COMPILED BY BRUCE MATTHEWS, P.ENG.

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:

Jeffrey A. White, P.Eng.

a member of the Association of Professional Engineers of Ontario, and

Delta Engineering

a holder of a Certificate of Authorization.

This matter came on for hearing before a panel of the Discipline Committee from June 7 through June 9, 2004 at the Association of Professional Engineers of Ontario ("PEO") in Toronto. The member was present and represented by Lee Anne Graston ("Graston") of Lang Michener LLP. William A. Black ("Black") of McCarthy Tétrault represented the association. Paul Le Vay ("Le Vay") of Stockwoods LLP acted as independent counsel to the panel.

The Allegations

The allegations against Jeffrey A. White, P.Eng. ("White"), and Delta Engineering ("Delta") as set out in the Notice of Hearing dated November 22, 2001 and filed as Exhibit 1, may be summarized as follows:

1. Company A was engaged by a municipality to conduct a class environmental assessment for the expansion and upgrading of the municipality's sewage treatment facilities.

2. On or about August 17, 1995, Company A presented a report at a public meeting that was attended by two professional engineers from Delta.

3. By letter dated August 29, 1995 from Delta to the municipality, White made accusations with respect to Company A's professional integrity and accused Company A of having a conflict of interest. Statements in the August 29, 1995 letter included, *inter alia*:

(a) With respect to the 2 per cent population increase calculation, "This increase meant an oversized facility. This served the engineer (i.e.) bigger facility, bigger fee," "Any attempt to justify this is a self-serving process on the part of your engineer," and "...we can show that unsubstantiated growth patterns are being recommended by the engineers hired by the towns;"

(b) With respect to alternatives, "The attached report by [Company A] has done the [municipality] a great disservice in its consideration of alternatives," "...(higher capital costs and lower operating costs numbers are absent) and, therefore, we cannot accept the engineers' recommendations in any way, as being anything but unsubstantiated opinions," "Your engineer has either not done his homework well, which translates into a poor job or they are deliberately misleading you," and "I believe their [Company A's] agenda is different than yours and is perhaps more self-serving;"

(c) With respect to the lagoon system, "In a very high-handed manner, your engineer patronizes the [municipality] by failing to provide adequate details on the lagoon system proposed;"

(d) With respect to conflict of interest, "Further, when the engineer eliminates, in the ESR [Environmental Study Report], procedures, technologies, that are not within his scope of skills and experience ...;" and

(e) With respect to the ESR fee justification, "To spend $200,000 on this exercise is a wanton misuse of taxpayers' money."

4. It would appear that White and Delta assessed a report prepared by Company A and forwarded a letter to the municipality, which made accusations with respect to Company A's professional integrity and accused Company A of a conflict of interest.

5. By reason of the facts set out above, it is alleged that White and Delta are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, c. P.28, which section provides as follows:

"28(2) A member of the Association or a holder of a certificate of authorization, a temporary licence or a limited licence may be found guilty of professional misconduct by the Committee if,...

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

6. The section of Regulation 941 made under the said Act, relevant to the alleged misconduct is:

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Section 72(2)(j): "Conduct or an act relevant to the practice of professional engineering that, having regard to all of the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional."

Plea of the Member and/or Holder

White and Delta denied the allegations set out in the Notice of Hearing.

Overview

The hearing arose as a result of a letter White wrote in August 1995 on Delta letterhead to the Mayor of the municipality criticizing recommendations made in a report by Company A. This report reviewed alternatives to improve the wastewater situation in the municipality.

The Mayor had asked White to attend a public meeting at which the Company A report would be presented and discussed. White was unable to attend and asked two of his engineers from Delta to attend and report back to him. Based on their report, he then spoke to the Mayor, who asked him to provide his comments in writing.

White did not agree with the recommendations in the Company A report. Among other things, he believed that Company A failed to properly consider a process for the treatment of wastewater that White had invented, and on which he held patents.

In his detailed criticism of the recommendations, he also variously described Company A's engineers as incompetent, misleading and, perhaps, self-serving. He did not send a copy of his report to Company A, but did ask the Mayor to do so.

Company A's engineers wrote a detailed response to the technical criticisms in White's letter that avoided personal comments of the kind made in White's letter.

The municipality was concerned about the cost of the recommendations in the Company A report. White and Engineer A, a local consulting engineer, walked around the municipality looking for drainage problems and concluded that the probable main cause of the overload in the wastewater system was infiltration from several sources. They recommended a television inspection of the sewer system to see if this was the case, and to identify solutions.

The municipality followed this advice, identified the places where infiltration was occurring, and eliminated the problem. The municipality did not expand the lagoon as had been recommended by Company A.

The Issues

The following issues had to be decided by the panel:

(a) Was the impugned behaviour of White and Delta, as described in the Notice of Hearing, relevant to the practice of professional engineering?

(b) If so, did it amount to disgraceful, dishonourable or unprofessional acts or conduct?

The Evidence

The Association's Case

Black, on behalf of the association, said he would not be calling any witnesses. The evidence would speak for itself.

Black argued that Company A, at a public meeting in the municipality on August 17, 1995, summarized the project status and their recommendations on a wastewater project. Two engineers from Delta were present to observe the presentation. Their report, dated August 18, 1995, was provided to White, who subsequently on August 29, 1995 wrote to the Mayor of the municipality, taking issue with the Company A report. The issue for this discipline panel was the language and tone used in the August 29, 1995 letter signed by White, not whether White was or was not technically correct. The contention of PEO in this matter was that the Delta report of August 18, 1995, and the Delta letter of August 29, 1995, signed by White, constituted professional misconduct. The tone and language was not that expected of a professional engineer.

White and Delta's Case

Graston, representing White and Delta, argued that the letter was requested by the Mayor, and should be considered in context. She would call five witnesses, including representatives of Company A, the Mayor of the municipality, Engineer A, and the defendant.

Evidence of Engineer X

Engineer X testified she was a member of both PEO and the Ordre des ingénieurs du Québec (OIQ), and was employed by Company A from 1985 to 1996. In August 1995, she was a project manager responsible for planning and scheduling projects. The project at issue was one of those assigned to her. She had worked on several ESRs before this and could be working on several ESRs at any given time. The executive summary of the project entered into evidence was probably written by her and reviewed with her supervisor, Engineer Y. The growth estimate of 5 per cent used in the executive summary of April 1995 would have been provided to her by a consultant or taken from government growth estimates. It would then be discussed with the municipality as the client.

Company A had not considered Snowfluent, the process developed by White and Delta, at that time. They were later asked by the Mayor to consider Snowfluent, and she met with the vice president of marketing for Delta. Company A considered both Snowfluent and another alternative process. Company A considered them independently, not in combination, as White had recommended they be applied. Company A did not recommend these alternatives in their final report.

The clerk of the municipality sent Engineer X a copy of White's August 29 letter. She prepared a detailed rebuttal of White's criticism with Engineer Y.

When cross-examined by Black, she agreed she had prepared a point-by-point response to White's letter. It was not a

personal attack. At no time did she impugn his personal integrity or comment on conflicts of interest. She stated that as a professional she would not do that.

She also testified that Company A did not do design-build projects so there was no financial advantage to Company A to increase the size of the project.

Evidence of Engineer Y

Engineer Y testified he was a member of PEO. In 1995 he was vice president of municipal engineering at Company A. He supervised all projects in his division, including plant projects. He was responsible for reviewing projects but did not prepare proposals or do analysis.

He testified he was not involved in drafting the original letter of complaint from Company A to PEO dated September 22, 1995, expressing the belief that White was in contravention of the PEO Code of Ethics. He did sign a formal complaint dated December 9, 1997. He presumed there would be an investigation by PEO, but had no conversation with PEO about it.

Company A provided a final report to the municipality, but the municipality decided to follow White's recommendations. The sewers were fixed and the lagoon was not extended. Company A's fee for the ESR was $245,000, which was in the normal range. The process was complex but the solution might be simple.

Motion to Hear the Evidence of the Mayor by Telephone

Graston submitted a motion to the panel to hear evidence from the Mayor of the municipality by telephone. He was unable to attend in person, as he was a candidate in the federal election campaign taking place at the time. PEO's procedural rules allow for electronic hearings, including telephone calls, and generally require that "these rules shall be liberally construed to secure a determination that is fair and just."

Rule 5.2 of the *Statutory Powers Procedure Act* also states "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding. The tribunal shall not hold electronic hearings if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice." PEO had always been aware that the Mayor would testify.

Black objected to the motion. Graston wrote on May 26, 2004 seeking PEO's agreement to hear the Mayor's evidence by telephone. PEO had replied by asking for an affidavit, but Graston, on behalf of White, had declined.

Black further argued that it was clear the appearance and demeanour of the witness were important when assessing credibility. White had ample notice of the earlier hearing on February 17, as well as this hearing on June 7. At this hearing, two of the defence witnesses were compelled to attend. Non-attendance should be reserved for special circumstances that impair the witness's attendance. "I'm busy" was not an acceptable excuse. Non-attendance could be a cause of prejudice.

Responding to a question from Ravi Gupta, PhD, P.Eng., a member of the discipline panel, Graston stated that she did not believe there would be significant prejudice. There would, in her opinion, be prejudice if the Mayor was not allowed to testify. Providing an affidavit as suggested by PEO would provide no opportunity for cross-examination.

Seimer Tsang, PhD, P.Eng., another member of the discipline panel, inquired how far the municipality was from a major urban centre and if it would be possible for the Mayor to attend a video conference there.

The panel considered the submissions regarding the motion on behalf of White and Delta to allow the evidence of the Mayor to be provided by telephone conference and reached the following decision pursuant to Rule 6 of PEO's Rules of Procedure:

"The panel would have preferred that the Mayor's evidence be given in person in the normal fashion. The panel accepted that the demands of a political campaign might reasonably prevent the appearance of the witness, although there was no evidence as to the Mayor's activities on June 7, 2004. The panel was of the view that hearing the Mayor's evidence by telephone conference would compromise his ability to provide opinion evidence, since the ability of the association to cross-examine and the ability of the panel to judge the witness' credibility and demeanour are both limited by the use of telephone conferencing."

The panel, therefore, held that telephone conference testimony by the Mayor could be useful in terms of matters of fact and to avoid the need to have others give hearsay evidence. However, any opinion to be given by the Mayor on a telephone conference could not be ascribed the same weight as would be the case had the Mayor appeared in person.

The panel's decision was, therefore, to accept factual evidence of the Mayor by telephone conference, but to ascribe reduced weight to any opinion evidence the Mayor might give by telephone conference. It further held that if the Mayor's evidence could be provided by video conference or in person in the next 24 hours that would be strongly preferred. The panel made clear that it had not assumed that opinion evidence would be given by the Mayor, but that it did not wish to exclude, in advance, whatever evidence the member proposed to lead through the witness.

Evidence of the Mayor of the Municipality

The Mayor testified he was a Conservative candidate in the federal election and was very busy with his campaign. He was the Mayor of the municipality from 1994 to 1997. The wastewater project began before he became Mayor, and the ESR was almost complete by the time he became Mayor.

He became concerned when he saw the draft report, as he believed the forecast population growth was too high. The municipal council agreed on a 2 per cent growth rate, but he personally believed this was still too high. Company A was recommending expansion of the lagoon and the council felt the project was too expensive. He personally thought they should look at the sewers before expanding the lagoon.

After the public meeting, he had a conversation with White and Engineer A, and asked White to put his comments in writing so he could include them in a

discussion with the council. He asked White to send a copy of his comments to Company A.

Company A did not identify the infiltration problem. PEO did not contact the Mayor as part of its investigation.

In cross examination by Black, the Mayor testified that he was concerned about the growth estimate, the cost, and the lack of other affordable options. He asked White to attend the public meeting when the Company A report was presented, and to confirm his informal comments in a letter. He recalled seeing White at the meeting. He was looking for technical advice but was not surprised by White's personal comments. He believed council would welcome these comments.

White had proposed a combined system–Snowfluent plus New Hamburg–but Company A dismissed this combination and said that the technology would not work in the municipality.

Further cross-examination and re-examination was prevented by the Mayor having to leave for a television interview.

Evidence of Engineer A

Engineer A testified that he was a member of both PEO and OIQ. He had been an independent consulting engineer since 1974.

He first worked with White in 1995 when White asked him to assist in a project to consider extending the municipality's water plant to also serve a neighbouring municipality. The neighbouring municipality eventually chose to construct its own water plant.

He attended the meeting on August 17, 1995 as a taxpayer, not as an engineering consultant, and not at the request of the Mayor. His local experience, from living and working in the area, told him the growth estimates used in the Company A report were too high. A cheese factory was closing and the high school population was shrinking. Councillors asked him questions at the public meeting and he discussed both the population growth estimates and the extraneous flow issues. White was not present at the meeting but was represented by someone from his office.

In 1996, the municipality hired a company to do a television inspection of the sewer system to identify potential leaks. Engineer A, as a local bilingual engineer, was involved to do the legwork, facilitate access, review the results of the inspection and make recommendations. He did smoke tests to check every lateral connection.

His report identified several major concerns:

- leakage at every lateral connection at the property line due to infiltration at the asbestos cement connections;
- some of the manholes were acting as catch basins;
- the water plant was sending considerable backwash into the sewer system; and
- groundwater was seeping into the system at the high school.

He reported these results to the municipal council. On behalf of the council, his company applied to the government for funding to cover the cost of the repair. The council received a 90 per cent subsidy in June 1998 and repairs were done later that year.

In cross examination by Black, Engineer A testified that the municipality retained him on the water supply project and later to facilitate a full-fledged inspection of the sewer system. White sought his input on the Company A report and he offered comments to members of the municipal council. He was at no time engaged to review the report.

He attended the public meeting in his own interest as a taxpayer. The municipality is a small town and the councillors were his friends.

He agreed with White's letter of August 29, 1995 to the Mayor, but would have limited his review to technical comments. He would not have used the same language, which was very aggressive and undiplomatic. PEO did not contact him about the complaint.

Evidence of Jeffrey White

White testified that he became registered in Ontario in 1965. He formed Delta Engineering in 1974. The company no longer exists. It was declared bankrupt in July 2000.

Early in 1995, the Mayor visited him in his office after reading an article in the local press about the Snowfluent process. Several months later, the Mayor told him of the wastewater project and asked him to attend the public meeting when Company A was to present their recommendations. He was not involved in other projects for the municipality at the time. He was unable to attend the meeting as he had other commitments and sent two of his engineers. He met with them afterwards to discuss the Company A report and the August 17, 1995 meeting.

White was of the opinion that the Company A report did not follow the prescribed procedures and was wrong. The *Environmental Assessment Act* (EAA) was carefully written to allow consideration of new processes. He believed Company A had made up its mind before considering alternatives, contrary to the EAA. The more he studied the report, the more upset he became. White's evidence was that he believed his arguments were correct, although he regrets that he wrote the words in anger.

The Mayor asked him to confirm his oral comments in writing. He did this in his letter of August 29, 1995. He asked the Mayor to send a copy to Company A. He expected the Mayor would discuss the report with him before sending it to Company A. He then expected to discuss it with Company A. There was no discussion and he believed Company A ignored his comments.

Referring to his letter to the Mayor of August 29 commenting on Company A's presentation, he believed the population growth forecasts were generally overestimated. He had seen similar

overestimates from other consulting engineering firms before.

White stated that an oversized facility did not work well, but a larger project produced a larger fee for the consulting engineer.

The Mayor introduced him to Engineer A. He had discussed the wastewater flows with Engineer A and the Mayor. The proposed flow of 648 litres per day per capita was much higher than the usual of around 400 litres per day per capita. Typically, the problem was extraneous flows within the sewer system, which, if reduced, could delay or reduce the need for treatment expansion. He believed the design flow could be reduced to 350 litres per day per capita. This would provide a 40 per cent increase in the capacity of the present lagoon. Suspecting this, he and Engineer A walked the site together and recommended hiring a company to do a television camera inspection.

In White's opinion, Company A failed to properly consider alternatives to expanding the sewage lagoon. They failed to provide capital and operating costs, failed to consider fixing up the sewers, and failed to consider the Snowfluent and New Hamburg processes. He believed Company A had a basic conflict of interest. They did not recuse themselves from further design and construction work on the project. He believed this practice was widespread among Ontario engineers. White stated that Delta did not do environmental studies because he believed an engineer who worked on an environmental study should not be involved in further work on the project.

He had previously met a vice president of Company A in 1994 who had told him that Company A had eastern Ontario "tied up" and that he should not be interfering. He had also had a confrontation with Company A at a public meeting on another water plant project.

In 1996, he wrote the Ontario Minister of Environment and Energy complaining about the system of approvals–"The bigger the project, the bigger the reward." However, in White's opinion, the ministry had unfortunately become very reactive, not proactive, since Walkerton.

White stated that he believed Company A was wrong in every one of its recommendations and that he was right on every issue. He also stated that counsel for PEO was defending Company A, and that Engineer X was incompetent.

He did not receive a copy of the September 22, 1995 letter from the president of Company A to PEO until 1998 saying that they believed he was contravening the PEO Code of Ethics. He received no explanation of the delay. He was told the complaint had been investigated, but he stated that he had never seen an investigation report.

White stated that his technical arguments were proven to be correct and his advice to the municipality was right. His language should have been more temperate. In 2004, he was asked to review a similar project by Company B, the successor company to Company A. He provided evidence that his language was then more appropriate.

In cross-examination by Black, White stated that he regretted PEO was focusing on his use of language. If his behaviour was misconduct, how about Company A? He regretted he did not hear about the charges earlier. He believed a heavy hand was sometimes needed and that engineers earned civility, courtesy and good faith only if they deserved them. He believed criticizing another professional engineer's work without his or her knowledge was acceptable.

He did not regret his comment that Company A was "pushing the fee." He believed that they were. He believed the ESR process was not being done properly. Canadians didn't like innovation, Americans did. In his opinion, any good engineer would have used Snowfluent.

When asked if Engineer X was incompetent, he testified that Company A had some competent engineers. He believed Company A laid the complaint to shut him up.

In re-examination by Graston, he testified local councils were vulnerable to the knowledge of engineers. He probably should have re-written his letter to the Mayor. Being angry was not helpful. He was going to have to stop being angry, but nice, ethical people don't accomplish change.

Argument

Association's Argument

Black, in final argument, argued that the case related solely to White's letter. It was self evident that the letter to the Mayor on Delta letterhead criticizing another professional engineer's recommendations was relevant to professional engineering. White prepared the letter at the request of the Mayor to comment on technical issues for the guidance of the municipality.

Criticism of another professional engineer's opinions might well be appropriate but this should be done bearing in mind the Code of Ethics. What should not be done is attacking colleagues. The tone and language of the letter was simply not appropriate.

In Black's submission, it was self-evident that the letter did not reflect devotion to high ideals of personal honour and professional integrity, nor acting towards other practitioners with courtesy and good faith. White went beyond what he had been asked to do and in his letter addressed to Company A's client knowingly and intentionally set out to maliciously injure Company A's business and reputation. In contrast, Company A's response of September 20, 1995 to White's allegations prepared by Engineer X and Engineer Y was entirely professional and avoided personal attacks. All the professional engineer witnesses called by the defence, except White, agreed they would not use the language used in White's letter.

White's regret appeared to be based on having to appear at a discipline hearing. He seemed to be on a personal crusade that the EAA and the ESR process needed to be changed.

On the issue of delay, there was no statutory limit to holding the discipline hearing. White could have asked for a stay of proceedings or for the issue to be

referred to the Complaints Review Councillor. He chose to deny that PEO was ready to proceed in 1998; the rest of the delay was requested by White on the grounds of illness.

White and Delta's Argument

In final argument on behalf of White and Delta, Graston argued there were two grounds for dismissing the case: denial of White's rights to natural justice and that the tone of his letter did not constitute professional misconduct.

White was advised of the complaint two and a half years after it was laid. He was deprived of his right to speak to witnesses. Graston submitted that the PEO Complaints Committee failed to properly investigate the complaint in a timely manner. The complaint sat with the PEO staff for two and a half years. The Complaints Committee failed in its statutory duty. Engineer Y expected there would be an investigation. Former PEO staff had advised White's counsel that an investigation had been done and a report prepared. But in December 2002, PEO's counsel wrote saying there was no report.

The report of the PEO Admissions, Complaints, Discipline and Enforcement Task Force included a recommendation that the secretary to the Complaints Committee should review and ensure due dispatch. The problem was recognized. White's complaint fell through the cracks. The result of this denial of natural justice was that the Complaints Committee lost its jurisdiction and the complaint should have been stayed.

The Delta letter of August 29, 1995, signed by White, had to be taken in context. Section 72(2)(j) of the Regulation refers to conduct that "...having regard to all the circumstances, would be reasonably regarded...." White's opinion was solicited by the Mayor who was concerned about the Company A report. White did not stand to gain financially, but simply said, "fix the sewers." The municipality followed his advice and reduced the flow to the lagoon by eliminating sources of extraneous flow in the system, rather than expanding the lagoon as had been recommended by Company A.

Company A, on the other hand, earned a fee of $245,000 for advice that was not followed. Was their work done in fidelity to public needs? The lagoon expansion was not in the public interest. They failed in their duty to provide alternatives.

White did regret the tone of his letter. The evidence showed that his response in 2004 on a similar project was different, and he chose his language carefully. He was proud to be a Canadian engineer who had earned many awards and served the public well. Nine hundred people in the municipality were happy and didn't care about the tone of his letter.

Reply Argument of the Association

In reply, Black noted Graston attempted to put Company A on trial and made no attempt to defend White's letter. The complaint referred to the Complaints Committee was originally of a breach of the Code of Ethics. The committee later received a formal complaint of professional misconduct. There was no evidence of prejudice.

White had two avenues for a remedy available to him with respect to the delay issue: an application for judicial review or a request to the Complaints Review Councillor. He chose not to pursue either.

Advice of Independent Counsel

Le Vay, independent counsel to the panel, advised the panel that under the *Professional Engineers Act*, the panel had the duty to hear and determine the matter referred to it by the Complaints Committee. The panel had no jurisdiction to consider what may or may not have happened at the Complaints Committee leading up to the referral of the matter.

The panel should focus on allegations in the Notice of Hearing–the words and phrases in the August 29, 1995 letter. Would these reasonably be regarded by a professional engineer as disgraceful, dishonourable or unprofessional?

For a verdict of professional misconduct, it was only necessary to make a finding of one of these. Conduct could be unprofessional without being dishonourable or disgraceful. Disgraceful conduct was the most serious and would be considered to cast serious doubt on the member's moral fitness and ability to discharge the higher obligations expected of a professional. Dishonourable conduct often involves dishonesty or deceit. Both disgraceful and dishonourable conduct carry the element of moral failure.

In contrast, unprofessional conduct does not require any dishonest or immoral elements. It is a failure to live up to the standards of good judgment and responsibility required of those privileged to practise as professional engineers. These standards should be those generally held by members of the profession.

Decision

PEO bears the onus of proving the allegations in accordance with the standard of proof the panel is familiar with, set out in *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977) 15 O.R. (2d) 477. The standard of proof applied by the panel, in accordance with the Bernstein decision, was on the balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel. The panel also recognized that the more serious the allegation to be proved, the more cogent must be the evidence.

Having considered the evidence, exhibits, testimony and submissions, and the onus and standard of proof, the panel found that Jeffrey A. White and Delta Engineering committed an act of professional misconduct as alleged in the Notice of Hearing.

With respect to the apparent delay in the investigation, the panel found that the time that elapsed between the dates of relevant correspondence might appear to be excessive. However, the panel did not find that this apparent delay was prejudicial to the position of White and Delta.

Regarding the submission on behalf of White and Delta that the apparent delay of the investigation constituted a violation of the rights of White and Delta, the panel found that consideration of this particular issue was not within the statutory mandate of the committee, and therefore the panel made no finding with respect to this issue.

Regarding section 72(2)(j) of the Regulation and the allegation of professional misconduct contained in Appendix A of the Notice of Hearing, the panel found that the Delta letter of August 29, 1995, signed by White, was relevant to the practice of professional engineering.

The panel noted that technical aspects of the letter appear to have been validated by the subsequent actions of the municipality, and the panel noted that there was no allegation that impugned White's technical competence or engineering skill and qualifications. However, the panel found that the wording of the letter of August 29, 1995 by White and Delta displayed a lack of the judgment and professional courtesy that would be expected by the engineering profession in the circumstances.

The panel did not find that the actions indicated dishonesty or deceit on the part of White or Delta.

Therefore, the panel finds that the conduct of White and Delta would reasonably be regarded by the engineering profession as unprofessional, but neither disgraceful nor dishonourable.

Reasons for Decision

The Delta letter of August 29, 1995 signed by White was provided to the Mayor and made extensive comments on engineering recommendations made by professional engineers employed by Company A. These comments express opinions based on a technical evaluation. They are clearly relevant to the practice of engineering.

White's comments on Company A's engineers alleged that they were incompetent, failed to consider alternative solutions, and were recommending solutions that would increase Company A's fees. He sent this letter to the Mayor of the municipality. He knew, or ought to have known, that his comments would go before the council and possibly be part of a public meeting. He did not send a copy of his opinions to Company A, although he asked the Mayor to do so. He did not seal the document, even though it contained his professional engineering opinions and was likely to become a public document.

All the professional engineer witnesses called by the defence, except the defendant, agreed that they would not have written such a letter.

The panel therefore finds that this conduct would reasonably be regarded by the engineering profession as unprofessional.

Penalty

Black, on behalf of PEO, argued that the penalty should provide a specific deterrent to discourage the defendant from repeating the offence, a general deterrent to deter other engineers from similar behaviours, and should reflect to the public that the profession treats the matter seriously. He proposed:

- a recorded reprimand;
- a requirement to write and pass both parts of the professional practice examination within 12 months, failing which his licence would be suspended until a further 12 months and then revoked;
- consulting engineering designation revoked until he passes the professional practice examination;
- publication with names in the association's official journal, which would provide both a general deterrent and public accountability; and
- to seek costs of $40,000.

Black further argued that the prosecution of this case had taken a long time. Even earlier this year, the defendant was pleading for more time. It should have been possible to deal with the matter much more speedily. It should be made clear to those attempting this strategy that there is a price to be paid. PEO's legal costs alone would exceed $45,000.

Graston, for the defendant, argued the penalty proposed by PEO was far too harsh. A light penalty of an oral reprimand, not on the record, no publication, and no professional practice exam would be more appropriate. The charge related to the tone and language in the letter only.

The letter was written at the request of the Mayor, and recommendations by Delta and White benefited the public. In a recent dispute with the successor company to Company A, he chose to use milder language. The defendant was a successful, proud engineer who had served the public well. Considering the actions of the Complaints Committee, the panel might choose a light sentence to indicate disapproval.

Graston proposed no costs to be awarded. White had already paid legal costs of over $20,000 at least. He has lived with the charge for many years. It has affected his health and caused him great embarrassment.

Graston did not believe the severe penalty met the expressed goal of public accountability.

Le Vay, independent counsel to the panel, advised the panel that the primary considerations should be to protect the public, to maintain professional standards and to preserve public confidence in the process. Another principle to be considered was how to help the engineer not repeat the conduct in question. Factors that might mitigate or aggravate the penalty would include the seriousness of the misconduct, previous discipline history, evidence of character and evidence that demonstrated remorse or the converse. The fact that White chose to defend the proceeding should not be taken as aggravation.

As far as Graston's argument that the panel could administer a lighter penalty to indicate disapproval of the complaint process, Le Vay advised that having found that to be beyond the jurisdiction of the panel, it should not be considered when deciding on penalty.

Penalty Decision

The panel reviewed the submissions with respect to penalty, and made the following decisions as to the penalty to be imposed on White and Delta:

1. **an oral reprimand to White, the fact of this reprimand to be recorded on the Register of PEO;**

2. **White must write and pass both parts of the Professional Practice Examination within 12 months of the date of the receipt of the written decision, failing which White's licence will be suspended for a period of up to 12 months, or until he passes the Professional Practice Examination. If the exam is not passed within this 24-month period, White's licence will be revoked;**

3. **White's consulting engineer designation shall be suspended pending his passing the Professional Practice Examination;**

4. **publication in the journal of the association with the names of White and Delta being mentioned, but without mention of the other parties;**

5. **costs in the amount of $10,000 payable to the association be assessed to Delta and White, payment to be made within 12 months of the date of receipt of the written decision.**

Reasons for Penalty Decision

The panel found an oral reprimand recorded on the Register was appropriate to again confirm to the defendant that his tone and language were inexcusable. The panel noted that White had not written the Professional Practice Examination and the requirement to write and pass the examination should demonstrate to him that his conduct was not acceptable and should allow him to learn more appropriate behaviour. Publication in the journal will act as a specific deterrent to the defendant, a general deterrent to other members of the profession, and demonstrate public accountability.

The panel considered that the many delays in bringing this matter to a decision, and the fact that after nine years, in February 2004, White was still unwilling to proceed and sought further delay, justified awarding costs of $10,000 to the association.

The written Decision and Reasons in this matter were dated March 24, 2005, and were signed by the Chair of the panel, David Smith P.Eng., on behalf of the members of the discipline panel: J.E. (Tim) Benson, P.Eng., Ravi Gupta, P.Eng., John Reid, P.Eng., and Seimer Tsang, P.Eng.

Note from Regulatory Compliance

White appealed the decision of the Discipline Committee to the Ontario Superior Court of Justice (Divisional Court). The Divisional Court heard the appeal on February 14, 2006, and in a majority decision dated May 25, 2006, upheld the finding of professional misconduct against White. The Divisional Court modified the terms of the penalty order to include only the oral reprimand (the fact of which is to be recorded on the Register) and the publication of the Decision and Reasons with names. The complete text of the decision of the Divisional Court can be found at www.canlii.ca/on/cas/onscdc/2006/2006onscdc14336.html.

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:

Marc Le Mageur, P.Eng.

a member of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on January 9, 2006 at the Association of Professional Engineers of Ontario ("PEO") in Toronto. The member was not present and was not represented. The association was represented by Neil Perrier ("Perrier") of Perrier Law

Professional Corporation. Johanna Braden ("Braden") of Stockwoods LLP acted as independent counsel to the panel.

The Allegations

The allegations were set out in the Appendix to the Notice of Hearing dated November 21, 2005, and are summarized as follows.

It is alleged that Marc Le Maguer, PhD, P.Eng. ("Le Maguer"), is guilty of professional misconduct and/or breaches of the Code of Ethics as defined in the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28, the particulars of which are as follows:

1. Le Maguer was at all material times a member of the Association of Professional Engineers of Ontario.

2. In or about August of 2003, Le Maguer was employed by the University of Guelph ("University") as a professor in the food sciences faculty. Le Maguer had been employed by the University since 1989.

3. Bradley Dolomount was employed by the University as a network support technician. In or about August of 2003, Dolomount was assigned to repair Le Maguer's office computer because of a faulty Internet connection. While repairing the computer, Dolomount discovered child pornography on the computer's hard drive. Dolomount reported this to his immediate supervisor who instructed him to delete the material, repair the machine, and report any further instances.

4. A few weeks later, Dolomount was advised again that Le Maguer's computer was not working properly. He attended to Le Maguer's office to run a diagnostic check on the computer and, again, found child pornography on the hard drive. Subsequently, Dolomount reported his finding to the acting chair of the food sciences department.

5. Guelph Police Services were subsequently contacted on or about September 23, 2003 and they, in turn, requested the assistance of the Ontario Provincial Police, Child Pornography Section. At this time, Le Maguer was in Thailand and was not expected back in Canada until September 26, 2003. Le Maguer's computer, which was the property of the University, was secured in the security director's office to prevent the loss of any evidence. On or about September 29, 2003, a search warrant was executed on the security director's office of the University and Le Maguer's computer was previewed. Upon discovering an image of child pornography, the preview was discontinued and the computer was seized for forensic examination.

6. A second search warrant was executed on September 29, 2003 at Le Maguer's office in the Food Sciences Building at the University. A large quantity of printed and electronic evidence was seized, catalogued and forensically examined.

7. On or about October 2, 2003, Le Maguer was arrested. At the time of his arrest, Le Maguer was in possession of child pornography. A search warrant was executed later in the day on October 2, 2003 at Le Maguer's residence. Seized during this search were a laptop computer and floppy and compact discs. A preview of these materials was commenced, child pornography was found and the material was catalogued and forensically examined.

   In total, 2708 documents consisting of electronic images, video images, printed images and written material confirmed as child pornography were catalogued from all executed search warrants.

8. On February 24, 2005, Le Maguer entered a plea of guilt to the following criminal indictment:
"Marc Le Maguer stands charged that he, between the 1st day of August, 2003, and the 2nd day of October 2003, at the city of Guelph in the said region, did have in his possession child pornography to wit: computerized graphic images files, video images, printed images and written materials, contrary to section 163.1(4) of the Criminal Code of Canada."

9. Section 163.1(4) of the Criminal Code of Canada provides that every person who possesses any child pornography is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction.

10. Also on February 24, 2005, the Honourable Justice C. Herold of the Ontario Court of Justice, made a finding of guilt and entered a conviction to the above criminal indictment based on Le Maguer's plea of guilt and the facts, documentation and exhibits entered as evidence at the trial.

11. By reason of the aforesaid, it is alleged that Marc Le Maguer, PhD, P.Eng.:
(a) was convicted of a criminal offence that is relevant to his suitability to practise professional engineering; and
(b) acted in a disgraceful, dishonourable and/or unprofessional manner.

12. By reason of the aforesaid, it is alleged that Marc Le Maguer, PhD, P.Eng., is guilty of professional misconduct as defined in sections 28(2)(a) and (b) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28 as follows:
    "28(2) A member of the Association or a holder of a certificate of authorization, a temporary licence, a provisional licence or a limited licence may be found guilty of professional misconduct by the Committee if,
    (a) the member or holder has been found guilty of an offence relevant to suitability to practise, upon proof of such conviction; and
    (b) the member or holder has been guilty in the opinion of the Discipline Committee of

professional misconduct as defined in the regulations." R.S.O. 1990, c.P-28, s. 28(2); 2001, c. 9, Sched. B, s.11 (36).

13. The section of Regulation 941 made under the Act and relevant to the alleged professional misconduct are: 72(2) For the purposes of the Act and this Regulation, "professional misconduct" means:
Section 72(2)(j): conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

Jurisdiction of a Single-member Panel

Pursuant to section 4.2.1(2) of the *Statutory Powers Procedure Act*, both parties consented to this matter being determined by a panel consisting of one member of the Discipline Committee.

Plea of the Member

The member did not enter a plea at this hearing. The member was not in attendance and was not represented.

Overview

This hearing arose as a result of the criminal conviction of Le Maguer on a charge of possession of child pornography. There were no allegations regarding the qualifications or technical competence of the member. Rather, the subject matter of this hearing was the suitability of Le Maguer to practise professional engineering in this province.

In August of 2003, child pornography was discovered on the hard drive of the computer in Le Maguer's office at the University of Guelph. During the subsequent criminal investigation, child pornography was also discovered on the member's computer at home. He was charged with various counts of possessing child pornography. He was in possession of pornographic materials at the time of his arrest.

In February 2005, Le Maguer pleaded guilty and on February 24, 2005 he was convicted of having child pornography in his possession contrary to section 163.1(4) of the Criminal Code.

The Evidence

Following his opening remarks, Perrier tendered evidence proving that the member had been served with the Notice of Hearing and was informed of the date, time and place of the hearing.

PEO then called Michael Marr, P.Eng. ("Marr"), as a witness for PEO.

Marr is employed by the Association of Professional Engineers of Ontario and was responsible for the investigation of this matter on behalf of PEO. Marr testified that he had contacted officials at the Ontario Superior Court of Justice regarding the charges against the member. He secured copies of relevant information and documentation regarding the trial of Le Maguer in the City of Guelph on February 24, 2005. Documents obtained by Marr included the following:

- a chart showing the breakdown of the number and classification of pornographic materials reviewed by the Ontario Provincial Police during searches of Le Maguer's office and residence;
- a copy of the criminal charge dated February 14, 2005;
- the statement of facts from the criminal proceedings; and
- certificate of conviction dated December 16, 2005.

These documents were entered as exhibits to this hearing, and had previously been disclosed to Le Maguer in Perrier's letter of December 30, 2005.

Marr was the sole witness for PEO.

Position of PEO

In his closing submission, PEO counsel advised that he was not seeking a finding that the member was guilty of "conduct or an act relevant to the practice of engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional" as required by section 72(2)(j) of Regulation 941 made under the *Professional Engineers Act*, R.S.O. 1990, c. P-28.

Rather, counsel advised that he was seeking a finding that the member was guilty of professional misconduct under section 28(2)(a) of the Act, which states that a member may be found guilty of professional misconduct if the member has been found guilty of an offence relevant to suitability to practise, upon proof of such conviction.

Counsel argued that the evidence of Marr and the exhibits tendered were conclusive proof that Le Maguer had been convicted of a serious criminal offence. The only issue was whether the offence was relevant to Le Maguer's suitability to practise. On this point, counsel noted that Le Maguer had used computers at his place of work (as well as computers at his home) in furtherance of this criminal behaviour. This provided a link between the conviction and Le Maguer's suitability to practise.

Counsel further submitted that, to be admitted to PEO, prospective members must be of "good character" as required by section 14(1) of the Act. Accordingly, when an act underlying a criminal conviction reveals a profound and fundamental defect of character, the Discipline Committee may find that such conviction is relevant to the member's suitability to practise under section 28(2)(a). Counsel characterized this type of conduct as so offensive to the sensibilities of Canadian citizens as to undermine the public perception of PEO, and therefore relevant to Le Maguer's suitability to practise.

Decision

(a) Onus and Standard of Proof
Braden, independent legal counsel to the panel, noted that PEO bore the onus of proving allegations in accordance with the standard of proof, as set out in *Re Bernstein and Col-*

lege of Physicians and Surgeons of Ontario, (1977) 15 O.R. (2d) 477.

The standard of proof to be applied by the panel, in accordance with the Bernstein decision, should be a balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel. Braden also noted that the more serious the allegation to be proved, the more cogent must be the evidence.

(b) Decision

The panel regarded the alleged conduct of the member as a very serious matter.

It was the finding of the panel that the exhibits demonstrated conclusively that the member had pleaded guilty and had subsequently been convicted of a serious criminal offence relevant to his suitability to practise. Accordingly, the panel determined that Le Maguer is guilty of professional misconduct as set out in section 28(2)(a) of the Act.

Reasons for Decision

The panel was disturbed that a member of this association pursued this type of conduct in his home and in the office of his employer. The panel felt that this behaviour was well beyond the scope of moral failure anticipated by the term "disgraceful."

The panel was of the view that PEO could not tolerate this behaviour among any of its members, and that Le Maguer had demonstrated by this criminal conduct that he was unsuitable to practise professional engineering in this province.

Penalty

Counsel for PEO recommended a penalty consisting of revocation of the member's licence, and costs to PEO in the amount of $2,500.

Counsel submitted the misconduct was so serious that revocation was the only suitable penalty. He also submitted that the requested costs award is in line with other decisions and with the costs actually incurred by PEO in this matter.

Penalty Decision

The panel accepted the submissions of counsel for PEO and accordingly made the following order with respect to penalty:

1. **The licence of Le Maguer is to be revoked; and**

2. **Costs in the amount of $2,500 are to be paid by Le Maguer to PEO within 90 days of this hearing.**

Reasons for Penalty Decision

The panel recognizes that revocation is the most severe penalty possible. In the panel's view, the severity of the penalty is matched by the severity of the member's conduct. The goals of protecting the public, enhancing the public's confidence in PEO and general deterrence compel such a penalty. The fact that the member chose not to attend the hearing also suggests that the goals of specific deterrence and rehabilitation could not be satisfied without a severe penalty.

It was noted that revocation triggers publication in Gazette. The panel noted that although publicity with names is a suitable penalty for the member, it was the view of the panel that further publicity for the University should be avoided, if possible.

The written Decision and Reasons in this matter were dated February 9, 2006, and were signed by David Smith, P.Eng., as the Chair and sole member of the panel.

Toronto Man Fined $45,000 for Illegally Representing Himself as a Professional Engineer

On August 29, 2006, at the Provincial Offences Court in Brampton, Sean A. Clyke of Toronto was found guilty of three offences under the *Professional Engineers Act* and was fined a total of $45,000. The offences related to Mr. Clyke misrepresenting himself as a professional engineer to an employment agency, and for using the protected titles "professional engineer" and "P.Eng."

Mr. Clyke is not, nor has he ever been, licensed as a professional engineer in Ontario.

PEO was represented in court by Mark Polley of the law firm McCarthy Tétrault. Mr. Polley told the court that this matter first came to PEO's attention through Mr. Clyke's former employer, who dismissed Mr. Clyke once it was discovered that he was not licensed. After a PEO investigation, charges were laid against Mr. Clyke.

The August 29 trial proceeded in the absence of Mr. Clyke, who had failed to appear in court on previous occasions. His Worship Justice of the Peace Jackson convicted Mr. Clyke of separate offences under sections 40(1), 40(2)(a) and 40(2)(b) of the *Professional Engineers Act*. After hearing submissions with respect to penalty from Mr. Polley, JP Jackson imposed the maximum allowable fine on each count.

Mr. Clyke was previously the subject of a court order to refrain from engaging in providing professional engineering services to the public and from using the terms "professional engineer," "engineer," and the abbreviation "P.Eng." The December 23, 2004 order by Madam Justice Herman was reported in the March/April 2005 edition of Gazette. The August 29, 2006 convictions in Brampton arose from the same circumstances that gave rise to the December 23, 2004 court order.

Anyone wishing to check whether an individual is licensed as a professional engineer in Ontario can check the members directory on the PEO website, www.peo.on.ca, or can contact PEO at 416-224-1100, ext. 1086.

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Discipline Hearing Schedule

This schedule is subject to change without public notice. For further information, contact PEO at 416-224-1100; toll free 800-339-3716.

Any person wishing to attend a hearing should contact the complaints and discipline coordinator at extension 1072.

All hearings commence at 9:30 a.m.

NOTE: These are allegations only. It is PEO's burden to prove these allegations during the discipline hearing. No adverse inference regarding the status, qualifications or character of the licence or Certificate of Authorization holder should be made based on the allegations listed herein.

October 11-13, 2006

Guy A. Cormier, P.Eng., and J.L. Richards & Associates Limited (JLRA)

It is alleged that Cormier is guilty of incompetence as defined in section 28(3)(a) of the *Professional Engineers Act*. It is alleged that Cormier and JLRA are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the Act relevant to the alleged professional misconduct are:

(a) *Section 72(2)(a)*: negligence;
(b) *Section 72(2)(b)*: failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work for which the practitioner is responsible;
(c) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
(d) *Section 72(2)(g)*: breach of the Act or regulations, other than an action that is solely a breach of the code of ethics;
(e) *Section 72(2)(h)*: undertaking work the practitioner is not competent to perform by virtue of the practitioner's training and experience; and
(f) *Section 72(2)(j)*: conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

October 23-27, 2006

Christopher M. Turek, P.Eng.

It is alleged that Turek is guilty of incompetence as defined in section 28(3)(a) of the *Professional Engineers Act*. It is alleged that Turek is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the Act relevant to the alleged professional misconduct are:

(a) *Section 72(2)(a)*: negligence;
(b) *Section 72(2)(b)*: failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work for which the practitioner is responsible;
(c) *Section 72(2)(c)*: failure to correct or report a situation that the practitioner believes may endanger the safety or welfare of the public;
(d) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
(e) *Section 72(2)(g)*: breach of the Act or regulations, other than an action that is solely a breach of the code of ethics;
(f) *Section 72(2)(h)*: undertaking work the practitioner is not competent to perform by virtue of the practitioner's training and experience; and
(g) *Section 72(2)(j)*: conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

November 6-10, 2006

Raymond O. Dobbin, P.Eng.

It is alleged that Dobbin is guilty of incompetence as defined in section 28(3)(a) of the *Professional Engineers Act*. It is alleged that Dobbin is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the Act relevant to the alleged professional misconduct are:

(a) *Section 72(2)(a)*: negligence;
(b) *Section 72(2)(b)*: failure to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work for which the practitioner is responsible;
(c) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
(d) *Section 72(2)(h)*: undertaking work the practitioner is not competent to perform by virtue of the practitioner's training and experience; and
(e) *Section 72(2)(j)*: conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

November 22, 2006

Kwang-Ray Hsu

It is alleged that Hsu is guilty of incompetence as defined in section 28(3)(a) of the *Professional Engineers Act*. It is alleged that Hsu is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*. The sections of Regulation 941 made under the Act relevant to the alleged professional misconduct are:

(a) *Section 72(2)(a)*: negligence;
(b) *Section 72(2)(d)*: failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner;
(c) *Section 72(2)(g)*: breach of the Act or regulations, other than an action that is solely a breach of the code of ethics;
(d) *Section 72(2)(j)*: conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional; and
(e) *Section 72(2)(k)*: failure by a practitioner to abide by the terms, conditions or limitations on the practitioner's licence, provisional licence, limited licence, temporary licence or certificate.