

## DECISION AND REASONS

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 GERARD J. VAN ITERSON, P.ENG., a member of the Association of Professional Engineers of Ontario, and 694470 ONTARIO LTD., a holder of a certificate of authorization.

This matter came on for hearing before a panel of the Discipline Committee on November 23, 2011 at the Association of Professional Engineers of Ontario (the association) at Toronto.

### THE ALLEGATIONS

The allegations against Gerard J. Van Iterson, P.Eng., and 694470 Ontario Ltd. (collectively referred to as Van Iterson), as stated in the Statement of Allegations dated June 10, 2011, are that they are guilty of professional misconduct committed as provided by subsection 28(2) (b) of the *Professional Engineers Act* (the act) by issuing a Phase II Environmental Site Report (the report) that was deficient. Specifically, the allegations were that their action contravened the following subsections of Ontario Regulation 941, R.R.O 1990:

- a. Subsection 72(2)(a), that they were negligent.
- b. Subsection 72(2)(d), that they failed to make responsible provisions for complying with applicable statutes, regulations, codes, bylaws and rules in connection with work undertaken by or under their responsibility.
- c. Subsection 72(2)(j), that they engaged in conduct or performed 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.

### MOTION FOR WITHDRAWAL

The parties jointly requested leave to withdraw the allegations against Van Iterson. The association outlined the sequence of events that lead up to the hearing, including getting an expert's opinion on Van Iterson's actions. The expert's opinion was that Van Iterson's report, the key evidence in the matter, met the standard of the profession. The association, therefore, concluded that there was no reasonable prospect of a finding of professional misconduct against Van Iterson and that, proceeding with the matter, was not in the public interest, not in the interest of the member, and not in the interest of justice.

The association submitted that the Discipline Committee has the power to grant the request under sections 4.1 and 23(1) of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S.22 (the SPPA). These sections, provided for convenience, are as follows:

- 4.1 If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another act or a regulation that applies to the proceeding provides otherwise.
- 23.(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The association pointed out that, under subsections 24(1)(a) and 24(5) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28 (the act), a member has a limited right to respond to a complaint made against them that is put before the Complaints Committee. The association compared this to the proceedings in a matter that is referred to the Discipline Committee where a member has the full scope of natural justice available to them to respond to the allegations referred to it regarding the member's conduct.

The association submitted that, to proceed with a hearing, would be an unnecessary expense, would not serve the interest of transparency, and would be a sham of a process.

The association noted that, in *Leggett v. LSBC*, the court accepted that an allegation could be withdrawn and, in *British Columbia (Police Complaint Commission) v. Vancouver (City) Police Department* (2003 B.C.J. 279), the British Columbia Supreme Court found that it was the role of the police complaints commissioner to determine whether the public interest will be served by a termination of a hearing.

The association noted that the reasons in *Chuang v. Royal College of Dental Surgeons of Ontario*, [2006] O.J. No. 2300 included that, "How it can be corrupt on the part of a prosecutor, qua the accused, to withdraw a charge is beyond me."

The association stated that it does not have evidence to support the allegations due to a change in circumstances.

The panel received advice from its independent legal counsel on the record that it is up to the panel to determine whether the word "shall" in section 28(1) of the act is mandatory or directory. This section, provided here for convenience, is as follows:

- 28.(1) The Discipline Committee shall,
- (a) when so directed by the Council, the Executive Committee or the Complaints Committee, hear and determine allegations of professional misconduct or incompetence against a member of the association or a holder of a certificate of authorization, a temporary licence, a provisional licence or a limited licence;
  - (b) hear and determine matters referred to it under section 24, 27 or 37; and
  - (c) perform such other duties as are assigned to it by the Council.

The panel decided not to grant the motion for leave to withdraw the allegations.

The panel is of the view that section 4.1 of the SPPA does not apply in this case since a hearing had already started in this matter in accordance with section 28 of the act.

The panel found that section 23(1) of the SPPA does not apply in this case since, completing the hearing, would not be an abuse of process in this case.

The panel interpreted section 28 as mandatory in this matter.

The panel took note of the fact that the prosecutor function under the act was split between the association and the Complaints Committee, and that the Complaints Committee is charged with considering the public interest when it decides to refer a matter to the Discipline Committee. In the absence of a revocation of this direction, the test for deciding to not proceed with a hearing is very high.

### HEARING ON THE MATTER

The panel accepted the Statement of Allegations as the only evidence in this matter. In the absence of any evidence upon which to make any findings of fact, the panel dismissed the allegations.

### SUBMISSION AS TO COSTS AND PUBLICATIONS

The panel will accept written submissions from the parties as to costs, and a submission from the defendants as to publication, within 10 working days from the date of this decision. Unless the parties object, the panel will consider and rule on these submissions in writing.

Submissions are to be sent to the panel chair, c/o the Tribunals Office (Room 206), Professional Engineers Ontario, 40 Sheppard Avenue West, Suite 101, Toronto, Ontario, M2N 6K9.

Aubrey Friedman, P.Eng., signed this Decision and Reasons for the decision as chair of this discipline panel and on behalf of the members of the discipline panel: James Amson, P.Eng., Paul Ballantyne, P.Eng., Richard Hilton, P.Eng., and Glenn Richardson, P.Eng.

## DECISION ON COSTS AND PUBLICATION

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 GERARD J. VAN ITERSON, P.ENG., a member of the Association of Professional Engineers of Ontario, and 694470 ONTARIO LTD., a holder of a certificate of authorization.

This matter came for hearing before a panel of the Discipline Committee on November 23, 2011 at the Association of Professional Engineers of Ontario (the association) in Toronto, Ontario. As part of the Decision and Reasons issued January 18, 2013, the panel stated it would accept written submissions from the parties as to costs, and a submission from the defendants as to publication, within 10 working days from the date of this decision.

No submission was received from the defendants on either costs or publication.

A submission was received from the association stating that, in their view, costs payable to the defendants are not warranted in the circumstances of this case.

In light of the facts of the case, the absence of any submission by the defendants and the submission by the association with respect to costs, the panel orders that no costs be awarded to the defendants. As for publication, the panel orders that the Decisions and Reasons dated January 18, 2013 and this Decision on Costs and Publication be published in the Gazette with names.

Aubrey Friedman, P.Eng., signed this Decision on Costs and Publication as chair of this discipline panel and on behalf of the members of the discipline panel: James Amson, P.Eng., Paul Ballantyne, P.Eng., Richard Hilton, P.Eng., and Glenn Richardson, P.Eng.