

## 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 actions and conduct of KAROL KAROLAK, P.ENG., a member of the Association of Professional Engineers of Ontario.

A panel of the Discipline Committee met at the Association of Professional Engineers of Ontario (the association) at Toronto on April 25, 2016 to hear this matter. Mr. Karol Karolak, P.Eng. (the member), was not present, but was represented by Ms. Frances Mahon. The association was represented by Ms. Leah Price. At the outset of the hearing, Ms. Price advised the panel that the parties agreed on all of the facts and documents supporting a finding of professional misconduct. The parties disagreed, however, on the appropriate disposition in the circumstances.

### PRELIMINARY ISSUES

The panel was asked to rule on two preliminary matters:

1. The member was not able to attend the hearing, and the parties requested that the matter proceed in the member's absence. In accordance with Rule 7 of the Discipline Committee's Rules of Procedure, the panel was provided with a Letter of Direction (the direction), which was signed by Mr. Karolak, and dated April 21, 2016. The direction instructed his lawyer, Ms. Mahon, to act on Mr. Karolak's behalf in the proceedings and stated his wish to plead guilty to professional misconduct on the basis of the allegations set out in the Notice of Hearing. The direction expressed Mr. Karolak's understanding of the nature and consequences of a guilty plea, and further set out his instructions to counsel regarding his position on the penalty he felt should be applied following such plea.
2. The parties had prepared an Agreed Statement of Facts, which referred to a Confidential Statement containing information relevant to the panel's consideration of the penalty. The parties advised that the Confidential Statement would be filed separately, and requested that the panel make an order under subsection 30(4.1) of the act that the Confidential Statement be sealed and the public excluded from the parts of the hearing dealing with the contents of the Confidential Statement.

In the result, the panel decided that the circumstances supported both preliminary requests. It accepted the signed direction and agreed that it was appropriate for the hearing to proceed, despite the member not being present in person or by video. Further, the panel agreed that the Confidential Statement contained sensitive information and made an order to seal the Confidential Statement, pursuant to subsection 30(4.1) of the act.

### THE ALLEGATIONS

The specific allegations against the member are set out in the Statement of Allegations, which are attached to the Complaints Committee decision dated October 21, 2014. Specifically, the association alleges that Mr. Karolak is guilty of professional misconduct as defined in the *Professional Engineers Act* (the act) and Regulation 941 as follows:

- a) The member made statements against a member of the public that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable and unprofessional, amounting to professional misconduct under section 28(2)(b) of the act and section 72(2)(j) of Regulation 941; and
- b) The member was found guilty of an offence relevant to suitability to practice, amounting to professional misconduct under section 28(2)(a) of the act.

### BACKGROUND FACTS

The background facts are straightforward, well supported by evidence, and are not in dispute.

Mr. Karolak held a licence as a professional engineer under the act from April 16, 1991 until August 24, 2015, at which time his licence was cancelled for non-payment of fees.

In or about 2005, Mr. Karolak was engaged in family court proceedings before Justice Nancy L. Backhouse, a justice of the Superior Court of Ontario. Justice Backhouse ruled against Mr. Karolak in those proceedings.

Beginning in approximately 2008 and continuing until at least 2011, Mr. Karolak made various offensive statements in emails and in Internet postings about Justice Backhouse's husband, Mr. Martin Teplitsky, QC (Mr. Teplitsky), a prominent Toronto lawyer, arbitrator and mediator. A number of these communications were signed "Karol Karolak, P.Eng."

The statements included, among other things, allegations that Mr. Teplitsky:

- is a "pimp";
- employs "prostitutes" and "working girls" and runs an "escort agency";
- uses his "working girls" to influence members of Toronto society;
- has prominent members of Toronto society in his back pocket; and
- videotapes members of the legal community engaged with prostitutes to gain influence over them.

On or about July 4, 2011, Mr. Teplitsky submitted a complaint to the association regarding the member's conduct. The complaint included a voluminous copy of the offending communications.

On July 9, 2011, Mr. Karolak wrote Mr. Teplitsky a lengthy email, in which he stated in part:

I hope that you have already read a copy of "Canadian Zyprexa Experiment File" that I have assembled few years ago, and I hope that you already know how easy it is to induce suicide in an intended victim by using well tried Zyprexa pump and dump procedure. Zyprexa Zydis is water soluble, tasteless and colourless when dissolved, so all that it takes is one person close to you and enough pills to alter serotonin production in your brain and you might die of your own hands without ever knowing what have (sic) hit you.

If you have not read a copy of "Canadian Zyprexa Experiment File" as of yet, please let me know and I will gladly send you a copy just so you also know how to dispose of undesirable people without leaving any trace that the murder was committed.

As a result of the July 9, 2011 email, Mr. Karolak was arrested and charged by the Peel Regional Police. He pleaded guilty on August 17, 2011 before the Honourable Justice W.B. Stead of the Ontario Court of Justice to the criminal offence of threatening death. Mr. Karolak was sentenced to 33 days of pre-trial custody and two years of probation. As well, an order was made prohibiting Mr. Karolak from communicating with Mr. Teplitsky or his family, and further prohibiting him from posting, on the Internet or any similar public network, postings about Mr. Teplitsky, his wife, or any other member of Mr. Teplitsky's immediate family.

On or around August 4, 2014, Mr. Karolak wrote to the association to provide a reply to Mr. Teplitsky's complaint. In his letter, Mr. Karolak repeated many of the offending statements and allegations against Mr. Teplitsky. He did not apologize for his behaviour or attempt to demonstrate any compunction for his criminal actions; instead, he made efforts to justify them.

### PLEA BY THE MEMBER

The direction contained Mr. Karolak's instructions to counsel regarding his wish to plead guilty to professional misconduct on the basis of the allegations against him. The panel found that the direction was an expression of his understanding of the nature and consequences of a guilty plea and, therefore, accepted the member's plea, being satisfied that the member's admission was voluntary, informed and unequivocal.

### FINDING OF PROFESSIONAL MISCONDUCT

The panel considered the evidence and, together with the member's plea, holds that the facts support a finding of professional misconduct. More specifically, the panel accepted that Mr. Karolak made statements about Mr. Teplitsky and his family that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable and unprofessional, amounting to professional misconduct under section 28(2)(b) of the act and section 72(2)(j) of Regulation 941.

Furthermore, the evidence confirmed that Mr. Karolak was convicted of knowingly uttering a death threat, contrary to section 264.1(1)(a) of the Criminal Code of Canada. The panel accepted that this was an offence relevant to suitability to practice, amounting to professional misconduct under section 28(2)(a) of the act.

### SUBMISSIONS ON PENALTY

Neither party suggested that the appropriate disposition would allow the member to continue to be licensed as an engineer. The association submits that revocation of the member's licence is required, while the member requests that he be permitted to resign his licence with an undertaking to not seek reinstatement. Both parties agree, however, that regardless of the result, a summary of the facts and the penalty order shall be published in the Gazette, including reference to the member's name.

Importantly, there was also agreement from both parties that, despite Mr. Karolak's licence having been cancelled in August 2015, he is nevertheless still subject to the continuing jurisdiction of the association in respect of disciplinary action arising out of his professional conduct while a member, in accordance with section 22(1) of the act.

## THE ASSOCIATION'S POSITION

The association seeks revocation of Mr. Karolak's engineering licence based on its assertion that it is the only penalty available that adequately protects the public interest. In particular, the association submits that, if the member's licence is not revoked, the legislation permits Mr. Karolak to demand reinstatement of his licence as a right.

The applicable statutory provisions are summarized as follows:

### Membership

Act, s. 5(1)—Every person who holds a licence is a member of the Association subject to any term, condition or limitation to which the licence is subject.

### Cancellation for default of fees

Act, s. 22(1)—The Registrar may cancel a licence...for non-payment of any fee prescribed by the regulations or bylaws...

### Reinstatement

Act, s. 22(2)—A person who was a member of the association...whose licence...was cancelled by the Registrar under subsection (1) is entitled to have the licence...reinstated upon compliance with the requirements and qualifications prescribed by the regulations.

Regulation 941. s. 51.(1)—Subject to subsection (2), the following qualifications and requirements are prescribed for the reinstatement of the licence of a member who resigned:

1. Payment of the fees owing by the applicant for reinstatement to the Association at the time the applicant resigned, if any, and of the fees for the current year.
2. Payment of a reinstatement fee of \$230.
3. Production of evidence of good character.

Regulation 941. s. 51.1(1)—Subject to subsection (2), the following qualifications and requirements are prescribed for the reinstatement of the licence that was cancelled for non-payment of fees:

1. Payment of the fees owing by the applicant for reinstatement to the Association

at the time his or her licence...was cancelled and of the fees for the current year.

2. Production of evidence of good character, if the payments referred to in paragraph 1 are made more than one year after the cancellation.

### Application for licence, etc., after revocation

Act, s. 37(1)—A person whose licence...has been revoked for cause under this act...may apply in writing to the Registrar for the issuance of a licence...but such application shall not be made sooner than two years after the revocation.

### Reference to Discipline Committee

Act, s. 37(3)—The registrar shall refer an application under subsection (1)...in respect of a licence...to the Discipline Committee which shall hold a hearing respecting and decide upon the application, and shall report its decision and reasons to the Council and the applicant.

Counsel for the association explained that, at present, if Mr. Karolak were to reapply by August 24, 2016, which is within a year of the date his licence was cancelled, the legislation would permit him to demand reinstatement of his licence without having to do anything more than pay the applicable fees. If he were to reapply after one year and before August 24, 2017, which is two years from the date his licence was cancelled, or otherwise, if he were permitted to resign his licence, Mr. Karolak would need only pay the applicable fees and produce evidence of "good character"; a qualification counsel stated the association has been given no assistance in assessing.

If, however, the panel accepts that revocation is the appropriate remedy, Mr. Karolak would be required to wait a minimum of two years after the date of revocation before he could reapply for licensure. Further, a hearing would necessarily be held before a panel of the Discipline Committee, which would eliminate the requirement for the registrar to consider any evidence relating to the member's good character.

Taken together, the association holds that the revocation of Mr. Karolak's licence is the only option that will ensure that his licence remains revoked, at least until such time as his suitability for licensure is appropriately determined. Without this, counsel for the association submits that there is an apparent presumption of reinstatement, which goes squarely against the association's public interest mandate.

## THE MEMBER'S POSITION

Mr. Karolak requests that he be allowed to resign his membership and further make an undertaking that he not reapply for a licence. The member submits that such a response serves the public interest in recognizing that he faces certain difficulties, as is outlined in the Confidential Statement.

The applicable statutory provisions are as follows:

**Resignation of membership**

Act, s. 5(2)—A member may resign his or her membership by filing with the Registrar a resignation in writing and his or her licence is thereupon cancelled, subject to the continuing jurisdiction of the Association in respect of any disciplinary action arising out of the person’s professional conduct while a member.

**Powers of the Discipline Committee**

Act, s. 28(4)(c)—Where the Discipline Committee finds a member of the Association... guilty of professional misconduct or to be incompetent it may, by order, accept the undertaking of the member...to limit the professional work of the member...in the practice of professional engineering to the extent specified in the undertaking.

**DECISION AND ORDER**

The panel makes the following order with respect to penalty:

1. The member’s engineering licence shall be revoked, pursuant to section 28(4)(a) of the act; and
2. The order of the panel, with the reasons therefor, shall be published in the Gazette, and shall include the name of the member, pursuant to section 28(5) of the act.

**REASONS FOR PENALTY DECISION**

In making its decision on the penalty, the panel carefully considered the Brief of Authorities and the submissions of counsel. The panel also paid close attention to the particular circumstances that were described in the Confidential Statement, and the member’s letter of August 4, 2014 to the association in response to the notice of complaint.

The panel considers the mitigating factors in this case to include the following:

1. Mr. Karolak has been diagnosed with an illness. The symptoms of this illness prevented him from attending the hearing in person and, although he was not diagnosed or treated during the period he perpetuated the conduct in question, the panel accepts that the effects of his illness are likely to have caused or contributed to his behaviour and actions during that time.
2. Mr. Karolak appears to have co-operated with the association by participating in the preparation of an Agreed Statement of Facts and acknowledging, through his guilty plea, his past misconduct.
3. Mr. Karolak also admitted the facts in his 2011 criminal proceedings and pleaded guilty to the charge of uttering a threat. He spent 33 days in prison in answer to that conviction and complied with the conditions that were imposed upon him.

The following are identified as aggravating factors:

1. In his August 4, 2014 reply to the association, Mr. Karolak repeated many of his allegations against Mr. Teplitsky and did not indicate any remorse, introspection or willingness to retract any of the statements, which led to the within discipline proceedings. He did not apologize for his actions but, rather, he attempted to justify his previous misconduct.
2. Mr. Karolak did not take any voluntary steps to remove the offending materials posted, or otherwise attempt to make restitution to Mr. Teplitsky or his family.
3. Mr. Karolak’s August 4, 2014 letter was written during a period when he was allegedly undergoing treatment for, and experiencing some improvement with, his illness.

The penalty order of a professional discipline panel is intended to satisfy several purposes, including protection of the public, general and specific deterrence, rehabilitation of the member, and upholding the reputation of the profession. In this case, the member is unwell and, by his own volition, he has agreed not to continue to practise professional engineering. In fact, the penalty he suggests involves making an undertaking that would prevent him from ever reapplying for licensure which, if adhered to, would have a longer-lasting and more permanent effect than revocation by order of this tribunal. In such circumstances, specific deterrence, or professional rehabilitation of the member, is effectively moot.

So, too, is the goal of general deterrence. The panel was provided with numerous precedents that would support an order for revocation of the member’s licence. Such a strong penalty sends a message to the public that the engineering profession does not tolerate such behaviour and seeks to deter professional engineers from behaving in this way. However, the panel accepts that there are mitigating circumstances worthy of consideration. Because these circumstances are described in the Confidential Statement ordered sealed and because the panel’s decision on penalty does not hinge on general deterrence, we will forego the details herein.

The remaining consideration and overarching objectives for this panel’s penalty order is, therefore, to ensure the protection of the public and support public confidence in the integrity of the profession. In answer to the former concern and, at first glance, the panel finds that the public would adequately be protected through either revocation or resignation of the licence since neither scenario would see the member as a licensed or practising engineer. On the one hand, revocation would ensure that Mr. Karolak could not have his licence reinstated for a minimum of two years. On the other hand, the proposed undertaking would involve that he not (ever) seek reinstatement.

However, if Mr. Karolak is granted the penalty he seeks, the panel would be placing the onus on him to comply with the undertaking and would rely on his commitment thereto. Such a disposition requires that the panel place trust in the member. Ms. Mahon warned that we cannot operate under a presumption that Mr. Karolak might breach the undertaking, which the panel accepts. Mr. Karolak complied with his court order, and there was no evidence to suggest that he breached any conditions following his criminal conviction. At the same time, the panel heard evidence, which seriously calls into question Mr. Karolak's judgment. In particular, the panel finds that, by repeating many of the allegations against Mr. Teplitsky in his reply to the association on August 4, 2014, Mr. Karolak perpetuated the campaign of defamation and abuse against Mr. Teplitsky. In doing so, the member continued to engage in discomfiting conduct, despite the fact that he was undergoing treatment and allegedly experiencing some improvement therefrom at that time. This suggests to the panel that the member may not have learned from his past missteps, and leaves doubt as to whether the member's judgment—with or without treatment—can be trusted.

It follows that, if Mr. Karolak were permitted to resign his licence and he later decided to breach the undertaking by seeking reinstatement under subsection 51.(1) of the regulation, he could be readmitted to the profession, despite that his suitability to practice might still be in question. Certainly, both the breach of the panel's order and Mr. Karolak's actions leading up to the order would be reviewed and considered by the registrar but, as counsel for the association articulated, there is little guidance to inform the registrar with respect to what constitutes evidence of good character. By contrast, if Mr. Karolak's licence is revoked and he later seeks reinstatement, he would be restricted from reapplying until after two years has elapsed and, more significantly, he would be required to have his application brought and heard before a panel of the Discipline Committee. Such an inquiry, we expect, would remove the focus from an obscure consideration of the member's good character and could, instead, or additionally, concentrate on a review of the member's reformation, including a demonstration of remorse for his past misconduct.

Furthermore, the panel's decision to revoke Mr. Karolak's licence is based on its finding that such an order is necessary to maintain the reputation and integrity of the profession. On this point, the panel was guided, in part, by *Bolton v. Law Society*, [1994] 1 W.L.R. 512 (C.A.), which was reproduced in paragraph 73 of *Kazman v. The Law Society of Upper Canada*, 2008 ONLSAP 7 (CANLII). *Bolton* applies in the context of Law Society Discipline Tribunals, and states that the most fundamental purpose of a panel's order is the collective reputation of the accused licensee's peer group:

Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his

lesson and will not offend again...and [he] may also be able to point to real efforts to...redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness...The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

While the evidence in this case indicates that mitigating circumstances may have existed during the period when the member was engaging in professional misconduct, Mr. Karolak's response on August 4th demonstrates that the circumstances may not have been really exceptional after all. Counsel for Mr. Karolak submits that his guilty plea is a significant expression of his remorse. She claimed that this, together with his willingness to co-operate in compiling an Agreed Statement of Facts, helped to speed up the disciplinary process, and indicated an acknowledgement and acceptance by Mr. Karolak of his past wrongdoings. We are not convinced of this. Even after receiving treatment, Mr. Karolak appears to have demonstrated little or no remorse for his actions. He has not taken any voluntary steps to remove the offending materials or make restitution to Mr. Teplitsky or his family. A decision to order the undertaking rather than revoke the licence would, therefore, confuse the public and undermine their trust in the profession. Mr. Karolak engaged in serious professional misconduct and is deserving of a serious penalty.

The potential damage to public confidence in the profession by not ordering the revocation would far outweigh any possible benefit of an alternative penalty. Accordingly, we find that the goals of protecting the public and enhancing the public's confidence in the profession compel such a penalty.

John Vieth, P.Eng., signed this Decision and Reasons for the decision as chair of the discipline panel and on behalf of the members of the discipline panel: Paul Ballantyne, P.Eng., Santosh Gupta, P.Eng., Charles Kidd, P.Eng., and Evelyn Spence, LLB.