

## REVISED 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 JOHNNY KIN NANG LEE, P.ENG., a member of the Association of Professional Engineers of Ontario.

### THE ALLEGATIONS

The Association of Professional Engineers of Ontario (the association) alleged that Johnny Kin Nang Lee, P.Eng. (Lee), was guilty of professional misconduct as defined in the *Professional Engineers Act* and Regulation 941, as follows:

1. Communicating engineering opinions to municipal officials and members of the public that failed to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances, amounting to professional misconduct as defined by section 72(2)(a) of Regulation 941;
2. Communicating engineering opinions about an alleged public safety risk without making prompt, voluntary and complete disclosure of an interest that might be construed as prejudicial to his professional judgment, amounting to professional misconduct as defined by section 72(2)(i) of Regulation 941;
3. Making misleading statements to municipal officials and members of the public regarding a matter of public safety, amounting to professional misconduct as defined by section 72(2)(j) of Regulation 941; and
4. Engaging in conduct that amounts to harassment, or in the alternative, was disgraceful, dishonourable or unprofessional, amounting to professional misconduct as defined by section 72(2)(n), or in the alternative, section 72(2)(j), of Regulation 941.

Following the start of the hearing and the filing of the Notice of Hearing as an exhibit, one of the members of the discipline panel advised the hearing that he had a family emergency and had to withdraw. Neither party objected to continuing the hearing with a panel composed of the remaining four members. After hearing submissions from counsel for both parties and receiving advice from independent legal counsel, the panel decided that it had jurisdiction to proceed with the hearing with the remaining four members of the panel presiding. Section 27(8) of the *Professional Engineers Act*, R.S.O. 1990, c. P.28, and section 4.4(1) of the *Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 permit the remaining members of a discipline panel to proceed with a hearing where, after the commencement of the hearing, one of the panel members is unable to continue to act. The member withdrew and had no further involvement in this matter.

Counsel for the association advised the panel that agreement had been reached on the facts and introduced an Agreed Statement of Facts, as follows:

1. The respondent (Lee) was first licensed under the *Professional Engineers Act* (PEA) on August 13, 2010. On or about July 3, 2012, Lee requested and obtained “fee remission” status pursuant to section 41.1 of Regulation 941. He remained on “fee remission” status until January 6, 2016. His licence was then cancelled for non-payment. He was reinstated to “fee remission” status on February 1, 2016 and returned to full practice status on July 21, 2016. It was a condition of Lee’s licence, throughout the relevant times, that he not engage in the practice of professional engineering. Lee has never held a Certificate of Authorization under the PEA.
2. The complainant is Bernie Nimer (Nimer) of Mayfair Hotel Development Corporation, which was at all relevant times the owner of a building (the building) located at 11 Young Street and 156-158 King Street West, in Kitchener, Ontario. While the building holds two municipal addresses, it functioned as a single structure because of a common brick masonry bearing wall between the two addresses. The two parts of the building were each registered with “intent to designate” heritage status.
3. On or about April 11, 2015, a municipal water main adjacent to 11 Young Street ruptured, breaching the rubble stone foundation wall and filling the basement of the building with water and sediment. The rupture created a slot in the building wall about 1 to 1.5 m. wide. In addition, the sidewalk slab heaved and a deep void was detected under the sidewalk slab in the worst affected area.

4. Two engineering firms were involved to assess the damage and the impact on the building structure. Blackwell Structural Engineers (Blackwell) were retained by Nimer, and MTE Consultants Inc. (MTE) were retained by the City of Kitchener (the city). According to Blackwell and MTE, the repair of the foundation wall, based on the current condition, could not be undertaken in a safe manner. They recommended demolition of the 11 Young Street portion of the building to mitigate the risk to potential workers and the public.
5. On April 16, 2015, following receipt of the two reports mentioned above, the chief building official (CBO) for the city issued an “Order to Remedy an Unsafe Building” under section 15.9 of the *Building Code Act*. The Order to Remedy required that 11 Young Street be demolished. The CBO also issued an “Order Prohibiting Occupancy of an Unsafe Building.”
6. On April 23, 2015, Kitchener City Council held a special meeting, whose purpose was to consider removal of the “intent to designate” 11 Young Street in order to allow the issuance of a demolition permit. Council voted to remove the “intent to designate.” Nimer consequently applied for a demolition permit for 11 Young Street.
7. Reports from the demolition contractor’s engineer dated May 1, 2015 and May 5, 2015 indicated that demolition of 11 Young Street independently of 156-158 King Street West would pose significant challenges, resulting in delays of demolition of 11 Young Street, leaving the unsafe and unstable conditions unresolved. MTE subsequently provided a supplementary report dated May 11, 2015, which recommended the demolition of 156-158 King Street West. Kitchener City Council placed on the agenda for May 11, 2015 a motion to remove “intent to designate” heritage status for 156-158 King Street West in order to permit demolition.
8. At some point in time between April 23, 2015 and May 11, 2015, Zyg Janecki, a Kitchener city councillor who opposed the demolition, sent a communication to interested residents of Kitchener, including Lee. The communication by Zyg Janecki urged the recipients to attend the council meeting scheduled for May 11 to object to the demolition. The communication requested the recipients to “contact your heritage friends and friends interested in saving heritage buildings to show up in the council chambers on Monday night for the Council meeting.”
9. Lee attended the city council meeting held on May 11, 2015, and spoke against the proposal to remove the “intent to designate.” According to the minutes of the meeting, Lee presented himself as a “structural engineer” and expressed his opinion that, if the foundation were secured, “it should be possible to stabilize the buildings.” He asked that council delay the demolition.
10. Despite the opposition of Lee and others, council voted to withdraw the “intent to designate”; thus, permitting Nimer to apply for a demolition permit.
11. Commencing on May 12, 2015, Lee embarked on a campaign to attempt to stop the demolition and to discredit the opinions of the CBO and the engineers who had recommended demolition. He sent numerous emails to various persons, including municipal officials, association employees, members of the media, and members of the public.
12. On May 15, 2015, the CBO issued the demolition permits for the building.
13. On May 16, 2015, at 8:54 a.m., Lee sent an email to Lisa Harme (an architect he had met in days following the May 11, 2015 city council meeting), expressing his opinion that the demolition plan submitted to the CBO was “invalid,” and stating:
 

“I will therefore issue an Engineer’s Instruction in my next email addressing [sic.] to the CBO and the Ministry of Labour at my earliest convenience.”

This email was copied to Linda Latham, deputy registrar, regulatory compliance at the association, and to the local newspaper.
14. On May 16, 2015, Lee sent an email addressed to the mayor of the City of Kitchener and the chief building official, and copied to members of Kitchener City Council, the media, the association, and others purporting to order an immediate halt to all work related to the demolition under the power of what Lee called an “engineer’s instruction.” In fact, there is no such thing in Ontario as an “engineer’s instruction,” and Lee had no authority to order a work stoppage.
15. On the same day, Lee wrote to a local architect, Simone Panziera, copying members of Kitchener City Council and others, improperly claiming that failure to comply with the “engineer’s instruction”

- would “carry maximum penalty of the law, including jail time for the offenders.”
16. Demolition commenced on May 19, 2015. On May 20, 2015, Lee sent an email to the CBO, copying others, threatening civil and criminal liability for persons who disregarded the “engineer’s instruction” and proceeded with the demolition.
  17. The demolition, nevertheless, proceeded and was completed without incident.
  18. Lee subsequently:
    - (a) Sought to have Kitchener City Councillor Zyg Janecki persuade the mayor to initiate an inquiry, writing “I hope you can convey to the mayor the seriousness of this case and persuade him to open an inquiry as soon as possible” in an email to Janecki and others dated July 3, 2015;
    - (b) Filed a complaint with the association about the CBO, by way of a letter bearing his signature and seal, a copy of which was sent to the mayor by email;
    - (c) Filed a complaint against the CBO with the Building Code Commission asking that he “be disciplined for his irrational behavior”; and
    - (d) Filed complaints with the association, which he sealed, against the relevant engineers at Blackwell and MTE, and subsequently against David Witzel, P.Eng., the engineer retained to plan and supervise the demolition.
  19. Lee admits:
    - (a) That he had no direct knowledge of the structural condition of the building;
    - (b) That he is not, and never has been, a “structural engineer” but, rather, is a geo-technical engineer;
    - (c) That the opinions he expressed were based solely on his own street-level observations of the exterior condition of the building and its surroundings, reading other engineers’ reports, and the publicly available municipal documents, such as the Order to Remedy Unsafe Building and Order Prohibiting Occupancy of an Unsafe Building dated April 16, 2015 and the City of Kitchener Staff Report dated May 11, 2015;
    - (d) That he had no right or authority to express any engineering opinions, or to attach his seal to any correspondence;
    - (e) That he failed to ascertain whether such a thing as an “engineer’s instruction” exists in Ontario, before sending the communications referred to above;
    - (f) That he engaged in the practice of professional engineering in contravention of section 41.1 of Regulation 941;
    - (g) That his conduct, as aforesaid, fell below the standards that a reasonable and prudent practitioner would have maintained in the circumstances; and
    - (h) That his conduct, including most importantly his attempt to coerce the CBO and others by threatening civil and criminal liability if they failed to follow his “engineer’s instruction,” was disgraceful, dishonorable and unprofessional.
  20. If Lee were to testify at a hearing, he would say that:
    - (a) He acted in what he perceived was the public interest;
    - (b) At no time did he benefit from his actions financially or in any other capacity; and
    - (c) He regrets his actions.
  21. By reason of the aforesaid, it is agreed that Lee is guilty of professional misconduct, as follows:
    - (a) Communicating engineering opinions to municipal officials and members of the public that failed to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances, amounting to professional misconduct as defined by section 72(2)(a) of Regulation 941;
    - (b) Making misleading statements to municipal officials and members of the public regarding a matter of public safety, amounting to professional misconduct as defined by section 72(2)(j) of Regulation 941; and
    - (c) Engaging in conduct that was disgraceful, dishonourable or unprofessional, amounting to professional misconduct as defined by section 72(2)(j) of Regulation 941.

Lee has had independent legal advice, or has had the opportunity to obtain independent legal advice, with respect to his agreement as to the facts, as set out above.

Counsel for the association advised that the association had withdrawn the allegation in paragraph 2 and of the allegation of “harassment” in paragraph 4 of the Statement of Allegations set out at the beginning of these Decisions and Reasons.

#### PLEA BY MEMBER

Lee admitted the allegations in the Statement of Allegations, except the allegation in paragraph 4 thereof, which was withdrawn. The panel

conducted a plea inquiry, and was satisfied that Lee's admissions were voluntary, informed and unequivocal.

## DECISION

The panel considered the Agreed Statement of Facts and finds that the facts support a finding of professional misconduct and, in particular, finds that Johnny Kin Nang Lee, P.Eng., committed acts of professional misconduct as agreed in paragraph 21 of the Agreed Statement of Facts.

## PENALTY

Counsel for the association advised the panel that a Joint Submission as to Penalty had been agreed upon, as follows:

1. Pursuant to section 28(4)(f) of the *Professional Engineers Act*, Lee shall be reprimanded, and the fact of the reprimand shall be recorded on the register for a period of three years;
2. The finding and order of the Discipline Committee shall be published in summary form under section 28(4)(i) of the *Professional Engineers Act*, with reference to names;
3. Pursuant to section 28(4)(d) of the *Professional Engineers Act*, it shall be a term or condition on Lee's licence that he shall, within 14 months of the date of pronouncement of the decision of the Discipline Committee, successfully complete the association's Professional Practice Examination (PPE);
4. Pursuant to sections 28(4)(b) and (k) of the *Professional Engineers Act*, in the event that Lee does not successfully complete the above-mentioned examination within the time set out in paragraph 3 above, his licence shall be suspended for a period of 10 months thereafter, or until he successfully completes the examination, whichever comes first; and
5. Pursuant to section 28(4)(j) of the *Professional Engineers Act*, Lee shall pay costs to the association in the amount of \$7,500, within 12 months of the pronouncement of the decision of the Discipline Committee.

Counsel for the association and counsel for Lee made submissions that the penalty proposed under the joint submissions served the purposes of protection of the public interest, remediation, general deterrence and specific deterrence, and fell within the range of penalties imposed in other matters of comparable severity.

## PENALTY DECISION

The panel determined that the penalties set out in the joint submission were appropriate as they fell within a reasonable range of acceptability, taking into due consideration the following items:

- (i) protection of the public interest;
- (ii) remediation of Lee;
- (iii) maintenance of the reputation of the profession in the eyes of the public;
- (iv) general deterrence; and
- (v) specific deterrence.

The panel concluded that the proposed penalty is reasonable and in the public interest. Lee 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.

Counsel for the association made oral submissions in support of the Joint Submission as to Penalty and Cost, including a submission that the successful completion of the PPE was appropriate as a measure to ensure the protection of the public interest. The panel noted that the joint submission did not provide for the continuation of the suspension until Lee had successfully completed the PPE. Counsel for the association advised that section 28(4)(b) of the PEA limited any suspension imposed by the panel to 24 months, such that the penalty could not provide for an indefinite suspension until Lee's successful completion of the PPE. Counsel for the association submitted that revocation of Lee's licence (in the event of failure to complete the PPE) was inappropriate and excessive given the nature of the allegations.

The panel accepted the submission that completion of the PPE is of importance in terms of protecting the public interest. If completion of the PPE is remedial in nature as submitted by counsel for the association and intended to ensure the protection of the public interest, it is the view of the panel that

the suspension should, in fact, remain in place until Lee successfully completed the PPE. However, section 28(4)(b) of the PEA prevents such an approach. It is not self-evident to the panel why a suspension imposed pursuant to section 28(4)(b) of the PEA is limited to 24 months, or to any period, particularly where a suspension is imposed to prevent a member from practising until remedial actions have been completed satisfactorily. The panel also noted that many of the other powers of the Discipline Committee that are set out in section 28 of the PEA are not subject to any time limitation.

Despite the concern expressed above, the panel accepted the Joint Submission as to Penalty, recognizing that a joint submission should not be rejected unless the panel is of the view that one proposed penalty would bring the administration of justice into disrepute or is otherwise contrary to the public interest (*R. v. Anthony-Cook, 2016 SCC 43*). The panel, accordingly, orders:

1. Pursuant to section 28(4)(f) of the *Professional Engineers Act*, Lee shall be reprimanded, and the fact of the reprimand shall be recorded on the register for a period of three years;
2. The finding and order of the Discipline Committee shall be published in summary form under section 28(4)(i) of the *Professional Engineers Act*, with reference to Lee;
3. Pursuant to section 28(4)(d) of the *Professional Engineers Act*, it shall be a term or condition on Lee's licence that he shall, within 14 months of the date of pronouncement of the decision of the Discipline Committee, successfully complete the Professional Practice Examination;
4. Pursuant to sections 28(4)(b) and (k) of the *Professional Engineers Act*, in the event that Lee does not successfully complete the above-mentioned examination within the set time, his licence shall be suspended for a period of 10 months thereafter, or until he successfully completes the examination, whichever comes first; and
5. Pursuant to section 28(4)(j) of the *Professional Engineers Act*, Lee shall pay costs to the Association of Professional Engineers of Ontario in the amount of \$7,500, within 12 months of the pronouncement of the decision of the Discipline Committee.

Glenn Richardson signed this Decision and Reasons for the decision as chair of this discipline panel and on behalf of the members of the discipline panel: Richard E. Austin, LLB, Tim Kirkby, P.Eng., and Rishi Kumar, P.Eng.