

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-

- ees and taking all reasonable steps to ensure that its employees, including Kwan, carried on the practice of professional engineering in a proper and lawful manner. Kwan was one of the professional engineers responsible for the services provided by K.O.
3. On or about August 5, 2002, Gabriel Gomori (“Gomori”), purchaser of a home being constructed by Greenville Development Group Inc. (“Greenville”) on Lot 22 Old Hardwood Village, municipally known as 17 Sheldon Drive, Ajax, Ontario (“Home”), was able to observe construction details from a vantage point off site of the building lot. Gomori noted items that appeared to be non-compliant with his understanding of the requirements of the construction of the Home.
 4. Previously, Kwan had sealed the structural drawings and details A-1 to A-4 for the Home that were approved by the Town of Ajax on March 26, 2002.
 5. By facsimile transmission dated August 29, 2002, to Paul Tse, vice president of Greenville, Gomori addressed concerns he had regarding the construction of the Home and explained how he had tried to contact staff members of Greenville to obtain permission to attend the site for closer inspection. After several unsuccessful attempts, and believing that Greenville was in violation of the terms of the purchase agreement, Gomori attended the building site on August 28, 2002. During his attendance, he noted several errors and deficiencies in the construction, including an out-of-plumb condition in part of the foundation wall and a large gap between the uneven top of the foundation wall and the sill plate. Gomori requested that the noted items be corrected.
 6. On October 21, 2002, Gomori sent a fax to Sheila Daubeny (“Daubeny”), senior building inspector for the Town of Ajax, outlining a list of what Gomori believed to be violations of the *Ontario Building Code* and CSA standards in the construction of the Home.
 7. On October 23, 2002, a site meeting was held at the Home. The meeting was attended by, among others, Amedeo Picano (“Picano”) for Greenville, Daubeny and Vito Catalano for the Town of Ajax, and Kwan for K.O. Kwan had been selected by Greenville at the behest of the City of Ajax as the consulting engineer who would report on the alleged construction deficiencies.
 8. On November 5, 2002 in a three-page fax from Kwan to Picano, copied to Lance Cumberbatch, chief building inspector for the Town of Ajax, Kwan listed four deficient items and their respective remedies and/or illustrations in accompanying sketches. In particular, Kwan noted that a gap between the top of the foundation wall and the sill plate needed to be filled either with non-shrink grout or steel shim plate. Kwan made no mention of the condition of the anchor bolts used to fix the sill plate to the top of the foundation wall.
 9. Also in November 2002, Kwan affixed his seal to a foundation “Wall Section” Drawing No. SK-1, detailing remediation of the misalignment between the foundation wall and the 2 x 6 wood stud wall.
 10. On December 20, 2002 in a sealed and dated fax from Kwan to Cumberbatch, Kwan detailed that the Home had been inspected and that all of the remedial work stipulated in Kwan’s November 5, 2002 report and drawings had been completed “in satisfactory workmanship and in accordance with our details and recommendations.”
 11. Subsequently, the complainant, Gomori, observed that the grouting and/or steel shims had not been previously installed as suggested by Kwan’s direction to Picano in his November 5, 2002 report and Kwan’s inspection report of December 20, 2002.
 12. On or about April 8, 2003, George Snowden (“Snowden”), P.Eng., of Construction Control Inc., was engaged by Gomori for the purpose of inspecting the home. Snowden was directed to check the work requested by, and allegedly inspected by, Kwan as detailed in Kwan’s November 5, 2002 and December 20, 2002 faxes. Snowden was also asked to comment on other apparent deficiencies that Gomori had observed.
 13. In the Construction Control Inc. report 6874, dated June 3, 2003, Snowden noted that the gap between the sill plate and the top of the west foundation wall still existed. He noted that wood shims had been installed between the top of the foundation wall and the underside of the sill plate at approximately 12-inch centres. Also, Snowden noted that the sill plates were attached to the top of the foundation wall using 1/2-inch diameter expansion bolts that had been inadequately installed in the concrete. One of the bolts was observed to have broken free of the foundation wall. This condition, in addition to said bolts being of insufficient length, resulted in an inadequate attachment of the sill plate to the foundation wall.
 14. Snowden went on to identify specific sections of the *Ontario Building Code* and *C.S.A./Can-A438 Concrete Construction for Housing and Small Buildings* related to his observations (9.23.7 Sill Plates, 9.23.6 Anchorage, 9.20.6.4 Masonry Veneer Walls, 9.23.17, and CSA Part 5—Clause 5.2—Sentence 5.2.3) and concluded that the as-built condition of the foundation wall and sill plate contained a number of deficiencies and violations of the *Ontario Building Code*. Snowden’s observations that were in contradiction to, or not noted in, Kwan’s inspection reports of November 5, 2002 and December 20, 2002, are as follows:
 - (a) Observed wood shims installed between the top of the west concrete foundation wall and the underside of the sill plate at approximately 12-inch centres;
 - (b) Trubolt Wedge Anchors had not been installed according to manufacturer specs and could not

- adequately secure the sill plate to the foundation;
- (c) At some locations, the wood sill of the back-up wall where it was observed to be overhanging the inside face of the concrete foundation wall by as much as 2.75 inches, indicating that only 50 per cent of the width of the back-up wall was supported by the foundation wall, was not properly corrected in all areas;
- (d) Portions of the constructions were non-compliant with the applicable CSA standard and the *Ontario Building Code*.
15. By reason of the facts aforesaid, it is alleged that John Yat-Man Kwan, P.Eng., and K.O. & Partners Limited:
- (a) were negligent;
- (b) failed to report construction deficiencies that they knew, or ought to have known, were violations of the *Ontario Building Code*;
- (c) provided information in an inspection report that they knew or ought to have known was incorrect with respect to completion of remedies stipulated in an earlier report; and
- (d) acted in an unprofessional manner.
16. By reason of the facts aforesaid, it is alleged that John Yat-Man Kwan, P.Eng., and K.O. & Partners Limited are guilty of professional misconduct as defined in section 28(2) of the *Professional Engineers Act* R.S.O. 1990, Chapter P.28 as follows:
- 28(2)(b) "The member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations."
17. The sections of O. Reg. 941 relevant to the alleged professional misconduct are:
- 72(1) In this section, "negligence" means 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.

R.R.O. 1990, Reg. 941, s. 72(1); O. Reg. 657/00, s. 1(1).

(2) For the purposes of the Act and this Regulation, "professional misconduct" means,

- (a) *Section 72(2)(a)*: negligence;
- (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)(c)*: failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public;
- (d) *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 the practitioner;
- (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 disgraceful, dishonourable or unprofessional. R.R.O. 1990, Reg. 941, s. 72(2); O. Reg. 657/00, s. 1(2); O. Reg. 13/03, s. 19.

Plea by Member and Holder of Certificate of Authorization

Kwan and K.O. admitted the allegations contained in paragraphs 15(a), (b), (c) and (d) of the Fresh Notice of Hearing dated September 30, 2004. The panel conducted a plea inquiry and was satisfied that Kwan's and K.O.'s pleas were voluntary, informed and unequivocal.

Decision

After deliberation, the panel unanimously accepted the plea by Kwan and K.O., and accordingly found Kwan and K.O. guilty of professional misconduct as defined by sections 72(2)(a), 72(2)(b), 72(2)(c), 72(2)(d), and 72(2)(j), under Regulation 941 as set out in the Fresh Notice of Hearing dated September 30, 2004.

Reasons for Decision

The panel accepted Kwan's and K.O.'s plea, which substantiated the findings of professional misconduct.

Penalty

Counsel for the association advised the panel that a Joint Submission on Penalty had been agreed upon. The Joint Submission as to Penalty provided as follows:

The parties, the Association of Professional Engineers of Ontario, John Yat-Man Kwan, P.Eng. ("Kwan"), and K.O. & Partners Limited ("K.O.") made the following joint submission on penalty:

1. Kwan and K.O. are to be reprimanded orally and that the fact of the oral reprimand recorded on the Register until such time as Kwan writes and successfully completes the Professional Practice Examinations;
2. the decision and reasons of the Discipline Committee, including names, shall be published in Gazette;
3. Kwan shall write and successfully complete the Professional Practice Examinations, Part A and Part B ("Examinations"), within 12 months of the date of the order of the Discipline Committee;
4. that in the event that Kwan fails to write and successfully complete the Examinations 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 shall be suspended until such time as he writes and successfully completes the Examinations;
5. that in the event that Kwan fails to write and successfully complete the Examinations within 24 months from the commencement date of the order of the Discipline Committee, his licence to engage in the practice of professional engineering shall be revoked; and

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

Penalty Decision

After deliberation, the panel unanimously accepted the Joint Submission on Penalty and therefore the panel ordered:

1. that Kwan and K.O. be reprimanded orally and that the fact of the oral reprimand be recorded on the register until such time as Kwan writes and successfully completes the Professional Practice Examinations;
2. that the decision and reasons of the Discipline Committee, including names, be published in Gazette;
3. that Kwan write and successfully complete the Professional Practice Examinations, Part A and Part B (“Examinations”), within 12

months of the date of the order of the Discipline Committee;

4. that in the event that Kwan fails to write and successfully complete the Examinations 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 be suspended until such time as he writes and successfully completes the Examinations;
5. that in the event that Kwan fails to write and successfully complete the Examinations 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 Kwan pay costs of the disciplinary proceeding fixed in the sum of \$3,000.

Reason for Penalty

The panel concluded that the proposed penalty is 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.

Waiver of Right to Appeal

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

The written Decision and Reasons in this matter were dated October 3, 2005, and were signed by the Chair of the panel, Seimer Tsang, P.Eng., on behalf of the other members of the panel: Derek L. Wilson, P. Eng., Virendra Sahni, P.Eng., Bill Walker, P.Eng., and Nick Monsour, P.Eng.

Regulation 941/90 amended effective March 23, 2006

At its meeting on December 1-2, 2005, PEO Council approved amendments to Regulation 941/90 made under the *Professional Engineers Act*. Following approval by Cabinet in February, the Regulation amendments became effective when filed with the Registrar of Regulations as O.Reg. 81/06 on March 23, 2006.

The amended sections are shown below, listed under subject headings. To access the complete Regulation 941/90, please visit www.e-laws.gov.on.ca/DBLaws/Regs/English/900941_e.htm.

Housekeeping amendments

These amendments correct out-of-date or incorrect references in the regulation.

Section 47

The requirement and qualifications for the issuance of a certificate of authorization are:

1. The applicant must designate, as the person or persons who will assume responsibility for and supervise the

services to be provided by the applicant within the practice of professional engineering, one or more Members or holders of temporary licences each of whom has at least five years of professional engineering experience following the conferral of a degree described in subparagraph 1i of subsection 33(1) or the completion of an equivalent engineering education. R.R.O. 1990, Reg. 941, s. 47; O.Reg. 81/06, s. 1

Section 52

(1.1) If a Member’s seal was issued before February 28, 2003, clause (1)(c) does not apply. O. Reg. 13/03, s. 15(2); O. Reg. 81/06, s. 2

Section 78

The following are prescribed as performance standards with respect to the general review of the construction, enlargement or alteration of a building by a professional engineer as provided for in the building code made under the *Building Code Act, 1992*: ...

4. In paragraph 1, “plans and specifications” means a plan or other document which formed the basis for the issuance of a building permit and includes all changes thereto that were authorized by the chief building official as defined in the *Building Code Act, 1992*. R.R.O. 1990, Reg. 941, s. 78; O. Reg. 81/06, s. 3

Section 88

Revoked. O. Reg. 81/06, s. 12

Fee-related amendments

Section 80

- (1) The application fee for registration as a holder of a licence is \$230. O. Reg. 631/92, s. 1; O. Reg. 81/06, s. 4(1)
- (2) The registration fee for applicants or applicants for reinstatement whose application is accepted is \$230. O. Reg. 631/92, s. 1; O. Reg. 81/06, s. 4(2)