

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

and

IN THE MATTER OF HANS HERINGA, P. Eng.
DECISION OF THE DISCIPLINE COMMITTEE

Hearing: By written submissions

Discipline Committee Panel: Peter Bobrowsky, P.Geo, Chair
Paul Adams, P. Eng
Ed Bird, P.Eng

Counsel for Engineers and Geoscientists BC: Lindsay Waddell

Counsel for Respondent: David Juteau

Decision Date: May 19, 2022

Panel's Determination
Respondent's Application to Re-Open

A. Introduction

1. 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 conducted an inquiry to determine whether Hans Heringa demonstrated unprofessional conduct, incompetence, or negligence; breached the Bylaws of the Association; or acted contrary to the Association's Code of Ethics.
2. On April 7, 2021, the Panel released its decision and found that the Respondent had demonstrated unprofessional conduct contrary to the *Engineers and Geoscientist Act*,

RSBC 1996 c. 116 (the “EGA”) with respect to filings for a sewerage system (the “Project”) for a property located in Qualicum Beach, British Columbia (the “Conduct Decision”).

3. The Conduct Decision set a schedule for the parties to deliver written submissions on penalty and costs. In his penalty submissions, the Respondent made certain references to wanting to “re-open” or “reconsider” the Conduct Decision. Engineers and Geoscientists of BC requested an opportunity to make full submissions on that point in the event the Panel decided to entertain the Respondent’s request. On April 27, 2021, the Panel decided to hear submissions on the Respondent’s request to re-open or reconsider the Conduct Decision. The Panel set a schedule for the parties to deliver submissions on the Respondent’s application.
4. For the reasons set out below, the Panel denies the Respondent’s application to re-open or reconsider the Conduct decision

B. Background

5. There is an extensive background to this application.

At the outset of this proceeding, Mr. Heringa was represented by Mr. Heringa’s representative of choice, Charles Fenton.

6. Mr. Fenton has introduced and referred to himself in various ways to the Discipline Committee, including, for example, as a “lawyer”,¹ a “retired lawyer”,² and “not a practising lawyer”.³
7. Mr. Fenton was permitted to appear before this Panel in these proceedings as Mr. Heringa’s non-lawyer agent.
8. In 2019, Mr. Heringa was served with a Notice of Inquiry alleging that he had breached section 30(4) of the EGA by failing to produce his file relating to the Project upon request. A hearing was held into that matter on October 16, 2019. This is referred to in the following paragraphs as the first disciplinary proceeding.
9. On May 17, 2019, Mr. Heringa wrote to Engineers and Geoscientists BC’s investigator, Joanne Wilson, about hearing dates in this proceeding. Among other things, Mr. Heringa advised that he “may even have to retain Counsel for your inquiry date. This too, takes time.”
10. On May 31, 2019, Counsel for Engineers and Geoscientists BC wrote to Mr. Heringa

¹ In the first disciplinary hearing held in October 2019

² In this disciplinary hearing

³ In this disciplinary hearing

to provide Engineers and Geoscientists BC's document disclosure in relation to Mr. Heringa's first disciplinary proceeding and encouraged Mr. Heringa to retain legal counsel.

11. Leading up to Mr. Heringa's first disciplinary hearing relating to the failure to disclose documents, he sought to adjourn the hearing date on a number of bases, including as expressed in an email dated June 18, 2019, that Mr. Fenton was not available on the original hearing date and that Mr. Heringa might, in any event, get "other proper legal advice, or legal representation".
12. Mr. Heringa more expressly sought an adjournment of the hearing date in a subsequent email dated June 20, 2019 in which he advised that his legal representation might change. Mr. Heringa's emails on this and other subjects were copied to Mr. Fenton.
13. On June 24, 2019, Engineers and Geoscientists BC made submissions opposing Mr. Heringa's request for an adjournment of the first disciplinary hearing arguing, among other things, that there is no absolute right to counsel in disciplinary proceedings. Engineers and Geoscientists BC further argued that there was no evidentiary basis for the Panel to conclude that Mr. Heringa had any intention of taking steps to retain counsel to represent him. Mr. Heringa's adjournment request was granted by the panel of the Discipline Committee.

In October of 2019, Mr. Heringa appeared before a hearing panel of the Discipline Committee tasked with determining whether Mr. Heringa had breached section 30(4) of the EGA by failing to produce a copy of his file for the Project upon request by Engineers and Geoscientists BC's Investigative Committee. During this first disciplinary proceeding, Mr. Fenton represented that he was a retired lawyer appearing as Mr. Heringa's representative.

14. Not long after the conduct decision in Mr. Heringa's first disciplinary hearing was issued, Engineers and Geoscientists BC served Mr. Heringa with a second Notice of Inquiry setting out allegations in relation to the substance of the complaint received regarding the sewerage system filings for the Project.
15. Mr. Fenton continued to act as Mr. Heringa's agent and representative in relation to the second disciplinary proceeding.
16. On April 6, 2020, leading up to Mr. Heringa's second disciplinary hearing, Counsel for Engineers and Geoscientists BC wrote to Mr. Heringa on the subject of a potential consent order, copying Mr. Fenton, and advising among other things as follows:

As you know, I am counsel to the Engineers and Geoscientists BC (the "Association"). I do not represent your interests in this matter. I urge you to seek legal advice. As you know, Mr. Fenton is a retired

lawyer. As such he is prohibited from engaging in the practice of law, including giving legal advice, by virtue of section 15 of the *Legal Profession Act*, RSBC 1996 c. 9. I copy him here as your agent and upon your request.

17. By email dated April 30, 2020, Mr. Heringa requested a postponement or adjournment of the second disciplinary hearing, advising that Mr. Fenton had not yet digested all of the correspondence and materials disclosed to Mr. Heringa by Engineers and Geoscientists BC and that “Chuck Fenton may have to be replaced with a practicing solicitor.”
18. In rendering a decision on the application to adjourn the second disciplinary hearing on May 11, 2020, this Panel noted the following factors it considered did not favour granting Mr. Heringa’s request for an adjournment:

d) The Panel is concerned by Mr. Heringa’s submissions in relation to Mr. Fenton’s involvement as his representative in this matter. On the one hand, he relies on Mr. Fenton’s involvement in this matter as one of the bases for the adjournment, when he states: “Chuck Fenton hasn’t “digested” all of the correspondence and the materials. Chuck is deathly afraid of COVID-19 due to his age of 80 years old, his Parkinsons, and general health. Also, Chuck is currently without a computer and doesn’t have internet at his cabin.”, and “Chuck may participate later, and it must be face-to-face.” On the other hand, Mr. Heringa states that “Chuck Fenton may have to be replaced with a practicing solicitor.” Mr. Heringa has had a significant amount of time to retain legal counsel instead to represent him in this matter. If Mr. Heringa intends to replace Mr. Fenton as his representative with practicing legal counsel, he should take steps promptly to retain such legal counsel.

In the result, the Panel ordered a brief adjournment of the matter and the hearing was reset to June 26, 29-30, 2020.

19. In the lead-up to the rescheduled second disciplinary hearing, Mr. Heringa, the Panel and Counsel for Engineers and Geoscientists BC continued to treat Mr. Fenton as a non-legal representative, not as Mr. Heringa’s legal counsel. Among other things, Mr. Fenton was identified as Mr. Heringa’s representative and a retired lawyer on pre-hearing conference reports dated May 29 and June 23, 2020.
20. The disciplinary hearing proceeded in late June 2020. Mr. Fenton was again referred to throughout the proceeding as Mr. Heringa’s representative, not his legal counsel.
21. At every stage of the proceedings, everyone – most notably Mr. Heringa – was aware that Mr. Fenton was not appearing or acting as legal counsel but as his representative. This was Mr. Heringa’s choice. Mr. Heringa was provided with every opportunity to retain practicing legal counsel, and chose instead to continue to be represented by Mr. Fenton.

22. After the conclusion of the second disciplinary hearing, the parties sought to reach agreement on an amended schedule for the exchange of written submissions.
23. Mr. Heringa sought an extension of time for delivery of his written argument in response to Engineers and Geoscientists BC's submissions. Among other things, he raised Mr. Fenton's age and ill health as a reason for requiring more time. In an email dated July 21, 2020, objecting to the length of extension sought, Engineers and Geoscientists BC noted that Mr. Heringa had had ample time to engage a practicing lawyer to represent him but chose not to do so.
24. Ultimately, the parties exchanged written submissions before the end of 2020. Mr. Heringa made submissions of 70 pages on the conduct alleged, signed by Mr. Fenton, and dated August 11, 2020.
25. In February 2021, the *Professional Governance Act*, S.B.C. 2018 c. 47 (the "PGA") came into force and effect while the Panel's decision on Mr. Heringa's conduct was in reserve. The Panel invited submissions from the parties on what if any effect the PGA's enactment (and EGA's repeal) presented, by email from Counsel for the Panel, dated February 18, 2021, and addressed to Counsel for Engineers and Geoscientists BC, Mr. Fenton and Mr. Heringa.
26. On February 19, 2021, Mr. Heringa responded stating "Is the EGBC going to reimburse me for my legal costs involved? It will also take time to get a Solicitor. I don't believe that Chuck Fenton is proper for this legal review when he is not a practicing Solicitor. I am also certainly not up to it." And further, "Please clarify the significance of your letter for me, and for a pending Solicitor."
27. By email dated February 19, 2021, Counsel for the Panel wrote back, providing some clarifying information and noting her understanding that Mr. Heringa continued to be represented by Mr. Fenton, and for that reason, she was copying Mr. Fenton on her email.
28. By email dated February 22, 2021 at 12:52 p.m., Mr. Heringa replied advising that he would provide a copy of Panel Counsel's email of February 19, 2021 to Mr. Fenton at his care facility. He further requested that Counsel for the Panel "advise as to what you rely on for your present understanding that [Mr. Fenton] still represents me on this matter?"
29. By email dated February 22, 2021 at 1:14 p.m., Michael McCubbin, barrister and solicitor, of Courtenay, B.C., wrote to Counsel for the Panel and Counsel for Engineers and Geoscientists BC to advise that he had been retained to address the submissions being sought by the Panel on the import of the PGA. Mr. McCubbin sought an extension of time to deliver those submissions in light of his wife's pending due date. The Panel granted an extension to the parties to provide submissions on the basis by counsel for Mr. Heringa.

30. Because Mr. McCubbin was a practicing lawyer and indicated that he had been retained to make submissions on Mr. Heringa's behalf, both Counsel for the Panel and Counsel for Engineers and Geoscientists BC corresponded directly with Mr. McCubbin upon being advised that he had been retained. While Mr. Heringa subsequently has suggested that Mr. McCubbin's retainer was directed at making submissions with respect to the application of the PGA on the "Appeal File" (which the Panel understands to be an appeal from the first disciplinary decision), Engineers and Geoscientists BC confirmed no submissions had been sought in relation to the PGA's impact on the "Appeal File". If there was any misunderstanding by Mr. McCubbin about the scope of what he was expected to address, that is a matter between Mr. McCubbin and Mr. Heringa. The Panel and Counsel to Engineers and Geoscientists BC were entitled to rely upon Mr. McCubbin's representation that he had been retained.
31. By email dated March 30, 2021, Mr. Heringa contacted Counsel to the Panel and Counsel for Engineers and Geoscientists BC directly advising that "Chuck Fenton has now prepared a response to EGBC file No. T17-062 (Technical Competency Matter)." He further advised that, before the response is released, Mr. Fenton would like to know whether the submission would go directly to the Panel hearing the matter. Notably, submissions on Mr. Heringa's conduct had closed in 2020. No submissions were outstanding – other than those requested by the Panel on the effect of the PGA.
32. Shortly after, Counsel to the Panel forwarded Mr. Heringa's email to Mr. McCubbin and Counsel for Engineers and Geoscientists BC inquiring whether Mr. McCubbin continued to represent Mr. Heringa so that she could be clear about who she should be communicating with:

I've just received the email below from Mr. Heringa. Can you please clarify whether you are still representing Mr. Heringa? I just want to be clear about who I should be communicating with. Mr. Heringa had previously suggested that Mr. Fenton no longer represented him, is in a care facility and that you are his lawyer. You then confirmed your retainer.

I look forward to hearing from you.

33. At 5:04 p.m. on March 30, 2021, Mr. McCubbin emailed Counsel to the Panel and Counsel to Engineers and Geoscientists BC, confirming that he was still representing Mr. Heringa and apologizing for any confusion:

Thank you for reaching out. Yes, I am still representing Mr. Heringa in this matter. My apologies for any confusion.

Our reply is attached.

[emphasis added]

Mr. McCubbin attached submissions on the PGA made on behalf of Mr. Heringa. The submissions were brief and largely agreed with those made by Engineers and Geoscientists BC on the application of the PGA. The submissions were clearly directed to this Panel in the second disciplinary matter and made no reference to the British Columbia Court of Appeal.

34. On April 7, 2021, Mr. Fenton emailed Counsel for the Panel, copying Mr. Heringa, and Counsel for Engineers and Geoscientists BC, attaching submissions on behalf of Mr. Heringa and requesting that they be provided to the Panel. Mr. Fenton's email went on to advise that:

Mr. McCubbin was asked to respond on both EGBC matters on behalf of Hans Heringa. However, Mr. McCubbin and Firm is officially acting for Hans Heringa only on the Appeal matter, as Mr. McCubbin is not familiar with any of the details of the T17-062 Hearing, other than "a decision is pending".

35. The submissions attached to Mr. Fenton's email were dated April 2nd, 2021. Engineers and Geoscientists BC submits that many of the arguments made in Mr. Heringa's submissions dated April 2, 2021 had already been argued extensively in Mr. Heringa's 70 page submissions on conduct dated August 11, 2021 and were not responsive to the Panel's February 18, 2021 request.
36. By email dated April 8, 2021, Counsel for the Panel delivered the Panel's Conduct Decision to Mr. McCubbin and Counsel for Engineers and Geoscientists BC. She did not copy Mr. Fenton or Mr. Heringa. The Conduct Decision itself is dated April 7 and, on the cover page, identifies that Charles Fenton, retired lawyer, Michael McCubbin, and Mr. Heringa himself appeared for the member. The Panel found Mr. Heringa to have engaged in most, but not all, of the unprofessional conduct alleged and directed the parties to make submissions on penalty and costs on April 21, 2021, May 12, 2021, and May 19, 2021 respectively.
37. On April 9, 2021, Counsel for Engineers and Geoscientists BC wrote to Counsel for the Panel copying Mr. McCubbin as Counsel for Mr. Heringa to request an extension to file Engineers and Geoscientists BC's initial submissions on penalty and costs because she was scheduled to be in hearing on the date submissions were due. By email dated April 9, 2021; Counsel for the Panel sought Mr. McCubbin's position on the extension request.
38. On April 12, 2021, Mr. McCubbin emailed Counsel for Engineers and Geoscientists BC to advise that "I have no issue with it, but let me reach out to confirm what involvement I will have at this stage."

39. On April 13, 2021, Counsel to the Panel wrote to Mr. McCubbin and Counsel for Engineers and Geoscientists BC confirming Mr. McCubbin's retainer again, confirming release of the Conduct Decision and communicating the Panel's decision that given Mr. Heringa had already been provided with the opportunity to make submissions, the Panel would not consider Mr. Fenton's additional communications of April 7, 2021.
40. At 10:49 a.m. on April 16, 2021, Mr. Heringa wrote to Counsel for the Panel inquiring whether Mr. Fenton's submission of April 7 had been provided to the Panel and whether there would be a response coming to Mr. Fenton's submission. Mr. Heringa advised that he was "perturbed" by the decision to send the Panel's Decision directly to Mr. McCubbin and said that:

While I did retain Mr. McCubbin, on a limited basis, to provide a proper legal response to the Inquiry Panel's February 18, 2021 request for submissions, I thought:

1. The response was meant to be for both the Appeal of the Document Delivery matter (now handled), and for the R17-062 matter (still being handled by Mr. Fenton). Note there was no reply to my letter to clarify this.
2. This request of Mr. McCubbin was made as insurance and in case Mr. Fenton didn't get a response out.
3. Unfortunately not all of my concerns, in my February 18, 2021, February 19, 2021, and February 22, 2021 emails were addressed.
4. Fortunately, Mr. Fenton was able to prepare a response, and did.
5. Since Mr. McCubbin had zero knowledge of any of the T17-062 Panel Hearing, and since I was never advised if my legal costs would be covered for this, I limited the review and response of Mr. McCubbin only, to the simple issue of new Law.

At this point, I am no longer retaining Mr. McCubbin for any further involvement with the T17-062 Hearing, until all matters within the Hearing are fully resolved.

Mr. Heringa went on to advise that "Mr. McCubbin's retainer was specifically for the EGBC Appeal File only. Mr. McCubbin also handles some other files for other matters with other companies and with other people."

41. However, at 11:12 a.m. also on April 16, 2021, an email from Mr. Heringa's email account to Counsel for the Panel advised "Please disregard our previous email. This was sent prematurely, without approval. Lisa Buemann".
42. On April 16, 2021, at 12:52 p.m. Counsel for Engineers and Geoscientists BC wrote to Mr. McCubbin to see whether he was still on the record and could provide a formal

position on her extension request.

43. Shortly thereafter on April 16, 2021, at 2:20 p.m., Mr. McCubbin wrote to Counsel for Engineers and Geoscientists BC, copying Counsel for the Panel, advising as follows:

I am going to be discussing the extent of my involvement moving forward on this next phase of the inquiry with Mr. Heringa next week and will let you know.

However, I do have instructions to agree to an extension of time as you might reasonably need on Mr. Heringa's behalf.

44. On April 20, 2021 at 3:54 p.m., Counsel for the Panel emailed Mr. McCubbin (copying Counsel to Engineers and Geoscientists BC) forwarding Mr. Heringa's emails of April 16, 2021 and advising that she was writing based upon her understanding that Mr. McCubbin was still legal counsel for Mr. Heringa. She requested that Mr. McCubbin let her know if he was no longer representing Mr. Heringa. She further confirmed that she would be corresponding with Mr. McCubbin (and not Mr. Heringa or Mr. Fenton) until advised otherwise:

I'm writing to you based upon my understanding that you are still legal counsel in this matter to Mr. Heringa. If you are no longer representing him, please advise me.

I received the emails below from Mr. Heringa in relation to a communication from Mr. Fenton (attached). For your reference, I am also attaching the Panel's response to that communication (attached). If there are any outstanding questions which have not been answered, can you please advise?

In terms of a protocol going forward should this arise again, I'm confirming that I will be communicating to you (and not Mr. Heringa directly or Mr. Fenton) until advised otherwise. If I receive a communication directly from Mr. Heringa or Mr. Fenton, I will forward that to you and you can advise how you would like to proceed. If Lindsay, as Association counsel, is not copied, I will copy her into those communications. I trust you will find this to be in order.

45. On April 22, 2021 at 4:00 p.m., Mr. Heringa emailed Counsel for the Panel, copying Mr. Fenton but not copying counsel to Engineers and Geoscientists BC, writing, in part, as follows:

I am a bit perturbed by your decision to send the Panel's Decision on T17-062 directly to Mr. McCubbin. While I did retain Mr. McCubbin, on a limited basis, to ensure and provide a proper legal response to the Inquiry Panel's February 18, 2021 request for submissions, I thought:

1. The response was meant to be for both the Appeal of the Document Delivery matter (now handled by Mr. McCubbin), and for the R17-062 matter (still being handled by

Mr. Fenton). Note there was no reply to my letter of February 19, 2021 to clarify this applicability.

2. This request of Mr. McCubbin was made as insurance, and in case Mr. Fenton didn't get a response out.

3. Unfortunately none of my concerns, in my February 19, 2021, and February 22, 2021 emails, were ever addressed by you. This did not assist. Is there an explanation?

4. Also, the fact that I was not copied in Mr. McCubbins letter of February 22, 2021, and the letter of March 30, 2021 to you, until recently, left Mr. Fenton and I were in the dark on this conversation.

5. Fortunately, Mr. Fenton was able to prepare a response, and did on April 7, 2021. It shouldn't be wasted.

6. Since Mr. McCubbin had zero knowledge of any of the T17-062 Panel Hearing, and since I was never advised if my legal costs would be covered for this, I limited the review and response of Mr. McCubbin only, to the simple issue of new Law here. And there was a simple response by Mr. McCubbin, which he thought probably applied the same for both Files, but without the benefit of knowing anything about the details of the T17-062 Panel Hearing.

At this point, I am likely no longer retaining Mr. McCubbin for any further involvement with the T17-062 Hearing, until all matters with the

Hearing are fully resolved, including the status of Mr. Fenton's Submission.

It's somewhat unfortunate that you never sent your email of March 30, 2021, to me. We could have clarified it then. This March 30, 2021 letter of yours to Mr. McCubbin is misleading for Mr. McCubbin. Where did I suggest to you that Mr. McCubbin was now fully involved in this File, and that Mr. Fenton was no longer acting for me on this matter? Why not go to me for answers on this?

Mr. McCubbin's original retainer was specifically for the EGBC Appeal File only. Mr. McCubbin also handles some other files for other matters with various Companies and with other people for me, which made his status uncertain and confusing here, for both of us.

I am having a further discussion with Mr. McCubbin shortly.

46. At 4:08 p.m. on April 22, 2021, Counsel for the Panel forwarded Mr. Heringa's correspondence to Mr. McCubbin, copying Counsel to Engineers and Geoscientists BC, requesting that he advise if he is no longer legal counsel for Mr. Heringa with respect to this matter:

Further to my email on Tuesday, I confirm that I am continuing to email you on my understanding that you are Mr. Heringa's legal counsel in this matter. If that is no longer the case, I would ask that you please advise me of that as I would like to ensure that I am communicating with the appropriate person in these proceedings.

I received the email below from Mr. Heringa. As mentioned in my email on Tuesday, the Panel addressed Mr. Fenton's communication by email to you of April 12, 2021. Can you please confirm whether there are any outstanding issues that you would like the Panel to address?

I look forward to hearing from you.

47. On April 23, 2021, Mr. McCubbin replied confirming for the first time that he was no longer retained to act for Mr. Heringa, and asked that all further correspondence should be sent to Mr. Heringa personally:

Thank you for passing this on.

I have now had the opportunity to discuss my ongoing involvement in this proceeding with Mr. Heringa.

While I may be retained to assist in replying to the Association's submissions, all further correspondence on this matter should be directed to Mr. Heringa, who is copied on this message. If Mr. Heringa does ask me to assist in that step, then I will let you know and will ensure that confusion of this nature is avoided.

48. Accordingly, on April 28, 2021, Counsel for the Panel wrote to Mr. Heringa directly requesting that he advise whether he had retained another lawyer or whether Mr. Fenton would be acting as his representative. She further confirmed the parties' schedule for exchange of submissions on penalty and costs (of April 27, 2021, May 18, 2021 and May 25, 2021 respectively).
49. On April 30, 2021, Mr. Heringa replied advising that he would be unable to respond to Engineers and Geoscientists BC's submissions by May 18, 2021 including because of, "The present uncertainty, as to whether to work with Chuck Fenton on this reply, or whether to retain a Solicitor and allow time to bring him up to speed." Mr. Heringa advised that he would provide an update on his status on May 31, 2021 but anticipated that the earliest he would likely be able to respond to submissions was June 30, 2021.
50. On May 11, 2021, Engineers and Geoscientists BC indicated that it consented to an extension to May 31, 2021 for Mr. Heringa but did not consent to any further extension. By email of the same date, Counsel for the Panel sought Mr. Heringa's position in reply.
51. On May 17, 2021, Mr. Heringa wrote to Counsel for the Panel elaborating on and adding to his reasons for requiring an extension beyond May 31, 2021. Mr. Heringa also made

submissions about the merits of the Conduct Decision, made submissions relevant to penalty and costs, advised that he wished to file a counter claim, denied that he called either panel a Kangaroo Court but then proceeded to assert that both the first and second panels were “Kangaroo Courts”, requested that he be compensated for his years of wasted time and sought reinstatement of a number of engineers whom he asserted had all been unfairly punished in the past. Mr. Heringa’s May 17, 2021 email included a number of inflammatory comments including:

[REDACTED]
 [REDACTED] This event allowed postponement of the
 Hearing on late Document Delivery, as you may recall. [REDACTED]
 [REDACTED]
 [REDACTED] or to take the situation
 to "Go Public" at CBC, etc., or to just Appeal another EGBC Panel
 Decision. I need help with this, and my options.

Note: Redacted by the Discipline Committee Panel pursuant to section 11.4(3) of the Bylaws of Engineers and Geoscientists BC.

...
 There was "no eyewitness" to this murder.

...
 Due to the recently changed legislation, my opinion is that you should all be fired, or terminated, for cause and misconduct of your own.

52. On May 18, 2021, Mr. Heringa wrote again to Counsel for the Panel, further to his email of May 17, 2021, posing a number of questions of, and seeking advice from, the Panel on a number of subjects.
53. On May 21, 2021, Counsel for the Panel wrote to Mr. Heringa and Counsel for Engineers and Geoscientists BC to advise that Mr. Heringa’s deadline for submissions on penalty and costs would be extended to June 30, 2021.
54. Mr. Heringa did not deliver submissions on or before June 30, 2021 or seek a further extension time.
55. However, on July 15, 2021 at 4:01 pm, Mr. Heringa emailed submissions of four pages to Counsel for the Panel and Counsel to Engineers and Geoscientists BC. Most of Mr. Heringa’s submissions were directed at the merits of the Conduct Decision or perceived issues of fairness with the hearing process.
56. Also on July 15, 2021 at 4:13 pm, Mr. Heringa emailed Counsel for Engineers and Geoscientists BC, copying Counsel for the Panel, the President of Engineers and Geoscientists BC and Ann English, then the CEO and Registrar of Engineers and Geoscientists BC, making submissions about the application of the PGA, the merits of the Conduct Decision, and penalty and costs (on the latter subject, seeking an award of costs in favour of Mr. Heringa in the amount of \$105,000 together with an apology). Mr.

Heringa's email also noted: "We trust that we won't have to involve the Courts or involve Innocence Canada, or the CBC News."

57. Counsel for the Panel replied on July 16, 2021, advising that she would deliver Mr. Heringa's submissions (as expressed in his two emails dated July 15, 2021) to the Panel who would determine whether or not they should be accepted late. She asked Mr. Heringa to confirm that the submissions were intended to be his submissions on penalty and costs and asked whether Engineers and Geoscientists BC's had a position on the late tendered submissions.
58. On July 20, 2021, Counsel for Engineers and Geoscientists BC advised that: (a) it consented to the retroactive provision of an extension to July 15, 2021 and delivery of Mr. Heringa's submissions to the Panel for consideration; (b) it would make submissions on the content of Mr. Heringa's response in its reply submissions but would be taking the position that the Panel should disregard most of Mr. Heringa's content directed at the merits of the Conduct Decision; and, that (c) in light of Mr. Heringa's late submissions and Counsel's hearing schedule, Engineers and Geoscientists BC would require an extension of time for delivery of reply submissions.
59. On July 21, 2021, Counsel for the Panel wrote to Mr. Heringa, copying counsel to Engineers and Geoscientists BC, advising, among other things, that the Panel would accept his two July 15, 2021 submissions and grant an extension for Engineers and Geoscientists BC to provide its reply on penalty and costs. Counsel for the Panel also noted that some of Mr. Heringa's recent correspondence included inflammatory statements, abusive language and threats of harm to himself and others and that such behaviour was unacceptable and would not be tolerated. On the subject of Mr. Heringa's representation, Counsel for the Panel wrote:

Mr. Heringa you have stated that Mr. Fenton's submissions of April 7, 2021 were not provided to the Panel. That is incorrect. Those were provided to the Panel. The Panel communicated its decision in relation to those submissions to your then lawyer, Mr. McCubbin, on April 13, 2021. This was also communicated to you directly on April 28, 2021 after the Panel was advised that Mr. McCubbin no longer acted for you. The Panel will consider whether to revise the conduct decision to reflect Mr. McCubbin's involvement on the record was not for the entire period of the proceedings. The Panel notes that Mr. Fenton has described himself as "retired lawyer" and "retired solicitor". The Panel now understands that Mr. Fenton is a Former Lawyer and not a Retired Lawyer. If that is incorrect, please advise. Assuming Mr. Fenton is a Former Lawyer and is acting as your advocate and not a lawyer in these proceedings, the Panel permits him to continue to participate in that capacity but notes that he is expected to comply with all of the Law Society of British Columbia's requirements in that regard.

60. On August 6, 2021, Mr. Heringa sent two further emails to Counsel for the Panel and Counsel for Engineers and Geoscientists BC addressing a number of issues, including,

among other things, Counsel for the Panel's July 21, 2021 email, the merits of the Conduct Decision, and to request that the hearing be reopened.

61. On August 10, 2021, Engineers and Geoscientists BC made its reply submissions on the subject of penalty and costs. In addition to making submissions on penalty and costs, Engineers and Geoscientists BC's reply submissions took the position that (a) Mr. Heringa's emails of August 6, 2021 ought not to be considered by the Panel and (b) should the Panel consider Mr. Heringa's request to re-open, Engineers and Geoscientists BC would seek the ability to make fulsome submissions on that subject.
62. By email dated August 27, 2021, Counsel for the Panel delivered the Panel's direction to the parties that:
 - a. It would accept Mr. Heringa's August 6, 2021 emails;
 - b. It would consider Mr. Heringa's request to re-open or reconsider;
 - c. Both parties would be provided with the opportunity to make submissions on the question of re-opening or reconsideration in accordance with the following schedule:
 - i) September 10, 2021 (Mr. Heringa)
 - ii) September 24, 2021 (Engineers and Geoscientists BC)
 - iii) October 1, 2021 (Mr. Heringa in reply)
63. On August 31, 2021, Mr. Heringa wrote to Counsel for the Panel to, among other things, seek an extension of time for delivery of his submissions seeking reopening or reconsideration to September 17, 2021.
64. On September 9, 2021, Counsel for Engineers and Geoscientists BC responded by email indicating, among other things, that Engineers and Geoscientists BC did not oppose the request for an extension.
65. On September 21, 2021, Counsel for the Panel wrote to Counsel for Engineers and Geoscientists BC and to Mr. Heringa directing, among other things, that:

The Panel has decided to grant Mr. Heringa an extension to deliver any further materials in support of any application for reconsideration or re-opening that are not included his emails of July 15, 2021 and August 6, 2021. He should confirm whether he wants the Panel to consider the attachment labelled "draft" to his August 31, 2021 email as part of those submissions. The revised schedule is as follows:

 - October 8: Mr. Heringa must provide any further materials in support of any application for reconsideration or reopening that are not included in his emails of July 15, 2021 and August 6, 2021;

- October 22: Engineers and Geoscientists Response; and
- October 29: Mr. Heringa's Reply

66. On October 7, 2021, Mr. Heringa emailed Counsel to the Panel and Counsel to Engineers and Geoscientists BC to advise that he had retained Mr. Juteau, a Barrister and Solicitor in British Columbia, to make submissions respecting his request to re-open or reconsider and that Mr. Juteau would be in touch (and would likely be in touch about obtaining a further extension of time for Mr. Heringa's submissions).
67. Mr. Juteau sought, and Engineers and Geoscientists BC consented to, an extension of time to make submissions on behalf of Mr. Heringa.
68. Mr. Juteau delivered Mr. Heringa's application to re-open and submissions on October 28, 2021 and delivered a limited number of documents relating to Mr. Heringa's argument on Friday, November 19, 2021. Mr. Heringa did not provide notice of his application to Mr. McCubbin or Mr. Fenton.

C. Respondent's Application

69. Mr. Heringa applies to re-open the Conduct Decision on the basis that the Panel made the following errors which he says rendered the Conduct Decision a nullity:
- a. The Panel failed to ensure that the Respondent was represented by legal counsel; and
 - b. The Panel applied the wrong standard of proof in rendering the Conduct Decision.
70. With respect to the "right to counsel", Mr. Heringa submits that:
- a. He has a statutory right to be represented by legal counsel at a professional discipline hearing. It is implied that such legal counsel must be competent to practice law, properly instructed by Mr. Heringa, and above all licensed to practice law in British Columbia. It was incumbent upon the Panel to satisfy itself that these standards were met to ensure that the Respondent enjoyed a fair hearing. Mr. Fenton is not a practising lawyer and is retired, was not retained by the Respondent as his legal counsel and has always been presented by Mr. Heringa to the Panel as his agent rather than his lawyer, and is not competent to practice law or ably represent the Respondent as his legal counsel in this proceeding.
 - b. Mr. Fenton's submissions to the Panel on April 7, 2021 are "not helpful".
 - c. In accepting submissions from Mr. McCubbin that he alleged were made on Mr. Heringa's behalf and as his legal counsel in this disciplinary hearing when that was not the case, and accordingly paragraphs 13 and 15 of the Conduct Decision contain factual errors. The Respondent intended to make submissions via his

agent, Mr. Fenton, who prepared some for submission on the same date the Conduct Decision was released.

71. With respect to the standard of proof, Mr. Heringa submits that the Panel relied upon the wrong standard of proof in making its findings. The Panel stated that the standard is “balance of probabilities” citing *F. H. v. McDougall*, 2008 SCC 53. He submits that the appropriate standard is set out in *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320 which requires a “high” standard of proof. Mr. Heringa submits the “higher *Jory* standard” applies in this proceeding. He maintains that higher standard was recently upheld in *Nguyen v. Chartered Professional Accountants of British Columbia*, 2018 BCSC 620, aff’d 2018 BCCA 299.

Engineers and Geoscientists BC’s Response

72. Engineers and Geoscientists BC opposes Mr. Heringa’s application. Engineers and Geoscientists BC submits that Mr. Heringa’s application does not raise issues which engage the Panel’s narrow equitable jurisdiction to re-open or reconsider the Conduct Decision. Engineers and Geoscientists BC further submits that – even if such alleged errors were in the nature of those which could give rise to re-opening - Mr. Heringa has not, in any event, been denied a right to legal counsel, nor did the Panel apply the wrong standard of proof.

D. Legal Framework

73. Mr. Heringa submits that the test to determine whether the Panel has the authority to reconsider or re-open the proceeding is set out in *Stephens v. Lynx Industries Inc.*, 2006 HRTO 31:

[9] The common law doctrine of *functus officio* maintains that a final decision of a decision-making body cannot be reopened except for very limited and exceptional reasons (*In re Nazaire Co.* (1879), 12 Ch.D. 88, *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934 CanLII 1 \(SCC\)](#), [1934] S.C.R. 186). Originally created for the courts, the doctrine has extended to apply to administrative tribunals as well (*Chandler v. Alberta Association of Architects*, [1989 CanLII 41 \(SCC\)](#), [1989] 2 S.C.R. 848; *Grier v. Metro International Trucks Ltd.* (1996) [1996 CanLII 11795 \(ON SC\)](#), 28 O.R. (3d) 67 (Div. Ct) (*Grier*). In the case of administrative tribunals, four exceptions to the *functus* doctrine justifying the reopening of a decision can be discerned from the jurisprudence. These are situations in which:

- a. the power to reopen has been conferred on the tribunal by legislation (see e.g. *Grillas v. Minister of Manpower and Immigration*, [1971 CanLII 3 \(SCC\)](#), [1972] S.C.R. 577)

b. the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose (see e.g. *Chandler, supra*)

c. the tribunal has made a clerical error or error in expressing its manifest intention (see *In re Nazaire Co.* (1879), 12 Ch.D. 88, *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934 CanLII 1 \(SCC\)](#), [1934] S.C.R. 186)

d. the tribunal has made an error that renders its decision a nullity such as “a denial of natural justice which vitiates the whole proceedings” (see *Chandler* at para. 25, *Ridge v. Baldwin*, [1964] A.C. 40(H.L.)) or “a misapprehension of an important fact lying at the heart of the litigation” (*Grier, supra*) which may stem from its reliance on factual errors made by the parties (see e.g. *Grier, supra*; *Kingston (City) v. Ontario (Mining & Lands Commissioner)* (1977), [1977 CanLII 1267 \(ON SC\)](#), 18 O.R. (2d) 166 (Div. Ct.) (*Kingston*)).

74. Engineers and Geoscientists BC relies upon the test set out by the Supreme Court of Canada in *Chandler v. Assn of Architects (Alberta)*, (1989) 2 S.C.R. 848 in which Justice Sopinka described the applicability of that principle in the administrative context as follows:

...As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

75. Engineers and Geoscientists BC notes that neither the EGA nor the PGA grant the Panel a statutory power to re-open a hearing or reconsider a decision. In the absence of such power, the principle of “*functus officio*” applies unless one of the two limited exceptions applies (it has committed a slip or error in rendering its final decision or where justice requires re-opening to permit the Panel to complete the task it was originally empowered to perform).
76. Engineers and Geoscientists BC relies upon *Kaminski v Assn. of Professional Engineers and Geoscientists (British Columbia)*, 2010 BCSC 468 which expressly considered and

rejected this regulator's ability to rehear, reconsider or re-open its decision under the EGA.

77. The Panel agrees that the proper test and approach is the one set out by Engineers and Geoscientists BC. Generally, once the Tribunal makes a decision, that decision is final. The decision "cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances". (*Chandler* para 20). There are two exceptions and those exceptions are narrow. The power to reopen a proceeding is limited to non substantive slips and to errors which results in the tribunal not exercising the jurisdiction given to it.

E. Analysis

Jurisdiction to reconsider or re-open a decision

78. There is no express statutory authority for the Panel to reconsider or re-open its decisions.
79. Neither of the two arguments that were advanced by the Respondent in this application (right to counsel and standard of proof) fall within the two limited exceptions set out in *Chandler*. Neither of these is a non substantive slip or an error or a failure of the Panel to have determined something it was statutorily empowered to do.
80. Accordingly, the Panel finds that even if the Respondent could establish either of the two errors alleged, those would not fall within the limited exceptions permitted in *Chandler* which allow the Panel to revisit its decision.
81. Despite this finding, the Panel will still consider each of the Respondent's arguments.

Right to Counsel

82. As noted above, the Respondent's first argument is that Mr. Heringa "has a statutory right to be represented by legal counsel at a professional discipline hearing."
83. Section 37 of the EGA provided:

Right to counsel

37 A person whose status or conduct is the subject of inquiry also has the right to be represented by counsel.

84. Engineers and Geoscientists BC argues that the right to be represented by counsel refers to the ability to exercise that choice. Engineers and Geoscientists BC submits that Mr. Heringa has been acutely aware of his opportunity to retain counsel and simply chose not

to seek that representation. Engineers and Geoscientists submits that Mr. Heringa is an experienced litigant and has been involved in various legal proceedings over the last 20 to 30 years, during which he was frequently represented by counsel, which demonstrates he is abundantly capable of retaining legal counsel if he so chooses. Engineers and Geoscientists BC submits that Mr. Heringa has sought to exploit Mr. Fenton's status throughout these proceedings occasionally seeking an adjournment on the basis that he might replace Mr. Fenton with a lawyer but never in fact doing so. It argues that Mr. Heringa again seeks to utilize his choice of Mr. Fenton as a basis to re-open these proceedings.

85. Engineers and Geoscientists BC submits that there a right to assistance from a non-legal representative at a professional disciplinary hearing. The leading case is *Thomas v. Assn. of New Brunswick Registered Nursing Assistants*, 2003 NBCA 58 which held:

[11] Generally speaking, representation by non-lawyers is consistent with the purpose of administrative tribunals. That purpose is to facilitate access to and decrease the need for formalities, as well as recognizing the expertise of other classes of persons: see *Law Society of British Columbia v. Magnat* at para.58. This explains why in administrative law circles, lawyer participation is often discouraged. As Lord Denning observed, in *Pett v. Greyhound Racing Association Ltd.*, [1968] 2 All E.R. 545 at 549: "If legal representation were allowed as a matter of right, the delay and complications that this would cause would largely frustrate the [tribunal's] intention to conduct their meetings expeditiously and with complete fairness." Indeed, the case law reveals that it is a tribunal's refusal to allow a party to be represented by legal counsel that generates the bulk of litigation.

[12] Whether a tribunal's exercise of its residual discretion to exclude legal counsel will be upheld on judicial review is determined largely by the nature of the proceedings. Disciplinary proceedings are one instance in which lawyer representation is to be expected. Where a party's reputation or livelihood is at stake, the courts have upheld a party's right to representation by an agent of his or her choosing, including legal counsel: see *Re Bachinsky et al. and Sawyer* (1973), 1973 CanLII 240 (AB QB), 43 D.L.R. (3d) 96 (Alta. S.C.T.D.) and cases cited therein; and *Pett v. Greyhound Racing Ass'n Ltd.*

...

[19] In my opinion, however, the fact that the Registered Nursing Assistants Act expressly allows for legal representation does not support the inference that the right to lay representation has been abrogated. Section 36 is permissive and does not restrict, nor does it prohibit, any party from attending with a representative of his or her choice. This view is supported by Brown and Evans in their text *Judicial Review of Administrative Action in Canada*, Looseleaf (Toronto: Canvasback, 1998), where at pages 10-28, 10-29 they write:

In the interests of ensuring some degree of accessibility and informality in administrative adjudication, parties are normally allowed to be represented by a person of their choice, even though

that person may not be legally trained or qualified. Indeed, at one time the right to be represented by counsel was often advanced as an aspect of the law of agency in the sense that wherever a person could act through an agent, that person could presumptively choose anyone as agent, including a lawyer. Accordingly, the courts have generally been reluctant to construe statutory directions providing for representation by counsel to exclude persons who are not lawyers.

86. In his reply submissions, the Respondent acknowledged that the right to counsel is not absolute but took issue with the quality of the representation that Mr. Fenton delivered and that it should have been clear to all that Mr. Fenton was providing Mr. Heringa with legal advice which did not assist him.
87. The Panel agrees with Engineers and Geoscientists BC's submission that the right to be represented by counsel refers to "the ability to have legal counsel present to represent them at a disciplinary hearing if they so choose." This section did not mandate that all registrants be represented by legal counsel. What matters with respect to the right to counsel is that the registrant has an opportunity to retain counsel, not whether they ultimately decide to exercise their opportunity.
88. In any event, as acknowledged by the Respondent, the right to counsel is not absolute. It is an opportunity to retain counsel of a party's choosing who is ready and able to appear according to tribunal's scheduling requirements and in accordance with the requirements of legislation.
89. Engineers and Geoscientists BC has a fundamental and onerous duty to at all times serve and protect the public interest. That duty cannot be fulfilled if its investigative or disciplinary processes are thwarted. Yet, this is exactly what the Respondent's position demands as a registrant could remain unrepresented for years while indefinitely suspending investigative and disciplinary processes. This would violate the Engineers and Geoscientists BC's public interest mandate and defeat the foundation of the self regulatory system.
90. The Panel finds the reasoning below from *MacDonald v. Institute of Chartered Accountants (British Columbia)*, 2010 BCCA 492 to be applicable in this case:

[36] As to the Panel's refusal to adjourn the hearing, the chambers judge held:

[35] The short point is that the Panel was confronted with a case in which it could reasonably take the view that an adjournment would prejudice the Institute and, on the other side, that Macdonald had had reasonable notice of with exactly what he was charged,

and of the extent of his jeopardy, and of the wisdom of seeking legal counsel and had responded by ignoring the proceedings even unto failing to attend a pre-hearing conference and doing nothing of significance in connection with possibly retaining counsel until just before the hearing. It was, in my respectful opinion, within the range of acceptable outcomes that the Panel conclude, as it did, that Macdonald's request for an adjournment to seek counsel was not "genuine".

[36] I add only that the way in which the hearing proceeded is the opposite of a case in which it is manifest that unfairness to the member was the upshot of the decision not to adjourn the hearing. Quite the contrary. Every reasonably available assistance was given to Macdonald.

91. The Panel also agrees with Engineers and Geoscientists BC's submissions that tribunals may allow lay representatives and agrees with the reasoning set out above in the *Thomas* decision. It is consistent with the very purpose of administrative tribunals to enhance access to regulatory processes and decrease the formalities of those processes. In the professional disciplinary context, where consequences may engage a person's reputation or livelihood, the Panel agrees there is even greater support for a person to be represented by an agent of their choosing – whether a lawyer or a layperson.
92. Mr. Heringa has been repeatedly and consistently made aware of his right to retain counsel of his choosing. The record is replete with communications from the Panel and all counsel involved advising him of that fact. What is more, not only was Mr. Heringa well aware that Mr. Fenton is not a practising lawyer, he was nonetheless reminded of that fact on multiple occasions and encouraged to seek assistance from a lawyer. The Respondent has been given multiple adjournments and extensions which allowed him to the opportunity to retain legal counsel after he raised the possibility that he might choose to do so. Mr. Heringa chose instead to have Mr. Fenton act and continue to act as his representative. That choice in no way undermines the fact that Mr. Heringa was given every reasonable opportunity to retain legal counsel. The fact that Mr. Heringa has been aware of his ability to retain legal counsel is further evidenced by the fact that in these proceedings he has retained two separate lawyers to assist him at different points: Mr. McCubbin and Mr. Juteau. Mr. Heringa was aware of his right to counsel, was reminded of his right to counsel, was given the opportunity to exercise his right to counsel, chose his representative of choice, and also retained two separate lawyers to assist him at different points.
93. The Panel does not accept the Respondent's submission that it erred in accepting Mr. McCubbin's representation that he was retained as Mr. Heringa's lawyer and accepted submissions on his behalf during that period. All counsel and the Panel were entitled to rely upon that representation. The record before this Panel is clear that all involved repeatedly requested and received confirmation from Mr. McCubbin of his status at the

material times. The limited documents provided from Mr. Heringa which were only between himself and Mr. McCubbin and not copied to any of the counsel involved in this proceeding or provided to the Panel during the material times, at most establish a misunderstanding between Mr. Heringa and Mr. McCubbin. However, that is an issue between Mr. Heringa and Mr. McCubbin.

94. The Panel also has difficulty with the Respondent's submission regarding the quality of Mr. Fenton's involvement, and that it should have been obvious that Mr. Heringa was not well advised by Mr. Fenton. The Panel permitted Mr. Fenton to appear as a non-lawyer representative for Mr. Heringa and agrees with Engineers and Geoscientists BC that his role was clear to all. Mr. Heringa and Mr. Fenton were both permitted to advance Mr. Heringa's case in response to the allegations set out in the Notice of Inquiry in a fair manner and in a manner that is consistent with the access to justice principles outlined in *Thomas*. The quality of representation that Mr. Fenton may or may not delivered to Mr. Heringa is not relevant to this application, or specifically to the question of whether Mr. Heringa was afforded the right to counsel. Whether or not specific aspects of Mr. Fenton's presentation were more or less "useful" or persuasive to the Panel is likewise not relevant to whether Mr. Heringa was afforded the opportunity to select his representative of choice. This argument also ignores the fact that the Panel did accept some of Mr. Fenton's submissions, for example, with respect to allegation 2 of the Notice of Inquiry which was dismissed against Mr. Heringa.

Standard of Proof

95. There is no dispute about the applicable standard of proof in professional regulation cases in British Columbia. The Supreme Court of Canada in *F.H. v. McDougall* expressly dealt with exactly the argument the Respondent raises in this case; namely, that there exists two civil standards. First, the "balance of probabilities". Second, on professional regulation cases, there is "something higher" than the balance of probabilities. The Supreme Court of Canada could not have been more clear in its rejection of this submission:

[40] Like the House of Lords, **I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.** Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

...

[44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified

standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

...

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[emphasis added]

96. The Respondent asks this Panel to depart from the clear findings of the Supreme Court of Canada in *F.H. v. McDougall* in 2008 in favour of the *Jory* decision, which was decided in 1985. The *Jory* decision, however, is a lower court decision which was decided 23 years before *F.H. v. McDougall* and without the Supreme Court of Canada’s guidance on that issue of standard of proof. The Respondent argues that the *Jory* decision has been recently upheld at the British Columbia Court of Appeal in *Nguyen*. The issue on appeal

in *Nguyen* was, however, the burden of proof and not the standard of proof. The Court of Appeal only dealt with that issue very briefly noting that the parties were agreed that the burden was on the body bringing the complaint and the party (or in this case, registrant) is not required to disprove it (*Nguyen* para.24). Burden of proof is not an issue before this Panel.

97. The Respondent argues that *F.H. v. McDougall* is silent on whether the balance of probabilities standard should apply to administrative tribunals. The Panel disagrees with that statement given the Supreme Court of Canada's unequivocal statement, "think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law". Irrespective, *F.H. McDougall* has been adopted and followed by thousands of tribunals across Canada, and consistently applied by this tribunal. The Panel does not accept the Respondent's alternate submission that "this is a grey area and is not settled law." The Panel sees no reason to depart from *F.H. v. McDougall* – the standard of proof is balance of probabilities.
98. The Panel dismisses the Respondent's application to re-open or reconsider the Conduct Decision. Given its determination on that issue, is it not necessary for the Panel to consider the Respondent's further submissions on the merits of the Conduct Decision.

<original signed by>

Peter Bobrowsky, P.Geog, Chair

<original signed by>

Paul Adams, P.Eng.

<original signed by>

Ed Bird, P.Eng.