

DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, and in the matter of a complaint regarding the conduct of PAUL SIEW CHOON LIM, P.ENG., a member of the Association of Professional Engineers of Ontario, and P. LIM & ASSOCIATES LIMITED, a holder of a Certificate of Authorization.

This matter was presented for a hearing before a panel of the Discipline Committee on October 8 and 9, 2008, and November 26 and 27, 2008, at the Association of Professional Engineers of Ontario (association) in Toronto.

The association was represented by Neil J. Perrier, Paul Siew Choon Lim, P.Eng., and P. Lim & Associates Limited were represented by Ryan Stewart Breedon, and David P. Jacobs acted as independent legal counsel to the panel.

THE ALLEGATIONS

The allegations against Paul Lim, P.Eng. (Lim or member), and P. Lim & Associates Limited (L&A or holder) as stated in the Notice of Hearing dated May 28, 2007 presented by counsel for the association are in summary:

1. The member and holder are guilty of professional misconduct as follows:
 - (a) provided an HVAC design that was not compliant with current Ontario Building Code (OBC) requirements for the proposed single-family residences at 2349 and 2350 Woodfield Road, Oakville, Ontario;
 - (b) failed to specify the system to provide the requirements of his designs;
 - (c) provided HVAC designs and drawings that did not include referencing of guidelines or requirements of the system and equipment supplier;
 - (d) did not provide a revised HVAC design for the significant modification to the Model T5 after it was requested from the Town of Oakville;
 - (e) provided HVAC designs that were incomplete; and
 - (f) undertook work that the practitioner was not competent to perform.

2. It is alleged that Lim is guilty of incompetence as defined in the *Professional Engineers Act*, and that Lim and L&A are guilty of professional misconduct as defined in the *Professional Engineers Act*.

Incompetence is defined in section 28(3)(a) as: “The member or holder has displayed in his or her professional responsibilities a lack of knowledge, skill or judgment or disregard for the welfare of the public of a nature or to an extent that demonstrates the member or holder is unfit to carry out the responsibilities of a professional engineer.”

Professional misconduct is defined in section 28(2)(b) as:

“The member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations.”

The sections of Regulation 941 made under the said act and relevant to this misconduct are:

- (a) **SECTION 72(2)(a):** negligence as defined at section 72(1): In this section negligence means 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 a practitioner;
- (d) **SECTION 72(2)(e)**: signing or sealing a final drawing, specification, plan, report or other document not actually prepared or checked by the practitioner; and
- (e) **SECTION 72(2)(h)**: undertaking work the practitioner is not competent to perform by virtue of the practitioner's training and experience.

OVERVIEW

The hearing arose as a result of the member's alleged involvement in the design of heating, ventilating, and air conditioning (HVAC) distribution systems that were installed in townhouses constructed by a local builder, Fernbrook Homes (Fernbrook), on Woodfield Road in Oakville, ON. The member provided at least two standard generic designs to HVAC Designs Ltd. (HVAC Designs): one for a Model T3 townhouse and the second for a Model T5 townhouse. Richard and Christine Ballard purchased a townhouse constructed at 2350 Woodfield Road, Oakville, using a modified T5 design. The standard HVAC system was not altered to account for the differences between the standard Model T5 and the modified Model T5. Several of the purchasers experienced a significant lack of heating and cooling in the houses after they occupied them in 2001. They complained that the temperatures in the houses were uncomfortable and the noise level of the ventilation system was high.

After considerable communications with the Town of Oakville (town), investigations and reports from M.V. Shore Associates (1993) Limited and J.D. Hubbert, P.Eng. (Hubbert), of J.D. Hubbert & Associates, and consultations with Dara G. Bowser, certified building technologist consultant, seven residents of Woodfield Road and D.G. Bowser filed a Form of Complaint against Lim on October 20, 2006. Subsequent to the review of the complaint by the Complaints Committee of the association under section 24 of the act, the matter was referred to the Discipline Committee. The association issued a Notice of Hearing to the member and the holder on May 28, 2007.

PLEA BY MEMBER AND HOLDER

The member and holder denied the allegations set out in the Notice of Hearing.

AGREED STATEMENT OF FACTS

Counsel for the association, on consent of the parties, presented the panel with an Agreed Statement of Facts as follows:

1. Lim was, at all material times, a member of the Association of Professional Engineers of Ontario (PEO).
2. At times material to the conduct of Lim and until September 14, 2001, P. Lim Design Services Limited was the holder of a Certificate of Authorization (C of A) to offer and provide to the public services that are within the practice of professional engineering under C of A number 11453265, and was responsible for supervising the conduct of its employees and taking all reasonable steps to ensure that its employees, including Lim, carried on the practice of professional engineering in a proper and lawful manner. The Ontario corporation number for P. Lim Design Services Limited was #682335. Lim was the professional engineer responsible for the services provided by P. Lim Design Services Limited.
3. On May 4, 2001, P. Lim Design Services Limited filed Form 3 Articles of Amendment with the Ministry of Consumer and Commercial Relations for the Province of Ontario, changing the corporation's name from P. Lim Design Services Limited to P. Lim & Associates Limited. The Ontario Corporation Number for L&A continued to be #682335.
4. At all other material times, L&A has been the holder of a C of A to offer and provide to the public services that are within the practice of professional engineering, under the same C of A number (11453265), and was responsible for supervising the conduct of its employees and taking all reasonable steps to ensure that its employees, including Lim, carried on the practice of professional engineering in a proper and lawful manner. Lim was the professional engineer responsible for the services provided by L&A.

THE EVIDENCE

Counsel for the association presented four witnesses:

- John Tutert (Tutert), manager building services, building services department, Town of Oakville;
- Patricia Kent (Kent), complainant, owner 2349 Woodfield Road;
- Christine Ballard (Ballard), complainant, owner 2350 Woodfield Road; and
- Greg A.S. Allen (Allen), P.Eng., expert witness.

From the testimony of Tutert, the panel found relevant the following:

- He had no knowledge of the contractual relationship between Lim and the subdivision developer;
- The two houses that are the basis of the complaint against Lim fall under Part 9 of the OBC. Part 9 does not require an engineer for their design, nor for a field review;
- It is not unusual for an engineer to seal a generic design for these types of projects;
- The house for 2350 Woodfield Road was changed from a Model T5 to a modified T5. Lim did not make changes to his HVAC design. The town did not ask Lim to make changes. At the time the permit was issued for 2350 Woodfield Road, the design met requirements;
- He knows of no objection to the heat loss calculations for 2350 Woodfield Road, a modified T5 townhouse, dated October 8, 2004, and faxed to the town on October 12, 2004 (Exhibit 17); the number of 52.6 MBH is correct using the ASHRAE method; and
- In response to complaints from the residents on Woodfield Road about the lack of heating in the homes, the town hired Hubbert & Associates to review the HVAC situation in the townhouses. Hubbert & Associates recommended that the dual-purpose boilers that provided hot water for domestic purposes and for the furnace heat exchanger be replaced with larger capacity units. The boilers were changed in the townhouses by the owners, either voluntarily or by order of the town.

From the testimony of Kent, the panel found relevant the following:

- Since the time she moved into the townhouse, she has had problems with the HVAC system. Heating and cooling were insufficient and the system was noisy. They had to use supplemental heating; and
- The boiler was replaced in her house and there are still problems. The witness did not elaborate on the problems except to say that the system is noisy.

From the testimony of Ballard, the panel found relevant the following:

During examination-in-chief:

- The witness moved into 2350 Woodfield Road in April 2000. There were problems with the HVAC system. In the summer, the house was hot; the air-conditioner ran all the time but did not cool the house. The house was stuffy; the air filters never got dirty. In the winter, they had to use portable heaters to get sufficient heating. To maintain humidity in the winter, they have had to keep water in containers and in the bathtub. The system is still noisy;
- The house had been modified from the original design; 140 square feet were added, as well as a total of 13 windows in the SE and SW walls, and a walkout from the basement; and
- The HVAC system was changed in her house in 2008; she is now satisfied. The hot water boiler had been previously changed to get more hot water.

During cross-examination:

- The witness did not engage Lim or have any dealings with him;
- She acknowledges Hubbert made recommendations for her house in reports prepared for the town. The reports presented as evidence stated in summary:
 - The heat losses of the units are somewhat larger than what was calculated and used as the basis of the design due to the actual buildings being slightly different than the original plans—exposed side walls where the plans appear to portray adjoining buildings,
 - The majority of the units, all of the west side units, have been constructed with rear basement floors at grade level and additional glass and doors were installed. We believe that the builder failed to refer the changes to the heating contractor and his designer for a re-evaluation before construction was complete,
 - The hot water tanks for the combined use of domestic hot water and space heating have limited output and insufficient capacity,
 - The high-velocity air handler used to heat the air for heating will provide enough heat, but it does not deliver the airflow capacity sufficient to handle the cooling systems without special coils and controls,
 - We also were told by several residents that the rooms on the north side tend to be quite cold when there is a cold wind blowing. This leads us to believe that

- there is an envelope leakage that exceeds what was calculated in the heating design,
- Our original heat loss calculations showed that the capacities of the three models investigated were very close to the results in the load estimates prepared by HVAC Designs. However, after reviewing the actual construction of the models examined, we found that the buildings are not adjoining as the Hunt architectural design floor plans had suggested, but were, in fact, separated by a walkway-sized space, with the only adjoining wall being the garage wall,
 - In the Ballard residence, the ensuite bathroom is large with two windows, and the one outlet is insufficient for heating the room,
 - The return air duct system is not performing, and drawing adequate air from the top floor is not possible. The contractors have to rework the system to ensure that the top floor returns will draw at least the amount of air supplied to that floor,
 - The final Hubbert report states that the air handler in the houses has a published fan curve of 1100 cfm. However, Hubbert, in tests, could only obtain an air output from the HVAC unit of between 800 and 900 cfm. The report notes that three other people had also tested the air supply and they measured airflows in the same range, with the majority around 800 cfm, and states there is an insufficient air supply to handle the cooling loads, and
 - The recommended solution was to refer the matter back to the builder and his design team to examine the entire site, recalculate the heat loads based on the as-built conditions, and rework the heating distribution and reapportion the outlets accordingly;
 - The witness acknowledges the report prepared on the HVAC system in her townhouse by GRG Building Consultants for Neil Abbott, Gowlings LaFleur Henderson LLP. The report notes, in part, as follows:
 - The HVAC owner's manual states: "That air is to be distributed to 30 to 40 vents." Current models allow 30 to 40 vents for the same system,
 - Current drawn by the blower was measured and found to be 4.8 amps. This is less than 70 per cent (68.6 per cent) of the rated amperage at full load (7.5 amps); as such, the fan could not possibly have been producing the required volume of airflow through the coil,
 - Without adequate airflow, as indicated by the power drawn by the fan, air supply to the rated design capacity is impossible,
 - By adjusting the rheostat control for the fan motor, the motor current could only be increased to 5.7 amps. This indicates that the rheostat is not reliable and should be changed to allow full power to the motor and, therefore, the design airflow,
 - According to the product design literature, the HV-100 unit could provide 72,000 BTUH at a water temperature of 150 F provided the blower unit was operating as required,
 - A larger tank with 125,000 BTU capacity has been installed so water supply should not be a problem once the temperature is increased,
 - We can assume that the failure of the blower to deliver the volume of air for which it was designed will limit the efficiency of the cooling available from the air conditioning system, thus limiting its performance, and
 - In regards to the complaint of noise, the report states that the sound levels measured are consistent with a quiet room;
 - The witness was unable to recall a report, presented as evidence, prepared by Paul Duffy, P.Eng., sent to Gowlings Lafleur Henderson LLP on October 3, 2007, titled Engineering Opinion on the HVAC System at 2350 Woodfield Road, Oakville, ON (Ballard House)—Tarion Warranty Ref. 28382-1050100—BLP File No. 6935.00, although she had laid a complaint with PEO against Duffy on the matter. The report states in part:
 - In regards to air leakage in the complainant's house: "The air tightness test, however, suggests that there may be isolated locations in the building where air

leaks could be significant and this might partly explain the heat distribution issues,” and

- In regards to the low airflow and heat delivery to the residence: “Assuming an adequate amount of heat can be provided to the coil, the heat delivered to the house is limited by the amount of air passing over the coil. The heated airflows provided by the fan coil appear to be low. Every test of the system indicates this has been an ongoing problem. The design of the system assumes that 1100 cfm of air is passing over the coil.
- Marshall (March 28, 2005) measured airflows of 781 cfm,
- Hubbert (May 18, 2005) measured airflows in the vicinity of 800 cfm,
- Bowser (November 13, 2005) measured airflows of approximately 570 cfm, and
- Enermodal’s testing (September 21, 2006) indicates approximately 693 cfm was measured.

The fan blower does not appear to be achieving its rated airflow output. The issue is graphically illustrated in the appendix to Hubbert’s report (May 18, 2005). The measured airflow data does not appear to match any point on the fan curve that describes full output of the equipment. This suggests the fan is not achieving full output.

GRG (September 14, 2007) discovered a fluctuation in amperage drawn by the blower motor indicating a possible controls (faulty rheostat) issue.

With heated airflows fluctuating at 50 to 70 per cent of the design, heat delivery is going to be similarly reduced. To address this problem, it may be necessary to replace the controls or possibly the entire fan coil unit.”

Ballard, during re-examination, agrees that:

- The builder modified the original T5 design to incorporate a basement walkout;
- Heating calculations were not made for the modified T5 house;
- Lim submitted three sets of calculations three years after she commenced living in the house; and
- Lim never came into the house.

Counsel for the association called Allen as an expert witness and submitted his curriculum vitae. Counsel for the member had no objection and the panel admitted him as an expert witness. The witness’ curriculum vitae showed that the majority of Allen’s work had involved sustainable development and energy-efficiency projects and had not involved HVAC

systems for residences covered by Part 9 of the OBC, except for the Regent Park Community revitalization, where he had been the sustainable design leader.

From the testimony of Allen, the panel found relevant the following:

During examination-in-chief:

- He did not have access to the contract documents between Lim and the builder;
- The heating calculations that he had been given by the association, he assumed, were for the building permit application;
- He was not aware of any drawings being submitted to the town for the modified T5 townhouse;
- The heating drawings stamped by Lim for building permit applications were generic and not specific to any house;
- The HVAC drawings by Lim for the building permit application for 2350 Woodfield Road left a lot to the installer. It is important for high-velocity systems to specify duct sizes, routing and elbows. There were no specifications on the hot water boiler and its relationship to the heating system. There was a lack of information on outlet design;
- The number of outlets on the drawings for 2350 Woodfield Road were two above the minimum;
- There was no indication as to who performed the heating calculations for either house;
- Changing from a T5 to a modified T5 design would have altered the HVAC performance through increased air leakage;
- Part 9 of the OBC does not require an engineer. However, if an engineer is involved, the engineer should, at least, require reports—air balancing reports as a minimum;
- An engineer should decline building design work if he or she is not also retained to do site inspections;
- The drawings for the HVAC system for a T5 townhouse and for a T3 townhouse do not meet standard engineering design as no limitations are noted and flows are not specified;
- He does not know the cause of the heating problems at 2349 and 2350 Woodfield Road, and he does not know if the HVAC system was properly installed. There could be equipment problems. Equipment could be undersized; and
- The design is adequate if the HVAC system provides adequate heating and cooling.

During cross-examination:

- His work is mainly outside of Part 9 of the OBC. He does not do subdivision designs, except for Regent Park, where he did work for a sustainability consultant. He provides consulting services in energy conservation projects;

- An engineer meets the standard of practice by fulfilling the obligations of health and safety of the public and providing proper work;
- The OBC defines a standard of practice, but an engineer can go beyond. An engineer does not have to meet a “gold” standard. The norm may be acceptable. A standard of perfection does not hold an engineer to perfection;
- He did not do any heating and cooling calculations for the townhouses. He reviewed Lim’s and they seemed in the “ball park”;
- There are different methods of calculating heating and cooling requirements that can give different answers depending upon assumptions made;
- He agrees that there can be a problem if a generic drawing is applied to a specific situation;
- He could not say whether he had seen any generic drawing used in subdivision development;
- He is not aware of any legislation or PEO guideline that prohibits generic drawings;
- Buildings falling under Part 9 of the OBC usually do not have engineering supervision;
- The scope of limited retainer is determined by the client. If Lim was retained only to do the heat distribution system, Lim would not have to select the boiler, except to specify its heating capacity;
- He did not know if engineering inspections were required under Part 9;
- A seal on a drawing implies that, if you build it as designed, it should “work.” If a builder wants to change joints in ducting, the builder can go back to the engineer for an opinion on the acceptability of the proposed changes;
- An engineer does not have to account for a builder installing a system that differs from the engineering design;
- The HVAC drawings done by Lim were reviewed by the municipality and met the requirements of the OBC;
- There were deviations in the installation from the design drawings; and
- The witness believed that there were equipment problems and that, also, the high-velocity fan coil units did not perform as expected.

In response to questions from the panel:

- He is not sure if an engineer who stamps drawings for Part 9 buildings has to do field inspection;
- He agrees that the drawings signed by Lim are similar to drawings generally submitted;
- He has never designed a high-velocity system;
- He does not know who prepared the HVAC heating and cooling calculations for the building permit applications for 2349 and 2350 Woodfield Road as there is no name on them; and
- It is confusing as to whether Lim had responsibility after other engineers became involved with the HVAC systems on Woodfield Road. Lim should have been notified that he was no longer involved.

In response to a question from the counsel for the association:

- He replied that there is not enough design information on the building permit application drawings for 2350 Woodfield Road; more information is needed on elbows as they are critical.

Margaret Michon, P.Eng. (Michon), was summoned to testify. She claimed protection provided to witnesses under the *Evidence Act*, R.S.O. 1990, Ch. E-23, as other proceedings were ongoing, such that any testimony given by her in this matter shall not be used or be receivable in evidence against her in any civil or any other proceeding. The panel considered her relevant evidence to be as follows:

During examination-in-chief:

- As a plan examiner for the town, she examines plans for mechanical systems to determine if they comply with the OBC;
- She did not examine Lim’s drawings for 2349 and 2350 Woodfield Road originally. She reviewed the drawings in 2004 for the Woodfield residences as there were problems with the HVAC systems; and
- She had contact with Lim and had seen the original drawings for Woodfield Road. The HVAC drawings are standard for a high-velocity system under Part 9 of the OBC.

During cross-examination:

- Lim's drawings were typical of generic drawings; in 2004, drawings for Part 9 of the OBC were not required to be stamped by an engineer;
- She does not act as an engineer in the building department; she is only a plan reviewer; and
- A drawing stamped by an engineer must meet code and good engineering practice.

In response to questions from the panel:

- An engineer could use the OBC and the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) publications as design standards for HVAC systems; and
- The OBC did not require an engineer to visit a construction site in 2004.

Counsel for the member and holder called Ed Porasz, P.Eng. (Porasz), as an expert witness for the member and submitted his curriculum vitae. He graduated in 1981 in mechanical engineering and has had over 25 years of design experience in commercial, institutional, industrial and residential buildings. He had reviewed over 500 buildings throughout Ontario, Canada, and overseas for pre-purchase, refinance and capital planning. The panel admitted Porasz as an expert witness.

From the testimony of Porasz, the panel found relevant the following:

During examination-in-chief:

- His consulting practice provides mechanical and electrical services. He designs HVAC systems for large buildings;
- He reviewed the heat loss and gain calculations for the 2350 Woodfield Road residence. His calculations matched those made by Lim within ± 10 per cent;
- He did not review the building permit application drawings;
- High-velocity HVAC systems are preferred by builders as they are less expensive to install. They should work if properly installed; and
- A contractor could install the HVAC system in the Woodfield Road residences from Lim's drawings and could determine if the system met code.

During cross-examination:

- He agreed with Allen that an HVAC system must meet OBC requirements;
- He did not agree with Allen's assertion that an engineer must go beyond code; a design is satisfactory if health, public welfare and codes are met;
- It is not necessary to consider building orientation in a generic design. Orientation has only a small effect on the

design. A safety factor is designed into the system that accounts for orientation;

- He did not agree that an end unit could have a different effect on the design;
- It is good engineering practice to have a written agreement or scope of work, but it is not necessary. He referred to the association's *Guideline for the Selection of Engineering Services*, which sets out that it is good engineering practice to obtain such a contract;
- He did not agree with counsel for the association that Lim was working with the builder in 2005 to solve hot water issues and the selection of a hot water tank. The hot water system was not in Lim's scope, in his view. Lim designed the heating coil and heat transfer system. He did not design the hot water tank;
- He would put his seal on the impugned HVAC distribution system drawings for a generic type T3 townhouse that are part of the building permit application for 2349 Woodfield Road;
- Sealed drawings say that the system will work;
- He did not agree with Allen that it is important to specify the tightness of elbows on ducts;
- Lim's drawings show 27 outlets in total. This is within 10 per cent of the manufacturer's recommended number of 30. However, considering that Lim did show a sufficient number of outlets in each space, this difference is minimal and within engineering design parameters. (Note: The actual number on the drawings is 32.);
- The length of the flexible duct shown on the design drawings ranged from 5 to 13 feet. The manufacturer's recommendation was for a maximum of 25 feet, and the OBC allows for 13'-1". Therefore, Lim's design was within good engineering practice;
- He does not agree that 27 outlets would not have provided the required airflow. He agreed that none of the houses achieved 1100 cfm and that the total airflow was around 800 cfm;
- He agreed that, in the duct work layout for the basement of 2350 Woodfield Road, the return air vent from the basement was poorly shown as a double arrow was missing. (Note: The significance of a double arrow was not made clear to the panel; one arrow was shown on the drawings.);
- He agreed that duct bends and elbows were not shown on the HVAC duct layout drawings for the Woodfield Road building permit application drawings; however, he stated that this should have been left up to the manufacturer's instructions;

- He agreed that, if airflow deficiencies were brought to Lim’s attention, he should have addressed them;
- He agreed that there was no evidence that Lim reviewed the heat loss and gain calculations in the building permit application for 2350 Woodfield Road; and
- He agreed that he could not tell if HVAC layout drawings in the building permit application for 2350 Woodfield Road had been altered.

During re-examination:

- The lengths of ducts can be determined from the Lim HVAC layout drawings as the drawings are scaled;
- He stated that the system could have been poorly installed causing it to underperform;
- The heating exchanger coil could have been poorly manufactured; and
- In answer to a question about his statement made during cross-examination that the drawings for 2350 Woodfield Road are not clear on the return air duct for the basement, he partly changed his opinion and stated a return duct is shown.

FINAL ARGUMENTS AND SUBMISSIONS OF THE PARTIES

Counsel for the association stated:

Lim, as alleged in the Notice of Hearing:

- Item 15(b): failed to specify the system to meet requirements of design;
- Item 15(c): provided HVAC designs and drawings that did not include references to guidelines or the requirements of equipment to be supplied; and
- Item 15(e): provided HVAC designs that were incomplete.

The association requested a finding of misconduct under sections 72(2)(a) and 72(2)(b) of the regulation (set out above).

The association argued that no evidence was presented to show that installation guidelines were issued. Counsel further suggested that the drawings left too much up to the installing contractor. It was the view of the association that the standard of practice goes beyond code requirements and, therefore,

compliance with the OBC was insufficient. The association pointed out that:

- No installation manual was presented as evidence;
- No building orientation information was given on the Lim drawings;
- There should have been a written engineering contract or agreement; and
- There was confusion over the manual for the HVAC system; the association had one and the defence, through its expert, had another.

As to the defence expert, the association submitted that he had not used a manual for his calculations, even though he stated that length and other information on ducts is in the manual. However, a manual was not presented as evidence.

Counsel for the member and holder submitted on behalf of his client that:

- Even though the number of supply air outlets was increased to 40, this did not alleviate the cooling and heating problems. It was on the record now that the defence expert had testified that Lim’s drawings met the requirements. A building permit was issued for the house and a number of engineers inspected the building, none of whom said that the HVAC system would not work because of design; and
- The member and holder did not need to testify as the association had not established a *prima facie* cast against the member and holder. To support his argument, he referenced Golomb and the College of Physicians and Surgeons of Ontario, Ontario High Court, divisional court, Fraser, Galligan and Reid, JJ., January 9, 1976. The decision stated in part:

“Counsel for the defence at a hearing before a professional disciplinary body is entitled to take the position, as was done in this case, that the onus of proof resting upon the college has not been satisfied and that there is therefore no case to answer. I think, however, that it is a dangerous course to follow. Section 39(1) of the *Medical Act* provides that the rules of evidence applicable in civil proceedings in Ontario (with certain exceptions that do not apply here) govern hearings before the Discipline Committee. It is a well-established rule of evidence in Ontario that once a *prima facie* case has been made out against a defendant, if he (assuming he has knowledge of

the circumstances of the case) declines to testify, the court may draw the inference that any evidence that he could give would hurt his case and for that reason, he did not testify. That rule of evidence was recently applied by the court in *Doxtator et al. v. Burch et al.*, [1972] 1 O.R. 321, 23 D.L.R. (3d) 52 (per Lief, J.), affirmed in the Court of Appeal, [1972] 3 O.R. 806, 29 D.L.R. (3d) 542. That inference may be drawn only after a *prima facie* case has been established. Otherwise the failure of a defendant to testify cannot be evidence against him. I think the principle was correctly stated by Haines, J., in *Mudrazia v. Holjevac et al.*, [1970] 1 O.R. 275 at p. 277, 8 D.L.R. (3d) 221 at p. 223:

Now failure of a defendant to testify does not constitute evidence where no case has been made out against him, but where a *prima facie* case has been made out the defendant's failure to testify may be the subject of an inference that his testimony, if given, would not support the defence raised.

A comprehensive definition of a *prima facie* case is not simple. Basically, it means sufficient evidence to entitle the tribunal to arrive legally at a particular determination of fact.”

In reply, counsel for the association stated:

Counsel for the member and holder, in stating how strong and convincing the evidence must be for the allegations to be proven, referenced the case of *Law Society of Upper Canada v. Neinstein*, which, in turn, referenced the case of *Berstein v. College of Physicians and Surgeons of Ontario*. Both of these cases involved a serious matter of sexual harassment. As the allegations against Lim are not as serious, the reference to these cases is not applicable in assessing the strength of the evidence against him.

DECISION OF THE PANEL

After hearing the testimonies from the witnesses and the arguments and submissions from counsels and receiving the evidence, the panel retired to deliberate and returned a verbal decision to the parties as follows:

Having considered all the evidence and the submissions of counsels, the panel found the member and holder not guilty of professional misconduct or incompetence, as alleged and stated in the Notice of Hearing, as follows:

That Lim and L&A:

- (a) provided an HVAC design that was not compliant with current OBC requirements for the proposed single-family residences at 2349 and 2350 Woodfield Road, Oakville, ON. The evidence presented did not prove that the member and holder provided an HVAC design for the residences at 2349 and 2350 Woodfield Road that did not meet the current OBC requirements;
- (b) failed to specify the system to provide the requirements of his designs. The member and holder specified systems that would provide the requirements of his designs;

- (c) provided HVAC designs and drawings that did not include referencing of guidelines or requirements of the system and equipment supplier. The member and holder provided designs and drawings that referenced adequately the system requirements;
- (d) did not provide a revised HVAC design for the significant modification to the Model T5 after it was requested from the town. The evidence did not prove that the member and holder failed to provide a revised HVAC design for the significant modification to the Model T5 after it was requested from the town or that the town even officially requested a revised design;
- (e) provided HVAC designs that were incomplete. The designs presented as evidence were adequately complete; and
- (f) undertook work that the practitioner was not competent to perform. The evidence did not prove that the member and holder undertook work that he was not competent to perform.

It is alleged that Lim is guilty of incompetence as defined in the *Professional Engineers Act*, and that Lim and L&A are guilty of professional misconduct as defined in the *Professional Engineers Act*. The evidence did not prove that Lim is guilty of incompetence as defined in the *Professional Engineers Act* and that Lim and L&A are guilty of professional misconduct as defined in the *Professional Engineers Act*.

The panel advised the parties that the reasons in writing will be provided.

REASONS FOR DECISION

In reviewing the evidence and in developing its decision, the panel confirmed the proper onus and standard of proof based on the balance of probabilities, as set out in the Supreme Court of Canada in the case *F.H. v. McDougall*, [2008] S.C.J. No. 54.

The complaint against the member and holder arose from the problems that the two complainants, Kent and Ballard, experienced with the HVAC and hot water systems in their new residences at 2349 and 2350 Woodfield Road, respectively, in Oakville, ON. The testimony from Kent and Ballard, the Hubbert reports, exhibits, the GRG report and the Duffy report provide evidence of unsatisfactory performance of the HVAC and hot water supply systems. However, it is not within the mandate or scope of the panel to investigate the causes of the poor performance and assign responsibility for the causes to a party or parties except as they may relate, as proven by evidence presented at the hearing, to the allegations against the member.

The panel assessed the witnesses as follows:

Tutert and Michon, from the town building services department, provided credible testimonies.

Both Kent and Ballard provided credible testimony on the problems they experienced with their townhouses.

Allen

The panel found that Allen lacked experience in residential construction and HVAC systems relevant to the allegations against the member. In response to a question from the panel, he stated that he had never designed a high-velocity HVAC system. His curriculum vitae showed that his experience was predominantly in the field of sustainability. The only project listed connected with residential occupancy construction was as “sustainable design leader for redevelopment of 30 ha. social housing complex for a sustainable community of 15,000, planning, life-cycle analysis, performance specifications.” His experience was insufficient to sustain his credentials as having the expertise necessary to assist the panel in this matter. He was not properly qualified.

During cross-examination, counsel for the member and holder stated to Allen, “You mainly do not do Part 9. You do not do subdivisions.” Allen agreed with the statement.

Porasz

The panel found Porasz to be a credible expert witness with relevant expertise. His curriculum vitae showed that he had experience relevant to the allegations. He has had over 25 years of design experience for commercial, institutional, industrial and residential facilities. He has employed state-of-the-art, energy-efficient designs. His designs have included fire halls, industrial buildings, hospitals, high-rise residential buildings, smaller residences and hotel complexes. His experience has included 15 years of building condition assessment that involved reviewing mechanical and electrical infrastructures from basic, simple building systems up to complex networks for energy-efficient, high-rise commercial buildings with redundant and emergency backup protection.

The panel found there was one item of evidence, the 2349 Woodfield Road building permit application, which associated the member and holder with the HVAC system at 2349 Woodfield Road. Attached to the permit are two HVAC drawings that bear Lim’s seal; the seal on both drawings is signed by Lim and dated May 24, 2000. The first drawing shows the duct and vent layout for the basement and first floor. The second drawing gives the layout for the second floor. The drawings state that the designer is HVAC Designs. The contractor is Downsview Heating (Downsview), and the builder is

Fernbrook. The drawing is generic for a Type 3 townhouse. There is no indication of addresses as to where the system is to be installed. The drawing gives duct and vent sizes; duct lengths can be determined from the scaled drawings. Total heat loss is stated as 43018 BTU/H. The HVAC unit is specified as Temp-Mizer model HV-100, output 57,000 MBTU/H at 130 F, cooling 2.0 tons, and fan speed 1100 cfm at 1.5" w.c. The drawing has a statement, “Contractor to work from municipal approved drawings only.” The drawings are dated April 2000.

The building permit application for 2349 Woodfield Road is dated April 6, 2000. The association did not prove conclusively that the drawings that Lim sealed on May 24, 2000, were submitted as part of the building permit application. The drawings do not identify the address or addresses of the townhouses that are to be constructed with HVAC systems based on the generic drawings. Included with the building permit application for 2349 Woodfield Road were joist drawings and specifications for a unit T3 at another location, the Fernbrook 16 Mile Creek development. The association presented no witnesses or evidence to prove conclusively that all the documents attached to the building permit application for 2349 Woodfield Road were submitted to the town as part of the permit application.

There are five items of evidence presented by the association that purportedly associate the member and holder with the HVAC system at 2350 Woodfield Road.

The first item is the building permit application dated April 6, 2010, for 2350 Woodfield Road. Attached to the permit are HVAC drawings dated 2000 that bear Lim’s seal. The seal is signed by Lim and dated May 24, 2000. The drawings show the duct and vent layout for the basement, first floor and second floor. The drawings state that the designer is HVAC Designs. The contractor is Downsview, and the builder is Fernbrook. The drawings are generic for a Type 5 townhouse. There is no indication on the drawings of addresses as to where the system is to be installed. The drawing gives duct and vent sizes; duct lengths can be determined from the scaled drawings. Total heat loss is stated as 52,914 BTU/H. The HVAC is specified as Temp-Mizer model HV-100, output 57,000 MBTU/H at 130 F, cooling 2.0 tons, and fan speed 1100 cfm at 1.5" w.c. The drawing has

a statement, "Contractor to work from municipal approved drawings only." The association did not prove conclusively that the drawings that Lim sealed on May 24, 2000, which had no address attached, were submitted as part of the building permit application. The association did not explain why the drawings were dated after the date on the permit application. In addition, the association did not present evidence to prove the drawings did not meet the minimum standards of practice of engineering.

The second item is a copy of a fax sent to the town of a heat loss calculation for a modified T5 building sealed by Lim; the seal is signed and dated August 3, 2004. The calculation sheet has the statement, "Calculation per ASHRAE Fundamentals and OBC Ventilation Section." The total heat loss is shown as 52.4 MBH. There is no indication of a house address on the document to associate the document with 2350 Woodfield Road.

Items three and four contain the same copy of a fax sent by Philip Li (Li) of L&A to Michon on September 20, 2004. The fax contains a cooling load calculation sheet for a T5 house. Li states in the covering letter, "Please advise and review the attached Model T5 heat gain calculation (done) by hand (as) per 2001 ASHRAE Fundamentals (P28.2–P28.3) Table 1 and 3." The calculation sheet is not sealed and it is not known if the calculations were reviewed by Lim. The calculated cooling load written on the sheet is 2.3 tons. Michon had reviewed the calculations and had written on the sheet her own cooling load calculation of 2.7 tons. Michon used a figure of 30 per cent for building load losses for her calculations; Lim used a figure of 15 per cent. In cross-examination, Allen stated he did not do any heating and cooling calculations for the townhouses. He reviewed Lim's, and they seemed in the "ball park." During examination-in-chief, Porasz agreed that he reviewed the member's heat loss and gain calculations and that he did his own calculations, which matched Lim's within ± 10 per cent. No conclusive evidence was presented to prove that more consideration should be given to a load loss of 30 per cent than to a loss of 15 per cent.

The fifth item contains a copy of a fax from L&A to the town for a heat loss calculation of 52.6 MBH for 2350 Woodfield Road using a modified T5 building envelope condition, dated October 6, 2004. The calculation sheet has the statement, "Calculation per ASHRAE Fundamentals and Ontario Building Code Ventilation Section." The sheet is not sealed or signed. No evidence was presented to prove that Lim prepared or reviewed these calculations, or was evidence presented to prove conclusively that the calculations were not acceptable.

The association did not establish the contractual relationships and responsibilities of the member and holder in respect to 2349 and 2350 Woodfield Road. The constructor of the

townhouses, Fernbrook, had direct and prime responsibility for constructing a residence with an HVAC system that, at the minimum, met the OBC. The relationship between the HVAC designer, HVAC Designs, and Fernbrook was not established by the association. The contractual obligations of the member and the holder to these two parties were not established and proven. The scope of the work that the member and holder was to provide is unknown. The association did not state that either HVAC Designs or Fernbrook had laid a complaint against the member in respect to his work for them.

The association failed to prove that the generic T3 and T5 HVAC layout drawings sealed, signed and dated by the member and holder were prepared specifically for 2349 and 2350 Woodfield Road, respectively. The townhouse at 2350 Woodfield Road is a modified Model T5; no HVAC layout drawings for a modified T5 were entered as evidence during the hearing. There was no evidence that the member and holder were aware that the drawings were to be used for a modified T5. When HVAC problems were brought to his attention in 2004, he co-operated with the town, as evidenced by the email dated August 18, 2004, which Tutert sent to Ballard, in which he acknowledges receiving revised heat loss calculations for her house from Lim. No evidence was presented to show whether the co-operation was voluntary, a demonstration of good will, a contractual obligation, or for some other reason.

The responsibilities and relationships of the builder and the contractor were set out by witness Tutert during examination-in-chief by counsel for the association as follows:

Counsel: "Are you dealing primarily with Paul Lim?"
Tutert: "No. The builder, contractor and Paul Lim. I corresponded mainly with the HVAC contractor. I sent no emails to Paul Lim."

During cross-examination, Tutert stated that he did not know how Lim was originally contracted. He testified that he did not ask Lim to change his design when the house at 2350 Woodfield Road was changed from a Model T5 to a modified Model T5.

Hubbert, in his report, opined that the designer (Lim) was not involved throughout in the building design and construction. He writes: "The investigation consisted of reviewing all the unit plans and heat losses, recalculating heat loss and heat gain for the three largest models, and physically testing the airflow in three units, with an intensive airflow test in one of the units.

The results of this investigation showed that the heat losses of the units are somewhat larger than what was calculated and used as the basis of the design due to the actual buildings being slightly different than the original plans—exposed side walls where the plans appear to portray adjoining buildings.

In addition, the majority of the units, all of the west side units, have been constructed with rear basement floors at grade level and additional glass and doors were installed. We believe that the builder failed to refer the changes to the heating contractor and his designer for a re-evaluation before construction was complete.

No evidence as to contractual obligations of the member and holder to Ballard was proven or advanced. During cross-examination, Ballard agreed with the statement by counsel, “You testified that you did not engage Lim or have any dealings with him.”

The burden was upon the association to prove the allegations against the member and holder by providing clear, convincing, cogent evidence on a balance of probabilities. The association had to prove the contractual responsibilities of the member and how he did not fulfill them. The onus was not on the member and holder to disprove the allegations by providing evidence as to his contract requirements and whether he fulfilled them.

Outside of any contractual requirement, the generic HVAC layout drawings produced and sealed for the T5 and T3 townhouses needed to be examined to determine if they met at least the minimum standard expected of an engineer.

Allen, during examination-in-chief, testified that the design would be adequate if the HVAC system provided adequate heating and cooling. The association did not prove that the HVAC systems were not adequate for a T3 or T5 townhouse.

The heating and cooling requirements for a modified T5 were not addressed clearly in evidence. The house at 2350 Woodfield Road is a modified T5; HVAC layout drawings were not submitted by the association for this model.

Allen gave evidence that the HVAC drawings left a lot to the installer. He said it was important for high-velocity systems to specify duct sizes, routing and elbows. He further added there were no specifications on the hot water boiler and its relationship to heating and there was lack of information on outlet design.

An examination of the drawings does not support Allen’s evidence. It is stated on the first HVAC layout drawing, “ALL S/A RUNS 5" Ø UNLESS NOTED OTHERWISE ON LAYOUT.” Routing is shown. Although elbow radii are not marked, their locations are given in the routing layouts. As duct sizes are specified, radii can be determined. No evidence was

given that the member and holder were responsible for specifying the hot water boiler. The input to the heating coil of 100 MBTU/H is specified on the drawing. Outlets are specified as “4"x10" UNLESS NOTED OTHERWISE ON LAYOUT.” No evidence was produced to show that the member and holder did not provide detailed written specifications.

Allen testified, during examination-in-chief, that the drawings for the HVAC system for the T3 and T5 townhouses did not meet standard engineering design as no limitations were noted and flows were not specified.

However, the first drawing in each set specifies a total airflow of 1100 cfm at 1.5" w.c. The limitations that Allen said should have been noted on the drawings were neither identified by Allen nor provided at any point in the hearing by the evidence.

In examination-in-chief, Allen stated that he was able to determine the number of outlets for a T5 from the drawings; 32 were shown, two above the minimum.

During cross-examination, Allen agreed:

- that the OBC defines a standard of practice, but an engineer can go beyond;
- that, if a group of engineers practise in a particular manner, that this would define a standard of practice;
- that an engineer does not have to meet a “gold” standard;
- that the norm may be acceptable;
- that the standard of practice does not hold an engineer to perfection;
- that scope of limited retainer is determined by the client, that if Lim was retained only to do the heat distribution system, Lim would not have had to select the boiler, except to specify its heating capacity;
- that an engineer does not have to account for a builder installing a system that differs from the engineering design;
- that the drawings were reviewed by the municipality and met the requirements of the OBC; and
- that there were deviations in the installation from the design drawings.

During cross-examination Allen stated that he believed there were equipment problems and also the high-velocity fan coil units had not performed as expected.

In response to counsel for the member and holder pointing out that Hubbert stated in his reports that the fans in the HVAC system air handling units were performing below the level given by the manufacturer data sheets, Allen agreed Lim could expect the equipment to perform as specified by the manufacturer.

In response to questions from the panel, Allen said the drawings signed by Lim were similar to drawings generally submitted. He further stated that he had never designed a high-velocity system. As stated above, this lack of experience weakens his testimony as an expert on the high-velocity systems designed by Lim.

During cross-examination, Tutert stated that, at the time the permit was issued for 2350 Woodfield Road, the design met requirements.

During examination-in-chief, Michon stated that Lim's HVAC drawings were standard for a high-velocity system under Part 9 of the OBC.

In cross-examination, Michon stated Lim's HVAC drawings were typical generic drawings.

During examination-in-chief, Porasz stated a contractor could install the HVAC system in the Woodfield Road residence from Lim's drawings and could determine if the system met code.

In cross-examination, Porasz stated that he agreed with Allen that an HVAC system must meet OBC requirements, but he did not agree with Allen's assertion that an engineer *must* go beyond code.

The panel found the opinion of Porasz, that it was sufficient if a design met code requirements in situations where a particular code was applicable, to be persuasive and acceptable. The OBC was applicable to the construction of the residences at 2349 and 2350 Woodfield Road. To go beyond a code or standard requirement is a matter to be decided between an engineer and a client; particularly, as the client may have to pay extra for work exceeding the minimum requirements of a code or standard.

Although, apart from the code, a member and holder must meet generally accepted professional standards, there is no evidence to persuade the panel that the member and holder fell below the standard.

The member's drawings met the minimum requirements; however, the drawings could have contained more information. Duct sizes and routing were shown on the drawings and total airflow was specified; however, the airflows out of each vent could have been given. Ducts, vents, and elbows could have been specified through description or by manufacturer's identification number. The drawings leave the selection up to the contractor. It is not known if the member prepared written specifications to accompany his drawings.

The panel gave consideration to the member and holder not providing testimony in his own defence and accepted the argument from the counsel for the member and holder that he did not need to testify as the association had not established a *prima facie* case against him.

In summary, the association failed to prove that the member and holder had a clearly defined responsibility for the heating, cooling and ventilation problems with the residences at 2349 and 2350 Woodfield Road in Oakville. The association presented several exhibits that indicated problems with the hot water tank in 2350 Woodfield Road. However, the association did not establish any responsibility on the part of the member and holder for the hot water tank or that the problems with the tank were attributable to a breach of the member's and holder's professional responsibilities. The member and holder had only to specify the heat output from the hot water tank for the furnace heating coil, which he did on a drawing included as part of the building permit application as 100 MBTU/H. No evidence was presented to show that the member was contractually obliged to specify or select the hot water tank.

The panel believes it just and equitable to hold the part of the hearing concerning submissions and evidence, if any, as to costs and publication in writing. If either party wishes to make submissions and present evidence in person in lieu of writing, such party shall advise the panel in writing within 10 calendar days from the date of this decision and the panel will schedule a hearing in person to dispose of such matters.

If neither party objects to holding this part of the hearing in writing, any submissions in writing in this matter under sections 28(6) and 28(7) of the *Professional Engineers Act* are to be made by the member and holder, together with all supporting materials, within 20 calendar days of the date of this decision, and addressed to:

Discipline Committee Panel
c/o Brian Ross, P.Eng., panel chair
Association of Professional Engineers of Ontario
40 Sheppard Avenue West, Suite 101
Toronto, ON M2N 6K9

Copies of the submissions and supporting material, if any, are to be sent concurrently to the association. The association, if it wishes to respond, shall have 20 days after receipt of such submissions to respond. The member's and holder's replies, if any, shall be made within 10 days of receipt of the association's response. The panel will provide, in writing, its decision after it reviews and deliberates on all submissions and replies received.

The written Decision and Reasons was dated August 18, 2010 and was signed by Brian Ross, P.Eng., as chair on behalf of the other members of the discipline panel: Len King, P.Eng., Max Perera, P.Eng., Michael Wesa, P.Eng., and Derek Wilson, P.Eng.

DECISION AND REASONS IN RESPECT OF COSTS AND PUBLICATION

In the matter of a hearing under the *Professional Engineers Act*, and in the matter of a complaint regarding the conduct of PAUL SIEW CHOON LIM, P.ENG., a member of the Association of Professional Engineers of Ontario, and P. LIM & ASSOCIATES LIMITED, a holder of a Certificate of Authorization.

This matter was presented for a hearing before a panel of the Discipline Committee on October 8 and 9, 2008, and November 26 and 27, 2008, at the Association of Professional Engineers of Ontario (association) in Toronto.

The association was represented by Neil J. Perrier, Paul Siew Choon Lim, P.Eng. (member), and P. Lim & Associates Limited (holder) were represented by Ryan Stewart Breedon, and David P. Jacobs acted as independent legal counsel (ILC) to the panel.

On August 18, 2010, the panel of the Discipline Committee of the Association of Professional Engineers of Ontario rendered a decision that found the member not to be incompetent, and the member and holder not guilty of professional misconduct.

The member and holder seek publication of the panel's August 18, 2010 Decision and Reasons in the official publication of the association pursuant to the *Professional Engineers Act*, R.S.O. 1990, c. P.28, section 28(6), which provides as follows:

Publication on request

- (6) The Discipline Committee shall cause a determination by the committee that an allegation of professional misconduct or incompetence was unfounded to be published in the official publication of association, upon the request of the member of association or the holder of the certificate of authorization, temporary licence, provisional licence or limited licence against whom the allegation was made. R.S.O. 1990, c. P.28, s. 28(6); 2001, c. 9, Sched. B, s. 11(40).

The member and holder also seek reimbursement of costs pursuant to the *Professional Engineers Act*, R.S.O. 1990, c. P.28, s. 28(7), which provides as follows:

Costs

- (7) Where the Discipline Committee is of the opinion that the commencement of the proceedings was unwarranted, the committee may order that the association reimburse the member of the association or the holder of the certificate of authorization, temporary licence, provisional licence or limited licence for the person's costs or such portion thereof as the Discipline Committee fixes. R.S.O. 1990, c. P.28, s. 28(7); 2001, c. 9, Sched. B, s. 11(41).

The panel received written submissions from the counsel for the member and holder and from counsel for the association. The panel obtained an opinion on the matter from its ILC, which was provided to the parties for their submissions thereon.

DECISION

The prosecution did not oppose the request for publication, and the panel orders that the Decision and Reasons in this matter are to be published in the official publication of the association. The panel declines to award costs to the member and holder for reasons as follows.

REASONS FOR THE DECISION

As the member was not found to be incompetent, and the member and holder were found not guilty of professional misconduct, the panel directs the association to publish its Decision and Reasons in its official publication pursuant to section 28(6) of the *Professional Engineers Act*, which publication is mandatory on the request of the member and holder.

In order for the panel to award costs, it must be shown that "the commencement of the proceedings was unwarranted" under section 28(7) of the *Professional Engineers Act*. The question is, in part, as to what time constitutes the "commencement of the proceedings" for the purposes of the section. The member and holder argued that disciplinary proceedings are commenced at the outset of the hearing, when the Notice of Hearing is tendered as an exhibit, not at the time of referral from the Complaints Committee." The association argued that the commencement of proceedings is at the

time that the Complaints Committee refers the matter to the Discipline Committee.

There is a distinction between “proceedings” and “hearing.” A hearing is part of the proceedings.

The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, defines “hearing” under section 1(1) thereof to mean “a hearing in any proceeding.” Thus, “a hearing” and “a proceeding” are distinct concepts. A hearing occurs in the course of a proceeding and commences at some time after the proceedings have commenced by way of referral to the Discipline Committee.

The *Professional Engineers Act* indicates that a hearing begins after the commencement of the proceedings. Section 27(6) of the act states:

Chair may refer matter to panel

- 27(6) When a matter is referred to the Discipline Committee for hearing and determination, the chair may,
- (a) select from among the members of the committee a panel composed of at least one person described in clause (1)(a), at least one person described in clause (1)(b), at least one person described in clause (1)(c) and, if the council has made an appointment under subsection (1.1), at least one person described in that subsection;
 - (b) designate one of the members of the panel to chair it; and
 - (c) refer the matter to the panel for hearing and determination; and set a date, time and place for the hearing.

and

Section 28(10) of the act states:

Duties of Discipline Committee

- 28(1) The Discipline Committee shall,
- (a) when so directed by the council, the Executive Committee or the Complaints Committee, hear and determine allegations of professional misconduct or incompetence against a member of the association or a holder of a Certificate of Authorization, a temporary licence, a provisional licence or a limited licence;
 - (b) hear and determine matters referred to it under section 24, 27 or 37; and
 - (c) perform such other duties as are assigned to it by the council.

There can be no hearing until the proceedings have already commenced against a member. As stated, the commencement of proceedings is at the time the Complaints Committee refers a matter to the Discipline Committee.

The panel was given to understand that the Complaints Committee had the Allen report, among other things, before it when it decided to refer the matter to the Discipline Com-

mittee. The meaning of the word “unwarranted,” as used in a disciplinary proceeding, is considered in *Re Anthony Michael Speciale*, Decision of the Law Society of Upper Canada, February 25, 1994. In *Speciale*, the tribunal ruled that, “The term ‘unwarranted’ means ‘without reasonable justification, patently unreasonable, malicious, taken in bad faith, or for a collateral purpose.’” The tribunal further stated, “Hindsight, while often instructive, should not be slavishly relied upon when determining whether disciplinary proceedings were unwarranted.” The panel is not convinced on the evidence that the Complaints Committee made the decision to refer the matter to the Discipline Committee without reasonable justification, patently unreasonably, maliciously, in bad faith or for a collateral purpose.

Based on the information before the Complaints Committee, the Form of Complaint and a report on the member’s and holder’s work on the HVAC systems for two houses, referenced in the complaint, from Sustainable EDGE Ltd. and signed and sealed by Greg Allen, P.Eng., president, the panel cannot conclude that the decision to refer to discipline was “unwarranted.”

The complaint listed a number of problems with the design and operation of the HVAC systems for the houses; the member and holder signed and sealed the HVAC drawings apparently used for the building permit application.

The Complaints Committee relied on a report from Sustainable EDGE Ltd., which alleged faults in the design of the HVAC systems in making its decision to refer the matter to the Discipline Committee. It is to be noted that the report was not subject to attack by means of cross-examination before the Complaints Committee. The Complaints Committee does not hold hearings and does not have the benefit of examination and cross-examination of witnesses prior to making a referral decision.

The panel concludes that it was only during the hearing, through cross-examination and evidence presented by counsel for the member and holder, that the weakness of the expert evidence and the report in question became apparent to the point wherein the panel dismissed the allegations against the member and holder. The Complaints Committee is not expected to conduct a cross-examination of its own witnesses prior to a hearing. The Complaints Committee has to decide on the propriety of referral based upon the information before it at the time of the decision. The test set out in the legislation, that the commencement of the proceedings was unwarranted, is a high test and it is not met here for the reasons above. The panel finds that, based on the evidence, it cannot come to the opinion that the commencement of the proceedings was unwarranted and, thus, dismisses the request for the reimbursement of costs. The written Decision and Reasons was dated January 11, 2011, and was signed by Brian Ross, P.Eng., as chair on behalf of the majority of members of the discipline panel: Len King, P.Eng., Michael Wesa, P.Eng., and Derek Wilson, P.Eng.

