

DECISION AND REASONS

In the matter of a discipline hearing under the *Professional Engineers Act* and in the matter of a complaint regarding the conduct of SULI BRAUNSHTEIN, P.ENG., a member of the Association of Professional Engineers of Ontario.

The matter came on for hearing before a panel of the Discipline Committee on August 12, 2009, at the Association of Professional Engineers of Ontario (association) in Toronto. The panel heard closing arguments with respect to penalty on January 11, 2010. The association was represented by Aviva R. Harari. The member was not present and was not represented. David P. Jacobs acted as independent legal counsel (ILC).

THE ALLEGATIONS

The allegations against Suli Braunshtein, P.Eng. (Braunshtein or the member), as stated in the Statement of Allegations dated February 10, 2009, and signed by the chair of the Complaints Committee, are as follows:

1. Braunshtein was at all material times a member of the Association of Professional Engineers of Ontario (PEO).
2. In or about March 2005, Braunshtein provided structural engineering services, including drawings bearing his engineering seal, with regards to a project at 1050 Stevenson Road South in Oshawa, Ontario. This project included a structural design by Braunshtein of a large, approximately 33 m x 24 m (108 ft x 78 ft), pre-engineered metal clad building for a switchgear and control building for Hydro One. A permit application was submitted to the City of Oshawa using Braunshtein's structural design drawings.
3. In or about December 2005, the City of Oshawa building department reviewed the Braunshtein drawings and found issues with the structural design and drawings. Braunshtein was asked for clarification on the issues; however, he was not available and did not respond.
4. Building permit review of the structural design noted a number of items, including the following issues:
 - (a) drawings were missing applicable codes and standards;
 - (b) design snow loading noted was below minimum required;
 - (c) drawings noted National Building Code (NBC) 95 and not the required Ontario Building Code (OBC) 1997;
 - (d) drawings were missing applicable design loads for roof structure;
 - (e) material standards were not the latest version as required;
 - (f) minimum yield strength of the steel on drawings was below the latest required strength;
 - (g) unacceptable (sealed) drawings as they contained no title blocks or project specific information; and
 - (h) confusing statements and design information on drawings.
5. Other concerns regarding the work of Braunshtein include the following:
 - (a) design contained both metric and imperial dimensions, when notes indicate "all dimensions in metric";
 - (b) loading combinations listed did not conform with the OBC;
 - (c) base plate details and notes were not consistent;
 - (d) noted column loading was unclear as to service or factored loads;
 - (e) material specifications and requirements did not comply with current requirements;
 - (f) design did not conform to the OBC;
 - (g) provided work that did not meet the minimum or acceptable standard of a reasonable and prudent practitioner; and
 - (h) provision of professional engineering services to the public without a Certificate of Authorization (C of A).
6. It is alleged that Braunshtein:
 - (a) provided professional engineering services to the public without a C of A;
 - (b) in providing professional engineering services to the public, he committed acts or made omissions that con-

- stitute a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances;
- (c) failed to make reasonable provision for the safeguarding of life, health and property regarding the structural design of a large switchgear and control building project;
 - (d) failed to make reasonable provision for complying with the OBC regarding part 4 requirements; and
 - (e) acted in a disgraceful, dishonourable and unprofessional manner.
7. It is alleged that Braunshtein is incompetent as defined in section 28(3)(a) of the *Professional Engineers Act* and is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*.

PLEA

The member was not present.

The Notice of Hearing had been sent to the member by registered mail on May 29, 2009. Association counsel tabled email messages received from the member. On August 10, 2009, the member indicated that he was “not able to attend this tribunal” and he did “agree previously with all sentences what we discussed.” On August 12, 2009, he indicated, “Please excuse me, I am sick and cannot attend.” Association counsel advised there was no consent to a written hearing, but that there was an Agreed Statement of Facts (ASF) and a penalty agreement, both having been signed by the member.

As the member was not present and the panel was unable to conduct a plea inquiry of the member, the chair entered a plea of not guilty on behalf of the member.

OVERVIEW

The member received his licence in 1980. His expertise and experience were as a mechanical engineer. The allegations relate to structural engineering matters.

EVIDENCE

Association counsel filed an ASF, which indicated:

1. Braunshtein was at all material times a member of PEO. At all material times, Braunshtein did

not hold a C of A issued by PEO allowing him to offer or engage in the business of providing professional engineering services to the public.

2. In or about March 2005, Braunshtein provided structural engineering services, including drawings bearing his engineering seal, with regards to a project at 1050 Stevenson Road South in Oshawa, Ontario. This project included a structural design by Braunshtein of a large, approximately 33 m x 24 m (108 ft x 78 ft), pre-engineered metal clad building for a switchgear and control building for Hydro One. A permit application was submitted to the City of Oshawa, using Braunshtein’s structural design drawings.
3. In or about December 2005, the City of Oshawa building department reviewed the Braunshtein drawings and found issues with the structural design and drawings. Braunshtein was asked for clarification on the issues; however, he was not available and did not respond.
4. Building permit review of the structural design noted a number of items, including the following issues:
 - (a) drawings were missing applicable codes and standards;
 - (b) design snow loading noted was below minimum required;
 - (c) drawings noted NBC 95 and not the required OBC 1997;
 - (d) drawings were missing applicable design loads for roof structure;
 - (e) material standards were not the latest version as required;
 - (f) minimum yield strength of the steel on drawings was below the latest required strength;
 - (g) unacceptable (sealed) drawings as they contained no title blocks or project specific information; and
 - (h) confusing statements and design information on drawings.

5. Other concerns regarding the work of Braunshtein include the following:
 - (a) design contained both metric and imperial dimensions, when notes indicate “all dimensions in metric”;
 - (b) loading combinations listed did not conform with the OBC;
 - (c) base plate details and notes were not consistent;
 - (d) noted column loading was unclear as to service or factored loads;
 - (e) material specifications and requirements did not comply with current requirements;
 - (f) design did not conform to the OBC; and
 - (g) provided work that did not meet the minimum or acceptable standard of a reasonable and prudent practitioner.

6. Braunshtein admits that he:
 - (a) breached section 12(2) of the *Professional Engineers Act* by providing professional engineering services to the public without holding a C of A issued by PEO;
 - (b) in providing professional engineering services to the public, committed acts or made omissions that constitute a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances;
 - (c) failed to make reasonable provision for the safeguarding of life, health and property regarding the structural design of a large switchgear and control building project;
 - (d) failed to make reasonable provision for complying with the OBC regarding part 4 requirements; and
 - (e) acted in a disgraceful, dishonourable and unprofessional manner.

7. Braunshtein is incompetent as defined in section 28(3)(a) of the *Professional Engineers Act* and is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*.

8. The provisions of section 72(2) of Regulation 941 relevant to this misconduct are:
 - (a) SECTION 72(2)(A): negligence, which is defined in section 72(1) as “an act or an 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”;
 - (b) SECTION 72(2)(B): failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work for which the practitioner is responsible;
 - (c) SECTION 72(2)(D): failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, bylaws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
 - (d) SECTION 72(2)(G): breach of the act or regulations, other than an action that is solely a breach of the Code of Ethics;
 - (e) SECTION 72(2)(H): undertaking work the practitioner is not competent to perform by virtue of the practitioner’s training and experience; and
 - (f) SECTION 72(2)(J): conduct or an act relevant to the practice of professional engineering that, having regard to all of the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

9. The member has obtained independent legal advice, or has had the opportunity to obtain independent legal advice, with respect to his agreement to the facts set out herein.

The ASF was dated June 4, 2009, and signed by counsel for PEO and the member. Association counsel advised that the ASF was prepared and sent to the member, and a copy signed by the member was subsequently received by the association. Counsel for PEO was not present at the time of signing and there was no other witness to attest to the authenticity of the member’s signature.

Association counsel indicated no further evidence or witnesses were to be called. The ASF supported the allegations, and argued that clauses 7 and 8 constituted an admission of guilt by the member. In response to questions from the panel, the association provided the panel with a copy of the report of an expert witness for PEO. This nine-page report, signed and sealed by a principal of a consulting engineering firm, was available to the member in the complaint investigation process.

The expert report provided a detailed review of the documentation relating to the building project in question. The expert validated the concerns identified by the City of Oshawa building department. The expert analysis concluded that the design package submitted by the member did not meet the minimum acceptable standard for structural engineering drawings, and that the errors, omissions and deficiencies would not be expected of a reasonable and prudent practitioner.

Association counsel argued that the member admitted to providing engineering services to the public without holding a C of A as prescribed under section 12(2) of the *Professional Engineers Act*. A finding of professional misconduct under section 28(2)(b) of the act was in order as the provisions of Regulation 941, sections 72(2)(a), 72(2)(b), 72(2)(d), 72(2)(g), 72(2)(h) and 72(2)(j) relevant to misconduct were substantiated by the ASF. The association submitted that the totality of the evidence in the ASF and, in particular, the admission that the member was practising without a C of A, providing service outside his area of expertise and the lack of response to remedy deficiencies, supported a finding of incompetence.

ILC highlighted the constraints with respect to admissibility of evidence under section 30(6) of the *Professional Engineers Act*. Section 28(3)(a) of the act stipulates that findings of incompetence apply where a member's action demonstrates "of a nature or to an extent" they are unfit to carry out the responsibilities of a professional engineer. The onus to prove the allegations lies with the association. Proof must be based on a balance of probabilities.

DECISION

The panel accepted that the member contravened section 12(2) of the act by providing engineering services to the public without a C of A. The evidence was clear and compelling to support a finding that the member was guilty of misconduct under section 28(2)(b) of the act and contravened sections 72(2)(a), 72(2)(b), 72(2)(d), 72(2)(g), 72(2)(h) and 72(2)(j) of Regulation 941. This conduct would reasonably be regarded by the engineering profession as disgraceful, dishonourable and unprofessional.

The panel determined that the burden of proof to satisfy the broad provisions to sustain a finding of incompetence was not met, and did not support a finding of guilty with respect to section 28(3)(a) of the act.

REASONS FOR DECISION

The ASF was received by the panel. The member was not present and there was no evidence to corroborate the member's signature. The panel accepted that the report providing expert services would have been available to the member in the complaint investigative process. The report signed and sealed by the principal of a consulting engineering firm validated the issues and concerns identified by the building department and reiterated in the allegations. The balance of probability was satisfied and supported a decision of guilty with respect to misconduct.

The panel accepted that the member did not act according to the standard of practice of the profession as it related to this incident where matters entailed structural engineering. There was no evidence of repeat occurrences of such conduct. There was no evidence on which the panel could assess the member's competency in his area of expertise, mechanical engineering. The evidence before the panel did not support the serious allegation of incompetence. Accordingly, the panel found the member not guilty of incompetence as alleged.

PENALTY SUBMISSION

Association counsel filed a document as a penalty agreement. The agreement, dated June 4, 2009, was processed in like manner to the ASF. There was no witness to attest to the authenticity of the member's signature. The penalty proposed under the agreement was:

1. a six-month suspension of Braunshtein's P.Eng. licence;
2. a reprimand by the Discipline Committee, the fact of which shall be recorded on the register for an unlimited period of time;
3. that it shall be a limitation and restriction on Braunshtein's licence that he only engage in the

practice of professional engineering in the area of mechanical engineering;

4. that it shall be a limitation and restriction on Braunshtein's licence that he shall not be designated as an engineer responsible to supervise the professional engineering work of a C of A holder;
5. this matter shall be published, including reference to names, in the official publication of the association; and
6. there shall be no order with respect to costs.

Association counsel outlined how the proposed penalty satisfied the principles relevant to penalty, namely:

- (a) protection of the public;
- (b) maintenance of the reputation of the profession to regulate;
- (c) the objective of general deterrence;
- (d) the objective of specific deterrence; and
- (e) rehabilitation of the offender.

Association counsel indicated that mitigating factors in formulating the penalty proposal were that the member had been licensed for 29 years and there were no previous occurrences.

ILC advised a Joint Submission as to Penalty should generally be accepted. It should not be rejected or taken lightly unless there is good reason to do so. The panel needs to have good cause to alter. The supporting principle for change would be that the proposed sentence would bring the administration of justice into disrepute or is, otherwise, not in the public interest.

The panel questioned the appropriateness of the proposed penalty, particularly as it related to rehabilitation and the profession's responsibility under the act to serve and protect the public interest. The panel noted that the member was not present and was not aware of the decision with respect to the allegations. There was no evidence that the member had obtained legal assistance in his determination to agree to the penalty submission.

The chair of the panel indicated: "It is the respectful view of the panel that the PEO Code of Ethics must be held in the highest regard; otherwise the

safety of the public may be seriously compromised and the profession will be brought into disrepute. In fact, being competent in the performance of any professional engineering services that are undertaken can be argued to be the most important aspect of PEO's ethics with regard to protecting the public. Even a single violation of this competency principle warrants a need to verify that person's ethics."

The panel expressed concern that the joint submission might bring the administration of justice into disrepute. As a result, the panel indicated it will provide dates for the parties to attend in the future to address the panel's concern, specifically on the issue of ethics, which is normally addressed by the professional practice exam (PPE). The parties are requested to address if the inclusion of the PPE in the penalty is appropriate in this instance. It was decided that, if either or both parties did not attend at the hearing, the panel would proceed with a decision without them.

The panel reconvened on January 11, 2010. The member was not present, and was not represented by legal counsel. It was confirmed that the member had been notified by registered mail as to the date of the hearing scheduled for that day. Association counsel advised the prosecution had received an email from the member on January 8, 2010, indicating that he was sick. This was confirmed in a telephone call from the member on January 11, 2010, when he further stated he would not be attending, but accepted the penalty.

Association counsel reiterated her argument as to the penalty agreement and the basis on which the five principles relevant to penalty were satisfied. It was submitted that the responsibility to regulate in the public interest was satisfied through the restrictions on the member and his licence in the penalty. The association argued that the allegations before the panel did not include a breach of the Code of Ethics. The association further submitted that the panel's decision was limited to misconduct and did not extend to incompetence as defined in section 28(3)(a) of the act. Association counsel argued that the penalty agreement was appropriate in these circumstances and that an additional sanction, such as a requirement to pass a PPE, was unnecessary to satisfy the regulator's mandate.

Association counsel indicated there were a number of mitigating factors in arriving at the proposed penalty. The member had co-operated throughout the process and accepted responsibility for his actions. He was in agreement with the restrictions to his involvement as a professional engineer. The member is beyond normal retirement age and is not presently involved in the practice of engineering. Association counsel was of the opinion the penalty proposed was fair and reasonable in these circumstances.

ILC advised that the association counsel's arguments were supported by regulatory jurisprudence. Parties should have a reasonable expectation that the results of a negotiated settlement will be accepted. The panel should respect such negotiated settlement, unless it was contrary to the public interest or would bring the administration of justice into disrepute.

PENALTY DECISION

The panel, in rendering the decision, indicated the panel was concerned that its ability to act was compromised, particularly as it related to the Code of Ethics, and that this was aggravated by the absence of the member at the hearing. The panel, nonetheless, affirmed the penalty agreement and ordered:

1. a six-month suspension of Braunshtein's engineering licence;
2. a reprimand, the fact of which shall be recorded on the register for an unlimited period of time;
3. that there be a limitation and restriction on Braunshtein's licence that he only engage in the practice of professional engineering in the area of mechanical engineering, unless otherwise ordered by the Discipline Committee;
4. that there be a limitation and restriction on Braunshtein's licence that he shall not be designated as an engineer responsible to supervise the professional engineering work of a C of A holder, unless otherwise ordered by the Discipline Committee;

5. the matter shall be published, including reference to names, in the official publication of the association; and
6. there be no order with respect to costs.

REASONS FOR PENALTY DECISION

The panel deemed that the penalty agreement between the association and the member had been resolved with a reasonable expectation of acceptance. The public interest was served by the agreement. The restrictions to the member's practice of engineering were appropriate in this instance, but need not be a precedent should there be other situations where an engineer might engage in practice outside their area of expertise. The reprimand can be delivered in writing and the fact will be recorded on the register. The member may, in future, make an application to remove the limitation and restrictions, and such may be granted in whole or in part if the circumstances so warrant.

The member, by his actions in not attending or having a representative attend the hearing on his behalf, demonstrated that efforts to deliver an oral reprimand would be futile. The member had, through association counsel, affirmed acceptance of the penalty. The panel determined that this indicated the member effectively waived his right of appeal and that a reprimand, in writing, should proceed. The chair, on behalf of the panel, delivered the reprimand in writing.

The written Decision and Reasons was signed by Albert Sweetnam, P.Eng., on March 26, 2010, as chair on behalf of the other members of the discipline panel: Roydon Fraser, P.Eng., Santosh Gupta, P.Eng., Rishi Kumar, P.Eng., and David Robinson, P.Eng.

DISCIPLINE HEARING SCHEDULE

OCTOBER 6-7, 2010

PAUL S.C. LIM, P.ENG., and P. LIM AND ASSOCIATES LTD.