

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

**DECISION OF THE DISCIPLINE COMMITTEE**

Hearing date: October 7, 2020  
Decision date: December 18, 2020  
Discipline Committee Panel: John Haythorne, Chair  
Edward Bird, P. Eng.  
David Ricketts, P. Eng.

Counsel for the Association: Lindsay Waddell and Natasha Edgar

For the Member: Not in attendance and not represented by counsel

**A. Introduction**

1. This Panel of the Discipline Committee (the "Panel") of the Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC (the "Association") conducted an inquiry pursuant to section 32 of the *Engineers and Geoscientists Act* (the "Act") on October 7, 2020.
2. The Panel was appointed to conduct an inquiry to determine, pursuant to section 33 of the Act, whether Mr. Nunn acted contrary to section 30(4)(a) and/or (c) of the Act. Section 30(4) provides as follows:
  - 30(4) A member, licensee or certificate holder being investigated under subsection (3) must
    - (a) provide the committee or subcommittee conducting the investigation with any information or records in the possession or

control of the member, licensee or certificate holder that the committee or subcommittee may require,

(b) answer, within a reasonable time and in the manner specified by the committee or subcommittee, any inquiries of the committee or subcommittee, and

(c) appear, on request, before the committee or subcommittee.

3. A notice of inquiry was issued on June 10, 2020 (the "Notice of Inquiry"). The Notice of Inquiry contemplated that the inquiry would be held in-person on October 7, 2020.
4. A revised notice of inquiry was issued on September 17, 2020 (the "Revised Notice of Inquiry"). The Revised Notice of Inquiry provided for the inquiry to proceed by video conference. The date and time of the inquiry and the allegations were unchanged.
5. The particulars of the allegations set out in the Revised Notice of Inquiry are as follows:
  1. You failed to provide your entire file on an 870 ft<sup>2</sup> single story combustible wood lumber storage building located at [address], South Slokan, BC (the "Project") to the Investigation Committee of the Association, despite requests to do so, including but not limited to those made by the Association's:
    - a. Investigator, by letter dated April 25, 2018;
    - b. Investigator, by letter dated May 31, 2018;
    - c. Investigator, by letter dated June 22, 2018.
  2. You failed to attend an interview with the Investigation Committee of the Association, despite requests to do so, including but not limited to those made by the Association's:
    - a. Investigator, by letter dated September 9, 2019, and sent to you via email;
    - b. Investigator, by phone call and voicemail message on September 17, 2019; and
    - c. Investigator, by letter dated September 19, 2019.

6. As set out in the Revised Notice of Inquiry, the inquiry proceeded by videoconference.
7. The Association led evidence and made submissions with respect to the allegations in the Revised Notice of Inquiry. As set out further below, Mr. Nunn was not represented by counsel and did not attend.

**B. Non-attendance and service**

8. The Panel members and counsel for the Association attended at 9:30 AM as set out in the Revised Notice of Inquiry. Mr. Nunn was not present and no one appeared on his behalf. The Panel waited 10 minutes before beginning to allow for the possibility that Mr. Nunn was running late or having technical difficulties.
9. The Chair called the inquiry to order at 9:40 AM. Mr. Nunn was not in attendance.
10. Counsel for the Association presented an affidavit of service indicating that a process server, after speaking with Mr. Nunn on the phone and receiving his permission, delivered the Revised Notice of Inquiry to Mr. Nunn's address in Nelson, BC on September 21, 2020.
11. Joanne Wilson, an investigator with the Association, testified that the address in Nelson was Mr. Nunn's last address on file with the Association.
12. Counsel for the Association sought to have the inquiry proceed in Mr. Nunn's absence, as contemplated by section 32(5) of the Act. Section 32(5) states:
  - (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.
13. As set out above, the application of section 32(5) hinges on proof of service having been made under section 32(2). Section 32(2) states:
  - (2) On receipt of the investigation committee's recommendation under section 30(9) or (10) for an inquiry, the discipline committee must cause an inquiry to be held before it by causing written notice of an inquiry to be personally served on the person who is the subject of the inquiry or, failing personal service, by leaving the notice at, or by mailing it by registered mail to, the person's last address on file with the association.
14. Based on the evidence before it, the Panel found that service of the Revised Notice of Inquiry had occurred as required under section 32(2) of the Act.

15. Additionally, while not determinative, the Panel notes that evidence provided by the Association established that the Notice of Inquiry (which contained the same date and time for the inquiry as the Revised Notice of Inquiry) was personally served on Mr. Nunn. Therefore, in addition to service of the Revised Notice of Inquiry in the method required under the Act, the evidence reveals that Mr. Nunn had actual notice of the date and time of the inquiry.
16. The Panel granted the Association's application to proceed in Mr. Nunn's absence, pursuant to section 32(5) of the Act.

**C. Burden and Standard of Proof**

17. The Association submits, and the Panel agrees, that the burden of proving the allegations in the Revised Notice of Inquiry is on the Association.
18. The standard of proof that the Association must meet was set out in *Re Syed*, Decision dated September 18, 2017, citing *Kaminski v. Assn. of Professional Engineers and Geoscientists*, 2010 BCSC 468 at paragraph 32. The standard is proof on the "balance of probabilities", meaning that the Panel must find that it is "more likely than not" that the alleged facts occurred.

**D. Evidence**

19. The Association called one witness, Joanne Wilson. A summary of Ms. Wilson's evidence is below:
  - a) Ms. Wilson testified that Mr. Nunn's address in Nelson is his last address on file with the Association (as discussed above in paragraph 11).
  - b) Ms. Wilson provided an overview of the Association's complaint intake and investigation process.
  - c) Ms. Wilson testified about her involvement as an investigator employed by the Association in the investigation of a complaint received about Mr. Nunn.
  - d) Ms. Wilson testified about the steps taken during the investigation and referred the Panel to documents and correspondence contained in the Association's investigation file, as set out further below in section (E).
20. Ms. Wilson's testimony was accepted by the Panel.

**E. Facts**

21. Based on Ms. Wilson's testimony and the documents and correspondence from the Association's investigation file introduced by Ms. Wilson at the inquiry, the Panel finds the following facts:

- a) On April 24, 2017, an official employed by the Regional District of Central Kootenay submitted a complaint to the Association about Mr. Nunn (the "Complainant" and the "Complaint"). The Complaint concerns the adequacy of design details on drawings for a proposed wood lumber storage building (the "Project"). The Complaint attached drawings for the Project that were sealed by Mr. Nunn. The Complainant advised that Mr. Nunn had provided "LoA [Letter of Assurance] Schedule B" for the structural scope of work for the Project, but that the original copy of this document had gone missing from the file.
- b) On May 11, 2017, a letter was sent to Mr. Nunn to advise him of the Complaint and request his response.
- c) On June 1, 2017, Mr. Nunn sent an email requesting an extension for his response to June 7, 2017. This email attached some drawings as well as some correspondence which indicates Mr. Nunn was attempting to make a complaint about the Complainant to the Regional District of Central Kootenay.
- d) On June 8, 2017, Mr. Nunn sent a letter to the Association in response to the Complaint. The letter included five pages of drawings which had not been previously provided to the Association. It did not include the sealed drawings provided by the Complainant or the Letter of Assurance Schedule B referred to by the Complainant.
- e) On June 9, 2017, Mr. Nunn emailed the Association. Mr. Nunn apologized for the delay in providing his response, and advised that he had been organizing a meeting with the owner and the contractor of the Project. Mr. Nunn recommended that the Association contact those parties to follow-up.
- f) On June 14, 2017, a letter was sent to the Complainant. The letter enclosed Mr. Nunn's response and attachments, and sought the Complainant's further comments.
- g) On August 8, 2017, the Complainant sent his comments in reply to Mr. Nunn's response.
- h) On August 12, 2017, the Registrar of the Association sent a letter to a professional engineer appointed as the "Designated Reviewer" of the Complaint.
- i) On August 29, 2017, the Designated Reviewer provided their report to the Registrar. The Designated Reviewer recommended that the Complaint should be forwarded to the Association's Investigation Committee (the "Investigation Committee") for further investigation.
- j) On September 26, 2017, the Investigation Committee considered the matter. The Investigation Committee directed that an investigation be undertaken, and

appointed a subcommittee (the "Subcommittee") to review the matter and report their findings and recommendation to the Investigations Committee.

- k) On April 25, 2018, Ms. Wilson wrote to Mr. Nunn on behalf of the Subcommittee. Ms. Wilson requested, pursuant to section 30(4) of the Act, that Mr. Nunn provide "a copy of [his] complete file for the Project, including all reports, drawings, photos, memos, correspondence, notes, invoices, etc". Mr. Nunn was asked to provide this material by May 16, 2018.
- l) Ms. Wilson did not receive a response. On May 31, 2018, she sent a follow-up letter. This letter again referred to section 30(4) of the Act, and asked that Mr. Nunn provide his "complete file for the project" by June 8, 2018.
- m) Again, Ms. Wilson did not receive a response. On June 22, 2018, she sent a second follow-up letter. This letter again requested Mr. Nunn's "complete file" and referred to his obligations under section 30(4) of the Act.
- n) Mr. Nunn replied by email on July 4, 2018. In his email he stated as follows:

"I have sent the documents to [the Association] twice; once in 2017 and the other during end of May 2018. Could you please confirm receipt,

I must continue to iterate; there was no project, no meeting, no invoices, and no complaints;...

Please let me know ASAP about the receipt of the documents."

- o) On July 5, 2018, Ms. Wilson replied to Mr. Nunn by email. Ms. Wilson's email attached Mr. Nunn's June 2017 response and stated:

"Please confirm these documents attached to [Mr. Nunn's July 4, 2018 letter] encompass everything you have in your possession relating to this Project."

[Underlining in original]

- p) On July 9, 2018, Mr. Nunn replied to Ms. Wilson. Mr. Nunn stated as follows:

"I sent the second set of documents to [Association staff member] who telephoned and said they are being sent to your department. Fortunately they are identical to the 7 June 2017 document (package was mailed).

I am attaching a modified letter which takes away any confusion. Other than that you should have the entire package."

- q) The letter attached to Mr. Nunn's email reported that he did very little work on the Project because no building permit was ever issued and the owner instructed Mr. Nunn to stop work. Mr. Nunn invited the Association to contact the owner and contractor.
- r) On September 9, 2019, Ms. Wilson wrote to Mr. Nunn on behalf of the Subcommittee requesting Mr. Nunn's attendance at an interview. Ms. Wilson proposed four different dates and also offered to accommodate other dates if Mr. Nunn was unable to attend on the proposed dates. Ms. Wilson requested Mr. Nunn's response by September 13, 2019. This letter was sent by email to the email address that Mr. Nunn had previously used to correspond with Ms. Wilson.
- s) On September 17, 2019, having not received a response from Mr. Nunn, Ms. Wilson tried to reach him by telephone. Nobody answered. Ms. Wilson left a voicemail in which she asked Mr. Nunn to return his call.
- t) On September 19, 2019, Ms. Wilson again wrote to Mr. Nunn. She again requested Mr. Nunn's attendance for an interview with the Subcommittee, and attached her previous letter. This letter referred expressly to Mr. Nunn's obligation under section 30(4)(c) of the Act. The September 19, 2019 letter was sent by email and registered mail. The registered mail was delivered and signed for on September 23, 2020.
- u) Mr. Nunn did not respond, and did not attend an interview with the Subcommittee.
- v) On October 1, 2019, Ms. Wilson had an email exchange with the Complainant.
- w) On October 18, 2019, Ms. Wilson wrote to Mr. Nunn confirming that her two previous letters of September 9 and 19, 2019 had not been answered. Ms. Wilson advised that Mr. Nunn's failure to attend an interview pursuant to section 30(4)(c) of the Act would be placed on the Investigation Committee's agenda to consider recommending disciplinary action. This letter did not refer to any failure to provide documents under section 30(4)(a) of the Act.
- x) On October 30, 2020, the Investigation Committee approved a motion that included an instruction to staff to forward the file to the Association's legal counsel to prepare a notice of inquiry.

#### **F. Submissions of the Parties**

- 22. The parties had the opportunity to provide written submissions. A schedule was set by the Panel. The Association provided written submissions. Mr. Nunn did not.

### ***Association's submissions***

23. With respect to the first allegation, given the paucity of documents provided, the Association submits that it is clear that Mr. Nunn failed to deliver his "entire file" as requested. In particular, the Association points out that:
  - a) Mr. Nunn did not provide the sealed drawings for the Project which were provided by the Complainant;
  - b) Mr. Nunn acknowledged submitting a Letter of Assurance Schedule B, but did not provide it; and
  - c) Ms. Wilson testified that, based on her discussions with the Subcommittee, she and the Subcommittee expected that there were additional documents in Mr. Nunn's file that had not been provided to the Association.
24. Overall, the Association submits that Mr. Nunn has clearly failed to deliver his entire file, thereby breaching section 30(4)(a) of the Act.
25. With respect to the second allegation, the Association submits that Mr. Nunn's failure to respond to Ms. Wilson's multiple requests that he attend an interview constitutes a breach of section 30(4)(c) of the Act.

### ***Further submissions***

26. After receiving the Association's submissions, the Panel requested that the parties provide further submissions on the meaning of the phrase "in the possession or control" of the member as it is used in section 30(4)(a) of the Act.
27. The Association provided further submissions. Mr. Nunn did not.
28. The Association submits that, while the words "possession" and "control" are not defined in the Act, these concepts can be applied by analogy to the BC Supreme Court Civil Rules. In that regime, these words are held to mean documents that are both within a party's physical possession and documents over which they exert direct or indirect control.
29. The Association acknowledges that it bears the burden of proof in these proceedings, but submits that Mr. Nunn bears the burden of establishing that specific documents were not in his possession or control at the time of the Association's requests for them because that knowledge is only available to Mr. Nunn. On this point, the Association relies on the decision of *Pleet v. Canadian Northern Quebec R. Co.* (1921), 64 D.L.R. 316 (ONCA).
30. The Association submits that the rule established in the *Pleet* case must apply for the following reasons:



- a) Only Mr. Nunn can know precisely what was in his possession or control at the relevant time; and
  - b) Mr. Nunn should be presumed to have retained his entire file because the Association's Bylaws require him to do so for a minimum of 10 years, and the Subcommittee reasonably expected that his entire file would contain more documents than those he provided.
31. If the Panel does not accept that Mr. Nunn has an onus to show that he provided his entire file, the Association argues that the evidence in the record is still sufficient to prove that Mr. Nunn contravened section 30(4)(a) of the Act.
32. In particular, the Association points out that the evidence establishes, at a minimum, that Mr. Nunn at some point had sealed drawings and a Schedule B Letter of Assurance because drawings bearing Mr. Nunn's seal were provided by the Complainant, and Mr. Nunn and the Complainant both stated that a Schedule B Letter of Assurance was provided to the Regional District of Central Kootenay.

#### **G. Analysis**

33. The Panel provides its analysis and findings with respect to the allegations in the Revised Notice of Inquiry below.

##### ***Failure to provide entire file***

34. The first allegation concerns Mr. Nunn's alleged breach of section 30(4)(a) of the Act. Section 30(4)(a) states as follows:

30(4) A member, licensee or certificate holder being investigated under subsection (3) must

(a) provide the committee or subcommittee conducting the investigation with any information or records in the possession or control of the member, licensee or certificate holder that the committee or subcommittee may require

35. As set out above, section 30(4)(a) of the Act sets out a clear requirement for a member to provide any information in the member's *possession or control* to the Investigation Committee or subcommittee.
36. The Panel notes that the allegation in this case is not that Mr. Nunn has expressly refused to provide a document requested of him, but rather that his response was inadequate. The Association says that in the circumstances there should have been more documents in Mr. Nunn's file, and this points to a breach of Mr. Nunn's obligation under section 30(4)(a). In that regard, the challenge facing the

Association is that the Association, through no fault of its own, cannot know exactly what was in Mr. Nunn's possession or control at the time Ms. Wilson transmitted the Subcommittee's requests for his "entire file".

37. The Panel accepts that the file provided by Mr. Nunn contained fewer documents than the Subcommittee expected for a project like the one in question. The Panel also accepts the Association's submission that, at some point, Mr. Nunn had possession or control of material beyond what he provided to the Subcommittee – specifically, the Schedule B Letter of Assurance, which was never located, or copies of all the sealed drawings which were submitted with the Complaint.
38. However, this does not establish that Mr. Nunn had those documents, or others, in his possession or control *at the time he was asked to provide them*. Mr. Nunn provided a package of documents to the Association on June 8, 2017 and again on July 9, 2018. When asked to confirm whether the documents he provided encompassed everything in his possession, Mr. Nunn replied that the Association had "the entire package". The Association did not make any further requests.
39. While Mr. Nunn's statement that his response was complete may not be entirely convincing in light of the fact that he did not provide his sealed drawings or the Schedule B Letter of Assurance, the Panel is mindful that it is the Association who has the burden of proving the allegations in the Revised Notice of Inquiry. Faced with Mr. Nunn's statement, and in the absence of any clear evidence to the contrary, the Panel could not find that the Association has met its burden of proving that Mr. Nunn had additional materials in his possession or control which he did not deliver when he was asked to provide his entire file.
40. The Panel has also considered the Association's submission that it should be for Mr. Nunn to prove that *he did not* have additional material in his possession or control, based on the fact that this information is exclusively within his knowledge, as set out in the *Pleet* case.
41. The Panel is hesitant to find that Mr. Nunn carries a burden to 'disprove' an element of the allegation against him. In any event, the Panel finds that the reverse onus from the *Pleet* case does not arise on the facts of this case.
42. The Association asked Mr. Nunn to confirm that the documents he provided represented "everything in his possession" related to the Project. Mr. Nunn stated that the Association had "the entire package". That was the end of the correspondence between Mr. Nunn and the Association on the issue of Mr. Nunn's provision of file materials. The Association, perhaps understandably, did not challenge Mr. Nunn's assertion, and instead decided to attempt to schedule a meeting with him.
43. In other words, the Association asked for his confirmation that he had provided everything in his possession and received it. Having not challenged Mr. Nunn's

assertion in this regard during the investigation, the Panel is not prepared to now find that there is an onus on Mr. Nunn to prove that he did not have more documents in his possession or control in the context of these disciplinary proceedings.

44. Based on all of the facts and submissions before it, the Panel concludes that this allegation is not proven to the required standard. The Panel finds that the first allegation in the Revised Notice of Inquiry has not been proven.
45. In reaching its conclusion on this issue, the Panel wishes to emphasize that it is not purporting to establish a general statement of law or principle regarding a member's obligations under section 30(4)(a) of the Act that would bind other panels in future cases. The Panel's decision in this case is limited to the facts and evidence before it.
46. Lastly, it is also important to note that the Panel does not wish for its decision on this allegation to be read as an endorsement of Mr. Nunn's management of his file. It was reasonable for the Association to expect that more materials existed than were provided by Mr. Nunn. It may be that subsequent proceedings reveal shortcomings in Mr. Nunn's approach to the project, including a breach of his obligation to retain his file for 10 years under Bylaw 14.1, but those are matters for another day.

***Failure to attend an interview***

47. The second allegation concerns Mr. Nunn's alleged breach of section 30(4)(c) of the Act. Section 30(4)(c) states as follows:

30(4) A member, licensee or certificate holder being investigated under subsection (3) must

...

(c) appear, on request, before the committee or subcommittee.

48. The Panel considers section 30(4)(c) of the Act to be clear and unequivocal: A member must appear on request before a committee or subcommittee.
49. The Panel considers this to be a very important professional obligation. If a member were able to avoid attending before a committee or subcommittee tasked with investigating a complaint in the public interest, the Investigation Committee's mandate would be frustrated. Simply put, a member cannot derail the Investigation Committee's process by ignoring a request to appear before it. A member must attend before the committee or subcommittee when requested to do so.

50. This obligation becomes even more important in the face of potentially incomplete documentation. In this case, the sparse documentation provided with Mr. Nunn's response underscored the need for his attendance before the Subcommittee so that it could investigate the Complaint.
51. The evidence is clear that Mr. Nunn was asked to appear before the Subcommittee. Ms. Wilson sent correspondence on September 9 and 19, 2019 with a request for him to appear.
52. Ms. Wilson was diligent in following-up and offering options to accommodate Mr. Nunn. Ms. Wilson's letter of September 19, 2019 expressly brought Mr. Nunn's obligation to attend under section 30(4)(c) of the Act to his attention.
53. There is no evidence of any response from Mr. Nunn to these requests. Mr. Nunn did not appear before the Subcommittee as requested.
54. The Panel finds that Mr. Nunn, in failing to appear before the Subcommittee despite requests that he do so, has breached section 30(4)(c) of the Act. The Panel finds that the second allegation in the Revised Notice of Inquiry has been proven.

#### **H. Determination and Conclusion**

55. Section 33(1) of the Act sets out the determinations available to the Panel. The Panel has determined that Mr. Nunn has contravened the Act, pursuant to section 33(1)(b).
56. Having made a determination under section 33(1), the Panel will next determine the sanctions that should be imposed upon Mr. Nunn pursuant to section 33(2) of the Act and whether, and in what amount, costs are payable pursuant to section 35 of the Act.
57. The Panel requests that the Association and Mr. Nunn provide written submissions on the appropriate sanctions and costs payable in accordance with the following schedule:
  - a. Counsel for the Association must provide the Association's submissions by January 8, 2021;
  - b. Mr. Nunn must provide his submissions by January 29, 2021; and
  - c. Counsel for the Association may provide any reply submissions by February 8, 2021.
58. All submissions must be delivered by email or registered mail to Greg Cavouras, counsel for the Panel, with a copy to the other party.

59. Lastly, in light of Mr. Nunn's non-attendance in these proceedings, the Panel directs the Association to promptly deliver this decision to Mr. Nunn by registered mail to his last address on file with the Association.

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John Haythorne, Chair

<original signed by>

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Edward Bird, P. Eng.

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David Ricketts, P. Eng.