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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 a licensee and a Certificate of Authorization holder.

BETWEEN:

The Association of Professional Engineers of Ontario and

**A licensee (hereinafter referred to as
“the member”) and a Certificate of
Authorization holder (hereinafter
referred to as “the company”)**

A member of the Association of Professional Engineers of Ontario

Decision and Reasons

A Panel of the Discipline Committee of the association met in the offices of the association on December 7, 1999, to hear allegations of professional misconduct and incompetence against the member and the company.

Legal counsel appeared for the association and legal counsel represented the member. A principal appeared on behalf of the company, which was not represented by legal counsel. Independent legal counsel for the Panel was present via teleconference.

The hearing arose as a result of the member and the company's involvement in condominium engineering advertisements.

The allegations of professional misconduct and incompetence are set out in Appendix “A” to the Notice of Hearing filed as an Exhibit and summarized as follows:

Appendix A

1. The member was at all material times a licensee of the Association of Professional Engineers of Ontario (“PEO”).
2. The company was at all material times a holder of a Certificate of Authorization.
3. The member was at all material times President of the company.
4. In 1994, the company placed an advertisement in a directory (the directory), available to the property management industry, which includes sources for contractors, trade suppliers and consultants. The advertisement read 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 the company. Since 1975, the firm has led the devel-

opment industry through new technologies and new methods of studying and 'reading' buildings from architectural, structural, mechanical, electrical and economical points of view. A company investigation is the equivalent of a building x-ray, where analysis is pinpointed, diagnosis achieved and remedies provided."

5. In the February 1994 and April 1994 issues of a condominium magazine (*Condominium*), the company stated in its advertisement that the company was: "...the leader in the condominium reserve fund industry for 18 years..."

6. By letter dated January 5, 1994, the Manager of Professional Practice for PEO advised the company regarding its 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.

We strongly suggest you reword this at the earliest opportunity."

7. Subsequently, advertisements in the 1995 and 1996 issues of the directory were revised to state the company is "...an industry leader in Building Science Engineering, Technical Audits and Reserve Funds Studies..."

8. In addition, the company advertisements in latter 1994 issues and 1995 and 1996 issues of *Condominium* stated the company is "...an industry leader in Building Sciences Engineering..."

9. In the January, February and March, 1997 issues of *Condominium* and Volume 3, No. 1 issue of a multi-unit magazine (the magazine), the company advertisement stated that:

"For twenty years the company has led every major innovation in Condominium Engineering. We invented the Technical Audit."

"We invented the Engineered Reserve Fund Study and we invented Critical 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."

10. In addition, a facsimile of a professional engineer's seal, with the individual's name omitted, was included in all of the above-noted 1997 company advertisements, including an April issue of *Condominium*.

11. PEO engaged an independent civil engineer ("the independent expert") to review the company advertisements from the perspective of somebody with knowledge of the industry.

12. While allowing that these matters are necessarily somewhat subjective and discretionary, the independent expert compared the company advertisements to advertisements placed by other firms practising in the same market as the company. Specifically, the independent expert reviewed advertisements by all of the professional engineering firms who advertised in two editions of another condominium magazine and one edition of *Condominium*.

13. The independent expert concluded that the company ads were very much more aggressive than the other ads. On the basis of this information, having reviewed 14 advertisements, the 13 firms other than the company all shared a common interpretation (different than that of the company's) of the words "professional and dignified" set out in subsection 75(a) under Regulation 941.

14. With respect to the claims that "no other engineering firm in North America has maintained the leading edge in building sciences" and "the company has led every major innovation in condominium engineering," the independent expert pointed out that such statements were difficult to prove or disprove. The independent expert pointed out that the techniques used in the analysis of condominium type buildings are the same as used in investigative work relating to non-condominium buildings. As such the independent expert describes as "curious" the company's use of capital letters in its phrase "Condominium Engineering" which seemed to imply that con-

dominium engineering is a particular, recognized field of engineering separate and apart from other engineering.

15. With respect to the company's statement that the "technical audit was trademarked to the company Canada-wide", the independent expert confirmed, by obtaining information from the Canadian Intellectual Property Office, that this statement is true.

16. However, the independent expert went on to express the opinion, based on comparison of the definition of "technical audit" to the words in the PEO performance standards for various disciplines over the years, that there is a striking similarity between what is required for a design professional and what the company was claiming to be its creation.

17. As such, the independent expert concluded that the company in its advertising created 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.

18. In this regard, the independent expert also found extremely unlikely the company's claim that it "invented the technical audit."

19. The independent expert also considered the company's claim to have invented the engineered reserve fund study and critical year analysis. The expert could find no reference to these phrases at the Intellectual Property Office.

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

21. The independent expert also referred to an article that appeared in *Condominium* in December 1996 quoting the member as follows:

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

The independent expert opined that this is a strange thing to note as an achievement for someone who claims to have “invented the engineered reserve fund study.”

22. With respect to the company's claim that it is “...applying systems and procedures that leave the competition standing still,” the independent expert opined that though this is difficult to prove/disprove, if it is not untrue it is certainly an exaggeration.
23. Returning to the subject of “technical audit” and “reserve fund,” the independent expert referred 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 expressed the belief that at least the reserve fund study was an invention of the Condominium Act.
24. The independent expert also expressed the opinion that, although the company's advertising did not directly criticize any person or company, it did criticize and denigrate its competitors in the field, by implication if not directly, in a number of ways.
25. With respect to the company's use in its full page ads of a depiction of the professional engineering seal (without a name in the horizontal bar), the independent expert opined that the company complied with the letter of the Regulation, but questioned whether the company complied with the spirit of that Regulation.
26. It is alleged that the member and the company:
 - 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 company 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.”;
 - c) indirectly denigrated and belittled other engineering firms by claiming that: the company applies systems and

procedures that leave “...the competition standing still.”; and, “the company approach has always been a step ahead”;

- d) lacked effective control of the content of the company's engineering advertisements which they knew or ought to have known were contrary to PEO's advertising guidelines published in Section 75 of Regulation 941 and Section 11 of PEO's Professional Practice Guideline;
 - e) the member as a member of *Condominium's* Editorial Advisory Board, knew or ought to have known that the company's advertisements were contrary to PEO's advertising guidelines published in Section 75 of Regulation 941 and Section 11 of the Professional Practice Guideline;
 - f) failed to permanently revise the company's advertisements after earlier concerns were brought to their attention by PEO; and
 - g) the company in its advertising made statements, which were untrue or exaggerated or contrary to Section 75 or Regulation 941 and Section 11 of the PEO's Professional Practice Guideline.
27. **By reason of the facts set out above, it is alleged that the member and the company were 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:**
- “A member of the Association or 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 the professional misconduct as defined in the regulations” [Section 28(2)(b)].**
28. The sections 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(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(j)].

At the beginning of the hearing legal counsel for the association explained that the member was prepared to enter a plea of guilt to one of the charges against him. Legal counsel suggested that the Panel should proceed with hearing only the member's plea of guilt and not proceed with the allegations against the company at this time.

He recommended that a new Notice of Hearing be given for a future hearing by a new Panel regarding the charges against the company. The company's principal objected and stated that he was prepared to proceed with the hearing since he had arranged for a witness to be present. In any case he said that he would be appealing any decision to the Courts. Legal counsel for the member agreed with PEO's legal counsel's position.

The Panel decided to consult with its independent legal counsel, via teleconference. The submissions of both legal counsel and the company's principal were repeated. Independent legal counsel advised the Panel that it would be difficult for the Panel to hear the admissions of the member and then proceed to hear the charges against the company. Accordingly, she advised that the Panel should proceed as suggested by PEO's legal counsel.

The Panel decided to proceed as outlined by PEO's legal counsel and deal only with the plea of guilt by the member and not with the charges against the company at this time. An entirely new Panel would have to deal with the allegations against the company at another time.

The principal of the company questioned whether PEO would proceed with charges against the company since the member, who was no longer with the firm, had been the sole proprietor of the Certificate of Authorization at the company.

PEO's legal counsel advised the principal to obtain legal advice. He was advised that he could stay to hear the member's plea, but that he would have no standing in the proceedings. The principal remained to hear the member's plea.

In outlining the member's plea of guilt, PEO's legal counsel reported that the asso-

ciation had accepted the guilty plea conditional on an appropriate penalty. He reported that the member agreed with the facts as outlined in the first 10 paragraphs of Appendix "A." Also he stated that the member admitted to the improper use of the professional engineer's seal contrary to Section 75(d) of Regulation 941, as outlined in paragraph 26(a) of Appendix "A". PEO's legal counsel noted that the company's advertisement content did not come under the member's jurisdiction but was the responsibility of the principal. Even though the member had raised objections to the use of the seal in the advertisement, the ad had been published with the seal.

Thus, PEO's legal counsel concluded that the association did not want a severe penalty and thus, he suggested that the following penalty should be considered:

- ◆ a reprimand;
- ◆ publication without names; and
- ◆ delay publication until hearing of the company charges are completed.

Legal counsel for the member stated that he agreed with PEO's legal counsel's presentation. He reported the member had joined the company in 1985, in Calgary, and moved with it to Toronto in 1987. The member had a 10 per cent ownership in the company while the principal was the largest shareholder. During the period from 1994 to 1996, the member was responsible for the ads, which did not include the seal (Exhibit 5). However, from 1997 onwards, the principal took charge of the ads and the company's ads contained the seal (Exhibits 3 and 4) even though the member protested its use. The member's legal counsel reported that the member resigned on July 17, 1998, and that he was only pleading guilty to paragraph 26(a) of Appendix A. The other allegations would be dealt with by a new Panel at another hearing.

In providing evidence on his own behalf, the member reported that he graduated in civil engineering from the University of Calgary in 1987, and practised

structural engineering design in the Calgary area prior to joining the company. Under cross-examination, the member noted that he had advised PEO about the use of the seal in the advertisement when he left the firm. He indicated that although he had verbally advised the principal not to use the seal, he regretted that he had not pursued the matter in writing.

After reviewing the joint submissions, the admission of the facts as set out in paragraphs 1 to 10 in the Notice of Hearing and Exhibits filed, the Panel was satisfied with the plea of guilt with respect to items 26(a) of the Notice of Hearing. The Panel found the member guilty of professional misconduct as defined in Section 28(2)(b) of the Professional Act R.S.O. 1990, c P.28.

No evidence was called with respect to the balance of the allegations in paragraph 26 of Appendix A, and accordingly, no finding is made with respect to those allegations against the member.

With regard to penalty, the Panel indicated that it was considering the following penalty:

- ◆ The member be reprimanded and the reprimand be recorded in the Register;
- ◆ The Decision and Reasons of the Committee be published in the official journal of the association with names.

Since the above-suggested penalty differed from the joint submission, the Panel invited submissions from counsel regarding the penalty.

PEO's legal counsel reported that the association would be satisfied with the penalty if there was publication without names.

In regard to the penalty, the member's legal counsel noted that the member had enjoyed an excellent reputation during his 15 years in the profession and that he had authored many articles. He also reiterated the fact that the member had not created nor had control of the advertisements. Also,

the member was ignored when he suggested that the seal be removed from the ad. He argued that the member's only error in judgment was the fact that he did not put his objections in writing. Thus, he concluded that the member's error in judgment was not serious enough to justify naming him in the publication. Legal counsel for the member argued that the member's good name should be preserved in the profession.

The Panel considered the additional submissions of counsel and was persuaded by those submissions to accept the joint submissions as to penalty.

After further deliberations, the Panel decided to impose penalty as follows:

- ◆ **The member be reprimanded personally and privately by the Panel immediately following the conclusion of this hearing;**
- ◆ **Publication of the Decision and Reasons be made in the official journal of the Association without names.**

Dated at Toronto this 24th Day of July, 2000

Jag Mohan, P.Eng. (Chair)

For and on behalf of the panel of the discipline committee

Denis Dixon, P.Eng.
Angelo Mattacchione, P.Eng.
Lawrence McCall, P.Eng.
Nick Monsour, P.Eng.

Notice of Licence Suspension

At a Discipline Hearing held on October 1, 2001, the Discipline Committee suspended the licence of Alfred R. Kettle, for a period of 24 months, effective October 1, 2001. The Decision and Reasons of the Discipline Committee will be published in due course.

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