

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

IN THE MATTER OF ROBERT UNGER, P.Eng.

**DECISION OF THE DISCIPLINE COMMITTEE**

Hearing date: By written submissions

Discipline Committee Panel: Christopher Arthur, P.Eng., Chair  
Neil Cumming, P.Eng.  
Jurgen Franke, P.Eng.

Counsel for the Association: Lindsay Waddell  
Sara Hanson

For the Member Robert Unger appearing on his  
own behalf

**A. Introduction**

1. On April 28, 2020, this Panel of Discipline Committee (the "Panel") of the Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC (the "Association") found that Robert Unger, P.Eng. breached section 44 of the *Engineers and Geoscientists Act*, RSBC 1996 c 116 (the "Act") by failing to provide the Practice Review Committee with a Practice Review Questionnaire requested by the Association's Director of Professional Practice and failing to provide a substantive response to correspondence that followed up on the original request (the "Determination").
2. In its Determination, the Panel requested written submissions on the appropriate penalty and whether costs should be imposed. The Panel received written submissions on penalty and costs from the Association and Mr. Unger.
3. In the present case, the Association seeks an order that:
  - a. Mr. Unger pay to the Association a fine of \$10,000 no later than 30 days from the date of the Panel's decision on penalty;

- b. Mr. Unger pay to the Association costs of \$16,454.50 (an amount equivalent to 90% of its investigation and legal costs) within three months from the date of the Panel's decision on penalty; and
  - c. If Mr. Unger's membership with the Association is reinstated in the future, he must complete the Practice Review Questionnaire within 30 days of his membership being reinstated.
4. Mr. Unger submits that he should pay a fine of \$1500 or be pardoned altogether and subject to no sanctions.

**B. Legal Framework for Penalty and Costs**

5. Having made a determination under section 33(1) of the Act that Mr. Unger contravened the Act, the Panel may impose the following penalties:

33 (2) If the discipline committee makes a determination under subsection (1), it may, by order, do one or more of the following:

- (a) reprimand the member, licensee or certificate holder;
- (b) impose conditions on the membership, licence or certificate of authorization of the member, licensee or certificate holder;
- (c) suspend or cancel the membership, licence 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.

6. Section 35(1) of the Act permits the Panel to direct the payment of reasonable costs as follows:

35 (1) If the discipline committee makes a determination under section 33 (1), the discipline committee may 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 by the person, and the costs may be determined by the committee.

7. The relevant factors to consider in determining an appropriate penalty are set out in *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17:
- a. the nature and gravity of the conduct proven;
  - b. the age and experience of the respondent;
  - c. the previous character of the respondent, including details of prior discipline;
  - d. the impact upon the victim;
  - e. the advantage gained, or to be gained, by the respondent;

- f. the number of times the offending conduct occurred;
- g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong, and the presence or absence of other mitigating circumstance;
- h. the possibility of remediating or rehabilitating the respondent;
- i. the impact on the respondent of criminal or other sanctions or penalties;
- j. the impact of the proposed penalty on the respondent;
- 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.

[the "Ogilvie Factors"]

8. The more recent decision of *Law Society of BC v. Dent*, 2016 LSBC 05, held that it is not necessary to consider each *Ogilvie* factor in every case, and that the factors can be consolidated. In *Dent*, the following consolidated list was suggested:
  - a. Nature, gravity and consequences of conduct;
  - b. Character and professional conduct record of the respondent;
  - c. Acknowledgement of the misconduct and remedial action; and
  - d. Public confidence in the legal profession including public confidence in the disciplinary process.
9. The Association submits that the *Ogilvie/Dent* factors are appropriate to decide penalty in this case. The Association notes that this approach has been followed by other discipline panels of the Association including in *Re Halarewicz* (18 January 2018).
10. Mr. Unger did not make submissions regarding the legal framework.
11. The Panel agrees that the *Ogilvie / Dent* factors are the appropriate factors to consider in this case.

## C. Analysis

### Penalty

#### Nature, gravity, and consequences of the conduct

12. The Association says that Mr. Unger's conduct is serious. He refused to respond to the Association's correspondence requesting he provide the Practice Review Questionnaire or confirm whether he was a practicing engineer, and failed to respond to numerous follow up communications. The Association submits that he did so in order to obtain a hearing so that he could air a decades-old grievance on an unrelated matter. The Association says that in doing so, Mr. Unger wasted the Association's time and financial resources.
13. Mr. Unger agreed that not responding to the Association is a serious matter. He says that he struggled deeply with that decision but still believed he was meeting all of his professional obligations. In his view, he was raising a more important issue. Mr. Unger stated he was no longer practicing engineering and believed there was no risk to the public in his actions. Mr. Unger claims there is no victim, he did not benefit, and there were no consequences to his conduct.
14. The Panel finds Mr. Unger's conduct to be serious. The cooperation of the Association's members in its processes is fundamental. In failing to provide the completed Practice Review Questionnaire and to respond to the Association's subsequent communications, Mr. Unger impeded the Association's statutory obligation to regulate the profession and caused the disciplinary process to be invoked. The Panel agrees that the fact that Mr. Unger did so deliberately with the aim of attending a hearing to discuss an unrelated matter renders the conduct more serious. This factor favours a more serious penalty.

#### Character and Professional Conduct of the Member

15. The Association submits that Mr. Unger's position and experience at the time of the conduct militate in favour of a more substantial penalty. Having worked in engineering for 33 years, he should have been well aware of his professional obligations given his experience.
16. The Association acknowledges Mr. Unger's lack of prior disciplinary record with the Association is a relevant factor that militates in favour of a less substantial penalty. However, the Association submits that that is outweighed by the seriousness of Mr. Unger's conduct in intentionally refusing to respond to the Association's repeated requests for information so that he could have a hearing to make a statement regarding a past unrelated grievance.
17. Mr. Unger submits that he has been a member in good standing since 1982 and has never been subject to any disciplinary action in the 38 years he has been a member.

He takes great issue with the Association's position that his clean record does not militate in favour of a lesser penalty.

18. The Panel recognizes that Mr. Unger has an unblemished disciplinary history with the Association. He had been a member for 33 years and has no prior action or complaints against him. Nevertheless, Mr. Unger's experience and professional record meant he should have been aware of his professional obligations and the consequences of failing to adhere to those obligations. Mr. Unger's admission that his failure to respond to the Association was deliberate and designed to force a hearing in order for him to make a statement regarding an unrelated matter outweighs his prior history. This factor weighs in favour of a more serious penalty.

#### Acknowledgement of the Misconduct and Remedial Action

19. The Association submits that Mr. Unger admitted the conduct set out in the Notice of Inquiry. He apologized for his lack of response and if he was ever discourteous to anyone from the Association. The Association submits that this would normally militate towards a less serious penalty however the Association submits it is outweighed by Mr. Unger's admission that he intentionally refused to respond to the requests so that he could have a hearing regarding the unrelated grievance from many years ago. In the unique circumstances of this case, the Association submits that Mr. Unger's admission militates strongly in favour of a more substantial penalty.
20. Mr. Unger has admitted to his failure to the conduct at issue and apologized to the Association. He has resigned. He submits that there will be no recurrence of the conduct and remedial and rehabilitative action is unnecessary in the circumstances.
21. The Panel recognizes that Mr. Unger admitted all of the conduct at issue in the Notice of Inquiry and apologized for his action. Having done so, is in Mr. Unger's favour. However, the Panel finds that Mr. Unger has no regret about his behaviour. This factor favours a more serious penalty.

#### Public Confidence in the Profession and Deterrence

22. The Association submits that there is a need for both specific and general deterrence. The Association submits that while Mr. Unger has now resigned his membership from the Association, there is nothing in his evidence or conduct to suggest that he would be more cooperative with the Association's requests for information if he were to have his membership reinstated in future.
23. With respect to general deterrence, the Association submits that it is essential to maintaining public confidence in the integrity of the engineering profession that members are held to account for failing to cooperate with requests for information from the Practice Review Committee. Leading members to believe that they can ignore the process without consequence would inhibit the Association's duty to uphold and protect the public interest respect the practice of professional engineering and professional

geoscience. The Association submits the need for deterrence militates in favour of a substantial penalty.

24. The Association relies upon the following cases:
  - a. *Re Phillips*: the member agreed to having breached section 44 of the Act. He agreed to provide the requested information within 30 days and to pay costs of \$1,500;
  - b. *Re Ho*: the member failed to provide information in the course of a practice review. He agreed to a reprimand and to provide the requested information. After finding that the member did not meet the terms of the consent order, the Panel ordered his membership suspended for 12 months.
  - c. *Re Johnson*: the member failed to provide information and documents as part of a practice review. He agreed to provide the requested information and pay a fine of \$5000.
25. The Association submits that the unique facts of this case, in which Mr. Unger consciously chose to ignore the requests in order to serve his own desire for a hearing in relation to an unrelated matter justify a more substantial penalty. The Association also notes that Phillips and Johnson involved consent orders.
26. Mr. Unger agrees that the facts are unique but submits that he was a whistle blower. He says he acted based upon a pledge to communicate his experience to the Association and to hold it accountable for failing to act in relation to his previous grievance. He submits that he acted not out of self-interest but in the public interest.
27. The Association submits a \$10,000 fine is justified in the circumstances. While he has resigned, the Association also seeks an order that Mr. Unger be required to complete the requested Practice Review Questionnaire within 30 days if his membership is reinstated in future.
28. Mr. Unger points out that the cases cited by the Association had lesser penalties than what the Association seeks in this case. He submits that a penalty of \$1500 is appropriate and the need to complete the Practice Review Questionnaire is unnecessary given that he has resigned.
29. In addition to the submissions noted above, Mr. Unger also argues that the following circumstances are relevant:
  - a. Mr. Unger also notes that any financial penalties will cause him financial hardship. His income has declined significantly after his employment was terminated and he has been on reduced fee status with the Association since. He currently receives a modest pension.

- b. He suffers from [REDACTED] [REDACTED] [REDACTED] As noted in the Panel's Determination, the Association's letter [REDACTED]
- c. Mr. Unger was not practicing engineering, not due to a lack of desire to do so, but due to lack of opportunities. He says he would have gladly practiced if he had the opportunity.
- d. None of the facts have ever been disputed by Mr. Unger. He claims the investigation and hearing costs were therefore unnecessary. He claims he should have been permitted to attend the Investigation Committee's meeting.
- e. In response to the suggestion that Mr. Unger was wasting the Association's time, he says that it was the Association who initiated the inquiry hearing.
- f. Mr. Unger submits that the Association failed to respond to a settlement offer which would have obviated the need for a hearing.

30. In reply, the Association says that:

- a. It was not aware that Mr. Unger suffered from [REDACTED] and he presented no medical evidence at the hearing in support of that point. The Association submits that it is irrelevant in any event.
- b. The Association says that the reasons Mr. Unger was not working are irrelevant to his failure to have informed the Association of that fact.
- c. The Association says nothing in the Act required that his attendance before the Investigation Committee be allowed in this case.
- d. The Association submits that the Panel should disregard Mr. Unger's submissions relating to settlement discussions as they were without prejudice. The Association denies that it did not respond in any event.
- e. The Association submits that Mr. Unger provided no evidence of his inability to pay penalty and costs amounts.
- f. The Association notes that the fact that Mr. Unger is a former member does not mean he is not subject to a penalty. The relevant provisions of the Act define "member" to include "former member".
- g. The Association agrees that the hearing need not have taken place, though for different reasons. The Association submits that had Mr. Unger responded to the Association's requests, the hearing could have been avoided.

31. The Panel finds there is likely little to no need for specific deterrence in this case. The Panel finds it unlikely that he would repeat his conduct at issue.
32. The Panel finds there is a need for general deterrence in this case. The Panel agrees that it is important that other members of the profession are made aware that they cannot ignore the Association's processes, requests for information and communications, or manipulate them for ulterior purposes. It is equally important that public confidence in the integrity of the engineering profession is maintained and that the public is aware that members are held to account for failing to cooperate with requests for information from the Practice Review Committee. This factor weighs in favour of a more serious penalty.
33. The Panel has considered the cases cited by the Association and both of the parties' submissions on the significance of those cases. The Panel notes that two of the penalty cases relied upon by the Association were consent orders, which meant that unlike here, the need for a hearing was obviated in those instances. There is no evidence in any of those cases that the member deliberately breached the Act in order to convene an inquiry hearing for ulterior and unrelated purposes. The Panel views the unique features of this case as being more serious than in *Re Phillips, Ho and Johnson*.
34. The Panel finds that the requested fine of \$10,000 is too high and not supported by the caselaw provided. Instead, weighing all of the factors which all support a more serious penalty, the Panel has decided to order a fine of \$5000 which is at the high end of the cases relied upon by the Association.
35. The Panel has considered Mr. Unger's submissions on mitigating circumstances. There is insufficient evidence in support of those mitigating circumstances. Moreover, the Panel does not consider that those warrant any decrease in the fine in this case in any event.
36. The Panel also orders that in the event Mr. Unger is reinstated, he must complete the Practice Review Questionnaire within 30 days of his membership being reinstated.

#### Costs

37. In terms of costs, the Association incurred \$18,282.74 in costs and disbursements, consisting of:
  - a. Legal fees and disbursements of \$17,828.67
  - b. Investigation and hearing costs \$454.07
38. The Association advises that in previous cases, panels have awarded 70-90% of actual costs incurred. In this case, the Association seeks 90% of the actual costs in the amount of \$16,454.50.



39. Mr. Unger submits that the inquiry hearing did not need to have taken place. He submits that he should not have to pay any costs. In addition, Mr. Unger notes that the costs in the Syed matter were less though he submits that matter was more complicated.
40. Mr. Unger requests that he be pardoned, and no further penalty be imposed.
41. The Panel finds the Association's costs and disbursements to be reasonable, given that a hearing was held. The Panel accepts that the awards have ranged between 70 to 90% of actual costs incurred, however, the Panel considers that with better communication on the part of both parties, the hearing may have been avoided. In this instance, the Panel orders Mr. Unger pay 60% of the Association's costs.

Order

42. The Panel orders that:
  - a. Mr. Unger pay to the Association a fine of \$5,000 no later than 30 days from the date of the Panel's decision on penalty;
  - b. Mr. Unger pay to the Association costs of \$10,969.64 (an amount equivalent to 60% of its investigation and legal costs) within three months from the date of the Panel's decision on penalty; and
  - c. If Mr. Unger's membership with the Association is reinstated in the future, he must complete the Practice Review Questionnaire within 30 days of his membership being reinstated.

Dated: June 18, 2020

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Christopher Arthur, P.Eng., Chair

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Neil Cumming, P.Eng.

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Jurgen Franke, P.Eng.