

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

IN THE MATTER OF PETER SCHOBER, P.Eng.

DECISION OF THE DISCIPLINE COMMITTEE

Hearing date:	By written submissions
Discipline Committee Panel:	Colin Smith, P.Eng., Chair Oliver Bonham, P. Geo. Tom Morrison, P.Eng.
Counsel for the Panel:	Susan Precious
Counsel for the Association:	Janet Gartner Victoria Broughton
For Mr. Schober:	Andi MacKay Samantha Arrandale

A. Introduction

1. On January 18, 2021, 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 Mr. Schober demonstrated negligent and unprofessional conduct contrary to the *Engineers and Geoscientists Act*, RSBC 1996 c.116 (repealed) ("EGA") and acted contrary to Principles 1 and 7 of the Association's Code of Ethics ("Decision").
2. During the hearing, the Association sought an order that reasonable costs be paid by Mr. Schober to the Association. Mr. Schober opposed any costs order on the basis that he was entitled to notice of the amount being sought and that the Panel could not assess or order reasonable costs in the abstract. The Association proposed a two-step process wherein the Panel would firstly order the payment of reasonable costs then following the hearing, when the bulk of costs and disbursements would be known, and the Panel's Decision on penalty would be released, the Association would provide Mr. Schober with evidence supporting its claim for costs. Mr. Schober could likewise provide any evidence he relied upon. The Panel declined to so order costs in its Decision and set a schedule for costs submissions so that it could hear full arguments from the parties with respect to their positions on costs.

3. Written submissions were exchanged in February and March 2021.

B. Association's Arguments

4. The Association reiterated its earlier position. It submits that the matter of costs should be addressed in two stages. First, it seeks an order for 80% of its actual reasonable costs incurred. Second, the quantum of costs can be addressed thereafter. The Association has not disclosed the total amount of costs incurred or that they are ultimately seeking.
5. The Association submits that the *Professional Governance Act*, SBC 2018, c. 47 ("PGA") applies to costs.
6. The Association submits its position is consistent with the general rule that a successful party is generally entitled to its costs. The range of orders in past Association decisions was 70 to 90%. The Association relies upon *Re James Halarewicz, P.Eng* (January 15, 2019) and *Re Eric Chrysanthous, P.Eng* (August 16, 2018).

C. Mr. Schober's Arguments

7. Mr. Schober opposes any costs order at this time. He submits that the Association should be ordered to provide notice of the quantum of the costs sought and supporting evidence regarding same.
8. Mr. Schober argues that costs cannot be assessed in the abstract and that the Association seeks an immediate order on the percentage of costs to which it is entitled, and a decision later on the quantum to which that percentage applies to.
9. Mr. Schober submits that natural justice and procedural fairness require that he be provided an opportunity to challenge the reasonableness of the Association's incurred legal costs. He relies upon *Gichuru v. Smith*, 2014 BCCA 414. Mr. Schober also sets out the factors in *Jaswal v. Newfoundland (Medical Board)*, [1996] N.J. No. 50 at para 51 which he says should guide an assessment of costs.
10. He submits there are a number of circumstances in this case which may warrant a departure from the general range of 70 to 90% put forward by the Association, and which could justify a reduction in costs, including:
 - a. Mr. Schober admitted the conduct prior to any substantive investigation being done;
 - b. Despite intimate knowledge of the settlement discussion between the parties, the Association engaged a second senior counsel to take-over settlement discussions and continued to incur costs for hearing preparation;
 - c. The Association opposed Mr. Schober's request for an adjournment and necessitated a hearing on the matter, despite being engaged in ongoing

settlement discussions with Mr. Schober; and
d. The disciplinary hearing proceeded on the basis of admissions with the only real point of significant divergence between the parties being costs.

11. Mr. Schober takes the position that the PGA does not apply to costs in this case, rather that is governed by the EGA.

D. Legal Framework for Penalty and Costs

12. On February 5, 2021, the PGA came into force. The PGA contains the following transition provisions:

Transition — powers and duties in progress

127 (1)The officers and committees for a regulatory body may exercise any power and perform any duty under this Act that an officer holding the same title with, or a committee having the same mandate of, an affected body

(a) began to exercise or to perform, but did not complete, before the reference date, or

(b) could have exercised with respect to a discipline matter referred to in Division 3 [Audits, Practice Reviews and Discipline] of Part 6 [Protection of the Public Interest With Respect to Professional Governance and Conduct] that is alleged to have existed or occurred, but was not investigated, before the reference date.

(2)If a discipline committee for an affected body, or a committee of the former body with similar duties and powers, commenced a hearing before the reference date, that committee is deemed to be a discipline committee for the regulatory body for the purpose of continuing the hearing on and after the reference date.

13. The *Interpretation Act*, RSBC 1996 c.238 provides:

Repeal and replacement

36 (1)If an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it,

(a)every person acting under the former enactment must continue to act as if appointed or elected under the new enactment until another is appointed or elected in his or her place,

(b)every proceeding commenced under the former enactment must be continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment,

14. Section 81 of the PGA deals with costs:

Costs

81 (1)A discipline committee or panel, in the context of a discipline hearing under section 75, may require the respondent to pay the costs of one or both of the following:

- (a) an investigation;
- (b) the hearing under section 75.

(2) Costs assessed under subsection (1)

- (a) must not exceed the actual costs incurred by the regulatory body during the course of the investigation and hearing, and
- (b) may include the salary costs for employees or officers engaged in the investigation and hearing.

(3) The council may make bylaws governing the assessment of costs under subsection (1), including the following:

- (a) the factors to be considered in assessing costs;
- (b) the maximum amount of costs that may be assessed within the limits set out in subsection (2);
- (c) the time allowed for payment of costs;
- (d) the extension of time for payment of costs.

(4) The amount of costs assessed against a respondent under subsection (1) may be recovered as a debt owing to a regulatory body and, when collected, that amount is the property of the regulatory body.

15. The Association has enacted bylaws pursuant to the PGA. Section 10.9 of the bylaws govern orders and assessment of costs. Section 10.9(1) provides that:

10.9 (1) If an adverse determination is made against a Respondent after a discipline hearing held pursuant to section 75 of the PGA [Discipline hearings] the Discipline Hearing Panel must require, through an order in writing, that the Respondent pay EGBC's costs, which may be up to the actual costs incurred by EGBC as a result of an investigation and a discipline hearing, provided that those actual costs are within the limits set out in section 81(2)(a) of the PGA [Costs].

16. Section 10.9 (5) of the PGA provides that the Panel must consider whether all of the allegations against the Respondent were proven, and may consider whether the Respondent previously rejected an undertaking or consent requested by the Investigation Committee or Discipline Committee.

17. The Panel finds that the PGA governs with the issues of costs in this case. The Association is an "affected body" for the purposes of section 127 of the PGA. The Panel may continue the discipline hearing it started under the EGA and may exercise any power and perform any duty under the PGA for that purpose. The *Interpretation Act* provides that the continuation of the discipline hearing must be done in conformity with the PGA. The Panel notes that the Association is seeking the same award of costs as it previously requested under the EGA.

E. Analysis

18. A determination has been made by this Panel against Mr. Schober. All of the allegations contained in the Notice of Inquiry against Mr. Schober were proven by the Association to the requisite standard, with the exception of one allegation which the Association abandoned. The Panel finds it is appropriate, in keeping with the usual practice, to award reasonable costs in favour of the Association in this case.
19. The Panel has not been provided with any evidence pertaining to the Association's costs, including the total amount of costs it incurred, which it claims is privileged. In the absence of that information, the Panel is not prepared to order a specific figure or a specific percentage of those reasonable costs at this juncture.
20. Mr. Schober has raised a number of important points, all of which go to the quantification of those reasonable costs. The Panel agrees that Mr. Schober should have an opportunity to challenge the reasonableness of the Association's costs prior to the Panel's exercise of its discretion in assessing costs. Mr. Schober requires sufficient disclosure in order to have a meaningful opportunity to do so.
21. The Panel finds the reasoning in *Re Chrysanthous* to be applicable in this case:
 46. The Association has submitted the figure of \$44,393.54. It has stated in its submissions that this is 90% of the actual costs. However, no material supporting that calculation is provided.
 47. Mr. Chrysanthous submits that the amount is "excessive" and unsupported and no costs should be awarded. He also submits that he does not have the means to pay costs, although no evidence is provided.
 48. The costs sought are higher than that awarded in a number (although not all) of the other cases to which we were referred. We accept that this case was more complex than a simple one day hearing. However, in our view, due to the size of the claim, some further information is required in order to determine the amount.
 49. We therefore direct that reasonable costs be paid by Mr. Chrysanthous. However, in order to determine a specific figure, we ask that the Association provide evidence supporting its claim. This can be in the form of an affidavit with copies of relevant invoices, which can be redacted for confidentiality if necessary. This information should be provided to Mr. Chrysanthous so that he can make any further submissions or provide further evidence if he wishes to do so.
 50. If the parties are able to agree upon a figure, then they can either refrain from providing further submissions to this Panel or, if an order is required, provide a form of consent order. If the parties cannot come to satisfactory arrangements, submissions may be made to this Panel including the evidence referred to above, on a schedule set out below.
22. The Panel notes that in *Re Chrysanthous*, the Discipline Committee was not prepared

to set a specific percentage of reasonable costs, despite the fact that the Association had disclosed the total amount of incurred costs in that case. This Panel has even less information before it. Accordingly, the Panel orders reasonable costs to the Association but directs the Association to provide evidence supporting its claim of costs, including evidence of the total costs incurred and the reasonableness of those costs.

F. Order

23. The Panel directs that Mr. Schober pay reasonable costs of these proceedings, the amount which may be determined by agreement between the parties or, if not, by further submissions, to be delivered as follows:
- a. submissions and any further evidence upon which the Association relies must be delivered by the Association to Mr. Schober and to the Panel no later than April 30, 2021;
 - b. submissions and any further evidence upon which Mr. Schober relies must be delivered by Mr. Schober to the Association and to the Panel no later than May 21, 2021; and
 - c. reply submissions may be delivered by counsel for the Association to Mr. Schober and to the Panel by May 28, 2021.
 - d. Submissions for the Panel shall be delivered to Susan Precious, counsel for the Panel and may be delivered electronically.

Dated: April 7, 2021

<original signed by>

Colin Smith, P.Eng.

<original signed by>

Oliver Bonham, P.Geo

<original signed by>

Tom Morrison, P.Eng.