



The Association of Professional
Engineers and Geoscientists of Alberta

APEGA DISCIPLINE COMMITTEE DECISION

Date of Hearing: February 22, 2024

Date of Decision: March 27, 2024

APEGA Discipline Case Number: 23-015-FH

**IN THE MATTER OF A HEARING OF THE DISCIPLINE
COMMITTEE OF THE ASSOCIATION OF PROFESSIONAL
ENGINEERS AND GEOSCIENTISTS OF ALBERTA**
Pursuant to the *Engineering and Geoscience Professions Act*,
being Chapter E-11 of the Revised Statutes of Alberta 2000

Regarding the Conduct of

[REDACTED], P.ENG. (the "Member") and [REDACTED]

[REDACTED] (the "Company")

INTRODUCTION

1. The hearing of the Discipline Committee took place virtually via video conferencing on February 22, 2024.
2. The hearing proceeded by an agreed statement of facts and admission of unprofessional conduct. The parties submitted a joint submission on penalty.

Appearances

3. The members of the Hearing Panel of the Discipline Committee (the "Panel") of the Association of Professional Engineers and Geoscientists of Alberta ("APEGA") were:

Parand Meysami, P.Eng., Discipline Committee Panel Chair
Christine Neff, P.Eng., Discipline Committee Panel Member
Kim Maddin, P.Eng., Discipline Committee Panel Member
Muriel Dunnigan, Discipline Committee Panel Public Member

4. Others in attendance included:

Katrina Haymond, KC, Legal Counsel for the Investigative Committee of APEGA (“the Investigative Committee”)

Brian Anderson, APEGA Investigator

Jason Harley, Legal Counsel to the Member

██████████, P. Eng., the Member

Stacey McPeck, Independent Legal Counsel for the Hearing Panel

5. There were several observers from APEGA staff attending and each of the staff identified themselves. Present were Jason Kalapurakal, P. Eng. Discipline Manager; and Jenny Seibel, Neetu Dodd, and Saher Ahmed, Discipline Coordinators.

6. The complainant, ██████████, also attended the hearing.

OPENING OF THE HEARING

7. The Chair welcomed all in attendance to the hearing and Mr. Kalapurakal provided some general housekeeping guidelines.

8. Each of the participants, including the Panel members, were asked to verify on the record that they were in a private space¹ with no one else in attendance.

9. The Chair indicated that there was a court reporter in attendance who would produce the official record of the proceedings. The Chair stated that there would be no other recordings.

Preliminary Matters

10. The parties advised there were no objections to either the jurisdiction or the constitution of the Panel or any other preliminary matters.

The Charges in the Notice of Hearing

11. The Notice of Hearing included the following charges:

1. On or between September 2015 and February 2016, [the Member], P.Eng., and/or [the Company] engaged in unskilled practice by failing to include sufficient design details in the repair/replacement of balcony posts at [the Condominium], the particulars of which include one or more of the following:

- a. Failing to include reference to standard specifications in design drawings; and/or

¹ Some of those in attendance confirmed that they were wearing headphones to create a private space.

- b. Failing to include sufficient detail and/or methodology regarding waterproofing.
2. On or between September 2015 and February 2016, [the Member] and/or [the Company] engaged in unskilled practice in the design of balcony posts by inadequately designing the repair/replacement of balcony posts at [the Condominium], the particulars of which include one or more of the following:
- a. Designing the detail to create a cavity in the wooden balcony post;
 - b. Designing the detail to accept a metal dowel using epoxy as a binding agent;
 - c. Failing to prevent water to ingress at the top of the balcony posts;
 - d. Failing to design a provision for water to escape the wooden balcony post cavity; and/or
 - e. Failing to correct the initial concern of rotting balcony posts.
3. On or between October 2015 and February 2016, [the Member] and [the Company] failed to maintain adequate records regarding the repair/replacement of balcony posts at [the Condominium], the particulars of which include one or more of the following:
- a. Failing to maintain field review reports;
 - b. Failing to maintain progress reports;
 - c. Failing to include sufficient detail and/or methodology for change orders; and/or
 - d. Failing to maintain records of correspondence between [the Member] and the client, [the] Condominium Corporation.

It is further alleged that the above-referenced conduct constitutes unprofessional conduct and unskilled practice as set out in section 44(1)(a) through (e), inclusive, and of the *Engineering and Geoscience Professions Act*, and is further contrary to one or more of the following:

- a. Rules of Conduct 1 through 5, inclusive, of APEGA's Code of Ethics;
- b. *Guideline for Professional Practice* (2013); and/or
- c. *Guideline for Ethical Practice* (2013).

Submissions by the Investigative Committee

12. The Investigative Committee advised the Panel that the hearing would proceed by way of an Agreed Statement of Facts and Admission of Unprofessional Conduct, which was entered as Exhibit 1.

13. The Investigative Committee highlighted the key points of the Agreed Statement of Facts and Admission of Unprofessional Conduct as it related to the complaint, the investigation, the allegations, and the specific facts related to the allegations.

Background

14. The Member became a registered member of the Association of Professional Engineers and Geologists and Geophysicists of Alberta (now APEGA) in 1988. In 2022, the Member became a life member. The Member has almost 35 years of professional practice. The Member was a practicing professional member of APEGA during the dates material to these proceedings.

15. The Member is the Responsible Member for the Company, an APEGA permit holder. The Member was the sole engineer and the Responsible Member for the Company during the dates material to these proceedings. Through the Company, the Member primarily provided engineering services to contractors and condominium corporations, including engineering services related to repairing condominium balconies.

The Complaint and Conduct at Issue

16. The Complainant is the owner of a building management company who provided services to a condominium corporation (the "Condominium") in Edmonton.

17. The Member was first retained to complete an Envelope and Reserve Fund Study for the Condominium and concluded that several balcony posts were rotting and required replacement.

18. The Condominium then retained the Company to provide project management services for the damaged balcony posts replacement. The Member was the only responsible engineer for the design and construction. As part of the application for the building permit, the Member issued a set of drawings for construction.

19. A contractor was hired and completed the work in 2016 with approximately 60 balcony posts built to the Member's specifications. The Member inspected the building and found that the work was complete and the building envelope "should be watertight for many years."

20. In 2019, the Condominium undertook additional maintenance and discovered that the balcony posts were rotting or damaged. The Complainant contacted the Member to express concern, and the Member responded. However, the issues were not resolved.

21. The Condominium retained an engineer to complete an independent review of the balcony posts, who concluded that the balcony post cladding was generally in good condition, but the vinyl membrane was not fully sealed to prevent water from entering. Further, water was able to penetrate behind the post cladding through a rebar dowl that penetrated the steel plate and was not sealed. The expert concluded that the design was technically deficient and did not meet the acceptable standard of engineering practice in Alberta.

22. The Complainant contacted APEGA in November 2020 about the Member's conduct. Following correspondence between APEGA and the Complainant through late 2020 and early 2021, on April 29, 2021, the Complainant provided the requested documentation, including an email to APEGA attaching a report prepared regarding the balcony posts, and APEGA accepted the concerns as a complaint (the "Complaint").

23. The Investigative Committee engaged an expert to provide an opinion on the structural design and identified several deficiencies in the work, including that there was no reference to any specifications and the lack of sufficient detail about waterproofing. The expert also identified that, while the Member stated that they made regular visits to the Condominium, the Member failed to maintain corresponding field review reports or other records regarding the project's status, their observations, or any actions taken. There were no progress reports over the course of the project and insufficient detail in a change order. The Member also failed to maintain fulsome records of correspondence between the Condominium and themselves.

24. At the conclusion of the investigation, the Investigative Committee accepted the Investigation Panel's recommendation and found there was sufficient evidence to refer the matter to the Discipline Committee for a formal hearing under section 52(1)(b) of the *Engineering and Geosciences Profession Act* (the "Act").

25. The Member was provided notice of the referral to the Discipline Committee.

Admissions of Unprofessional Conduct

26. The Member admits the allegations set out in the Notice of Hearing are factually proven.

27. In relation to the charges, the Member acknowledges their conduct:

- a. Breached the following APEGA *Guidelines for Ethical Practice v2.2²*: Sections 2.1, 3.2, 4.1, 4.2.6 and 4.3.1.
- b. Breached the following APEGA *Guidelines for Professional Practice*: Sections 3.2.3., 3.3., 3.3.1, 3.3.5, 3.4, 3.4.3, and 3.4.6.
- c. Constitutes unprofessional conduct and unskilled practice within the meaning of section 44 of the *Act*. Specifically, the Member acknowledges that their conduct:
 - i. Was detrimental to the best interests of the public;
 - ii. Contravenes Rules of Conduct 1, 2, 3, 4, and 5 of the Code of Ethics;
 - iii. Displayed a lack of judgment in the practice of the profession; and

² This was the version of APEGA *Guidelines for Ethical Practice* that was in force at the time of the conduct. Since then, the document has been amended to APEGA *Guideline for Ethical Practice v 3.0* (August 2022).

- iv. Harmed or tended to harm the standing of the profession generally.

Submissions of the Member

28. The Member indicated that the Agreed Statement of Facts was freely entered into and speaks for itself. The Member agrees that its contents are adequate to support their admissions of unprofessional conduct.

Decision of the Panel Regarding Unprofessional Conduct

29. The Panel caucused to consider the evidence and the submissions, the hearing reconvened and the Chair informed the parties that the Panel agreed that the allegations were factually proven and accepted the admission of unprofessional conduct and unskilled practice.

30. Regarding charge 1, the Panel considered the evidence about the drawings that the Member created and finds that the evidence supports the admission that the Member failed to include reference to standard specifications or sufficient detail or methodology about waterproofing.

31. Regarding charge 2, the Panel found the two expert engineering reports that both concluded that there were deficiencies in the Member's work to be particularly compelling.

32. Regarding charge 3, the Panel considered the lack of records to be self-evident of the conduct at issue.

33. When considered all together, the content of the Agreed Statement of Facts supported the Member's admissions and was sufficient to establish that the conduct occurred. Such conduct constitutes unprofessional conduct and unskilled practice.

SUBMISSIONS ON PENALTY

Joint Submission on Penalty

34. The Investigative Committee advised the Panel that the parties were submitting a Joint Submission on Penalty, which was marked as Exhibit 2.

35. The Investigative Committee also provided a book of authorities that included excerpts from:

- a. *Jaswal v. Medical Board (Nfld)*, 1996 CanLII 11630 (NL SC) ("Jaswal");
- b. *Timothy Edward Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 ("Bradley"); and
- c. *Ontario College of Teachers v. Merolle*, 2023 ONSC 3453 ("Merolle").

36. The book of authorities also included an additional excerpt; however, the Investigative Committee confirmed that they would not be referring to that case, as it was not relevant.
37. The Investigative Committee informed the Panel that the authority to sanction and the range of sanction available to the Hearing Panel is set out in sections 63 and 64 of the Act.
38. The Investigative Committee set out the following joint recommendations:
1. The Member shall be reprimanded for their conduct, and the Discipline Committee's written decision (the "Decision") shall serve as the reprimand.
 2. The Member shall pay a fine of \$2500 within **12 months** from service of the Decision or in accordance with a payment schedule approved by the Director.
 3. The fine referred to in paragraph 2 above is a debt owing to APEGA.
 4. The Member will not be eligible to apply for reinstatement as a practicing member with APEGA until the Member has done the following:
 - a. Completed, at their own cost, the following course:
 - i. the National Professional Practice Exam.
 - b. Provided evidence of successful completion of the course outlined in para 4(a) to the Director; and
 - c. Paid the fine outlined in paragraph 2 in full.
 5. Upon being reinstated (subject to the requirements of paragraph 4 above), the Member will be subject to the following restrictions and conditions for a period of 24 months:
 - a. The Member will be restricted from engaging in any scope of engineering practice that relates to building envelopes or cladding unless the Member is supervised by a qualified engineer or architect who practices in the area of building envelopes;
 - b. The Member may submit the name or names of supervisor(s) they wish to work with, and the Director will consider the suitability of those candidates. The final selection of a supervisor will be made by the Director;
 - c. The supervisor shall provide quarterly reports to the Director respecting all projects the Member has worked on, at the Member's expense;
 - d. The Member shall not be permitted to act as a Responsible Member until the condition of supervised practice has been lifted. The Member must disclose the supervised practice requirement to their employer;

e. The condition of supervised practice will be lifted at the conclusion of the 24-month period so long as the supervisor attests in writing to the Member's competency in the area of building envelopes and cladding;

f. If the supervisor does not attest to the Member's competency at the conclusion of the 24 months of supervised practice, the period of supervised practice will be extended for a further twelve (12) months;

g. If at the conclusion of the twelve (12) month extension, the supervisor does not attest to the Member's competency, the matter will be referred by Council to the Practice Review Board to conduct a review; and

h. The Member will not be considered to be a member "in good standing" until the condition of supervised practice has been lifted.

6. The Discipline Committee's decision shall be published and circulated as follows:

a. This matter and its outcome will be published by APEGA as deemed appropriate and such publication will not name the Member; and

b. If any member of the public inquires with APEGA as to whether the Member was the subject of a discipline hearing or was found guilty of any charges under the *Engineering and Geoscience Professions Act*, APEGA shall be at liberty to provide a complete copy of the Discipline Committee's decision.

39. The Investigative Committee noted that the primary purposes of penalty are to ensure the public is not further harmed, to maintain the public's confidence in APEGA's ability to regulate the professions, and to deter the Member and the profession generally from engaging in similar conduct.

40. The reprimand and the fine are intended as a deterrent for both the Member and the profession generally. The conditions on reinstatement are remedial with a public protection component.

41. As noted in the Joint Submission on Sanction and as the Investigative Committee highlighted, effective March 8, 2022, the Member became a non-practicing life member. The Member indicates that they have no intention of returning to practice. Further, if the Member's intention changes, there are significant education and monitoring conditions that would be required. These requirements would satisfy the intent to ensure the public is not further harmed.

42. The Investigative Committee acknowledged that generally APEGA publishes its discipline decision with names in the interest of transparency. However, in this instance, the Investigative Committee recommends that the Panel use their discretion to publish without names. The Investigative Committee suggests that given the Member's long and unblemished career, with no discipline history, publishing without names is appropriate to allow them to continue their retirement without their name being published.

43. The Investigative Committee clarified that this decision should not be seen as a precedent or presumption of publication without names, but that it was appropriate in these specific circumstances. The Investigative Committee confirmed that the publication without names was a key component of the joint submission.

44. The Investigative Committee suggested that transparency is still achieved, as the decision will be published on the website and anyone who inquires would still receive a copy of the decision.

45. The Investigative Committee reviewed the factors when imposing sanction to demonstrate how the proposed penalty will protect the public and will appropriately convey to members, the public, and APEGA that this conduct is taken seriously and is unacceptable. In doing so, the Investigative Committee referred the Panel to the case of *Jaswal*. The Investigative Committee noted that while the case is from the medical profession, it is frequently referenced and applied in other professions in Alberta.

46. The Investigative Committee submitted the following:

- a. Nature and gravity of the proven allegations – the conduct at issue had a serious impact on the Condominium and its board and, in that sense, it is serious conduct.
- b. Age and experience of the Member – the Member is a very senior member of the profession. This was not a situation where a young and inexperienced practitioner made an error of judgment or skill that would be more understandable in a junior member of the profession.
- c. Presence or absence of prior complaints or convictions - there is no evidence of any prior findings of unprofessional conduct against the Member. The Investigative Committee suggested that one issue in nearly 35 years is a significant mitigating factor.
- d. Number of times the offence occurred – The conduct occurred within a single specific project. This was not a situation with multiple complaints from multiple people or projects.
- e. Member's role in acknowledging what occurred – The Member admitted to their conduct and allowed the hearing to proceed without witnesses. The Investigative Committee suggested that this is a significant factor, as it further supports that the Member recognized their error.
- f. Need to promote deterrence – As far as specific deterrence, the Member is retired with no intention of returning to practice; therefore, this is not as significant an issue as if the Member were an active member. The sanction addresses the potential return to practice with protocols to protect the public should that occur.

As far as general deterrence, the reprimand and fine signal the remedial steps that need to be taken so that other members see that APEGA takes the conduct seriously.

- g. Range of sanction in other cases – The parties reviewed the case law but were unable to locate a decision with parallel facts. However, the parties suggest that the proposed sanction is generally consistent with APEGA’s approach to issues of unskilled practice.

47. The Investigative Committee confirmed that no costs were sought against the Member and clarified that this is common in discipline matters that proceed fully by agreement.

48. The Investigative Committee submitted that the proposed sanction is appropriate, achieves the goal of public protections, while considering the mitigating factors specific to the Member.

49. The Investigative Committee concluded their submission with a review of the law related to joint submission. The parties worked together and for parties to come to an agreement, the parties need to have some assurance that the proposal will be accepted.

50. The Investigative Committee reviewed the public interest test from *R. v. Anthony-Cook*, 2016 SCC 43 (“Anthony-Cook”) and submitted that it is a high test and suggested that the Panel should not depart from a joint submission unless the proposed penalty would bring the administration of justice into disrepute or be otherwise contrary to the public interest.

51. The Investigative Committee confirmed that while the test from *Anthony-Cook* came from the criminal context, it has been consistently applied in professional discipline cases, including both *Bradley* and *Merolle*, as well as other discipline hearings in Alberta.

52. The Investigative Committee emphasized that if the Panel has concerns with the proposed penalty, the Panel must advise the parties, so that the parties can make submissions to address those concerns and consider whether to withdraw the admission and joint submission and proceed to a contested hearing.

Submissions on Penalty by the Member

53. The Member agreed with the submissions from the Investigative Committee and highlighted that the Member is retired after a distinguished career and that the proposed sanction achieved both specific and general deterrence.

54. The Member emphasized the importance of certainty when negotiating a joint submission and that there is benefit to APEGA to have disciplinary issues resolve early and by agreement.

55. The Member suggested that where appropriate, the Panel should accept joint submissions and that this was an appropriate matter in which to do so.

Questions from the Panel

56. The Panel adjourned to consider whether they had any questions of either party and concluded that they did not.

The Decision of the Panel on Orders of Penalty

57. The Panel adjourned to consider the submissions of the parties and returned to advise that they accepted the Joint Submission on Penalty.

58. The Panel recognizes that, as stated by the Supreme Court of Canada in *Anthony-Cook*, it has a duty to give serious consideration to a joint submission on penalty by the parties and should exercise deference to any jointly agreed submission. After considering the proposed orders, the Panel finds that the Joint Submission on Penalty is appropriate and sufficient to ensure protection of the public.

59. The Panel considered the factors in *Jaswal* and found the following factors weighed in favour of accepting the joint submission:

- a. it was a single occurrence of unprofessional conduct. The Member had a long career prior with no prior complaints or discipline. The single occurrence in a long, unblemished career was a significant mitigating factor.
- b. the Member has acknowledged and cooperated with the process, which allowed for a streamlined discipline hearing without witnesses being called. The Member's acknowledgment and cooperation were both significant mitigating factors.

60. The Panel found that reprimand and fine will serve as a specific deterrent to the Member. The reprimand and fine will also confirm to the general membership that this conduct is unprofessional. The profession and the public will know that APEGA does not tolerate such conduct.

61. The Panel also considered the significant education and supervision conditions that would be imposed on any return to practice. These conditions not only serve to protect the public but are also a high bar to meet to return to practice. The Panel found the conditions a strong deterrent for future similar conduct by either the Member or the engineering profession generally.

62. Regarding publication, the Panel confirms that the presumption is for all decisions to be published with names. There is significant public interest in having hearings that are open to the public and where the public can be informed about the actions of members, especially when a member is found to have committed unskilled practice. One way to protect the public is through publication with names. This public interest and protection of the public should not be easily set aside.

63. However, when the Panel reviewed the proposed publication without names in the context of the joint submission and the specific facts in these circumstances, they did not feel that the presumption of publication should cause them to reject the joint submission on penalty.

64. The Panel recognized that, given the Member's retirement from the profession without intent to return to practice, publication with names does not enhance the protection of the public in the same way that it would with an active member. The public are protected because the Member is no longer practicing unless they complete significant education and supervision requirements. Publishing a retired member's name on APEGA's website is more likely to tarnish the Member's reputation rather than enhance public protection.

65. Further, the Panel was mindful of the parties' submissions that publication without names was an important aspect of the joint submission and that those who inquire after the Member's discipline history will still receive a copy of this decision. The Panel found publication without names to be an appropriate balance between the goal of transparency and fairness to the Member.

66. Following the guidance from the court in *R. v. Anthony-Cook*, the Panel considered that they are not to alter a joint submission, unless there are concerns that the joint submission would bring the administration of justice into disrepute. The Panel accepts that the parties are in the best position to evaluate the strengths and weaknesses of their case and that concessions on both sides were likely made to reach agreement. Adjustments by the Panel could impact future joint submissions, if done without due reason. The Panel did not feel that publishing without names would bring the administration of justice into disrepute in these circumstances. Therefore, the Panel accepted the joint submission, including publication without names.

Conclusion

67. For the reasons set out above, the Panel makes the following orders pursuant to sections 63 and 64 of the *Act*:

1. The Member shall be reprimanded for their conduct, and the Discipline Committee's written decision (the "Decision") shall serve as the reprimand.
2. The Member shall pay a fine of \$2500 within 12 months from service of the Decision or in accordance with a payment schedule approved by the Director.
3. The fine referred to in paragraph 2 above is a debt owing to APEGA.
4. The Member will not be eligible to apply for reinstatement as a practicing member with APEGA until the Member has done the following:
 - a. Completed, at their own cost, the following course:
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5. Upon being reinstated (subject to the requirements of paragraph 4 above), the Member will be subject to the following restrictions and conditions for a period of 24 months:
- a. The Member will be restricted from engaging in any scope of engineering practice that relates to building envelopes or cladding unless the Member is supervised by a qualified engineer or architect who practices in the area of building envelopes;
 - b. The Member may submit the name or names of supervisor(s) they wish to work with, and the Director will consider the suitability of those candidates. The final selection of a supervisor will be made by the Director;
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 - e. The condition of supervised practice will be lifted at the conclusion of the 24-month period so long as the supervisor attests in writing to the Member's competency in the area of building envelopes and cladding;
 - f. If the supervisor does not attest to the Member's competency at the conclusion of the 24 months of supervised practice, the period of supervised practice will be extended for a further twelve (12) months;
 - g. If at the conclusion of the twelve (12) month extension, the supervisor does not attest to the Member's competency, the matter will be referred by Council to the Practice Review Board to conduct a review; and
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6. The Discipline Committee's decision shall be published and circulated as follows:
- a. This matter and its outcome will be published by APEGA as deemed appropriate and such publication will not name the Member; and
 - b. If any member of the public inquires with APEGA as to whether the Member was the subject of a discipline hearing or was found guilty of any charges under the *Engineering and Geoscience Professions Act*, APEGA shall be at liberty to provide a complete copy of the Discipline Committee's decision.

Dated March 27, 2024

On behalf of the Panel of the APEGA Discipline Committee.

Parand Meysami

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Parand Meysami, P.Eng., Discipline
Committee Panel Chair

Christine Neff

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Christine Neff, P.Eng., Discipline Committee
Panel Member

Kim Maddin

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Kim Maddin, P.Eng., Discipline Committee
Panel Member

Muriel Dunnigan

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Muriel Dunnigan, Discipline Committee
Panel Member, Public Member