SUMMARY OF THE DECISION AND REASONS

In the matter of the Association of Professional Engineers v. an Engineer and the Engineer's Company

In the matter of a hearing under the *Professional Engineers Act*, and in the matter of a complaint against the conduct of Engineer A, a member of the Association of Professional Engineers of Ontario.

This matter came on for hearing before a panel of the Discipline Committee on February 21, 2012 at the Association of Professional Engineers of Ontario in Toronto.

BACKGROUND

The hearing arose as a result of the involvement of Engineer A and Engineer A's company, namely Company B Engineering Inc., offering to provide professional engineering services without a Certificate of Authorization; and the use of the word "engineering" in the corporate name of Company B; and the use of the PEO logo on the website of Company B.

AGREED FACTS

Counsel for the association advised the panel that agreement had been reached on certain alleged facts and introduced an Agreed Statement of Facts (ASF), which included facts and admissions to the effect that:

- At all material times, Engineer A was licensed as a professional engineer in Ontario pursuant to the *Professional Engineers Act*; and

- In or about March 17, 1999, Company B Engineering Inc. was incorporated pursuant to the laws of Ontario. At all material times, Engineer A was the sole director of Company B; and

- That when the Association of Professional Engineers of Ontario (PEO) became aware of the existence of Company B Engineering Inc., further investigation revealed that:
  - Company B Engineering Inc. did not hold a Certification of Authorization issued by PEO;
  - The consent of PEO to use the word "engineering" in its corporate name, as required by the regulation under the *Business Corporations Act*, was not obtained by Engineer A; and
  - Company B's website included the PEO logo.

- That when in 2009, Company B was instructed by PEO to stop using the term "engineering" in its corporate name without having a Certificate of Authorization (C of A), Engineer A, rather than complying with the PEO request, challenged the *Professional Engineers Act* requirements with respect to the need for holding a Certificate of Authorization.

- As of the end of the year 2011, when no proactive steps had been taken by Engineer A to obtain a Certificate of Authorization for Company B, PEO advised Engineer A of the requirement to apply for and obtain a Certificate of Authorization for Company B as a condition of its agreement to settle the matter and Engineer A did so eventually in January 2012.

ADMISSIONS

a. As per the aforesaid ASF, Engineer A accepts and has agreed in writing that Engineer A is guilty of professional misconduct as defined in the *Professional Engineers Act*.

b. PEO required Engineer A to apply for and obtain a Certificate of Authorization for Company B, as a condition of its agreement to settle the matter. Engineer A did so eventually in January 2012.

c. Engineer A now admits that Engineer A's conduct in this matter constitutes professional misconduct as defined by the *Professional Engineers Act*, section 28(2)(b) and Regulation 941, section 72(2)(g).

PLEA OF THE MEMBER

The panel conducted a plea inquiry and was satisfied that the member's admissions were voluntary, informed and unequivocal and noted that the member, "Engineer A," has had independent legal advice or has had the opportunity to obtain independent legal advice with respect to the member's admissions.

DECISION AND REASONS

The panel, having considered the Agreed Statement of Facts (voluntarily admitted), finds that the agreed facts supported a finding of professional misconduct contrary to section 28(2) of the *Professional Engineers Act* as defined in Regulation 941, section 72(2)(g).

PENALTY DECISION

The panel received a Joint Submission as to Penalty (JSP) from the association and the member.

While deliberating on their decision as to penalty, the panel took special note of legal advice to the effect that, based on court precedents, they should accept the JSP unless there was very good cause to reject it.

The panel thereby accepted the joint submission and accordingly orders that:

1. Pursuant to s. 28(4)(f) of the *Professional Engineers Act,* Engineer A shall be orally reprimanded within 90 days of the date of the penalty decision and the fact of the reprimand shall be recorded on the register; and

2. The finding and order of the Discipline Committee be published in summary form pursuant to section 28(4)(i) of the *Professional Engineers Act*, without the publication of the member/holder's name or identifying details; and

3. That Engineer A will pay costs to PEO in the amount of $1,250 within 30 days of the date the penalty decision of the Discipline Committee becomes effective.

The panel was of the opinion that the actions that gave rise to the hearing could and would have been avoided if the member had fully co-operated with PEO at an earlier point, by making an application for a Certificate of Authorization (C of A), rather than challenging the *Professional Engineers Act* requirements with respect to the need for holding a C of A. It was noted that the member when asked did remove the PEO logo from Company B's website.

The panel nevertheless concluded that, overall, the proposed penalty is just and reasonable when considered in total and was satisfied that it achieves an equitable balance in recognizing both the protection of the public and fairness to the member, who ultimately co-operated with the association and, by agreeing to the facts and a proposed penalty, has now accepted responsibility for the member's actions and initial intransigence.

SUMMARY OF FINDINGS AND ORDER

Pursuant to the tribunal's Notice of Hearing issued on October 13, 2011 by David C. Robinson, P.Eng. (chair of the Discipline Committee), this discipline panel convened a hearing in November 2011 at the offices of the Association of Professional Engineers of Ontario in Toronto to hear and determine allegations of professional misconduct against a corporation being the holder of a Certificate of Authorization, and its employee (the member) having been, at all material times, the supervising and directing engineer on the corporation's Certificate of Authorization.

THE MATTER

The Complaints Committee of the Association of Professional Engineers of Ontario had directed that the matter be referred in whole, alleging professional misconduct in professional engineering services provided to the public in 2007 and 2008, with energy audits of five Toronto buildings undertaken in connection with application for the ecoEnergy Retrofit Incentive for Buildings.

The association asserted that the holder performed one energy audit (of five buildings audited) negligently by providing grossly inaccurate initial estimates and a report, which provided no benefit to the client, and that the member, as supervising and directing engineer under the holder's Certificate of Authorization, bears professional responsibility for the work in question and alleged the member was guilty of professional misconduct under the same provisions, even though the holder embarked on the engineering project without informing the member and without the member's knowledge. The panel accepted that the member had nothing to do with the project at issue, was never informed of the project until the member learned of the complaint from PEO, and did not stamp any of the associated documents.

Under section 72(2)(a) of Ontario Regulation 941 made under the *Professional Engineers Act*, professional misconduct includes "negligence" as defined in subsection 72(1), namely, "an act or an omission in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances." The requirement to supervise work conducted under a Certificate of Authorization is found at section 17 of the *Professional Engineers Act*.

The parties expedited the proceeding by agreeing upon and filing an Agreed Statement of Facts and a Joint Submission as to Penalty and Costs, which avoided the need for further evidence or testimony. The member and the holder admitted to allegations of professional misconduct, orally to the panel and in writing through the Agreed Statement of Facts.

SUMMARY OF FINDINGS

The panel determined the holder performed the energy audit for one of the five buildings negligently; in particular, Natural Resources Canada (NRCan) had to repeatedly seek further information and clarification, and the initial estimates concerning energy savings were inaccurate. The panel found the holder committed an act of professional misconduct by virtue of such negligence in providing professional engineering services associated with the energy audit and EcoAction application for the one property at issue.

The panel accepted that the energy audit report and application at issue were prepared without the supervision, direction or involvement of the member, and outside of the member's expectation that the holder would make the member aware of such work and reports so that the member could properly supervise. Despite the member having no actual involvement in, or knowledge of, the subject energy audit, by failing to have such knowledge the member failed to properly supervise the activities of the holder for which the member bore responsibility under the holder's Certificate of Authorization. The panel found that the member committed an act of professional misconduct by virtue of failing to supervise those activities.

The obligations associated with Certificates of Authorization are explicit and clearly stated in section 17 of the *Professional Engineers Act*. Either by supervising/directing the provision of professional engineering services or by assuming responsibility for a holder's practice of professional engineering, the member is subject to the same standards of professional conduct as if the member had provided those services or had engaged in such practice. Thus, the finding that the holder committed professional misconduct in performing negligently the energy audit for one building is sufficient to establish that the member, as its supervising and directing engineer, be considered to have committed professional misconduct.

As a result, the holder and member were found guilty of professional misconduct pursuant to section 28(2)(b) of the *Professional Engineers Act* by virtue of contravening sections 72(2)(a) and 72(1) of Regulation 941.

The panel took judicial notice of the provisions in subsection 17(1) of the act that, in essence, would have obliged the holder to provide services within the practice of professional engineering only under the member's personal supervision and direction. Although the association made no corresponding allegation against the holder, from the agreed facts, it is an inescapable conclusion that the holder contravened that condition of its Certificate of Authorization in failing to inform the member of the work

and in excluding the member from any involvement in the project. This failing on the part of the holder does not extinguish the member's professional responsibility and accountability, but is a mitigating factor to be considered when determining a fair and just penalty.

PENALTY

The panel accepted the Joint Submission as to Penalty and Costs, save for varying the duration of reprimand recorded for the member from what was originally sought and, accordingly:

1. Pursuant to s. 28(4)(f) of the *Professional Engineers Act*, orders that the holder shall be orally reprimanded and the fact of the reprimand shall be recorded on the register for a period of six months;

2. Pursuant to s. 28(4)(f) of the *Professional Engineers Act*, orders that the member shall be orally reprimanded and the fact of the reprimand shall be recorded on the register for a period of one month;

3. Pursuant to s. 28(4)(d) of the *Professional Engineers Act*, imposes terms, conditions and limitations on the Certificate of Authorization of the holder, whereby the holder shall provide, to the satisfaction of the registrar and within four months of the date of this order, a quality assurance plan regarding the holder's provision of engineering services to the public. The plan shall address, but shall not be limited to, applicable standards for engineering work, including energy audits, and the internal review and approval process to be employed for engineering deliverables, such as energy audit reports;

4. Directs that the findings and order of the Discipline Committee be published in summary form under s. 28(4)(i) of the *Professional Engineers Act*, but without the publication of the member's/holder's names or identifying details; and

5. Makes no order with respect to costs.

The penalty order originally sought would have directed that the fact of both reprimands be recorded on the register for identical periods. The perception of the public and members that the outcomes are fair is important to the integrity and reputation of the discipline process, and the facts disclosed in this matter imply different degrees of culpability between the holder and the member. The penalty order, therefore, needs to demonstrably reflect that distinction.

The panel considered its penalty order stated below to be fair and just, and in the public interest, in three respects:

- General deterrence–through publication, other members and holders can reflect on the circumstances of this matter and take to heart the lessons learned today by the member and holder.
- Specific deterrence–clearly, both the member and holder would today rather be anywhere else than here in this proceeding; and both will face a reprimand that is recorded on the register for a period of time.
- Rehabilitation–particularly in the case of the holder, development of a quality assurance plan is an explicit and clear step to improve the supervision and direction of the practice of professional engineering within the firm; and, in so doing, also a measure of public protection by reducing the chance that such an omission in supervision and direction will arise in future.

The panel noted the example of *PEO v. Haas*[1], in which a reprimand was ordered and preparation of a quality assurance plan was required as a remedial measure.

A quality assurance plan, as the cornerstone of a quality management system, is a business tool to ensure consistency in the delivery of services. The panel noted the member's statement that the member had been assigned to review and approve work on other occasions, and the agreed fact that the energy audits were wrong only for one of five buildings. The panel inferred from such information that the underlying issue is a failure to ensure review and approval of professional engineering work and services on a consistent basis, and agrees that development of a quality assurance plan is a reasonable remedial measure to ensure future consistency.

The panel determined that an oral reprimand is appropriate to reinforce the holder's appreciation of the holder's obligations under the holder's Certificate of Authorization and to mitigate the possibility of recurrence. The public protection role of the Certificate of Authorization depends upon meaningful and effective review of all professional engineering work, especially that performed by people not themselves holding a professional engineering licence.

The member had a full appreciation and accepted the member's responsibilities under the holder's Certificate of Authorization.

1. PEO v. William Lloyd Haas, P.Eng., and William Haas Consultants Inc., decision dated 21 October, 2008–published in Engineering Dimensions, March/April 2009 at pages 27-32.