kevin Prentice), who would have given evidence favourable to his client. Rew could have called these witnesses that he alleges would have provided evidence favourable to his client, but chose not to do so. The panel gives no weight to this claim as no evidence was heard from these witnesses.

J.E. (Tim) Benson, P.Eng., signed this Decision and Reasons for the decision as chair of this discipline panel and on behalf of the members of the discipline panel: Ishwar Bhatia, P.Eng., Phil Maka, P.Eng., and John Vieth, P.Eng.

#### REMINDER: ALL REGULATION 941/90 CHANGES NOW IN EFFECT

All Regulation 941/90 amendments published in the May/June 2015 issue of *Engineering Dimensions* (p. 35) are in effect as of July 1.

The amendments that became effective July 1 pertain to changes in the requirements to obtain a limited licence, allow limited licence holders to provide engineering services to the public under a Certificate of Authorization, outline the requirements to obtain the newly created licensed engineering technologist (LET) class of limited licence, and establish the engineering intern class of person and protected EIT title.

Updated application forms for the limited licence (now including the LET class of limited licence) and the Certificate of Authorization, and the updated *Guide to the Required Experience for a Limited Licence in Ontario*, can be found on the PEO website ([www.peo.on.ca](http://www.peo.on.ca)) under the Forms and Publications tab.

Please report any person or company you suspect is violating the act. Call the PEO enforcement hotline at 416-224-9528, ext. 1444 or 800-339-3716, ext. 1444. Or email your questions or concerns to [enforcement@peo.on.ca](mailto:enforcement@peo.on.ca).

