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 SOTIROS KATSOULAKOS, P.ENG., a member of the Association of Professional Engineers of Ontario, and MICRO CITY ENGINEERING SERVICES INC., a holder of a Certificate of Authorization.

This matter came for a hearing on February 7, 2017 at the PEO offices in Toronto before a panel of the Discipline Committee of the Association of Professional Engineer of Ontario (the panel), convened pursuant to section 28 of the *Professional Engineers Act*.

THE ALLEGATIONS

It was alleged that Sotiros Katsoulakos, P.Eng. (Katsoulakos), and Micro City Engineering Services Inc. (MCES) were guilty of professional misconduct.

The parties filed an Agreed Statement of Facts, which is set out in full as follows.

AGREED STATEMENT OF FACTS

This Agreed Statement of Facts is made between the Association of Professional Engineers of Ontario and the respondents, Sotiros Katsoulakos, P.Eng. (Katsoulakos), and Micro City Engineering Services Inc. (MCES) (collectively, the parties). The summary is as follows:

1. Katsoulakos is a professional engineer licensed pursuant to the *Professional Engineers Act* (the act).

2. At all material times, MCES held a Certificate of Authorization issued pursuant to the act. Katsoulakos was, at all material times, the person designated under section 47 of Regulation 941 under the act as assuming responsibility for the professional engineering services provided by MCES.

3. Katsoulakos and MCES were retained in or about July 2008 to design a circular manure storage tank (the tank) for the Hogendoorn Dairy Farm (HDF), located in Baden, Ontario.

4. In August 2008, Katsoulakos prepared, signed and sealed a design drawing (the first drawing) for the tank.

5. A building permit was issued on August 6, 2008.

6. On or about August 12, 2008, Katsoulakos prepared a revised design for the tank (the revised drawing) at the request of HDF. The revised drawing was the same as the first drawing in all respects except for the dimensions of the tank, which were changed from 160'x12' to 148'x14'.

7. The revised drawing included the following information concerning the tank:
   (a) diameter: 148 feet
   (b) height: 14 feet, including 7 feet above grade
   (c) 10-inch thick concrete wall
   (d) 32 MPa concrete
   (e) horizontal steel reinforcing: 15 m at 8-inch spacing
   (f) vertical steel reinforcing: 15 m at 16-inch spacing

8. Both the respondents' design of the tank and the revised drawing itself were deficient and failed to comply with the applicable statues, regulations, standards and codes. In particular, the first drawing and the revised drawing failed to comply with the Ontario Building Code 2006, the *Nutrient Management Act* and the National Farm Building Code (1995), in that:
   (a) The specified horizontal and vertical steel reinforcing was inadequate;
   (b) The drawings failed to include, or to make reference to, structural calculations in support of the design;
   (c) The drawings failed to account for ice pressure;
   (d) The drawings failed to contain any inlet, or to otherwise make provisions for loading or transfer of manure into the tank;
   (e) The drawings failed to make provision for a loading ramp for manure agitation and pumping;
   (f) The drawings failed to specify "the structural systems and surrounding soil conditions that are deemed to provide two layers of protection," as required by the regulation under the *Nutrient Management Act*; and
   (g) The drawings failed to properly indicate the requirements for proper perimeter and under tank drainage in relation to the geotechnical report.

9. Construction of the tank, in accordance with the revised drawing, commenced on or about September 1, 2008.

10. On or about September 12, 2008, the project contractor, Schoonderwoerd Brothers Concrete Ltd. (SBC), on behalf of HDF, contracted MCES by telephone to request a design change on one side of the tank. The change increased the backfill height

on the barn side of the tank by four feet. The increased backfill height was to serve as a driving ramp up to a location measuring three feet from the top of the tank.

11. Katsoulakos advised Darrell Schoonderwoerd of SBC that he agreed with the change, provided SBC doubled the amount of horizontal rebar on the side where the backfill height would be increased. In addition, Katsoulakos required the rebar on the side with increased backfill height to extend horizontally a minimum of 10 feet past the increased backfill. Despite this additional rebar, the reinforcing steel specified by Katsoulakos remained inadequate.

12. Katsoulakos attended the site, for the purpose of inspection, on September 4, September 10, September 12, September 19 and October 3, 2008. The inspection reports are all dated September 22, 2009.

13. The report for the September 12, 2008 site visit (Interim General Review Letter #3) referred to a "cut-out" at the top of the tank wall, and specified that this was to be filled with concrete, "utilizing a concrete bonding agent between old and new concrete pours." This instruction was inadequate, in that it failed to specify the concrete bonding material and failed to specify replacement of the steel rebar removed at the "cut-out" section of the tank wall.

14. The tank was investigated in the spring of 2009 as a result of issues unrelated to the respondents. One of those involved in the investigation was the complainant, Tim Morrison, P.Eng. Following the investigation, the tank was drained and removed from service.

15. The association obtained an independent expert report (the report) from Yves Choinière, P.Eng., Eng. Agr., dated July 28, 2015. The report concludes, among other things, that Katsoulakos committed numerous structural design errors, as further particularized in the body of the report: that the steel rebar (reinforcement) called for in the revised drawing was only 40 to 45 per cent of the rebar required to ensure safety; that the revised drawing was deficient in numerous respects, including lack of planning and design for the loading ramp, vehicle loads, selection of the proper structural system in relation to secondary containment, cross-references to other professional work for site drainage, and the design of the repair of the "cut-out"; that were numerous breaches of the applicable standards and codes; that the tank structure, as built, presented high risks of failure, which could result in nutrient leakage in the surrounding environment; that the structure was unsafe to resist the basic liquid manure loads, and unsafe to resist the additional loads for manure transfer, loading ramps, vehicle loads and local ice loads.

16. For the purposes of this proceeding, the respondents accept as correct the findings, opinions and conclusions contained in the report, and the respondents admit that they failed to meet the minimum acceptable standard for engineering work of this type, and that they failed to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances.

17. By reason of the aforesaid, the parties agree that the respondents, Katsoulakos and MCES, are guilty of professional misconduct, as follows:
    (a) Their work in connection with the tank was negligent, amounting to professional misconduct pursuant to subsection 72(2)(a) of Regulation 941;
    (b) Their work in connection with the tank failed to make reasonable provision for the safeguarding of the health or property of the persons who might be affected thereby, amounting to professional misconduct pursuant to subsection 72(2)(b) of Regulation 941;
    (c) In their work in connection with the tank, they failed to make responsible provision for complying with applicable statues, regulations, standards and codes, amounting to professional misconduct pursuant to subsection 72(2)(d) of Regulation 941; and
    (d) Their conduct, as aforesaid, would reasonably be regarded by the engineering profession as unprofessional, amounting to professional misconduct under subsection 72(2)(i) of Regulation 941.

The respondents have had independent legal advice with respect to their agreement as to the facts, as set out above.

Katsoulakos admitted the allegations set out in the Agreed Statement of Facts on his own behalf and on behalf of MCES. The panel conducted a plea inquiry, and the members of the panel were satisfied that Katsoulakos' and MCES' admissions were voluntary, informed and given without reservation.

The panel considered that the agreed facts made out acts of misconduct, as alleged, and found Katsoulakos and MCES guilty of professional misconduct as set out in paragraph 17 of the Agreed Statement of Facts.

After the panel announced its findings as to liability for professional misconduct, the parties thereafter filed a Joint Submission as to Penalty and Costs. The parties and independent legal counsel made submissions as to the criteria, which

the panel should apply in determining whether to accept a joint submission as to penalty. The parties submitted that the penalty was in the public interest and within the range of acceptable penalties in all the circumstances.

The joint submission provided for the following penalties to be imposed by the panel:

(a) Pursuant to section 28(4) of the *Professional Engineers Act*, the defendants shall be reprimanded and the fact of the reprimand shall be recorded on the register for a period of one year. Pursuant to section 28(4)(d) of the *Professional Engineers Act*, it shall be a term or condition on Katsoulakos' licence that he shall, within 16 months of the date of pronouncement of the decision of the Discipline Committee, successfully complete the following examinations administered by PEO: 98-CIV-B1 (Advanced Structural Analysis), and 98-CIV-B2 (Advanced Structural Design).

(b) Pursuant to sections 28(4)(b) and (k) of the *Professional Engineers Act*, in the event that Katsoulakos does not successfully complete the above-mentioned examinations within the time set out in (b) above, his licence shall be suspended for a period of 10 months thereafter, or until he successfully completes the examinations, whichever comes first;

(c) Pursuant to subsection 28(4)(e)(iii) of the act, a restriction shall be placed upon Katsoulakos' licence and MCES's Certificate of Authorization, requiring them to accept a practice inspection on the following terms:
   (i) The practice inspection will be carried out by an independent expert (to be named by the deputy registrar, regulatory compliance), who will provide a report to the deputy registrar, the chair of discipline panel, and Katsoulakos at the conclusion of the inspection;
   (ii) The practice inspector shall provide written notice to the defendants at least two weeks before attending at the defendants' premises to carry out his or her inspection;
   (iii) The practice inspection will be limited to not less than five and not more than 10 projects carried out in or after the year 2010, of a scope or nature similar to that which was the subject of this hearing (as identified by the independent expert named by PEO);
   (iv) The practice inspection shall be completed and the report submitted within six months from the date of release of the penalty decision;
   (v) After review of the independent expert's inspection report, the deputy registrar, regulatory compliance may, if he or she has opinion of that inspection report evidences incompetence or additional professional misconduct on the part of Katsoulakos and/or MCES, after providing Katsoulakos and MCES an opportunity to respond to this determination, request that the discipline panel order additional penalty action against Katsoulakos and/or MCES;
   (vi) The discipline panel shall make the determination noted in (v) no later than three months after the receipt of the request by the deputy registrar; and
   (vii) All costs associated with the practice inspection and the report shall be paid by Katsoulakos and/or MCES.

(d) Pursuant to section 28(5) of the *Professional Engineers Act*, the findings and order of the Discipline Committee shall be published, with the reasons therefore, together with the names of the defendants, in the official publication of PEO; and

(e) There shall be no order as to costs.

PENALTY DECISION AND REASONS

After exhaustive deliberations, a majority of the panel accepted that the Joint Submission as to Penalty and Costs would not bring the administration of justice into disrepute nor would it otherwise be contrary to the public interest. The penalties met sentencing objectives, including: protection of the public, maintenance of the reputation of the profession in the eyes of the public, specific deterrence, general deterrence, and rehabilitation of the member and holder. The panel, accordingly, ordered that the penalties, as set out in the joint submission, be imposed and take effect as of the date of the hearing on February 7, 2017.

The reprimand was administered at the conclusion of the hearing on February 7, 2017.

Kam Elguindi, 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: Aubrey Friedman, P.Eng., Tim Kirkby, P.Eng., and Warren Turnbull, P.Eng.

DISSENTING OPINION

(Delivered by: Richard E. Austin, LLB, MBA)

There was a joint submission made by counsel for PEO and the defendants that was accepted by the majority of the panel.

The panel imposed the following penalty (as per the joint submission):

(a) Pursuant to section 28(4) of the *Professional Engineers Act*, the defendants shall be reprimanded and the fact of the reprimand shall be recorded on the register for a period of one year.

(b) Pursuant to section 28(4)(d) of the *Professional Engineers Act*, it shall be a term or condition on Katsoulakos' licence that he shall, within 16 months of the date of pronouncement of the decision of the Discipline Committee, successfully complete the following examinations administered by PEO: 98-CIV-B1 (Advanced Structural Analysis), and 98-CIV-B2 (Advanced Structural Design).

(c) Pursuant to sections 28(4)(b) and (k) of the *Professional Engineers Act*, in the event that Katsoulakos does not successfully complete the above-mentioned examinations within the time set out in (b) above, his licence shall be suspended for a period of 10 months thereafter, or until he successfully completes the examinations, whichever comes first;

(d) Pursuant to subsection 28(4)(e)(iii) of the act, a restriction shall be placed upon Katsoulakos' licence and MCES's Certificate of Authorization, requiring them to accept a practice inspection on the following terms:

(i) The practice inspection will be carried out by an independent expert (to be named by the deputy registrar, regulatory compliance), who will provide a report to the deputy registrar, the chair of discipline panel, and Katsoulakos at the conclusion of the inspection;

(ii) The practice inspector shall provide written notice to the defendants at least two weeks before attending at the defendants' premises to carry out his or her inspection;

(iii) The practice inspection will be limited to not less than five and not more than 10 projects carried out in or after the year 2010, of a scope or nature similar to that which was the subject of this hearing (as identified by the independent expert named by PEO);

(iv) The practice inspection shall be completed and the report submitted within six months from the date of release of the penalty decision;

(v) After review of the independent expert's inspection report, the deputy registrar, regulatory compliance may, if he or she has opinion of that inspection report evidences incompetence or additional professional misconduct on the part of Katsoulakos and/or MCES, after providing Katsoulakos and MCES an opportunity to respond to this determination, request that the discipline panel order additional penalty action against Katsoulakos and/or MCES;

(vi) The discipline panel shall make the determination noted in (v) no later than three months after the receipt of the request by the deputy registrar; and

(vii) All costs associated with the practice inspection and the report shall be paid by Katsoulakos and/or MCES.

(e) Pursuant to section 28(5) of the *Professional Engineers Act*, the findings and order of the Discipline Committee shall be published, with the reasons therefore, together with the names of the defendants, in the official publication of PEO; and

(f) There shall be no order as to costs.

The panel, in determining whether to accept a joint submission, is obliged to consider the following in assessing whether the proposed penalties are within a reasonable range of acceptability:

(i) Protection of the public interest;

(ii) Maintenance of the reputation of the profession in the eyes of the public; and

(iii) General deterrence.

While the majority of the panel accepted the joint submission, I was unable to do so for the reasons that follow.

With all due respect to the other members of the panel, I am of the view that the fact that the reprimand of the defendants shall be recorded on the register for a period of one year conflicts with, and fails to adequately address, each of the three items that the panel was obliged to consider.

The Concise Oxford Dictionary defines "reprimand" as "an official or sharp rebuke (for fault, etc.)." Noting the reprimand on the register can have only a single legitimate purpose, that is to provide the public, and more specifically other professionals (e.g. architects, other members of the PEO) who rely on the expertise of members of the Association of Professional Engineers of Ontario (PEO), with an official source of information regarding the disciplinary record of its members.

With regard to the protection of the public interest, the register must be seen as a record which one can rely upon, and should rely upon, in determining conclusively whether a member of PEO has been sanctioned for failing to meet an applicable requirement of PEO. Counsel for the defendants suggested that a potential client of the defendants could rely on an Internet search to determine that the defendants had been found in breach of a requirement of PEO and were reprimanded for such breach after the reprimand was removed from the register. I am of the view that the record of a self-regulated organization (an SRO), such as PEO, should be the "official" source of such information, and the public should not be expected to undertake a search or due diligence beyond contacting the SRO itself in determining whether a member of has been sanctioned by the SRO.

While I have not conducted exhaustive research, I can think of no other professional body where a formal reprimand simply disappears with the passage of time and there is an expectation that this sort of information is to be gleaned from an Internet search. If anything, over the last few years, many regulators have taken steps to increase the ease by which the public can find out whether a specific individual or entity, that has been granted a professional licence, or similar qualification, has ever been subject to a disciplinary action and the sanctions imposed.

Further, as Katsoulakos has a permanent reprimand on the register from a previous disciplinary matter several years ago, the removal of the reprimand arising from the matter before the panel in a year's time would leave a member of the public making an inquiry of the register with the impression that he was a "one-time" offender. This is not the case as he is before a panel of the Discipline Committee for a second time, and has admitted his liability.

The reputation of the profession, in the eyes of the public, can only be diminished by acceptance of the joint submission. Katsoulakos has a reprimand on the register from a prior disciplinary matter. The panel has been advised that there is no specified means by which this reprimand can be removed. One can only reasonably conclude that it was envisioned, and intended, that a reprimand in the ordinary course would be permanently recorded on the register. The fact that there is no specific means by which a reprimand can be removed from the register supports the view that a reprimand, being "an official or sharp rebuke," should remain on the register permanently.

Given the involvement of several government agencies once the multiple deficiencies and failings in the structure designed by the defendants that is at the heart of this matter came to their attention, it is evident that the potential harm arising from the deficiencies and failings was significant. There is no question, in my mind, that a reprimand is appropriate in this matter.

If a permanent reprimand was appropriate for Katsoulakos' first offence, how can it be appropriate in the instance of a second conviction that a second reprimand would disappear from the register simply by the passage of time? While one could argue that it might be appropriate for a reprimand to remain on the record for a limited period if the potential consequences of a breach were minor and it was a first offence, this is not the case in the matter before the panel. I can think of no explanation that PEO could offer to the public, any member of PEO, any member of any other profession or any government agency that could satisfactorily explain or reconcile this aspect of the penalty. In the event of such an inquiry, the reputation of PEO would be diminished. Further, it is reasonable to foresee that members of PEO, itself, will question the integrity of the disciplinary process upon reading the findings, order and reasons of the panel once published.

The fact that the reprimand could potentially be removed prior to Katsoulakos successfully completing the courses specified in (b) above, only adds to what is an untenable and unacceptable outcome.

It is commonly understood and accepted that repeat offenders should be subject to increasingly onerous penalties as part of achieving the general deterrence objective. The joint submission provides for appropriate review of the defendants' practice to ensure the safety of the public and, quite rightfully, at the defendants' expense. Unfortunately, the balance of the penalty, specifically the lack of an imposition of costs payable to PEO and the "vanishing" reprimand, do not in aggregate represent an increased penalty in my view, or if were seen as an increased penalty by others, not sufficiently increased given the potential consequences of the defendants' breach.

For these reasons, I was unable to accept the joint submission.