The Discipline Committee of the Association of Professional Engineers of Ontario

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, Chapter P. 28

And in the matter of a complaint regarding the conduct of

A Member

a member of the Association of Professional Engineers of Ontario

BETWEEN:

The Association of Professional Engineers of Ontario and

A Member

Summary of Decision and Reasons

A Panel of the Discipline Committee of the Association of Professional Engineers of Ontario (PEO) met in the offices of PEO on December 3, 2002, to hear allegations of professional misconduct against a member of PEO (the member).

Both PEO and the member were represented by legal counsel. Independent legal counsel was in attendance for the Panel of the Discipline Committee.

The allegations against the member as stated in the Notice of Hearing dated March 21, 2002, are summarized as follows:

Allegations

It is alleged that the member is guilty of professional misconduct, the particulars of which are as follows:

1. In early 1992, a businessman (hereinafter referred to as the purchaser) made an offer to a property owner (hereinafter referred to as the vendor) to purchase a property located in Etobicoke, Ontario. Because the site had previously been occupied by a gas station and, at the time of the offer, was occupied by two automotive service franchises, the offer to purchase was conditional upon the purchaser's satisfaction with the environmental condition of the soil.

2. The vendor retained an environmental assessment firm to conduct an environmental investigation at the site. Their report, dated February 1992, identified a number of minor contamination issues. The report included drawings showing the locations on the site where samples and measurements were taken, and it also included, as an appendix, copies of the certificates of analysis from the independent laboratory that conducted the tests.

3. In July 1992, the manager of retail environmental affairs for the vendor reviewed the report and identified recommendations for site remediation activities that would be required prior to the sale of the property. The recommendations included the determination of the existence and status of an abandoned underground furnace fuel oil tank.

4. In or about September 1992, the vendor retained the member, who at the time worked for a firm of environmental engineers and contractors, to perform a site investigation and remediate the soil where required at the property. The member attended at the site between October 1, 1992, and October 5, 1992.

5. In an October 26, 1992, letter to the vendor, the purchaser noted that, in accordance with Ministry of Consumer and Commercial Relations regulations, the vendor should remove the tank, but that if that was not possible then they could have it filled with concrete.

6. In a November 5, 1992, letter to the purchaser, the vendor agreed to the purchaser's telephone request that his own consultant be present during the fuel oil tank location assessment.

7. The member issued a site investigation and soil remediation report dated November 30, 1992. The signature block of the report named the member as the author, but it did not bear his seal and was signed on his behalf by the president of his firm. The report noted that the exact location of the furnace oil tank could not be determined. It further noted that eight soil samples were taken and submitted to an independent laboratory for analysis to determine the presence and concentrations of various petroleum related compounds and total petroleum hydrocarbons. However, Table 1 of the report provided data for only six soil samples. Furthermore, the certificates of analysis from the independent laboratory were not included with the report. The report concluded that the soil samples met the Ontario Level II remediation criteria and that the site had been satisfactorily decommissioned from petroleum use.

8. The underground fuel oil tank was ultimately located and removed on November 30, 1992. The vendor

retained the member and his firm to examine the soil conditions within the tank excavation during the removal of the tank.

9. In a December 4, 1992, letter to the purchaser, the vendor noted that the tank was removed and that remediation of the soil surrounding the tank was completed on November 30, 1992. The vendor proposed a closing date of December 21, 1992, for the sale of the property.

10. The member issued a report dated December 23, 1992, arising from the November 30, 1992, removal of the furnace oil tank. The signature block of the report named the member as the author, but it did not bear his seal and was again signed on his behalf by the president of his firm. The report noted that the 1000-gallon steel underground furnace oil tank had to be cut into small sections to facilitate removal. It further noted that four representative soil samples were taken from the walls and base of the excavation and these were submitted to an independent laboratory for analysis to determine the presence and concentrations of various petroleum related compounds and total petroleum hydrocarbons. However, Table 1 of the report provided data for only three soil samples. Furthermore, the report did not include a figure showing the locations where the samples were taken and the certificates of analysis from the independent laboratory were not included. The report stated that "examination of the laboratory results for the representative soil samples indicates" that the petroleum compound and total petroleum hydrocarbon concentrations were below the Ontario Level II remediation criteria. The report also stated that "no petroleum related environmental liability exists at the location of the former underground furnace oil tank at the present time."

11. In January 1993, the purchaser's consultant called and advised the purchaser that one of the soil samples he had taken from the tank excavation had total petroleum hydrocarbon levels well in excess of the Level II criterion. In a January 4, 1993, letter to the vendor, the purchaser requested a copy of the laboratory results obtained by the vendor. The vendor responded on January 8, 1993, and included a copy of Table 1 from the December 23, 1992, report, which showed three samples all below the Level II criteria. The purchaser accepted this and assumed that a small spill had occurred during removal of the tank and that there was no significant contamination.

12. In 1996, the purchaser applied for a building permit for the property. The City of Etobicoke building department requested reports on the environmental conditions for the site. The purchaser forwarded all of the reports in his possession. The city requested the complete reports by the member's firm, including laboratory certificates. The purchaser contacted the vendor and obtained the reports, but he noted that there were no certificates of analysis attached. He then contacted the member's firm and they found the certificates in their archives and faxed them to the vendor on April 24, 1997. The vendor faxed the certificates to the purchaser the same day

13. A review of the certificates indicated that four soil samples from the tank excavation were analyzed and that the one sample not included in the December 23, 1992, report had total petroleum hydrocarbon levels in excess of the Ontario Level II criterion.

14. In a July 21, 1997, letter to the vendor, the purchaser noted that the building department at the City of Etobicoke was not accepting any of the reports by the member's firm, due to the error in reporting of the tank excavation soil samples. The purchaser requested that the vendor arrange for new soil and groundwater testing and remediation. The vendor agreed.

15. In or about August 1997, the vendor retained an independent environmental assessment firm to carry out an environmental site assessment and remediation. In reports dated August 19, 1997, and September 11, 1997, that firm reported two areas that did not meet the Ministry of Energy and the Environment's 1996 *Guideline for Use at Contaminated Sites in Ontario*. Those areas were cleaned up at the vendor's expense.

16. In summary, it is alleged that the member

(a) issued a December 23, 1992, soil condition report that failed to meet the standards of a reasonable and prudent practitioner in those circumstances in that he failed to report data for all soil samples analyzed;

(b) failed in his duty to the public and his client by failing to report a soil sample that he knew, or ought to have known, was contaminated beyond applicable criteria; and

(c) stated that no petroleum-related environmental liability existed at a site when he knew, or ought to have known, that it did.

17. By reason of the facts aforesaid, it is alleged that the member is guilty of incompetence as defined in section 28(3)(a) and professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28.

Counsel for the association advised the panel that agreement had been reached on the material facts listed above, with explanations by the member as follows:

1. Regarding the reports bearing the member's name, but being signed by the president of his firm, the member noted that this was in accordance with the customary procedure at the firm that was in effect at the time of the work. Similarly, it was the customary procedure of the firm at the time to not include the certificates of analysis from the independent laboratory.

2. The results from the sample taken by the purchaser's consultant were not reported to the member's firm at the time.

3. The vendor and the purchaser completed the sale of the property on December 21, 1992, in advance of the December 23, 1992, report being issued.

4. The lab results for all four samples described in the December 23, 1992, report were orally reported to the vendor.

The member admitted the allegations of professional misconduct as outlined above. The panel conducted a plea inquiry and was satisfied that the admission of the member was voluntary, informed and unequivocal.

The panel considered the agreed facts and found that the facts support a finding of professional misconduct and, in particular, finds that the member committed an act of professional misconduct as alleged in the Notice of Hearing, in particular:

- **Section 72(2)(a): negligence as defined at Section 72(1): In this section, "negligence" means an act or an 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;**

- **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;**

- **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; and**

- **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 unprofessional.**

The panel deliberated on the matter and considered the usefulness of resolution discussions to the discipline process. In consideration of this, and after reviewing the Agreed Statement of Facts, it was the panel's unanimous decision to accept the admission of professional misconduct.

Counsel for PEO advised the panel that a Joint Submission as to Penalty had been agreed upon. The panel accepted the Joint Submission as to Penalty and accordingly ordered:

a) that the member is reprimanded and the fact of the reprimand is recorded on the register;

b) that the member write and pass the Professional Practice Examination within a period of 12 months, failing which this matter be brought back before the Discipline Committee for further penalty action;

c) that the member's current practice be subject to a practice inspection under the following terms:

(i) the practice inspection will be carried out by an independent expert to be named by the registrar and who will provide a report to the Discipline Committee at the conclusion of the inspection;

(ii) the practice inspection will be limited to not less than three and not more than six projects of a scope similar to that which was the subject of his hearing (to be agreed upon between the member and the independent expert named by PEO);

(iii) the practice inspection shall be completed and the report submitted to the Discipline Committee within 12 months;

(iv) after review of the independent expert's inspection report, the Discipline Committee may, at its sole discretion, order additional penalty action against the member under Sections 28(4)(c), 28(d), and/or 28(e) of the *Professional Engineers Act*; and

(v) the cost of the practice inspection shall be paid by the member;

d) the decision be published, but without names.

The panel unanimously concluded that the jointly submitted penalty is reasonable and in the public interest. The member has cooperated with the association and, by agreeing to the facts and a proposed penalty, has accepted responsibility for his actions and has avoided unnecessary expense to the association.

The written Decision and Reasons in this matter were dated January 24, 2003, and were signed by the Chair of the Panel, Angelo Mattacchione, P.Eng., for and on behalf of the other members of the Discipline Panel: James Dunsmuir, P.Eng., Tom Ellerbusch, P.Eng., Monique Frize, P.Eng., Ken Lopez, P.Eng.

Note from the Regulatory Compliance department

The member waived his right of appeal and the reprimand was administered at the conclusion of the discipline hearing. The practice inspection report was issued on June 27, 2003 and was accepted by the Discipline Panel. On October 16, 2003, at the member's request, the Discipline Panel granted the member a six-month extension to the deadline for writing the Professional Practice Examination.