

Decision Issued: February 9, 2022

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

and

**IN THE MATTER OF LAURA FIDEL, P. Eng.
EGBC File No. T15-048**

**DECISION AND ORDER OF THE DISCIPLINE COMMITTEE
ON PENALTY AND COSTS**

Discipline Committee Panel:	Ed Bird, P. Eng., Chair, Tom Morrison, P. Eng. Ron Yaworsky, P. Eng.
Counsel for the Association:	Andrew D. Gay, Q.C. Adrian Greer
Counsel for the Member:	Steven Haakonson Cassandra Patterson
Counsel for the Discipline Committee Panel:	Michael D. Shirreff

Introduction

1. In its decision, issued July 12, 2021, this Panel of the Discipline Committee (the “Panel”) of the Association of Professional Engineers and Geoscientists of British Columbia, doing business as Engineers and Geoscientists BC (the “Association”), determined that Ms. Fidel had committed several instances of unprofessional conduct while acting as the Project Manager and Engineer of Record (the “EOR”) for the Mt. Polley mine Tailings Storage Facility (the “TSF”).

2. Although the Panel concluded that the Association had met its burden to establish a number of the allegations against Ms. Fidel in the Amended Notice of Inquiry, it must also be noted that many allegations against Ms. Fidel put forward by the Association were

dismissed by the Panel. This was a matter where it can fairly be said that success at the initial hearing was divided as between the Association and Ms. Fidel.

3. The penalty hearing took place on October 1, 2021.
4. In advance of the hearing, the Panel received lengthy written submissions from both the Association and Ms. Fidel. Ms. Fidel also provided the Panel with a brief of character references.
5. As outlined in greater detail below, there was general agreement between the Association and Ms. Fidel as to the legal framework through which the Panel was to assess and determine an appropriate penalty in the circumstances of this proceeding. The parties were also able to agree, prior to the penalty hearing, how the Panel should address any costs consequences associated with the proceeding. In light of the positions put forward by both parties, the Panel was able to focus its assessment of this matter on the relatively confined issues where the parties were not in agreement.
6. In broad terms, the Association proposed the following penalty for Ms. Fidel:
 - (a) a four (4) month suspension of Ms. Fidel's membership; and
 - (b) an order that within a specified period of time (for example 9 months), that Ms. Fidel successfully complete the following three courses as a condition of her membership:
 - (i) Responsible Tailings Management 101;
 - (ii) Tailings Facility Design, Operation and Closure; and
 - (iii) Risk Assessment, Decision-Making, and Engineering Management For Mine Geowaste Facilities.¹

7. Ms. Fidel advised the Panel that she was agreeable to completing the coursework, but she took the position that a suspension of her membership was not required, as it would not further the goal of rehabilitation or specific deterrence and there was no public interest to be served in suspending Ms. Fidel. Ms. Fidel emphasized that the Association did not prove a number of the allegations in the Notice of Inquiry; there was no allegation or finding in this proceeding that Ms. Fidel's actions caused or contributed to the breach of the tailings dam; and the fact that these proceedings had already had a significant impact on Ms. Fidel's well-being, reputation and career in the seven years since the TSF breach had occurred.

¹ The Association submitted that the Panel could order that Ms. Fidel complete the three courses as a "remedial program" pursuant to s. 75(6)(f) of the *Engineers and Geoscientists Act* (the "EGA"), or as a condition of membership under s. 75(b)(c) of the EGA.

8. For the reasons that are set out in more detail below, having considered the positions taken by both parties, the Panel has concluded that the appropriate penalty in this matter is a suspension of Ms. Fidel's membership for a period of **two (2) months**. The Panel also agrees with the parties that it is appropriate for Ms. Fidel to complete the coursework outlined above. There will be no order in relation to costs of this proceeding.

Impact of the repeal and replacement of the EGA

9. On February 5, 2021, the *Professional Governance Act* (the "PGA") came into force and the EGA was repealed. The potential impact of the repeal and replacement of the EGA, in terms of the penalty available for the Panel to impose on Ms. Fidel, was the subject of extensive written submissions from the parties.

10. Given the procedural history of this proceeding, the Association and Ms. Fidel were both of the view that the Panel was required to determine the issue of penalty as if the EGA were still in force. In practical terms, this meant that the new, more significant fine provisions in the PGA would not apply to Ms. Fidel (note that the Association was also not seeking a fine against Ms. Fidel in this matter in any event).

11. Having also reviewed the provisions of the *Interpretation Act* (sections 35 and 36), and certain prior decisions that address the impact of the repeal and replacement of legislation, including *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46, the Panel accepted that there is a legal presumption against retroactive application of legislation concerning penalties, unless the new statute expressly authorizes such application. There is no suggestion in the PGA that the penalty provisions are to apply retroactively, which leads to the result that the previous legislative regime set out in the EGA applies with respect to the penalty that the Panel can order for Ms. Fidel.

12. As touched on further below, there was initially considerable disagreement between the parties with respect to the implications of the repeal and replacement of the EGA in terms of the costs of the proceeding. However, in light of the parties' agreement on costs at the penalty hearing, that issue need not be addressed by the Panel in this decision.

Framework for assessing the appropriate penalty

13. Pursuant to section 33(2) of the EGA, at this stage of the proceeding, the Panel has the authority to make one or more of the following orders:

- (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; or
- (d) impose a fine, payable to the association of not more than \$25,000 on the member, licensee or certificate holder.

14. There have been a number of previous Discipline Committee decisions that have outlined the factors to be considered in selecting an appropriate penalty against a member found to have committed unprofessional conduct. On this issue, the Discipline Committee frequently cites *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 172, which provides a list of potentially relevant factors in relation to penalty, including:

- a) the nature and gravity of the conduct proven;
- b) the age and experience of the member;
- c) the previous character of the member, including details of prior discipline;
- d) the impact upon the victim;
- e) the advantage gained, or to be gained, by the member;
- f) the number of times the offending conduct occurred;
- g) whether the member 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 member;
- i) the impact on the member 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”)

15. The *Ogilvie* Factors have been referred to by Discipline Committee panels in a number of prior cases, including *Re Foreman*, November 23, 2015; *Re Syed*, August 18, 2020; and *Re Popov*, June 1, 2021.

16. Other Discipline Committees have referred to another Law Society decision, *Law Society of BC v. Dent*, 2016 LSBC 05, in relation to the approach to be used at the penalty stage of a discipline proceeding. In *Dent*, the hearing panel examined the *Ogilvie* Factors and concluded that a consolidation of the factors is probably more helpful in some circumstances. The hearing panel in *Dent* then provided its views on some simplifications

to the process and encouraged discipline panels to depart from a rigid application of every *Ogilvie* Factor in every matter (at paras. 16-17):

It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to the secondary factors

17. The approach articulated by the Law Society panel in *Dent* has been adopted by Discipline Committees, for example in *Re Chrysanthous*, August 16, 2018, as well as *Re Halarewicz*, January 18, 2019.

18. When all of these legal principles and approaches are considered, the primary consideration for the Panel must still be to ensure that the penalty ordered against Ms. Fidel is tailored to her individual case. In doing this, the Panel will consider the factors set out in *Ogilvie* and *Dent*, but the analysis must still be guided by the over-arching consideration in a matter such as this, which is the protection of the public interest.

19. In the remainder of this decision, the Panel will analyze and review the factors that it views as being of most assistance in determining an appropriate penalty for Ms. Fidel.

(a) Nature and gravity of the conduct

20. There was a significant divergence in the submissions between the Association and Ms. Fidel with respect to how the Panel should view the seriousness of the conduct issues in this proceeding.

21. The Association submitted that Ms. Fidel's unprofessional conduct was very serious, focusing largely on the nature of the engineered structure at Mt. Polley and the importance of Ms. Fidel's positions as Project Manager and EOR. As noted in the Panel's earlier decision, the TSF and its embankments were a complex engineered structure that required a high level of engineering skill and attention. The Association submitted that

nature of the underlying project was key to regarding Ms. Fidel's unprofessional conduct as being quite serious. Observation and monitoring of the TSF by qualified and experienced professionals was critical because of the use of the "observational approach" to the design and construction of the TSF. As the Association described it, the potential consequences for failure at a TSF embankment are such that when an engineer accepts a role as a Project Manager or EOR in relation to such a structure, that engineer must fulfill that role diligently and professionally.

22. The Association also emphasized that the Panel had concluded that the engineering complexity of the dam increased as the height of the TSF embankments rose. Each raise of the embankments resulted in an incremental increase in the loading, deformation, hydraulic pressures and shear stresses within the TSF foundation. As the TSF was raised, the embankments became much steeper than what had been set out in the initial design. Water volumes in the impoundment were also increasing significantly.

23. The Association highlighted that the Panel had concluded that Ms. Fidel failed in a number of respects to meet professional standards in relation to the observation and monitoring of the TSF. The Association submitted that Ms. Fidel's five instances of unprofessional conduct during her time as Project Manager and EOR had to be regarded as serious and mandated a strong penalty in order to foster the principle of general deterrence. It was the Association's position that if the Panel did *not* order a significant penalty in this situation it would send a "bad message" to the profession.

24. The Association also compared Ms. Fidel's misconduct to that of Mr. Rice, who was the senior engineer at AMEC who inserted Ms. Fidel into the role of the EOR of the TSF. In Mr. Rice's case, another Discipline Committee imposed a two-year suspension (should Mr. Rice apply for re-admission) together with the maximum fine allowable under the EGA. The Association conceded that the penalty in Ms. Fidel's case should be less onerous than the penalty in Mr. Rice's case, but submitted that the four-month suspension being sought for Ms. Fidel was an appropriate balancing of her culpability as compared to that of Mr. Rice.

25. The Panel accepts, in a general sense, that given the potential for a failure of a TSF embankment to create a serious risk to human life and the environment, unprofessional conduct in relation to a large tailings dam should be viewed seriously from the perspective of the important principles of public protection and general deterrence. Further, the Panel is also of the view that it must consider the potential for a loss of public confidence in the engineering profession if findings of unprofessional conduct in relation to the design, observation and monitoring of a tailings dam are not treated seriously at the penalty stage of a discipline matter.

26. However, the Panel also sees there as being merit to Ms. Fidel's submissions with respect to this important factor, which focused on how the findings of the Panel related to what Ms. Fidel characterized as being the "less serious" issues in the Amended Notice of Inquiry.

27. Further, Ms. Fidel submitted that when each instance of unprofessional conduct was examined on its own, a number of important facts mitigated the gravity of the misconduct. With respect to the Panel's conclusions that Ms. Fidel improperly signed and sealed the 2013 Construction Monitoring Manual (the "CMM"), Ms. Fidel noted that the experts agreed that she had the necessary training experience to undertake the engineering work, provided that she received appropriate guidance from a senior engineer. Also, prior to sealing the documents, Ms. Fidel had been involved in the design process, so it was not a situation where an engineer had signed and sealed documentation without any prior involvement in the matter. Further, as the Panel already noted, there was much debate internally within AMEC as to which firm, AMEC or BGC, should be signing off on the CMM. Finally, Ms. Fidel submitted that it was important to note that the Association did not raise any issues with respect to problems with the CMM, characterizing this allegation as best viewed as a breach of Ms. Fidel's professional obligations without any resulting harm.

28. In terms of the unprofessional conduct associated with the monitoring of the TSF, Ms. Fidel submitted that the following facts militated in favour of a less serious penalty:

- (a) she was the EOR for the TSF for a relatively short and confined period of only approximately 10 months, between April 2013 and February 2014;
- (b) the AMEC budget estimate, which had been prepared by senior engineers and completed prior to her involvement as the EOR, specifically contemplated the EOR's attendance at the site only one time during that period;
- (c) there was an absence of any clear definitions in the project documentation prepared by Mt. Polley Mining Corporation ("Mt. Polley") or AMEC that outlined what was expected of the project EOR; more generally, there were also significant differences of opinion in the profession at large as to the role to be played by an EOR (as was made apparent to some degree in the evidence given by the experts at the initial hearing); and
- (d) Ms. Fidel inherited the TSF student monitoring structure from senior geotechnical engineers who had been involved in the project prior to her time.

29. Finally, with respect to the Panel's conclusion that Ms. Fidel failed to take appropriate steps to investigate what was occurring with the TSF toe excavation, Ms. Fidel again emphasized the poor communication between Mt. Polley and AMEC at that point in time, together with the potential confusion that was caused by BGC being involved in the project by that date (without the full knowledge of AMEC).

30. In light of the above, although conceding that engineering work in relation to tailings dams is important and requires a high degree of knowledge and attention given the potential implications of issues with that work, Ms. Fidel characterized her unprofessional conduct in this instance as falling at the lower end of the spectrum.

31. Ultimately, in assessing and analyzing the seriousness of Ms. Fidel's unprofessional conduct as proven by the Association, the Panel believes that it is critically important to note that none of Ms. Fidel's conduct was linked to any resulting harm or the actual breach of the TSF. That being said, the Panel also accepts, at a general level, that the conduct issues in this matter have to be regarded as being at the more serious end of the spectrum in light of the nature of the engineered structure at issue, coupled with the potential for serious harm should issues emerge from unprofessional conduct. Further, the Panel notes that this matter involved multiple instances of unprofessional conduct on the part of Ms. Fidel in relation to her involvement with the TSF. Although Ms. Fidel's submissions do mitigate the Panel's view of this factor, on balance the Panel regards the circumstances as suggesting that a serious penalty is required in order to adequately protect the public interest.

(b) Age and experience of the member

32. The Association accepts that this factor militates in favour of a less serious penalty. Ms. Fidel was still a relatively junior engineer during the material period of time. She had approximately five years of experience working on tailings pond projects, including construction monitoring work, but she had never held any positions of authority on these projects and had never previously acted as an EOR.

33. As the Panel noted in its initial decision, Ms. Fidel was not also well-served by her firm or her direct supervisors. Ms. Fidel should not have been placed in the position of significant professional responsibility that she found herself in after her colleagues departed AMEC for BGC, particularly when the professional expectations and responsibilities she was to be assuming were insufficiently defined, both as between the client and firm, but also more generally in the profession.

(c) Previous character and prior discipline/possibility of remediation or rehabilitation

34. Ms. Fidel has no professional discipline record. There is also no evidence before the Panel to suggest that Ms. Fidel has been anything other than an upstanding member of the profession since this incident many years ago.

35. The Panel was struck by the statements of support in the letters from Ms. Fidel's colleagues. It was notable to the Panel that Ms. Fidel continued to work at the same engineering firm where she had worked when the conduct issues in this proceeding initially arose. As outlined in these letters, most of which were from other engineers at her firm, Ms. Fidel is viewed as a person of integrity, professional diligence and general good character. A unifying theme of the letters reveals that Ms. Fidel has learned from her negative experiences on the Mt. Polley project and has been willing to share her knowledge in order to improve the quality of work and professional conduct of her engineering colleagues. As Nick Davis, P. Eng., stated in his letter:

Laura demonstrates considerable courage to continue her career as a professional engineer, which has been an inspiration to the many young female EITs that work in our group. She has been helpful at communicating her story to our internal Geotechnical group and to upper company management so that we can improve and grow as a professional group of engineers serving the province of British Columbia.

In addition, I would also make note that I have personally witnessed Laura endure tremendous emotional and physical stress and the overwhelming toll this process has had on her and her family.

36. The Association accepts that these matters favour the ordering of a less serious penalty for Ms. Fidel. Ms. Fidel has a potentially long career ahead of her and, as noted above, the character and reference letters indicate that she has taken the matter seriously and has been dedicated to improving her professional practice. The Panel has no hesitation in concluding that these factors are mitigating in terms of the penalty that should be ordered.

(d) The number of times the offending conduct occurred

37. The parties were not in agreement with respect to the application of this factor. The Association submitted that Ms. Fidel's unprofessional conduct revealed a pattern of repeated professional failures over a 10-month period. The Association acknowledged that this was not a case involving repeated similar incidents on multiple projects, but submitted

that Ms. Fidel's conduct was manifestly problematic for an extended period of time on one significant engineering project, which supported the imposition of a more serious penalty.

38. Ms. Fidel, on the other hand, characterized the misconduct as arising from her work on a single project over a defined period of 10 months. Although the aspects of the unprofessional conduct that related to TSF monitoring could technically have been said to have occurred over that entire period, Ms. Fidel submitted that the conduct issue in relation to that allegation was better seen as being singular in scope and mitigating in terms of the resulting penalty.

39. Ultimately, the Panel does not view this factor as particularly compelling for either party. This was not a singular instance of unprofessional conduct on a discrete project, which might be said to be mitigating. Conversely, the conduct issues in this matter emerged after Ms. Fidel was thrust into the Project Manager and EOR roles in relation to the TSF by her employer for a period of only 10 months. There were multiple instances of unprofessional conduct, but all were related to Ms. Fidel's work with the TSF and the bulk of the issues were a direct result of Ms. Fidel being forced into positions of authority and responsibility in relation to the project after her colleagues had left for BGC. Taking all of this into account, the Panel regards this as a neutral factor in terms of assessing an appropriate penalty.

(e) Impact of the proposed penalty on Ms. Fidel

40. Through her counsel, Ms. Fidel advised that these proceedings have already had a significant negative impact on her reputation and career. The Mt. Polley TSF failure and resulting environmental issues have received significant public and media attention for many years. Despite no allegations that Ms. Fidel's professional conduct was tied to the failure of the TSF (indeed, the Association specifically denied any such connection), she noted that the media, and consequently the public, continue to correlate her professional conduct issues to the TSF breach. Ms. Fidel was also critical of certain publications from the Association, particularly a media statement following the release of the Panel's earlier decision, dated August 10, 2021, which Ms. Fidel characterized as being highly unfair to her given that it *overtly* connected her discipline issues to the 2014 breach of the TSF at the Mt. Polley mine. In this connection, the Panel accepts Ms. Fidel's view of the publication issue and wishes to express its disappointment with the Association's ambivalence about the impact of such matters on Ms. Fidel.

41. The Association's position, as expanded on in its reply submissions, was that its press releases were accurate, fairly described Ms. Fidel's role at Mt. Polley and there was nothing that the Association could do to shape the way these issues might be reported in the media. The Association also argued that the hearing in relation to Ms. Fidel's conduct was

certainly connected to the Mt. Polley TSF failure even if the conduct issues addressed during this proceeding were not alleged to be causes of the breach. If a reasonable and objective person were to review the detailed information in the press release, it would be clear that the Association provided a fair and balance summary of the findings and the Association documentation that one will find when searching Ms. Fidel's name on the internet provides a balanced reporting on the Panel's initial determinations.

42. The Panel accepts what the Association submitted about the technical accuracy of the press release. That being said, based on the materials provided by Ms. Fidel, there is no doubt in the Panel's mind that Ms. Fidel has been the subject of significant negative media coverage in relation to the Mt. Polley events. This has occurred over the course of many years and certain of the coverage has unfairly linked the TSF breach to Ms. Fidel's professional conduct. The Panel believes that these matters are worthy of weight in terms of assessing some of the factors that must now be considered at this stage of the proceeding, including specific and general deterrence. The Panel also accepts that a suspension of any length will have a serious impact on Ms. Fidel's professional practice.

43. Overall, the Panel has concluded that these issues, most of which should be unique to this specific proceeding, point towards the need for a less serious penalty.

(f) General deterrence and the need to ensure public confidence in the integrity of the profession

44. The Association argued that the need for general deterrence in this matter is significant and mandates heavily in favour of a more serious penalty. The Association submitted that this is a proceeding that speaks to the importance of an engineer understanding the responsibility and obligations that one has assumed as a professional, as well as the need to fulfill one's professional responsibilities with a high level of diligence. As the Association put it in its written submissions:

At a more specific level, this case is about the need for vigilant observation and monitoring of tailings dams, particularly as they grow in size and complexity and where the "observational method" is in use (para. 74). Engineers employing the "observational method" must remain mindful that such a method involves significant risk if observation and monitoring are not performed diligently.

...

Because a failure to engage in proper observation and monitoring of a tailings dam is such a serious matter, having the potential to cause "wide-ranging and serious environmental issues" (para. 3) and risk to human life

(para. 347), it is important for the Panel to make clear to the profession that there will be professional consequences if this work is not undertaken professionally. The public depends upon professional engineers to ensure tailings dams are properly monitored and in a safe condition.

45. The Association advised the Panel that this proceeding was not brought as any attempt by the Association to paint Ms. Fidel as a “scapegoat” for the ultimate TSF breach at Mt. Polley. The Association submitted that the matter was pursued because of the public interest involved in the underlying events and submitted that the penalty ordered by the Panel must be such that the principles of general deterrence will be satisfied – only with a serious penalty will a junior engineer in British Columbia understand and appreciate that if he or she assumes a role on a project that involves significant responsibility, there will be corresponding significant professional consequences if they act unprofessionally in that role.

46. More specifically, at a project level, the Association also emphasized the importance of this matter with respect to the safety of tailings dam projects in British Columbia and the need for vigilant observation and monitoring of complex engineered structures, particularly as they grow in size and complexity. With structures like the TSF, given the potential consequences, both from an environmental, and also human perspective, the Association submitted that the Panel needed to send a clear message to the public that a failure to comply with an engineer’s professional obligations in relation to these projects will be taken seriously. As the Association put it, a penalty that would send a signal that the unprofessional conduct of this nature is not viewed as a serious matter by the Panel would impair the public’s confidence in the integrity of the profession. The Association submitted that the public is entitled to expect “a high level of rigour from the engineering community in this context”, with correspondingly meaningful consequences when a professional does not adhere to acceptable standards.

47. Ms. Fidel, on the other hand, submitted that any issues or concerns about general deterrence have already been met given the Association’s overall response to the Mt. Polley TSF failure. The environmental disaster has received an extraordinary amount of media attention and publicity since the breach, such that a clear and strong message has already been sent to both the profession and the public about the need for engineers involved with such projects to scrupulously comply with their professional obligations.

48. In light of the Panel’s global findings with respect to the allegations against Ms. Fidel, emphasizing the number of allegations in the Amended Notice of Inquiry that were not established by the Association, Ms. Fidel submitted that any need for specific and general deterrence in this proceeding had also already been met and should be subsumed by many of the above factors that are unique to Ms. Fidel.

49. Ultimately, having carefully reviewed the parties' submissions on issues of deterrence, the Panel has concluded that the penalty it orders in this matter should emphasize the need for general deterrence. In light of the other factors discussed above, the Panel does not see this as a proceeding where issues of specific deterrence arise. However, there is a need for the Panel to send a strong message to both the profession and the public that unprofessional conduct of the kind in this proceeding will be met with a serious penalty.

(g) Penalties imposed in similar cases

50. The Association conceded that it was not aware of any prior decision which "closely resembles" Ms. Fidel's case on its facts. However, the Association then submitted that the Panel could take guidance from a number of prior decisions in which members have faced several findings of unprofessional conduct, some of which involved moderately serious findings, as well as certain conduct matters that could potentially place the public at risk.

51. To this end, the Association referred the Panel to six previous decisions in which the range of penalties was a suspension of between two and six months. All six decisions were consent resolutions; that is, the agreements were reached by the Association and the member prior to a hearing. The Association was fair to note that a discipline panel must be cautious when relying on consent resolutions to establish a range of penalty, as there may have been an increased willingness on the part of the member to make admissions in exchange for perhaps a somewhat more moderate penalty.

52. In any event, the Panel carefully reviewed the following decisions that were provided by the Association: *Re Wu*, February 17, 2017; *Re Proctor*, April 5, 2017; *Re Jian*, January 14, 2021; *Re Triggs*, September 30, 2016; *Re Ghodhousi*, August 18, 2020; and *Re Stuchlik*, July 11, 2014.

53. Ms. Fidel dedicated a significant portion of her written submissions to distinguishing the facts of these six decisions from the matter presently before the Panel. Ms. Fidel submitted, in broad terms, that when these decisions are placed into proper context, the misconduct of the six members in these prior decisions was much more serious than her own unprofessional conduct while Project Manager and EOR at Mt. Polley.

54. It goes without saying that the Panel is not bound by precedent in terms of assessing an appropriate penalty for unprofessional conduct. That being said, where prior decisions are available that address similar allegations, the Panel accepts that such decisions may be helpful in terms of establishing an appropriate range of penalty.

55. Arguments can be made in relation to each of these prior decisions about the manner in which the case is similar to, or different from, Ms. Fidel's professional conduct circumstances. The Panel found that exercise to be challenging in light of the simple fact that the decisions are each quite factually distinct and none offer any guidance on conduct issues similar to those addressed in this proceeding. That being said, the Panel did identify some similarities between the general nature of the conduct issues in these prior decisions to those of Ms. Fidel that allowed the Panel to conclude that the available prior discipline decisions would appear to support the Association's position that unprofessional conduct that involves some combination of multiple issues, relatively serious conduct concerns and could also lead to significant public harm, will generally result in the professional being suspended from practice for some period of time.

Discussion

56. Having carefully reviewed all of the above factors through the lens of the legal principles articulated in *Ogilvie* and *Dent*, the Panel has concluded that this is a matter in which the appropriate order is a suspension.

57. There are a number of factors that, in the eyes of the Panel, are clearly mitigating with respect to establishing a fair and reasonable penalty for Ms. Fidel. At the time of the material events, Ms. Fidel was still a relatively junior engineer. As the Panel outlined in its initial decision, Ms. Fidel found herself in a position where she was appointed by her employer to roles in relation to the Mt. Polley project that she was perhaps not yet ready to assume.

58. There is also no question that Ms. Fidel has already paid a significant personal and professional price as a result of her involvement with the Mt. Polley matter dating back to the TSF breach in 2014. Over seven years have passed since the breach and Ms. Fidel has been the subject of significant public scrutiny and attention during this period. The Panel accepts that these intervening events have been difficult for Ms. Fidel and accepts that Ms. Fidel's professional conduct has been, and will be, associated with the TSF breach even though the Association has been clear in this proceeding that it was not alleging any such causal connection.

59. This is not a situation in which the Panel sees the need for the penalty to focus on specific deterrence. Ms. Fidel remains employed with the same engineering firm and her colleagues at that firm have painted a compelling picture of a professional who has learned from these issues and made changes to her professional practice so as to ensure that nothing similar happens again in the future.

60. All of that being said, the Panel agrees with the Association that the principles of general deterrence, combined with the nature of the unprofessional conduct committed by Ms. Fidel, still requires a relatively strong discipline outcome even with all of the mitigating factors referred to above. The TSF was a complex engineered structure and in her roles as Project Manager and EOR, the Panel has concluded that Ms. Fidel fell short with respect to a number of aspects of her professional responsibilities. As the Association described the matter in its written submissions, whether or not these professional issues resulted from inexperience or otherwise, Ms. Fidel failed to ensure, through observation and monitoring, that the TSF was safe and operating as intended.

61. In light of the nature of the project and the conduct matters at issue, including the potential for a failure of a TSF embankment to create a serious risk to human life and the environment, the Panel has concluded that unprofessional conduct in relation to a large tailings dam must be viewed seriously from the perspective of public protection and general deterrence.

62. The principle of general deterrence is an important aspect of self-regulation. In circumstances such as these, it is important that the penalty ordered against Ms. Fidel sends a clear message to the profession that an engineer needs to be vigilant in ensuring that he or she understands the responsibilities that one has assumed as a professional when taking on new roles on a project, particularly a project with the characteristics of the Mt. Polley TSF. Although, as noted above, Ms. Fidel's personal and professional circumstances are definitely mitigating in terms of the appropriate penalty, such factors do not outweigh the serious nature of the conduct and the need for general deterrence. If the Panel were to make an order that fails to balance these competing factors, the right message would not be sent to the profession or the public.

63. Having reviewed the prior decisions, the Panel is of the view that Ms. Fidel's circumstances are quite different from those of Mr. Rice. Mr. Rice was a senior engineer at the time of the Mt. Polley events. It was Mr. Rice who placed Ms. Fidel into the important roles on the project and then failed to ensure that she had the necessary support from senior engineers and management at her firm. By the time of his discipline hearing, Mr. Rice was no longer a member. The discipline panel in Mr. Rice's matter ordered that he pay the maximum available fine (\$25,000) and be suspended for a two-year period, with the suspension only taking effect if Mr. Rice applied to return to practice.

64. As the Association effectively conceded, the penalty ordered against Mr. Rice was not of assistance in terms of establishing the penalty for Ms. Fidel, other than to note that Ms. Fidel's penalty should be "less onerous" than that ordered against Mr. Rice, as "the nature and gravity of Ms. Fidel's misconduct is not as grave as Mr. Rice's". The Panel accepts the Association's position on this point. There is no question to the Panel that Ms.

Fidel's conduct issues should be properly viewed as being much less serious than those of Mr. Rice.

65. As noted above, the prior decisions that the Association referred the Panel to were also quite different from the facts of Ms. Fidel's proceeding. That being said, after reviewing those prior decisions, the Panel has concluded that when a proceeding involves conduct of a serious nature, particularly if combined with the potential for serious harm to the public if that professional fails to meet his or her professional standards, there is a general view that an appropriate disciplinary penalty should include a period of suspension.

66. The Panel agrees with this broad principle. Even though there may be many mitigating factors that exist in this matter, the nature and seriousness of the conduct issues still mandates a period of suspension for Ms. Fidel. Considering the various factors discussed in detail above, and trying to balance the seriousness of the conduct and need for general deterrence against the many factors that point to a less serious penalty for Ms. Fidel, the Panel has concluded that a **two (2) month** period of suspension is appropriate in these circumstances, together with an order that Ms. Fidel complete the coursework set out by the parties.

Costs

67. In its written submissions, the Association raised a question about the impact of the repeal and replacement of the EGA with respect to costs orders in these proceedings. In brief, the Association took the position that costs issues should be regarded as a mere "procedural matter" such that costs must be interpreted under the regime established in the new legislation, the PGA. Ms. Fidel did not agree with the Association that costs are a procedural matter and provided a detailed written submission setting out her position, similar to what she submitted in relation to how the Panel must address the penalty, that costs in this proceeding have to be determined in accordance with the provisions of the EGA.

68. After the exchange of detailed written submissions on this point, by the time the in-person hearing occurred, the parties had discussed the costs issues further and had agreed that the appropriate order in these circumstances was that there would be no costs payable by Ms. Fidel to the Association. In the result, it was unnecessary for the Panel to resolve the legal issue raised with respect to the retroactivity of the statutory regime.

69. The Panel was content to accept the parties' joint submission with respect to costs in the circumstances of this proceeding, particularly given the divided success of the parties at the initial hearing.

Conclusion

70. In summary, pursuant to section 33(2) of the EGA, the Panel orders as follows:
- (a) Ms. Fidel's membership be suspended, and that the appropriate length of suspension is two (2) months;
 - (b) the suspension shall commence on March 7, 2022, or on an earlier date to be agreed between Ms. Fidel and the Association;
 - (c) within 9 months of the date of this order, Ms. Fidel will complete the following three courses as a condition of her membership:
 - (i) Responsible Tailings Management 101;
 - (ii) Tailings Facility Design, Operation and Closure; and
 - (iii) Risk Assessment, Decision-Making, and Engineering Management For Mine Geowaste Facilities.
71. By agreement of the parties, there are no costs ordered payable by Ms. Fidel to the Association.

Dated this 9th day of February, 2022

<original signed by>

Ed Bird, P. Eng., Chair

<original signed by>

Tom Morrison, P. Eng.

<original signed by>

Ron Yaworsky, P. Eng.