

**IN THE MATTER OF
THE ENGINEERS AND GEOSCIENTISTS ACT,
R.S.B.C. 1996, chapter 116, as amended (the “EGA”)**

and

IN THE MATTER OF STEPHEN RICE, P. Eng.

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

Discipline Committee Panel: Paul T. Adams, P. Eng., Chair,
Colin Smith, P. Eng.,
Frank Denton, P. Eng.

Counsel for the Association: Andrew D. Gay, Q.C.

Counsel for the Member: Nicholas Hughes, Patrick Williams

1. In its decision issued September 18, 2020, 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 Mr. Rice demonstrated unprofessional conduct and contravened the Bylaws of the Association, contrary to s. 33(1)(b) and (c) of the EGA.

2. The penalty portion of this hearing proceeded by written submissions. The Panel received written submissions from the Association dated January 27, 2021. Also on January 27, 2021, Mr. Rice provided submissions stating that he agrees with the penalty proposed by the Association.

3. The Association proposes a penalty pursuant to s. 33(2) of the EGA, consisting of a suspension of two years (to take effect if Mr. Rice is ever in future reinstated as a member), remedial or supervisory measures and a fine of \$25,000. The terms sought are more specifically described as follows:

“(a) that Mr. Rice’s membership be suspended, and that the appropriate length of suspension is two years;

(c) [sic] that the suspension shall take effect if and when Mr. Rice successfully re-applies for membership in the Association;

- (d) should Mr. Rice successfully re-apply for membership in the Association, he must complete and pass the Association's Professional Practice Examination before resuming the practice of professional engineering;
- (e) should Mr. Rice successfully re-apply for membership in the Association, following the period of suspension of his membership it will be a condition of his membership that, for a minimum period of 12 months, his work must be subject to peer review in accordance with the policies of the Association concerning peer review applicable at that time, subject to the following minimum requirements:
 - i) Mr. Rice may not sign or seal any reports, drawings, plans or calculations unless they have been peer reviewed;
 - ii) if the peer reviewer identifies any deficiencies in such reports, drawings, plans or calculations, Mr. Rice must remedy the deficiencies;
 - iii) after six months, and again after twelve months, the peer reviewer must submit a report to the Registrar of the Association describing the engineering work of Mr. Rice and whether it is technically sound and in substantial compliance with all applicable codes, guidelines and standards, and whether Mr. Rice lacks sufficient training, experience or expertise to be practicing a particular discipline or sub-discipline of professional engineering; and
 - iv) the cost of the above peer review process, including the fees of the peer reviewer, are to be borne by Mr. Rice;(the "Peer Review Process")
- (f) should Mr. Rice successfully re-apply for membership in the Association, it will be a condition of his membership that within one year of the conclusion of the Peer Review Process he must:
 - i) participate, at his cost, in a practice review at dates and times to be set by the Audit and Practice Review Committee; and
 - ii) successfully complete the Association's Professional Engineering and Geoscience Practice in BC Online Seminar; and
- (g) Mr. Rice be ordered to pay a fine in the amount of \$25,000."

4. In addition, the Association seeks an order for costs, pursuant to s. 35 of the EGA, in the agreed-upon amount of \$107,500.

5. As stated above, Mr. Rice, through counsel, agrees to the disposition sought by the Association. In its written submissions, the Association refers to *Rault v. Law Society of*

Saskatchewan, 2009 SKCA 81, for the proposition that the Panel should defer to the joint proposal of the parties unless it is “inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest” (para. 28).

6. For the reasons set out below, the Panel is satisfied that the proposed disposition is suitable.

Impact of new legislation

7. On February 5, 2021, shortly after the parties’ submissions were received, the EGA was repealed and replaced by amendments to the *Professional Governance Act*, RSBC 2018, c. 47, (the “PGA”). The Panel requested additional written submissions from the parties as to whether the PGA impacts these proceedings. Those submissions were received on March 4, 2021.

8. The Panel accepts the parties’ submissions that there is a legal presumption against the retroactive application of legislation concerning penalties, unless expressly authorized by the new statute, and that the PGA does not depart from that principle.

9. The Panel is satisfied that s. 127(1) and (2) of the PGA empowers this Panel to complete these proceedings in accordance with the EGA.

10. The Panel notes that the PGA provides for a maximum fine of \$100,000, whereas the maximum fine under the EGA was \$25,000. Accordingly, the fine agreed upon by the parties is the maximum that could be imposed in this case.

11. On the subject of costs, the Association notes that the method for the calculation of costs under the PGA differs from that under the EGA and that it might be argued that costs are a procedural matter rather than a penalty and therefore subject to the PGA. However, the Association submits it would be unfair to impose the new regime upon the calculation of costs here because the agreement of costs was negotiated between the parties while the EGA remained in force. Mr. Rice agrees. Without deciding whether the method of calculation of costs is procedural, and as set out below, the Panel accepts that the figure negotiated by the parties is reasonable.

Framework for Assessing Penalty

12. Section 33(2) of the EGA states that where there is a finding against the member, the Panel may:

- a) reprimand the member, licensee or certificate holder;
- b) impose conditions on the membership, license or certificate of authorization of the member, licensee or certificate holder;

- c) suspend or cancel the membership, license or certificate of authorization of the member, licensee, or certificate holder;
 - d) impose a fine, payable to the association, of not more than \$25,000 on the member, licensee or certificate holder.
13. Member is defined in s. 28 of the EGA to include a former member, as is Mr. Rice.
14. The Panel may impose any of the sanctions upon a former member that would be applicable to a current member. This is set out in numerous authorities, including *Re Chrysanthous*, August 16, 2018; *College of Nurses of Ontario v. Mark Dumchin*, 2016 ONSC 626, and *Law Society of BC v. Power*, 2009 LSBC 23.
15. The Association refers to *Re Foreman*, November 23, 2015, which sets out a list of factors to be considered in the imposition of penalty, citing the Law Society discipline penalty decision *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17.
16. Additionally, the Association relies upon *Re Chrysanthous*, which referred to a more recent Law Society decision, *Law Society of British Columbia v. Dent*, 2016 LSBC 05, and to more recent decisions of the Association, *Re Syed*, August 18, 2020 and *Re Halarewicz*, January 18, 2019, for the proposition that it is not necessary to consider each and every Ogilvie factor in every case, and the considerations should be tailored to the individual case.
17. In this case, the Association emphasized the following factors:
- 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;
 - g) whether the member has acknowledged the misconduct;
 - 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.
18. The Panel's analysis of the submissions and the relevant factors is set out below.

Nature and Gravity of the Conduct

19. In summary, the Panel found that Mr. Rice demonstrated unprofessional conduct as follows:

- In relation to paragraph 1(a) of the Notice of Inquiry (“NOI”), the Panel found that Mr. Rice allowed a relatively junior engineer with little experience with embankment design, who had never previously acted on a project as the Engineer of Record (“EOR”), to act as EOR for the very complex Mount Polley Tailings Storage Facility (“TSF”);
- In relation to paragraph 2(a) of the NOI, the Panel found that Mr. Rice failed to ensure that a geotechnical engineer with appropriate experience and knowledge of the design of the embankments visited the site on a regular basis to observe the TSF for potential indicators of safety or stability issues, and generally to check that the embankments were functioning as intended and in a safe condition;
- In relation to paragraph 2(b) of the NOI, the Panel found that Mr. Rice failed to ensure that either he or the EOR warned Mount Polley Mining Corporation that the field inspectors conducting construction monitoring at the TSF (who were first and second year engineering students) were not appropriately experienced or trained;
- In relation to paragraph 3 of the NOI, the Panel found that Mr. Rice accepted professional responsibility as the review engineer for the Stage 9 Design of the TSF embankments when he was not qualified by training or experience to adequately fulfil that role;
- In relation to paragraphs 4(a)-(c) of the NOI, the Panel found that Mr. Rice failed to fulfil the role of a review engineer by conducting a superficial review of the Stage 9 Design, by failing to acquire sufficient knowledge of the design and site conditions, and by signing the Stage 9 Design as a reviewer without adequate knowledge of the Stage 9 Design and stability analysis;
- In relation to paragraph 4(d) of the NOI, the Panel found that Mr. Rice failed to question the Stage 9 Design slope of 1.3H:1V when the steepness of the slope and proposed height of the dam clearly ought to have precipitated an in-depth review;
- In relation to paragraph 6 of the NOI, the Panel found that Mr. Rice failed, after the existing EOR went on leave, to fulfil his obligations as the senior-most engineer responsible for the engineering work at the TSF, and in particular failed to:
 - (a) appoint a new EOR;
 - (b) visit the site himself;

- (c) ensure that a geotechnical engineer or engineers with appropriate experience and knowledge of the design of the embankment was conducting observation and monitoring of the embankments, including by regularly visiting the site to observe the TSF for potential indicators of safety or stability issues;
 - (d) ensure that he or another engineer with appropriate experience received regular updates on the volume and level of water in the TSF impoundment and the status of the tailings beaches within the TSF;
 - (e) ensure that the implications, both in terms of embankment stability and consequences if failure occurred, of any changes in the matters referred to in subparagraph (d) were addressed;
- In relation to paragraph 7 of the NOI, the Panel found that Mr. Rice failed to take appropriate steps upon learning of an excavation at the toe of the perimeter embankment of the TSF that had remained unfilled for a number of months, including:
 - (a) failing to have an appropriately qualified geotechnical engineer assess the excavation to determine what impact, if any, the excavation would have on the stability of the embankment if it was left unfilled; and
 - (b) failing to determine whether the excavation should be filled as soon as possible and, if so, to see that this was done.

20. The Panel also found that Mr. Rice contravened section 14(b)(2) of the Bylaws under the EGA by failing to document his review of the Stage 9 Design and stability analysis.

21. As the Panel has found, Mr. Rice failed to fulfill standards that are fundamental ethical obligations of members of the profession. His conduct was more than negligence or carelessness. The Panel found in a number of instances that Mr. Rice must have been aware that he was falling short of his professional obligations.

22. These findings place this case on the serious end of the scale of unprofessional conduct, warranting a significant penalty.

The Age and Experience of the Member

23. As the Association notes in its submissions, as a senior and experienced engineer and the senior engineer on the Mount Polley project, Mr. Rice ought to have known better. This is an aggravating factor in this case.

Previous character of the member, including details of prior discipline

24. The Panel notes that Mr. Rice has no prior discipline proceedings. This is a mitigating factor.

25. Three reference letters have been provided by Mr. Rice from professional colleagues. They describe Mr. Rice's long history of successful professional practice and speak to his otherwise excellent reputation.

Acknowledgement of misconduct

26. Mr. Rice did not make admissions of liability. However, he made extensive admissions of fact which greatly reduced the duration and complexity of the hearing.

Specific and general deterrence

27. The Panel is satisfied that specific deterrence is not necessary in this case.

28. The Panel agrees with the Association's submissions that the penalty in this case must send the important message to the profession that a superficial approach by an engineer to his or her professional obligations as senior engineer or review engineer is unacceptable.

Need to ensure the public's confidence in the integrity of the profession

29. Public confidence requires that the Association enforce its professional standards. Mr. Rice failed to render precisely the skill and expertise that engineers are uniquely qualified to provide.

30. The Panel repeats its finding that the duty to hold paramount the safety, health and welfare of the public and the protection of the environment is especially important in a project as large and complex as Mount Polley, and given the risk of harm in the event of a breach of the dam.

31. This is a significant factor in this case. The Panel is satisfied that the supervisory steps proposed are appropriate and that, given the legislation in effect at the time, the penalty is also appropriate.

Penalties imposed in similar cases

32. The Association refers to five relatively recent cases where an engineer was found to have demonstrated unprofessional conduct for performing services for which he was not qualified and/or failing to fulfil responsibilities undertaken in his professional capacity: *Re Balayo*, April 5, 2017; *Re Bohemier*, April 19, 2018; *Re Burch*, November 1, 2018; *Re Bryson*, March 26, 2019; and *Re Syed*, August 18, 2020.

33. In *Re Bryson*, the former member agreed not to re-apply for membership. In the rest of the cases, the panel ordered cancellation of membership, in some instances coupled with a period of prohibition on an application for reinstatement and other remedial measures. None of the cases cited involved a fine as large as that sought here.

34. As the Association notes, none of the cases are factually close to the present case, but they all concern a significant pattern of substandard conduct. Several are considerably worse, such as *Re Syed*, where the member acted as a “seal for hire”, abdicating entirely his professional responsibilities.

35. A lengthy suspension, to take effect upon reinstatement, is a reasonable parallel to cancellation. The Panel is satisfied that the proposed suspension in combination with a fine that is the maximum applicable under the EGA suitably reflects the gravity of this case, the need for general deterrence, and the need to promote public confidence in the profession.

36. The member’s cooperation in the process, his character references and past unblemished record militate against a more serious penalty.

37. The Panel is also satisfied that the proposed supervisory and remedial measures are appropriate given the nature of the unprofessional conduct.

Costs

38. Section 35 of the EGA permits the Panel to direct that “reasonable costs of and incidental to the investigation under section 30 and the inquiry under section 32, including reasonable fees payable to solicitors, counsel and witnesses, or any part of the costs, be paid”. As set out above, the Association seeks, and Mr. Rice agrees to, a costs order of \$107,500.

39. Section 35 provides that the precise figure for costs may be determined by the discipline committee or referred to the BC Supreme Court registrar for assessment. Therefore, the assessment of costs may take place in two stages.

40. In this case, the parties agreed that an order for costs would be appropriate and negotiated the sum. In this way, the parties have, through agreement, simplified the process. The Panel is also informed that an arrangement has been made to ensure that the costs will indeed be paid by Mr. Rice to the Association.

41. In the Panel’s view, it is reasonable that Mr. Rice bear the costs of these proceedings.

42. In this case, due to the parties’ successful negotiations, the precise amount of the Association’s claimable costs is not before the Panel. The Panel is however satisfied that the sum agreed upon is significant and suitable and the Panel defers to the parties’ agreement.

Conclusion

43. In summary, pursuant to s. 33(2) of the EGA, the Panel orders as follows:
- a) that Mr. Rice's membership be suspended, and that the appropriate length of suspension is two years;
 - b) that the suspension shall take effect if and when Mr. Rice successfully re-applies for membership in the Association;
 - c) should Mr. Rice successfully re-apply for membership in the Association, he must complete and pass the Association's Professional Practice Examination before resuming the practice of professional engineering;
 - d) should Mr. Rice successfully re-apply for membership in the Association, following the period of suspension of his membership, it will be a condition of his membership that, for a minimum period of 12 months, his work must be subject to peer review in accordance with the policies of the Association concerning peer review applicable at that time, subject to the following minimum requirements:
 - i) Mr. Rice may not sign or seal any reports, drawings, plans or calculations unless they have been peer reviewed;
 - ii) if the peer reviewer identifies any deficiencies in such reports, drawings, plans or calculations, Mr. Rice must remedy the deficiencies;
 - iii) after six months, and again after twelve months, the peer reviewer must submit a report to the Registrar of the Association describing the engineering work of Mr. Rice and whether it is technically sound and in substantial compliance with all applicable codes, guidelines and standards, and whether Mr. Rice lacks sufficient training, experience or expertise to be practicing a particular discipline or sub-discipline of professional engineering; and
 - iv) the costs of the above peer review process, including the fees of the peer reviewer, are to be borne by Mr. Rice;(the "Peer Review Process")
 - (e) should Mr. Rice successfully re-apply for membership in the Association, it will be a condition of his membership that within one year of the conclusion of the Peer Review Process he must:
 - i) participate, at his cost, in a practice review at dates and times to be set by the Audit and Practice Review Committee; and

- ii) successfully complete the Association's Professional Engineering and Geoscience Practice in BC Online Seminar; and
- (f) Mr. Rice shall pay a fine in the amount of \$25,000.

44. In addition, pursuant to s. 35 of the EGA, the Panel orders that Mr. Rice pay costs in the amount of \$107,500.

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Paul T. Adams, P. Eng., Chair

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Colin Smith, P. Eng.

<original signed by>

Frank Denton, P. Eng.