

SUMMARY OF DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, c. P.28; and in the matter of a complaint regarding the conduct of JAMES R. MALO, P.ENG., a member of the Association of Professional Engineers of Ontario, and FORM ARCHITECTURE ENGINEERING (FAE), a holder of a certificate of authorization.

The panel of the Discipline Committee (the panel) of the Association of Professional Engineers of Ontario (the association or PEO) heard this matter on November 4 and 5, 2020, by means of an online video conference platform, which was simultaneously broadcast in a publicly accessible format over the internet. All participants in the proceedings attended by video conference. The association was represented by Leah Price. The member James R Malo (Malo) was represented by counsel Mike Maher and the C of A Form Architecture Engineering (FAE) were represented by counsels Jordan Lester and Michel Caza.

STATEMENT OF ALLEGATIONS

Two complaints were filed with PEO concerning the alleged conduct or actions of the respondents. The Complaints Committee of PEO referred the first complaint to the Discipline Committee on November 2, 2017 (Matter 1). On June 13, 2018, the hearing in Matter 1 was adjourned to a date to be determined. On April 24, 2019, it was again adjourned, on consent, to permit a registrar's investigation to be completed. A second complaint was filed following the registrar's investigation. The second complaint was referred to the Discipline Committee from the Complaints Committee in July 2019 (Matter 2). A pre-hearing conference was held on September 25, 2019. At the pre-hearing conference, an order was made on consent to consolidate Matters 1 and 2 for hearing. The Notice of Hearing was issued on September 11, 2020, in respect of the hearing of the consolidated matters.

SUMMARY OF AGREED STATEMENT OF FACTS

1. The respondent Malo was a professional engineer licensed pursuant to the *Professional Engineers Act*. Kuch Stephenson Gibson Malo Architects & Engineers obtained certificate of authorization (C of A) number 10055885 on

February 20, 2002. That C of A remained in place when Kuch Stephenson Gibson Malo Architects & Engineers changed its name to FAE on April 20, 2011. Malo was the individual taking responsibility for the professional engineering services provided under the C of A from March 26, 2002 until March 21, 2018. Malo resigned his membership effective May 6, 2019. FAE continues to hold a C of A.

2. PEO received a complaint dated August 9, 2013, from Paul Barnwell, P.Eng., relating to structural engineering designs and drawings done by the respondents on a school in Thunder Bay (the School). Attached as Schedule "A" is a copy of this complaint. This matter (Matter 1) was referred to the Discipline Committee (DIC) on November 2, 2017. Attached as Schedule "B" is a copy of the Statement of Allegations in Matter 1. As can be seen from the Statement of Allegations, the issue in Matter 1 is that the designs and drawings in question were allegedly deficient in that they allegedly failed to properly account for snow loads.
3. After Matter 1 was referred to DIC, it was brought to PEO's attention that a second school had been constructed utilizing Malo's and FAE designs, which were also allegedly deficient in that they allegedly failed to properly account for snow loads. As a result, the deputy registrar, regulatory compliance, issued a registrar's investigation (RI) order under s. 33 of the *Professional Engineers Act*. Attached as Schedule "C" is a copy of the RI order.
4. The DIC hearing in Matter 1 was adjourned *sine die* on July 13, 2018 (and again on April 24, 2019), on consent, to await the outcome of the RI. Malo executed an undertaking that, pending the hearing, he would not design, or sign and seal the design, of any roof structures. As noted above, Malo has since resigned, and his licence was accordingly cancelled.
5. The RI eventually involved examination of over 45 structures. The examination was conducted by PEO, together with its independent expert, in co-operation with FAE, together with its consultants. It resulted in a registrar's investigation report dated May 28, 2019, which in turn resulted in a complaint made by Irena Gawelek, P.Eng., the investigator under the RI. This complaint (Matter 2) was referred to DIC by the Complaints Committee in July 2019.

Matter 2 raised the same or very similar issues as were raised in Matter 1 but involved additional structures.

6. On consent of the parties, Patrick Quinn, P.Eng., the presiding chair at the pre-hearing conference, ordered that Matter 1 and Matter 2 be consolidated, and that they be heard together.

THE BUILDINGS AND THE DESIGN ISSUES

7. The parties agreed that there were 25 structures (the Buildings), encompassed by the now consolidated matter, that were deficiently designed.
8. Malo designed all the Buildings listed in the complaint and signed and sealed all the structural design drawings for the Buildings. The drawings were issued under FAE's C of A.
9. Five of the Buildings identified were deficiently designed because the snow accumulation loads that were utilized did not comply with Ontario Building Code (the code) requirements.
10. Twelve of the Buildings identified were deficiently designed in that snow accumulation load values were not properly identified on sealed drawings.
11. Four of the Buildings identified were deficiently designed in that the designer utilized a Wind Exposure Factor (Cw) less than 1.0, contrary to the code requirements.
12. Four of the Buildings identified were deficiently designed in that the designer utilized an Importance Factor that did not comply with the code requirements for the building's appropriate classification.
13. PEO retained Will Teron, P.Eng., of Tacoma Engineers (Tacoma), as an independent expert to review the drawings made available to PEO, and to comment upon the snow load issue. He provided four expert reports commenting on eleven (11) of the Buildings. The expert reports concluded that the roofs of the Buildings reviewed were deficient in that they were designed based on a roof snow load less than that specified in the code. In addition, Tacoma concluded that the design deficiencies in the drawings in connection with the Buildings reviewed were of such a magnitude that they represented a significant risk to the safety of the public.
14. The as-built condition of certain of the Buildings were the subject of an engineering analysis by a team of engineers retained by or on behalf of FAE. They included Peter Halsall, P.Eng., RWDI and Lea Consulting Ltd. This team determined that, in their opinion, based on examination of excess capacity in a number of the structural elements as well as wind study modelling, this Building was not a significant safety risk to the public and required only minor work to satisfy snow load requirements. PEO took no position on whether this opinion is correct or not.
15. The as-built condition of other of the Buildings identified were the subject of a detailed examination and engineering analysis by Jamie Pilot, P.Eng., the current responsible engineer under FAE's C of A. He determined that, in his opinion, while the design of these buildings was not compliant with the OBC, the as-built structures were sufficient to support OBC defined loads and did not pose a safety risk. On the basis of that opinion, no work was required by the municipality to be carried out on these Buildings to satisfy snow load requirements. PEO takes no position on whether Mr. Pilot's opinion was correct or not.
16. FAE undertook to review all the projects identified in the RI, and provided a report dated February 26, 2019. That report covered 31 structures that had not been reviewed by Tacoma. FAE's report identified Buildings which did not include snow load information, Buildings which used $C_w < 1.0$, Buildings in which the designer used an importance factor, $I_s = 1.0$ rather than $I_s = 1.15$, and Buildings which did not identify the snow loads used in the design. FAE's report also identified certain structures, wherein examination of relevant components as built (reverse engineering) showed that they satisfied code required loads, despite the fact that the drawings either did not identify the snow loads or used incorrect snow loads. FAE's report noted that the roofs of some of the Buildings were not code compliant even as-built. FAE determined in their engineering judgment that as-built capacities of these structures were in such proximity to code-required specified loads that, when factored, would be considered satisfactory to accommodate loading requirements imposed on them and therefore required no remediation efforts.
17. For the purposes of these proceedings, and subject to the foregoing, the respondents accept as correct the findings, opinions and conclusions in the expert reports, and admit that the roof designs

and the associated drawings in connection with the Buildings that were the subject of the complaint failed to make responsible provision for complying with applicable statutes, regulations and codes. The respondents further admit that the engineering work in relation to the design of the roofs of the Buildings fell below the expected standards that a reasonable and prudent practitioner should maintain in the circumstances, and did not make reasonable provision for the safeguarding of life, health or property of the persons affected by the work.

18. The parties therefore agree that the respondents are guilty of professional misconduct as follows:
- a. Issuing structural drawings for the construction of buildings that failed to meet the standard of a reasonable and prudent practitioner, amounting to professional misconduct as defined by section 72(2)(a) of Regulation 941;
 - b. Issuing structural drawings for the construction of buildings that failed to make reasonable provision for the safeguarding of life, health or property of a person who may be affected by the work, amounting to professional misconduct as defined by section 72(2)(b) of Regulation 941;
 - c. Issuing structural drawings for the construction of buildings that failed to make responsible provision for complying with applicable statutes, regulations, standards, codes and bylaws, amounting to professional misconduct as defined by section 72(2)(d) of Regulation 941; and
 - d. Issuing structural drawings for the construction of buildings in an unprofessional manner, amounting to professional misconduct as defined by section 72(2)(j) of Regulation 941.

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

PLEA BY THE MEMBER AND THE HOLDER

Malo and FAE both admitted to the allegations set out in the Agreed Statement of Facts. The panel conducted a plea inquiry and was satisfied that the admissions of each of the parties were voluntary, informed and unequivocal.

DECISION

The panel considered the Agreed Statement of Facts and the guilty plea of both the member and FAE. The panel finds that the facts supported a finding that both Malo and FAE committed acts of professional misconduct as alleged in paragraphs 18 a., b., c. and d. of the Agreed Statement of Facts as mentioned above.

JOINT SUBMISSION AS TO PENALTY (JSP) AND COSTS WITH RESPECT TO THE MEMBER MALO

PEO and Malo made the following joint submission on penalty and costs:

- a) Pursuant to s. 28(4)(a) of the *Professional Engineers Act*, Malo's licence shall be revoked;
- b) Pursuant to s. 28(5) of the *Professional Engineers Act*, the order of the Discipline Committee shall be published, with reference to Malo's name; and
- c) There shall be no order as to costs, and there shall be no fines imposed.

Malo has had independent legal advice with respect to the penalty set out above.

PANEL DECISION AND REASONS AS TO PENALTY FOR MALO

The proposed penalty addressed the key principles in respect of the imposition of penalties including: a) protection of the public; b) maintenance of professional standards; c) maintenance of public confidence in the ability of the profession to regulate itself; and d) general deterrence. It is well established that a joint submission as to penalty should not be lightly disregarded. It is only where the circumstances are such that the proposed penalty is contrary to the public interest and/or it would bring the administration of justice into disrepute that it should be varied.

Malo resigned and admitted guilt. His licence was revoked and he agreed to the order being published in the Gazette with his name, which sends a message to practising members that PEO considers its responsibility seriously in protecting the public from unsafe conditions. Given that the member had already resigned, the principles of specific deterrence and rehabilitation were less relevant as they related to the penalty with respect to Malo.

The panel determined that there was no compelling reason to deviate from the penalty jointly submitted by the parties.

DECISION AND REASONS WITH RESPECT TO PENALTY AND COSTS FOR THE C OF A FAE

The association and FAE did not agree on an appropriate penalty. FAE called two witnesses to give evidence with respect to penalty, Jamie Pilot, P.Eng. (Pilot), and Peter Halsall, P.Eng. (Halsall). Both parties made submissions on penalty.

Both the association and FAE agreed that FAE should be reprimanded pursuant to paragraph 28(4)(b) of the *Professional Engineers Act*, R.S.O. 1990 c. P.28 (PEA). However, the association wanted the reprimand to be registered permanently with names published in the Gazette; while FAE wanted the reprimand to be recorded for a period of one year without publication.

EVIDENCE ON PENALTY

Pilot testified that he joined FAE in 2006, apprenticed under Malo, and by the time of the hearing, had become a partner and the structural engineer responsible for FAE. He is a member in good standing of the association. He testified that he was not aware of any complaints against FAE other than these two. He was first made aware of the issues with the projects that were the subject of the complaints in Matter 1 when the first complaint was filed. He reported that he conducted an intensive review involving long hours in addition to his regular work with the time and the remediation work by FAE exceeding \$250,000 to ensure public safety and developing a quality assurance program with the help of partners.

FAE was co-operative with the registrar's investigation and throughout the process.

Halsall gave evidence regarding the review process and the complexities of reviewing the large body of work that was the subject of the registrar's investigation. He stated that there was no need to force Pilot to do anything; that he was inspired by Pilot. He described the context: working in a small practice in a small community and the importance of setting up outside networks. He testified that FAE's and Pilot's conduct in response to the complaints as both professional and honourable. He considered FAE to be a firm that "did the right thing."

ARGUMENTS ON PENALTY

Summary of Submissions of Counsel for the Association

Counsel for the association agreed that Pilot had been helpful and co-operative. She noted that the designs at issue had not been done by Pilot. Pilot was not the responsible engineer. She noted that Pilot was not considered to be technically incompetent. Counsel submitted, nonetheless, with respect to FAE, the misconduct was very serious. Counsel for the association pointed out that there were 25 buildings at issue. The Buildings included two schools. The owners of Buildings and the chief building official had to be notified of the deficiencies. Some of the Buildings needed immediate temporary remediation to avoid possible public safety risk. FAE, the holder of the C of A, was guilty of serious misconduct.

Counsel for the association referred to *PEO v. Houston T. Engio, P.Eng. and Houston Engineering & Drafting Inc.*, [2016] *Engineering Dimensions* November/December 40 (Engio) and made note of paragraph 11 which set out the objectives of penalty. In terms of protection of the public, counsel for the association submitted that the association did not have a concern for future protection of the public, but general deterrence remained an important consideration that required that other holders of certificates of authorization be aware that serious misconduct is treated seriously and submitted that this requires that the name of the holder be published, that holders know that their name will be published, referring to paragraph 19 of Engio which discussed the need to denounce misconduct by publishing. Counsel for the association also pointed out that the protection of the reputation of the profession required publication of the name of the holder of the certificate of authorization, FAE, in the circumstances of this case. Counsel for the association referred to *Ontario College of Social Workers and Social Service Workers v Rozina Shaheen*, 2019 ONCSWSSW 9, especially in relation to the principle that not publishing should be a rare exception and require compelling reasons.

On the issue of the association's request for the penalty to include a reprimand being placed on the record permanently, counsel for the association referred to decisions including *PEO v. Gerard Van Iterson, P.Eng. and 694470 Ontario Ltd. O/A Unicorn Engineering*, [2018] *Engineering Dimensions* March/April 32 (Van Iterson). In Van Iterson, the parties had agreed on a time-limited reprimand, but the Discipline Committee decided that a timed reprimand was not acceptable. Counsel for the association submitted that the conduct of FAE was at least as serious in this case if not more so than the conduct at issue in Van Iterson and as such a time-limited reprimand was not appropriate.

Counsel for the association disagreed that the publication of names and a permanent reprimand amounted to a punishment of Pilot for something in the future. It was to reflect the conduct of FAE that had occurred in the past. She referred to the Agreed Statement of Facts in that the design failures were agreed to have represented a significant

risk to the public. She submitted that the case law supported a permanent reprimand in cases of serious misconduct.

Summary of Submissions of Counsel for FAE

Counsel for FAE pointed out that Malo was the responsible member at the time that the designs in issue were stamped. He described Malo as being FAE in effect until Malo was replaced by Pilot, at which time Pilot became FAE. He reviewed Pilot's evidence regarding the internal review efforts of FAE and submitted that such efforts were made out of concern for public safety. He argued that there was no deliberate disregard for the Ontario Building Code or for public safety. He pointed out the comprehensive quality assurance process and peer review process that FAE had put in place at its own expense and at its own initiative. He pointed out that Halsall had given evidence that there were no concerns with Pilot's technical competence. He submitted in all of the circumstances, that FAE did not deserve to have its name published.

Counsel for FAE referred to case law with respect to the principles on the appropriateness of penalty. In particular, he referred to paragraph 14 in the decision of the Divisional Court in *White v. Association of Professional Engineers of Ontario*, 2006 CanLII 17320 (ON SCDC) in support of FAE's position that a time-limited reprimand without names being published was appropriate given that there was no danger to the public expected in the future and no current issue with technical competence. He distinguished the comments at paragraph 16, stating that in that case the member had misled the public building official. That was not the case here. He also pointed out that this was a first offence for FAE. He distinguished the Engio case, stating that in Engio, the member had approved shoring designs without even looking at them; the designs in that case were described as incoherent and the member gave misleading evidence and had prior convictions. He pointed out that in other decisions where there was a permanent reprimand, the member was continuing to practice. In this case, Malo had resigned and his licence had now been revoked.

Counsel for FAE summarized by stating that a permanent reprimand and the publication of names was tantamount to penalizing Pilot for the conduct of Malo. FAE was co-operative. It took steps without being asked. There was no evidence that there was any future risk of danger to the public.

COMMENTS BY THE INDEPENDENT LEGAL COUNSEL (ILC)

ILC advised that the panel can only do what the statute permits, previous decisions of the Discipline Committee are not binding on this panel, but that decisions of the courts are binding. His advice was not binding on the panel.

He pointed to subsection 28(4) of the PEA which sets out the powers of the panel. Subparagraph (f) specifically states that the Discipline Committee can:

28(4)(f) require that the member or the holder of the certificate of authorization, temporary licence, provisional licence or limited licence be reprimanded, admonished or counselled and, if considered warranted, direct that the fact of the reprimand, admonishment or counselling be recorded on the register for a stated or unlimited period of time; a reprimand can be recorded for a limited time

ILC advised that a licence suspension must be published, whereas reprimands do not have to be published. ILC advised that the open court principle may not be engaged by the issue of publication of the name of FAE. He submitted that in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), referred to in the decision in *Ontario College of Social Workers and Social Service Workers v Rozina Shabeen*, that the case dealt with a request for a publication ban.

In ILC's view, the Engio case was wrongly decided to the extent that it may be read as fettering the discretion of the panel to determine whether a reprimand should be recorded for a limited amount of time or indefinitely. He pointed out that it was provided for guidance.

Counsel for the parties agreed that the panel had jurisdiction to order that the reprimand be recorded on the register and that the reprimand could be time limited or permanent. Both counsel agreed that the panel had jurisdiction to order publication of the decision and of the reprimand with or without names.

PENALTY DECISION

The panel makes the following order as to penalty:

1. Pursuant to paragraph 28(4)(f) of the PEA, FAE shall be reprimanded, and the fact of the reprimand shall be recorded on the register for a period of one year.
2. Pursuant to paragraph 28(4)(i) and subsection 28(5) of the PEA, the decision and order of the Discipline Committee shall be published in PEO's official publication with reference to names; and
3. There shall be no order as to costs.

REASONS FOR PENALTY DECISION

The panel considered application of the following principles:

- a) protection of the public;
- b) maintenance of professional standards;
- c) maintenance of public confidence in the ability of the profession to regulate itself;
- d) general deterrence;
- e) specific deterrence; and
- f) rehabilitation

No single principle should govern. The decision should balance aggravating and mitigating factors.

The panel was mindful of the fact that FAE was co-operative in an extensive investigation of its projects involving a considerable amount of time, effort and support by FAE. The panel was impressed with the response of FAE in dealing with the complaint, including by conducting its own review, taking remediation steps, setting up quality control processes and generally taking responsibility for the design deficiencies. The panel considered the time and effort and out-of-pocket expense incurred by FAE in determining an appropriate penalty as well as what the panel found to be a genuine desire and concrete steps taken to ensure that the previous misconduct not be repeated. The panel would hope that other members and holders will follow the example of FAE and of Pilot in the event that an error in their own work or that of the holder of a certificate of authorization for which they find themselves now responsible is found.

The panel acknowledges that the Discipline Committee should act to deter members from similar acts of misconduct by imposing a meaningful but reasonable penalty. The panel decided, given

the special circumstances of this case, that the publication of the decision and reasons with names and of the reprimand being recorded for a limited time period is sufficient in all of the circumstances.

The panel concluded that the penalty it has ordered is reasonable and in the public interest. FAE co-operated with the association. It agreed on the facts, has accepted responsibility for its actions and has avoided unnecessary expense to the association. It was not, in the panel's view, unreasonable for FAE to contest parts of the penalty requested by the association. The panel found the evidence of FAE on the issue of penalty helpful in making its decision. As such, the panel finds that an award of costs was not warranted.

In summary, the panel finds that the penalty ordered is reasonable and that public confidence in the ability of the association to be a self-regulator of the profession is satisfied by the penalty.

Kathleen Robichaud, LLB, chair of the discipline panel, signed the Decision and Reasons on April 14, 2021, on behalf of the other panel members: Ishwar Bhatia, P.Eng., and Gary Thompson, P.Eng.