

IN THE MATTER OF
THE *ENGINEERS AND GEOSCIENTISTS ACT*,
R.S.B.C. 1996, c. 116 as amended and
IN THE MATTER OF EDWARD NUNN, P. Eng.

DECISION OF THE DISCIPLINE COMMITTEE
(Penalty and Costs)

Hearing date: By written submissions
Decision date: April 21, 2021
Discipline Committee Panel: John Haythorne, Chair
Edward Bird, P. Eng.
David Ricketts, P. Eng.

Counsel for the Association: Lindsay Waddell and Natasha Edgar
For the Member: No submissions received

A. Introduction

1. On December 18, 2020, following a hearing, this Panel of the Discipline Committee (the “Panel”) of the Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC (the “Association”) found that Edward Nunn, P.Eng. had breached the *Engineers and Geoscientists Act* (the “Act”), pursuant to section 33(1)(b) of the Act (the “Decision”).
2. Having made that finding, the Panel requested written submissions on what sanctions should be imposed on Mr. Nunn, and whether, and in what amount, costs should be ordered.
3. The Panel established a schedule for written submissions on these questions, and, in light of Mr. Nunn’s non-attendance at the previous hearing, directed that the Decision, which included the Panel’s direction and schedule for written submissions, be delivered to Mr. Nunn by registered mail to his last address on file with the Association.

4. The Panel received written submissions from the Association, but did not receive any from Mr. Nunn.
5. This is the Panel's decision with respect to the appropriate penalty and costs payable.

B. Legal framework for penalty

6. In the Decision, the Panel made a finding that Mr. Nunn breached the Act, pursuant to section 33(1)(b) of the Act.
7. When a determination is made under section 33(1) of the Act, section 33(2) states that the Panel may do one or more of the following:
 - a. Reprimand the member, licensee or certificate holder;
 - b. Impose conditions on the membership, license or certificate of authorization of the member, licensee or certificate holder;
 - c. Suspend or cancel the membership, licence or certificate of authorization of the member, licensee or certificate holder;
 - d. Impose a fine, payable to the association, of not more than \$25 000 on the member, licensee or certificate holder.
8. The Association submitted that when determining the appropriate penalty, the Panel should consider the factors set out in the decision of *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17. The factors set out in the *Ogilvie* case are listed below:
 - a. The nature and gravity of the conduct proven;
 - b. The age and experience of the respondent;
 - c. The previous character of the respondent, including details of prior discipline;
 - d. The impact upon the victim;
 - e. The advantage gained, or to be gained, by the respondent;
 - f. The number of times the offending conduct occurred;

- g. Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
 - h. The possibility of remediating or rehabilitating the respondent;
 - i. The impact on the respondent of criminal or other sanctions or penalties;
 - j. The impact of the proposed penalty on the respondent;
 - k. The need for specific and general deterrence;
 - l. The need to ensure the public's confidence in the integrity of the profession;
 - m. The range of penalties imposed in similar cases.
9. The more recent case of *Law Society of British Columbia v. Dent*, 2016 LSBC 5 indicates that it is not necessary to go through each and every one of these factors. In the *Dent* case, the factors were consolidated as follows:
- a. Nature, gravity and consequences of conduct;
 - b. Character and professional conduct record of the respondent;
 - c. Acknowledgement of the misconduct and remedial action; and
 - d. Public confidence in the profession including public confidence in the disciplinary process.
10. The Panel accepts the Association's submission that it is appropriate to determine the penalty in this case based on the consolidated factors set out in the *Dent* case. The Panel also accepts that the weight and consideration given to each of these factors must be tailored to the specific facts of the case.
11. The Panel has conducted its analysis based on the consolidated factors from the *Dent* case. The Panel has applied those factors to the options available to it under section 33(2) of the Act.

C. Panel's analysis

12. The Panel sets out its analysis on each of the factors from *Dent* below.

Nature, gravity, and consequences of the conduct

13. As set out in the Decision, Mr. Nunn failed to respond to requests to attend an interview with the Association as part of its investigation into a complaint about

him. This was a breach of his statutory obligation under section 30(4)(c) of the Act.

14. The Panel considers this to be a serious matter. Investigating complaints about members is perhaps the Association's most important function. Mr. Nunn's failure to cooperate with the investigation frustrated the Association's ability to investigate the complaint about him.
15. This behaviour negatively impacted the complainant, the Association itself, and the public at large. The complaint about Mr. Nunn remains unresolved, even today, largely because of the Association's inability to investigate it using the tools the Act provides it with. This is a result of Mr. Nunn's conduct.
16. The Panel agrees with the Association's submission that this is serious misconduct.

Character and professional conduct record of the member

17. Mr. Nunn has been a member of the Association since 1992. As of the date of the Association's submissions, he remained a full-time practising member.
18. The Panel has no evidence of any prior disciplinary action involving Mr. Nunn. While this does not itself overcome the other factors, the Panel considers that the absence of a professional conduct record after many years in practice weighs slightly in Mr. Nunn's favour.
19. However, that is not the end of the analysis. The misconduct here involves a breach of a clear and unequivocal provision of the Act. The Association submits that a professional engineer with almost 30 years' experience should have been well aware of his professional obligations.
20. The Panel agrees. The basic obligation to comply with the Act and respond to the Association's requests, even without an express statutory requirement, should have been well known to Mr. Nunn in light of his many years of experience. Even accounting for his lack of professional conduct record, the Panel considers this an aggravating factor.

Acknowledgement of the misconduct and remedial action

21. There is no evidence indicating that Mr. Nunn has acknowledged his misconduct. He did not reply to the Association during the investigation. He did not attend the hearing. He did not provide submissions when given the opportunity to do so.
22. Similarly, the Panel has received no evidence of any remedial action on Mr. Nunn's part.

23. The Panel accepts the Association's submission that this militates in favour of a more substantial penalty.

Public confidence in the profession

24. Under this factor, the Panel must consider the need for specific and general deterrence as well as penalties in similar cases.
25. With respect to specific deterrence, the Panel agrees with the Association that it would have been far preferable for Mr. Nunn to attend the hearing or have counsel speak on his behalf.
26. Without the benefit of Mr. Nunn's response to the issues identified in this case, the Panel is left with an incomplete picture. However, his failure to engage with the process suggests that some degree of specific deterrence is required.
27. With respect to general deterrence, the analysis is simpler. The Panel considers that public confidence in the engineering and geoscience professions requires that the message to members be clear and unequivocal: all members must cooperate fully with the Association's complaint investigation process.
28. Members who do not provide full and timely cooperation harm the public's confidence in the profession and the Association's ability to effectively regulate it in the public interest. That is not acceptable, and must be deterred.
29. Public confidence also requires that the Panel consider previous cases involving similar misconduct. The Association provided a helpful review of seven decisions of the discipline committee which involved similar misconduct. These decisions were made following hearings. The Association also directed the Panel to three consent orders involving similar misconduct, where no hearing was required.
30. In reviewing these previous decisions, the Panel has chosen to primarily rely on the decisions rendered following a hearing. In that regard, the Panel accepts the Association's submission that consent orders are made by agreement and through cooperation. Those types of decisions may engage different considerations.
31. The Panel considers the following decisions and their corresponding penalties¹ most applicable to this case:
 - a. In *Re Hage* (September 29, 2005), Mr. Hage failed to reply to letters from the Investigation Committee. A disciplinary hearing was held and Mr. Hage did not attend. The following penalty was ordered:

¹ Each of these decisions also includes an order of costs payable by the member. However, the Panel has not included that as part of the penalty because it considers the question of costs payable separately.

- Mr. Hage’s membership was suspended until he provided a complete response to the requests of the Investigation Committee; and
 - Mr. Hage’s membership was suspended until he wrote and passed the Association’s Professional Practice exam.
- b. In *Re Dextras* (June 20, 2008), Mr. Dextras failed to reply to a request by the Investigation Committee for documents and information. The following penalty was ordered:
- Mr. Dextras’s membership was suspended for 60 days, with the suspension to continue until he provided the response requested and paid the fine and costs ordered; and
 - Mr. Dextras was ordered to pay a fine of \$5,000.
- c. In *Re Syed* (February 5, 2018), Mr. Syed failed to provide requested information to the Investigation Committee with respect to two separate complaints. Mr. Syed only provided responsive information at the disciplinary hearing. The following penalty was ordered:
- Mr. Syed was ordered to pay a fine of \$5,000;
 - Mr. Syed was required to complete and pass the Association’s Professional Practice Examination and the Professional Engineering and Geoscience Practice online seminar; and
 - If Mr, Syed did not fulfill the requirements by a certain date, his membership would be suspended.

D. Panel’s decision on penalty

32. The Association submits that the appropriate penalty is as follows:

- a. Mr. Nunn’s membership be suspended until he has:
- i. Attended an interview with the Association’s Investigation Committee and provided a satisfactory response to the questions and requests of the Investigation Committee;
 - ii. Completed and passed the Association’s Professional Practice Examination, at his own expense; and
 - iii. Fulfilled the obligations set out in items b and c below;

- b. Mr. Nunn pay to the Association a fine of \$3,000 no later than 30 days from the date of the Panel's decision on penalty; and
 - c. Mr. Nunn pay to the Association costs of \$22,036.31 (an amount equivalent to 90% of its investigation and legal costs) no later than 30 days from the date of the Panel's decision on penalty.
33. Subject to an adjustment to the amount of costs payable, discussed further below, the Panel accepts this submission. In reaching this conclusion, the Panel has carefully considered the appropriate penalty in light of the factors reviewed above.
34. The Panel's primary consideration is that the Association must be able to carry out its public-interest mandate in investigating the complaint about Mr. Nunn. The investigation will benefit from his cooperation.
35. It is therefore appropriate that Mr. Nunn be suspended at least as long as he withholds that cooperation. An order of this nature is consistent with the orders in *Re Hage* and *Re Dextras*. The Panel notes that no such order was made in *Re Syed*, but that appears to be because Mr. Syed had provided the required responses by the time of the hearing.
36. The Panel also considers that the misconduct in this case also requires a punitive component. A modest fine is therefore appropriate.
37. Finally, given the fact that the misconduct here engages fundamental professional obligations, the Panel agrees that the Professional Practice Examination is appropriate as a remedial measure.

E. Legal framework for costs

38. Section 35 of the Act sets out the authority of the Panel to order costs:
- 35(1) If the discipline committee makes a determination under section 33 (1), the discipline committee may direct that reasonable costs of and incidental to the investigation under section 30 and the inquiry under section 32, including reasonable fees payable to solicitors, counsel and witnesses, or any part of the costs, be paid by the person, and the costs may be determined by the committee.
39. As the Panel made a determination under section 33(1), this section is engaged.
40. The Association submits that an order of costs under section 35 can comprise 70% to 90% of the actual costs incurred.
41. Authority for an order in this range comes from the decision of the BC Supreme Court in *Perry v. Association of Professional Engineers and Geoscientists*, 2005

BCSC 1102, in which the Court upheld an order for 70% of actual reasonable fees incurred. In *Re Syed*, referenced above, Mr. Syed was required to pay 90% of the Association's costs.

42. The Association seeks an order for 90% of its costs in this case, similar to the one made in *Re Syed*.

F. Panel's analysis

43. The Panel accepts the Association's submissions regarding the range of costs.
44. However, in this case, the Panel is not prepared to make an order of 90% of the Association's costs. This is because the Notice of Inquiry in this matter made two separate allegations against Mr. Nunn (as set out in paragraph 5 of the Decision), and the Panel only made a finding against Mr. Nunn with respect to one of the allegations.
45. While it cannot be said that Mr. Nunn "succeeded" in defending the one allegation through his non-appearance, the Panel is not prepared to make an order for costs at the upper end of the range in these circumstances.
46. The Panel instead orders costs at 70% of actual costs incurred. This reflects the fact that the case brought by Association was meritorious and the Panel made an order against Mr. Nunn under section 33(1) of the Act.
47. The Panel is also mindful of the fact that it requested further submissions on a matter that was related to the allegation on which it did not make a finding against Mr. Nunn (as set out at paragraphs 26-32 of the Decision). While the Panel found the further submissions provided by the Association very helpful in its analysis, it ultimately did not accept those submissions. The Panel considers it fair that the Association bear its own costs with respect to this step (\$3,204.22).
48. The Panel otherwise accepts that the Association's costs as submitted are reasonable. The Association identifies legal fees of \$23,538.28 and investigative costs of \$946.84 for a total of \$24,485.12.
49. Subtracting the costs associated with the further submissions (\$3,204.22) yields a revised total of \$21,280.90. That figure is multiplied by 70% for a net costs order of \$14,896.63.

G. Panel's decision on costs

50. The Panel orders costs payable by Mr. Nunn to the Association in the amount of \$14,896.63.

H. Order

51. In summary, the Panel orders as follows:

- a. Mr. Nunn's membership is suspended until he has:
 - i. Attended an interview with the Association's Investigation Committee and provided a satisfactory response to the questions and requests of the Investigation Committee;
 - ii. Completed and passed the Association's Professional Practice Examination, at his own expense; and
 - iii. Fulfilled the obligations set out in items b and c below;
- b. Mr. Nunn must pay the Association a fine of \$3,000 no later than 30 days from the date of this order; and
- c. Mr. Nunn must pay the Association costs of \$14,896.63 no later than 30 days from the date of this order.

52. Lastly, in light of Mr. Nunn's ongoing non-participation in these proceedings, the Panel directs the Association to promptly deliver this decision to Mr. Nunn by registered mail to his last address on file with the Association.

DATED this 21st day of April, 2021

<original signed by>

John Haythorne, P.Eng., Chair

<original signed by>

Edward Bird, P.Eng.

<original signed by>

David Ricketts, P.Eng.