SUMMARY OF DECISION AND REASONS

Summary of the decision and reasons in the matter of the Association of Professional Engineers of Ontario v. the member and the Certificate of Authorization holder.

The association was represented by Leah Price. The respondents were represented by Ryan Breedon. David P. Jacobs acted as independent legal counsel for the panel.

1. This matter came before a panel of the Discipline Committee of the Association of Professional Engineers of Ontario (PEO) for hearing on May 12, 2014, in Toronto.

COMPLAINTS COMMITTEE'S REFERRAL AND PEO'S ALLEGATIONS

2. The member is licensed as a professional engineer under the *Professional Engineers Act* R.S.O. 1990, Chapter P.28 (the act). The holder holds a Certificate of Authorization issued under the act. The member and the holder are collectively referred to as the respondents.

3. The referral decision of the Complaints Committee dated August 30, 2013, included PEO's Statement of Allegations in relation to the respondents' inspection of a diesel-fueled, back-up generator system installed by the respondents' client in an eight-storey condominium apartment building in Toronto. It alleged the respondents were guilty of professional misconduct.

SUMMARY OF THE PANEL'S FINDINGS

4. For the reasons that follow, the panel concluded the respondents are guilty of professional misconduct as defined in section 28(2) of the act, specifically under subsections 72(2)(d) and 72(2)(j) of Regulation 941 under the act. The panel accepted that the conduct would be considered unprofessional under subsection 72(2)(j).

SUMMARY OF THE EVIDENCE

5. The parties jointly submitted an Agreed Statement of Facts. Neither party called any witnesses, nor introduced any other evidence at the hearing. The material facts are summarized as follows:

(a) The Canadian Standards Association standard CSA B139ON-06 (*Ontario Installation Code for Oil-Burning Equipment*) is the mandatory standard for the installation of fuel oil-burning equipment in Ontario. It has been incorporated by reference into Ontario law.

(b) The Technical Standards & Safety Authority (TSSA) is empowered to grant authorizations and variances relating to B139ON-06 and its inspectors review such variance applications.

(c) The TSSA received an application for a variance in connection with a diesel-fueled, back-up generator system in 2008. The system consisted of a diesel-fueled, back-up generator located on the mechanical penthouse level of an eight-storey condominium apartment building. The fuel delivery system consisted of a main fuel supply tank located on parking level 2, and an auxiliary (day) tank located on the mechanical penthouse level. The two tanks were connected by piping and were vented through a single vent line leading outside from the main supply tank located on parking level 2.

(d) The 2008 application referred to above did not proceed, but, in or about September 2010, the application to the TSSA was reactivated. The TSSA advised the applicant that the vent system required certification by a professional engineer since the equivalent length of the day tank vent was in excess of 100 feet. The certification was required to ensure the safe ventilation of the day tank.

(e) In December 2010, the respondents were retained to provide the certification referred to above. On or about May 9, 2011, the member signed and sealed

a letter on behalf of the certificate holder that stated the "oil piping system is in compliance with CSA B139 code."

(f) A TSSA inspector (the inspector) rejected the member's conclusion that the venting for the system was adequate. The inspector advised that the CSA standard referred to by the member is not applicable in Ontario. In fact, the member had considered a standard that had not been adopted for use in Ontario and, instead, should have considered CSA B139ON-06. The inspector further advised that, under the correct standard, the common vent had to be at least three inches in diameter, instead of the existing two-inch-diameter venting.

(g) The member continued to assert the existing system was adequate. He was asked to provide his calculations to the inspector in support of this assertion. In response, he provided a document generated by a software tool. He later stated he had done (but did not provide) his calculations under NFPA 30. NFPA 30 is not adopted for use in Ontario, and the inspector advised the member of this as well. The inspector further advised that the reason why neither the software tool nor NFPA 30 was applicable was because neither source accounted for the pipe lengths of the venting system.

(h) On June 16, 2011, the inspector requested that the member provide a letter "clearly indicating that the entire venting system of both the day tank and the main tank meets the code requirements." The member did not comply. In response to this request, the member referred only to the vent from the main tank to the outside, which he said was 16.1 metres in length and, thus, "within the 30.5 m allowable length for a two-inch vent." However, the equivalent length of the day tank venting (to and through the main tank to the outside) was well in excess of 30.5 m.

(i) The inspector, subsequently, requested that the member either amend or withdraw his certification letter. The member refused to do so.

(j) The conduct described above constituted professional misconduct within the meaning of section 28 of the act and Regulation 941 thereunder, as follows:

(i) The respondents considered and applied inapplicable standards and codes and failed to correctly apply the applicable CSA standard and, therefore, failed to make responsible provision for complying with applicable standards and codes in connection with their review and certification of a diesel-powered generating system, amounting to professional misconduct under subsection 72(2)(d) of Regulation 941; and

(ii) They failed to properly or adequately respond to requests by the TSSA, the regulatory authority, for calculations or verification that the system certified by them, in fact, complied with the applicable CSA standard, amounting to conduct that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as unprofessional.

PLEA BY RESPONDENTS AND THE PANEL'S FINDINGS

6. The respondents admitted the allegations. The panel conducted a plea inquiry and was satisfied the respondents' admissions were voluntary, informed and unequivocal. Based on the jointly submitted Agreed Statement of Facts dated May 12, 2014, as well as the guilty pleas, the respondents were found guilty of professional misconduct, the particulars of which are set out above.

JOINT SUBMISSION AS TO PENALTY

7. The parties filed a Joint Submission as to Penalty and Costs dated May 12, 2014. The material points of the submission proposed:

(a) Pursuant to section 28(4)(f) of the act, the respondents shall be reprimanded, and the fact of the reprimand shall be recorded on the register for a period of one year;

(b) The finding and order of the Discipline Committee shall be published in summary form under section 28(4)(i) of the act without reference to names;

(c) Pursuant to section 28(4)(d) of the act, it shall be a term or condition on the member's licence that he shall, within 14 months of the date of pronouncement of this decision, successfully complete the professional practice examination (PPE);

(d) Pursuant to section 28(4)(b) and 28(4)(k) of the act, in the event the member does not successfully complete the PPE within 14 months, his licence shall be suspended for a period of 10 months or until he successfully completes the PPE (whichever comes first);

(e) In the event the member fails to successfully complete the PPE within 24 months of the date of pronouncement of this decision, his licence shall be revoked; and

(f) There shall be no order with respect to costs.

8. PEO's counsel argued that the joint submission was reasonable, especially taking into account the purposes of penalties. Counsel's position with respect to such purposes– as applicable in this case–is summarized as follows:

(a) *Protection of the public*: In this case, there were no concerns relating to endangering the public. The respondents considered the wrong code to be applicable, but they have admitted and accepted responsibility for this and there is, therefore, no danger to the public.

(b) *Public confidence in the process*: There was an admission of guilt, a summary of the decision will be published, and there will be a penalty. This would, therefore, not lead a reasonable person to conclude that the process is flawed and/or to question the ability of the profession to self-regulate.

(c) *General deterrence*: Members of the profession know that regulators' authority is to be respected and must take care to ensure compliance with applicable law and timely, appropriate responses to communications from regulators. This decision will emphasize these points.

(d) *Specific deterrence*: The member has practised for more than 50 years, and the certificate holder has held a Certificate of Authorization for more than 20 years. They have accepted responsibility and have pled guilty, and it is unlikely they will re-offend.

(e) *Rehabilitation*: The respondents have accepted responsibility, and the member will successfully complete the PPE. He now knows his conduct and his responsibility to promptly respond to communications from regulators are extremely important and are to be taken very seriously. Under these circumstances, there is little concern regarding the need for further rehabilitation of these respondents.

9. The panel was provided precedent decisions of the committee, which supported the appropriateness of the penalty. Both the argument as to fact and to submission on penalty had been negotiated over a considerable period of time, with the assistance of legal counsel. The respondents' counsel confirmed support and emphasized that such joint submission as to penalty deserves serious consideration.

THE PANEL'S DECISION

10. It is well established that a Joint Submission as to Penalty shall not be disregarded unless the circumstances are such that the proposed sentence is contrary to the public interest and/or would bring the administration of justice into disrepute.

11. In this case, in light of the evidence contained in the Agreed Statement of Facts, the fact the parties were represented by counsel who negotiated the submission as to penalty, and the submission of the parties, the panel finds the Joint Submission as to Penalty and Costs is within the reasonable range and should not be disregarded. The panel, therefore, orders the penalty and costs as set out in the joint submission.

WAIVER OF APPEAL RIGHTS AND ADMINISTERING OF REPRIMAND

12. The respondents waived their rights to appeal. The panel administered the reprimand at the conclusion of the hearing.

The Decision and Reasons was signed on May 28, 2014, by David Robinson, P.Eng., chair, on behalf of the other members of the discipline panel: Bruce Clarida, P.Eng., Richard Hilton, P.Eng., Leigh A. Lampert, LLB, and Michael Wesa, P.Eng.

CORRECTION NOTICE

In the third paragraph of Gazette article "Council approves practice standards" (May/June 2014, p. 33), we incorrectly identified the governing regulation. Reports prepared for the purpose of producing a record of site condition are subject to O. Reg. 153/04. Each reference to O. Reg. 170/03 in that paragraph should be replaced with O. Reg. 153/04.