

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

**and**

**IN THE MATTER OF PETER GORDON KOVACIK, P.ENG.  
ENGINEERS AND GEOSCIENTISTS BC FILE NO. T18-024**

**REASONS FOR DECISIONS**

**(Motions to Admit Late Filed Expert Report and Unredacted Expert File of Dr.  
Bruce Ball, P.Eng.)**

<b>Date and Place of Hearing:</b>	Written submissions dated March 30, 2022, April 1, 2022 and July 20, 2022. Oral submissions on April 4, 2022, and July 19 and 20, 2022.
<b>Panel of the Discipline Committee</b>	Frank Denton P. Eng., Chair Pierre Gallant, Lay Committee Member
<b>Counsel for Engineers and Geoscientists BC:</b>	Lindsay Waddell
<b>Counsel for the Respondent:</b>	Jagmeet Virk
<b>Independent Legal Counsel for the Panel:</b>	Fritz Gaerdes

**A. Introduction**

1. Pursuant to the version of section 1.5(2)(a) of Schedule B of the bylaws of Engineers and Geoscientists BC that was in force at the time this motion was heard (the “Bylaws”) the Respondent was required to provide his expert reports to Engineers

and Geoscientists BC at least 30 days prior to the commencement of the discipline hearing.

2. The Respondent applied to the Panel for relief from this timeline so that he may use the written expert report of Dr. Bruce Ball P. Eng., which report he delivered to Engineers and Geoscientists BC on March 22, 2022, 13 days before the start of the hearing.
3. Subsequently, on July 20, 2022, Engineers and Geoscientists BC also applied for the disclosure of a complete unredacted copy of Dr. Ball's expert file, particularly email correspondence between him and the respondent's counsel that has been redacted.
4. On April 4, 2022, the Panel granted the Respondent's motion with reasons to follow. On July 20, 2022, the Panel also granted Engineers and Geoscientists BC's motion with reasons to follow.
5. These are the Panel's reasons for granting those two motions.

#### **B. Quorum of the Panel**

6. The Panel that was convened to conduct this discipline hearing was constituted pursuant to section 77(1) of the PGA. At the time the Panel was convened it consisted of the Chair, Frank Denton P. Eng., and Panel Members Thomas Morrison P. Eng. and Pierre Gallant.
7. The discipline hearing was originally scheduled for December 6 to 10, 2021. At a pre-hearing conference on October 18, 2021, the Panel granted the Respondent's request to adjourn the hearing to accommodate his counsel's availability. The hearing was adjourned to be conducted on April 4 to 8, 2022.
8. On April 4, 2022, the parties provided oral submissions with respect to the Respondent's motion for leave to admit the late-filed expert report of Dr. Ball. All three Panel Members received the parties' written submissions and were present for

their oral submissions on April 4, 2022. All three Panel Members agreed with the decision on that date to grant the Respondent's motion, with reasons to follow.

9. On July 20, 2022, all three Panel Members also received written submissions with respect to Engineers and Geoscientists BC's motion for the disclosure of a complete unredacted copy of Dr. Ball's expert file.
10. All three Panel Members heard evidence over the first five hearing days in April 2022, continuing for a further five days in July 2022 and one day in April 2023. All three Panel Members also subsequently received the parties' closing written submissions regarding the conduct allegations set out in the Citation between May and September 2023.
11. Subsequently, in April 2024, and before the Panel's reasons for its decisions to grant the Respondent and Engineers and Geoscientists BC's respective motions were finalized, Panel Member Thomas Morrison, P. Eng. became unable to continue with this discipline hearing.
12. The *PGA* and Engineers and Geoscientists BC's Bylaws set out the Panel's authority and the requirements for its composition.
13. Section 77(1) of the *PGA* provides that a discipline committee of a regulatory body may establish panels to conduct discipline hearings. Section 77(2) provides that such a panel must include at least one lay member, and that the panel may exercise any power or authority a discipline committee may exercise under the *PGA*.
14. Section 77(3) empowers Engineers and Geoscientists BC's Board to make bylaws for the appointment and composition of panels. Section 1 of the Bylaws, and section 1.1 of Schedule B to the Bylaws, define a "Discipline Hearing Panel" as "a panel of at least 3 members of the Discipline Committee, one of whom must be a Lay Committee Member...".

15. A quorum is the minimum number of members who must be present for a body to exercise its powers validly [CED 4<sup>th</sup>, *Administrative Law*, "Improper Constitution of the Delegate - Technical Requirements and Quorum" at §27 (March 2024)].
16. Neither the *PGA* nor the Bylaws contain any provision about the quorum of a discipline hearing panel, or whether the remaining members has jurisdiction to provide reasons for interim or final determinations if one or more panel members become unable to continue to serve on the discipline panel during the course of the hearing, or any provision clarifying whether a discipline hearing panel must act unanimously or may act by majority.
17. In the absence of any provisions to the contrary, interpretation of the *PGA* and Bylaws is governed by the *Interpretation Act*. Section 2(1) of the *Interpretation Act* provides that it applies to "every enactment" unless a contrary intention appears either in the enactment or in the *Interpretation Act*.
18. The Bylaws are an "enactment" within the meaning of the *Interpretation Act*. Section 1 of the *Interpretation Act* defines an "enactment" to include a regulation and a "regulation" to include a bylaw enacted in execution of a power conferred under an Act. Moreover, the status of bylaws as "regulations" was confirmed by the Supreme Court of Canada in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 51 (dealing with a substantively identical provision of the federal *Interpretation Act*, R.S.C. 1985, c. 1-21, and bylaws enacted under the *Indian Act*, R.S.C. 1985, C. 1-5).
19. Section 18 of the *Interpretation Act* provides:
  - Majority and quorum
  - 18 (1) If in an enactment an act or thing is required or authorized to be done by more than 2 persons, a majority of them may do it.
  - (2) If an enactment establishes a board, commission or other body consisting of 3 or more members, in this subsection called

the "association", the following rules apply:

(a) if the number of members of the association provided for by the enactment is a fixed number, at least 1/2 of that number of members constitutes a quorum at a meeting of the association;

(b) if the number of members of the association provided for by the enactment is not a fixed number, at least 1/2 of the number of members in office constitutes a quorum at a meeting of the association, as long as the number of members is within the maximum or minimum number, if any, authorized by the enactment;

(c) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association;

(d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

20. Applying the above-mentioned provisions of the *Interpretation Act* to the Panel, it is clear that:

a. The Panel may exercise its powers by majority: section 18(1).

b. Any decision made by the majority of the Panel, if quorum is met, is deemed to have been made by the Panel: section 18(c).

c. Section 18(2)(b) applies rather than section 18(2)(a) because the Bylaws do not fix the number of members of a disciplinary hearing panel, providing only that it must be "at least 3". Accordingly, two members of the Panel constitute a quorum of the Panel: section 18(2)(b).

d. A vacancy in the membership of the Panel does not invalidate the constitution of the Panel or impair the right of the remaining Panel members to act, if the number of remaining Panel members is not less than two: section 18(d).

21. Such an approach is further consistent with the existing case law. In this regard, similar provisions of Manitoba's *Interpretation Act*, C.C.S.M. c. 180 were applied by two panel members in the disciplinary process underlying *Jhanji v. The Law Society of Manitoba*, 2022 MBCA 78 ("*Jhanji*") after the third panel member was appointed to the Bench and therefore unable to continue (see: paras. 70-71). The two remaining panel members decided that they could continue to hear the matter and retained jurisdiction (see: para. 71). Notably, as in this case, the two remaining members included the lay member required to be included on the panel in question.
22. The Manitoba Court of Appeal confirmed that the panel was correct in holding that it had jurisdiction to continue: "when an unforeseen vacancy arises on an administrative tribunal, the 'remaining members of the body can continue to act for it, provided that their numbers are at all times sufficient to satisfy the requirements of the applicable *quorum*'" (see: para. 72), citing *Re Ballard and Arkin* (1973), 34 D.L.R. (3d) 758 (Man. CA) at pp. 760-761.
23. Moreover, in *Bhullar v. British Columbia Veterinary Medical Assn.*, 2012 BCCA 443 ("*Bhullar*"), the Court of Appeal found, at para. 77, that a decision rendered by four of the seven original members of the body was validly rendered, applying provisions on the necessary quorum from the regulatory authority's bylaws. *Bhullar* further confirms that a quorum specified as sufficient "at a meeting" of a disciplinary body is also sufficient for the purpose of rendering a decision of that disciplinary body (see: paras 85-90).
24. Accordingly, considering the above provisions of the *Interpretation Act*, the Bylaws and relevant case law, the Panel finds that the remaining two Panel Members constitute a quorum that continues to have jurisdiction to provide these reasons for the Panel's interim decision of April 4, 2022, granting the Respondent's motion.

### **C. Background Facts**

25. As noted, the hearing in this discipline proceeding was scheduled to commence on April 4, 2022.
26. The Respondent produced 4 expert reports by March 4, 2022. However, he also wanted to retain Dr. Bruce Ball, P.Eng. to provide an expert opinion in response to the expert report of Dr. Mathew Smith tendered by Engineers and Geoscientists BC.
27. It took the Respondent's counsel several months to get in touch with Dr. Ball by phone because the only available contact information for Dr. Ball was his home phone number in Edmonton, Alberta, where he usually resides.
28. At the time, Dr. Ball was on an extended holiday in Arizona, USA. When the Respondent's counsel finally managed to get hold of Dr. Ball for the first time on February 11, 2022, there was a mistake in taking down his correct email address, which resulted in further delay in obtaining an expert report from him.
29. The Respondent's counsel managed to get in touch with Dr. Ball again, but he was on an extended holiday, and it took him a further 10 days to review Dr. Smith's report. Dr. Ball contacted Respondent's counsel on March 4, 2022, the date the Respondent's expert reports were due, but thereafter it took Dr. Ball about two weeks to formulate his opinion on whether he could act in this matter and what his expert opinion would be. The Respondent was accordingly only able to officially retain Dr. Ball for his services on March 18, 2022. After Dr. Ball had been retained, he worked through the weekend to prepare his expert report which Respondent's counsel provided to counsel for Engineers and Geoscientists BC on March 22, 2022.
30. Engineers and Geoscientists BC has requested an unredacted copy of Dr. Ball's file from the Respondent's counsel.

31. The Respondent's counsel has provided a redacted copy of Dr. Ball's file to Engineers and Geoscientists BC claiming litigation privilege over the redacted contents.
32. Shortly before Dr. Ball was scheduled to testify in the hearing, Engineers and Geoscientists BC applied for an order for disclosure of a complete unredacted copy of Dr. Ball's expert file, particularly email correspondence between him and the respondent's counsel that has been redacted.

#### **D. The Parties' Submissions**

##### **Admission of Late Filed Expert Report of Dr. Ball**

###### **The Respondent's Position**

33. Dr. Ball has been a Metallurgical Engineer since 1969. The Respondent submits he is a professional engineer with special expertise in the subject matter of welding and tower cranes and who also has special experience in crane manufacture and certification including:
  - a. being a responsible and supervising inspector for CSA welding inspection organizations and weld testing laboratories;
  - b. being a 30-year member of the CSA Committee W178 responsible for various CSA Standards; and
  - c. acting as an instructor, both at university and trade school, teaching Engineering Standards courses including those related to CSA Standards W47.1 and W59.
34. The Respondent says these are the very Standards that form the basis of the allegations set out in the Citation.
35. The Respondent submits that the courts in British Columbia have held that only substantial and irremediable prejudice to the receiving party will justify excluding a



late filed expert report (*CA v. Critchley* (1996), 4 C.P.C. (4th) 269 (B.C.S.C.), at para. 12; *Dhaliwal v. Bassi*, 2007 BCSC 547, at para. 12; *S.D.H v. T.H.*, 2016 BCSC 380, at para. 77), and relevant evidence should not be excluded unless the prejudice created by receiving the evidence is such that it ought to be excluded (*Sam v. British Columbia*, 2014 BCSC 632, at para. 33; citing *Gibson v. Rickett*, [1995] B.C.J. No. 2426, at paras. 11, 12).

36. The Respondent says that Dr. Ball's expert report was provided to Engineers and Geoscientists BC on March 22, 2022, and the discipline hearing will commence on April 4, 2022.
37. The Respondent submits this situation must be distinguished from the circumstances where an expert report is first provided during the hearing or late in the hearing. He submits there is no prejudice to Engineers and Geoscientists BC. He further argues the expert report from Dr. Ball would be exceedingly helpful to the Panel in understanding the Standards and Regulations and their application in relation to tower cranes.
38. The Respondent submits that allowing Dr. Ball's report would cause negligible, if any, prejudice to Engineers and Geoscientists BC since their counsel still has about two weeks until the hearing starts to prepare for the cross-examination of Dr. Ball. The Respondent further says that since Dr. Ball will provide his evidence towards the end of the hearing, likely on April 7 or 8, and perhaps even later depending on how the hearing proceeds, Engineers and Geoscientists BC will also have this additional time to prepare for their cross examination. The Respondent further submits that Engineers and Geoscientists BC will also not be deprived of the opportunity to ask their own expert Dr. Smith for his opinion on Dr. Ball's report because the hearing has not yet commenced.
39. The Respondent argues that if Dr. Ball's expert report is excluded, prejudice to the Respondent's defense would be significant. He submits that excluding Dr. Ball's

report would not only deprive the Panel of his years of experience and intimate understanding of the Standards and Regulations, but also deprive the Respondent from providing a fulsome defense. Accordingly, it is in the interest of procedural fairness that the Respondent be allowed to rely on Dr. Ball's expert report.

*Engineers and Geoscientists BC's Position*

40. Engineers and Geoscientists BC oppose the Respondent's application. It submits that the Respondent has failed to offer a compelling basis to warrant granting him leave to tender Dr. Ball's expert report which was delivered less than two weeks before the hearing in circumstances where the report to which Dr. Ball responds has been in the Respondent's hands for over 5 months. Engineers and Geoscientists BC says that permitting admission of such evidence now would be procedurally unfair and prejudicial to it, because it is already tasked with responding to 4 expert reports delivered by the Respondent 30 days prior to the hearing.
41. Engineers and Geoscientists BC further submits that the Panel's discretion to admit expert evidence and relieve the Respondent from the time limits set out in the Bylaws must be exercised sparingly and in a manner that will foster the fair, just and timely disposition of the discipline hearing. It says in the present circumstances, rejecting the late-filed evidence would best achieve those objectives.
42. Engineers and Geoscientists BC also says the following procedural history is important for purposes of deciding this application:
  - a. On May 27, 2021 Engineers and Geoscientists BC issued the Citation, together with a letter to the Respondent advising that this matter would be set down for hearing from December 6 to 10, 2021. It attempted to serve the Respondent with the Citation and accompanying letter at Kova Engineering in July of 2021.
  - b. Shortly thereafter, on July 21, 2021, the Respondent's counsel reached out to Engineers and Geoscientists BC about the attempted service and

requested service to be affected through counsel. Engineers and Geoscientists BC delivered the Citation to the Respondent's counsel later that same day and advised that the discipline hearing had been set down for December 6 to 10, 2021.

- c. On February 5, 2021 the *Professional Governance Act*, S.B.C. 2018, c. 47 (the "PGA") came into effect along with new Bylaws (the "Bylaws") setting, among other things, deadlines for disclosure of expert reports. In accordance with the Bylaws, any expert report upon which Engineers and Geoscientists BC wished to rely would be due 60 days before the hearing. The Bylaws in force at the time this motion was argued required that expert reports from a respondent be delivered at least 30 days in advance of the commencement date set for the discipline hearing.
- d. When the matter was initially set down for hearing in early December of 2021, Engineers and Geoscientists BC's deadline for delivery of expert reports fell on October 7, 2021. The Respondent's deadline for delivery of expert reports would have fallen on November 6, 2021.
- e. On October 2, 2021 counsel for Engineers and Geoscientists BC wrote to Respondent's counsel to request an 8-day extension of time for delivery of its expert report to October 15, 2021 and offered to extend the timeline for delivery of any responding report to 30 days after receipt of its own report (instead of 30 days before the hearing). In counsel's email seeking the Respondent's consent to an extension, counsel for Engineers and Geoscientists BC advised the Respondent's counsel of the relatively new Bylaws setting out processes for hearing disciplinary matters, including deadlines for the delivery of expert reports.
- f. On October 4, 2021 the Respondent's counsel responded indicating that he did not expect to be representing the Respondent at the hearing, and that a

decision respecting counsel's request for an extension should be made by counsel representing the Respondent for the hearing.

- g. After hearing nothing further from the Respondent's counsel (or new counsel to the Respondent), counsel for Engineers and Geoscientists BC wrote to Independent Legal Counsel for the Panel ("ILC"), on October 5, 2021 to formally request the 8-day extension. Engineers and Geoscientists BC also sought a reciprocal extension of time for the Respondent. In response, the Respondent's counsel again indicated that he did not expect to be representing the Respondent at the hearing because he was unavailable for the hearing dates.
- h. On October 7, 2021 the Panel granted the Engineers and Geoscientists BC's extension requests. Accordingly, the Respondent's expert report would now be due by November 14, 2021. In communicating the Panel's decision to grant the extension request, ILC also requested that counsel make themselves available for a pre-hearing conference on October 18 or 19, 2021.
- i. On October 15, 2021 ILC forwarded dial-in information for the pre-hearing call and included a link to the Engineers and Geoscientists BC's Bylaws to give counsel a sense of the matters the Panel wished to address during the call.
- j. Also on October 15, 2021 Engineers and Geoscientists BC delivered to the Respondent's counsel the expert report from Dr. Mathew Smith that it intended to rely upon in these proceedings.
- k. The pre-hearing conference took place on October 18, 2021, during which the Respondent's counsel applied to adjourn the hearing dates on the basis that he was not available in December and that Respondent had not yet retained new counsel. Engineers and Geoscientists BC took no position on the adjournment request on the understanding that, without an adjournment,

the Respondent would be unrepresented at the hearing. The Panel granted the Respondent's adjournment request, and the matter was set down for hearing from April 4 to 8, 2022. In accordance with the Bylaws the Respondent's new deadline for delivery of expert reports was now March 4, 2022.

- i. On February 24, 2022 the Respondent's counsel requested copies of the documents that Dr. Smith reviewed to provide his expert report. Engineers and Geoscientists BC provided those documents to the Respondent's counsel the following day.
- m. On March 3, 2022 ILC contacted counsel to schedule another pre-hearing conference to "discuss the parties' hearing preparations, including document disclosure, and readiness to proceed." The Respondent's counsel responded the same day providing his availability. The Respondent's counsel did not provide any indication that there would be a need to address the admissibility of further expert evidence. The pre-hearing conference was scheduled for March 24, 2022.
- n. On March 4, 2022 (30 days before the dates set for hearing) counsel delivered 4 expert reports on behalf of the Respondent. At that time he did not seek an extension of time for delivery of a fifth expert report or indicate any intention to retain a further expert.
- o. On March 18, 2022 (in accordance with the Bylaws) the Respondent's counsel delivered a list of witnesses that the Respondent intended to call to give evidence at the hearing. The list contained 9 names. Among those listed was a "Bruce Ball". The list did not indicate or suggest that Bruce Ball was being tendered as an expert witness.
- p. On March 22, 2022 two days before the pre-hearing conference and less than two weeks before the dates set for hearing, the Respondent's counsel

delivered an expert report from Dr. Ball commenting on Dr. Smith's expert report October 2021 report, conceding its lateness and advising that his client would be seeking leave of the Panel to have the report admitted at the hearing.

- q. On March 24, 2022 the Panel presided over the scheduled pre-hearing conference, and, among other things, requested that the parties provide written submissions on the Respondent's request for leave to tender the late-filed expert report of Dr. Ball. The Respondent's application to adduce the evidence was due on March 30, and Engineers and Geoscientists BC's submissions were to be due on April 1, 2022.
  - r. On March 28, 2022, counsel for Engineers and Geoscientists BC wrote to the Respondent's counsel to request the files for the five expert witnesses identified by the Respondent by noon on April 1, 2022.
  - s. On April 1, 2022 at 1:41 pm, the Respondent's Counsel advised that he was not yet in possession of all of the expert files, including Dr. Ball's file, but was attaching redacted copies of his office's correspondence with each of the Respondent's experts, including his correspondence with Dr. Ball.
43. Engineers and Geoscientists BC submits that section 1.5(2) of Schedule B of the Bylaws requires that a Respondent deliver his expert reports, or a summary of the anticipated evidence of an expert, to it at least 30 days prior to the commencement of a hearing.
44. It says there is no question that the Panel has the discretion to grant relief from the timelines set out in the Bylaws. However, the Panel must exercise its discretion in a manner that will foster the fair, just and timely disposition of the hearing as required by section 1.6(3) of the Bylaws.
45. Engineers and Geoscientists BC says the Respondent does not offer an acceptable reason to be granted leave to introduce Dr. Ball's report. It submits the fact that the

Respondent wished to retain Dr. Ball and that he may appear to be qualified to offer the opinion sought are irrelevant to the question of whether the Respondent ought to be granted leave to introduce his report outside the 30-day window provided by the Bylaws. It says there is nothing unique about the desire to retain an expert and the identification of someone who may be qualified, and these factors cannot be relevant to the Panel's determination of whether to relieve from the time limits provided by the Bylaws because, if considered, they would make those time limits all but redundant. Engineers and Geoscientists BC submits something more or unique, something compelling, is required.

46. It says the only other justification the Respondent offers for leave to tender Dr. Ball's late filed expert report relates to the difficulty he says he and his counsel had in reaching and retaining Dr. Ball for this work. It submits the Respondent appears to argue that it took "several months" to reach Dr. Ball and that retaining him was delayed because Dr. Ball was, at some point in time, on an extended vacation in the United States.
47. Engineers and Geoscientists BC submits the only evidence in support of these arguments is the supporting affidavit of the Respondent's counsel's legal assistant. It says the affidavits provides no evidence or information about when or how first efforts were made to contact Dr. Ball, or when Dr. Ball was out of the country, or why - in this digital age - Dr. Ball was unable to review Dr. Smith's remotely report before March 4, 2022, if indeed he was out of the country.
48. Engineers and Geoscientists BC says the correspondence between counsel for the Respondent's office and Dr. Ball indicates that their first contact was on February 11, 2022 - three weeks before the Respondent's deadline for delivery of his expert reports and suggests that afterward - because materials were sent to the wrong email address for Dr. Ball - he did not receive a copy of Dr. Smith's report and related material until February 24, 2022. The same correspondence suggests that he offered no response to that material until March 5, 2022 (after the expiry

of Respondent's deadline for delivery of expert reports), that there was no further correspondence between Dr. Ball and the Respondent's counsel until March 17, 2022, and that he was not retained until March 18, 2022.

49. Engineers and Geoscientists BC submits that the evidentiary record before the Panel is far from compelling and supports only that the Respondent may have wanted to retain Dr. Ball but that he reached out to him late in the day and was for some reason unable to retain him until March 18, 2022 and unable secure a report from him until March 22, 2022.
50. It says the legal assistant's affidavit does not explain if efforts to retain alternate experts were undertaken while Dr. Ball was not reachable. It says it is apparent that the Respondent was able to marshal alternative evidence in the form of the 4 expert reports he delivered on March 4, 2022.
51. Engineers and Geoscientists BC submits the fact that Dr. Smith's report - to which Mr. Ball was asked to respond - had been in the Respondent's hands since October 15, 2021 must also be considered.
52. It argues that although the *Supreme Court Civil Rules* do not apply to proceedings under the *PGA* they are instructive to the matter at hand because the Court, like the Panel, generally has wide discretion over its own procedure. It argues that despite its broad discretion over matters of procedure, the BC Court of Appeal has confirmed in *Griffioen v. Arnold*, 2019 BCCA 83, ["Griffioen"], at para. 52, that a Court's discretion to dispense with the requirements of expert reports, such as time of delivery, must be "exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in the Rules... There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the requirements of the Rules...".
53. Engineers and Geoscientists BC submits that this approach to the requirements for expert reports provided by the Court Rules is consistent in the jurisprudence. It



points to *Perry v. Vargas*, 2012 BCSC 1537 ("*Perry*") where the plaintiff made an application to admit an expert report on the eve of trial. The trial had previously been scheduled once and adjourned to a new date. The court refused to admit the late-filed expert evidence because it placed the defendant in what the court called "obvious difficulties" and because admitting this evidence would be "antithetical" to the purpose of the court rules.

54. Engineers and Geoscientists BC further relies on *Law Society of Ontario v. Guiste*, 2021 ONLSTH 147 ("*Guiste*"), a professional regulatory case dealing with the issue of a late-filed expert report in a disciplinary proceeding involving alleged misconduct of a lawyer. In *Guiste*, a lawyer who was the subject of a discipline proceeding applied to the Ontario Law Society Tribunal for leave to retain an expert and late-file an expert report and to vary the hearing schedule as necessary. The Law Society Tribunal panel refused the application. The panel considered the impact that this late-filed report would have on the timeliness of the hearing and found that it would be significantly delayed if the motion was allowed. The panel also considered the prejudice to the Law Society in allowing the late report: the fact that the Society had developed and presented its case, prepared its witnesses, and called its evidence without the benefit of the proposed report. In all the circumstances, the panel concluded that it would not be fair to allow the member to produce this late report.
55. Engineers and Geoscientists BC submits that in the present circumstances, the Respondent similarly should not be permitted to tender Dr. Ball's late filed expert report because doing so would not further the fair, just and timely disposition of this discipline hearing.
56. It argues that if the Respondent is permitted to tender Dr. Ball's report, it will be forced to prepare to respond to, and cross examine on, no less than five expert reports. Engineers and Geoscientists BC argues that admitting Dr. Ball's evidence would be procedurally unfair and prejudicial to it and compromise its ability to

appropriately respond to the report before the commencement of the hearing, both in terms of preparing for cross-examination, and the ability to file responding evidence if necessary.

57. In contrast, declining to grant the Respondent leave to adduce expert evidence outside of the timelines set by the Bylaws will not result in unfairness to him who has been able to deliver 4 different proposed expert reports in support of his position.
58. Engineers and Geoscientists BC further submits there are good reasons why the Bylaws (in addition to the *Evidence Act* and Rules of Court) provide timelines for the exchange of expert reports. First, the rules encourage fairness and predictability, and are intended to avoid surprise and costly delays. For this reason, Engineers and Geoscientists BC submits that the timelines must be applied, save in exceptional circumstances. It says the Respondent has not pointed to any such exceptional circumstances. In fact, given the adjournment of the original hearing dates at the Respondent's request, he has enjoyed an additional 5 months to prepare his case with Dr. Smith's expert report in hand. Engineers and Geoscientists BC submits what the Respondent now seeks to do is add to his collection of reports very late in the day. It says he could have, but did not, advise of his intention to adduce late filed evidence from a fifth expert when he delivered his other 4 expert reports on March 4, 2022.
59. Engineers and Geoscientists BC argues that the Respondent has offered no compelling reason to conclude that acceptance of this report would further the fair, just and timely disposition of this hearing. It submits he was able to retain a different expert when it became difficult to contact Dr. Ball. Indeed, he has already filed 4 separate expert reports. It would be contrary to the fair, just and timely disposition of the hearing to allow the Respondent to late file a fifth expert report.
60. Engineers and Geoscientists BC further submits that the Respondent's argument that "only substantial and irremediable prejudice" will justify excluding a late expert

report has been overtaken by the BC Court of Appeal's decision in *Griffioen*, which expressly deals with the issue of late-filed reports in the civil context, and which was not appealed.

### **Disclosure of Unredacted Copy of Dr. Ball's File**

#### *The Respondent's Position*

61. The Respondent's counsel objects to the disclosure an unredacted copy of Dr. Ball's file to Engineers and Geoscientists BC on the basis that the redacted communications are protected by litigation privilege (also known as "lawyer's brief privilege). He takes the position that portions of his email communications with Dr. Ball are protected by litigation privilege. The Respondent's counsel says this is so because the redacted portions of his communications with Dr. Ball are about "litigation strategy" and go beyond the confines of his expert opinion.

#### *Engineers and Geoscientists BC's Position*

62. Engineers and Geoscientists BC submits that the legal burden of establishing privilege lies with the party asserting it. Once an expert report has been tendered, litigation privilege over the contents of the experts file is waived with respect to all matters that pertain to that expert's evidence, including his report, his *viva voce* evidence, and his credibility.
63. Engineers and Geoscientists BC says the unredacted communications sought are intended to test the evidence of Dr. Ball for consistency, reliability, qualifications, and credibility. This is the purpose of cross-examination.
64. Engineers and Geoscientists BC submits there are different types of experts in litigation. One type of expert is one who prepares a report and testifies before a decision-maker, with the goal of providing opinion evidence on a matter requiring expertise and specialized knowledge ("Expert Witness"). Before the Expert Witness's report is tendered, litigation privilege applies to the expert's report and to

the contents of their file, including, among other things, communications with legal counsel.

65. Engineers and Geoscientists BC argues that when the Expert Witness is called to testify, litigation privilege is deemed to have been waived to allow the Expert Witness's evidence to be tested in cross-examination in respect of the expert's consistency, reliability, qualifications, and credibility.
66. Engineers and Geoscientists BC points out that a party to litigation may also hire an expert as confidential advisor to assist counsel in preparing for the litigation, including, for example, how to cross-examine the other side's expert ("Expert Advisor"). Counsel's communication with an Expert Advisor is indeed protected by litigation privilege until the end of the litigation. Counsel may decide to hire such an Expert Advisor and never tender their evidence to the decision-maker to allow their communications to remain protected.
67. Engineers and Geoscientists BC submits experts cannot remain both Expert Advisors and Expert Witnesses throughout the entirety of the litigation. Once an Expert Advisor testifies as an Expert Witness before a decision-maker, litigation privilege is waived. This is because the role of the Expert Witness is to be unbiased and impartial, and to provide the decision-maker with their opinions on the matters in issue using their expertise. In contrast, the role of an Expert Advisor is to assist counsel in advocating for one party to the litigation.
68. Engineers and Geoscientists BC says the Respondent could have chosen to retain Dr. Ball - or any other expert - exclusively to advise him on the litigation. However, he has chosen to tender Dr. Ball's report and *viva voce* evidence. In other words, Dr. Ball can no longer be an Expert Advisor at the same time as he professes himself to be an impartial and unbiased Expert Witness at this stage of the proceedings.
69. In rare circumstances, litigation privilege in respect to communications with an Expert Advisor after their report is tendered may still attach if it would be unfair

or inconsistent to require such production. For example, courts have found that the Expert Advisor's communications with counsel in respect to the cross-examination of the other side's expert witness still attracts litigation privilege. However, such privilege is waived after such cross-examination has taken place.

70. Engineers and Geoscientists BC says the above are well-established legal principles, based on both the role of the expert in litigation and the need for procedural fairness. Engineers and Geoscientists BC submits that the BC Supreme Court summarized these principles in *First Majestic Silver Corporation v. Santos*, 2012 BCSC 1250:

[5] The previous court rules did not deal with the production of an expert's file. Rather, judicial decisions set out the law. The leading case is *Vancouver Community College v. Phillips, Barrett* [citation omitted]. Finch J., as he then was, set out the following principles:

34 I will attempt to summarize my view of the law. When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure.

[6] Finch J., at para. 29, drew a distinction between the role of an expert in providing his opinion to the court and acting as an adviser to counsel:

... As well, in the litigation in which the witness is called to testify, he may remain a confidential advisor to the party who retained him in, at least, one respect. He may be asked or may have been asked to give advice on how to cross-examine the other side's witnesses. In putting forward his own opinion, he need not necessarily attack the

opinions of experts opposite. Counsel may wish to save that sort of ammunition until after the adverse expert has been called. It would not be fair to require the witness to disclose documents relating only to the cross-examination of such adverse experts because it would give the other side an advantage not available to the party calling evidence on a subject matter first.

[7] In the more recent decision of *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2007 BCSC 909, Satanove J. dealt with the dual role of an expert giving evidence at trial and providing advice to counsel for the purposes of cross-examining the opponent's experts. She stated:

15 I do not think that the statements by Finch J., as he then was, in *Vancouver Community College v. Phillips, Barratt* regarding exceptions to the waiver of litigation privilege can be taken as blanket exceptions which will apply in all cases regardless of the circumstances. He was citing examples where exceptions may occur, but the principle he was espousing was that the court must balance the competing policies of disclosure versus privilege and determine what is fair in each particular case.

71. Engineers and Geoscientists BC says that in *Lax*, above, Justice Satanove ordered the production of a Dr. James' file, despite the fact that it contained advice to counsel about how to cross-examine the opponent's expert. The Court reasoned that, because Dr. James' report included Dr. James' opinion on the other expert's report, Dr. James' comments on the matter were relevant to Dr. James' evidence.
72. Engineers and Geoscientists BC argues that this is not unlike Dr. Ball's report, which repeatedly references Dr. Smith's expert report. It says that given the stage of the discipline proceedings - with Dr. Mathew Smith having already been cross-examined - there can be no concern about fairness or consistency in ordering the production of the communications at issue. Nor can it be said that the defense's strategy will be revealed for the first time: the Respondent has already testified, and his position on the live issues has been thoroughly canvassed.

73. Engineers and Geoscientists BC appended the documents in question, in redacted form, to their motion. It says all the communications in question arose while Dr. Ball was in the throes of drafting his late tendered report. Engineers and Geoscientists BC argues the timing and context of the communications strongly suggests the redacted portions are relevant to the drafting of Dr. Ball's report, the topics it might cover, his views on the issues he should address, his credibility, or the cross-examination of Dr. Smith. Dr. Ball's report is 22 pages long and it answers a broad range of questions, including about the regulations that apply, the risks involved if the Anchor Stools had not been properly inspected, the design of the placement of the tower crane, the certification of the wire, the welders and the fabricator, and Dr. Ball's opinions about the appropriateness of the Respondent's actions in inspecting the Stools.
74. Litigation privilege over documents touching in any way on the above subjects has now been clearly waived, and it would not be unfair or inconsistent to order the production of the records in question. To the contrary, it would be unfair and inconsistent not to order the unredacted disclosure as such a failure would severely curtail Engineers and Geoscientists BC's ability to test Dr. Ball's evidence on cross examination.

## **E. Analysis and Findings**

### **Admission of Late Filed Expert Report of Dr. Ball**

75. The parties referred the Panel to several cases in support of their respective positions on the approach or test the Panel should follow when exercising its discretion in deciding whether to allow the Respondent to use the late-filed expert report of Dr. Ball.
76. Except for *Guiste*, none of those cases are professional discipline matters, but instead concern litigation between private parties where procedural fairness and protection of the public interest are not principal considerations like in professional

discipline proceedings such as this case. The factual circumstances in *Guiste* are also completely different than in this case. In *Guiste*, the registrant applied more than two-and-a-half years after the delivery of the Law Society's expert report, and almost six months after the Law Society's expert had completed his testimony and the Law Society closed its case for leave to file a yet to be prepared expert report. In this case, Dr. Ball's expert has already been prepared and was provided to Engineers and Geoscientists BC almost two weeks before the start of the discipline hearing. It is also not seriously disputed by Engineers and Geoscientists BC that the contents of the report are relevant because it provides an opinion on the application of the specific Regulations and Standards underlying the allegations in the Citation. In fact, the Respondent submits that it is the only expert report that specifically does so.

77. Accordingly, the Panel has decided not to follow the cases on which the parties rely, including *Guiste*.
78. In this case, both parties agree that the versions of sections 1.5(2)(a), 1.5(3) and 1.6(3) of Schedule B of the Bylaws that were in force at the time the Respondent's motion was heard provide the Panel with a discretion to grant leave to use a late-filed expert report in the discipline hearing:

#### **1.5 Disclosure and Evidence**

(2) Unless otherwise agreed by the parties or ordered by the Decision Maker, the Applicant/Respondent must provide the following to EGBC: (a) expert reports, or a summary of the anticipated evidence of an expert if no report is produced, at least 30 days prior to the commencement of a hearing;

...

(3) A failure to comply with a timeline in subsection (1) or (2) does not make the document or evidence inadmissible, subject to the Decision Maker's obligation to ensure procedural fairness.

#### **1.6 Pre-Hearing Conference**

...

(3) The Decision Maker may determine any procedural matter at a pre-hearing conference that will foster the fair, just, and timely disposition of the hearing.



79. It is clear from these provisions of the Bylaws that when deciding whether to grant leave to use a late-filed expert report in the discipline hearing, the Panel is under an obligation to ensure procedural fairness.
80. The concept of procedural fairness is eminently variable, and its contents is to be decided in the specific context of each case.
81. It is an established principle of Canadian administrative law that the more important a tribunal's decision is to the life of the affected person and the greater its impact on that person, the more stringent the procedural protections that should be afforded.
82. No doubt if the Panel finds that the allegations in the Citation are proven, it could adversely impact the Respondent's ability to practice his profession. Based on the nature and importance of a potentially adverse decision in this proceeding, the Panel accordingly finds that a high standard of procedural fairness is required in conducting the discipline hearing.
83. During oral argument the Respondent stressed that Dr. Ball's evidence is unique because there is not another expert that will be providing evidence in this discipline proceeding whose opinion will touch in the same amount of detail on the application of the Regulations and Standards CSA W178, CSA W47.1 and W59, that underly the allegations in the Citation. Engineers and Geoscientists BC did not dispute this submission.
84. Further, as noted, the Respondent argued that granting leave to introduce Dr. Ball's expert report would only cause marginal or nominal prejudice to Engineers and Geoscientists BC but if the report is excluded, prejudice to his defense would be significant because it would not only deprive the Panel of his years of experience and intimate understanding of the Standards and Regulations but also deprive the Respondent from providing a fulsome defense. It was argued that it is therefore in

the interest of procedural fairness that the Respondent be allowed to rely on Dr. Ball's expert report.

85. The Panel accepts the Respondent's submissions in this regard. The Panel is not persuaded that allowing the Respondent to introduce Dr. Ball's evidence would be significantly prejudicial Engineers and Geoscientists BC, would breach procedural fairness, or that such order would not best further the objectives of a fair, just, and timely disposition of this discipline proceeding.
86. The Panel agrees with the Respondent that when Dr. Ball's report was provided to them, Engineers and Geoscientists BC still had about two weeks until the start of the hearing to prepare for their cross-examination of him. Since Dr. Ball is expected to only provide his evidence on or about April 7 or 8, or perhaps even later depending on how the hearing proceeds, they would also have this additional time to prepare after commencement of the hearing. Further, Engineers and Geoscientists BC received Dr. Ball's report before the hearing started and could therefore also ask their own expert, Dr. Smith, for a responding opinion. And if Engineers and Geoscientists BC at the start of the hearing believed they still needed additional time to prepare their cross-examination or to retain another expert to respond to Dr. Ball's expert report they could have applied for another adjournment for those purposes. They did not do so.
87. More importantly, the essence of a discipline hearing is to determine whether there has been professional misconduct. It is in the public interest to ensure that alleged professional misconduct is evaluated to the fullest extent possible, on the merits, while ensuring fairness to the affected professional.
88. It is also in the public interest that professional discipline hearings are conducted fairly. A discipline hearing where all relevant evidence is before the Panel will no doubt be fairer than a hearing where it is not.

89. The Panel accordingly cannot accept Engineers and Geoscientists BC's position that the fact that Dr. Ball is very qualified and has helpful evidence to provide concerning the matters at issue cannot weigh into the Panel's consideration of whether to grant leave to introduce his expert report.
90. The Panel accepts the Respondent's submission that the expert report of Dr. Ball would be helpful to the Panel in understanding the applicable Standards and Regulations and their application in relation to tower cranes; that is, to evaluate to the fullest extent possible if the Respondent committed professional misconduct or not.
91. Sections 1.9(6) and 1.9(9) of Schedule B of the Bylaws provide the Panel with the discretion to determine its own procedures in conducting the discipline hearing, and not to strictly apply the rules of evidence, consistent with the principles of procedural fairness:

**1.9 Hearing**

(6) The Decision Maker may determine the procedures to be followed at a hearing, consistent with the principles of procedural fairness.

...

(9) The rules of evidence must not be strictly applied, subject to the Decision Maker's obligation to ensure procedural fairness.

92. Administrative tribunals, including this Panel, may use a variety of methods to assist itself in gaining a better understanding of a party's case, including directing a party to file additional evidence on issues which will assist it in better understanding the case.
93. The Panel finds that the discretion to decide its own hearing procedures includes allowing a late-filed expert report into evidence if that report could assist the Panel in better understanding the case or deciding whether a registrant committed professional misconduct or not.

94. Based on the information before it, Dr. Ball's expert report appears to be of that nature. In compliance with procedural fairness, and in the public interest, the Panel finds the report should therefore be allowed to be tendered into evidence.

**Disclosure of Unredacted Copy of Dr. Ball's File**

95. Further, for all the reasons offered in Engineers and Geoscientists BC's written submissions, the Panel did not accept the Respondent's position that the redacted correspondence between his counsel and Dr. Ball was protected by litigation privilege and having to disclose that correspondence to Engineers and Geoscientists would cause unfairness by disclosing his litigation strategy.
96. In particular, the Panel agreed with Engineers and Geoscientist BC's submission that it appeared that all the communications in question arose while Dr. Ball was in the throes of drafting his late tendered report; that the timing and context of the communications strongly suggests the redacted portions are relevant to the drafting of Dr. Ball's report, the topics it might cover, his views on the issues he should address, his credibility, or the cross-examination of Dr. Smith. As also pointed out, Dr. Ball's report is 22 pages long and answers a broad range of questions, including about the regulations that apply, the risks involved if the Anchor Stools had not been properly inspected, the design of the placement of the tower crane, the certification of the wire, the welders and the fabricator, and Dr. Ball's opinions about the appropriateness of the Respondent's actions in inspecting the Stools.
97. The Panel agreed with and accepted Engineers and Geoscientists BC's submissions that litigation privilege over documents touching in any way on the above subjects had been waived, and it would not be unfair or inconsistent to order the production of the records in question. To the contrary, it would be unfair and inconsistent not to order the unredacted disclosure as such a failure would severely

curtail Engineers and Geoscientists BC's ability to test Dr. Ball's evidence on cross examination.

**F. Orders**

98. Accordingly, for the above reasons the Panel allowed the Respondent's motion to admit the late-filed expert report of Dr. Ball, and the Panel also allowed Engineers and Geoscientists BC's motion that the Respondent must disclose to Engineers and Geoscientists BC's counsel, before Dr. Ball is called to testify, the redacted email correspondence between the Respondent's counsel and Dr. Ball dated respectively March 5th, 17th, and 18<sup>th</sup> 2022.

Dated: June 6, 2024

**By the Panel**