

# SUMMARY OF 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 A MEMBER of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on November 3, 2008, at the Association of Professional Engineers of Ontario (association) in Toronto. All parties were present. The association was represented by Neil J. Perrier. The member was represented by David Waterhouse. David P. Jacobs acted as independent legal counsel.

## THE ALLEGATIONS

The association filed a very comprehensive list of allegations to the effect that the member was guilty of professional misconduct.

For summary purposes, the essence of those allegations that were used subsequently in evidence is summarized as follows.

It is alleged that the member:

- (a) disclosed confidential information of a competitor for the purposes of interfering with the legitimate economic interests of the competitor;
- (b) as a former employee of this competitor, the member was in breach of the confidentiality terms of the “letter of intent and basic agreement of employment terms” with the competitor;
- (c) engaged in a course of vexatious comment, including inappropriate emails and conduct that he knew, or ought to have known, was unwelcome and that might reasonably be regarded as interfering in the business relationships and commercial interests of the competitor; and
- (d) acted in a disgraceful, dishonourable and unprofessional manner.

It is alleged that the member is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*.

## THE EVIDENCE

Counsel for the association advised the panel that general agreement had been reached on certain facts and allegations and introduced an Agreed Statement of Facts (ASF). Therefore, despite the comprehensive Statement of Allegations filed, a significant number of these allegations against the member were not pursued by PEO, and no evidence was presented in support of such allegations.

As such, the panel deliberated and adjudicated only on the facts presented in the ASF and, thereby, dismissed the balance of the allegations in the originally filed Statement of Allegations.

It is agreed that the member is guilty of professional misconduct, the particulars of which can be summarized as follows:

- It is agreed that the member acted in an unprofessional manner; and

- It is agreed that the member is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*.

## PLEA BY MEMBER

The member, through his counsel, admitted the conduct alleged as set out in the ASF. The panel then conducted a plea inquiry and was satisfied that the member’s admissions were voluntary, informed and unequivocal.

## DECISION BY PANEL

Counsel for the association summarized the ASF and submitted that the tone and language used by the member in correspondence was not that expected of a professional engineer. The member, through counsel, agreed that he acted in an unprofessional manner in these instances and he entered a plea of guilty to the allegations in the ASF. The panel, having deliberated, found that the facts in the ASF admitted to by the member support a finding of professional misconduct when considered in total. The panel, thus, found that the member acted and communicated in an unprofessional manner and, specifically, is guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act* R.S.O. 1990.

## PENALTY SUBMISSIONS

The association proposed a penalty that would, in the association’s submission, achieve general and specific deterrence and rehabilitation in the following terms:

- The member should be required to appear before the panel to be reprimanded, and the fact of the reprimand should be recorded on the register for one year; and
- The Decision and Reasons of the discipline panel should be published in summary in Gazette, with names.

The member, through his counsel, concurred with the penalty proposed by the association, except that they took the position that names should not be published in Gazette.

Counsel for the association argued that the facts as to misconduct and the proposed penalty were consistent with the facts and penalty in *White v. Association of Professional Engineers of Ontario*, 2006, CanLII 17320 (Div. Ct.) and in the matter of *PEO v. Remisz et al*, Decision and Reasons signed on May 12, 2008, Gazette, September/October 2008.

Counsel for the association argued that, because the member’s statements injured the reputation of the complainant in public, publishing names with the Decision and Reasons in Gazette would be an appropriate part of the penalty and

would serve to deter others, again consistent with the above-cited decisions.

Counsel for the member argued that the correspondence containing the inappropriate language and tone was directed to parties within a business relationship and was not publicly disclosed. He agreed that the language and tone were inappropriate.

Counsel for the member presented the member's resume (Exhibit #3) as evidence of his accomplishments, professionalism and good character.

Counsel for the association alleged that one of the inappropriate emails at issue was posted on a public website. In reply, counsel for the member stated that such email was not written by the member and was, in fact, placed in a secure file transfer location on the site for selective secured access only by a small number of people. It was only necessary for the document to be on the website at all because the file was of a size that could not be transmitted otherwise. Counsel for the association did not dispute these facts.

### REASONS FOR PENALTY DECISION

The panel regarded both the severity and tone of the language used by the member as constituting unprofessional conduct and as being an impediment to sound engineering practice in having the potential to erode public confidence in the profession of engineering.

The panel chose to orally reprimand the member, with the key objective clearly being rehabilitation. In the reprimand, the panel could and would, in no uncertain terms, convey to the member that the language used in the correspondence that was admitted in evidence before it was professionally inappropriate for use in such communications. The panel would aim to convince the member that, in future, his practice of engineering would be better served by avoiding the kind of inappropriate language and tone used in his communications, as admitted.

Given the co-operative nature of the member during the hearing and his acceptance of the facts, the panel concluded that the reprimand should have the required rehabilitative effect and that the member would be unlikely to re-offend. As such, the panel did not consider that there was need for any additional penalty to deter the member from re-offending.

The panel considered whether and how the public interest or the integrity of the profession might be served by imposing a penalty in addition to the reprimand. Counsel for the association argued that, because the member's statements injured the reputation of the complainant in public, publishing the names with the Decision and Reasons in Gazette would be appropriate redress. The panel was not convinced the association had presented persuasive evidence that the member had injured the complainant's reputation publicly by way of his inappropriate language and tone.

On examining the context of the correspondence in greater depth, the panel found materially important that the contentious communications were not publicly disclosed. The panel found

no convincing evidence that the member intended his inappropriate tone and language to be broadly distributed. In the view of the panel, the inappropriate tone and language was used by the member in secured correspondence to others as part of a broader business relationship. The member's rash description of the complainant was also related to those business relationships.

In the two cases cited as precedents as to the appropriateness of the penalty urged by the association, the members had sent their correspondence to elected public officials, thereby demonstrating intended public disclosure. The public impact in those cases was considered by the panel to be more severe. In those cases, certainly, the public record could be corrected by publishing the names. However, the panel did come to the conclusion that the two cases cited were distinguishable on their facts from the instant case and, therefore, that publication without names is more appropriate here.

Publication of the Decision and Reasons in this case will provide a clear message to the members and the public that inappropriate language and tone are not tolerated in such circumstances. Because the evidence did not show that the member "went public," there is no public record to correct by including the name of the defendant or, additionally, the name of the complainant (as the complainant requested).

The panel concludes that publication with names would amount to an additional punishment for the member that the panel feels is neither constructive nor warranted. The panel, therefore, decided that its Decision and Reasons should be published in summary in Gazette, without names. Furthermore, since it would be counterproductive to suppress the names in the publication while recording the fact of the reprimand on the register, the panel, in assigning penalty, thus chose to direct that the reprimand not be recorded on the register.

### PENALTY DECISION

In addition to the foregoing reasons, the panel recognized that the member was co-operative in agreeing to the ASF in pleading guilty and during the course of this hearing. The panel further took into account the fact that many of the initial allegations against the member were not pursued by PEO and no evidence was presented in support of such initial allegations.

The panel, having deliberated carefully and for the reasons herein, made the following order as to penalty:

- (a) The member is required to appear before the panel to be reprimanded; and
- (b) The fact of the reprimand is not to be recorded on the register.

The Decision and Reasons of the discipline panel shall be published in summary in Gazette, without names.

At the conclusion of the oral hearing, the member signed a Waiver of Appeal, which was filed, following which the member was orally reprimanded by the panel.

The written summary of the Decision and Reasons was signed by Jim Lucey, P.Eng., as chair on behalf of the other members of the discipline panel: Aubrey Friedman, P.Eng., Ed Rohacek, P.Eng., John Vieth, P.Eng., and Derek Wilson, P.Eng.