

ENGINEERS GEOSCIENTISTS MANITOBA

IN THE MATTER OF: *The Engineering and Geoscientific Professions Act, C.C.S.M., c. E120*

AND IN THE MATTER OF: F. Daniel Wolfrom, P. Eng., a Professional Engineer in the Province of
Manitoba

REASONS FOR DECISION

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Panel of the Discipline Committee:

A. Ball, P. Eng., FEC (Chair)
D. Spangelo, P. Eng., FEC
J. Carvell (Lay Member)

IN THE MATTER OF: F. Daniel Wolfrom, P. Eng., a Professional Engineer in the Province
of Manitoba

AND IN THE MATTER OF: *The Engineering and Geoscientific Professions Act,*
C.C.S.M. c. E120

Legal Counsel for the Investigation Committee:

Brent C. Ross
Robert E. Prokopanko

Legal Counsel for the Member:

William S. Gange

Legal Counsel for This Panel of the Discipline Committee:

Kathleen McCandless

Hearing Dates: December 20, 2021 and December 15, 2022

REASONS FOR DECISION

The Charge:

The Charge dated October 25, 2021 ("Charge"), alleges that Mr. Wolfrom committed professional misconduct or unskilled practice of professional engineering, contrary to s. 46(1)(a)(c)(d) and (e) of *The Engineering and Geoscientific Professions Act*, C.C.S.M. c. E120 (the "Act") and Canons 1.2 and

2.6 of the EGM *Code of Ethics* (adopted December 14, 2000) (the "Code"), in connection with preparation of a letter by Mr. Wolfrom regarding the cause of slab-on-grade settlement at 455 Shorehill Drive, in Winnipeg, Manitoba (the "**Property**"), the particulars of which are that:

1. On or about November 15, 2013, Mr. Wolfrom prepared and issued a letter (the "**Letter**") to Daniel Serhal Architecture pertaining to the cause of slab-on-grade settlement at the Property;
2. The Letter was considered as part of a conciliation review under the New Home Warranty Program.
3. In the Letter, Mr. Wolfrom:
 - a. indicated that he had reviewed a report produced by Joe Solomon of Concrete Restoration Services, dated April 29, 2013;
 - b. indicated that he had not personally visited the Property, but accepted that there had been some settlement of the slab-on-grade floor at the Property;
 - c. indicated that periodic site visits had been performed during construction of the Property, and on that basis assumed that the construction of the Property had been performed in accordance with the construction drawings; and
 - d. concluded in the Letter that, "the clay soils in Winnipeg are commonly affected by increases or decreases in moisture content, and this is what had occurred at this address."
4. In preparing and issuing the Letter in the manner he did, Mr. Wolfrom violated s. 46(1)(a)(c)(d) and (e) of the Act and Canons 1.2 and 2.6 of the Code, and acted contrary to the public interest by:
 - a. failing to give his opinion conscientiously and only after conducting an adequate study of the matter under review;

- b. failing to employ all reasonably attributable skill and knowledge to perform and satisfy the engineering and geoscientific needs of the task in a professional manner; and
- c. making statements on engineering matters in a manner which might mislead, including by:
 - i. failing to consider or provide an explanation of other potential causes or contributors to the slab settlement, despite being aware that other potential causes or contributors had been proposed;
 - ii. making assumptions in connection with the preparation and issuance of the Letter without first having sufficient evidence or information to reasonably do so;
 - iii. failing to conduct adequate investigations to support the findings, opinions and conclusions in the Letter; and
 - iv. providing a definitive conclusion regarding the cause of the slab settlement that eliminated other possible causes or contributors without having sufficient evidence to support that conclusion.

The Charge was referred to the Discipline Committee on or about November 3, 2021.

Admissions by Mr. Wolfrom:

At the initial commencement hearing on December 20, 2021, counsel for the Investigation Committee ("IC") satisfied the Discipline Panel (the "Panel") that the Panel has jurisdiction to hear this matter, and that all procedural steps required by the Act and the EGM By-Laws regarding the commencement of hearings and notice thereof were fulfilled.

At the commencement hearing, through counsel, Mr. Wolfrom pled not guilty to the Charge and the matter was adjourned.

The hearing of this matter was continued on December 15, 2022. At that time, an agreed statement of facts ("Agreed Statement") in support of a joint submission on penalty, executed by counsel for the IC and counsel for Mr. Wolfrom, dated December 14, 2022, was entered as an exhibit. In summary, the Agreed Statement provides that:

1. Mr. Wolfrom was first registered as a member of EGM in 1976 and has been practicing as an engineer in Manitoba since then.
2. Mr. Wolfrom's discipline history with EGM consists of the following:
 - a. November 4, 1994: Mr. Wolfrom was assessed a fine of \$10,000.00 and received a censure resulting from a conviction on the charge that he committed acts of negligence in the practice of engineering and conduct in the practice of professional engineering that was detrimental to the public interest.
 - b. September 25, 2000: Mr. Wolfrom received a reprimand for his conduct in the provision of engineering services and was subject to periodic random inspections for a period of one year.
 - c. November 5, 2002: Mr. Wolfrom was convicted of a charge of negligence in the practice of engineering and was assessed a fine of \$5,000.00.
 - d. August 6, 2004: Mr. Wolfrom was convicted of unskilled practice of professional engineering and/or professional misconduct and accepted a penalty proposal, which included a reprimand, a requirement that he pass the EGM Professional Practice Exam at his own expense, a fine of \$2,000.00 and costs of up to \$2,000.00.
 - e. October 17, 2014: Mr. Wolfrom received a caution for a conviction of professional misconduct.

3. In 2010 and 2011, Wolfrom Engineering Ltd. was involved in the development of the Property. Mr. Wolfrom was the principal of Wolfrom Engineering Ltd.
4. The Property is a condominium complex consisting of townhouse style condominiums. A&S Homes ("**A&S**") was the developer for the Property, and Daniel Serhal Architecture was the architect.
5. During the development of the Property, Mr. Wolfrom provided professional engineering services to A&S in connection with the design of the foundations of the condominiums, including those of 55-455 and 57-455 Shorehill Drive.
6. The construction drawings for the basement den slabs of 55-455 and 57-455 Shorehill Drive called for a 4" concrete slab over a 6 mil poly vapour barrier, over 6" of clean backfill.
7. The owners of 55-455 and 57-455 Shorehill Drive filed claims under the Manitoba New Home Warranty Program ("**Warranty Program**") regarding slab-on-grade settlement issues in their basement dens. On September 3, 2013, the owner of 57-455 Shorehill Drive filed a request for conciliation under the Warranty Program. The owner of 55-455 Shorehill Drive, Mr. John Alksnis, filed a request for conciliation on September 9, 2013.
8. Mr. Ken Drysdale, P. Eng., of Accu-Tech Engineering Inc., was appointed as conciliator. On April 29, 2013, Mr. Joe Solomon of Concrete Restoration Services Ltd. authored a report regarding the slab-on-grade settlement at 57-455 Shorehill Drive (the "**Solomon Report**").
9. Daniel Serhal Architecture asked Mr. Wolfrom to respond to the Solomon Report on May 30, 2013, and again on November 13, 2013. On November 15, 2013, Mr. Wolfrom provided a letter to Daniel Serhal Architecture regarding the slab-on-grade settlement at 57-455 Shorehill Drive (the "**Wolfrom Report**"). Prior to issuing the Wolfrom Report, Mr. Wolfrom was not asked to, nor did he, attend at the Property.

10. On February 20, 2014, Mr. Drysdale issued two decision letters on the requests for conciliation filed by Mr. Alksnis and the owner of 57-455 Shorehill Drive. In the letters, Mr. Drysdale included the Wolfrom Report among the materials he considered. Mr. Drysdale concluded that there was no coverage under the Warranty Program for the slab-on-grade settlement issues at 55-455 and 57-455 Shorehill Drive.
11. On March 13, 2020, Mr. Alksnis submitted a complaint against Mr. Wolfrom to EGM, related to the Wolfrom Report.

As further set out in the Agreed Statement, following receipt of the complaint, a subcommittee of the IC was struck to investigate the complaint. Mr. Wolfrom provided a response to the complaint by letter to the Registrar dated May 11, 2020. Further correspondence ensued between EGM and Mr. Wolfrom, through Mr. Wolfrom's counsel, in late 2020 and early 2021. On February 26, 2021, the subcommittee of the IC issued a memorandum setting out its findings arising out of the investigation. Among the conclusions reached by the subcommittee was that:

In his initial response to the complaint, Mr. Wolfrom noted that his staff had visited the site during construction to review the foundation and, based on the successful outcome of these inspections, that construction occurred in conformance with the design. However, the subcommittee notes that Mr. Wolfrom specifically indicated that he did not assume responsibility for, nor performed inspections for, the construction of the basement floors.

The subcommittee is therefore of the opinion that Mr. Wolfrom's conclusion that the correct materials and appropriate construction techniques were used in the construction of this floor slab was made without sufficient evidence to come to this conclusion.

The IC received the conclusions set out in the subcommittee's memorandum and formulated the Charge on October 25, 2021. On November 3, 2021, the Charge was referred to the Discipline Committee and this Panel was struck.

On November 20, 2021, Patrick Gloux, Ph.D., P. Eng., issued a report to counsel for the IC, which concluded that Mr. Wolfrom had provided a definitive conclusion regarding the cause of the slab settlement, which eliminated other possible causes or contributors without having sufficient evidence to support this conclusion, and accordingly, Mr. Wolfrom had made misleading statements on engineering matters in contravention of Canon 2.6 of the Code.

On December 8, 2022, Roman Hudon, P. Eng., issued a report to counsel for Mr. Wolfrom following his review of the Wolfrom Report, and concluded that Mr. Wolfrom had provided an educated and appropriate response, the only exception being that the word "likely" ought to have been included in the description of what had occurred at 57-455 Shorehill Drive. As a result, the Wolfrom Report was not to mislead the architect or owner, but rather, was to provide the most likely reason for the slab-on-grade settlement.

In the agreed statement, Mr. Wolfrom admitted that he is guilty of professional misconduct and unskilled practice of engineering contrary to s. 46(1)(a)(c)(d) and (e) of the Act as well as a breach of Canons 1.2 and 2.6 of the Code, as a consequence of committing the following acts as particularized in the Charge:

1. That in connection with the preparation and issuance of the Wolfrom Report, Mr. Wolfrom:
 - a. Failed to give his opinion conscientiously and only after conducting an adequate study of the matter under review;
 - b. Failed to employ all reasonably attainable skill and knowledge to perform and satisfy the engineering and geoscientific needs of the task in a professional manner; and
 - c. Made statements on engineering matters in a manner which might mislead, including by:

- i. Failing to consider or provide an explanation of other potential causes of contributors to the slab settlement, despite being aware that other potential causes or contributors had been proposed;
- ii. Making assumptions in connection with the preparation and issuance of the Wolfrom Report without first having sufficient evidence or information to reasonably do so;
- iii. Failing to conduct adequate investigations to support the findings, opinions and conclusions in the Wolfrom Report; and
- iv. Providing a definitive conclusion regarding the cause of the slab settlement that eliminated other possible causes or contributors without having sufficient evidence to support that conclusion.

In the Agreed Statement, the IC and Mr. Wolfrom, through counsel, agreed jointly to a disposition on penalty in relation to the findings of professional misconduct and unskilled practice of engineering.

The joint submission on penalty is that:

- a. Mr. Wolfrom be reprimanded;
- b. Mr. Wolfrom be assessed a fine of \$1,500.00, payable within 14 days from the date of the Order; and
- c. Information relating to the disposition of this matter shall be published in accordance with EGM's policy on publication.

Submissions of Counsel for the Investigation Committee:

Counsel for the IC reviewed the Agreed Statement with the Panel, filed a Book of Legal Authorities with the Panel and spoke to the joint disposition as to penalty.

Counsel for the IC submitted that the proposed penalty is appropriate and pointed the Panel to a previous decision of a panel of the DC in the case of *Re: Phillip M. Dorn, P. Eng.* (May 1, 2012), in which the panel accepted that the factors to be considered in determining an appropriate sanction have been set out by James T. Casey, in *Regulation of Professions in Canada*. In his text, Mr. Casey states that:

The fundamental purpose of sentencing for professional misconduct is to ensure that the public is protected from acts of professional misconduct.

A number of factors are taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases.

Counsel for the IC also pointed out that while this Panel is not bound to accept the joint submission, the authorities make clear that the Panel owes a joint submission a high level of deference, noting a previous DC decision in *Engineers Geoscientists Manitoba v. Syed* (August 23, 2021), in which the DC panel adopted the questions set out in *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43 ("*Anthony-Cook*") in assessing when a panel should depart from a joint submission on penalty:

Does the joint submission on penalty before this discipline panel bring the administration of justice into disrepute or would it otherwise be contrary to the public interest? Is the joint submission so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system?

Counsel for the IC also pointed the Panel to previous DC decisions in analogous cases and noted that in those cases, the members were assessed fines of \$500.00 and \$2,500.00 and were reprimanded. Counsel therefore submitted that the proposed penalty in Mr. Wolfrom's case is proportionate to prior similar cases, and should be accepted by the Panel.

Submissions of Counsel for Mr. Wolfrom:

Counsel for Mr. Wolfrom stated that IC counsel provided a fair overview of the facts and the law.

Analysis:

As set out above, the question before the Panel is whether the joint submission on penalty brings the administration of justice into disrepute or would otherwise be contrary to the public interest. Stated otherwise, is the joint submission so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the justice system?

In order to consider the above question, the Panel first deliberated on how fitting the proposed penalty was, given the repetitive nature of charges and the commonly increasing penalties over the 30-year span of Mr. Wolfrom's disciplinary history. Fundamentally, the issues of past complaints, investigations, charges and resulting cautions, censures, sanctions, fines or penalties all generally imply a lack of understanding of the professional obligations of a registered engineer as outlined in the Act, By-Laws, and Code. This would typically dictate that stronger penalties are necessary to elicit changes in the professional's behaviour. However, the Panel also considered the time that had passed between the subject event and the current date. The Panel further considered Mr. Wolfrom's admission of guilt to the charges in arriving at its decision regarding the joint submission.

The Panel finds that the joint submission does not bring the administration of justice into disrepute nor would it otherwise be contrary to the public interest. Nor, for that matter, would acceptance of the joint submission be so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown of the proper functioning of the professional regulation system.

Accordingly, the Panel accepts the joint submission on penalty presented to it.

Decision:

The Panel therefore finds that Mr. Wolfrom committed professional misconduct and unskilled practice of professional engineering, contrary to s. 46(1)(a)(c)(d) and (e) of the Act and that he contravened Canons 1.2 and 2.6 of the Code of Ethics (adopted December 14, 2000), as a consequence of committing the following acts as particularized in the Charge:

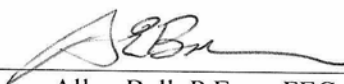
1. In connection with the preparation and issuance of the November 15, 2013 Wolfrom Report regarding the slab-on-grade settlement at 57-455 Shorehill Drive, in Winnipeg, Manitoba, Mr. Wolfrom:
 - a. Failed to give his opinion conscientiously and only after conducting an adequate study of the matter under review;
 - b. Failed to employ all reasonably attainable skill and knowledge to perform and satisfy the engineering and geoscientific needs of the task in a professional manner; and
 - c. Made statements on engineering matters in a manner which might mislead, including by:


- i. Failing to consider or provide an explanation of other potential causes of contributors to the slab settlement, despite being aware that other potential causes or contributors had been proposed;
- ii. Making assumptions in connection with the preparation and issuance of the Wolfrom Report without first having sufficient evidence or information to reasonably do so;
- iii. Failing to conduct adequate investigations to support the findings, opinions and conclusions in the Wolfrom Report; and
- iv. Providing a definitive conclusion regarding the cause of the slab settlement that eliminated other possible causes or contributors without having sufficient evidence to support that conclusion.

The Panel therefore orders, pursuant to ss. 47, 48, and 50 of the Act, that:

- a. Mr. Wolfrom be reprimanded;
- b. Mr. Wolfrom be assessed a fine of \$1,500.00, payable within 14 days from the date of the Order; and
- c. Information relating to the disposition of this matter shall be published in accordance with EGM's policy on publication.

Dated in Winnipeg, Manitoba this 25th day of January, 2023.


Allan Ball, P.Eng., FEC, Chair



Don Spangelo, P. Eng., FEC



Jessica Carvell, Lay Member