

KATSOULAKOS V ASSOCIATION OF PROFESSIONAL ENGINEERS OF ONTARIO

SARAH YUN - SEPTEMBER 2014

The Divisional Court's recent decision, *Katsoulakos v Association of Professional Engineers of Ontario*, raises two important issues for professional self-regulatory bodies in respect of the degree to which procedural fairness applies in the context of a disciplinary proceeding. First, the case suggests that the obligation to disclose the particulars of professional misconduct allegations in the Notice of Hearing may be quite onerous. Divisional Court ruled that the Discipline Committee in this case could not rule on conduct that was not referred to in the Statement of Allegations by virtue of the fact that it fell within the broader subject matter of the referral. Rather, the College was required to provide reasonable notice of the conduct of the member and its relation to the allegations of professional misconduct in a highly particularized manner. Second, this case cautions discipline committees against making findings as to the standards of practice of a profession without a clearly indicated standard or expert evidence.

The facts of the case can be briefly summarized as follows: Sotiros Katsoulakos, and his company Micro City, designed a manure storage tank which leaked when the farm owner punched a hole in the lower part of the tank's concrete wall in order to transfer pipes. During the course of an investigation of the leak, a complaint was filed against Mr. Katsoulakos, alleging professional misconduct, incompetence and breach of the *Code of Ethics*.

The matter was eventually referred to a panel of the Discipline Committee which, subsequent to a hearing, released a decision that found Mr. Katsoulakos guilty of professional misconduct and negligence and Micro City guilty of professional misconduct. The panel did not find that they breached the *Code of Ethics*. The Discipline Committee held that Mr. Katsoulakos and Micro City were negligent in designing the tank and dealing with a cut-out in the tank wall. They failed to ensure that the tank's design complied with the Ontario *Building Code* and the Canada Plan Service, and failed to ensure the tank's structural integrity would not be compromised by the cut-out. The panel found Mr. Katsoulakos demonstrated a lack of knowledge, skill or judgment in using a software program for the design of the tank and in failing to comply with the Canada Plan Service.

Mr. Katsoulakos and Micro City appealed the decision on two grounds: (1) that the Notice of Hearing was deficient as it failed to provide reasonable notice of certain allegations, and (2) the Discipline Committee acted in a procedurally unfair manner as it improperly considered and relied upon evidence of an expert that had previously been ruled inadmissible and unfairly exercised its power to take judicial notice of professional standards in the absence of expert evidence. As discussed below in greater detail, both grounds of appeal were accepted as the appeal was allowed and the matter was remitted for a re-hearing before a differently constituted panel with an order for costs in the amount of \$12,000.

The first ground of appeal related to the finding of the Discipline Committee that Mr. Katsoulakos was negligent in respect of the advice that he gave for repairing a cut-out in the tank. The "cut-out" issue was not set out in the Statement of Allegations or the Referral Decision. While the Discipline Committee sought advice from Independent Legal Counsel who

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advised the Committee to consider only those allegations mentioned in the Statement of Allegations, after considering that advice, the Discipline Committee ruled that the subject matter of the complaint (i.e., the structural adequacy and integrity of the tank) was broad enough to capture the advice given about the cut-out.

In overturning the decision of the Discipline Committee, the Divisional Court held that the duty of fairness requires the professional body to disclose with reasonable particularity the act or conduct alleged to amount to professional misconduct to enable the member to prepare a full defence. Further, the degree of particularity required in the originating document to satisfy the duty of fairness resembles what is expected of litigants in a judicial proceeding, given the severe effect that a decision may have on the member.

The second ground of appeal was whether the Discipline Committee's ruling on the scope of expert evidence was procedurally fair and whether the Discipline Committee fairly exercised its powers of judicial notice. At the hearing, Mr. Katsoulakos and Micro City objected to the qualification of John Stephenson as an expert in circular liquid retaining storage structures and in respect of the standard of practice of engineers providing structural engineering in the agricultural sector. The Discipline Committee agreed with the objection and declined to qualify Mr. Stephenson as an expert in those areas. Notwithstanding that ruling, however, the Discipline Committee then allowed Mr. Stephenson to give evidence on reinforcing steel requirements of the Canada Plan Service; the adequacy of the advice given by Mr. Katsoulakos for the repair of the cut-out; and whether the amount of structural steel used by Mr. Katsoulakos in designing the tank met the requirements of the Canada Plan Service. The Discipline Committee relied on this evidence in its findings of negligence and failure to comply with the Canada Plan Service.

The Divisional Court held that the Discipline Committee considered inadmissible evidence and acted contrary to its own ruling to exclude some of the expert testimony. In so ruling, the Court rejected the argument that the panel was engaging in permissible inference-drawing from the evidence. Moreover, the Divisional Court found that the Discipline Committee inappropriately exercised its powers of judicial notice when ruling on whether the standard of practice had been met. The Court pointed out that the Discipline Committee had not qualified Mr. Stephenson as an expert on the standard of practice, and there was no other admissible expert evidence regarding whether the standard of practice had been met.

The Divisional Court's decision provides several lessons for the complaints and discipline process of regulators. First, the decision cautions that Referral Decisions and Statement of Allegations must be carefully drafted to ensure that a defendant to a College proceeding has sufficient notice of the essential elements of the allegations in order to fully respond to the matter. It is insufficient for the details contained in broadly framed allegations to become clear during the course of a hearing.

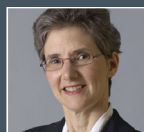
Second, notwithstanding that Discipline Committees tend to be predominantly comprised of professional members, it appears that Discipline Committee panels should take a cautious approach to findings in respect of standards of practice where the purported standard has not been previously set out and where an expert has not been tendered to provide evidence on the standard itself. While a panel may take judicial notice of non-controversial matters of fact, the Divisional Court held that the standard of practice is not such an issue.

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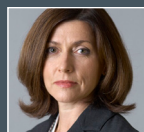
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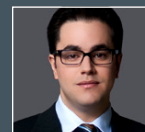
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