

# SUMMARY OF THE DECISIONS AND REASONS

## In the matter of the Association of Professional Engineers v. an Engineer and Engineering Company

A matter came for a hearing before a panel of the Discipline Committee on September 14, 2011, at the offices of the Association of Professional Engineers of Ontario. The matter stemmed from a complaint against the actions of an engineer, who is a member of the Association of Professional Engineers of Ontario, and against the actions of an engineering company that is a holder of a Certificate of Authorization.

### STATEMENT OF ALLEGATIONS AND AGREED STATEMENT OF FACTS

The association provided a Statement of Allegations and an Agreed Statement of Facts that were entered into evidence.

The Statement of Allegations included allegations of professional misconduct against the member and the holder. Counsel for the association provided the panel with the Agreed Statement of Facts, which included the following:

1. At all material times, the engineer was a licensed professional engineer and a member of PEO.
2. At all material times, the engineering company held a Certificate of Authorization issued by PEO, allowing it to offer and provide to the public services that are within the practice of professional engineering and was responsible for supervising its employees and taking all reasonable steps to ensure that its employees carried on the practice of engineering in a proper manner.
3. At all material times, another engineer (herein designated the testing engineer), who was responsible for coordinating, reporting and signing of test result reports of concrete air void system (AVS) testing at the engineering company was a licensed professional engineer and member of PEO. The testing engineer does not have laboratory testing certification with Canadian Council of Independent Laboratories (CCIL) or other organization. In practice, the testing engineer had some knowledge of quality testing of construction material, including AVS testing of concrete.
4. A contractor engaged the engineering company as the quality control laboratory to perform quality control testing on high-performance concrete samples from structures under construction. The quality control testing was required by the contractor under the terms of a contract for highway construction between the contractor and the Ministry of Transportation (MTO) for a construction period from July 2007 to October 2009.
5. Included in the engagement from the contractor was that the engineering company was responsible for AVS testing on concrete samples that came from concrete bridge structures under construction. AVS testing is required to establish the long-term durability of the hardened concrete in concrete bridge structures.
6. The actual AVS testing at the engineering firm was undertaken by a technician, whereas the testing engineer who managed the AVS testing process calculated the required pass/fail AVS results and signed the AVS reports.
7. In July 2008, the contract administrator (CA) submitted a summary of AVS results to the MTO that indicated some samples tested by the CA failed the minimum allowable parameters of concrete durability, contrary to the positive pass results provided by the AVS test results obtained from the engineering firm.
8. The MTO investigated further and, ultimately, it was determined that certain of the AVS reports submitted by the engineering company to the CA that showed acceptable results were, in fact, unacceptable on the original AVS reports in the files of the engineering company. The testing engineer at the engineering company denied, but then subsequently admitted, to an MTO forensic investigation team that the AVS test results were altered prior to submission to the CA.
9. Subsequently, the testing engineer admitted to PEO that the AVS data was altered because the testing engineer believed the concrete samples had been inadequately "polished," which can potentially negatively

affect AVS testing results. The testing engineer altered the test results, with no clear indication on worksheets of said alteration, to purportedly compensate for the inadequate polishing of the concrete samples.

10. As a result, the MTO removed the engineering firm from its list of qualified laboratories for concrete testing on MTO contracts. As well, the MTO filed a formal complaint of professional misconduct against the engineering firm with the CCIL and the firm resigned its membership in the CCIL while under investigation.

## ADMISSIONS OF PROFESSIONAL MISCONDUCT AND PLEA OF THE MEMBER AND/OR HOLDER

The engineering company admitted that its actions and conduct in this matter constituted professional misconduct as defined by the *Professional Engineers Act*, s. 28(2)(b), and Regulation 941, s. 72(2)(d), which provides as follows:

“...that it failed to make responsible provision for complying with applicable statutes, regulations, standards, codes, bylaws and rules in connection with work being undertaken by or under its responsibility.”

The panel conducted a plea inquiry and was satisfied that the engineering company’s admission was voluntary, informed and unequivocal, and that the engineering company had the benefit of independent legal advice.

The engineer denied knowledge of the testing engineer’s alteration of the AVS test results in advance of the government initiated investigation of the AVS tests. The engineer denied allegations of professional misconduct and, in the absence of any presented evidence, requested a dismissal of charges.

In light of the engineer’s undertaking to supervise the testing engineer for one year (or lesser period if the testing engineer is no longer employed by the engineering company), PEO leads no evidence in support of allegations against the engineer. Hence, the parties seek no finding of professional misconduct against the engineer.

## DECISION AND REASONS

The panel considered the Agreed Statement of Facts and finds that the actions and conduct of

the engineering company support a finding of professional misconduct by the engineering company as defined by the *Professional Engineers Act*, s. 28(2)(b) and Regulation 941, s. 72(2)(d).

The panel dismissed the charges of professional misconduct against the engineer, since there was no evidence presented by PEO to support the allegations.

## PENALTY DECISION

Counsel for the association provided the panel with a Joint Submission as to Penalty. The panel considered and accepted the submission and ordered the following:

1. The engineering company is to prove, to the satisfaction of the PEO registrar and within three months of the hearing, a comprehensive policy and procedure document for the engineering company’s staff regarding the conduct, documentation and reporting of laboratory testing results and analyses;
2. Pursuant to section 28(4)(i) of the *Professional Engineers Act*, the finding and the order of the Discipline Committee will be published in summary form, without names; and
3. There shall be no order with respect to costs.

In conjunction with the joint submission on penalty, the engineer voluntarily provided to the association an undertaking to supervise all engineering work performed by the testing engineer for one year from the date of PEO’s order (or lesser period if the testing engineer is no longer employed by the engineering company).

The panel concluded that the proposed penalty is reasonable and in the public interest. The engineering company has co-operated with the association and, by agreeing to the facts and a proposed penalty, has accepted responsibility for its actions, and has avoided unnecessary expense to the association.

## 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 ENGINEER A, a member of the Association of Professional Engineers of Ontario and a holder of a Certificate of Authorization.

This matter came on for hearing before a panel of the Discipline Committee on May 3 and 4, 2010, at the Association of Professional Engineers of Ontario (the association) in Toronto. The association was represented by Richard Steinecke. The member was represented by Ryan Steward Breedon, and Jill Dougherty acted as independent legal counsel.

### THE ALLEGATIONS

The allegations in this case relate to the alleged conduct of Engineer A during his 2008 campaign to be elected to the position of East Central Region councillor on the Professional Engineers Ontario (PEO) council. The association alleged that Engineer A was guilty of professional misconduct as defined in the *Professional Engineers Act*. The particulars of the alleged misconduct, as set out in the Amended Statement of Allegations dated April 29, 2009, are summarized as follows:

1. Between January 7 and January 16, 2008, Engineer A exchanged numerous emails with PEO's chief elections officer regarding the chief elections officer's direction that portions of an article be removed from the Scarborough Chapter website during the January/February 2008 election period. In the midst of this email exchange, the chief elections officer communicated his "final position" and instructed Engineer A to raise any further concerns with the Central Election and Search Committee (CESC). In spite of this, Engineer A continued to direct several emails to the chief elections officer.
2. As part of his election campaign, Engineer A established a personal website to communicate his views and positions to the PEO electorate. In accordance with established policy, PEO's election web page provided a link to Engineer A's website. Among other things, the website included the exchange of emails with the chief elections officer.
3. A complaint was received by the CESC regarding the content of Engineer A's website and, on February 1, 2008, the chair of the CESC wrote to Engineer A and advised him that the committee had met to

discuss the complaint and the committee concluded that the content of the website contravened several of PEO's standards of professional conduct and also contravened PEO election publicity procedures in that the content:

- (a) was inappropriate, offensive, vexatious and unacceptable;
- (b) ridiculed and impugned the motives and integrity of PEO councillors and staff;
- (c) was not in keeping with the dignity of the profession;
- (d) was not based on fact but, instead, contained unsupported innuendo; and
- (e) was offensive in general tone and tenor.

4. The CESC characterized the website content as harassment and requested that Engineer A revise the content. Engineer A did not take the requested action and, as a result, the link on the PEO elections web page to Engineer A's website was removed.
5. Engineer A subsequently modified the website home page to include an "official notice" stating that: "This website has been censored by PEO. You are not allowed to read any more." Engineer A also included the February 1, 2008 letter from the CESC on his home page.
6. From on or about September 19, 2006 to present, Engineer A has been on fee remission on the basis of unemployment. Since January 2007, Engineer A has been employed on a contract, part-time basis as a professor at Centennial College. In his 2008 election campaign material, he indicated that he was a professor at Centennial College.

The association clarified and summarized the above allegations at the hearing, as follows:

- that Engineer A's actions described in paragraph 1 above constituted harassment of the chief elections officer as defined in section 72(1) of Regulation 941, thereby constituting professional misconduct as set out in section 72(2)(n) of the Regulation;
- that Engineer A's actions described in paragraph 2 above constituted harassment of the members of council and the employees of the association; and

- that the actions described in paragraphs 1, 2 and 6 above each constituted professional misconduct as set out in section 72(2)(j) of Regulation 941.

## PLEA OF THE MEMBER

Engineer A denied the allegations set out in the Amended Statement of Allegations.

## DECISION

The panel found the member not guilty of all of the allegations by a majority of three to two.

Two members of the panel provided dissenting reasons. In their opinion the member's last email to the chief elections officer constituted harassment.

## OVERVIEW

The association received a complaint from a member who was offended by some of the content on Engineer A's election website. The association alleged that the information constituted harassment and would reasonably be regarded by the engineering profession as unprofessional. Harassment is defined in Regulation 941, section 72(1), as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known as unwelcome and that might reasonably be regarded as interfering in a professional engineering relationship."

During its investigation into the complaint, the association identified a series of emails from Engineer A that the association alleged constituted harassment of the chief elections officer. The association also alleged that Engineer A had been paying reduced fees to the association (fee remission) at the same time as he was describing his employment in his election materials as an assistant professor. The association submitted that Engineer A's actions would reasonably be regarded by the engineering profession as disgraceful, dishonourable and unprofessional conduct.

The association's only witness, Bruce Matthews, P.Eng., deputy registrar for the association (Matthews), testified that Engineer A's emails in question established a pattern that did not stop even after the chief elections officer advised Engineer A that his actions were "approaching harassment."

Engineer A's defence was, in part, that he had no professional engineering relationship with the chief elections officer and that the emails were not vexatious and did not constitute harassment since they were all sent to the person whose job it was to provide answers to requests that Engineer A considered as reasonable.

The panel found that Engineer A was a volunteer with the association by virtue of being a candidate for councillor. A councillor is a member of the governing body of the association (council). The panel noted that the council passed a resolution in 2006 that volunteers are in a professional engineering relationship with others whenever they are engaged in PEO activities. While not determinative of the issue, the panel found that the resolution was relevant evidence and was of assistance to the panel in determining whether the relationship between Engineer A and the chief elections officer was an engineering relationship for purposes of applying the definition of harassment in Regulation 941, section 72(1).

With respect to the issue of harassment of the chief elections officer, the panel found that Engineer A's emails were a series of reasonable requests

posed to the chief elections officer about his decision that led to the removal of certain information from the Scarborough Chapter's website. The panel was of the view that Engineer A's emails, including the one sent after the chief elections officer cautioned him, were respectful in tone and showed that he was not trying to antagonize the chief elections officer. The panel noted that the association provided no evidence that the chief elections officer felt that he was harassed by Engineer A. The panel found that, while the emails may have been annoying to the chief elections officer, they did not rise to the level of seriousness that is required for them to be vexatious and, therefore, they did not constitute harassment.

The association identified a number of items on Engineer A's website that it said constituted harassment of councillors and of the association's volunteers. Engineer A's response was that there was no professional engineering relationship, that the website contained information that was entirely factual, and that Engineer A had a right to freedom of expression.

With respect to the issue of whether Engineer A's actions would "reasonably be considered by the profession to be unprofessional," this case is unusual in that the panel received highly specific evidence reflecting the profession's views of his particular conduct, including:

- unsolicited, supportive feedback from members of the association;
- emails between councillors in which they expressed their views about the website;
- the complaint to the CESC;
- two letters from the CESC of the association expressing its view that the website constituted harassment;
- evidence that Engineer A's actions were referred to council; and
- the association's 2008 election results.

The panel considered the above evidence and the content of Engineer A's website and concluded that the profession would not regard the tone or content of the information on Engineer A's website as disgraceful, dishonourable or unprofessional.

The panel found that no individual was identified for ridicule on the website and that Engineer A's comments were expressed within the context of an election. The panel believed that it is important to allow candidates to express their views to enable members of the profession to judge the candidate's suitability for

an elected position. The panel decided that people who are elected or appointed to council must understand that the actions and decisions they take individually and as a council are going to be criticized during an election and that, while they may find such criticism uncomfortable, it is an important facet of a democratic process and, therefore, cannot be considered unwelcome or vexatious or disgraceful, dishonourable or unprofessional, according to either the normal standard of discourse in that context, or the particular standards of the engineering profession.

With respect to the allegations regarding Engineer A being on fees remission, the association's position was that Engineer A's statements regarding his employment on his fee remission declarations and in his election materials were contradictory and misleading, and that Engineer A's actions would reasonably be regarded by the engineering profession as unprofessional. However, Matthews testified that Engineer A's election information was correct. The panel found, based upon the evidence in the Agreed Statements of Facts, that Engineer A was unemployed when he requested fee remission. The panel considered whether Engineer A's statements were, nevertheless, unprofessional and noted that Engineer A checked with the association to confirm that he understood and correctly applied its reduced fees policy. The panel found that Engineer A's actions were not unprofessional since Engineer A complied with the applicable policy and only made statements that were true.

The panel noted that the allegations regarding Engineer A's email exchange with the chief elections officer and Engineer A's statements regarding fee remission were not included in the original complaint. However, those allegations were included in the Amended Statement of Allegations, setting out the allegations referred by the Complaints Committee, and were referenced in the Agreed Statement of Facts. The panel considered the case of *Kupeyan v. Royal College of Dental Surgeons of Ontario* (1982) 73 O.R. (2d) 737 (HJC), where the court held that "the matter" meant the subject matter of the complaint.

## THE EVIDENCE

The parties provided an Agreed Statement of Facts that included the following:

- that Engineer A is a member of the association;

- that Engineer A was a contract faculty professor with Centennial College; and
- that Engineer A taught:
  - four courses from February 26 until April 27, 2007,
  - one course from July 3 to July 6, 2007,
  - four courses from September 7 until December 2007,
  - three courses from January 8 to April 24, 2008, and
  - three courses from September 2 to December 12, 2008.

The association called one fact witness: Matthews. In 2008, Matthews led the group that investigated complaints about members at the association, and he assigned this matter to himself. Matthews described his actions and introduced most of the documentary evidence regarding this matter, including:

- 25 pages of emails and other correspondence dated between December 11, 2007, and January 16, 2008, including email exchanges between Engineer A and the chief elections officer of the association between January 7 and 16, 2008;
- a copy of the council resolution that the association's volunteers are in a professional engineering relationship;
- a copy of the 2008 election publicity procedures published in the July/August 2007 issue of *Engineering Dimensions*, the official publication of the association;
- 24 pages printed from Engineer A's website dated 2/1/2008, including a scanned copy of a letter dated February 1, 2008, from the association to Engineer A;
- unsolicited, supportive feedback from members of the association about the website;
- several emails between councillors in which they expressed their views about the website;
- the complaint sent to the CESC about the contents of the website;
- the complaint sent to the association, which started the complaints process;
- the association's 2008 election results that show Engineer A was elected as a councillor of the East Central Region;
- a copy of the association's reduced fee policy;
- copies of Engineer A's statements regarding his fee remission;
- a letter from Engineer A dated July 12, 2008, regarding his status; and
- two pages of Engineer A's election material that were printed from the association's website dated 2/1/2008 and reprinted in the January/February 2008 issue of *Engineering Dimensions*, the association's magazine.

Matthews testified that, during the course of his investigation, he collected copies of every page of Engineer A's website and conducted interviews with the complainant and the chair of the CESC.

## EMAILS

Matthews testified that the Scarborough Chapter published a December 2007 newsletter that contained an article by Engineer A. Matthews walked the panel through the exchange of emails between various association employees and volunteers that led to a decision by the chief elections officer to direct that the article be removed during the election period and the chapter's subsequent decision to comply with this direction.

The panel noted that the emails in evidence in this matter included one from the incumbent candidate for the East Central Regional councillor, in

which he complained to the chief elections officer that he was offended by the following sentence in the article: “While recycling our waste materials is good for the environment, the all too common practice of recycling our past PEO councillors is not.”

The panel noted that the incumbent also sent an email to the members of the Regional Councillors Committee seeking their views about the article in an attempt to generate a consensus in his bid to have it removed from the chapter’s web page. The responses from four of the councillors included:

- (a) “[Engineer A’s] article...is lacking in sensitivity and logic”;
- (b) “The article is saturated with irony on multiple levels”;
- (c) “The irony is that he is recycling himself as a member of the Scarborough Chapter for many years, isn’t it?”; and
- (d) “He carefully crafted the newsletter to avoid violating election rules. However [sic] I believe the statement, ‘While recycling our waste materials is good for the environment, the all too common practice of recycling our past PEO councillors is not’ is in bad taste.”

The panel noted that the newsletter article was reprinted on Engineer A’s website.

Matthews noted that the first paragraph of the chief elections officer’s last email to Engineer A was:

“[Engineer A] I have made my decision. I have no time to deal with this any further. I now have more than 10 emails from you. This is approaching harassment. If this continues, I will deal with it appropriately.”

Matthews testified that the emails were on Engineer A’s website. Matthews testified that all of the emails, except the last one, were reasonable for Engineer A to have sent, and that the last email from Engineer A was “not unreasonable.”

Matthews said that the council of the association had decided that acting as a volunteer is acting in a professional engineering relationship. The panel noted that the association later entered the council’s resolution into evidence. The resolution, passed in September of 2006 by PEO council, included that “PEO volunteers are in a professional engineering relationship with others whenever they are engaged in PEO activities.”

Engineer A testified that he wrote his emails to elicit “simple yes or no” answers from the chief elections officer regarding the chief elections officer’s decision that led to the removal of certain information from the Scarborough Chapter website.

## WEBSITE

Engineer A testified that he posted the information at issue in this matter on his website. He said that he struggled to understand what the letter from the CESC was referring to since he believed that the website contained facts, that the descriptions of the required changes were unclear, and that nobody else told him that his website was unacceptable. He said that he tried to contact the chair of the CESC, but his voice message was not returned.

The panel noted that the chair stated, in a letter from the CESC to council dated February 16, 2008, that he decided not to return Engineer A’s phone call because Engineer A had posted the letter on his website and “...

marked it ‘censored.’ It was clear to me that any further discussion with him might be repeated on his PEO site [sic], so I did not return his call.”

Engineer A said that the purpose of his website was to provide information to members, and that he recognized that there were limits to what he could put on his website.

Engineer A said that his website did not identify any individual but, instead, commented on the council and its policies in a humorous, satirical way in an effort to generate interest in the election within his region.

Engineer A posted the following statement on the first web page of his website:

“Official Notice

This website has been censored by PEO.  
You are not allowed to read any more.”

Engineer A said that he posted this notice at the same time as he posted the letter from the CESC, since the removal of the link from the association’s web page to his website was, in effect, censorship since there was no other way for anybody to discover his website.

Engineer A posted the following warning statement later on his web page:

“This website contains material intended only for viewing by the voting members of the East Central Region. (East Toronto, Lake Ontario, Scarborough, Simcoe Muskoka, Willowdale/ Thornhill and York)

This site is rated R. The material in here pertains to PEO elections and is not suitable for young children or beneficiaries of PEO largesse. The more mature themes and aberrational behaviour may call for parental guidance. Parents of those involved in PEO politics are advised that some material in here may be considered too strong and therefore off-limits for viewing by their children. Some snippets of language may go beyond polite conversation but are common everyday expressions. No stronger words are present. Depictions of violence are minimal. No nudity, sex scenes, or drug use are present in this website.”

Engineer A explained that the reference to “beneficiaries of PEO largesse” in the warning statement was not a reference to councillors, but for anyone who so benefits, including councillors. Engineer A said that the purpose of this warning paragraph was to stop people who were not members who could vote for him from reading further as they were not his intended audience.

Engineer A's next web page was, in essence, a table of contents that included (with the emphasis in the original text):

"Click on the following to read the Top Ten reasons why [Engineer A] would **not** make a good PEO councillor:

9 [Engineer A] wants the hotels, wine and fine dining"

Engineer A said that he believed that some people participated in the association's activities to benefit for this reason and wished to emphasize this with satire.

Engineer A posted the following paragraph later on this web page (with the emphasis in the original text):

**"What am I promising?**

If you elect me, please don't expect any earth shattering results. Pragmatically, one or two councillors voting against a couple of dozen incumbents and government appointees will not get too far. But I will at least raise the issues that no one wants to talk about. Simply cracking open the closet door so that a little light falls upon the skeletons within may evince a little more ethical behaviour."

Engineer A said that this paragraph was his commitment to provide increased transparency by council. He denied that he was accusing councillors of unethical behaviour.

The panel noted that these comments were not specifically identified by the association as forming part of an allegation in the Amended Statement of Allegations. However, the allegations that might be regarded as falling under paragraph 6 were addressed by the parties during the hearing and have, therefore, been considered by the panel in reaching this decision.

Engineer A posted the following statement later on the web page:

"...none of the East Central Region chapters saw any improvement in their funding..."

Engineer A posted an excerpt from the election platform for the incumbent councillor who was seeking re-election following the above statement, and added a hand-written arrow pointing to:

"Over the past two years, I have accomplished the following for your chapters and membership:

...

- Improved funding for chapters..."

The panel noted that these comments also were not specifically identified by the association as forming part of an allegation in the Amended

Statement of Allegations, but have been addressed by the panel, as well, on the same basis as set out above.

Engineer A posted the following statement on the web page titled "Fee Increases Again" (with the emphasis in the original text):

"...We need to know that your membership fees are used for the benefit of all members and public rather than the small group who frequent PEO HQ."

Engineer A said that the underlining was a hyperlink to another web page and that he was not referring only to councillors with this comment.

Engineer A posted an image of the letter he received from the CESC dated February 1, 2008, on the web page titled "Code of Conduct." The letter included the text in the Statement of Allegations and the following (with the emphasis in the original text):

"Based upon our review of your website, we consider that its content contravenes several of PEO's council-approved standards of professional conduct, as well as section 10 of the approved 2008 election publicity procedures. We concluded that the content:

- relating to councillor-staff relationship is inappropriate, offensive, vexatious and unacceptable;
- ridicules and impugns the motives and integrity of PEO councillors and staff, and is not in keeping with the dignity of the profession;
- is not based on fact but, instead, contains unsupported innuendo and generalization; and
- is offensive in general tone and tenor, rather than any specific wording in the materials.

We find that the content falls within the definition of harassment provided in section 72(1) of Regulation 941/90 and is not in keeping with a practitioner's duties under sections 1 to 8 of section 77 of the regulation (the Code of Ethics), PEO's *Guideline on Human Rights in Professional Practice*, and PEO's core values."

The panel noted that the CESC gave Engineer A four-and-a-half hours to revise his website or the link from the association's website would be removed, and the committee would refer the issue to council.

Matthews summarized the mandate of CESC as "identifying candidates and acting as a resource for the candidates." The panel noted that paragraph 11 of the 2008 election publicity procedures describes the mandate of the committee as "authorized to interpret the election publicity guidelines and procedures, and to rule on questions and concerns of the candidates on matters around the election process."

The panel noted that section 12(3) of Regulation 941 sets out the mandate of the CESC as follows:

- 12.(3) The Central Election and Search Committee shall,
- (a) encourage members to seek nomination for election to the council as president-elect, vice-president or a councillor-at-large;
  - (b) assist the chief elections officer as may be required by him or her; and
  - (c) receive and respond to complaints regarding the procedures for nominating, electing and voting for members to the council in accordance with this regulation. O. Reg. 157/07, s. 3(3).

Matthews testified that Engineer A did not revise his website and that the link from the association's website to Engineer A's website was removed.

Engineer A testified that he posted the information at issue in this matter on his website. He said that he struggled to understand what the letter from the CESC was referring to since he believed that the website contained

facts, that the letter did not set out the CESC's concerns in sufficient detail to know what needed to be changed, and that nobody else told him that his website was unacceptable. Engineer A said he characterized the effect of this letter as censorship.

He said that he tried to contact the chair of the CESC, but his voice message was not returned.

The panel noted that the CESC sent a letter to council dated February 16, 2008, that outlined the committee's action regarding Engineer A's website and that the letter included a comment by the chair of the committee that he decided not to return Engineer A's phone call because Engineer A had posted the letter on his website and "...marked it 'censored.' It was clear to me that any further discussion with him might be repeated on his PEO site [sic], so I did not return his call."

Engineer A posted an image of a street sign for "Retirement Lane" on the web page titled "Retirement Home." He also posted the following paragraphs beside this image:

"So what kind of engineer has this amount of time?

"One look at a photograph of PEO council will tell you.

"What incentive is there for our acclaimed representatives to respond to the needs of the members when there is no pressure to do so? How can our profession respond to its current needs when there is a lack of energy in our governance?"

Engineer A said that the picture was a reference to the number of councillors who were retired and, since he was not, this was a reason to vote for him. He also said that the subsequent paragraph was not an allegation that councillors were unethical or lazy. Engineer A expressed his belief that the prevalence of retired members on council is due, in part, to the large amount of time that is required to function effectively as a councillor. He testified that he was not referring to any particular councillor with these comments.

Engineer A admitted posting the following text on the web page titled "Warm and Fuzzy":

"The whole concept of a democracy where your vote means something is lost. While recycling our waste materials is good for the environment, the all too common practice of recycling our past PEO councillors is not."

Engineer A expressed his view that recycling is good, that it is not waste. He said that this comment was not referring to any particular councillor.

Engineer A posted the following paragraph later on this web page:

"PEO's staff is technically under the financial control of PEO councillors; therefore how can a PEO lawyer be unbiased in an election matter? PEO's lawyer is also the 'chief election officer' [sic], which means he fulfills the functions of a prosecutor, judge and jury. So, how fair can this process be to 'an outsider' when the sitting councillor has such a cozy relationship with prosecutor, judge and jury [sic]?"

Engineer A testified that, in his view, the chief elections officer was biased because he was an employee of the association.

Engineer A posted the following paragraph on the web page titled "PEO Style Democracy":

"This time we have competition only for the top positions. Before I jumped in, there was to be a one horse race for each regional councillor position. A smaller version of the Cuban style of elections where the voters get to choose 641 candidates for 641 positions [sic]."

Engineer A said that his reference to the Cuban model was to illustrate the parallel with the PEO elections for regional councillor.

Engineer A posted the following later on this web page:

"How can we expect the beneficiaries of the current cockeyed system to actually vote themselves out of a free lunch? The basic problem still remains. The fictional democracy we have is run by the PEO old boys club."

Engineer A said that he believed some councillors received a personal benefit of a free lunch, but that the point of these statements was that the election process was tainted.

Engineer A posted the following on the web page titled "Old Boys":

"If it is not yet clear by now, PEO is run as an old boys club. A private club. Invitations only if you behave. When I first joined PEO, all I saw were old white men. Since then, there has been considerable pressure for PEO to change; to allow women, immigrants and other groups in. If you look now, yes, PEO does look a little different in photographs;..."

Engineer A stated that the reference to the "old boys club" was a term that is used by others in council meetings, and that he was not a member of this group.

The panel noted that the evidence included a letter from the chair of the CESC to the council dated February 16, 2008, advising it of the CESC's decision and actions in response to a complaint about Engineer A's website. Engineer A said that he was not aware of any action taken by the council regarding his website and that the association did not deny this claim.

Engineer A provided a package of emails that he received regarding his website and candidature. The emails included three that clearly indicated that the writers had seen the website. None of the emails expressed offence at the content, and two expressed strong support for Engineer A based upon his website.

## FEE REMISSION

Mathews testified that Engineer A was a professor when he made the statements in his election material. Engineer A testified that he applied for fee remission because he was experiencing financial hardship and he was unemployed. In addition, he testified that he contacted the appropriate person in the association who advised him how to interpret the policy. The association did not deny this testimony.

Engineer A testified that his letter dated July 12, 2008, addressed each of the criteria set out in the association's reduced fee policy. The panel noted that Engineer A did not state that he was unemployed.

## APPLICABLE LEGISLATION

The applicable statutory provisions regarding this matter include section 28 of the *Professional Engineers Act*, R.S.O. 1990, Ch. P.28, and section 72 of Regulation 941, R.R.O. 1990. Harassment is defined in Regulation 941, section 72(1), as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known as unwelcome and that might reasonably be regarded as interfering in a professional engineering relationship."

The association bore the onus of proving the allegations on a balance of probabilities, based on clear, cogent and convincing evidence.

## DECISION

Having considered the evidence and the onus and standard of proof, the panel finds that Engineer A did not commit an act of professional misconduct as set out in the Amended Statement of Allegations.

## REASONS FOR DECISION

The panel found Matthews' testimony to be credible and reliable. His testimony was direct, clear and cogent, and he was able to recall facts easily. His evidence was consistent with the physical evidence provided and it made sense. The panel put great weight on his evidence and, where his evidence differed from Engineer A's, the panel preferred Matthews' evidence.

The panel placed less weight on Engineer A's testimony, as the panel found his testimony was not as reliable as that of Matthews and, where their evidence differed, the panel preferred Matthews' evidence. Engineer A's responses to some questions were unclear or evasive and, in a few instances, he had to be reminded to answer the questions put to him. Engineer A had some difficulty recalling certain facts. However, Engineer A's evidence was internally consistent throughout.

The panel notes that Matthews was not tendered as an expert witness, and the panel did not qualify him as such. Therefore, Matthews' views regarding whether Engineer A's emails to the chief elections officer were reasonable or not were given corresponding weight and treated simply as Matthews' own views, and not as expert opinion evidence.

The panel found that Engineer A:

- sent the emails entered into evidence to the chief elections officer between January 7 and 16, 2008;
- posted the information on his election website at issue in this matter; and
- made statements that he was unemployed on his fee remission forms and employed as an assistant professor in his election materials.

The panel noted, and took into account, that the association provided no expert evidence as to what constitutes harassment.

The panel found that Engineer A's emails posting an election platform for councillor and applying for a fee remission are all "act(s) or conduct related to the practice of professional engineering" as set out in section 72(2)(j) of Regulation 941. That interpretation is supported by the decision of the divisional court in *Association of Professional Engineers of Ontario v. Karmash (1998)* O.J. No. 2161.

The panel also noted that, in *College of Physicians and Surgeons and Dr. John G. Patterson (1974)* B.C.J. No. 702, the British Columbia Supreme Court upheld a decision of the college's discipline committee, finding a member guilty of unprofessional conduct based upon the fact that the member had, among other things, "publicly impugned the good faith of the College of Physicians and Surgeons of British Columbia" in certain statements in the media. The Patterson decision supports the conclusion that a finding of unprofessional conduct be made in respect of conduct by a member in relation to his or her regulatory body.

The panel noted that neither party presented any expert evidence as to what "having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional" as set out in section 72(2)(j) of Regulation 941. The panel took note of the various comments by others regarding Engineer A's website, which are discussed in relation to that allegation below.

Disgraceful conduct is the most serious of the three types of conduct contained in this definition of professional misconduct in section 72(2)(j) of Regulation 941. Disgraceful conduct generally encompasses conduct that relates to a member's moral fitness and ability to discharge the higher obligations of a professional. "Dishonourable" conduct generally involves dishonesty or deceit, whereas "unprofessional conduct" does not involve an element of moral failure of the type required for an action to be considered disgraceful or dishonourable [see: *White v. Association of Professional Engineers of Ontario (2006)* O.J. No. 2068, 2006 CanLII 17320 (Div. Ct.)].

In *Caskanette v. Association of Professional Engineers of Ontario*, the divisional court noted that the term "unprofessional conduct" is found in association with "disgraceful" and "dishonourable...conduct," suggesting that the unprofessional conduct is a departure from expected conduct that is so serious that it warrants professional discipline. In the view of the panel, unprofessional conduct would need to involve a clear and serious breach of the Code of Ethics of the association, or fall well outside the range of behaviour generally and reasonably expected of the profession. The association made no allegations of a breach of the Code of Ethics in the present case. While certain that the conduct in question might be regarded by some as inappropriate or offensive, this alone (given the context of the bulk of that conduct as occurring within an election campaign) generally would not be sufficient to make the conduct unprofessional. The panel further found that none of the evidence in this matter demonstrated that

Engineer A's conduct reached the level of being disgraceful or dishonourable within the meaning outlined above.

The panel also considered the case of *Coffey v. College of Licensed Practical Nurses (Man.)*, 2008, MBCA 33, where the court upheld a finding by a discipline committee that the member engaged in professional misconduct and conduct unbecoming a member by circulating "false information [that] impugned the integrity of the college's officers and staff." In upholding the committee's decision, the court noted that the sanction "was imposed for the appellant's careless or reckless behaviour which unjustifiably damaged the college," which was regarded by the court as "a permissible basis for the imposition of a professional sanction." The panel, therefore, considered whether Engineer A's conduct could be characterized as careless or reckless and, therefore, as unprofessional on that basis.

## EMAILS

The allegation was that Engineer A's emails established a pattern that did not stop even after the chief elections officer advised Engineer A that his actions were "approaching harassment."

Engineer A's defence was that he had no professional engineering relationship with the chief elections officer and that the emails were not vexatious since they were all sent to the one person who could provide the answers to Engineer A's reasonable requests for information.

The panel considered the issue of whether there was a professional engineering relationship between Engineer A and the chief elections officer, a requirement in the definition of harassment. The panel took note of council's resolution that was entered in evidence that volunteers are in a professional engineering relationship with others whenever they are engaged in PEO activities. While not determinative of the issue, council's resolution is some evidence on the issue and is of assistance in analyzing whether Engineer A was in a professional engineering relationship with the chief elections officer. The panel found that Engineer A was a volunteer because he submitted his name for election to council, which is an action in furtherance of an association objective (regulating the profession) and that Engineer A would not be paid for this work. The panel found that Engineer A's emails with the chief elections officer were directly related to his actions as a volunteer.

The panel did not agree with Engineer A that the term "professional engineering relationship" within the definition of harassment in section 72(1) of Regulation 941 applied exclusively to a relationship between a professional engineer who is providing engineering advice to a client. The panel agreed with the association based upon a plain reading of the definition and the principal object of the *Professional Engineers Act*, which is (emphasis added):

2(1) The principal object of the association is to regulate the practice of professional engineering *and to govern its members...* in accordance with this act, the regulations and the bylaws *in order that the public interest may be served and protected.*

In the panel's view, the principal object is not restricted to the practice of engineering, and that it is in the public interest to regulate to deal with harassment by a member. However, based upon the wording in the regulation, there must be some relation to professional engineering involved. The panel decided that the term professional engineering relationship

includes relationships where a member holds himself or herself out as an engineer when they interact with another person or group.

Turning to the issue of whether there was harassment of the chief elections officer, the panel noted that the association presented no evidence that the chief elections officer felt harassed by Engineer A's emails and that the chief elections officer characterized, in his last reply email to Engineer A, that Engineer A's actions are "approaching harassment." The chief elections officer was interviewed by Matthews and would, therefore, have had an opportunity to express his views on this issue.

Based upon *MacMaster (Litigation guardian of) v. York (Regional Municipality)*, it is possible for the panel to draw an adverse inference against the association for failing to call a material witness (namely, the chief elections officer) without a reasonable explanation. The explanation offered by the association was that the chief elections officer had been on medical leave since the beginning of 2010 and was not available to be a witness.

The panel accepted that explanation as reasonable and did not draw any adverse inference from the association's failure to call the chief elections officer to testify. However, the absence of any evidence that the chief elections officer felt that he was harassed, or that this issue was investigated by the association, was problematic for the panel. Since the chief elections officer was a practising lawyer, he could be expected to know what harassment was, and it would have been helpful for the panel to have evidence concerning his reaction to the emails.

The panel reviewed each of Engineer A's emails separately, as follows:

1. a request for the reason for the chief elections officer's decision (January 7);
2. a clarification of his request for the reason (January 7 at 4:32 p.m.);
3. a request for the reason to be sent by email (January 7 at 4:40 p.m.);
4. a request for a clarification of the reason provided by the chief elections officer (January 7 at 4:59 p.m.);
5. a request for the basis for the reason provided by the chief elections officer (January 7 at 6:11 p.m.);

6. a clarification of the previous request (January 8);
7. a question by Engineer A as to whether the published procedures would be followed (January 9);
8. a request whether there were any other reasons for the chief elections officer's decision (January 10);
9. a re-stated request for the basis for the chief elections officer's decision;
10. a request for a response to the previous email (January 16 at 9:33 p.m.); and
11. a clarified request for the basis for the reason for the chief elections officer's decision (January 16 at 3:32 p.m.).

In summary, Engineer A sent three requests for the reason (emails 1, 2 and 8 above) and three requests for the basis of the reason (emails 4, 5, 6, 7, 9 and 11) that led to the removal of his article from the chapter website.

Section 11.1 of Regulation 941 sets out the mandate of the chief elections officer as follows:

- 11.1 The council shall appoint in each year a chief elections officer, who shall for that year,
- (a) oversee the nomination of members for election to the council and the election of and voting for members to the council; and
  - (b) ensure that nomination, election and voting are conducted in accordance with the procedures established under the act.

In this case, the association alleges that the chief elections officer "... instructed [Engineer A] to raise any further concerns with the CESC. In spite of this, Engineer A continued to direct several emails to the association's chief elections officer." The panel found that Engineer A was not making a complaint, which is within the mandate of the CESC, and that he was properly addressing his questions to the proper individual, the chief elections officer, whose mandate included responding to such matters and since he, alone, knew the response to Engineer A's questions.

The panel found that Engineer A's emails, with the possible exception of the seventh email, used a respectful tone, and that there is no evidence to suggest that they were designed or intended to antagonize the chief elections officer. The panel believed that Engineer A was trying to get the chief elections officer to recognize that he had, in Engineer A's opinion, made a mistake. The panel decided that it was not necessary to determine whether the chief elections officer actually made a mistake.

The panel noted Matthew's opinion that Engineer A's emails, except the last one, were reasonable, and that the last one was "not unreasonable." Based upon this evidence and a review of the emails themselves, and after careful consideration of the intent of the last email, the panel found that the emails were all reasonable when each was considered separately.

The panel considered the group of the three emails that requested the reason for the chief elections officer's decision. The first was the request itself, the second was a clarification of the first email, and the third was an inquiry as to whether there were any other reasons. The panel judged that these emails were akin to a civil conversation between two people that was conducted by email instead of in person where one person does not understand the question being asked. The panel found that the three emails together were part of a normal conversation between two people.

The panel considered the group of six emails that requested the basis for the chief elections officer's decision. The panel noted that, in its opinion, the responses from the chief elections officer were curt, and that he did not always answer Engineer A's questions directly. The panel likened this exchange to a conversation between two people who were not listening to each other's point of view. The last email from Engineer A was akin to calling after someone who has turned and started to walk away. The panel decided that such situations occur occasionally within normal discourse and, therefore, one such situation between Engineer A and the chief elections officer did not meet the requirement of a course of vexatious comment.

The panel considered next whether the emails together constituted harassment and, in that context, whether the member engaged in "a course of vexatious comment or conduct" in sending the emails.

While the panel felt that the email exchange was not a complete and detailed exchange of views, the panel recognized that Engineer A put some thought into his communications and did not make any personal or disparaging remarks.

The panel noted that Engineer A ought to have known the person acting as the chief elections officer was an employee of the association for which he was a candidate to its governing body.

The panel noted the following principles set out in *Lang Michener et al. v. Fabian et al.* (1987), 37 D.L.R. (4th) 685 (Ont. H.Ct. of Justice) to determine whether proceedings are vexatious:

- (a) The bringing of one or more actions to determine an issue, which has already been determined by a court of competent jurisdiction, constitutes a vexatious proceeding;
- (b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multi-

furious proceedings brought for purposes other than the assertion of legitimate rights;

- (d) It is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) In determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) The failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious; and
- (g) The respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

In the absence of any other framework that would apply to determining whether Engineer A's actions were vexatious, the panel adapted and applied the principles set out above and, taking into account the required standard of proof, as follows:

- (a) While Engineer A asked for the reason for the chief elections officers' decision and, subsequently, for the basis for that decision, the panel found that these requests were not intended to determine an issue that had already been determined. For example, this was not a case of Engineer A submitting a complaint to the CESC, having it rejected, and submitting another complaint about the same decision;
- (b) Engineer A was asking the chief elections officer for his reasons and the basis for those reasons. As the chief elections officer was the only one who could provide this information, the panel found that Engineer A could reasonably have expected to have his questions answered. In addition, the panel found that Engineer A's actions could have led to a possible good—the confirmation or reversal of a decision as part of the conduct of a fair election;
- (c) The panel found that the requests were not for an improper purpose;
- (d) The panel noted that there was no evidence that Engineer A complained to the CESC about the chief elections officer's decision. The panel found that Engineer A remained on a single issue in his emails to the chief elections officer and did not roll it forward into subsequent actions and repeat and supplement the issue;
- (e) The panel considered the history and context of the emails, as summarized in the sections titled "Newsletter" and "Emails," and did not find anything that suggested that they were vexatious;

- (f) There were no costs awarded, so this principle is not applicable to this issue; and
- (g) Again, the panel noted that there was no evidence that Engineer A complained to the CESC about the chief elections officer's decision, so this principle regarding making persistent complaints is not applicable to this issue.

For the reasons set out above, the panel found that, while the emails may have been annoying to the chief elections officer, they did not rise to the level of seriousness that is required for them to be a course of vexatious comment. Therefore, the panel found Engineer A did not harass the chief elections officer with his emails.

The panel considered whether the emails were disgraceful, dishonourable or unprofessional. The panel found that there was no evidence of any moral turpitude involved in the emails, so the emails were not dishonourable. The panel noted that the terms disgraceful and dishonourable provide context for defining what constitutes unprofessional conduct.

Matthews stated that the email exchange between Engineer A and the chief elections officer was found on Engineer A's website and that this was also included in the Statement of Allegations. The panel found that these statements were in error based upon the evidence in this matter. The panel noted that a web page included a reference to an exchange between the chief elections officer and the incumbent councillor, and another included a reference to the chief elections officer's decision regarding the Scarborough website.

The panel considered the case of *Kupeyan v. Royal College of Dental Surgeons of Ontario* (1982) 73 O.R. (2d) 737 (HJC), where the court held that "the matter" meant the subject matter of the complaint, and that the allegation of harassment of the chief elections officer through Engineer A's emails is far removed from the issue set out in the complaint.

## WEBSITE

The panel found that, by virtue of submitting his name for election, Engineer A was a volunteer with the association and, as noted above, the panel found that such work is acting in a professional engineering relationship. The panel noted that the association's position was that there was harassment of members of council and employees

of the association. The panel found that Engineer A was acting in a professional engineering relationship with both of these groups.

The association's position was that Engineer A had to conduct himself in a manner consistent with the fiduciary role that he was running to serve in, as set out in section 28 of By-Law No. 1 of the association. The panel could find no evidence upon which to base this assertion or to show that Engineer A was not acting "honestly in good faith and in furtherance of the objects of the association in order that the public interest may be served and protected."

The panel agreed with the association's position that, in asking to be elected to a fiduciary position, Engineer A should have modelled the association's values. The panel noted that Engineer A was elected in 2008 as a councillor and there was no evidence to suggest that Engineer A failed to model these values once elected.

The panel noted that neither party presented any expert evidence as to what constitutes harassment and, more specifically, a course of vexatious comment. In addition, it found that it could not adapt and apply the model set out in *Lang Michener et al. v. Fabian et al.* to the allegations regarding the website as these were not "actions" by Engineer A; rather, they were a single act. Despite this, the panel decided that the website was a course of comment since the website contained multiple comments within this one act. The panel reached a consensus of opinion that it believed would reflect what the engineering profession would reasonably regard as disgraceful, dishonourable and unprofessional regarding this allegation.

The panel determined that a course of comment or a single comment that is simply annoying and impolite is insufficient to amount to a course of vexatious comment for purposes of section 72(1) of Regulation 941. For a course of comment to be vexatious and qualify as harassment within the meaning of section 72(19), it must not only be vexatious, it must also be known or ought reasonably be known to be unwelcome and must be reasonably regarded as interfering with a professional engineering relationship.

Members expect candidates to express their views strongly when campaigning and, therefore, during an election campaign, in order for a comment to reach the level of being vexatious and amount to harassment, it must be degrading, derogatory or clearly inappropriate, such that the person making it must know or ought to have known that it was unwelcome even in an

election context. For example, annoying or impolite satire is not necessarily vexatious in the context of an election campaign.

The panel believed that it was important to allow candidates to express their views to enable members of the profession to judge a candidate's suitability for an elected position. In addition, the panel believed that people who are elected or appointed to council must understand that their actions and decisions are likely to be criticized during an election and that, while they may find the criticism uncomfortable, it is an important facet of a democratic process and, therefore, cannot be considered unwelcome or vexatious in accordance with the bounds of the normal standard of discourse or the standards of the profession.

For similar reasons, the panel also decided that a comment during an election campaign would have to be inappropriate, offensive, unacceptable or false, or a combination of these characteristics, to fall outside of the range of behaviour generally and reasonably expected of the profession so as to be considered unprofessional.

The panel considered each issue identified by the association as forming part of the allegations, and then considered the issues as a whole.

The panel found that the "Official Notice" statement on the first web page was an expression of Engineer A's view about the effect of removing the link from the association's web page to his web page. The panel found that the comment was not vexatious since it was not degrading, derogatory or clearly inappropriate (in the context of an election) with respect to either the council or the employees of the association. The panel also found that the notice would not be considered by the profession to be unprofessional because the statement simply did not rise to the level of being outside of the range of behaviour generally and reasonably expected of the profession in the context of an election.

The panel found that the reference to "beneficiaries of PEO largesse" in the warning paragraph on the first web page was not a vexatious comment in the context of an election because it did not identify any particular group, it was not clearly inappropriate, degrading or derogatory to councillors or employees of the association, and there was no evidence that the comment was known or ought reasonably to have been known by Engineer A to be unwelcome in the election context.

The panel did not agree with the association's position that Engineer A's statement is an indictment that councillors are breaching their fiduciary duty by acting in their own interest. The panel found that although Engineer A's statement was an exaggeration of the effect of the CESC's letter, that the statement was not false.

The panel considered Engineer A's statement that some people participated in the association's activities to benefit from PEO's largesse. The panel interpreted the term largesse to include the professional status derived from being a member of a committee or task force.

The panel found that the reference to "beneficiaries of PEO largesse" would not be considered by the profession to be unprofessional because the statement did not rise to the level of being clearly inappropriate or offensive, or a serious departure from expected professional conduct.

The association's position was that the reference to hotels, wine and fine dining reinforced the idea that councillors are "beneficiaries of PEO largesse." The panel noted that the link from "hotels, wine and fine dining" was to a page where Engineer A provided a specific example where he thought the association spent too much on these items for a workshop.

The panel did not accept the proposition that Engineer A was saying indirectly that hotels, wine and fine dining are the reason councillors seek

election or are appointed to council. The panel did note that volunteers with the association are sometimes provided with hotel accommodation, food and wine, but there was no evidence that this practice was inappropriate, and the panel did not find anything untoward in Engineer A's statement that this was not his reason for seeking election.

The panel found the sentence, "Simply cracking open the closet door so that a little light falls upon the skeletons within may evince a little more ethical behaviour," was not a vexatious comment because the panel judged that the comment was not clearly degrading or derogatory or inappropriate toward councillors or employees of the association in the context of an election, and the evidence did not show that Engineer A knew or ought reasonably to have known that the statement (in an election context) was unwelcome and might reasonably be regarded as interfering with a professional engineering relationship.

The panel found the sentence was not clearly inappropriate, offensive, unacceptable or false. The panel believed Engineer A's explanation that this was simply a commitment to increase the transparency in council matters. The panel did not agree with the association's suggestion that this sentence was accusing council members of unethical behaviour.

Similarly, the panel found the sentence, "We need to know that your membership fees are used for the benefit of all members and public rather than the small group who frequent PEO HQ," was not a vexatious comment because the panel judged that the comment was not clearly inappropriate or degrading or derogatory toward councillors or employees of the association.

The panel also found the comment was not clearly inappropriate, offensive, unacceptable or false. However, the panel felt that this comment was close to the line of being clearly false, and it required careful consideration to arrive at this finding.

The panel found the picture of a street sign for a road called "Retirement Lane" was not ageism as suggested by the association. The panel believed that the image was to complement the accompanying text on the web page that stated that the workload on councillors causes people who are retired to make up a disproportionate percentage of council. The panel decided that the picture was not vexatious or clearly inappropriate, offensive, unacceptable or false.

The panel found that the accompanying text on the web page did not suggest that retired councillors were too tired to do their job, as suggested by the association. The panel decided that the text was not vexatious or clearly inappropriate, offensive, unacceptable or false. However, the panel felt that the comments were close to the line of being clearly offensive, and they required careful consideration to arrive at this finding.

The panel found the comment about "recycling our past PEO councillors" was not a reference to incumbent councillors as waste or that the comment was insulting to councillors, as suggested by the association. The panel found that the comment was a metaphor for Engineer A's election platform position that the existing councillors should be replaced. The panel did not find that the comment was vexatious or clearly inappropriate, offensive, unacceptable or false.

The panel considered the following comment on Engineer A's web page titled "Warm and Fuzzy" (emphasis in the original text):

"[The chief elections officer] considers that because a PEO councillor is offended, that is sufficient reason for you not to know about PEO's long standing practice of recycling councillors, even though none of the election rules published on the PEO website were broken."

The association noted that the chief elections officer did judge that an election rule was broken regarding the Scarborough Chapter's website. The panel noted that the sentence was referring to re-electing incumbent councillors, which was different from the issue in the email exchanges between the chief elections officer that were entered into evidence. Despite this and, based upon the context used in the sentence, the panel found that Engineer A was indeed referring to the email exchange.

The panel found that Engineer A's statement was false but, based upon the tone and tenor of Engineer A's emails, was a reflection and a simple overstatement of Engineer A's view that there was no basis for the chief elections officer's decision. The panel found that the comment alone was not sufficient to be characterized as vexatious, clearly inappropriate, offensive or unacceptable. However, the panel felt that the comment was close to the line of being vexatious, and the comment required careful consideration to arrive at this finding.

The panel did not agree with the association's position that Engineer A's comments stemming from the fact that the chief elections officer was also legal counsel for the association were a serious allegation of bias or favouritism against the chief elections officer. The panel found that Engineer A's comment was an expression of his view that there is a perception of a conflict of interest due to this relationship. The panel found this was a legitimate expression of opinion on a decision made within the association. The panel found that this comment was not vexatious, inappropriate, offensive, unacceptable or false.

The panel did not agree with the association's position that Engineer A's comparison between the association's election and a Cuban election implied that the association is a dictatorship, or that the association's elections were unfair, dishonest or slow. The panel read the comparison within the context of the web page and agreed with Engineer A that the purpose of the comment was to criticize the lack of contested elections satirically. The panel found this comparison was not vexatious, clearly inappropriate, offensive, unacceptable or false.

The panel did not agree with the association's position that Engineer A's comment about the "beneficiaries of the current cockeyed system" and that the association is a "fictional democracy" equated to an unfounded allegation that councillors derive a personal benefit or that the elections are a sham. The panel found that the comment, when read within the context of the web page, is a comment that the election process needs reform to be more fair. The panel found this comment was not vexatious, clearly inappropriate, offensive, unacceptable or false.

The panel agreed with the association's position that a major theme of the website is that Engineer A is running against the "old boys club." The panel noted that Engineer A recognized in his web pages that the term was not completely applicable, since there were women and minorities represented on council. The panel believed that Engineer A was using this expression simply to point out that he was not a member of this group. For these reasons, the panel found that the use of this term was not vexatious, clearly inappropriate, offensive, unacceptable or false.

Considering the website as a whole, the panel was of the view that Engineer A tried to take a humorous, provocative and often satirical approach to present his election information and that this approach is riskier than a more traditional approach. The panel believed Engineer A's statement that he decided to take this approach to increase members' interest in the election, which presumably would be to his advantage over his opponent. The panel believed that taking measures to increase interest in an election is in the public interest.

The panel believed that Engineer A took an appropriate step to put a warning on his website that it contained "mature themes" and language that "may go beyond polite conversation." The panel believed that these statements mitigated the risk that members of the public who are not members of the association in the East Central Region would read this web page.

Counsel for Engineer A stated that the association did not, until its closing statement, provide a detailed explanation of the elements of Engineer A's website that the association alleged constituted harassment and why the association believed they would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

The panel considered the elements identified by the association above and agreed with counsel

for Engineer A that they were controversial but did not, as a group, rise to the level required for them to be considered a course of vexatious comment. The panel considered the elements within the context of the website as a whole and found that the website was primarily an election platform, that it did not repeat and build upon issues, and that it was not aimed at the existing councillors or staff, but that it was aimed at the conduct and actions of council. The panel notes that consultation with legal counsel by a candidate before posting campaign material on a website may mitigate the risk that someone will complain about the content of the website.

Engineer A's lawyer referred to the right to freedom of expression enshrined in the Charter of Rights and Freedoms and relied on a number of cases in which that right has been interpreted and applied. However, no Notice of Constitutional Question was served by Engineer A and he did not seek to challenge the constitutionality of any of the provisions of the act or regulations in issue in this case. Rather, Engineer A argued that the charter cases and, more broadly, charter values should be taken into account by the panel in interpreting and applying the provisions of the act and regulations in issue and in determining whether there had been professional misconduct. For that purpose, the panel considered those charter cases and, in particular, the Supreme Court of Canada's decision in *R. v. Zundel* (1992) 2 S.C.R. 731 and the following comments of that court in *Edmonton Journal v. Alberta (Attorney General)*, (1989) 2 S.C.R. 1326:

"Freedom of expression is of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances.

"...

"Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinion about the functioning of public institutions."

The panel did not agree with counsel for Engineer A's position that this matter was an issue of whether the association could run a fair election.

The panel was greatly influenced by the following evidence:

- that the comments regarding the "recycling of councillors" and the "lack of energy" at council were posted on the Scarborough Chapter website for months without complaint;
- that several councillors reviewed the comments and none found them serious enough to even suggest that they were offended by the comments; and
- that Engineer A received unsolicited complimentary feedback from some members of the profession.

In addition, the panel took into account the fact that Engineer A was elected as a councillor in 2008.

The panel noted that Matthews, the only witness who was an employee of the association, did not testify that he felt harassed by the content of the website.

The panel found that the profession did not, and would not have, regarded the tone or content of the information on Engineer A's website as disgraceful, dishonourable or unprofessional. The panel found that elements of the website, although distasteful to some, do not constitute harassment and would not reasonably be regarded by the profession as unprofessional for the reasons given above.

## **FEE REMISSION**

The panel noted that Engineer A stated in his fee remission application that he was actively seeking employment and described his employment status in his campaign material as an assistant professor at Centennial College.

The panel accepted Matthews' testimony that Engineer A's statement in his campaign material was correct.

The association provided a copy of its reduced fee policy that was in effect at the time that Engineer A made his requests for fee remission under the policy. The applicable sections of the policy are as follows:

"Policy statement: PEO recognizes the following situations in which a reduced or no annual fee may apply:

"...

"D) Financial difficulty due to unemployment or change in employment."

The policy requirements are set out in section D:

"D. Financial difficulty due to unemployment

"A member actively seeking employment who has not practised engineering for at least three months and is experiencing financial hardship is eligible for the reduced fee if the member:

- provides a written request with the annual licence fee renewal notice giving the reasons for the request and indicating that the member is actively seeking employment."

The panel found, based upon the information in the Agreed Statement of Facts, that Engineer A was unemployed when he signed his request for a fee reduction on July 25, 2008. The panel noted that there was no evidence that Engineer A's statements in his letter dated July 12, 2008, were false. The association misread the letter to mean that Engineer A was unemployed when he signed the letter, but the letter only states that Engineer A is "looking for employment" (emphasis added). While Engineer A was retained on a very short-term contract when he wrote his letter, the panel found that the contracted work was not employment for the purposes of the policy.

Engineer A made a previous request for fee remission on June 6, 2006. The only evidence regarding whether Engineer A was employed at that time was Engineer A's resume, which says that he was employed in the Ministry of Community Safety and Correctional Services between 2001 and 2006. Based upon the lack of precision throughout the employment section of the résumé and the fact that this was the first time Engineer A applied for a reduced fee and that he did so only after consulting with the association employee who implemented the policy, the panel believed Engineer A and found that he was unemployed on June 6, 2006.

The panel found, based upon Engineer A's uncontested evidence, that he was experiencing financial hardship when he applied for fee remission.

The association did not dispute that Engineer A's work as a professor was work that did not require a licence as a professional engineer, but argued that the term "practised engineering" had a broader meaning, without being defined.

The panel considered the term within the context of the sentence and the policy objective statement, and found that the term referred only to activities that are regulated by the profession. The panel found that Engineer A had not practised engineering for three months prior to his declarations.

The association provided evidence that Engineer A properly completed the required forms and provided the required statements to comply with the administrative requirements of the policy.

Based upon the above, the panel found that Engineer A met all of the requirements of the association's fee reduction policy.

The panel considered whether Engineer A's actions were, as the association proposed, "misleading and less than fulsome to the members of the association during the election campaign." The association did not provide any evidence of the profession's views of Engineer A's actions so the panel used its own judgment. Since the statements were found to be correct, it is not possible to find that they constituted an action that is disgraceful or dishonourable.

The panel considered whether Engineer A's actions were unprofessional and found that Engineer A's actions did not meet this threshold because:

- they were all correct; and
- they were made within the context of an election where the members expect candidates to put forth their best aspects and not to provide ammunition to other candidates that they could use to attack them.

The panel found that Engineer A's actions would not be reasonably regarded by the profession as disgraceful, dishonourable or unprofessional conduct.

The panel notes that the allegation regarding Engineer A's statements on his fee remission forms and on his website, like the allegation regarding Engineer A's emails, was not part of the original complaint, although it was referred to in the Amended Statement of Allegations.

## SUBMISSIONS

Before adjourning, counsel for Engineer A indicated that he intended to make a submission as to costs.

The panel also requests from the parties written submissions on the need for publication, with names, of the Decision and Reasons in the official journal of the association.

The panel intends to continue this hearing in writing in accordance with Rule 7 of the Rules of Procedure of the Discipline Committee (available at [www.peo.on.ca/Tribunals/DisciplineTribunal.html](http://www.peo.on.ca/Tribunals/DisciplineTribunal.html)). Any submission by the parties to the panel as part of a written hearing is to be delivered to the tribunals office within 30 days after the date of this decision and a copy provided to the other party. The other party will have 30 days to provide its submission, and the

party making the motion will have another 10 days to provide a reply submission.

The panel may decide to ignore any submission that it receives after a deadline has passed.

Submissions are to be sent to the tribunals office at the following address:

Professional Engineers Ontario  
40 Sheppard Avenue West, Suite 101  
Toronto, ON M2N 6K9

Attention: Albert Sweetnam, P.Eng.

Chair, [Engineer A] panel of the Discipline Committee

The written summary of the Decision and Reasons was signed by Albert Sweetnam, P.Eng., as chair on behalf of the other members of the discipline panel: J.E. (Tim) Benson, P.Eng., Ishwar Bhatia, P.Eng., Roydon Fraser, P.Eng., and Glenn Richardson, P.Eng.

## DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, c. P.28; and in the matter of a complaint regarding the conduct of ENGINEER A, a member of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on May 3 and 4, 2010, at the offices of the Association of Professional Engineers of Ontario in Toronto.

On December 6, 2010, a panel of the Discipline Committee released its Decision and Reasons in this matter, and provided a framework for the parties to make submissions as to publication and costs. The panel received the following:

- (a) submissions on publication and costs on behalf of Engineer A, dated January 5, 2011;
- (b) submissions on behalf of the Association of Professional Engineers of Ontario (the association) dated January 31, 2011; and
- (c) a reply submission on behalf of Engineer A, dated February 11, 2011.

### SUBMISSIONS REGARDING PUBLICATION

Engineer A requested that the panel's Decisions and Reasons be published in the official publication of the association, with any reference to Engineer A's identity omitted. The association made no submission in respect of this request.

On reviewing the submissions and the provisions of section 28(6) of the *Professional Engineers Act*, the panel orders that the Decision and Reasons as to the merits and this Decision and Reasons as to costs and publication be published in the official publication of the association, with any reference to Engineer A's identity omitted, and that the association may reformat the panel's decisions to comply with the normal publishing practices and standards for its official publication.

### SUBMISSIONS REGARDING COSTS

Engineer A requested, pursuant to section 28(7) of the *Professional Engineers Act*, that the Discipline Committee order the association to pay the costs of his defence, on a partial indemnity basis, in the total amount of \$27,717.67, which sum includes partial indemnity for legal fees (in the amount of \$24,311.58) and the full indemnification of disbursements totalling \$3,406.09. The grounds for this request are summarized in Engineer A's submission as follows:

"[...that] by the start of the actual hearing on May 3, 2010, [the association] knew or ought to have known that the allegations against [Engineer A] could not have succeeded. [The association's] obligation, to both the Discipline Committee and to its member, was to withdraw the allegations. Instead, [the association] proceeded with the prosecution unnecessarily, forcing [Engineer A] to incur significant expense in defending himself."

Engineer A submitted that the commencement of the proceedings was unwarranted for the following reasons:

- (a) The matter should never have been referred to the Discipline Committee by the Complaints Committee;
- (b) The evidence before the Complaints Committee included the fact that Engineer A had been elected to council by a substantial majority, despite the commencement of the proceedings;
- (c) The Complaints Committee was aware that the matter had been referred to council, who took no action against Engineer A; and
- (d) There was no evidence before the Complaints Committee of any harassment of the chief elections officer or any other alleged victim of harassment.

Engineer A submitted that:

- (a) The association amended the Statement of Allegations on April 29, 2009 (several days before the hearing), to include an allegation of harassment against the association's chief elections officer by Engineer A through emails sent in the context of an election query;
- (b) The association added an allegation regarding Engineer A's statements on his fee remission forms and on his website, along with the allegations regarding Engineer A's emails, which was not part of the original complaint;
- (c) The association chose not to obtain evidence from the chief elections officer;
- (d) The Discipline Committee found that the allegation of harassment of the chief elections officer through Engineer A's emails was "far removed from the issue set out in the complaint";
- (e) The association did not call any witnesses who could support the allegations of harassment and professional misconduct, and did not clarify the substance of the allegations until the association's counsel made his closing submissions; and
- (f) There is an obligation on the association as the prosecutor to ensure that it only pursues allegations of professional misconduct that have a reasonable prospect of conviction, and to withdraw every allegation that has no reasonable prospect of conviction, is frivolous or is vexatious.

The association's response was that costs can be awarded only in accordance with section 28(7) of the *Professional Engineers Act* when "the commencement of the proceedings was unwarranted," that the burden of proof is on Engineer A to provide the information that was before the Complaints Committee when it made its decision to refer the matter to

the Discipline Committee, that Engineer A had this information, and that Engineer A had not done so.

In addition, the association cited the following elements of the panel's Decision and Reasons as illustrative that the panel wrestled with its decision:

- (a) The comments on elements of Engineer A's website included that:
  - (i) "The panel felt that this comment was close to the line of being clearly false, and it required careful consideration to arrive at the finding." (Decision and Reasons page 38),
  - (ii) "The panel felt that the comment was close to the line of being vexatious, and the comment required careful consideration to arrive at this finding. (Decision and Reasons page 40); and
- (b) The fact that there was a dissenting opinion from two members of the panel.

In reply, Engineer A repeated many of the same points made in Engineer A's original submission and added that the fact that the panel wrestled with its decision is not relevant.

## EVIDENCE SUBMITTED ON THE MOTION FOR COSTS

Engineer A provided:

- (a) a breakdown of the fees and disbursements incurred by the defence in this matter totalling \$47,730.13;
- (b) an excerpt from the book "*A Complete Guide to the Regulated Health Professions Act*" by Richard Steinecke; and
- (c) some legal authorities.

The association provided some legal authorities.

## DECISION ON THE MOTION

The panel declines to award costs against the association.

There is a dissenting opinion on this motion.

## REASONS FOR THE DECISION

Section 28(7) of the *Professional Engineers Act* provides the panel with the power to reimburse costs to a member or a holder in a proceeding. The section is provided here for convenience:

"28(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."

The panel took note of the finding in the matter of the *Association v. Paul Siew Choon Lim, P.Eng. and P. Lim & Associates Limited* (Lim) dated January 11, 2011 (provided by the association) that "the commencement of the proceedings is at the time the Complaints Committee refers a matter to the Discipline Committee."

The panel noted that the rules of procedure of the Discipline Committee define the term proceeding as follows:

"Proceeding' means a motion, hearing and/or application under Rule 9 that is before a discipline panel."

The panel decided that this definition does not apply to the use of the term "proceeding" in the *Professional Engineers Act* since a rule cannot limit the application of a term in an act. However, the panel used the definition to provide some context for its deliberations.

The panel noted that the *Statutory Powers Procedure Act* (SPPA) uses the term "proceeding" 145 times and defines it as follows:

"proceeding' means a proceeding to which this act applies; (instance)"

The SPPA further defines a hearing as "a hearing in any proceeding," indicating that proceedings encompass hearings, but are not limited to hearings.

The panel decided that these definitions are governing. The following sections of the SPPA are also instructive:

#### **"Record of proceeding**

20. A tribunal shall compile a record of any proceeding in which a hearing has been held, which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and

- (f) the decision of the tribunal and the reasons therefor, where reasons have been given."

#### **"Decision not to process commencement of proceeding**

4.5(1) Subject to subsection (3), upon receiving documents relating to the commencement of a proceeding, a tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding if,

- (a) the documents are incomplete;
- (b) the documents are received after the time required for commencing the proceeding has elapsed;
- (c) the fee required for commencing the proceeding is not paid; or
- (d) there is some other technical defect in the commencement of the proceeding."

#### **"Dismissal of proceeding without hearing**

4.6(1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met."

The panel interpreted these sections of the SPPA to mean that a proceeding includes steps that occur before a hearing is started and after a matter is referred. The panel is of the view that proceedings commence when a matter is referred to the Discipline Committee.

## **UNWARRANTED**

The panel took note of the finding by the Discipline Committee in Lim that the term "unwarranted" in section 28(7) of the *Professional Engineers Act* means "without reasonable justification, patently unreasonable, malicious, taken in bad faith, or for a collateral purpose" as set out in *Re Anthony Michael Speciale*, a decision of the Law Society of Upper Canada dated February 25, 1994.

## **SUBMISSIONS BY THE PARTIES**

The panel agreed with the association that the motion required Engineer A to prove on a balance of probabilities that the Complaints Committee's decision to refer this matter to discipline was unwarranted. The Complaints Committee does not provide reasons for a decision where it decides to refer a matter to the Discipline Committee. However, the Discipline Committee has considered the Statement of Allegations in this matter, which reflects the allegations that the Complaints Committee decided to refer to discipline.

The panel took note of the complaint and the other evidence entered on the merits, including the evidence by Bruce Matthews, P.Eng. (Matthews), regarding the conduct of his investigation. Specifi-

cally, the complaint was made regarding the content of Engineer A's website and on Engineer A's response to a letter from the association's Central Election and Search Committee (CESC).

Matthews testified that his investigation consisted of:

- (a) verifying the authenticity of the statements in the complaint;
- (b) interviewing the complainant (and that he did not take notes during this interview);
- (c) interviewing the chair of the CESC (and that he did take notes);
- (d) interviewing the association's chief elections officer (and that he did not take notes);
- (e) collecting a copy of the letter in question from the CESC to Engineer A; and
- (f) printing a copy of Engineer A's website.

A complete list of the information collected by Matthews and provided as evidence to the panel is contained in the panel's Decision and Reasons on the merits.

The panel noted that the allegations include:

- (a) statements in the complaint regarding the status of Engineer A and other pertinent details;
- (b) correspondence and details that could only have originated from the chair of the CESC;
- (c) an excerpt from the letter from the CESC to Engineer A; and
- (d) additional details from Engineer A's website.

Based upon the alignment of the allegations, the information collected by Matthews and the complaint, the panel finds that the Complaints Committee had the information listed above when it made its decision to refer the matter to the Discipline Committee. In addition, since Matthews testified that there were no other avenues of investigation and that the complaints regarding Engineer A's emails and fee abatement were not part of the referral, the panel found that it was in possession of all the information that was relevant to the complaint that led to the Complaints Committee's decision to refer the matter to the Discipline Committee.

The panel had no evidence that the Complaints Committee knew that the council of the association had considered the complaint as stated by Engineer A. Similarly, the panel had no evidence that the Complaints Committee was presented with or considered the results of the council election. The panel makes no finding on these issues and considered them no further.

The panel gave little weight to the fact that it wrestled with its decision on the merits.

The panel found that it was reasonable for the Complaints Committee to consider the decision by the CESC, a group of senior members of the association, in addition to the complaint was, on a balance of probabilities, sufficient evidence alone that could have resulted in a decision of professional misconduct by the Discipline Committee if Engineer A had not presented a defence. Therefore, the Complaints Committee had a reasonable justification for its decision to refer the matter to the Discipline Committee.

The panel also noted that Matthews gave several opportunities to Engineer A to counter the claims in the complaint and that Engineer A chose not to do so.

The panel did not consider whether the commencement of proceedings was unwarranted on the basis of being patently unreasonable, malicious, taken in bad faith, or for a collateral purpose because these elements were not part of Engineer A's submission on costs.

Since the panel found that the commencement of proceedings was not unwarranted, there is no basis for reimbursing Engineer A his costs, or to even consider the question of quantum of costs.

The panel noted, based upon *Kupeyan v. Royal College of Dental Surgeons of Ontario* (1982) 73 O.R. (2d) 737 HJC (which case was provided to the panel by the parties in argument regarding the merits of this matter), that the allegations of harassment of the chief elections officer, and that Engineer A made conflicting statements regarding his employment status, were not part of the original complaint. In the panel's view, those allegations were distinct from the other allegations included in the original referral in this case and should have been considered by the Complaints Committee, council or the council executive in accordance with section 28(1)(a) of the *Professional Engineers Act* well in advance of the hearing, to determine whether they should be referred to the Discipline Committee before they were presented to the panel. In addition, the panel agreed with Engineer A that the association should have made its allegations clear to Engineer A well before the association's closing submission. The panel was very troubled by these actions by the association and would have considered them as important reasons when determining the quantum of the costs had the referral been unwarranted. The association would be well advised not to repeat these actions.

Albert Sweetnam, P.Eng., signed this Decision and Reasons on the motions as chair of this discipline panel and on behalf of the members of the discipline panel: J.E.(Tim) Benson, P.Eng.; Ishwar Bhatia, P.Eng.; and Glenn Richardson, P.Eng.