

Decision and Reasons

In the matter 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 ZHI QIANG CAO, P.ENG., a member of the Association of Professional Engineers of Ontario, and DBI GROUP LTD., a holder of a Certificate of Authorization.

This Panel of the Discipline Committee (the “Panel”) of the Association of Professional Engineers of Ontario (the “PEO” or the “Association”) convened a hearing remotely via Zoom on September 26, 2023, to consider the conduct of Zhi Qiang Cao, P.Eng. and DBI Group Ltd. (“Mr. Cao” and “DBI” or collectively the “Respondents”) as described more particularly herein.

PRELIMINARY ISSUE

At the beginning of the hearing, the Chair stated that there was an issue that needed to be addressed. In particular, on the day before the hearing, Mr. Cao attempted to contact the Chair’s daughter by telephone and by email. Mr. Cao asked the Chair’s daughter to speak to him about the hearing on an urgent basis because he was nervous about the hearing. The Chair’s daughter teaches at a university and sits as a director on a board of directors of an organization, so Mr. Cao was able to find her contact information. The Chair’s daughter did not respond to Mr. Cao.

Counsel for the Association stated that the PEO had no prior knowledge that this occurred and that she would need to receive instructions from her internal client. In doing so, the PEO requested that the Chair provide the communications in his possession to the parties, which he did, via the Tribunal Office.

After seeking instructions, the PEO stated that they did not believe the Chair should recuse himself and did not believe that the reasonable apprehension of bias test had been met. In support of this position, counsel for the Association cited *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)* (“Yukon Francophone School Board”), 2015 SCC 25. Counsel for the Association stated that Yukon Francophone School Board has been applied in discipline cases for other regulatory bodies.

Counsel for the Association noted some of the passages in Yukon Francophone School Board including the following:

The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

... what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly...

...

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis included in Yukon Francophone School Board decision].

...

Because there is a strong presumption of judicial impartiality that is not easily displaced (Cojocar v. British Columbia Women’s Hospital and Health Centre, 2013 SCC 30 (CanLII), [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a “real likelihood or probability of bias” and that a judge’s individual comments during a trial not be seen in isolation...

...

The inquiry into whether a decision-maker’s conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see Wewaykum, at para. 77; S. (R.D.), at para. 114, per Cory J. As Cory J. observed in S. (R.D.):

... allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added in Yukon Francophone School Board; para. 141 of Wewaykum.]

Counsel for the Association stated that the PEO’s opinion that the Panel Chair could continue as Panel Chair was bolstered by the facts that there is an Agreed Statement of Facts (“ASF”) in place which contains an admission that the Respondents are guilty of professional misconduct and it was not anticipated that there would be any oral testimony that required an assessment of credibility. These facts diminished any potential concerns regarding a reasonable apprehension of bias.

Mr. Cao also stated that he did not object to the Panel Chair continuing as Panel Chair but did not make arguments

in support of this position. Mr. Cao did, however, apologize for attempting to contact the Panel Chair's daughter.

Independent Legal Counsel to the Panel ("ILC") stated that she agreed with PEO's submissions regarding this issue and that under the circumstances, her advice was that the hearing could proceed.

Based on the strong presumption of impartiality and the high burden of proving bias noted in Yukon Francophone School Board as well as the fact that both parties and ILC were in agreement, the Panel decided that the Chair could continue as Chair in this matter.

AGREED STATEMENT OF FACTS

The allegations against Mr. Cao and DBI as stated in the ASF taken directly therefrom (without Schedules attached), are as follows:

This Agreed Statement of Facts is made between the Association of Professional Engineers ("PEO") and the Respondents, Zhi Qiang (Johnson) Cao, P.Eng. ("Cao") and DBI Group Ltd. ("DBI") (collectively, the "parties").

1. *At all material times, Cao was a professional engineer licensed pursuant to the Act.*
2. *At all material times, DBI held a Certificate of Authorization ("C of A") naming Cao as the individual accepting professional responsibility for the engineering services provided under the C of A.*
3. *On or around January 29, 2014, the complainant retained Cao and DBI to provide structural consulting services for the design and construction of a new commercial building to be located at 369 Queen Street West in Toronto, Ontario (the "Project").*
4. *In connection with the Project, Cao and DBI prepared several sets of drawings containing both shoring and structural designs (the "Drawings").*
5. *PEO retained Daria Khachi, P.Eng., as an independent expert to review the Drawings. Mr. Khachi prepared a report dated December 28, 2021, and a revised report dated February 4, 2022. A copy of the revised report (the "February Expert Report") (without Appendices) is attached hereto as Schedule "A".*
6. *On August 18, 2023, then-counsel for the Respondents provided PEO with a report dated August 16, 2023, signed and sealed by Dave Tipler, P.Eng. (the "Tipler Report"). A copy of the Tipler Report (without Appendices) is attached*

hereto as Schedule "B". The Tipler Report commented on each of the items referred to in the February Expert Report. It also attached an "Explanation Letter" from Cao, dated August 18, 2023, a copy of which is attached as Schedule "C".

7. *PEO provided the Tipler Report and its Appendices, including the Explanation Letter, to Daria Khachi. He provided a Responding Report that identified a number of clerical errors, omissions, typos and lack of coordination issues in the Drawings. He opined that a "thorough design followed by proper peer review and quality assurance checks may have eliminated some of the clerical errors, omissions, typos and coordination issues". The Responding Report concluded further that, assuming the information provided in the Tipler Report is accurate, there was no failure to be aware of applicable standards and codes, and that there was no public safety impact. A copy of the Responding Report is attached hereto as Schedule "D".*
8. *For the purposes of this proceeding, the Respondents accept as correct the findings, opinions and conclusions contained in the Responding Report. The Respondents admit that their conduct was in all the circumstances, unprofessional.*
9. *By reason of the aforesaid, the parties agree that the Respondents are guilty of professional misconduct as follows:*
 - a. *Signing and sealing shoring and structural drawings related to the Project that were prepared in an unprofessional manner, amounting to professional misconduct as defined by section 72(2)(j) of Regulation 941.*

The Respondents have had independent legal advice or have had the opportunity to obtain independent legal advice, with respect to their agreement as to the facts, as set out above.

Relevant Section re Misconduct in Regulation 941

The following is the subsection cited regarding the Respondents' professional misconduct in paragraph 9 of the ASF, noted above—namely subsection 72(2)(j) of Regulation 941 of the *Professional Engineers Act*, R.S.O. 1990, c. P.28 (the "Act").

Subsection 72(2)(j) of Regulation 941 states -
"professional misconduct" means,
...

- (j) *conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional, [emphasis added]*

Counsel for the Association confirmed that the Association was only seeking a finding that the Respondents were “unprofessional” pursuant to Section 72(2)(j) and not “disgraceful” and “dishonourable”.

PLEA BY MR. CAO AND DBI & PANEL’S FINDING RE ASF

Mr. Cao and DBI admitted to the information set out in the ASF. The Panel conducted a plea inquiry and was satisfied that Mr. Cao and DBI’s admissions were voluntary, informed and unequivocal.

The Panel considered the ASF and found, based on the evidence, that Mr. Cao and DBI committed the agreed upon acts enumerated in the ASF and that the facts support a finding of professional misconduct. The Panel made a finding that Mr. Cao and DBI are guilty of professional misconduct in accordance with paragraph 9 of the ASF, noted above.

ARGUMENTS REGARDING PENALTY & PENALTY SOUGHT

Registrar’s Certificate

Counsel for the Association stated that the Association’s “Registrar’s Certificate” for the Respondents noted that on November 11, 2020, after a finding of professional misconduct by the Discipline Committee in a different matter, the Respondents received a reprimand that was recorded on the Register permanently. In addition, as a result of that matter, Mr. Cao’s licence and DBI’s certificate of authorization were both suspended from November 11, 2020 to March 10, 2021 and a restriction was placed on Mr. Cao’s licence and DBI’s certificate of authorization prohibiting the Respondents from practising mechanical and electrical engineering.

Furthermore, the Registrar’s Certificate states that Mr. Cao’s licence was suspended from July 8, 2022 to January 6, 2023 in accordance with a Registrar’s Notice of Proposal issued on May 24, 2022, pursuant to subsection 14(2)(c)¹ of the Act.

Independent Reports

As a Schedule to the ASF, the Association provided an independent review report regarding the actions of Mr. Cao and DBI in relation to the structural design of a 3-storey building and its temporary foundation shoring at 369 Queen Street West in Toronto, Ontario (the “Project”) from Daria Khachi, P.Eng., (“Mr. Khachi”) Principal of DIALOG Ontario Inc. As noted

above, Mr. Khachi prepared a report dated December 28, 2021. He also prepared a revised report dated February 4, 2022 (“Revised Khachi Report”).

The Revised Khachi Report stated the following as an issue and conclusion on that issue:

3. *Consider whether Cao failed to meet the standards expected of a reasonable and prudent practitioner in the circumstances;*

Having designed the shoring of the structure and the superstructure with deficiencies in design, quality of work and including material copied from other another engineering firm, I would respectfully conclude that the work of Zhi Qiang Cao, P.Eng. and DBI Group Ltd. is inconsistent with generally accepted standards in the field of professional engineering. Mr. Cao and DBI Group Ltd. failed to meet the standards expected of a reasonable and prudent practitioner.

As noted above, the counsel who was representing the Respondents at that time provided the PEO with a report dated August 16, 2023 signed and sealed by Dave Tipler, P.Eng. (the “Tipler Report”) which attached an “Explanation Letter” from Mr. Cao dated August 18, 2023. As noted above, the Tipler Report commented on each of the items referred to in the Revised Khachi Report. As also noted above, after reviewing the Tipler Report and Explanation Letter, Mr. Khachi stated, in a Responding Report dated September 7, 2023, a “thorough design followed by proper peer review and quality assurance checks may have eliminated some of the clerical errors, omissions, typos and coordination issues”. Mr. Khachi also stated that that assuming the information provided in the Tipler Report is accurate, he did not believe that the Respondents had failed to be aware of applicable standards and codes, and there was no public safety impact.

Aggravating and Mitigating Factors

The Association argued that there were aggravating factors in this case that showed a lack of cooperation and governability by Mr. Cao. For example, counsel for the Association argued that it was difficult to set a hearing date with Mr. Cao, who made multiple adjournment requests. Counsel for the Association also stated that at times, Mr. Cao was unresponsive and, at times, there was a lack of communication from him in relation to setting a hearing date.

In response to this argument, Mr. Cao stated that he was dealing with some personal issues including the death of both of his parents. In addition, he was dealing with some issues regarding his lawyers. For example, he stated that with one of his lawyers, the insurance company stopped paying for the lawyer so the lawyer withdrew. In addition, Mr. Cao stated that when

¹Subsection 14(2)(c) of the Act states:

(2) The Registrar may refuse to issue or may suspend or revoke a licence if the Registrar is of the opinion, on reasonable and probable grounds,

...

(c) that there has been a breach of a term, condition or limitation of the licence.

he retained a new lawyer, Mr. Cao did not need to postpone the hearing but the lawyer wanted a postponement. As noted above, ultimately Mr. Cao was self-represented in this hearing.

Counsel for the Association also stated that PEO's expert needed to reevaluate the case based on information which was provided by Mr. Cao that should have been provided two years earlier. The PEO argued that this action made it necessary for the PEO to spend more money on its expert. In particular, Mr. Khachi prepared a Responding Report to the Tipler Report and the Explanation Letter, dated September 7, 2023, which, among other things, states the following:

The Tipler report provides useful clarification on the six different sets of drawings that were subsequently provided by Cao between the period of early 2014 to late 2014. The Tipler report also provides insight into the neighbouring construction taking place at 367 Queen Street West in 2013/2014 that affected the design of 369 Queen Street West. It is unfortunate that there was a lack of communication between Cao and PEO, and it took approximately 2 years to receive the much needed clarification.

Counsel for the Association also stated that the events giving rise to the misconduct in the matter which caused Mr. Cao's prior suspension, reprimand and licence restriction, as noted in the Registrar's Certificate, post-dated the events giving rise to the misconduct being dealt with in the hearing before this Panel, so they cannot be said to be an aggravating factor. Nevertheless, counsel for the Association stated that these events raise other concerns regarding Mr. Cao.

In addition, counsel for the Association stated that mitigating factors included Mr. Cao entering into an ASF and therefore avoiding a full hearing, as well as time constraints surrounding Mr. Cao's work on the Project.

Mr. Cao stated that his work on the Project was not final and he was not expecting it to be relied upon. In addition, he stated that he believes that most of his mistakes were clerical in nature such as typos. He submitted that these errors were uncharacteristic and that he did his best on this project within the time restraints. Nevertheless, Mr. Cao stated that he thinks he should have done a better design job.

PROPOSED PENALTIES, DECISION & ORDER

The Penalty proposed by counsel for the Association was as follows:

- a. A permanent reprimand (under s.28(4)(f));
- b. Publication of the findings and order, with reference to names (under s. 28(4)(i)); and
- c. That there be a term and condition on Mr. Cao's licence requiring him to successfully complete the

National Professional Practice Examination within 14 months after the Discipline Committee pronounces its decision (under s. 28(4)(d)).

The Penalty proposed by Mr. Cao and DBI was as follows:

- a. A reprimand to stay on the Respondents' record for 6 months (under s. 28(4)(f)); and
- b. Within 4 months of the date of the hearing Mr. Cao and DBI would enter into a quality assurance plan.

With respect to item (b) in Mr. Cao and DBI's proposed penalty, above, Mr. Cao proposed that he would submit a quality assurance plan for acceptance by the Registrar, to be followed by Mr. Cao, DBI and any employees.

In response to this proposal, counsel for the Association stated that quality assurance plans can be complicated documents and often present issues including how to enforce and monitor them. In any event, counsel for the Association argued that a quality assurance plan would not address the specific problems that were identified in this matter.

After weighing the ASF and the Schedules thereto, both parties' proposals regarding penalty, both parties' arguments regarding aggravating and mitigating factors and the contents of the Registrar's Certificate, the Panel ordered the penalty below.

Order

This Panel ordered the following:

- a. A reprimand to stay on the Respondents' record for 2 years (under s. 28(4)(f));
- b. Publication of the findings and order, with reference to names (under s. 28(4)(i)); and
- c. That there be a term and condition on Mr. Cao's licence requiring him to successfully complete the National Professional Practice Examination within 14 months after the Discipline Committee pronounces its decision (under s. 28(4)(d)).

Counsel for the Association stated that no costs were sought in this matter because the Respondents entered into an ASF. No costs were ordered.

The Panel issued the oral reprimand to the Respondents at the end of the hearing.

Albert Sweetnam, P.Eng., signed this Decision and Reasons as Chair of this Discipline Panel and on behalf of the members of the Discipline Panel: Alisa Chaplick, LL.B., LL.M., and Charles McDermott, P.Eng.