

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 appropri-

ate 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. Clyde 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. Clyde misrepresenting himself as a professional engineer to an employment agency, and for using the protected titles “professional engineer” and “P.Eng.”

Mr. Clyde 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. Clyde’s former employer, who dismissed Mr. Clyde once it was discovered that he was not licensed. After a PEO investigation, charges were laid against Mr. Clyde.

The August 29 trial proceeded in the absence of Mr. Clyde, who had failed to appear in court on previous occasions. His Worship Justice of the Peace Jackson

convicted Mr. Clyde 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. Clyde 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.