

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 A MEMBER of the Association of Professional Engineers of Ontario.

This matter came on for hearing, with the consent of the parties, before a three-member panel of the Discipline Committee on November 5, 2007, at the Association of Professional Engineers of Ontario (the association) in Toronto. All parties were represented by legal counsel.

THE ALLEGATIONS

The allegations against the member in the Notice of Hearing dated November 17, 2006 included incompetence and professional misconduct on several grounds under section 72 of Regulation 941/90 made under the act. Counsel for the association advised that the association was only seeking a finding of professional misconduct pursuant to section 72(2)(d) of Regulation 941/90 of the act. The allegations with respect to incompetence under section 28(3)(a) of the act and of professional misconduct pursuant to other grounds under section 72 were withdrawn.

STATEMENT OF AGREED FACTS

Counsel for the association, on consent of the parties, provided the panel with a Statement of Agreed Facts, which was marked as Exhibit 2. The Statement of Agreed Facts provided as follows:

1. The member was, at all material times, a member of the Association of Professional Engineers of Ontario.
2. In or about the summer of 1999, a contracting company approached a specialized service provider to form a joint venture to carry out a contract to perform surface preparation and re-painting work on a portion of a bridge. The joint venture was incorporated as Company A. To facilitate the work, a multi-point suspended platform (MPSP) was used. The MPSP had been designed and manufactured by an American firm and had been used for surface preparation and repainting portions of the bridge since about 1997. The member was the project manager in charge of the project on behalf of Company A.
3. The member and Company A did not offer engineering services to the public. Company A did not hold, nor apply for, a Certificate of Authorization. Company A did not carry professional liability insurance.
4. The member was ultimately responsible for ensuring that Company A had policies and procedures in place to ensure compliance with the requirements of the *Occupational Health and Safety Act* (OHSA) and regulations in respect to the MPSP.
5. Prior to using the MPSP in connection with a construction project in Ontario, Company A was required by the OHSA to arrange for a professional engineer registered in Ontario to conduct an inspection of the MPSP as called for in subsections 139(5) and (6) of Ontario Regulation 213 (O.Reg. 213) under the OHSA.
6. In connection with the project, Company A entered into a subcontract with Company B, an expert scaffolding contractor, to, among other things, erect access scaffolding and environmental protection in accordance with engineered drawings and related inspections.
7. The member was familiar with the requirements of sections 137 through 139 of O.Reg. 213 (construction projects) made under the OHSA, which detail the design, inspection and record-keeping requirements that apply to suspended platforms.

8. In the spring of 2000, Company A retained Company C to assume engineering design responsibility, pursuant to the OHSA, for the existing MPSP to be used for the project. The MPSP would support the access scaffolding, also designed by Company C. No written contract or letter of engagement was issued for the work.
9. Engineer A, a professional engineer with Company C, was responsible for the design for the access scaffolding and environmental enclosure. Engineer B, also a professional engineer with Company C, was primarily responsible for the design of the MPSP.
10. On July 20, 2000, Engineer A and Engineer B attended at the bridge site to examine the MPSP. The member, along with staff from Company A and Company B, were also present. The member and the staff from Company A and Company B would testify that they believed an inspection pursuant to section 139(5) of O.Reg. 213 under the OHSA was being carried out. Engineer A and Engineer B would testify that they believed they were conducting an examination for the purpose of completing the required design drawings pursuant to section 139(3) of O.Reg. 213 under the OHSA.
11. On August 10, 2000, Engineer A and Engineer B issued two signed, sealed and dated drawings, showing the details, layout, sections and moving procedures for the MPSP and the access scaffolding.
12. Company A began the cleaning and repainting work on the bridge on or about August 12, 2000.
13. On November 14, 2000, while the MPSP was being traversed to its final position for the cleaning and repainting project, the traversing beam became disengaged from one trolley. The workers were in the process of replacing the trolley when a failure occurred and the entire suspended MPSP collapsed and fell into the river below the bridge. Three of the approximately 10 workers on the MPSP fell into the river. One worker drowned.
14. By reason of the aforesaid, it is agreed that:
 - (a) The member did not maintain at Company A, at the relevant time, policies and procedures that adequately ensured that Company A obtained the written statement by a professional engineer as required under section 139(5) of O.Reg. 213 under the OHSA in respect of the MPSP;
 - (b) The member did not maintain at Company A, at the relevant time, policies and procedures in place to adequately ensure that no persons used the MPSP until the statement required by section 139(5) had been given as required by section 139(6) of O.Reg. 213 under the OHSA;
 - (c) No written statement as required by section 139(5) of O.Reg. 213 under the OHSA was obtained in respect of the MPSP and it was used from on or about August 12 to November 14, 2000;
 - (d) The conduct and omissions described at paragraphs 14(a) to (c) above constitute professional misconduct; and
 - (e) Section 72(2)(d) of O.Reg. 941/90 made under the *Professional Engineers Act*, is relevant to the professional misconduct:

72(2) For the purposes of the act and this regulation “professional misconduct” means,

 - (d) failure to make provision for complying with applicable statutes, regulations, standards, codes, bylaws and rules in connection with work being undertaken by or under the responsibility of the practitioner.
15. It is agreed that PEO has no evidence and it does not suggest that the actions or conduct in the Notice of Hearing or in this Agreed Statement of Facts were in any way the proximate cause of the collapse of the MPSP.

It was also noted by counsel that the relevant subsections of Ontario Regulation 213 were:

- 139(5) Before a suspended scaffold or platform is used, a professional engineer shall inspect it and state in writing that it has been erected in accordance with the design drawings; and
- 139(6) No person shall use a suspended scaffold or suspended platform until the statement required by subsection (5) has been given.

PLEA BY THE MEMBER

The member confirmed his acceptance of the Statement of Agreed Facts and of the allegations of professional misconduct under section 72(2)(d) of Regulation 941/90 of the act. The panel conducted a plea inquiry and was satisfied that the member’s admission was voluntary, informed and unequivocal.

DECISION

The panel accepted the Statement of Agreed Facts and the plea by the member. The panel concluded that the member was guilty of professional misconduct pursuant to section 28(2)(b) of the act in that he contravened the provisions of section 72(2)(d) of Regulation 941/90.

REASON FOR DECISION

The panel considered the onus and burden of proof of the association to prove the allegations and was satisfied by the Statement of Agreed Facts and the member's plea. There was no evidence that the member's actions were in any way the proximate cause of the collapse of the platform. The omissions set forth in paragraphs 14(a), (b) and (c) of the Statement of Agreed Facts breached the strict compliance provisions of the OHSA.

PENALTY

The panel was provided a precedent decision of the Discipline Committee, which addressed a similar technical breach of the OHSA as a result of the same incident.

Counsel for the member provided two letters of reference, one from an individual who works for a firm that specializes in occupational health and safety issues and had been engaged to assist the member in such matters for over 10 years, and one from an acquaintance of the member since 1983 and business partner since 1999, who outlined the member's responsibilities for occupational health and safety issues. Each attested to the commitment of the member to health and safety in the workplace.

Counsel for the association advised that the association was seeking as a penalty that:

1. The member be reprimanded and that the fact of the reprimand be recorded on the register for a period of 12 months from the date of the reprimand;
2. The panel's Decision and Reasons be published in summary in Gazette with names; and
3. The member forthwith pay a portion of the costs associated with the hearing, such costs to be fixed at \$2,500.

Counsel for the association stated that, with the exception of publishing with names, the penalty proposed could be considered as a joint submission by both parties.

Counsel for the association informed the panel that the penalty proposed was similar to the precedent case. The council of the association by motion 9921 recommended names be published where there is a finding of guilt with respect to professional misconduct. The precedent case ordered publishing without names and provided reasons why such a decision was appropriate.

Association counsel indicated that the member had been a licensed professional engineer since 1989 and there had been no prior finding or evidence of professional misconduct. He had admitted to the allegations, thereby saving the association

the effort and expense of proving the allegations and a hearing that could reasonably take over five days. He reiterated that neither the member's actions nor conduct were in any way the proximate cause of the collapse of the platform.

Counsel for the member argued that the focus of section 72(2)(d) of Regulation 941/90 was on a failure to make provision for compliance with applicable statutes and regulations; evidence could have shown there was substantial compliance. Since the collapse, there has been a long history of investigation through the Ministry of Labour and the coroner's inquest; however, there were no charges against the member or evidence of claims through civil litigation.

Counsel noted that the member had been employed in construction since 1987. He respects being a professional engineer and deeply regrets the accident. He co-operated with the various investigations throughout in an effort to determine the cause of the accident. The reference letters attest to his strong and continuing commitment to worker safety. The firm had a superior WSIB rating prior to the accident and has worked diligently to again achieve a superior rating.

Counsel for the member argued that publication should be without names in the interests of fairness and symmetry with the precedent decision. Four of the five reasons stated in the precedent, namely that the member's actions were not the proximate cause of the accident, that the incident resulted in a forensic investigation of the work, that the allegations of professional misconduct were a matter of public record, and that the member co-operated in the process, all applied to this case. In response to the panel's questions whether publication would facilitate closure, the member's counsel replied that publication of names had occurred throughout the investigations since the accident. Publication in this instance would raise the question once again. The member and the profession would be better served by allowing him to serve the public and the profession in the acceptable manner he has been demonstrating.

SUBMISSION BY INDEPENDENT LEGAL COUNSEL

Independent legal counsel (ILC) advised that the Joint Submission as to Penalty should be accepted unless it was so disproportionate to the offence in question that to accept it would bring the administration of justice into disrepute or, otherwise, not be in the public interest.

ILC confirmed that the Discipline Committee is independent of the council of the association and is not bound to follow council's recommendation. The panel is not bound by, but should give serious consideration to, the precedent decision on a similar technical breach of the OHSA as a result of the same incident.

PENALTY DECISION

The panel deliberated and ordered that:

1. The member be reprimanded and the fact of the reprimand be recorded on the register for a period of 12 months from the date of the reprimand;
2. The panel's Decision and Reasons be published in summary in Gazette without names; and
3. The member shall forthwith pay \$2,500 in costs.

REASONS FOR DECISION

The panel accepted the joint submission with respect to penalty. The reprimand was considered appropriate as a specific deterrent. The co-operation of the member in admitting to the allegations saved the association significant effort and expense to prove the allegations. The award of costs, reflecting only a portion of the actual costs, is reasonable in view of the co-operation by the member.

In assessing a penalty, the panel took into consideration that the member was ably represented by experienced counsel well versed in such matters. The panel also recognized that the submission had been developed through a process of thought by experienced counsel applying principles consistent with the circumstances.

Publication is a general deterrent in that it may assist other professional engineers should they encounter like situations. Publication also serves to protect the public interest. The panel confirmed that, as a general principle, it is in the public interest that the names be published. The rare exceptions should have compelling reasons.

Considerations in the decision to publish without names included:

1. The member's actions were not the proximate cause of the failure;
2. The member acted responsibly throughout detailed forensic investigations;
3. The member's co-operation avoided a protracted investigation and hearing;
4. The similarity of the precedent decision arising from the same event;
5. The allegations of misconduct were a matter of public record prior to the hearing;
6. The member has demonstrated remorse and a determined commitment to workplace safety; and
7. The member's name had already been made public through the investigation by the Ministry of Labour and the coroner's inquest.

The panel determined the reasons to be significant. Protection of the public interest and maintaining confidence in the profession's ability to regulate would not be compromised by a decision to publish without names in this instance. In the interest of fairness, the panel ordered publication without names.

The member waived his right to appeal and the panel administered an oral reprimand following the hearing.

The written Decision and Reasons were dated July 3, 2008, and were signed by J.E. (Tim) Benson, P.Eng., as the chair on behalf of the other members of the discipline panel: David Robinson, P.Eng., and Brian Ross, P.Eng.

NOTICE OF LICENCE REVOCATION—RAIKESH (RICK) BEDI

On March 28, 2008, the professional engineering licence of RAIKESH (RICK) BEDI was revoked pursuant to a March 28, 2006 order of the Discipline Committee. The order was issued following a finding of professional misconduct against Bedi at a discipline hearing held on March 27 and 28, 2006. Bedi's licence was revoked because he failed to write and pass the Professional Practice Examination within the 24-month time frame prescribed by the Discipline Committee. Bedi's licence had been suspended since March 28, 2007, pursuant to the same order of the Discipline Committee.

REGULATION 941/90 AMENDED, NEW REGULATION 260/08 CREATED, EFFECTIVE JULY 25, 2008

At its meeting on June 27, 2008, PEO council approved a new regulation to establish performance standards for professional engineers, relating to general review of construction of a building as provided for in the building code, and to demolition. Council also approved revoking section 78 of Regulation 941, which was previously the performance standard for general review.

Following approval by Cabinet, the amendment to Regulation 941 and new regulation were filed with the registrar of regulations as O.Reg. 258/08 and O.Reg. 260/08 on July 25, 2008, and came into force immediately.

The amendment to Regulation 941 and new Regulation 260 follow. To access the complete Regulation 941/90, visit www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900941_e.htm.

REGULATION 941/90

78. Revoked: O.Reg. 258/08, s. 1.

REGULATION 260/08

PERFORMANCE STANDARDS

Definitions

1. In this Regulation,
“building” means a building as defined in the *Building Code Act, 1992*;
“building code” means Ontario Regulation 350/06 (building code) made under the *Building Code Act, 1992*.

Construction of a building

- 2.(1) In this section,
“construct” and “construction” have the same meaning as in the *Building Code Act, 1992*
“plans and specifications” means a plan or other document which formed the basis for the issuance of a building permit and includes any changes to the plan or other document that are authorized by the chief building official as defined in the *Building Code Act, 1992*.
- (2) The following are prescribed as performance standards with respect to the general review of the construction of a building by a professional engineer as provided for in the building code:
 1. The professional engineer, with respect to the matters that are governed by the building code, shall,
 - (i) make periodic visits to the construction site to determine, on a rational sampling basis, whether the work is in general conformity with the plans and specifications for the building;
 - (ii) record deficiencies found during site visits and provide the client, the contractor and the owner with written reports of the deficiencies and the actions that must be taken to rectify the deficiencies;
 - (iii) review the reports of independent inspection and testing companies called for in the plans and specifications and which pertain directly to the work being reviewed;
 - (iv) interpret plans and specifications in writing when requested to do so by the client, the contractor or the owner; and
 - (v) review shop drawings and samples submitted by the contractor for consistency with the intent of the plans and specifications.
 2. The professional engineer may delegate one or more of the functions or requirements described in paragraph 1 to another person if it is consistent with prudent engineering practice to do so and the functions or requirements are performed under the supervision of the professional engineer.

- (3) Subsection (2) applies with necessary modifications to a limited licence holder, if the holder undertakes a general review of the construction of a building.

Demolition

3. (1) In this section,
 “demolish” means to do anything in the removal of a building or structure, as the case may be, or of any material part of a building or structure;
 “demolition plan” means a plan or other document prepared by a professional engineer, limited licence holder or provisional licence holder in accordance with subsection (3) with respect to the demolition of a building or structure, and includes any changes to the plan or other document that are made by a professional engineer, limited licence holder or provisional licence holder;
 “methodology” means a detailed description of the systematic and sequential procedure for cutting, destroying, removing or otherwise demolishing a building or structure in a manner that does not endanger the health or safety of any persons or negatively affect the integrity of any other buildings, structures, buried or above ground utilities or any other real property;
 “structure” means any permanent structure other than a building, including a bridge, dam or lock.

- (2) The following are prescribed as performance standards with respect to the general review of the demolition of a building by a professional engineer as provided for in the building code:
1. The professional engineer shall not undertake a general review of the demolition of a building unless,
 - (i) the professional engineer has satisfied himself or herself that a permit for the demolition has been issued under the *Building Code Act, 1992*, and
 - (ii) a demolition plan has been prepared with respect to the demolition.
 2. The professional engineer shall,
 - (i) make periodic visits to the demolition site to determine whether the demolition is proceeding in general conformity with the demolition plan;
 - (ii) record any material deviation from the demolition plan found during a site visit and as soon as reasonably possible notify the client,

the contractor and the owner in writing of the deviation and of the professional engineer’s opinion on the impact the deviation may have on the health or safety of any person or the integrity of any other building, structure, buried or above ground utility or any other real property;

- (iii) record any site condition or other issue relating to the demolition identified during a site visit that may endanger the health or safety of any person or the integrity of any other building, structure, buried or above ground utility or any other real property and as soon as reasonably possible notify the client, the contractor and the owner in writing of the condition or other issue;
 - (iv) notify the client, the contractor and the owner in writing about any site condition or other issue that requires the demolition plan to be changed;
 - (v) review the reports of any independent inspection and testing companies called for in the demolition plan and which pertain directly to the work being reviewed; and
 - (vi) interpret the demolition plan in writing when requested to do so by the client, the contractor or the owner.
- (3) The following are prescribed as performance standards with respect to the preparation of a demolition plan:
1. The professional engineer, limited licence holder or provisional licence holder shall, before preparing a demolition plan with respect to the demolition of a building or structure,
 - (i) visit and examine the demolition site in order to assess site limitations and adjacent conditions that may affect the content of the demolition plan; and
 - (ii) verify the structural characteristics and condition of the building or structure by conducting one or more inspections of the building or structure and by reviewing any existing drawings or specifications relating to the building or structure.
 2. The professional engineer, limited licence holder or provisional licence holder shall include in a demolition plan made with respect to the demolition of a building or structure,

DISCIPLINE HEARING SCHEDULE

This schedule is subject to change without public notice. For further information contact PEO at 416-224-1100; toll free 800-339-3716.

Any person wishing to attend a hearing should contact the tribunal office at extension 1083.

All hearings commence at 9:30 a.m.

Note: These are allegations only. It is PEO's burden to prove these allegations during the discipline hearing. No adverse inference regarding the status, qualifications or character of the licence or Certificate of Authorization holder should be made based on the allegations listed herein.

NOVEMBER 3-7, 2008

JEFFREY H. MAXWELL, P.ENG.

It is alleged that Maxwell is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the act relevant to the alleged professional misconduct are:

- (a) 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; and
- (b) SECTION 72(2)(N): harassment.

NOVEMBER 17-20, 2008

ROBERT G. WOOD, P.ENG., GREGORY J. SAUNDERS, P.ENG., and M.R. WRIGHT & ASSOCIATES CO. LTD. (MRWA)

It is alleged that Wood and Saunders are guilty of incompetence as defined in section 28(3)(a) of the *Professional Engineers Act*. It is alleged that Wood, Saunders and MRWA are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the act relevant to the alleged professional misconduct are:

- (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)(D): failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, bylaws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
- (d) SECTION 72(2)(G): breach of the act or regulation, other than an act that is solely a breach of the Code of Ethics;
- (e) SECTION 72(2)(H): undertaking work the practitioner is not competent to perform by virtue of the practitioner's training and experience; and
- (f) 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.

- (i) a description of the structural characteristics and condition of the building or structure as verified by the professional engineer, limited licence holder or provisional licence holder under subparagraph 1(ii);
 - (ii) the methodology a contractor should follow in demolishing the building or structure;
 - (iii) a description of the measures necessary to ensure that the health or safety of any person, including an occupant of a building being demolished if the building is not vacated before the demolition commences as permitted by the building code, is not endangered as a result of the demolition;
 - (iv) a description of the measures necessary to ensure that the integrity of any other buildings, structures, buried or above ground utilities or any other real property is not negatively affected as a result of the demolition;
 - (v) identification of all buried or above ground utilities under or at the demolition site and a description of the requirements for their safe disconnection, removal or protection before the commencement of the demolition;
 - (vi) a description of any environmental hazard that would or could arise as a result of the demolition, and of the measures necessary to address the hazard, with reference to the applicable municipal, provincial or federal statutes, regulations, rules, by-laws, codes, standards or other legislation; and
 - (vii) identification of any inspection or testing to be carried out by an independent company during the demolition.
- (4) A professional engineer may delegate one or more of the functions or requirements described in subsection (2) to another person if it is consistent with prudent engineering practice to do so and the functions or requirements are performed under the supervision of the professional engineer.
- (5) A professional engineer or limited licence holder may delegate one or more of the functions or requirements described in subsection (3) to another person if it is consistent with prudent engineering practice to do so and the functions or requirements are performed under the supervision of the professional engineer or limited licence holder.
- (6) Subsections (2) and (4) apply with necessary modifications to a limited licence holder, if the holder undertakes a general review of the demolition of a building.

Commencement

4. This regulation comes into force on the day it is filed.

ENFORCEMENT EXPLAINED

This column aims to educate members about some of the issues PEO faces in protecting the public against unlicensed individuals who engage in the practice of professional engineering, and in enforcing the title protection provisions of the *Professional Engineers Act*.

By Steven Haddock

Q. Our consulting firm has the opportunity to hire a qualified internationally trained individual. However, we have been in contact with immigration officials who wish to know if he will be able to legally work in Ontario. Unfortunately, he has no Canadian experience. In addition, we are not sure if we will employ him long enough for him to obtain the Canadian experience required for licensure. Do we have to pass up the opportunity to hire him?

A. As long as Citizenship and Immigration Canada concurs, there are two ways of handling this matter that satisfy both the *Professional Engineers Act* and immigration concerns.

If the newcomer will be working with at least one professional engineer on the project, there is no need for him to be licensed. Under the provisions of s. 12(3)(b) of the act, any person may perform an act within the practice of professional engineering where a professional engineer assumes responsibility for the services within the practice of professional engineering to which the act is related. Although this section was written with new graduates, technologists and technicians in mind, given the need to provide experience to internationally trained applicants, it can certainly be extended to anyone a professional engineer is confident will do the work properly.

Immigration officials are usually not aware of this exception in the act and usually request that applicants for guest worker status provide proof they can work in a regulated field before they will be admitted. PEO can provide letters to immigration officials explaining that a person may work in a professional engineering capacity as long as he or she is working under the supervision of a professional engineer. However, because PEO does not assess individuals' skills for immigration purposes, we cannot assure immigration officials that someone who has not applied for licensure and had their qualifications assessed as part of the licensure process has an equivalent education to what would be expected of a Canadian professional engineer.

If the newcomer is expected to work independently or with only minimal supervision, he should consider applying for a temporary licence. However, a temporary licence is limited to a single project, and may require that the newcomer work with a local P.Eng. as a collaborator. It is not appropriate for someone who is expected to work on a series of projects.

As you have pointed out, it would be impossible in this situation for the person to get a full licence prior to beginning the work. However, a person may apply for a licence prior to coming to Ontario. In fact, if your prospective employee applies now, by the time he goes through the application process, he will most likely have the one year of Canadian experience required for licensure. At that point, he can be licensed immediately on obtaining permanent resident status.

2008 ENFORCEMENT STATISTICS TO DATE

TOTAL INQUIRIES	516
Major enforcement files opened	18
Job advertisers contacted	2
Existing business names reviewed	204
New corporate names reviewed	30
Enforcement matters reported	54
From professional engineers	37
From other	9
From staff	8
<i>Daily Commercial News</i> inquiries	19
Out of province engineers	
Repeat offenders	4
Alberta	97
Newfoundland and Labrador	11
Nova Scotia	6
Internet searches	8
Self-employed engineers contacted	58

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.