

DECISION AND REASONS

party making the motion will have another 10 days to provide a reply submission.

The panel may decide to ignore any submission that it receives after a deadline has passed.

Submissions are to be sent to the tribunals office at the following address:

Professional Engineers Ontario
40 Sheppard Avenue West, Suite 101
Toronto, ON M2N 6K9

Attention: Albert Sweetnam, P.Eng.

Chair, [Engineer A] panel of the Discipline Committee

The written summary of the Decision and Reasons was signed by Albert Sweetnam, P.Eng., as chair on behalf of the other members of the discipline panel: J.E. (Tim) Benson, P.Eng., Ishwar Bhatia, P.Eng., Roydon Fraser, P.Eng., and Glenn Richardson, P.Eng.

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 ENGINEER A, a member of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on May 3 and 4, 2010, at the offices of the Association of Professional Engineers of Ontario in Toronto.

On December 6, 2010, a panel of the Discipline Committee released its Decision and Reasons in this matter, and provided a framework for the parties to make submissions as to publication and costs. The panel received the following:

- (a) submissions on publication and costs on behalf of Engineer A, dated January 5, 2011;
- (b) submissions on behalf of the Association of Professional Engineers of Ontario (the association) dated January 31, 2011; and
- (c) a reply submission on behalf of Engineer A, dated February 11, 2011.

SUBMISSIONS REGARDING PUBLICATION

Engineer A requested that the panel's Decisions and Reasons be published in the official publication of the association, with any reference to Engineer A's identity omitted. The association made no submission in respect of this request.

On reviewing the submissions and the provisions of section 28(6) of the *Professional Engineers Act*, the panel orders that the Decision and Reasons as to the merits and this Decision and Reasons as to costs and publication be published in the official publication of the association, with any reference to Engineer A's identity omitted, and that the association may reformat the panel's decisions to comply with the normal publishing practices and standards for its official publication.

SUBMISSIONS REGARDING COSTS

Engineer A requested, pursuant to section 28(7) of the *Professional Engineers Act*, that the Discipline Committee order the association to pay the costs of his defence, on a partial indemnity basis, in the total amount of \$27,717.67, which sum includes partial indemnity for legal fees (in the amount of \$24,311.58) and the full indemnification of disbursements totalling \$3,406.09. The grounds for this request are summarized in Engineer A's submission as follows:

"[...that] by the start of the actual hearing on May 3, 2010, [the association] knew or ought to have known that the allegations against [Engineer A] could not have succeeded. [The association's] obligation, to both the Discipline Committee and to its member, was to withdraw the allegations. Instead, [the association] proceeded with the prosecution unnecessarily, forcing [Engineer A] to incur significant expense in defending himself."

[GAZETTE]

Engineer A submitted that the commencement of the proceedings was unwarranted for the following reasons:

- (a) The matter should never have been referred to the Discipline Committee by the Complaints Committee;
- (b) The evidence before the Complaints Committee included the fact that Engineer A had been elected to council by a substantial majority, despite the commencement of the proceedings;
- (c) The Complaints Committee was aware that the matter had been referred to council, who took no action against Engineer A; and
- (d) There was no evidence before the Complaints Committee of any harassment of the chief elections officer or any other alleged victim of harassment.

Engineer A submitted that:

- (a) The association amended the Statement of Allegations on April 29, 2009 (several days before the hearing), to include an allegation of harassment against the association's chief elections officer by Engineer A through emails sent in the context of an election query;
- (b) The association added an allegation regarding Engineer A's statements on his fee remission forms and on his website, along with the allegations regarding Engineer A's emails, which was not part of the original complaint;
- (c) The association chose not to obtain evidence from the chief elections officer;
- (d) The Discipline Committee found that the allegation of harassment of the chief elections officer through Engineer A's emails was "far removed from the issue set out in the complaint";
- (e) The association did not call any witnesses who could support the allegations of harassment and professional misconduct, and did not clarify the substance of the allegations until the association's counsel made his closing submissions; and
- (f) There is an obligation on the association as the prosecutor to ensure that it only pursues allegations of professional misconduct that have a reasonable prospect of conviction, and to withdraw every allegation that has no reasonable prospect of conviction, is frivolous or is vexatious.

The association's response was that costs can be awarded only in accordance with section 28(7) of the *Professional Engineers Act* when "the commencement of the proceedings was unwarranted," that the burden of proof is on Engineer A to provide the information that was before the Complaints Committee when it made its decision to refer the matter to

the Discipline Committee, that Engineer A had this information, and that Engineer A had not done so.

In addition, the association cited the following elements of the panel's Decision and Reasons as illustrative that the panel wrestled with its decision:

- (a) The comments on elements of Engineer A's website included that:
 - (i) "The panel felt that this comment was close to the line of being clearly false, and it required careful consideration to arrive at the finding." (Decision and Reasons page 38),
 - (ii) "The panel felt that the comment was close to the line of being vexatious, and the comment required careful consideration to arrive at this finding. (Decision and Reasons page 40); and
- (b) The fact that there was a dissenting opinion from two members of the panel.

In reply, Engineer A repeated many of the same points made in Engineer A's original submission and added that the fact that the panel wrestled with its decision is not relevant.

EVIDENCE SUBMITTED ON THE MOTION FOR COSTS

Engineer A provided:

- (a) a breakdown of the fees and disbursements incurred by the defence in this matter totalling \$47,730.13;
- (b) an excerpt from the book "*A Complete Guide to the Regulated Health Professions Act*" by Richard Steinecke; and
- (c) some legal authorities.

The association provided some legal authorities.

DECISION ON THE MOTION

The panel declines to award costs against the association.

There is a dissenting opinion on this motion.

REASONS FOR THE DECISION

Section 28(7) of the *Professional Engineers Act* provides the panel with the power to reimburse costs to a member or a holder in a proceeding. The section is provided here for convenience:

"28(7) 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 panel took note of the finding in the matter of the *Association v. Paul Siew Choon Lim, P.Eng. and P. Lim & Associates Limited* (Lim) dated January 11, 2011 (provided by the association) that "the commencement of the proceedings is at the time the Complaints Committee refers a matter to the Discipline Committee."

The panel noted that the rules of procedure of the Discipline Committee define the term proceeding as follows:

"'Proceeding' means a motion, hearing and/or application under Rule 9 that is before a discipline panel."

The panel decided that this definition does not apply to the use of the term "proceeding" in the *Professional Engineers Act* since a rule cannot limit the application of a term in an act. However, the panel used the definition to provide some context for its deliberations.

The panel noted that the *Statutory Powers Procedure Act* (SPPA) uses the term "proceeding" 145 times and defines it as follows:

"'proceeding' means a proceeding to which this act applies; (instance)"

The SPPA further defines a hearing as "a hearing in any proceeding," indicating that proceedings encompass hearings, but are not limited to hearings.

The panel decided that these definitions are governing. The following sections of the SPPA are also instructive:

"Record of proceeding"

20. A tribunal shall compile a record of any proceeding in which a hearing has been held, which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and

- (f) the decision of the tribunal and the reasons therefor, where reasons have been given."

"Decision not to process commencement of proceeding"

4.5(1) Subject to subsection (3), upon receiving documents relating to the commencement of a proceeding, a tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding if,

- (a) the documents are incomplete;
- (b) the documents are received after the time required for commencing the proceeding has elapsed;
- (c) the fee required for commencing the proceeding is not paid; or
- (d) there is some other technical defect in the commencement of the proceeding."

"Dismissal of proceeding without hearing"

4.6(1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met."

The panel interpreted these sections of the SPPA to mean that a proceeding includes steps that occur before a hearing is started and after a matter is referred. The panel is of the view that proceedings commence when a matter is referred to the Discipline Committee.

UNWARRANTED

The panel took note of the finding by the Discipline Committee in Lim that the term "unwarranted" in section 28(7) of the *Professional Engineers Act* means "without reasonable justification, patently unreasonable, malicious, taken in bad faith, or for a collateral purpose" as set out in *Re Anthony Michael Speciale*, a decision of the Law Society of Upper Canada dated February 25, 1994.

SUBMISSIONS BY THE PARTIES

The panel agreed with the association that the motion required Engineer A to prove on a balance of probabilities that the Complaints Committee's decision to refer this matter to discipline was unwarranted. The Complaints Committee does not provide reasons for a decision where it decides to refer a matter to the Discipline Committee. However, the Discipline Committee has considered the Statement of Allegations in this matter, which reflects the allegations that the Complaints Committee decided to refer to discipline.

The panel took note of the complaint and the other evidence entered on the merits, including the evidence by Bruce Matthews, P.Eng. (Matthews), regarding the conduct of his investigation. Specifi-

cally, the complaint was made regarding the content of Engineer A's website and on Engineer A's response to a letter from the association's Central Election and Search Committee (CESC).

Matthews testified that his investigation consisted of:

- (a) verifying the authenticity of the statements in the complaint;
- (b) interviewing the complainant (and that he did not take notes during this interview);
- (c) interviewing the chair of the CESC (and that he did take notes);
- (d) interviewing the association's chief elections officer (and that he did not take notes);
- (e) collecting a copy of the letter in question from the CESC to Engineer A; and
- (f) printing a copy of Engineer A's website.

A complete list of the information collected by Matthews and provided as evidence to the panel is contained in the panel's Decision and Reasons on the merits.

The panel noted that the allegations include:

- (a) statements in the complaint regarding the status of Engineer A and other pertinent details;
- (b) correspondence and details that could only have originated from the chair of the CESC;
- (c) an excerpt from the letter from the CESC to Engineer A; and
- (d) additional details from Engineer A's website.

Based upon the alignment of the allegations, the information collected by Matthews and the complaint, the panel finds that the Complaints Committee had the information listed above when it made its decision to refer the matter to the Discipline Committee. In addition, since Matthews testified that there were no other avenues of investigation and that the complaints regarding Engineer A's emails and fee abatement were not part of the referral, the panel found that it was in possession of all the information that was relevant to the complaint that led to the Complaints Committee's decision to refer the matter to the Discipline Committee.

The panel had no evidence that the Complaints Committee knew that the council of the association had considered the complaint as stated by Engineer A. Similarly, the panel had no evidence that the Complaints Committee was presented with or considered the results of the council election. The panel makes no finding on these issues and considered them no further.

The panel gave little weight to the fact that it wrestled with its decision on the merits.

The panel found that it was reasonable for the Complaints Committee to consider the decision by the CESC, a group of senior members of the association, in addition to the complaint was, on a balance of probabilities, sufficient evidence alone that could have resulted in a decision of professional misconduct by the Discipline Committee if Engineer A had not presented a defence. Therefore, the Complaints Committee had a reasonable justification for its decision to refer the matter to the Discipline Committee.

The panel also noted that Matthews gave several opportunities to Engineer A to counter the claims in the complaint and that Engineer A chose not to do so.

The panel did not consider whether the commencement of proceedings was unwarranted on the basis of being patently unreasonable, malicious, taken in bad faith, or for a collateral purpose because these elements were not part of Engineer A's submission on costs.

Since the panel found that the commencement of proceedings was not unwarranted, there is no basis for reimbursing Engineer A his costs, or to even consider the question of quantum of costs.

The panel noted, based upon *Kupeyan v. Royal College of Dental Surgeons of Ontario* (1982) 73 O.R. (2d) 737 HJC (which case was provided to the panel by the parties in argument regarding the merits of this matter), that the allegations of harassment of the chief elections officer, and that Engineer A made conflicting statements regarding his employment status, were not part of the original complaint. In the panel's view, those allegations were distinct from the other allegations included in the original referral in this case and should have been considered by the Complaints Committee, council or the council executive in accordance with section 28(1)(a) of the *Professional Engineers Act* well in advance of the hearing, to determine whether they should be referred to the Discipline Committee before they were presented to the panel. In addition, the panel agreed with Engineer A that the association should have made its allegations clear to Engineer A well before the association's closing submission. The panel was very troubled by these actions by the association and would have considered them as important reasons when determining the quantum of the costs had the referral been unwarranted. The association would be well advised not to repeat these actions.

Albert Sweetnam, P.Eng., signed this Decision and Reasons on the motions as chair of this discipline panel and on behalf of the members of the discipline panel: J.E.(Tim) Benson, P.Eng.; Ishwar Bhatia, P.Eng.; and Glenn Richardson, P.Eng.