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25 Sheppard Avenue W.
Suite 1000
Toronto, Ontario
M2N 6S9
Tel: (416) 224-1100
(800) 339-3716

Editor: Eric Newton
Staff Contributors:
Roger Barker, P.Eng.
Ian Eng, P.Eng.

The Discipline Committee of the Association of Professional Engineers of Ontario

In the matter of a hearing under the Professional Engineers Act R.S.O. 1990, Chapter P.28.

And in the matter of a complaint regarding the conduct of

Medhurst, Hogg, Sobottka, Leong & Associates Limited

a holder of a Certificate of Authorization of the Association of Professional Engineers of Ontario.

BETWEEN:

The Association of Professional Engineers of Ontario and
Medhurst, Hogg, Sobottka, Leong & Associates Limited

Decision and Reasons

A Panel of the Discipline Committee of the Association of Professional Engineers of Ontario (PEO) met in the offices at the association on April 11, 2000, to hear allegations of professional misconduct against Medhurst, Hogg, Sobottka, Leong & Associates Limited (hereinafter referred to as "MHSL").

William Black, of McCarthy Tétrault, appeared as legal counsel for the association. Although MHSL was not represented at the hearing by legal counsel or by a company representative, Mr. Black reported that he was authorized to address the Panel on MHSL's behalf.

Nancy Spies, of Stockwood Spies, appeared as independent legal counsel to the Discipline Panel.

The hearing arose as a result of MHSL's involvement in condominium engineering advertisements.

The allegations of professional misconduct are set out in Appendix "A" to the notice of hearing and filed as an Exhibit and summarized as follows:

Appendix A

1. MHSL was at all material times a holder of a Certificate of Authorization under the *Professional Engineers Act*, R.S.O. 1990 c.P.28 (the "Act").
2. In 1994 MHSL placed an advertisement in the *Proman Directory (Proman)*, a directory available to the property management industry, which includes sources for contractors, trade suppliers and consultants. The advertisement reads as follows: "No other engineering firm in North America

- has maintained the leading edge in building sciences that has always been at the heart of Medhurst, Hogg, Sobottka, Leong & Associates Ltd. (MHSL). Since 1975, the firm has led the development industry through new technologies and new methods of studying and ‘reading’ buildings from architectural, structural, mechanical, electrical and economical points of view. An MHSL investigation is the equivalent of a building x-ray, where analysis is pinpointed, diagnosis achieved and remedies provided.”
3. In February 1994, and April 1994 issues of *The Condominium Magazine (Condominium)*, MHSL stated in its advertisement that MHSL was: “...**the leader** in the condominium reserve fund industry for 18 years...” [emphasis added].
 4. By letter dated January 5, 1994, Chris Hart, P.Eng., Manager, Professional Practice for PEO, advised MHSL that regarding its *Proman* advertisement: “There are other firms in your business which also feel they are at the leading edge in building science. You should be mindful of this possibility and of the PEO Regulation governing Advertising when placing an advertisement under the heading of Professional Services – Engineers.
 5. Subsequently, advertisements in the 1995 and 1996 issues of *Proman* were revised to state MHSL is “...**an** industry leader in Building Science Engineering, Technical Audits and Reserve Funds Studies...” [emphasis added].
 6. In addition, MHSL advertisements in later 1994 issues and 1995 and 1996 issues of *Condominium* stated that MHSL is “...**an** industry leader in Building Sciences Engineering...” [emphasis added].
 7. In the January, February and March, 1997 issues of *Condominium* and Volume 3, No. 1 issue of the *Multi-Unit Magazine*, the MHSL advertisement stated that:

“For twenty years MHSL has led every major innovation in Condominium Engineering. We invented the Technical Audit”;

“We invented the Engineered Reserve Fund Study and we invented Critical Year Analysis®. Our Building Scientists, Engineers and Quantity Surveyors understand long term maintenance and life cycle planning better than anyone else in Canada”; and

“We approach the challenge of accurate Reserve Fund budgeting, monitoring, quality assurance and analytical decisions by applying systems and procedures that leave the competition standing still.”
 8. In addition, a facsimile of professional engineer’s seal, with the individual’s name omitted, was included in all of the above-noted 1997 MHSL advertisements, including an April issue of *Condominium*.
 9. In that April 1997 issue of *Condominium*, the text of the MHSL advertisement stated that:

“For twenty years MHSL has led every major innovation in Condominium Engineering. We invented Technical Audits. In fact, at one time, Technical Audit was Trademarked to MHSL Canada-wide. Now it is an industry standard, from coast to coast”;

“While others try to keep up, we are constantly driving innovation and progress”; and

“The MHSL approach has always been a step ahead.”
 10. The PEO engaged an independent civil engineer to review the MHSL advertisements from the perspective of somebody with knowledge of the industry.
 11. While allowing that these matters are necessarily somewhat subjective and discretionary, the independent expert compared the MHSL advertisements to advertisements placed by other firms practising in the same markets as MHSL. Specifically, the independent expert reviewed advertising by all of the professional engineering firms who advertised in two editions of *Condominium Manager* and one edition of *Condominium*.
 12. The independent expert concluded that the MHSL ads are very much more aggressive than the other ads. On the basis of this information, having reviewed 14 advertisements, the 13 firms other than MHSL all shared a common interpretation (different than that of MHSL) of the words “professional and dignified” set out in subsection 75(a) under Regulation 941.
 13. With respect to the claims that “no other engineering firm in North America has maintained the leading edge in building sciences” and “MHSL has led every major innovation in condominium engineering”, the independent expert points out that such statements are difficult to prove or disprove. The independent expert points out that the techniques used in the analysis of condominium-type buildings are the same as used in investigative work relating to non-condominium-type buildings. As such, the independent expert describes as “curious” MHSL’s use of the capital letters in its phrase “Condominium Engineering,” which seems to imply that condominium engineering is a particular, recognized field of engineering, separate and apart from other engineering.
 14. With respect to MHSL’s statement that the “Technical Audit was trademarked to MHSL Canada-wide”, the independent expert confirmed, by obtaining information from the Canada Intellectual Property Office, that this statement is true.
 15. However, the independent expert goes on to express the opinion, based on comparison of the definition of “technical audit” to the words in the PEO performance standards for the various disciplines over the years, that

there is a striking similarity between what is required of a design professional and what MHSL is claiming to be its creation.

16. As such, the independent expert concludes that MHSL in its advertising creates the illusion of having developed a whole new strategy when, in fact, all it did was perhaps to coin an identifying phrase for longstanding engineering functions.

17. In this regard, the independent expert also finds extremely unlikely MHSL's claim that it "invented the Technical Audit".

18. The independent expert also considered MHSL's claim to have invented the Engineered Reserve Funds Study and Critical Year Analysis. The expert can find no reference to these phrases at the Intellectual Property Office.

19. The independent expert noted, however, that the Condominium Act R.S.O. 1990, c. C-26 defines what is a reserve fund and its purpose. The independent expert goes on to express the view that adding the word "engineered" as a prefix to the word "reserve fund" does not make the combined phrase an "invention".

20. The independent expert also refers to an article that appeared in *Condominium* in December 1996, quoting Peter Leong (then of MHSL) as follows:

"Leong notes one of the big achievements in 1996 was the creation of a committee under CCI to look into the establishment of a Guideline for reserve fund studies."

The expert opines that this is a strange thing to note as an achievement for someone who claims to have "invented the Engineered Reserve Fund Study."

21. With respect to MHSL's claim that it is "...applying systems and procedures that leave the competition standing still," the independent expert opines

that though this is difficult to prove/disprove, if it is not untrue, it is certainly an exaggeration.

22. Returning to the subjects of "technical audit" and "reserve fund", the independent expert refers to an article published in 1991, using both of the terms "reserve fund study" and "technical audit" and identifying as the source of these terms the *Condominium Act*. As such, the expert expresses the belief that at least the reserve fund study was an invention of the *Condominium Act*.

23. The Independent expert also expresses the opinion that, although MHSL's advertising does not directly criticize any person or company, it does criticize and denigrate its competitors in the field, by implication if not directly, in a number of ways.

24. With respect to MHSL's use in their full page ads of a depiction of the professional engineer's seal (without a name in the horizontal bar), the independent expert opines that MHSL complied with the letter of the Regulation but questions whether MHSL complied with the spirit of the Regulation.

25. It is alleged that MHSL:

a) used the professional engineer's seal, in a modified form, in their advertisements, contrary to Section 75(d) of Regulation 941;

b) indirectly denigrated and belittled other professional engineers, by claiming: that MHSL personnel "understand long-term maintenance and life cycle planning *better than anyone else in Canada,*" and *while others try to keep up,* we are constantly driving innovation and progress." [emphasis added];

c) indirectly denigrated and belittled other engineering firms by claiming that: MHSL applies systems and procedures that leave "... *the competition standing still,*" and "the MHSL approach *has always been a step ahead.*" [emphasis added];

d) lacked effective control of the content of MHSL's engineering advertisements which they knew or ought to have known were contrary to PEO's advertising guideline published in Section 7 of Regulation 941 and Section 11 of the PEO's *Guideline for Professional Practice*;

e) failed to permanently revise MHSL advertisements after earlier concerns were brought to their attention by PEO; and

f) in its advertising made statements that were untrue, exaggerated or contrary to Section 75 of Regulation 941 and Section 11 of the PEO's *Guideline for Professional Practice*.

26. By reason of the facts set out above, it is alleged that MHSL is guilty of professional misconduct as defined in Section 28(2)(b) of the *Professional Engineers Act, R.S.O. 1990 c. P.28*, which sections provide as follows:

"28(2) A member of the Association or a holder of a certificate of authorization, temporary licence or a limited licence may be found guilty of professional misconduct by the Committee if,...

a member or holder has been guilty in the opinion of the Discipline Committee of professional misconduct as defined in the regulations."

27. The section of Regulation 941 made under the said Act, relevant to the alleged misconduct are:

"Breach of the Act or Regulations, other than an action that is solely a breach of the Code of Ethics." [Section 72(2)(g)]

"Conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional." [Section 72(2)(j)]

At the beginning of the hearing, Mr. Black explained that he had been authorized by MHSL to enter a plea of guilt on its behalf to paragraphs 25 and 26 of Appendix "A" and to agree with the facts as set out in paragraphs 1-9 in that Appendix.

As counsel for the association, Mr. Black submitted Exhibit #3, which illustrated the type of advertisement that MHSL placed in *Condominium*. He argued that these advertisements, with a replica of the professional engineer's seal, violated all sections of Section 75 of Regulation 941 of the *Professional Engineers Act*. He also submitted that these advertisements were not consistent with the *Guideline for Professional Practice* for advertising (Exhibit #4).

In response to Ms. Spies' question about findings with respect to the allegations of misconduct under Section 72(2)(j) of Regulation 941, Mr. Black submitted that MHSL had admitted to unprofessional conduct but not disgraceful or dishonourable conduct. Mr. Black reported that he did not have a written agreement with MHSL but rather an agreement by telephone with respect to their admission of guilt and suggested penalties.

After considering the evidence and exhibits filed, the Panel found MHSL guilty of professional misconduct as defined in Section 28(2)(b) of the *Professional Engineers Act*, R.S.O., c. P28. The sections of Regulation 941 made under the Act and relevant to the alleged misconduct are:

Section 72(2)(g): Breach of the Act or Regulation, other than an action that is solely a breach of the Code of Ethics.

The Panel found MHSL in violation of Regulation 941 Section 75(a) and (d) in that it used the professional engineer's seal in advertisements, even after being warned

by PEO in a letter dated January 5, 1994. The Panel made no findings with respect to the Sections 75 (b) and (c) because of insufficient evidence.

Section 72(2)(j): "Conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional."

The Panel made no finding with respect to disgraceful or dishonourable conduct, however, the Panel finds that MHSL's conduct with respect to the advertisements was unprofessional.

The Panel found the evidence and testimony presented by the association to be compelling and not disputed by MHSL. The physical evidence of the advertisement and warning letter from the association were compelling, particularly when reviewed against the clear language of the Act, Regulation and *Guideline for Professional Practice*.

The Panel heard submissions from Mr. Black with respect to penalty. Mr. Black reported that the parties (PEO and MHSL) agreed on a joint submission as to the appropriate penalty as outlined in a facsimile dated April 4, 2000, from Mr. Black to Mr. Medhurst, (Exhibit #5).

The Panel expressed concern that this joint submission had not been signed by Mr. Medhurst and therefore recessed the proceedings until such time as the joint submission was signed by Mr. Medhurst and submitted to the Panel.

On April 11, 2000, the Panel received a signed joint submission (Exhibit #6) and the Panel determined penalty as follows:

◆ **That MHSL be reprimanded on the basis of this Decision and the rep-**

rimand shall be entered on the records of the Registry of PEO;

◆ **MHSL's Certificate of Authorization shall be subject to the following terms, conditions and limitations:**

- a) **MHSL will send a letter of retraction/apology relative to certain aspects of the advertisements placed by MHSL to the editors of the publications or periodicals in which the advertisements in question appeared, including *Condominium*. The letter shall contain the wording as agreed in paragraph 2 of pages 2 and 3 of Exhibit #6; and**
- b) **MHSL will adopt internal written policies/protocols/procedures to ensure that future advertisements of engineering services comply with Section 75 of Regulation 941 of the *Professional Engineers Act* and PEO's guideline.**

◆ **The Decision and Reasons be published in the official journal of the association with names.**

Dated at Toronto this 25th day of August, 2000.

Roydon Fraser, PhD, P.Eng. (Chair)

(For and on behalf of the Panel of the Discipline Committee)

David Brezer, P.Eng.
Ken Lopez, P.Eng.
Cam Mirza, P.Eng.
Glenn Richardson, P.Eng.

Notice of Licence Revocation

At a Discipline Hearing held on November 1, 2001, at the offices of the association in Toronto, the Discipline Committee revoked the licence of Gordon F. Cowie. The Decision and Reasons of the Discipline Committee will be published in due course.