

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

IN THE MATTER OF PETER SCHOBER, P.Eng.

DECISION OF THE DISCIPLINE COMMITTEE

Hearing date: By written submissions

Decision date: September 20, 2021

Discipline Committee Panel: Colin Smith, P.Eng., Chair
Oliver Bonham, P. Geo.
Tom Morrison, P.Eng.

Counsel for the Panel: Susan Precious

Counsel for the Association: Janet Gartner
Victoria Broughton

For Mr. Schober: Andi MacKay
Samantha Arrandale

A. Introduction

1. On January 18, 2021, this Panel of the Discipline Committee (the "Panel") of the Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC found that Mr. Schober demonstrated negligent and unprofessional conduct contrary to the *Engineers and Geoscientists Act*, RSBC 1996 c.116 (repealed) ("EGA") and acted contrary to Principles 1 and 7 of the Association's Code of Ethics ("Conduct Decision"). The Panel ordered that Mr. Schober's membership in the Association (as it was then termed) be cancelled on certain terms.
2. On April 7, 2021, this Panel issued its decision on costs and ordered that Mr. Schober pay reasonable costs of these proceedings ("Costs Decision"). The Panel set a timetable for exchange of submissions regarding the amount of costs payable if the parties could not reach agreement. The parties did not reach an agreement and delivered written submissions.
3. Engineers and Geoscientists BC seeks 80% of its actual costs of \$84,266.11, which amounts to \$67,412.89.

B. Engineers and Geoscientists BC's Arguments

4. Engineers and Geoscientists BC set out a detailed chronology of key events in its submissions which included the following:
 - a. The Notice of Inquiry was delivered on September 19, 2019.
 - b. On November 1, 2019, Engineers and Geoscientists BC delivered a proposed consent order which it submits provided for essentially the same penalty which was ultimately ordered by the Panel: cancellation with conditions imposed prior to re-application including a prohibition on re-applying for 24 months.
 - c. On March 6, 2020, Mr. Schober sent a revised proposed consent order with several changes including removing the admission that he failed to correct the Human Machine Interface, did not admit to any violations of the Code of Ethics, and proposed a 12-month suspension.
 - d. On March 25, 2020, counsel for Mr. Schober indicated that she had instructions to proceed to a hearing.
 - e. On July 6, 2020, Engineers and Geoscientists BC proposed proceeding by way of an agreed statement of facts and documents.
 - f. The parties communicated about draft documents during July and the beginning of August 2020.
 - g. On August 14, 2020, Mr. Schober requested an adjournment of the hearing set for August 17, 2020.
 - h. The hearing was reset for October 21, 2020.
 - i. On September 21, 2020, the parties agreed to settle liability on the basis that Mr. Schober would admit to all of the allegations in the Notice of Inquiry (except paragraph 1(h)) and there would be no need to conduct a full hearing on liability.
 - j. Admissions were signed on October 8, 2020.
 - k. On October 20, 2020, Mr. Schober's counsel indicated that he would consent to the disposition of cancellation.
5. Engineers and Geoscientists BC submits this matter could have easily been resolved by way of a consent order, however, Mr. Schober chose not to take that approach. It notes that section 10.9(5)(b) of the Bylaws of Engineers and Geoscientists BC ("the Bylaws") provide that a Panel may consider evidence that the Respondent previously rejected a consent order proposed by the Investigation Committee or the Discipline Committee. Engineers and Geoscientists BC submits that Mr. Schober rejected a consent order delivered almost a year prior to the hearing which proposed essentially the same penalty that was ultimately ordered by the Panel.
6. Engineers and Geoscientists BC also relies upon section 10.9(2) and (3) of the Bylaws which directs that "recoverable costs" are "all costs incurred" during the investigation and the hearing.
7. As Mr. Schober could not have known at the time he refused the consent order that he could be subject to an order for 100% of Engineers and Geoscientists BC's costs, the organization is only seeking an order for 80% of its actual reasonable costs. It submits

this approach is consistent with decisions of the Discipline Committee which predate the *Professional Governance Act*, SBC 2018, c.47 (the “PGA”) and which awarded reasonable costs in the range of 70 to 90% of actual costs incurred by the Association.

8. Engineers and Geoscientists BC’s total costs, excluding GST, are \$84,266.11. It submitted the Affidavit #1 of Anna Lee (affirmed April 30, 2021) which attaches amongst others, invoices for costs incurred from the material periods. The invoices for Engineers and Geoscientists BC’s legal counsel contain detailed breakdowns of the legal services provided. The entries are broken down by date, professional and rate, and detailed narratives of the tasks are included.
9. Engineers and Geoscientists BC submits that its costs were reasonably incurred to prepare for the hearing. It submits that counsel had to understand the regulatory context in which the hydroelectric project operated, including the documents relating to the background for approval and relevant operational parameters such as drawdown limits and water licence conditions. It had to discern Mr. Schober’s role and responsibility for the project, his communications with government officials and the data submissions. Engineers and Geoscientists BC notes it reviewed almost 10,000 documents provided by the government in response to a Freedom of Information request.
10. Moreover, Engineers and Geoscientists BC prepared its anticipated witnesses to testify at the hearing, and prepared submissions on the matters before the Panel.
11. Engineers and Geoscientists BC submits that Mr. Schober did not request an adjournment until five days prior to the hearing. While the parties were engaged in settlement negotiations, he should have been prepared for the possibility that the matter would proceed to a hearing. In any event, it submits limited time was spent preparing for the adjournment.
12. Engineers and Geoscientists BC submits that Mr. Schober did not admit liability until October 6, 2020 (the admissions were then signed on October 8, 2020), as a result, it was necessary to prepare for a hearing on liability up until two weeks before the second hearing was scheduled.
13. In terms of the legal counsel who acted for Engineers and Geoscientists BC, it is submitted that senior counsel, Andrew Gay, Q.C., transferred the matter to Ms. Gartner on May 11, 2020. He did not charge for his time in May 2020, and after Ms. Gartner took over carriage of the matter, Mr. Gay did not record any billable time except in August 2020. The August 2020 invoice was discounted by writing off \$3000, which represents more than all of Mr. Gay’s time. Ms. Gartner’s hourly rate is lower than Mr. Gay’s hourly rate. Engineers and Geoscientists BC submits there were no unreasonable fees or costs in having both Mr. Gay and Ms. Gartner involved in this matter.

C. Mr. Schober's Arguments

14. Mr. Schober submits that he cannot meaningfully challenge Engineers and Geoscientists BC's position on costs without production of its entire file and the opportunity to examine Ms. Gartner on the invoices and the file. Mr. Schober seeks orders that:
 - a. Engineers and Geoscientists BC produce its file in its entirety by a date determined by the Panel; and
 - b. Ms. Gartner attend at an examination before a court reporter, in the absence of the Panel, on a date reasonably agreed upon by both parties' counsel after production of the file in (a).
15. Mr. Schober states that within 14 days of receipt of the transcript from Ms. Gartner's examination, he will provide the Panel with his substantive position on costs.
16. Mr. Schober also submits the chronology of events is important to the costs analysis. He notes that the first complaint was received on or around November 26, 2014, and that Mr. Schober admitted to the actions underlying the allegations on February 6, 2015. Mr. Schober submits that it was not until February 14, 2019, that Mr. Schober received initial disclosure from Engineers and Geoscientists BC.
17. Mr. Schober submits that the resolution discussions in 2019 and 2020 were not successful because of the manner in which the Engineers and Geoscientists BC sought to characterize him.
18. Mr. Schober submits that Engineers and Geoscientists BC's position opposing the Mr. Schober's adjournment request was unreasonable. He notes that the Panel granted the adjournment he requested.
19. Mr. Schober submits that Engineers and Geoscientists BC's positions drew out the process and produced work product that required significant modification by Mr. Schober's legal counsel. He argues that the book of documents was "disjointed, duplicative, included dozens of documents behind poorly described tabs and required hours of work by Mr. Schober's counsel to get into proper form."
20. Mr. Schober notes that while the admissions were finalized on October 6, 2020, he had indicated by September 21, 2021, that he agreed to proceed by way of admissions, an agreement statement of acts and a joint book of documents.
21. Mr. Schober submits that Engineers and Geoscientists BC sought to take a position on costs which was deemed to be unworkable in *Chrysanthous*. In its January 18, 2021, decision, the Panel indicated that it wanted to hear full arguments from the parties as to their position on costs. Mr. Schober submits that on February 5, 2021, Engineers

and Geoscientists BC then provided written submissions to the Panel seeking exactly the same order it had sought at the October 20-21, 2020 hearing. It did not provide any evidence supporting its claim for costs despite its earlier assertion that it would.

22. In a decision dated April 7, 2021, the Panel directed that Mr. Schober pay the reasonable costs of the proceedings, the amount of which was to be determined by agreement of the parties or by further submissions. Mr. Schober submits that there is no evidence from the Engineers and Geoscientists BC's lawyers working on the file to establish the reasonableness of the costs claimed.
23. Mr. Schober relies upon *Gichuru v Smith*, 2014 BCCA 414 for the principle that assessing costs on a summary basis without sufficient evidence of the objective reasonableness of a fee is an error in principle contrary to natural justice. Mr. Schober submits that because he does not consent to the summary assessment of costs, he is entitled to a meaningful opportunity to challenge the costs sought by Engineers and Geoscientists BC. He submits that includes disclosure of Engineers and Geoscientists BC's file and examination of its legal counsel. The fact that a certain amount was billed does not in and of itself make that amount reasonable.
24. Mr. Schober submits that the Association has put forth an amount in costs that is the second highest cost award reported on Engineers and Geoscientists BC's website. He submits it is not defendable in the circumstances. He identified in particular the following concerns:
 - a. Engineers and Geoscientists BC's failure to explore settlement before conducting a lengthy investigation;
 - b. Ms. Gartner and Ms. Broughton have both charged for their time in getting Ms. Gartner up to speed on the matter;
 - c. Incurring significant and unreasonable costs for continued hearing preparation in the weeks leading up to the initial hearing dates despite the parties being engaged in intensive and meaningful resolution discussions;
 - d. Engineers and Geoscientists BC took an unreasonable position in opposing the adjournment;
 - e. Engineers and Geoscientists BC took an unreasonable position in seeking the costs order it did at the October 20-21, 2020 hearing;
 - f. Engineers and Geoscientists BC took an unreasonable position in resolution discussions;
 - g. Engineers and Geoscientists BC spent an unreasonable amount of time and incurred significant and unreasonable costs with respect to the joint book of documents
 - h. Engineers and Geoscientists BC has provided no support for the disbursements claimed.

D. Engineers and Geoscientists BC's Reply

25. Engineers and Geoscientists BC argues in reply that Mr. Schober's position is beyond the jurisdiction of the Panel, unnecessary and overbroad.
26. It submits that the EGA contained a process for costs to be assessed by a registrar of the British Columbia Supreme Court. In enacting the PGA, the legislature chose not to include a registrar's process in the cost provisions for a detailed hearing to assess costs. Aside from the restriction that costs assessed must not exceed actual costs incurred (section 81(2) of the PGA), the assessment of costs is largely left to the regulator by way of bylaw making powers. Engineers and Geoscientists BC submits that the legislature's decision not to include a registrar's process, or similar, means the legislature intended the matter of costs to be a summary process. The bylaws require an order in writing, which Engineers and Geoscientists submits, indicates that a hearing on costs is not contemplated. Moreover, the Bylaws set out which costs are recoverable. Read together, this regime contemplates a streamlined approach to costs which does not include the involved, drawn-out process sought by Mr. Schober. Engineers and Geoscientists BC submits that Mr. Schober is proposing a full trial on the matter of costs, which is not a process available under the relevant legislation.
27. Engineers and Geoscientists BC likewise submits Mr. Schober has not identified the jurisdiction to cross-examine legal counsel before a court reporter. Cross-examination of counsel is considered to be an extraordinary measure. No foundation has been advanced in support of that request. In addition, there is no process for cross-examination of witnesses outside of a hearing before the Panel.
28. Engineers and Geoscientists BC submits that Mr. Schober has provided no notice of the number of hours his counsel devoted to settlement discussions which precluded them from properly preparing for a hearing. Mr. Gay's total time in August 2020 was 6.2 hours, totaling \$2108, and a discount of \$3000 was applied.
29. Engineers and Geoscientists BC submits that there were no substantial changes to the document index as alleged. Rather, it submits the track changes show the index was a working document used by both parties. Further, it submits that the work associated with the major change requested by Mr. Schober was undertaken by counsel for Engineers and Geoscientists BC.
30. Engineers and Geoscientists BC submits that Mr. Schober has raised an issue with the work product he received and steps or positions taken by Engineers and Geoscientists BC. He has not established why recourse to its file is necessary to dispute the reasonableness of those fees when he is already in possession of the work product and is aware of the positions and steps taken. It submits that the issues Mr. Schober raises can be addressed on the basis of the evidence already before the Panel. Engineers and Geoscientists BC submits that Mr. Schober is in possession of the invoices and time entries, and it was open to him to argue which of those were unreasonable. He is able to meaningfully challenge the fees incurred on the basis of

what has been produced, but instead has only made broad statements about unreasonable positions taken.

31. Engineers and Geoscientists BC provided further affidavit evidence attaching the information for the disbursements.
32. In relation to the adjournment application, Engineers and Geoscientists BC acknowledges it was unsuccessful. It notes that taking the amounts billed on August 14, 2020, and half from the day before would result in a reduction of \$3,248.
33. Engineers and Geoscientists BC points out the Court of Appeal in *Gichuru* referenced the need to balance competing concerns: “A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.” It submits that the concerns about a microscopic review are present in this case.

E. Analysis

34. The Panel previously determined that the PGA governs with the issues of costs in this case. Section 81 of the PGA provides:

Costs

- 81 (1) A discipline committee or panel, in the context of a discipline hearing under section 75, may require the respondent to pay the costs of one or both of the following:
 - (a) an investigation;
 - (b) the hearing under section 75.
- (2) Costs assessed under subsection (1)
 - (a) must not exceed the actual costs incurred by the regulatory body during the course of the investigation and hearing, and
 - (b) may include the salary costs for employees or officers engaged in the investigation and hearing.
- (3) The council may make bylaws governing the assessment of costs under subsection (1), including the following:
 - (a) the factors to be considered in assessing costs;
 - (b) the maximum amount of costs that may be assessed within the limits set out in subsection (2);
 - (c) the time allowed for payment of costs;
 - (d) the extension of time for payment of costs.
- (4) The amount of costs assessed against a respondent under subsection (1) may be

recovered as a debt owing to a regulatory body and, when collected, that amount is the property of the regulatory body.

35. The Bylaws provide:

10.9 Assessment of Costs After a Discipline Hearing

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

(2) For the purpose of calculating costs with respect to an investigation, recoverable costs are all costs incurred from the time the investigation is authorized pursuant to section 66(1)(a) of the PGA [Investigations] until the time that a citation is issued pursuant to section 66(1)(d) of the PGA [Investigations] or 72(3) of the PGA [Reprimand or remedial action by consent].

(3) For the purpose of calculating costs with respect to a discipline hearing, recoverable costs are all costs incurred from the time that the citation is issued pursuant to section 66(1)(d) of the PGA [Investigations] or 72(3) of the PGA [Reprimand or remedial action by consent] until the conclusion of a hearing regarding the amount of costs to be assessed pursuant to section 81 of the PGA [Costs].

(4) For the purposes of subsections (2) and (3), recoverable costs must include

(a) salary costs for employees or officers engaged in the investigation and the discipline hearing, and

(b) the actual costs incurred by EGBC during the course of the investigation and the discipline hearing, including any motions, applications or pre-hearing conferences, or any other applications associated with a discipline matter, which may include some or all of the following:

- (i) costs incurred to retain contractors who are engaged in the investigation and the discipline hearing, including contractors who are appointed as officers;
- (ii) expenses incurred by persons appointed as Inspectors for EGBC pursuant to section 68 of the PGA [Inspectors];
- (iii) fees charged and expenses incurred by legal counsel retained by EGBC;
- (iv) fees charged and expenses incurred by expert witnesses retained by EGBC or EGBC's legal counsel;
- (v) expenses incurred by witnesses called to testify by EGBC;
- (vi) the cost of recording interviews, pre-hearing conferences, and hearings;
- (vii) the cost of a court reporter for interviews, pre-hearing conferences, and hearings;
- (viii) the cost of preparing a transcript of interviews, pre-hearing conferences, and hearings;
- (ix) the cost of a translator for interviews, pre-hearing conferences, and hearings;
- (x) costs incurred to rent facilities at which interviews, pre-hearing conferences, and hearings are held;
- (xi) costs incurred to conduct interviews, pre-hearing conferences, and hearings, whether conducted in person, by Electronic Means, in writing or by any combination thereof;
- (xii) any other reasonable costs, fees, or expenses paid or payable by EGBC as a result of the investigation or the hearing pursuant to section 75 of the PGA [Discipline hearings].

(5) In determining the costs to require the Respondent to pay, the Discipline Hearing Panel

- (a) must consider whether EGBC did not prove all the allegations made against the Respondent set out in the citation to the requisite standard, and if so, the seriousness of the allegations which were not proven relative to those which were proven, and
- (b) may consider evidence that the Respondent previously rejected
 - (i) an undertaking or a consent requested by the Investigation Committee or the Discipline Committee, as applicable, pursuant to section 72(1) of the PGA [Reprimand or remedial action by consent], or
 - (ii) a consent order proposed by the Investigation Committee or the Discipline Committee, as applicable, pursuant to section 73(1) of the PGA [Consent orders].

10.10 Payment of Costs

(1) A Respondent must pay the full amount of any costs imposed on the Respondent pursuant to section 10.9 of the Bylaws within 30 days of the date of the order for costs, unless an extension for payment of costs is obtained pursuant to section 10.10.1(1).

10.10.1 Extension of Time for Payment of Costs

(1) Upon receipt of a written request from a Respondent stating that the Respondent will suffer financial hardship if the Respondent is required to pay costs within 30 days of the date of the order for costs, the Registrant must be granted a one-time, 30-day extension for payment of costs imposed on the Respondent pursuant to section 10.9 of Bylaws.

36. The orders that Mr. Schober seeks with respect to production of Engineers and Geoscientists BC's file and cross-examination of one of its legal counsel are extraordinary requests.
37. Mr. Schober has not set out the jurisdiction for the orders he is seeking.
38. There is no express provision in the PGA or in the Bylaws which provides the Panel with the authority to make the orders which Mr. Schober is seeking.
39. The *Gichuru* decision, relied upon by Mr. Schober, arises in the context of an entirely different costs regime. Mr. Schober has not provided the Panel with a decision of this tribunal, or any other administrative tribunal in the province, which has adopted that approach.
40. In any event, the Panel agrees with the submissions from the Engineers and Geoscientists BC that to make the requested orders in this case would be to permit a "microscopic review" of costs in something akin to a mini-trial. That would be incompatible with the costs regime provided in the PGA which contemplates a summary assessment of costs.
41. The Panel also considers that Mr. Schober has not laid a sufficient foundation for either of his requests. There has already been substantial production of costs documentation. The parties have adduced four affidavits attaching hundreds of pages of costs

documents. Three of those affidavits are from Engineers and Geoscientists BC. All of the invoices and disbursements from the material period have been disclosed. As noted above, the invoices contain detailed narrative entries and are broken down by date, by professional and by rate. Mr. Schober could have argued that any of the specific entries for a particular position were excessive, were duplicative or were unreasonable in some other manner based upon the information which has been disclosed. Mr. Schober has not demonstrated how production of the file or cross-examination of legal counsel is necessary to establish that any of the costs incurred were not reasonable for the reasons which he did set out in his submissions.

42. Engineers and Geoscientists BC's request for costs is for an amount that does not exceed the actual costs incurred during the course of the investigation and hearing. Engineers and Geoscientists BC has chosen not to seek costs associated with the investigation or for post-hearing processes relating to costs.
43. The Panel is satisfied that those costs are reasonable. This matter was complex in terms of the regulatory framework, the number of anticipated witnesses, and of note, the significant volume of documents that required review and analysis.
44. The Panel does not consider that Engineers and Geoscientists BC's document preparation was unreasonable. The communications between both parties' legal counsel indicates they were cooperating on production of a joint document which involved reasonable dialogue and positions about what to include and exclude.
45. With respect to settlement, Engineers and Geoscientists BC initiated settlement discussions within two months of issuing the Notice of Inquiry and delivered a proposed consent order. Mr. Schober delivered a revised proposed consent order. Engineers and Geoscientists BC invited Mr. Schober to explain the significant changes, which included the removal of key admissions. On March 25, 2020, Mr. Schober's legal counsel indicated that she had instructions to proceed to a hearing. Engineers and Geoscientists BC's proposed consent order sought substantially the same outcome as was ultimately achieved.
46. While the Panel does recognize that Mr. Schober acknowledged misconduct on February 6, 2015, the Panel also noted in the Conduct Decision that this must be viewed in context of the other surrounding events:
 33. The Panel agrees that Mr. Schober's letter to the Association dated February 6, 2015 represents an acknowledgment of his misconduct, which came well before his October 8, 2020 admission. The Panel also considers that this acknowledgement must be viewed in context of the other aspects of the timeline pointed out by the Association. It was not until Mr. Schober was questioned under oath in 2013 that he admitted to having manipulated the data recording device in February 2010, and submitted falsified data for a period of 1.5 years thereafter.
47. It was reasonable for Engineers and Geoscientists BC to continue to prepare for the discipline hearing while also exploring settlement, in the absence of the matter having formally settled. The Panel does not consider Mr. Gay's role in engaging in settlement

discussions, while Mr. Gartner and Ms. Broughton prepared for the hearing, to have been unreasonable. Both parties had two lawyers present at the discipline hearing. Mr. Gay's time incurred on the file at that point was minimal, and he discounted more than the equivalent of all of his time incurred during that period. Accordingly, the actual costs of \$84,266.11 identified by Engineers and Geoscientists BC have already embedded a discount of \$3000, representing more than Mr. Gay's total time in August 2020.

48. The Panel agrees with Mr. Schober's submission that he was successful in his adjournment application on August 14, 2020, and that Engineers and Geoscientists BC opposed that application. The Panel accordingly reduces the costs by \$3,333 (representing Engineers and Geoscientists BC's time on August 14, 2020 and half of its time on August 13, 2020). This figure is based upon the amounts set out in the Affidavit of Anna Lee (affirmed April 30, 2021) and is slightly higher than the figure cited in Engineers and Geoscientists BC's submissions.
49. The Panel has considered Mr. Schober's argument that Engineers and Geoscientists BC took an unreasonable costs position and one which was found to be unworkable in *Chrysanthous*. The Panel refers to the Cost Decision which addresses this issue in more detail. The Panel will not repeat its reasoning here other than to note that the Panel agreed in some respects with Mr. Schober on the approach for assessment of costs in this case. Nevertheless, Engineers and Geoscientists of BC is not seeking to recover any legal fees and disbursements related to the submissions on costs incurred after the main hearing and has not claimed for such costs after October 21, 2020. As such, the Panel does not consider any further reduction to be necessary.
50. For the reasons previously outlined in its Costs Decision, and given the past decisions of this Discipline Committee, considering the seriousness of the matter, and that Engineers and Geoscientists BC was successful in this matter, as well Mr. Schober's admissions on liability and penalty, the Panel considers that 75% is an appropriate amount of the Engineers and Geoscientists BC's actual costs to award.
51. Accordingly, the Panel assesses costs in the amount of \$60,699.83, representing 75% the Engineers and Geoscientists BC's actual costs of \$84,266.11 minus \$3333.

F. Order

52. The Panel orders that:

- a. Mr. Schober pay to Engineers and Geoscientists BC costs of \$60,699.93 within 30 days from the date of this order and in accordance with section 10.10 of the Bylaws.

<original signed by>

Colin Smith, P.Eng.

<original signed by>

Oliver Bonham, P.Geo

<original signed by>

Tom Morrison, P.Eng.