



# Gazette

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Discipline Committee of the Association of Professional Engineers of Ontario  
In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990,  
Chapter P.28. And in the matter of a complaint regarding the conduct of

## **Kwang Ray Hsu, P.Eng., and Kwang Ray Hsu, P.Eng., carrying on business as Ray K. Hsu, P.Eng.**

A member of the Association of Professional Engineers of Ontario  
and a holder of a Certificate of Authorization

### **Summary of Decisions and Reasons**

A panel of the Discipline Committee of the association met in the offices of the association on May 21, 1997, to hear allegations of professional misconduct and incompetence against Kwang Ray Hsu, P.Eng., carrying on business as Ray K. Hsu, P.Eng., hereinafter referred to as "Hsu."

William Black, barrister & solicitor of McCarthy Tétrault, appeared as legal counsel for the association. Paul Sullivan appeared as legal counsel for Hsu. The hearing arose as a result of Hsu's involvement in three separate projects,

At the commencement of the hearing, the committee was advised by legal counsel for the association that one of the charges was being withdrawn, the matter was proceeding by way of an Agreed Statement of Facts, and Hsu would be entering a plea of guilty to professional misconduct. Paul Sullivan confirmed this representation by counsel for the association, The Agreed Statement of Facts was filed as an exhibit. The following facts were agreed upon:

#### **With respect to project "A":**

1. Hsu was at all material times a member of the Association of Professional Engineers of Ontario ("PEO"), and Ray K. Hsu was the holder of a Certificate of Authorization,
2. On October 5, 1993, an inspector from the City of Toronto, Building and Inspections Department ("the city"), attended at a house located on Dundas Street West in the City of Toronto, and observed that a wood-framed carport was being erected at the rear of the building. As no building permit had been issued for this carport, the city issued an Order to Comply requiring the owner to submit plans and obtain a building permit.
3. On December 3, 1993, Hsu signed and submitted a permit application together with Drawing No.1, dated October 27, 1993, which he had prepared. The city subsequently issued a building permit for the carport.
4. On February 4, 1994, the city inspector con-

ducted a final inspection using the drawing submitted with the building permit application, and noted the presence of a porch that was not shown on the drawing, and that the carport was not constructed in accordance with the drawing. The city advised the owner and Hsu that the building permit was revoked on the grounds that the plans on which the permit was based contained inaccurate information.

5. PEO engaged Halsall Associates to review the documents and Drawing No.1. Halsall indicated that the actual construction did not match the distances shown on the drawing, and Hsu's actions in not correcting the errors on the drawing were not in keeping with professional engineering standards.

6. It appears that Hsu and Ray K. Hsu prepared a drawing for the purpose of a building permit application, when knew, or ought to have known that the information shown on the drawing did not accurately reflect the construction, contained errors and omissions, and violated applicable city by-laws, and he failed to make provision to comply with the city's requirements.

### **With respect to project "B":**

7. In September of 1995, a citizen was planning to open a restaurant in a building located on King Street West, in the City of Toronto. The citizen began negotiations with the landlord for a lease of the building, which would include the full use of the basement, first and second floors, and the rooftop for a future rooftop patio.

8. Because of the age and previous usage of the building, she sought assurance from the landlord that the building was structurally sound. To that end, she negotiated that the landlord "engage a structural engineer to

test all weight loads for intended use."

9. On April 10, the real estate agent supplied Mr. Hsu with a set of architectural plans and requested that he examine the plans and the site and check approximate building loads. Mr. Hsu sealed, signed and dated a letter report on April 10, 1996, providing an assessment with respect to load bearing capacities of the floors, and the adequacy of the floor beams and joists. On April 27, 1996, the citizen signed an offer to lease with the landlord.

10. During the demolition and renovation work on the building, she became concerned about various aspects of the building structure, and engaged Zoltan Bodroghkozy, P.Eng. to inspect the structural elements made visible by the demolition and recommend corrective actions. .

11. The findings in Bodroghkozy's reports included that: the centre support beam and some floor joists were fire-damaged; some floor joists were cut short and the supporting bearing wall was removed under the short-cut ends; several of the ground floor supporting joists were cracked, split and burned, or heavily notched; some joists and lintels were not adequate for any loading; the wall separating the building from the adjacent structure was missing; the second floor supporting joists framing into the headers at the east and west walls were connected without joist hangers; the second floor supporting laminated beam under the floor joists at the south portion of the building was under-designed; the ground floor supporting joists were not protected when framed into the east and west brick wall as required by the Ontario Building Code, with most of these joists partially and completely decayed at their bearing, having virtually no bearing capacity; the existing 6" x 8" beams under the ground floor joists at the north portion of the

building were not adequate for the assigned loading and resisting sheer forces; and pier #3, which supported the first steel column from the north wall, had no footing.

12. PEO engaged Halsall Associates to attend at the project site and to review Hsu's letter report and Bodroghkozy's reports. Halsall reported that: Hsu's report was basically a statement without clarification of the structural capacities of the floors and roofs of the project; Bodroghkozy's report recorded observations made during demolition work for the construction of the new restaurant in the facility; a variety of unsafe conditions were reported that were not addressed in Hsu's April 10, 1996, report; while there was no complaint that the capacities in Hsu's report were incorrect for the member sizes and spacing in the building, the issue appeared to be that many members were damaged or modified so that the capacities could not, or may not be, achieved; and Hsu's report did not mention the assumptions made to determine the capacity of the floor structure and any of the deficiencies that were clearly evident.

13. Although Halsall saw no evidence that Hsu was engaged to perform a condition survey, in his opinion, it was imprudent of Hsu not to record the evidence of deterioration in his April 10, 1996, report, noting that Hsu's unqualified report is easily misinterpreted.

14. Halsall concluded that: Hsu's report was deficient, if only because of its brevity, making it misleading even if the underlying assumptions were correct; he did not adequately layout the basis of his opinion; these matters represented inadequate practice, management and communication; he did not appear to understand the potential risks associated with presenting conditions without explaining their origin; and the

standard of care was below that expected of professional engineers.

**By reason of the facts aforesaid, it was agreed by Kwang Ray Hsu, P.Eng., and Ray K. Hsu, P.Eng., that they were guilty of professional misconduct as defined in Section 28(2)(b) of the Professional Engineers Act, R.S.O. 1990 Chapter P28 as defined in Regulation 941.**

No witnesses were called by either party.

Paul Sullivan, on behalf of Hsu, entered a guilty plea to the charges of professional misconduct as defined in Section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990 Chapter P28, which prescribes as follows:

"28(2) A member of the association or a holder of a Certificate of Authorization, a temporary licence or a limited licence may be found guilty of professional misconduct by the committee if:

"(b) the member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations."

The committee accepted Hsu's guilty plea to professional misconduct.

**Counsels for the parties submitted that the sections of Regulation 941 applicable to Hsu's professional misconduct were Section 72(a) "negligence" and Section 72(j) "unprofessional conduct," as follows:**

**Section 72(2)(a): "negligence" as defined at Section 72(1): "In this section, 'negligence' means an act or omission in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances";**

**Section 72(2)(j): "conduct or an act relevant to the practice of professional engineering that,**

having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.”

Both counsels submitted that whilst the conduct of Hsu was not disgraceful or dishonourable, it was unprofessional.

After considering the evidence and the exhibits filed, the committee accepted the joint submission by counsels with respect to Section 72(2)(a) and Section 72(2)(j), with respect to unpro-

fessional conduct or an act only.

On the basis of the guilty plea in the Agreed Statement of Facts, counsels for the association and Hsu entered a joint submission as to penalty. By virtue of the power vested in it by Section 28 of the Professional Engineers Act, the committee ordered that:

1. Hsu and his Certificate of Authorization be suspended for a period of four months, the suspension to be suspended provided that the following

terms and conditions are complied with within one year of this order:

(a) at agreed intervals (relating to milestones on projects on which the practitioner is involved) an inspector appointed by PEO shall attend at the practitioner's offices to review the state of ongoing projects and develop procedures with Hsu within these projects. At the conclusion of the year (or earlier if appropriate), the inspector will prepare a report for PEO;

(b) Hsu shall bear the cost of such inspections up to a maximum of \$1,000;

(c) Hsu shall attend the PPE course and pass the PPE examination;

(d) Hsu shall attend and pass course 92-CIV-A2, Elementary Structural Design, from the CCPE Syllabus of examinations, or alternatively pass the equivalent confirmatory examination designated by PEO;

(e) In the event that Hsu fails to meet the conditions set out above by May 21, 1998, his licence will be suspended for a four-month period effective on that date;

(f) that the matter be published forthwith in the official journal of the association without names or project identifiers;

(g) in the event that the conditions are not met and there is a suspension, the Decision be published in summary form in the official journal of the association with the name of the engineer.

Dated at Toronto this 12th day of September 1997

Jag Mohan, P.Eng. (Chair)

For and on behalf of the committee:

Barry Batchelor, P.Eng.

Richard Braddock, P.Eng.

William Fredenburg, P.Eng.

Ed Rohacek, P.Eng.

### Note from Legal and Professional Affairs

Mr. Hsu subsequently attended and successfully passed course 92-CIV-A2, Elementary Structural Design. He also attended and wrote the Professional Practice Examination, but failed to pass it within the stipulated time frame. As a result, his licence was suspended for four months, effective May 21, 1998.

## Divisional Court finds fault with PEO discipline hearings

On March 25, 1998, the Divisional Court of the Ontario Court of Justice released its decision of a Judicial Review of a decision of a PEO discipline panel. Because of PEO's handling of the particular complaint of professional misconduct against a PEO member, the Court quashed the discipline

panel decision, and ordered PEO to rehear the complaint (and a related one that had been handled similarly) with newly constituted discipline panels. This article summarizes the Divisional Court decision, and discusses how PEO is responding to it.

On March 23, 24 and 25, 1998, the Divisional Court of the Ontario Court of Justice heard a Judicial Review of a decision of a PEO discipline panel, regarding a complaint of professional misconduct against a PEO member.

The Divisional Court hearing arose as a result of a previous motion the member had made to PEO's discipline panel to stay

the complaint of professional misconduct. The member claimed in the motion that the Complaints Committee had lacked jurisdiction to hear the complaint, and that there was a reasonable apprehension of bias in the process by which the discipline panel had been selected, including institutional bias. The member also raised arguments relating to the definition of the

practice of engineering, investigation of a member without the member's knowledge, delay, breaches of the secrecy provisions of section 38 of the *Professional Engineers Act*, and Crown immunity. The Discipline panel refused to stay the complaint. The member then brought an application for a Judicial Review of this decision to the Divisional Court. The Court released its

Decision and Order on March 25, 1998.

### Summary of Divisional Court Decision

◆ *Jurisdiction.* The member claimed that the Complaints Committee lacked jurisdiction to hear the complaint because the complainant's signature on the formal written complaint

had been "pasted" to the document by PEO staff. The Court dismissed this claim on the grounds that when the complaint was considered by the Complaints Committee, it was in the form subsequently approved by the complainant. The Court also did not believe that the action of "pasting" the signature prejudiced the case against the member. However, the Court did not approve of the general practice of staff "pasting" signatures onto complaints.

The member also claimed that the Complaints Committee had lost jurisdiction to hear the complaint because it had not examined all records relating to the complaint. Again, the Court dismissed this claim, noting the complexity of the case and the volume of material to be examined. Although the Court did not approve of PEO staff selecting the documentation to be reviewed, it recognized that the Complaints Committee had examined most of the relevant material, including the material the member had submitted in the member's own defence. The Court therefore had concluded that an examination of the material omitted would not have changed the decision of the Complaints Committee to refer the complaint to discipline.

◆ *Practice of engineering.* The member argued that the conduct that was the subject of the complaint was not within the definition of the practice of professional engineering as defined in the *Professional Engineers Act*. The Court found that the PEO discipline panel was correct in concluding that the conduct was within the practice of engineering.

◆ *Violation of secrecy provisions in the Act.* The member cited subsection 38 of the *Professional Engineers Act*, which requires that information obtained by PEO and those in its employ in connection with a discipline

matter remain confidential except as required to administer the discipline process. In this case, the Court determined that one of PEO's experts breached the secrecy requirements, but against PEO's specific instructions. The Court found that PEO staff also shared more information than necessary with the complainant, which the Court felt was inappropriate.

◆ *Delay, Crown immunity.* Because the member withdrew these aspects of the member's motion to the discipline panel, the Court made no ruling on them.

◆ *Investigation of a member without the member's knowledge.* The member claimed that a letter requesting information sent to the member from PEO staff, which did not disclose that the member was being investigated, was prejudicial to the member. The Court found that PEO's discipline panel was correct in expressing concern about this practice, but also correct in concluding that there had been no prejudice to the member, because no information had been provided to PEO as a result of the letter.

◆ *Reasonable apprehension of bias, including institutional bias.* Counsel for all parties agreed that the legal test for reasonable apprehension of bias is an objective test of whether a reasonably well-informed observer could reasonably apprehend that an adjudicator might not act in an entirely impartial manner. Using this test the Court concluded that a reasonable apprehension of bias did exist. The Court found that in this case PEO staff investigated, prosecuted and participated in selecting the members of the discipline panel. Staff also advised the Discipline Committees as a whole.

The Court found that, in this case, staff influenced PEO's expert to amend the expert's report. It also found that PEO staff had allowed the com-

plainant to exercise undue influence over the progress of the complaint for the complainant's own purposes, which PEO knew were contrary to the member's position.

On the selection of discipline panels, PEO argued that staff selection of panel members should not be an issue, since Council had already approved the makeup of the Discipline Committee, the pool from which panel members are drawn. However, the Court found that this position failed "to take into account the reality that, although the candidates for a particular panel have already been determined suitable for Discipline Committee work, the individuals have different personalities, interests, strengths and weaknesses, and track records on discipline matters, "of which PEO staff would be aware. The Court concluded that when staff's role as investigator, prosecutor, general advisor to the Discipline Committee and selector of discipline panels is viewed in addition to staff's conduct in this particular case, "a reasonably well-informed observer could reasonably apprehend that the tribunal so selected might not act in an entirely impartial manner."

The Court saw no need to deal with the more general issue of institutional bias.

## Divisional Court order

To address its findings, the Court ordered that the complaint of professional misconduct against the member be referred to "an entirely differently constituted panel of the Discipline Committee to be chosen by the Council of the PEO without any involvement of the PEO staff." It also ordered PEO to pay costs of \$15,000 to the member.

Because a connected complaint against another PEO member

had been handled by PEO in a similar manner, the Court ordered that the decision of the discipline panel that heard this complaint be quashed, and that the complaint also be referred to a new panel chosen by the Council of the PEO without the involvement of staff. It ordered PEO to pay costs to this member of \$7,500.

## PEO response to ruling

In its ruling, the Divisional Court took issue with some practices and procedures forming part of PEO's discipline process. The practices and procedures have now all been changed or are being reviewed, to bring them in line with the Court's findings.

PEO's recently appointed Admissions, Complaints, Discipline and Enforcement Task Force, chaired by Justice Douglas Carruthers, Q.C., is reviewing PEO's admissions, complaints, discipline and enforcement procedures, policies and practices, as well as relevant legislation. The review is aimed at recommending improvements to the association's regulatory processes (see *Engineering Dimension*, July/August 1998, p. 15 and September/October 1998, p. 11.)

The task force expects to complete its task late this year, or early in 1999. It welcomes written comments on any matter relating to admissions, complaints, discipline and enforcement policies and procedures. Comments should be directed to:

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