

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ellwood v. Association of Professional
Engineers of Yukon*, 2006 YKSC 42

Date: 20060619
Docket No.: S.C. No. 05-AP005
Registry: Whitehorse

Between:

ROBB ELLWOOD, P. ENG

Appellant

And

**THE ASSOCIATION OF PROFESSIONAL ENGINEERS
OF YUKON**

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Christopher Rusnak
Daniel Shier

Counsel for the Appellant
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an appeal from a decision of the Council of the Association of Professional Engineers of Yukon (the Council), which found Robb Ellwood guilty of conduct that constituted unskilled practice or unprofessional conduct. A written complaint from the Government of Yukon dated April 16, 2003, arose from work Mr. Ellwood completed with respect to a boiler room upgrade project and air quality reports, all for Whitehorse schools. The Discipline Committee made its decision against Mr. Ellwood on March 17, 2005. The Council rendered its decision on September 2, 2005, confirming the decision of the Discipline Committee but increasing the sentence by

requiring a four-year period of supervision of Mr. Ellwood's practice following his successful passing of the Professional Practice Exam. Mr. Ellwood appeals the decision of the Council pursuant to section 51(1) of the *Engineering Profession Act*, R.S.Y. 2002, c. 75. This judgment will focus on the appropriate standard of review and its application to the decision of the Discipline Committee according to the judgment of the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, (Dr. Q.).

THE FACTS

[2] There were initially four charges against Mr. Ellwood. One charge was dropped and the Discipline Committee dismissed one charge. The remaining two charges to be considered by this court are as follows:

- 1) Between March 3, 2003, and April 8, 2003, Mr. Ellwood refused to comply with the direction of the Property Management Agency (PMA), an agency of the Government of Yukon, to make changes to specifications and drawings for the boiler room upgrade project. The essence of the complaint is that Mr. Ellwood was directed by the PMA to make six changes to the specifications of the boiler room upgrade project. He was directed to make these changes on April 7, 2003. Mr. Ellwood responded that he did not accept that the PMA could direct the changes and demand that they be incorporated into his design. Despite a further request, Mr. Ellwood declined to make the changes.
- 2) Between February 12, 2003, and April 16, 2003, Mr. Ellwood prepared three reports on the ventilation concerns at three Whitehorse schools. The PMA complaint is that the reports displayed “a lack of knowledge, skill or judgment

reasonably to be expected for the carrying out of any duty or obligation undertaken in the engineering practice”. The assessment of this complaint requires an interpretation of the following clause in the letter contract between the PMA and Mr. Ellwood:

“On this basis I propose to verify a ventilation issue at Whitehorse Elementary School and set forth the evidence and implications of it in a letter report. I will require unfettered access to the school and relevant documentation, particularly relating to recent work done there. The proposed scope of my work is sufficient to document the cause of a problem so that you may engage others to develop engineering solutions. I will not expand the scope to seek out any other problems not presently known to me.”

[3] The precise question to be determined is whether the ventilation reports represent good engineering practice.

The Discipline Committee Decision

[4] The Discipline Committee found that Mr. Ellwood's refusal to follow the directions of the PMA breached section 27(1)(b) and (c) of the *Engineering Profession Act* in that he contravened the code of ethics of the profession requiring fairness to clients and devotion to high ideals of personal honour and professional integrity.

[5] With respect to the air quality reports, the Discipline Committee accepted the expert evidence of James Thompson, a mechanical engineer, that the reports did not represent good engineering practice.

[6] The Discipline Committee imposed the following penalty on Mr. Ellwood:

- a) Within three months, write and successfully pass the APEY Professional Practice Exam;

- b) Commencing immediately, and for a period of two years following passing the Professional Practice Exam, have all work as a professional engineer be (*sic*) reviewed and approved by an independent professional engineer;
- c) Within three months, pay a fine of \$2500 to APEY.

The Decision of the Council

[7] The Council reviewed the evidence presented to the Discipline Committee. No new evidence was introduced. The Council dismissed Mr. Ellwood's allegations of bias against the six Council members hearing his appeal. This issue has not been raised by counsel in this appeal.

[8] The Council made two important legal decisions in its judgment. Firstly, the Council determined that the standard of review would be based on reasonableness. They did not do so based on the four contextual factors in the pragmatic and functional approach. The Council found that in some instances, the reasons provided by the Discipline Committee were not stated as fully as would have been desirable. They determined that the findings of the Discipline Committee upon review are reasonable and grounded in the evidence.

[9] Secondly, the Council made a legal finding that "it is fundamental to the engineering profession that quantitative data be produced". Further, the Council found that a qualitative analysis is also fundamental to the engineering profession. The Council cited the case of *Evans v. Assn. of Professional Engineers and Geoscientists of the Province of British Columbia*, [2002] B.C.S.C. 1029 (Evans), in support of its ruling. The issue according to the Council is whether the client would have reason to expect that Mr. Ellwood's work would be supported by quantitative analysis. The Council

concluded that a reasonable engineer would expect that the client would view the work product critically and to pass such critical review, the work would necessarily need to provide the methodology, data, and analysis that quantitatively support the findings. The Council very clearly stated that the application of *Evans* required Mr. Ellwood to complete some level of quantitative analysis and provide a record of this analysis to the client.

[10] The Council also concluded that Mr. Ellwood's misconduct did not arise from a single transgression, but rather from a systemic series of actions.

[11] With respect to Mr. Ellwood's refusal to comply with the directions of the PMA on the boiler upgrade project, Council agreed that Mr. Ellwood was responsible for the design. However, the Council stated that does not allow him to refuse the preferences of this client unless those preferences:

- 1) would endanger the public; or,
- 2) would contravene applicable laws, codes or regulations; or,
- 3) would not allow the design to meet the functions or objectives it is required to achieve.

[12] The Council concluded that Mr. Ellwood did not attempt to explain to his client how the proposed directions would lead him to contravene his statutory responsibility or compromise his design. They concluded that he simply refused to incorporate their directions in his design without further explanation.

[13] With respect to the air-quality reports, the Council found that when faced with a critical technical review by the client, Mr. Ellwood provided no substantive information to

support his findings, even though his testimony demonstrated that he had such information that could be put forward.

[14] However, the Council was even more disturbed by a subsequent letter written by Mr. Ellwood to the Government of Yukon dated May 1, 2003. In the letter, Mr. Ellwood was highly critical of the PMA. He referred specifically to “weaknesses in management there”. He was more specific as follows:

“It is not reasonable, in my opinion, to expect this management team to have the breadth of knowledge to properly run the agency. There should be at least one resource person at management level who is schooled in management or administration or who is a professional engineer or architect to be available to guide PMA staff in areas where tradesmen are not expected to be competent.”

[15] The Council concluded that Mr. Ellwood placed his own interests above his duty to his client, his profession and the public. Because Mr. Ellwood maintained that his conduct was beyond reproach, the Council was of the view that the penalty assessed by the Discipline Committee was inadequate. The Council found that the two-year period of supervision by an independent professional engineer was inadequate and ordered a four-year period of supervision.

[16] Council also ordered Mr. Ellwood to pay costs of the appeal in the amount of \$1000 in addition to the fine of \$2500 assessed by the Discipline Committee.

THE LAW

[17] The procedure to be followed in these matters is found in the Supreme Court of Canada's decision in *Dr. Q.*, cited above. In that case, Dr. Q. was found guilty of infamous conduct and suspended for 18 months. In paragraph 43, the Court decided that the appropriate test at the second appellate level is whether the reviewing court or

tribunal had chosen and applied the correct standard of review. The question of the right standard to select and apply is one of law and therefore must be answered correctly by the Council. In the event that I find that Council has not selected the appropriate standard of review, it will be necessary for this Court to substitute the appropriate standard of administrative review and assess the decision of the Discipline Committee accordingly. If Council has chosen the correct standard of review, I must determine whether that standard has been correctly applied to the decision of the Discipline Committee.

[18] The Supreme Court of Canada was clear that despite a statutory right of appeal, the standard of review should be determined by applying the pragmatic and functional approach and considering the four contextual factors -- the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact. I will briefly discuss the gist of each contextual factor as it applies to determine the appropriate standard of review.

Privative Clause or Statutory Right of Appeal.

[19] A broad right of appeal to a tribunal or court suggests a more searching standard of review. A privative clause suggests more deference.

The Expertise of the Tribunal

[20] This factor considers the expertise of the Council relative to that of the Discipline Committee on the issue in question. Greater deference will be given to Discipline

Committee answering questions that are in its area of expertise and not in the expertise of the reviewing Council.

The Purpose of the Statute

[21] A greater deference is accorded where legislation intended the Discipline Committee to resolve competing policy objectives. Less deference is accorded if the Discipline Committee is resolving disputes between two parties.

The Nature of the Problem

[22] This is usually a key factor to determine the appropriate standard of review. If the question is one of pure fact, greater deference is given. If the question is one of pure law, a more searching standard is appropriate such as correctness. If the question falls somewhere in between fact and law, reasonableness would be appropriate.

[23] The following are the task and powers on appeal of the Council and this Court respectively as set out in the *Engineering Profession Act*:

Determination of unprofessional conduct and unskilled practice

27(1) Any conduct of a professional engineer, holder of a limited licence, permit holder, or engineer-in-training that

- (a) is detrimental to the public interests;
- (b) contravenes a code of ethics of the profession as established under the regulations;
- (c) harms or tends to harm the standing of the profession generally;
- (d) displays a lack of the knowledge or of the skill or judgement (*sic*) reasonably to be expected in the practice of the profession; or
- (e) displays a lack of the knowledge or the skill or judgement (*sic*) reasonably to be expected for the carrying out of any duty or obligation undertaken in the practice of the profession,

whether or not that conduct is disgraceful or dishonourable, constitutes either unskilled practice of the profession or unprofessional conduct, whichever the Discipline Committee finds.

(2) If an investigated person fails to comply with or contravenes this Act, the regulations or the bylaws, and the failure or contravention is, in the opinion of the Discipline Committee, of a serious nature, the failure or contravention may be found by the Discipline Committee to be unprofessional conduct whether or not it would be so found under subsection (1).

Powers of the Council on appeal

50(1) On an appeal the Council may do any or all of the following

- (a) grant adjournments of the proceedings or reserve the determination of the matters before it for a future meeting of the Council;
- (b) receive further evidence;
- (c) draw inferences of fact and make any determination or finding that in its opinion ought to have been made by the Discipline Committee;
- (d) order that the matter be referred back to the Discipline Committee.

(2) Sections 37 to 42, 46 and 47 apply to the hearing of an appeal by the Council.

(3) The Council shall immediately after the date of the conclusion of all proceedings before it

- (a) make any findings as to the conduct of the investigated person that in its opinion ought to have been made by the Discipline Committee; or
- (b) quash, vary, or confirm the finding or order of the Discipline Committee or substitute or make a finding or order of its own; or
- (c) refer the matter back to the Discipline Committee for further consideration in accordance with any direction that the Council may make.

(4) The Council may order the investigated person to pay all or part of the costs of the appeal determined in accordance with the bylaws.

Powers of the Court on appeal

54(1) The Court on hearing the appeal may do any or all of the following

- (a) make any finding that in its opinion ought to have been made;
- (b) quash, confirm, or vary the order or decision of the Council or any part of it;
- (c) refer the matter back to the Council for further consideration in accordance with any direction of the Court;
- (d) direct that a new hearing of any questions of fact relating to a finding or order or to both a finding and an order of the Council made under section 53 be held before the Court.

(2) The Court may make any award as to the costs of an appeal to it that it considers appropriate.

ISSUES

[24] The following issues will be considered:

- 1) What is the standard of review that this Court should apply to the decision of the Council?
- 2) Did the Council choose the appropriate standard of review to apply to the decision of the Discipline Committee?
- 3) Did the Council correctly apply the appropriate standard of review to the decision of the Discipline Committee?

DECISION

[25] As to the first issue, this Court should apply the standard of correctness to determine the question of the standard of review chosen by the Council as it is a question of law. This Court has expertise in matters of law and the Council does not. It is also appropriate for this Court to apply a standard of correctness in assessing

whether the standard has been properly applied by the Council. While the specific issue may be one of mixed fact and law, the Council has no expertise in law.

[26] On the second issue, the fact that there is a statutory right of appeal with broad appellate powers suggests a more searching standard. As to expertise, the Council has no greater expertise than that of the Discipline Committee and the nature of the problem is one of deciding a dispute between two parties. The Council on appeal has the power to hear new evidence, make the decision that ought to have been made or send the matter back to the Discipline Committee for further hearing. Again, this suggests a more searching standard of review. As a result on these two factors, the Council should have less deference for the Discipline Committee's decision based on a statutory right of appeal and to powers granted to the Council. On the issue of expertise, the Council has no greater expertise than that of the Discipline Committee as both are made up primarily of engineers. The nature of the problem is to assess the conduct of the investigated person as against the standard required for unskilled practice or unprofessional conduct. In this aspect, the Discipline Committee had the advantage of hearing the evidence and assessing credibility. On balance, I am of the view that the standard of review should be reasonableness. This was the standard chosen by the Council.

[27] I note that the same standard of review was applied in a disciplinary case involving the nursing profession. See *Nelson v. Alberta Assn. of Registered Nurses*, 2005 ABCA 229.

The Application of the Reasonableness Standard of Review

[28] Although the Council was somewhat critical of the Discipline Committee, it concluded that its decision on Mr. Ellwood's refusal to follow directions on the boiler room upgrade was a reasonable one based on the evidence before it. In my view, the statements made by Mr. Ellwood at the time of receiving specific direction from the PMA on design specifications, could reasonably be interpreted to be an unequivocal refusal to follow their direction. The Council and the Discipline Committee were quite entitled to discount the evidence of Mr. Ellwood at the hearing where he tried to justify his refusal with the explanation that he wanted to have further discussions on the matter. The time for further discussions was when the direction was given by the PMA and not at the time of the hearing. It is reasonable to interpret Mr. Ellwood's actions and words, at the time of the direction, to be an outright refusal.

[29] With respect to Council's decision on the air quality reports, I do not agree with Council's statement of the law requiring Mr. Ellwood to provide quantitative data and a quantitative analysis to fulfill his contract with the PMA. This legal conclusion completely ignored the terms of Mr. Ellwood's contract with the PMA.

[30] The Council relied upon the case of *Evans*, cited above. However, the standard of practice for engineers in these circumstances cannot be derived from case law. It must be based upon expert evidence that Mr. Ellwood can challenge by cross-examination or by calling his own expert. See *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (Sask.C.A.), at page 106 and *Re: Reddall and College of Nurses of Ontario* (1983), 42 O.R. (2d) 412 (C.A.), at page 416.

[31] In my view, a proper statement of the law is that the Discipline Committee and the Council are entitled to apply their own expertise to the assessment of the evidence. However, they are not entitled to use their expertise to establish the standard of practice to be met by Mr. Ellwood. See *Palmquist v. Architectural Institute of British Columbia*, [1999] B.C.J. No. 2589 (S.C.), at paragraph 61.

[32] The Discipline Committee decided to rely on the evidence of James Thompson who provided a peer review of Mr. Ellwood's reports. Mr. Thompson is a mechanical engineer with 26 years of experience. He is a member of the Association of Professional Engineers of Alberta and Manitoba but he is not a member of the Professional Engineers of Yukon. He has a number of years of experience in the ventilation field and was qualified as an expert in mechanical engineering in the area of ventilation of building projects.

[33] Mr. Thompson was retained to do an on-site inspection and assess the standard of technical expertise in the three Ellwood reports. Mr. Thompson's report was peer reviewed and sealed by Reagan Williams, his partner, who is a member of the Association of Professional Engineers of Yukon.

[34] Mr. Thompson made certain assumptions when he prepared his peer review. He stated:

“From our experience, clients are looking for answers to their problems, and therefore expect the report to provide recommendations for correcting the problem. We consider these reports of very little value to the client with regard to making decisions towards correcting the problems in each school.”

[35] From this perspective Mr. Thompson was very critical of the Ellwood reports as they did not provide recommendations or solutions.

[36] Mr. Thompson outlined the practice of his firm to prepare reports that include an introduction, system description, observations, recommendations and costs.

[37] Mr. Thompson was aware of the terms of Mr. Ellwood's contract, set out above, indicating that Ellwood wanted to "verify the ventilation issues" and "document the cause of a problem so that you may engage others to develop engineering solutions". However, despite this contractual term, he opined "that the report should provide some recommendations for the next engineering company".

[38] Interestingly, in cross-examination, Mr. Thompson agreed with some of the design errors pointed out by Mr. Ellwood in his reports. However, he always returned to his opinion that Mr. Ellwood did not provide a solution and he did not follow the format used by Mr. Thompson's firm. Mr. Thompson could not provide any authority that defines a format for a letter-report.

[39] When questioned about his opinion that the technical expertise demonstrated in all three reports was "poor", Mr. Thompson stated:

"... I guess mainly if you had finished it off by providing some recommendations to the client, we would have considered your engineering expertise a lot more valuable ..."

[40] I am of the view that Mr. Thompson's evidence does not provide a Yukon standard of practice that should be adopted by the Discipline Committee. Mr. Thompson simply provided the format that his firm has adopted. More particularly, he failed to take into consideration that Mr. Ellwood had no contractual obligation to provide solutions and his agreement stated clearly that the PMA could "engage others to develop engineering solutions". In any event, once Mr. Thompson focussed on technical

expertise and not engineering solutions, he considered the engineering expertise of Mr. Ellwood to be “a lot more valuable”.

[41] I therefore find that the Council did not apply the standard of review of reasonableness properly to the Discipline Committee decision.

[42] The Council did not appear to rely on the expert evidence of Mr. Thompson, although Council stated that he had “limited disagreement” with Ellwood’s technical conclusions. Nevertheless, the Council concluded that the findings of the Discipline Committee were reasonable and grounded in the evidence.

[43] In fact, the Council created a new standard of practice based on case law, an entirely improper approach to determining the appropriate Yukon standard of practice.

[44] Thus, I find that the Council did not correctly apply the standard of reasonableness to the evidence of Mr. Thompson which was before the Discipline Committee, but rather adopted a new standard of practice incorrectly in my view. Had the Council applied the reasonableness standard to the evidence of Mr. Thompson, which was relied upon by the Discipline Committee, they should have dismissed the complaint about the air quality reports prepared by Mr. Ellwood. The Discipline Committee erred in accepting the evidence of Mr. Thompson that the Ellwood air quality reports were not good engineering practice. I find that Mr. Thompson’s evidence, once it focussed on engineering and not solutions, does not support a finding that the reports were not good engineering practice. I conclude that it was not reasonable for the Discipline Committee to find Mr. Ellwood’s reports not good engineering practice based on the evidence of Mr. Thompson.

[45] Unfortunately, the Council went on to discuss further misconduct of Mr. Ellwood under the heading "Findings of Council on Penalties". They expressed the view that his misconduct did not arise from a single transaction but showed a systemic series of actions. Council reviewed the evidence of misconduct again and concluded that the penalty assessed by the Discipline Committee was inadequate. Council therefore increased the period of supervision after passing his Professional Practice Exam to four years and added that he pay costs of the appeal in the amount of \$1,000 in addition to a fine of \$2,500.

[46] At the time of hearing this appeal, Mr. Ellwood has complied with all aspects of Council's penalty, except for the four-year period of supervision. On January 14, 2006, he passed the Yukon Professional Practice Exam and on February 23, 2006, he passed the National Professional Practice Exam. It is my view that the period of supervision following the passing of these exams was directed to the air quality reports and designed to ensure that Mr. Ellwood was performing good engineering practice. Since I have dismissed the complaint relating to the air quality reports and the fact that it is the only penalty condition that remains, it is appropriate to cancel the supervision condition completely. Further, the additional \$1,000 in costs assessed by the Council should be returned to Mr. Ellwood.

[47] In summary, I confirm the finding of unprofessional conduct on Mr. Ellwood's refusal to take the direction of the PMA to change the design of the boiler room upgrade project. I dismiss the complaint against the air quality reports. As a result, the penalties imposed by both the Discipline Committee and the Council are excessive. I find the appropriate penalty to be rewriting the Professional Practice exams, which he has

completed and the payment of a \$2,500 fine to the Association. The \$1,000 costs payment added by the Council shall be returned to Mr. Ellwood.

[48] The result of the appeal is mixed. Counsel may speak to court costs, if necessary.

VEALE J.