

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

and

IN THE MATTER OF KONSTANTIN (CONSTANTINE) POPOV, P. Eng.

DECISION OF THE DISCIPLINE COMMITTEE

Hearing dates:

In writing

Discipline Committee Panel:

Colin Smith, P.Eng., Chair

Neil Cumming, P.Eng.

Emily Cheung, P.Eng.

Counsel for Engineers and
Geoscientists of BC:

Lindsay Waddell

For the Registrant:

Konstantin Popov, on his own behalf

A. Background

1. On December 4, 2020, this Panel of Discipline Committee (the "Panel") of The Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists of BC found that Konstantin Popov, P.Eng. demonstrated unprofessional conduct contrary to the *Engineers and Geoscientists Act*, R.S.B.C. 1996, c. 116 (the "EGA" or the "Act") and acted in a manner contrary to Principles 4, 5, and 7 of the Code of Ethics (the "Determination").
2. In its Determination, the Panel requested written submissions on the appropriate penalty and whether costs should be imposed. Mr. Popov applied for an extension to provide submissions, which was granted by the Panel. Both parties delivered written submissions.

3. On February 5, 2021, the *Professional Governance Act* S.B.C. 2018 c.47 (the "PGA") came into force and repealed and replaced the *Engineers and Geoscientists Act*. The Panel requested submissions from the parties on the application of the PGA to the assessment of penalty and costs in this case. Engineers and Geoscientists of BC took the position that the PGA has no application with respect to penalty because the penalty provisions of the PGA cannot be applied retrospectively. With respect to costs, Engineers and Geoscientists of BC submitted that the expanded approach to costs provided for in the PGA may be applied, however it continued only to seek those costs outlined in its submissions from when the EGA was in force. Mr. Popov agreed with those submissions.
4. Engineers and Geoscientists of BC seeks an order that:
 - a. Mr. Popov's membership be suspended for a period of six months from the date of the Panel's decision on penalty;
 - b. Before Mr. Popov's membership can be reinstated following the six month suspension referred to in (a) above, Mr. Popov must:
 - i. Successfully complete Engineers and Geoscientists of BC's Professional Practice Examination; and
 - ii. Successfully pass Engineers and Geoscientists of BC's Law and Ethics course;
 - c. Mr. Popov will pay to Engineers and Geoscientists of BC a fine of \$10,000 no later than 30 days from the date of the Panel's decision on penalty; and
 - d. Mr. Popov will pay to Engineers and Geoscientists of BC costs of \$65,874.29 (an amount equivalent to 70% of its investigation and legal costs) within three months from the date of the Panel's decision on penalty.
5. Mr. Popov submits that there should be a reprimand and no costs; or in the alternative, reduced costs, because:
 - a. Engineers and Geoscientists of BC failed to prove the allegations made by the complainant which took up the vast majority of the investigation and hearing;
 - b. The consequences of the misconduct identified by the Panel are minimal;
 - c. The costs incurred by Engineers and Geoscientists of BC were excessive; and
 - d. Imposing the costs incurred by Engineers and Geoscientists of BC on Mr. Popov would be a substantial burden for him.

B. Legal Framework for Penalty and Costs

6. The Panel accepts the parties' position that while the PGA is in force, and it was open to Engineers and Geoscientists of BC to seek costs under the PGA, in this case, it is only seeking the penalties and costs outlined in its submissions that were made while the EGA was in force.

7. Having made a determination under section 33(1) of the EGA that Mr. Popov contravened the Act, the following penalties were available under that Act:

33 (2) If the discipline committee makes a determination under subsection (1), it may, by order, do one or more of the following:

(a) reprimand the member, licensee or certificate holder;

(b) impose conditions on the membership, licence 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. Section 35(1) of the EGA provided the following with respect to 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.

9. The relevant factors to consider in determining an appropriate penalty are set out in *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17:

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 circumstance;

- 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; and
- m. the range of penalties imposed in similar cases.

[the “*Ogilvie* factors”]

10. The decision of *Law Society of BC v. Dent*, 2016 LSBC 05, held that it is not necessary to consider each *Ogilvie* factor in every case, and that the factors can be consolidated. In *Dent*, the following consolidated list was suggested:
 - 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 legal profession including public confidence in the disciplinary process.
11. Engineers and Geoscientists of BC submits that the *Ogilvie/Dent* factors are appropriate to decide penalty in this case. Engineers and Geoscientists of BC notes that this approach has been followed by other discipline panels of Engineers and Geoscientists of BC including in *Re Halarewicz* (18 January 2018).
12. Mr. Popov submitted that “In general law, the gravity of a violation of any type composes of 3 components: intent, concurrence, and causation.” No caselaw was cited but the submissions on these points referenced examples from criminal law.
13. The Panel agrees with Engineers and Geoscientists of BC that the *Ogilvie / Dent* factors are the appropriate factors to consider in this case.

Nature, gravity and consequences of conduct

14. Engineers and Geoscientists of BC submits that Mr. Popov’s conduct was on the more serious end of the spectrum. First, the Panel found Mr. Popov’s conduct was “serious, prolonged, and hidden” from the General Contractor (his client) and the Registration Committee which was assessing Mr. Popov’s suitability to join the profession. Second, Mr. Popov benefitted financially by \$9450, which he has not repaid.

15. Mr. Popov submits that the conduct was not severe. He submits that he did not comprehend that the arrangement in question would ever be a conflict of interest. He submits that there was no victim or party who was adversely affected. He submits that he has suffered reputational consequences as a result of the investigation. Mr. Popov says he regrets agreeing “to help [the Subcontractor], which ultimately led to the Panel’s conclusion that by doing this he has placed himself in a position of conflict of interests [sic].” Mr. Popov indicated that other options to manage the situation would have been preferable.
16. The Panel finds the proven conduct is serious. The Code of Ethics underlines the importance of avoiding conflicts of interest. It is a core value of the profession and an essential feature of an engineer’s relationship with their client. This factor weighs in favour of a more serious penalty.

Character and professional conduct record of the respondent

17. Engineers and Geoscientists of BC acknowledges that Mr. Popov has no other prior discipline record and was new to the profession at the time of the conflict, which are mitigating factors. Nevertheless, it notes that Mr. Popov had completed Engineers and Geoscientists of BC’s Law and Ethics exam. In addition, Mr. Popov had significant project management and construction industry experience, something he underlined to the Registration Committee.
18. Mr. Popov submits that his character and reputation among his colleagues and the engineering community was in good standing prior to the investigation in this matter.
19. The Panel recognizes that Mr. Popov does not have a prior disciplinary record and that he was relatively new to the profession. Those factors generally weigh in favour of a lesser penalty. However, in this case, Mr. Popov had already taken the Law and Ethics exam, and he expressly offered the Project as an example of his work to support his application for membership. Moreover, the conflict of interest was serious, prolonged, and hidden. For these reasons, the Panel finds this factor weighs in favour of a more serious penalty.

Acknowledgement of the misconduct and remedial action

20. Engineers and Geoscientists of BC submits that Mr. Popov has never acknowledged that he was engaged in a conflict of interest and should not have accepted payment from a subcontractor. There was no factual dispute that Mr. Popov acted as Project Manager for the General Contractor and also accepted \$9,450 from Subcontractor without disclosing this second business relationship to the General Contractor. Engineers and Geoscientists of BC submits that Mr. Popov demonstrated a lack of insight into his actions, which militates in favour of a stronger penalty.

21. As noted above, Mr. Popov states he “regrets that he agreed to help [the Subcontractor]”, and indicated that “he had learned his lesson and would not get in such relations ever again.”
22. In reply, Engineers and Geoscientists of BC submits that while Mr. Popov makes those assertions, he continues to dispute that his conduct amounted to a conflict of interest. This undermines his assertion that he has acknowledged his misconduct.
23. The Panel finds that Mr. Popov has expressed some regret about how he proceeded during the material times, but does not find that he had acknowledged his misconduct. The Panel found no evidence of any remedial action taken. This factor weighs in favour of a more serious penalty.

Public confidence in the profession including public confidence in the disciplinary process

24. Engineers and Geoscientists of BC submits that ordinarily the need for specific deterrence may be lessened where a registrant is no longer practicing or has resigned their membership. In this case, however, Mr. Popov has suffered no consequences for his conduct other than his removal from the project. Moreover, he benefitted financially and must be deterred from engaging in similar conduct in future. As a result, it submits that a fine of \$10,000 is warranted to address the need for specific deterrence.
25. Engineers and Geoscientists of BC submits there is also a need for general deterrence, and it is essential that public confidence is maintained in the integrity of the profession. Registrants must be held to account for breaches of the Code of Ethics.
26. Engineers and Geoscientists of BC relies upon the following cases, which it argues establishes a range of reprimand/3-month suspension to 15-month suspension/cancellation:
 - a. *Re Ackbar, P.Eng* (May 6, 1985)
 - b. *Re Baker, P.Eng* (April 18, 1986)
 - c. *Re Chatwin, P.Eng* (September 30, 1981)
 - d. *Re Evans, P.Eng* (October 16, 2006)
 - e. *Re La Rose, P. Eng.* (October 10, 1986).
27. Engineers and Geoscientists of BC submits that a six-month suspension and a fine of \$10,000 is appropriate in the circumstances. Engineers and Geoscientists also submits certain coursework is appropriate in this case.

28. Mr. Popov submits that the cases cited by Engineers and Geoscientists of BC are all distinguishable and involved substantially more serious conduct.
29. Mr. Popov submits that he had no intent to adversely affect any party and there were no negative consequences to any party resulting from his conduct. He submits that he should only be reprimanded as he genuinely believed that his conduct did not amount to a conflict of interest.
30. The Panel finds that there is a need for specific deterrence and general deterrence to ensure that Mr. Popov does not repeat the conduct and that a message is sent to the profession. Moreover, it is vital that the public has confidence in the profession and the disciplinary process. This includes confidence that the principles in the Code of Ethics will be upheld, particularly where conduct is serious, hidden and prolonged, and in circumstances where there is financial gain. Those factors justify an elevated sanction. Having said that, the Panel is not satisfied that a suspension of six months is appropriate. Instead, the Panel finds that a four-month suspension, a fine of \$10,000, and completion of the Professional Practice Examination and Law and Ethics course is appropriate in the circumstances.

Costs

31. In terms of costs, Engineers and Geoscientists of BC submits that the range of past orders is between 70 to 90% of costs incurred. It cites *Perry v. Association of Professional Engineers and Geoscientists*, 2005 BCSC 1102, in which the court upheld an award of 70% of actual reasonable fees incurred.
32. Engineers and Geoscientists of BC recognizes that it was unsuccessful in proving the bribery allegation to the requisite standard, therefore submits that costs should be ordered at the lower end of the spectrum. It also submits that the majority of the evidence adduced was relevant to both allegations.
33. Engineers and Geoscientists of BC has incurred the following costs:

Legal fees and disbursements (Moore Edgar Lyster LLP)	\$89,638.14
Investigation and hearing costs (of the Association)	
<u>\$4,467.99</u>	
TOTAL (detailed in the attached Appendix "A" and "B")	\$94,106.13
34. Engineers and Geoscientists of BC seeks reasonable costs at 70% of actual costs, in the amount of \$65,874.29.
35. Mr. Popov also points out that there are cases where despite findings of unprofessional conduct, the panel ordered costs below 70%. He cites *Re Lim* (May 15, 2019) in which the Association sought \$64,437.05 (which represented approximately 90% of the costs incurred). Instead, the panel in that case ordered costs at \$25,000.

36. Mr. Popov submits that the investigation and discipline hearing were heavily focused on the complaint allegations which Engineers and Geoscientists of BC failed to prove.
37. Mr. Popov submits it would be unfair and unreasonable for him to bear the financial responsibility for the fees that are being sought in circumstances where the complaint was driven by another registrant who was motivated by revenge. As the primary allegation was not proven, Mr. Popov should bear no costs.
38. Mr. Popov submits that the costs were excessive as two lawyers worked on the file and he is concerned about duplication of work. He submits that the imposition of costs would present a particularly large burden on Mr. Popov. He cooperated throughout the investigation. Finally, the vast amount of time and costs incurred in the investigation and the hearing were associated with the first allegation which was not proven.
39. In reply, Engineers and Geoscientists of BC submits that Engineers and Geoscientists of BC, its registrants, and the public were all impacted by Mr. Popov's conduct which tarnishes the reputation of the Engineers and Geoscientists of BC in the eyes of its registrants and members of the public.
40. It also submits that Mr. Popov has submitted no evidence of the financial consequences he has raised or that he is not in a position to pay costs.
41. The Panel finds that the costs in this case should be substantially reduced in this case.
42. First, there was mixed success as only one of two allegations was proven to the requisite standard. The least serious of the two allegations was proven.
43. Second, the Panel agrees with Mr. Popov's submissions that a substantial portion of the investigation and discipline hearing were devoted to the allegation of a rigged bid process. Nevertheless, an important portion of both of those processes was also devoted to the conflict-of-interest allegation. The Panel finds that it was necessary for Engineers and Geoscientists of BC to call all the witnesses in this case.
44. Third, while it appears that Mr. Popov largely cooperated with the investigation, there was some important disclosure which Mr. Popov produced late in the investigation (namely, the invoice for the Subcontracting services at issue). Moreover, no admissions or agreed facts were made.
45. Fourth, the Panel is not satisfied that Engineers and Geoscientists of BC's costs were excessive by virtue of having had two lawyers present at the discipline hearing and saw no evidence of duplication of work.
46. Fifth, Mr. Popov asserted he would experience a significant financial impact, however, there was no evidence other than that assertion before this Panel.

Nevertheless, the Panel appreciates a costs order would likely present some measure of impact to Mr. Popov.

47. The Panel finds in all the circumstances that it is appropriate to award 25% of the reasonable costs incurred in this case, which amounts to \$23,526.53.

C. Summary

48. The Panel orders:

- a. Mr. Popov's membership be suspended for a period of four (4) months to commence immediately upon reinstatement with Engineers and Geoscientists BC, in the event Mr. Popov is reinstated;
- b. Before Mr. Popov's membership can be reinstated following the four-month suspension referred to in (a) above, Mr. Popov must have:
 - i. Successfully retaken and completed Engineers and Geoscientists of BC's Law and Ethics course;
 - ii. Successfully repassed Engineers and Geoscientists of BC's Professional Practice Examination; and
- c. Mr. Popov will pay to Engineers and Geoscientists of BC a fine of \$10,000 no later than 30 days from the date of the Panel's decision on penalty; and
- d. Mr. Popov will pay to Engineers and Geoscientists of BC \$23,526.53 costs within three months from the date of the Panel's decision on penalty.

Dated: June 1, 2021

<original signed by>

Colin Smith, P.Eng., Chair

<original signed by>

Neil Cumming, P.Eng.

<original signed by>

Emily Cheung, P.Eng.