

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

**AND:**

**IN THE MATTER OF  
MOHAMED MUSSA SWALEHE, P.ENG**

**EGBC File No. T20-012**

Date of Hearing: December 1, 2021

Panel: John Wilson, Chair,  
Roz Nielsen, P.Eng.  
Jaswinder Bansal, P.Eng.

Counsel for Engineers  
and Geoscientists BC: Sara Hanson

Counsel for the Respondent: The Respondent was not represented and did not attend

**DECISION OF THE DISCIPLINE COMMITTEE**

1. In a decision issued October 28, 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 (“Engineers and Geoscientists BC” or “EGBC”) found that Mohamed Mussa Swalehe, P.Eng. (the “Respondent” or “Mr. Swalehe”) contravened sections 30(4)(a) and (b) of the *Engineers and Geoscientists Act* (the “*EGA*”) by failing to provide the EGBC Investigation Committee with information and records requested in the course of an investigation.

2. The Respondent did not attend the hearing on September 28, 2021. EGBC presented evidence that satisfied the Panel that the citation and notice of the hearing date had been provided to the Respondent. The Panel therefore directed that the hearing proceed in the absence of the Respondent, pursuant to s.78 of the *Professional Governance Act*, S.B.C. 2018, c.47 (the “*PGA*”). Nonetheless, the Respondent was provided with notice that the continuation of the hearing, concerning penalty and costs, was set for December 1, 2021.

3. On November 26, 2021, the zoom link for the continuation of the hearing was sent to the parties by email by counsel for the Panel. The Respondent then sent an email requesting an adjournment of the hearing. The Respondent's email was sent from one of the addresses to which EGBC has been directing communications for the Respondent since the beginning of these proceedings. The Respondent advised that the basis for his request for an adjournment was that he was awaiting documents from EGBC.

4. EGBC opposed the adjournment on the basis that the documents sought by the Respondent related to the complaint giving rise to EGBC's investigation and not the present hearing. That is, the present hearing concerns the Respondent's failure to respond to the investigation and not the substance of the underlying complaint.

5. On November 28, 2021, through its counsel, the Panel advised the parties by email that the Panel rejected the request for an adjournment at that time, but that the Respondent could attend the hearing on Wednesday December 1, 2021, and further pursue this request, if he wished to do so.

6. The Respondent did not attend the hearing on December 1, 2021. The hearing was conducted in his absence.

7. As set out more fully below, the Panel orders that the Respondent's registration with Engineers and Geoscientists BC be suspended until he has provided the Investigation Committee with the requested information, passed the Professional Practice Examination, and paid a fine of \$5,000 and costs of \$19,125.78.

### **Legislative Framework**

8. The *EGA* was repealed on February 5, 2021, and replaced with the *PGA*.

9. Section 35(1)(d) of the *Interpretation Act* [RSBC 1996] c.238 provides that, where legislation is repealed, "the repeal does not... (d) subject to section 36(1)(d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it".

10. Section 36(1)(d) of the *Interpretation Act* provides that if the new enactment reduces the penalty then the new penalty must be applied. In the present case, the *PGA* provides for higher fines than did the *EGA*. Accordingly, the penalty framework under "old" enactment, the *EGA*, remains applicable to the present case.

11. Section 33(2) of the *EGA* set out the available penalties as follows:

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.
12. Costs are treated differently. Costs are treated as procedural in nature and subject to assessment under the regime in place at the time of the assessment (*Association of Professional Engineers and Geoscientists v. Mah*, 1995 CanLII 829 (BCCA), para. 36-37; *Re Peter Schober, P.Eng.* (April 7, 2021), para. 17). Therefore, the assessment of costs is to be conducted under the provisions of the *PGA*.

### **Principles regarding the Imposition of Penalty**

13. EGBC counsel referred to *Law Society of British Columbia v. Ogilvie*, [1999] LSBC 17 (para. 10), where a Law Society discipline panel set out a list of factors to be considered when deciding upon a penalty, and to *Law Society of British Columbia v. Dent*, 2016 LSBC 5, where a discipline panel suggested a “consolidation” of the *Ogilvie* factors, as follows:

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

[20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

#### **Character and professional conduct record of the respondent**

[21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

#### **Acknowledgement of the misconduct and remedial action**

[22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

**Public confidence in the legal profession including public confidence in the disciplinary process**

[23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

14. The discipline panel in *Dent* also noted that the weight given to each factor is to be tailored to the case in question.

15. *Ogilvie* and *Dent* have been widely approved and applied in discipline proceedings, including by EGBC (see, for example, *Re Edward Nunn, P.Eng.* (April 21, 2021)). The factors set out in those cases are considered by the Panel in this case.

**Penalty**

16. EGBC submits that the appropriate penalty is that the Respondent's registration with Engineers and Geoscientists BC be immediately suspended until he has fulfilled all of the following conditions:

- a) he has provided the Investigation Committee with
  - (i) a response to the complaint regarding his design of a sprinkler system for a medical office unit in a commercial building located at Surrey, British Columbia (the "Project");
  - (ii) his complete file for the Project; and
  - (iii) an explanation of his qualifications relating to sprinkler system design and any experience he has that qualifies him for sprinkler system design;
- b) he has completed and passed the Professional Practice Examination at his own expense;
- c) he pays a fine in the amount of \$5,000 (which is payable within 30 days from the Panel's decision); and
- d) he pays the costs of these proceedings of \$19,125.78 (also payable within 30 days from the Panel's decision).

***Nature and gravity of the misconduct***

17. The Panel found that the Respondent contravened s. 30(a) and (b) of the *EGA* by failing to provide the Subcommittee of the Investigation Committee with

- a) a response to the complaint made regarding the design of a sprinkler system for the Project,
- b) a copy of his complete file for the Project,
- c) an explanation of his qualifications and experience relating to sprinkler design,

as requested by the Investigation Committee on multiple occasions, including April 7 and 30, 2020, May 15, 2020 and January 29, 2021.

18. The Respondent failed to respond to the requests of the Investigation Committee on four separate occasions. The evidence set out the extensive efforts of EGBC to locate the Respondent and obtain his response.

19. The Panel agrees with the words of the panel in *Re Nunn*:

14. The Panel considers this to be a serious matter. Investigating complaints about members is perhaps the Association's most important function. Mr. Nunn's failure to cooperate with the investigation frustrated the Association's ability to investigate the complaint about him.

15. This behaviour negatively impacted the complainant, the Association itself, and the public at large. The complaint about Mr. Nunn remains unresolved, even today, largely because of the Association's inability to investigate it using the tools the Act provides it with. This is a result of Mr. Nunn's conduct.

20. The Panel finds that the Respondent's misconduct in failing to provide the requested information is serious.

#### ***Past History and Character***

21. No evidence was placed before the Panel of any prior discipline history.

22. However, the Panel agrees with EGBC's submission that, as the Respondent was an engineer for 34 years, he ought to be well aware of his professional obligation to respond to the regulatory body.

#### ***Acknowledgement of Misconduct and Remedial Action***

23. After 20 months, the Respondent's contravention of the *EGA* has not yet been remedied.

24. No explanation whatsoever has been offered by the Respondent for his breach of the *EGA*. The Respondent's only communication to EGBC during this process was to ask for an adjournment of the hearing.

25. This is a significantly aggravating factor in this case.

***Public Confidence in the Profession***

26. To maintain public confidence in the profession and in EGBC's ability to regulate the profession, EGBC must be able to rely upon its registrants to comply with their basic obligation to respond regarding complaint investigations.

27. Public confidence in the profession requires both specific deterrence of the Respondent, who has continued to be able to engage in the practice of the profession despite his ongoing contravention, and general deterrence of other registrants who might otherwise consider a similar path.

28. For these reasons, the Panel accepts that it must impose a significant penalty; one which protects the public and sends a significant message to the Respondent, to the profession and to the public.

29. EGBC counsel referred to five prior discipline committee decisions concerning similar misconduct, spanning from 2005 to earlier this year. They are summarized as follows:

- a) *Re Nunn* – Mr. Nunn failed to respond to a request for an interview in an investigation and did not attend the hearing. The panel suspended Mr. Nunn until he attended an interview, completed and passed the Professional Practice Examination, paid a fine of \$3,000 and paid costs of just under \$15,000.
- b) *Re Ahmed Raza Syed, P.Eng.*, (February 4, 2018) – Mr. Syed failed to provide requested information on two complaints until the commencement of the discipline hearing concerning his failure to do so. The panel ordered that he complete and pass the Professional Practice Examination and that an additional course be completed, and that he pay a fine of \$5,000 and costs of \$7,500. The panel ordered that, unless Mr. Syed fulfilled the conditions ordered by a stipulated date, his registration would be suspended until he did so.
- c) *Re Ken Dextras, P.Eng.* (June 20, 2008) – Mr. Dextras was found to have failed to provide requested information and documents to the Investigation Committee. The panel suspended Mr. Dextras for 60 days and thereafter until he provided a satisfactory response to the Committee, and ordered that he pay a fine of \$5,000 and pay costs of \$16,500.
- d) *Re Jamal Asfar, P.Eng.* (September 5, 2006) – Mr. Asfar was found to have failed to provide information and documents to the Investigation Committee. The panel suspended Mr. Asfar until he provided an acceptable response to the Committee, and paid costs of \$4,500.
- e) *Re Sven E. Hage, P.Eng.* (September 29, 2005) – Mr. Hage was found to have failed to provide information and documents to the Investigation Committee. The panel suspended Mr. Hage until he provided an

acceptable response to the Committee, passed the Professional Practice Examination, and paid costs of \$3,000. By the time of the hearing, Mr. Hage was a former member of EGBC and the panel held that these terms were conditions precedent to reinstatement.

30. The cases above all involve misconduct similar to that in the present case. In each case, except *Re Syed*, the registrant was suspended until they responded to the complaint and, in some cases, paid a fine and/or completed an examination or course. Mr. Syed was not suspended *unless* he failed to meet the conditions ordered. Unlike the other cases, Mr. Syed had responded to EGBC by the time the penalty was determined.

31. The Panel is satisfied that a suspension until the Respondent “cures” the contravention of s.30(4) and fulfills other terms is appropriate here.

32. Consistent with the cases referred to above, and for better clarity, the Panel orders that the suspension continue until the Respondent provides responses that are *satisfactory* to the Investigation Committee. This requires that the responses are substantive and responsive to the inquiries made.

33. The fine of \$5,000 sought by EGBC is in the range of the cases set out above. The Panel is satisfied that a failure to provide a response for a period of 20 months and counting warrants a \$5,000 fine in addition to a suspension and the other terms ordered.

34. The completion of the Professional Practice Exam is a useful remedial action to remind the Respondent of his professional obligations.

35. For these reasons, the Panel is satisfied that penalties sought by EGBC are consistent with the authorities and, more broadly, suitable in the present case. The order is set out in full at the conclusion of this decision.

### **Costs**

36. Section 81 of the *PGA* provides that the discipline committee may order that a respondent pay the costs of an investigation or hearing.

37. The EGBC Bylaws provide that the hearing panel must order the respondent to pay the costs of the investigation and hearing, “which may be up to the actual costs incurred by EGBC” (Bylaw 10.9(1)).

38. EGBC has elected to limit its claim for costs to 90% of the legal fees and disbursements incurred in the conduct of the discipline hearing.

39. EGBC submits that the range of costs awarded under the *PGA* was between 70% and 90% of the costs incurred. This is seen in the cases referred to above.

40. EGBC expressly forgoes any claim for the salary of employees engaged in the investigation or hearing, which could be allowable under s.81(2)(b) of the *PGA*.

41. EGBC has provided redacted copies of counsel's accounts and copies of receipts for expenses for service and the court reporter, which are exhibits to the affidavit of EGBC counsel's legal assistant. The total fees and disbursements are \$21,250.87, 90% of which is \$19,125.78.

42. The Panel is satisfied that the costs incurred are reasonable given the work that is required to conduct a discipline hearing.

43. The Panel agrees with the submissions of counsel that this is an appropriate case for an award of 90% of the costs incurred. While two paragraphs on the original citation were not pursued, they were simply additional dates of communications and so would not have affected the time spent in the preparation or conduct of the case. The substantive allegations were proven entirely.

### **Publication**

44. The Respondent has presented no evidence that he suffers from a condition referred to in EGBC Bylaw 11.4(2). Therefore, full publication of this decision will be made in the usual course.

### **Order**

45. For the reasons set out above, the Panel orders as follows:

- a) Mr. Swalehe's registration with Engineers and Geoscientists BC will be immediately suspended until he has provided the Investigation Committee with
  - (i) a satisfactory response to the complaint regarding his design of a sprinkler system for a medical office unit in a commercial building located at Surrey, British Columbia (the "Project"),
  - (ii) his complete file for the Project; and
  - (iii) a satisfactory explanation of his qualifications relating to sprinkler system design and any experience he has that qualifies him for sprinkler system design;
- b) Mr. Swalehe must complete and pass the Professional Practice Examination at his own expense;
- c) Mr. Swalehe must pay Engineers and Geoscientists BC a fine in the amount of \$5,000 within 30 days from this decision;
- d) Mr. Swalehe must pay Engineers and Geoscientists BC costs in the amount of \$19,125.78 within 30 days from this decision;



- e) Mr. Swalehe's registration shall remain suspended until he fulfills all the conditions set out above.

46. As a suspended registrant, the Respondent is not permitted to practise professional engineering, may not use his professional seal and may not use the title professional engineer (P.Eng.). The Respondent must immediately notify clients and any other relevant parties of his suspension so that alternate arrangements can be made.

47. The Panel notes that its orders do not modify the requirement for annual registration renewal. If the Respondent does not renew his registration in Engineers and Geoscientists BC before the end of 2021, his registration will expire. In order in future to be reinstated as a registrant, the Respondent would have to comply with the orders made by this Panel and meet any other requirements for reinstatement that are in place under the *PGA* and the *EGBC* Bylaws at the time of his application.

Dated: December 9, 2021

<original signed by>

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John Wilson, Chair

<original signed by>

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Jaswinder Bansal, P. Eng.

<original signed by>

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Roz Nielsen, P. Eng.