

**IN THE MATTER OF
THE ENGINEERS AND GEOSCIENTISTS ACT,
R.S.B.C. 1996, chapter 116, as amended (the “Act”)**

and

IN THE MATTER OF GINGER ADA ROGERS, P.GEO.

DETERMINATION OF THE DISCIPLINE COMMITTEE

Hearing Date: November 25, 2019

Discipline Committee Panel: Neil Cumming, P.Eng., Chair
Jurgen Franke, P. Eng.
Jaswinder Bansal, P. Eng.

Counsel for the Association: Lindsay Waddell and Heather Hoiness

Neither Ms. Rogers nor anyone on her behalf appeared.

[1] This panel of the Discipline Committee (the “Panel”) of the Association of Professional Engineers and Geoscientists of BC (the “Association”), doing business as Engineers and Geoscientists BC, conducted an inquiry pursuant to s. 32 of the Act.

[2] The allegations against Ms. Rogers are set out in the Notice of Inquiry issued September 19, 2019:

AND TAKE NOTICE that the allegations against you are that:

1. *You have demonstrated incompetence, negligence or unprofessional conduct by:*
 - a) *On or about March 31, 2016, knowingly submitting falsified soil testing data to Alberta Environment and Parks (the “AEP”) in the 2015 Annual Industrial Wastewater, Industrial Runoff and Waste Management Report (the “2015 Report”) submitted by you on behalf of Bouvry Exports Calgary Ltd. (“Bouvry”);*
 - b) *More specifically, you knowingly submitted in the 2015 Report data taken from soil testing completed in 2013 for Bouvry in place of data taken from soil testing completed in 2015 making it appear as though parameters were not exceeded and that Bouvry could continue to discharge wastewater on land through irrigation, when*

in fact the parameters had been exceeded for 2015 and Bouvry would not have been permitted to discharge the wastewater had the AEP received accurate soil testing data;

2. *You pleaded guilty and were convicted of violating s. 227(a) of the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, in relation to the conduct set out in paragraph 1, above.*
3. *The conduct set out in paragraph 1, above, is contrary to Principle 1 of the Association's Code of Ethics which requires that all members and licensees shall hold paramount the safety, health and welfare of the public, the protection of the environment and promote health and safety within the workplace.*
4. *The conduct set out in paragraph 1, above, is contrary to Principle 3 of the Association's Code of Ethics which requires that all members and licensees provide an opinion on a professional subject only when it is founded upon adequate knowledge and honest conviction.*

[3] For the reasons set out more fully below, the Panel finds that the allegations in Clauses 1 – 3 of the Notice of Inquiry are proven to the required standard.

Service of Notice of Inquiry

[4] The Chair called the hearing to order at 9:30 am as scheduled. Ms. Rogers was not present and no one appeared on her behalf. In order to give Ms. Rogers time in case she had been delayed the hearing was adjourned for 30 minutes. The hearing reconvened at 10:03 am, at which time neither Ms. Rogers nor anyone acting on her behalf had appeared.

[5] The Association submitted that the hearing could proceed in Ms. Rogers' absence and made submissions to support that position, relying on Section 32(5) of the Act:

(5) In the event of nonattendance of the person who is the subject of the inquiry, the discipline committee, on proof of service of the notice under subsection (2), which proof may be made by affidavit, may proceed with the subject matter of the inquiry in that person's absence and make findings of fact and its decision without further notice to that person.

[6] The Association presented an affidavit dated November 21, 2019 of Belinda Lai, legal administrative assistant to counsel for the Association, in which the following is deposed:

a) On September 19, 2019 the Notice of Inquiry was sent by email to Ms. Rogers. The notice contained the information required by Section 32(4) of the Act, including the date, but the starting time of the hearing had been omitted from the Notice.

b) On September 19, 2019 Ms. Lai received a response from Ms. Rogers stating:

“I regret to inform you that I will not be attending the scheduled hearing as requested in the attached document. I do not have the financial means to do so. I also do not have the financial means to retain a lawyer.

I did plead guilty to charges in 2018. I also accepted disciplinary actions from APEGA who has provincial jurisdiction in this matter not APEGBC. I am no longer practicing geosciences and have paid a huge price for the consequences of my actions. I am unable to find gainful employment in the environmental sector and lost my job with the military this year as a result of this conviction. There isn't a day that goes by that I do not regret my actions and I have been harshly humbled.

According to the Canadian Charter of Human Rights and Freedoms under Section 11(h), I have already been convicted and punished once in court and the second time for the same action by APEGA. I have a right to not be continually punished for the same action over and over.

I have already sent APEGBC a copy of the disciplinary action from APEGA. I have nothing further to discuss in this matter.”

c) From October 9 through 25, 2019 there were attempts to deliver documents to Ms. Rogers by email at the email address used on September 19, 2019 and at another email address for her place of work, by registered mail at the address provided by the Association, and by telephone. None of these attempts were successful.

d) From October 30 through November 13, 2019 a process server retained by counsel for the Association made four attempts to personally serve documents on Ms. Rogers by attending at the address provided by the Association. The documents to be served included the Notice of Inquiry. The attempts to serve Ms. Rogers personally were not successful. On the final attempt on November 13, 2019 the documents were served by leaving them on the doorstep of the address provided by the Association.

- e) On November 19, 2019 counsel for the Association sent a letter to the same address by courier. The letter contained the date, time and location of the hearing and expressed the Association's counsel's understanding that Ms. Rogers did not intend to attend the hearing. On November 20, 2019 the courier company provided confirmation that the letter had been delivered.

[7] At the hearing Mr. Jesse Romano, Investigation Manager for the Association testified that the address provided by him to the Association's counsel, and used for delivery of the documents described above, was the last address on file with the Association for Ms. Rogers.

[8] The Association submitted that there are two bases on which the hearing could proceed:

- a) That Ms. Rogers, through her actions and acknowledgements, effectively waived strict compliance with section 32 of the Act;
- b) The Association has on at least one previous occasion, taken the view that it is entitled to proceed despite a failure to comply with the service provisions in section 32 where a) it has made all reasonable efforts to effect service; b) where it is apparent that the intended recipient of the notice has been evading service; and c) where it is apparent that the individual nonetheless did have actual knowledge of the proceedings.

[9] The Panel adjourned briefly to consider the evidence and the Association's submission. The Panel concluded that the service had been completed in accordance with section 32 of the Act with the exception that the starting time of the hearing had not been included in the Notice of Inquiry. The Panel concluded that the Association had made reasonable efforts to correct this defect, that Ms. Rogers in fact had knowledge of the date, time and location of the hearing and furthermore, had ample opportunity to seek clarification of the starting time, and that she had indicated her intent not to participate. On this basis the Panel determined that the hearing could proceed in the absence of Ms. Rogers.

Onus and Burden of Proof

[10] The burden of proof is on the Association.

[11] The standard to be met by the Association is proof on the "balance of probabilities", meaning this Panel must find that it is "more likely true than not" that the

alleged facts occurred (*Kaminski v. Assn. of Professional Engineers and Geoscientists of British Columbia*, 2010 BCSC 468, para. 52).

[12] The Panel must then decide whether the facts as proven constitute unprofessional conduct within the meaning of the Act.

The Evidence

[13] The Association presented an Agreed Statement of Facts prepared under the proceedings in the Provincial Court of Alberta that resulted in the conviction described in Paragraph [2] 2 of the Notice of Inquiry. In that document Ms. Rogers admitted to charges essentially as set out in Paragraphs 1(a) and 1(b) of the Notice of Inquiry and agreed to plead guilty to Count 1 of the charges made under 227(a) of the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.

[14] The Association presented an email dated January 22, 2019 from Ms. Rogers in which she stated that she pled guilty to one count of providing false information in a report which was provided to Alberta Environment in March 2016. As a consequence Ms. Rogers accepted a fine of \$27,750 and a prohibition on submission of regulatory reports to Alberta for three years.

[15] The Association presented a Recommended Order to the Disciplinary Committee of the Association of Professional Engineers and Geoscientists of Alberta (APEGA) dated January 16, 2019 in which Ms. Rogers admitted to unprofessional conduct, and agreed that she would be ineligible to reinstate her membership for three years, together with other conditions.

Canadian Charter of Human Rights and Freedoms

[16] In her email of September 19, 2019 Ms. Rogers stated:

“According to the Canadian Charter of Human Rights and Freedoms under Section 11(h), I have already been convicted and punished once in court and the second time for the same action by APEGA. I have a right to not be continually punished for the same action over and over.”

[17] The Panel interprets this as an argument that the Association may not punish her for a matter for which she has already been punished in another court or jurisdiction. Ms. Rogers provided no other argument or authorities to support this position.

[18] The Association argued that this disciplinary proceeding does not attract protection of section 11 of the Charter and provided a number of authorities to support this position.

[19] After considering the Association's argument and the relevant authorities the Panel accepts the Association's position.

Discussion

[20] Unprofessional conduct is not defined in the Act. The Panel adopts the definition set out in *Re Foreman*, which is that unprofessional conduct is that which is a "marked departure from the standard expected of a competent professional":

[93] The Association's *Code of Ethics Guidelines* addresses the standard of professional conduct as follows:

"The APEGBC Code of Ethics serves several purposes. It designates the standard of conduct expected of engineers and geoscientists in easily understandable terms. It distinguishes appropriate professional conduct from that which fails to meet a required standard. The Code also provides a basis on which allegations of unprofessional conduct are adjudicated by the Discipline Committee or other groups charged with responsibilities related to the conduct of members."

[94] Hence, unprofessional conduct is that which does not meet the standard expected through application of the *Code of Ethics*. The Panel accepts the submission of the Association, based on *Law Society of British Columbia v. Martin, 2005 LSBC 16*, that professional misconduct is established when there is a marked departure from the standard to be expected of a competent professional, and that minor or inadvertent failure to comply with professional standards does not constitute unprofessional conduct. (underlining added)

[21] The Panel has considered the allegations against Ms. Rogers and the evidence presented by the Association, in which Ms. Rogers has admitted to and has pled guilty to providing falsified information in a report to Alberta Environment and Parks (AEP). In the Panel's view this is a marked departure from the standard to be expected of a competent professional. The Panel finds that this conduct contravenes the Association's Code of Ethics and Principle 1 thereof, which states:

"Members and licensees shall act at all times with fairness, courtesy and good faith to their associates, employers, employees and clients, and with fidelity to the public needs. They shall uphold the values of truth, honesty and trustworthiness and safeguard human life and welfare and the environment. In keeping with these basic tenets, members and licensees shall:

1. *Hold paramount the safety, health, and welfare of the public, the protection of the environment, and promote health and safety within the workplace,"*

[22] The Association also alleges that Ms. Rogers' conduct contravenes Principle 3 of the Code of Ethics, which states:

3. Provide an opinion on a professional subject only when it is founded upon adequate knowledge and honest conviction,

While it has been established that Ms. Rogers provided falsified data to AEP, and that her actions were clearly dishonest, no evidence or argument has been presented that she provided an opinion based on that data, nor that any such opinion was in contravention of Principle 3. The Panel therefore declines to make a determination that Ms. Rogers' conduct contravened Principle 3 of the Code of Ethics.

Summary

[23] In summary, the Panel finds the allegations in Clauses 1 – 3 of the Notice of Inquiry have been proven to the required standard, and, pursuant to s. 33(1)(c) of the Act, finds that Ms. Rogers has demonstrated unprofessional conduct. The Panel finds that the allegation in Clause 4 of the Notice of Inquiry has not been proven.

[24] The Panel is now required to determine whether sanctions should be imposed upon Ms. Rogers pursuant to s. 33(2) of the Act and whether to impose costs pursuant to s. 35 of the Act. The Panel requests that the parties provide written submissions in accordance with the following schedule:

- a) Submissions must be delivered by counsel for the Association (“Association Submissions”) to Ms. Rogers and to the Panel within 30 days of the date of this decision.
- b) Submissions must be delivered by Ms. Rogers to counsel for the Association and to the Panel within 14 days of the receipt of the Association Submissions.
- c) Reply submissions may be delivered by counsel for the Association to Ms. Rogers and to the Panel within 10 days of receipt of Ms. Rogers' submissions.
- d) Submissions for the Panel shall be delivered to Robin McFee, Q.C., counsel for the Panel and may be delivered electronically.

[25] In lieu of preparing a written submission, Ms. Rogers may choose to request an oral hearing no later than within 14 days of receipt of the Association's submissions.

DATED this 9th day of December, 2019.

<original signed by>

Neil A. Cumming, P. Eng., Chair

<original signed by>

Jurgen Frank, P. Eng.

<original signed by>

Jaswinder Bansal, P. Eng.