

**IN THE MATTER OF THE *PROFESSIONAL GOVERNANCE ACT*,
S.B.C. 2018, CHAPTER 47**

and

**IN THE MATTER OF DAVID DWYER, P.ENG.
ENGINEERS AND GEOSCIENTISTS BC FILES NO. T21-006,
T22-041, T22-046 and T23-013**

DECISION AND REASONS ON EXTRAORDINARY ACTION

Extraordinary Action Panel:	Dr. Ron Yaworsky, PhD, P.Eng., Chair Larry Spence, P.Eng., PMP, FEC, FGC (Hon) Pierre Gallant, Retired Architect, AIBC
Counsel for the Panel:	Jean P. Whittow, KC
Counsel for EGBC:	Ruth Nieuwenhuis
For David Dwyer, P. Eng.	Self-represented

A. Introduction

1. This Extraordinary Action Panel (the "Panel") of the Association of Professional Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC ("EGBC") was appointed to consider whether extraordinary action is necessary pursuant to s. 67 of the *Professional Governance Act* S.B.C. 2018, c. 47 (the "PGA") concerning the registration of David George Dwyer, P. Eng.
2. On March 30, 2023, the Investigation Committee of EGBC considered four investigation files concerning Mr. Dwyer (no. T21-006, T22-041, T22-046 and T23-013) and resolved to issue a citation. It also resolved to refer the files immediately to the Discipline Committee pursuant to section 9.7.3(1)(b) of the bylaws of Engineers and Geoscientists BC (the "Bylaws") to consider action pursuant to s. 67 of the *PGA*.
3. A Request to Appoint an Extraordinary Action Panel was submitted to the Chair of the Discipline Committee, and this Panel was appointed. In a Process and Procedure Order dated April 28, 2023, this Panel directed that notice of the proceedings be provided to Mr. Dwyer and that EGBC provide him with a description of the issues of concern and the materials relied upon by EGBC.

4. EGBC delivered written submissions dated May 4, 2023, the affidavit of Alexandra Lakirovich dated May 3, 2023 and the affidavit of Christopher Hawley dated May 3, 2023 and a Book of Authorities to Mr. Dwyer on May 4, 2023. After receipt of the materials described above, on May 5, 2023, Mr. Dwyer sent seven emails to counsel for the Panel, which he relied upon as his submissions.
5. Also as directed by the Panel, EGBC and Mr. Dwyer attended before the Panel by video-conference on May 18, 2023. Each made oral submissions supplementary to their written submissions. EGBC's written submissions and affidavits and a volume containing all of Mr. Dwyer's email submissions were marked as Exhibits 1 through 4.
6. At the conclusion of the proceeding on May 18, 2023, following deliberations, the Panel ordered that Mr. Dwyer be immediately suspended and not be permitted to engage in the reserved practice of professional engineering in British Columbia until the earlier date that
 - a. a Consent Order is made between the Investigation Committee or the Discipline Committee and Mr. Dwyer pursuant to section 73(2) of the *PGA*;
 - b. a discipline hearing is held and a final determination is made in this matter pursuant to section 75(5)(a) or 75(6) of the *PGA*; or
 - c. the Discipline Committee determines pursuant to section 67(4) of the *PGA* that a suspension is no longer necessary to protect the public.
7. The Panel also advised the parties that further written reasons would be issued. These are those reasons.

B. The Discipline Committee's Authority to take Extraordinary Action

8. Section 67(1) of the *PGA* provides:
 - (1) If the council of a regulatory body, or a discipline committee established under section 75 [*discipline hearings*], considers the action necessary in the public interest during an investigation under section 66(1)(a) or pending a hearing under section 75, the council may, by order and without giving the registrant an opportunity to be heard,
 - (a) impose limits or conditions on the practice of the regulated practice by the registrant, or
 - (b) suspend the registration of the registrant.
9. This is repeated in section 10.5(1) of the Bylaws.

10. EGBC referred the Panel to the legal test. The legal test is well-established and was not disputed by Mr. Dwyer.
11. The leading case regarding extraordinary action against a registrant of a regulated profession is *Scott v. College of Massage Therapists of British Columbia*, 2016 BCAA 180 (“*Scott*”). In *Re Duerichen* (2022), (“*Duerichen*”), a panel of the discipline committee of EGBC adopted *Scott* for application in extraordinary action cases under the *PGA*:
 33. Based on that authority [*Scott*], and in alignment with the parties' submissions, the criteria for an order under section 67 of the Act can be summarized as follows:
 - a. A *prima facie* case;
 - b. A risk to the public interest; and
 - c. Urgency to the matter.
 34. Additionally, as set out in the *Scott* case, the Panel must be mindful of the impact of an interim order on the registrant. While it is at all times considering the public interest, the Panel must not automatically impose an interim suspension where the criteria above have been met. The Panel must also consider whether practice restrictions would be sufficient and proportionate.
12. In *Scott*, the Court of Appeal approved the following definition of a *prima facie* case: “[one] which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer” (para. 80).
13. *Scott* and *Duerichen* instruct that the Panel is to make a “provisional assessment” of the facts. This includes considering the consistency and plausibility of the complaint. The Panel must discount allegations that are manifestly unfounded, exaggerated, unreliable, or misconceived. However, the Panel must not conduct a “mini-trial”, or consider the merits of the allegations as if it were conducting a discipline hearing.
14. As to the question of risk, in order to take action, the Panel must be satisfied that there is a real risk of harm to the public. Relatedly, the Panel must consider the urgency of the matter; that is whether the risk is imminent. This involves considering the seriousness of the allegation and the risk of repetition.
15. In considering whether action should be taken, the Panel must consider the potential impact upon the practice of the registrant. Orders are to be used “sparingly”.
16. Furthermore, the Panel must impose action that is proportionate to the risk. The Panel must intervene in the registrant’s practice by the least intrusive method that will achieve public protection.

C. Is there a *Prima Facie* case?

17. The first branch of the test requires the Panel to consider the four EGBC investigation files. The material concerning these investigations, including the complaint, the responses received, the expert opinions and the investigation reports, is attached to the affidavit of Christopher Hawley dated May 3, 2023.
18. Mr. Dwyer has been a registrant of EGBC since December 12, 1995. He has been registered with the Association of Professional Engineers and Geoscientists of Alberta since 1973. Mr. Dwyer practices through his own firm. Mr. Dwyer has self-declared his practice in the EGBC database as “Consulting Engineering – Construction” and his areas of practice are “Wastewater Treatment/Management”, “Pipelines” and “Project Management”.

File T21-006

19. On July 24, 2020, EGBC received two separate complaints concerning three reports signed and authenticated by Mr. Dwyer assessing wastewater system suitability for a three-lot subdivision in Kaslo (the “Assessments”). The complaints were made by the owners of the property and by a Registered Onsite Water Practitioner (“ROWP”).
20. Before initiating an investigation, EGBC obtained the opinion of an independent intake expert. On February 17, 2021, the expert opined that Mr. Dwyer did not provide engineering services on the Assessments to a standard of competence. After considering the results of this initial review, the Investigation Committee authorized an investigation. On June 21, 2021, EGBC notified Mr. Dwyer of the investigation, and asked that he provide all documents in his possession regarding the matter.
21. The staff investigator and subcommittee of the Investigation Committee gathered evidence and prepared an investigation report for the Investigation Committee incorporating this material. The Investigation Committee considered the investigation report on March 30, 2023 when, as noted in the introduction to this Decision, the Committee resolved to issue the citation and refer the matter for consideration of extraordinary action.
22. EGBC submits that the investigation discloses three professional conduct concerns.
23. The first concern is that the Assessments were technically deficient. They do not include a number of criteria published by Interior Health in the Subdivision Report Criteria for Authorized Persons. While recognizing that the Assessments do not constitute a Record of Sewerage System, portions of the EGBC Sewerage Guidelines version 1.3 (January 2018)(the “Sewerage Guidelines”) apply to the Assessments. EGBC asserts that the Assessments failed to meet the requirements of the following sections of the Sewerage

Guidelines: Section 3.1 (Assessment of Qualification); Section 3.2 (Technical Ability: Core Competencies); Section 2.3.6 (Field Reviews) and Section 6.15 (Subdivision Approval).

24. The second concern is Mr. Dwyer's aggressive and/or intimidating behaviour toward the complaining ROWP. The ROWP alleged that when he met with Mr. Dwyer to discuss his concerns about the Assessments, Mr. Dwyer "got right up in my face. I had to keep backing away from him..." When responding to the complaint, Mr. Dwyer confirmed that he "got in [the complainant's] face, he simply does not understand the concept..."
25. The third area of concern is Mr. Dwyer's participation in EGBC's investigation and his document retention practices:
 - a. Mr. Dwyer delivered limited materials to EGBC during the investigation despite repeated requests and failed to complete an investigative interview. EGBC alleges this contravenes his duty to cooperate in the investigation contrary to s. 30(4)(a) of the *Engineers and Geoscientists Act* RSBC c. 116 ("*EGA*"), which was in place at the time the Assessments were prepared.
 - b. During the course of the investigation, it became apparent that Mr. Dwyer does not maintain adequate records. EGBC alleges that Mr. Dwyer's record retention practices are contrary to s. 14(b) of the Bylaws under the *EGA* and contrary to EGBC's Quality Management Guidelines: Retention of Project Documentation Version 1.3 (January 2018) ("*Document Retention Guidelines*").
26. EGBC alleges that Mr. Dwyer's practice is outside the standard practice of a registered professional under the *EGA*, and the Bylaws and Code of Ethics under the *EGA* including:
 - a. section 30(4)(a) of the *EGA* which requires a member to provide the investigator with any information in the possession or control of the member when required;
 - b. section 14(b) of the Bylaws under the *EGA* which require that members retain documents for a minimum of ten years;
 - c. the Code of Ethics under the *EGA* which required all members to act at all times with fairness, courtesy and good faith and hold paramount the safety health and welfare of the public, the protection of the environment and safeguard human life and welfare and the environment;
 - d. the Document Retention Guidelines and
 - e. the Sewerage Guidelines.

27. Mr. Dwyer's written submissions dispute aspects of the complaint. He states that he believes that the complainant does not understand the different requirements for a Record of Sewerage System submission compared to an assessment for subdivision approval. As to the records-related aspects of the complaint, Mr. Dwyer states, "I apologize if I have been negligent in finding data and information related to assessments and I will be pleased to find anything else specific that can help put a wrap on this file".
28. Mr. Dwyer's explanations and submissions do not go to the heart of the complaint. The Panel is satisfied that there is a *prima facie* case as alleged by EGBC.

File T22-041

29. On November 16, 2021, EGBC received a complaint from another ROWP that an onsite wastewater system design for a property in Lardeau, in which Mr. Dwyer acted as the authorized person in filing the design with the relevant health authority, was improperly designed and constructed. Mr. Dwyer was provided with the complaint and given an opportunity to reply but did not do so.
30. On February 14, 2023, an independent intake expert provided a written opinion on the complaint materials stating that there was evidence that Mr. Dwyer did not demonstrate competence in the field of on-site sewerage system design. On February 23, 2022, on review of the independent intake expert's opinion, the Investigation Committee authorized an investigation and appointed a staff investigator. EGBC notified Mr. Dwyer and asked that he provide all documentation concerning the matter and his response to the complaint. The staff investigator then prepared an investigation report incorporating all the information gathered, which was considered by the Investigation Committee on March 30, 2023.
31. The investigation raised substantial concerns with technical deficiencies in the Lardeau Project, including, for example using an expired version of the Sewerage System Standard Practice Manual, which led to the failure to meet the standards in the current version for daily design flow, hydraulic loading rate and linear loading rate. Further, the independent expert and the investigation report notes that the maintenance plan in Mr. Dwyer's system was significantly deficient.
32. In addition, EGBC asserts that Mr. Dwyer failed to provide a copy of documents in his possession or control relating to the project to the EGBC. Mr. Dwyer stated that he had "nothing in my file" concerning the relevant property.
33. EGBC submits that Mr. Dwyer's practice is outside the standard practice of a professional engineer and that he has contravened Bylaw 7.3.1, which requires a registrant to have regard to standards required by government or EGBC including professional practice guidelines; Bylaw 7.3.2, which requires a registrant to retain completed project

documentation; and the Code of Ethics. EGBC also alleges that Mr. Dwyer contravened the Document Retention Guidelines and Sewerage Guidelines.

34. In Mr. Dwyer's written submissions to this Panel, he states that the Sewerage System Standard Practice Manual version 2 dated September 21, 2007 is more prudent than version 3. The Sewerage System Standard Practice Manual is a government publication and the primary reference for professionals responsible for planning, installing and maintaining onsite sewage systems. Version 3 of the Manual *replaces* the former version. Mr. Dwyer's position is contrary to engineering practice.
35. As regards his failure to retain records, Mr. Dwyer states in his submissions that records are available on the Interior Health Registry. This is not a helpful response.
36. Having reviewed the material presented by EGBC and the response and submissions of Mr. Dwyer, the Panel is satisfied that there is a *prima facie* case as alleged by EGBC.

File T22-046

37. On December 2, 2021, EGBC received a complaint from a senior staff officer of the City of Nelson (the "City"). The City complained that Mr. Dwyer (1) did not possess professional liability insurance as required by the City's bylaws for engineers that submit letters of assurance, (2) submitted false documents to show he had insurance when he did not, and (3) provided two individuals with his signature and seal.
38. On December 8, 2022, the Investigation Committee authorized an investigation and appointed a staff investigator. EGBC notified Mr. Dwyer and sought his response and records. Mr. Dwyer responded in part to the complaint, as described below. The investigator then prepared the investigation report incorporating all the information obtained, which was considered by the Investigation Committee on March 30, 2023.
39. The investigator ascertained that insurance was not in fact required under the City bylaws; although Mr. Dwyer and a City employee believed that it was.
40. In support of the second aspect of the complaint, the City provided an email from Mr. Dwyer to a City employee on November 29, 2021, forwarding a document received from an insurer, which created the impression that Mr. Dwyer did indeed have such insurance. The next day, after the City employee sought confirmation from the insurer, Mr. Dwyer wrote to the City employee and stated that he was unable to get E & O insurance but was self-insured in that he will redo any mistakes or omissions. When the complaint was made, Mr. Dwyer initially responded that the allegedly false insurance documents were a joke. In further response to the complaint, Mr. Dwyer stated on one occasion that he did in fact have professional liability insurance in December 2021, but on another occasion stated that he did not.

41. In support of the third aspect of the complaint, the City provided a second email chain between Mr. Dwyer and a representative of timber framing company, who in turn forwarded that email chain to the City. In that email chain, the representative of the timber framing company asked Mr. Dwyer to look at a sketch of stairs that the City wanted “engineering on” (i.e. appropriately designed and sealed by an engineer). In a reply email dated November 27, 2021 to the representative and a second person, Mr. Dwyer stated, in part: “My seal is attached for future possible (sic); below the seal would go PTP 1001813, egbc 22264 and the appropriate date”. He attached a copy of his seal and signature. EGBC alleges that this conduct does not comply with the *PGA* or the provisions of Bylaw 7.3.3(6), and EGBC’s *Quality Management Guidelines: Use of Seal* (version 2.0, December 4, 2017), all of which generally prohibit a registrant from allowing another person to apply their seal and signature.
42. In response to this aspect of the complaint, Mr. Dwyer wrote that the stamp and seal were not given to a builder but to a signer/drafter to apply specifically with his permission on the drawings he had approved. (The Panel notes that this limitation is not stated in Mr. Dwyer’s email of November 27, 2021).
43. The investigation raised a third issue, which is that Mr. Dwyer did not fully respond to EGBC’s requests for information or documentation and does not appear to retain project records.
44. EGBC submits that Mr. Dwyer’s practice is outside the standard practice of a professional engineer and that he has contravened the Bylaws 7.3.1, 7.3.2, and 7.3.3 and the Code of Ethics. EGBC also alleges that Mr. Dwyer contravened the Document Retention Guidelines and *Quality Management Guidelines: Use of Seal* Version 2.0 (December 4, 2017).
45. In Mr. Dwyer’s written submissions to the Panel, he again states that he defines self-insurance as fixing mistakes at no cost; E&O (Professional Liability Insurance for Errors and Omissions) insurance is a “conflict of interest” and that he submitted his certificate of insurance a day late. He further states that he was in control of his stamp and that he had no idea who stamped the drawings as he did not hear back (presumably after he provided a copy of his seal and signature) and that the staircase was “designed, fabricated, and installed by a local business that specialized in supplying the product...”
46. Mr. Dwyer is entitled to defend these allegations in a discipline hearing, including providing his evidence as to his intentions in submitting the insurance documents to the City and giving his seal and signature to a third party. For the purposes of a provisional assessment of the facts, the Panel is satisfied that there is a *prima facie* case supporting the allegations.

File T23-013

47. On August 18, 2022, EGBC received a second complaint from the ROWP who submitted the complaint addressed in File T21-006. The complaint alleged that Mr. Dwyer's onsite wastewater system for a property in Balfour was substantially deficient.
48. EGBC engaged an independent expert for review of this complaint, who opined on February 15, 2023 that there was evidence that Mr. Dwyer does not have the training, experience or competence to practice in the field and the complaint should proceed to investigation. On February 23, 2023, the Investigation Committee directed an investigation, to be conducted by EGBC staff. EGBC notified Mr. Dwyer and requested his response and all documentation. After investigation, EGBC staff prepared the investigation report incorporating all information gathered, which was considered by the Investigation Committee on March 30, 2023.
49. The investigation disclosed significant deficiencies, including, for example, that Mr. Dwyer had used the expired Sewerage System Standard Practice Manual, failed to provide site evaluation documentation, provided no site capability analysis, and failed to provide other required design details and rationale, which is contrary to the Sewerage Guidelines and expected standards of practice.
50. Mr. Dwyer responded to this complaint, stating that he believes the expired Sewerage System Standard Practice Manual is identical or more conservative than the current version. Mr. Dwyer repeated this position during oral submissions.
51. The investigation report also states that, while Mr. Dwyer responded to the substance of the complaint, he did not produce the required documentation. EGBC therefore asserts this is a further instance of failure to comply with Bylaw 7.3.2 and the Document Retention Guidelines.
52. EGBC submits that Mr. Dwyer's practice is outside the standard practice of a professional engineer and that he has contravened the Bylaw 7.3.1, Bylaw 7.3.2, and the Code of Ethics. It also alleges that Mr. Dwyer contravened the Document Retention Guidelines and Sewerage Guidelines.
53. Mr. Dwyer's responses and submissions do not address the apparent serious failings in the onsite wastewater system that is the subject of this complaint. The Panel is satisfied there is a *prima facie* case.

Summary regarding a *prima facie* case

54. As set out above, the Panel considered the evidence presented by EGBC and the responses and submissions provided by Mr. Dwyer concerning each of the investigations described above. Having done so, the Panel is satisfied that there is a *prima facie* case that

Mr. Dwyer contravened the Bylaws under the *EGA* and *PGA* and published EGBC Guidelines, and thereby committed professional misconduct, conduct unbecoming or the incompetent performance of duties undertaken as a registrant.

55. In particular, there are three separate cases where Mr. Dwyer's wastewater system fell below a reasonable standard of competence with technical deficiencies in these designs as enumerated by the investigators with respect to each system.
56. On Mr. Dwyer's own evidence, he employed an expired version of the Sewerage System Standard Practice Manual, arguing it was more cost efficient and had been used extensively in the past. This is contrary to the Sewerage Guidelines and Bylaw 7.3.1.
57. In all four cases, Mr. Dwyer has failed to provide documentation, when required to do so by the investigator. Mr. Dwyer agrees that he does not preserve the required project records. This is contrary to the Bylaws under the *EGA* and the *PGA* and to EGBC's Record Retention Guidelines.
58. In File T22-046, Mr. Dwyer gave his seal and signature to two persons by email. While he states that it was for a specific purpose, his email to those persons contains no such limitation, contrary to the provisions of Bylaw 7.3.3.
59. Mr. Dwyer is entitled to lead evidence and defend himself fully in the discipline hearing. However, for the purposes of a provisional assessment of the facts, Mr. Dwyer's explanations do not render any of these complaints manifestly unfounded, exaggerated or unreliable.

D. Is there a Risk to the Public Interest?

60. The Panel is satisfied that there is a real risk to the public if Mr. Dwyer is permitted to continue in practice pending the discipline hearing. There is a risk is that he will design and submit deficient wastewater plans. Owners and health authorities will rely upon such permit applications and deficient plans to their detriment. The deficient designs leads to a risk to the safety, health and welfare of the property owners and public, as well as gives rise to a broader risk to the environment.
61. There is also a risk attendant upon Mr. Dwyer's apparent disregard for the standards set by EGBC. Mr. Dwyer describes great confidence in other professionals and practitioners in the building industry. But the care and skill of others is no substitute for an engineer's professional duties. The Panel is concerned that Mr. Dwyer's willingness to provide his seal and signature to a person who is not a registrant risks significant public harm.

E. Is there Urgency to the matter?

62. The urgency arises in this case from the gravity of the errors in Mr. Dwyer's wastewater systems, the repeated deficiencies, and the costs and consequences of remediating any failures.
63. Mr. Dwyer submitted that he has completed about ten wastewater designs over the last two years. The Panel notes that Mr. Dwyer holds himself out as having expertise in "Wastewater Treatment/Management". Mr. Dwyer advised the Panel that there is high demand for not only this work, but "for every aspect of permitting" (including structural permits) due to the amount of construction. This creates a risk that must be addressed immediately.
64. Mr. Dwyer's persistent disregard for EGBC's Guidelines and Bylaws also gives rise to urgency.
65. *Duerichen* requires that EGBC move expeditiously to seek an interim order following the conclusion of the investigation. The Panel is satisfied that it did so, given that the investigation was concluded March 30, 2023 and notice of these proceedings was provided to Mr. Dwyer.
66. EGBC confirmed that they would proceed in a timely manner with the issuance of a comprehensive Citation with a resolution either by Consent Order or with a discipline hearing.

F. Action Proportionate to the Risk

67. In considering the impact of a suspension upon Mr. Dwyer's practice, the Panel noted his statement that it is his wish to retire. The Panel also notes that a suspension would apply to Mr. Dwyer, but the company of which he is a principal could engage another registrant and continue to operate.
68. The Panel recognizes that the purpose of conditions and restrictions short of suspension is to bring the risk to an acceptable level and not to achieve perfection.
69. The Panel considered whether a restriction preventing Mr. Dwyer from designing wastewater systems or a requirement for supervision would suffice. The Panel is concerned about the practicality of imposing such a requirement. Further, the Panel is concerned that a condition short of suspension would not address the risks attendant upon Mr. Dwyer's continued practice given his failure to adhere to the most basic requirements of documentation and his disregard of the requirements regarding the use of his seal.
70. For these reasons, the Panel is of the view that there would be an unacceptable level of risk to the public if Mr. Dwyer is engaged in practice and he must be immediately suspended.

G. Order

71. As set out above, the Panel therefore ordered on May 18, 2023 that Mr. Dwyer be immediately suspended and not be permitted to engage in the reserved practice of professional engineering in British Columbia until the earlier date that

- a. a Consent Order is made between the Investigation Committee or the Discipline Committee and Mr. Dwyer pursuant to section 73(2) of the *PGA*;
- b. a discipline hearing is held and a final determination is made in this matter pursuant to section 75(5)(a) or 75(6) of the *PGA*; or
- c. the Discipline Committee determines pursuant to section 67(4) of the *PGA* that a suspension is no longer necessary to protect the public.

DATED THIS 29 DAY OF May 2023

<original signed by>

Dr. Ron Yaworsky, PhD, P.Eng., Chair

<original signed by>

Larry Spence, P.Eng., PMP, FEC, FGC (Hon)

<original signed by>

Pierre Gallant, Retired Architect, AIBC