

Summary of Decision and Reasons

A hearing was convened before a panel of the Discipline Committee of the Association of the Professional Engineers of Ontario (“PEO” or the “association”) in the association’s offices on Wednesday, October 1, 2003. This hearing was convened to hear allegations of professional misconduct and incompetence against Wiktor Kwiatek, P.Eng. (hereinafter referred to as the “member”).

William Black of McCarthy Tétrault appeared as legal counsel for PEO. The member was not present and was not represented by legal counsel.

On convening the hearing at 9:30 a.m., the panel noted the member’s absence and directed that the hearing stand in recess until 10:00 a.m. to give the member further opportunity to attend the hearing.

The hearing resumed at 10:05 a.m. and continued in the member’s absence, as the panel was satisfied that the member had been given notice of the hearing (in the form of the Notice of Hearing dated May 8, 2003) and that the ends of justice did not dictate that the hearing be adjourned. PEO’s counsel fairly raised the issue of whether the proceedings should be adjourned to another date in order to permit the member to attend. However, on reviewing the exhibits on the motion for adjournment (the Affidavit of Service of the Notice of Hearing, the Notice of Hearing itself and correspondence between the member and PEO counsel), the panel concluded that even if the member’s letter could be construed as a request for an adjournment, his conduct subsequent to sending the letter to PEO suggested that he did not wish to attend the hearing in any event, so there would be no practical purpose in granting an adjournment.

The Allegations

The allegations of professional misconduct and incompetence against the member were set out in Appendix A to the Notice of Hearing and are summarized as follows:

In the matter of a discipline hearing under the Professional Engineers Act and in the matter of a complaint regarding the conduct of:

Wiktor Kwiatek, P.Eng.

a member of the Association of Professional Engineers of Ontario.

1. In or about mid-2002, the Splash Nightclub (“Splash Club”) installed a wood sound barrier at the south perimeter of a patio on its property located at 4170 South Service Road in Burlington, Ontario. This sound barrier was required to be constructed as part of an agreement between Splash Club and the Corporation of the City of Burlington (the “city”). The city expected the sound barrier to be constructed in accordance with industry standards. The sound barrier wall was approximately 70 feet long, varying in height from 12 to 14 feet, and was reported to be framed with 8” x 8” posts, with 2” horizontal struts and 1” vertical slats.
2. In June 2002, at the request of the owner of the Splash Club, Kwiatek undertook to inspect the wood sound barrier to ensure its suitability for its intended purpose and to ensure its compliance with relevant standards. At this time, Kwiatek did not hold a Certificate of Authorization under the Act to offer and provide engineering services to the public.
3. In a sealed report dated June 18, 2002, which was submitted to the city, Kwiatek indicated that he had inspected the wood sound barrier wall and found it to be “structurally adequate, built in accordance with prevailing construction practice in Ontario.”
4. On July 9, 2002, a city by-law enforcement officer went, to the Splash Club and observed, at that time, that sections of the sound barrier had failed and were lying on the ground, apparently after being blown over by the wind.
5. On July 17, 2002, the city wrote to Kwiatek, enclosing a copy of the photograph showing pieces of the sound barrier lying on the ground. In this letter, the city requested a report from Kwiatek explaining the “discrepancy” between the fact of pieces of the sound barrier having failed and lying on the ground on the one hand, and Kwiatek’s report, which indicated that the sound barrier was “structurally adequate” on the other.
6. Kwiatek responded to the city’s July 17, 2002, letter by letter dated July 20, 2002. In this letter, Kwiatek purported to explain the “discrepancy” as follows:
 - (a) In order for the nightclub to operate on weekends, the wall had to be constructed and approved to meet a deadline of June 21, 2002;
 - (b) At the time of Kwiatek’s inspection, drawings and design details were not available, such that

- Kwiatek conducted a visual inspection only;
- (c) Kwiatek stated that he had informed the owner orally that the wood sound barrier wall was adequate assuming normal wind velocity, but that there may be a problem if there was “excessive windstorm”;
 - (d) Kwiatek had no means to check the depth to which the main structural members (already built by that time) were embedded into the ground; and
 - (e) Kwiatek claimed that he was never asked to design or verify the design of the sound barrier wall.
7. It appears that Kwiatek:
- (a) breached subsection 12(2) of the Act by offering and/or providing professional engineering services to the public while not possessing a Certificate of Authorization under the Act;
 - (b) inappropriately proceeded to carry out an inspection of the sound barrier wall and provided a report in that regard, based on inadequate information;
 - (c) provided an inspection report that indicated that the sound barrier was structurally adequate when, in fact, the sound barrier was not structurally adequate;
 - (d) failed to have sufficient regard for the safety of the public;
 - (e) failed to indicate the limitations on his inspection report;
 - (f) failed to include in his inspection report the caution that he purports to have provided orally to the owner;
 - (g) failed to maintain the standards that a reasonable and prudent engineer would maintain in carrying out an inspection of the sound barrier and reporting thereon; and
 - (h) acted in an unprofessional manner.
8. By reason of the facts set out above, it is alleged that Kwiatek is guilty of incompetence as defined in Section 28(3)(a) of the Act as follows:

“28(3)(a) The Discipline Committee may find a member of the Association or holder of a temporary licence or limited licence to be incompetent if in its opinion,

(a) The member or holder has displayed in his or her professional responsibilities a lack of knowledge, skill or judgment or disregard for the welfare of the public of a nature or to an extent that demonstrates the member or holder is unfit to carry out the responsibilities of a professional engineer.”

9. In addition, it is alleged that Kwiatek is guilty of professional misconduct as defined in section 28(2)(b) as follows:

“28(2)(b) A member of the Association or holder of a certificate of authorization, temporary licence, provisional licence, or a limited licence may be found guilty of professional misconduct by the Committee if, ...

(b) the member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations.”

10. 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, by-laws 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 regulations other than an action that is solely a breach of the Code of Ethics”;

(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.”

11. In addition, it is alleged that Kwiatek has breached provisions of the Code of Ethics under Regulation 941.

Member’s Plea

In the member’s absence, the panel noted that the member was deemed to have denied the allegations and the hearing proceeded as a contested hearing.

The Evidence

PEO called three witnesses:

1. Dave McLellan, a by-law enforcement officer employed by the city;
2. Dan Mousseau, P.Eng., now retired, but formerly the city’s director of building and chief building official;
3. Alan Quaile, P.Eng., tendered by PEO as an expert witness in relation to wooden wall structures, structural engineering as it relates to those structures, and the member’s performance in this matter.

Decision

Having considered the evidence and the onus and standard of proof, the panel finds the member guilty of incompetence as defined in section 28(3)(a) of the Act and guilty of professional misconduct as defined in section 28(2)(b) of the Act and Regulation 941, sections 72(2)(a), (b), (d), (g), (h) and (j).

The panel also finds that the member is guilty of contravening the Code

of Ethics of the association contained in section 77 under Regulation 941 in that he breached his duty to public welfare by failing to have sufficient regard for the safety of the public.

Reasons for Decision

There is no question that the member offered an incorrect statement that the wooden barrier was structurally adequate. The member's letter of July 20, 2002, provides a partial explanation of the factors that led to that incorrect statement. In that letter, the member claimed that:

- He was under time pressure to meet a deadline;
- He did not have sufficient information about the actual construction; and
- He cautioned the club owner orally that the wall safety was not assured for a windstorm.

The panel accepted Mr. Quaille's expert opinion evidence that:

- None of the above arguments are consistent with accepted engineering practice. Accepted standards require that if a conclusion about safety is drawn on the basis of insufficient information, the report must explain whether and how the conclusion might be affected by the missing information.
- The member's caution to the club owner was not appropriate given that he had not at that time done a structural analysis and so had no concept of how unsafe the wood barrier actually was.

The panel reviewed the calculations of Kwiatek with the expert and found that they were grossly in error, and the structure woefully inadequate to withstand moderate winds.

Furthermore, the member breached the Act by providing professional engineering services to the club owner without a Certificate of Authorization.

With respect to the many failures alleged in the Notice of Hearing, the panel evaluated these in the context of the evidence placed before it and considered the conduct to be unprofessional.

This evidence, plus the member's apparently poor technical judgment to ensure the safety and welfare of the public, demonstrated that the member is unfit to carry out the responsibilities of a professional engineer.

Penalty

Counsel for PEO made submissions with respect to penalty. He requested revocation of the member's licence, considering the distinct lack of competence and professional misconduct the member had demonstrated. He further submitted that in the event that the panel was not inclined to revoke the member's licence, the panel should impose a licence suspension of not less than 24 months. In either case, PEO sought publication of the member's name in its publication. Further, counsel for PEO sought recovery of costs in the amount of \$10,000.

Penalty Decision

In considering the penalty, the panel considered its findings and

the possible consequences of the member's incompetence and professional misconduct and agreed with Mr. Black's submission that the evidence established that in the circumstances of this case of incompetence and professional misconduct, revocation of the member's licence was warranted. The panel therefore ordered:

- **revocation of Wiktor Kwiatek's licence, and**
- **publication in PEO's *Gazette*, with names, a summary of the allegations in the Notice of Hearing, and reasons for the decision.**

Considering his age and circumstances, the panel was reluctant to order the member to pay costs in the amount of \$10,000 as requested by PEO. In the circumstances, the panel declined to order the member to pay any of PEO's costs.

The written Decision and Reasons in this matter was dated November 18, 2003, and was signed by the Chair of the panel, Max Perera, P.Eng., on behalf of the other members of the Discipline Panel: Daniela Iliescu, P.Eng., Ken Lopez, P.Eng., Nick Monsour, P.Eng., and Ed Rohacek, P.Eng.

Note from the Regulatory Compliance Department

In accordance with Section 29(1) of the *Professional Engineers Act*, the revocation of Kwiatek's licence took effect immediately because he was found guilty of incompetence. Kwiatek did not appeal the decision of the Discipline Committee. Pursuant to Section 37(1) of the Act, Kwiatek will be eligible to apply for reinstatement of his licence as of November 19, 2005. Such an application would be decided by the Discipline Committee after holding a hearing with regard to the application.