Pursuant to section 26(5) of the Surveyors Act the following Discipline decisions regarding Ward I. Houghton, O.L.S. are being published. Mr. Houghton has appealed the decisions and a stay has been granted until completion of the hearing of the appeal.

**DISCIPLINE COMMITTEE**
**OF THE ASSOCIATION OF ONTARIO LAND SURVEYORS**

**IN THE MATTER OF** a hearing by the Discipline Committee of the Association of Ontario Land Surveyors in respect of Ward I. Houghton, O.L.S., pursuant to the *Surveyors Act*, R.S.O. 1990, chapter S.29, as amended, section 26.

**Hearing** held at Office of the AOLS
1043 McNicoll Avenue, Toronto, Ontario
Commencing January 14, 2016 at 10:00 a.m.

**BEFORE:** Kathleen Gowanlock (Chair, Lieutenant Governor Council Appointee)
Bruce Parker, O.L.S.
Paul Gregoire, O.L.S.
Paul Edward, O.L.S.
Sasa Krcmar, O.L.S.

**Also present:** Ward I. Houghton, O.L.S. (Member)
Robert C. Taylor (Counsel for Member)
Allyson Lee (Counsel for Member)
Peter Simm (Counsel for Member on Jurisdictional Motion)
Robert J. Fenn (Counsel for AOLS)
Jonathan Bar (Counsel for AOLS)
Ashleigh Tomlinson (Counsel for AOLS on Jurisdictional Motion)
William D. Buck (Registrar)
Carol Street (Counsel for Panel)

## RULING AND REASONS FOR RULING

### PURPOSE OF THE HEARING

The purpose of this lengthy hearing by this Panel of the Discipline Committee was to determine whether Ward I. Houghton, O.L.S. is guilty of professional misconduct as alleged in Exhibits 1, 2 and 3, being Notices dated March 23, 24 and 25, 2015.

## DATES OF THE HEARING OF PRELIMINARY MOTIONS, DECISION AND REASONS

The hearing commenced on January 14, 2016 at Toronto, Ontario. The Panel was presented with a motion for recusal of the Chair and a related motion for recusal of the Panel. On January 15, the Panel released its decision and dismissed the motion for recusal of the Chair and the related motion for recusal of the Panel.

The Panel then proceeded to deal with jurisdictional motions put forward by the Member's Counsel on January 15, 25, 26 and February 4. 2016. The Panel received a number of exhibits in evidence and heard comprehensive oral submissions from Counsel for the Member and Counsel for the AOLS. In addition, the Panel heard reply submissions from Counsel for the Member. On 18 February, 2016 the Panel convened to consider the evidence, submissions and caselaw. The interim ruling which was released on 19 February, 2016 reserved the Panel's final ruling with respect to its jurisdiction pending completion of the evidence by both parties.

The Member sought Judicial Review of this interim ruling. The Application for Judicial Review was dismissed as premature by the Divisional Court by a Panel of judges. The substantive hearing resumed on June 6, 2017, and continued on June 7, 8, October 30, 31, November 1, 2, 2017, April 9-12, 2018, and May 14-17, 2018. Submissions by both parties were heard on June 12, 2018. The Panel commenced its deliberations on June 13, 2018.

The Panel did not give effect to the jurisdictional challenges raised by the Member for the reasons outlined below. The Preliminary Motions brought by the Member are therefore dismissed.

In the alternative, if the Panel is not correct in its interpretation of the law or has incorrectly applied the law to the facts of this case, the Panel maintains jurisdiction over the charges contained in the Notice dated March 24, 2015 (Sloan), Exhibit 2, and the Notice dated March 25, 2015 (Salhani), Exhibit 3.

The determinations with respect to the charges of professional misconduct contained in the Notice dated March 23, 2015, Exhibit 1, and the two other Notices will be addressed following the jurisdictional ruling.

## LEGISLATION CONSIDERED

The *Surveyors Act (*the "Act"), R.S.O. 1990, c.S.29 as amended, sections 22, 26, 27, and 30. The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 as amended was also referenced as needed during the course of the hearing.

**FINAL RULING ON PRELIMINARY MOTIONS**

At the commencement of the hearing, Counsel for the Member raised a number of preliminary issues that called into question the jurisdiction of this Panel of the Discipline Committee to proceed with a hearing into the charges against the Member.

Counsel for the Member filed a comprehensive written Factum wherein he set out his arguments with respect to the jurisdictional issues as well as the case law he relied upon in support of each of his arguments. The Book of Authorities filed in support of the jurisdictional argument was extensive. In addition Counsel for the Member presented oral arguments at the hearing and presented two additional cases. Ultimately, the arguments presented by the Member through Counsel go to the question of whether this Panel has the requisite jurisdiction in the circumstances to determine the complaints against the Member.

Additionally, Counsel for the Member raised preliminary arguments in written materials with respect to whether he had received full Disclosure in accordance with the requirements of *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. Clearly this argument was subject to the outcome of the jurisdictional arguments and presumably argument in the alternative should the jurisdictional arguments fail.

The disclosure issues raised by the Member resulted in an order for further disclosure in the form of Will Say statements by all witnesses whom the Association intended to call. In accordance with this order, further disclosure was provided. The Member through Counsel did not make requests for further disclosure. Therefore the Panel considered the issue of disclosure concluded.

**JURISDICTIONAL ISSUES**

The cornerstone to the Member's argument is that when a statute confers jurisdiction upon a tribunal of limited authority the conditions and qualifications attached to that limited authority require strict compliance. The Member cited voluminous case law in support of that proposition including *Harris v. Law Society (Alberta)* [1936] 5 CR 88; *Parlee v. College of Psychologists (New Brunswick)* 2004 NBCA 42 (CanLII), 2004 NBCA 42 (Can LII); and *Kalin v. College of Teachers(Ontario)* 2005 CanLII 18286.

Corollary to that argument is the notion that actions taken in the public interest cannot cure jurisdictional defects. Essentially it is in the public interest for the tribunal, in this case the Discipline Panel to strictly adhere to the enabling statute. The Member cited *Service Employees' International Union, Local No. 333 v. Nipawan District Staff Nurses Association et al.,* [1975] 1 SCR 382, 1973 CanLii 191 (SCC). Procedural fairness cannot cure the exercise of statutory power exercised in excess of the power conferred by the statute per *Henderson v. College of Physician & Surgeons (Ontario),* 2003 CanLII 10566 (Ont. C.A.).

The Panel accepted these general propositions and was guided accordingly in its review of the evidence and submissions by the Member and the Association. We reviewed whether we had heard clear and compelling evidence whether any of the organs of the Association had acted outside its jurisdiction. We considered the evidence in respect of whether the process which brought the complaints before the Panel was fatally flawed thereby essentially depriving the Panel of jurisdiction. We agreed that procedural fairness in the hearing before the Panel cannot cure fatal flaws. We also accepted that good intentions and an otherwise fair process cannot cure fatal flaws.

## THE LAW

### The Governing Legislation

The Association is the regulator of professional land surveyors in Ontario pursuant to s. 2(2) of the Act which provides:

> The principal object of the Association is to regulate the practice of professional land surveying and to govern its members and holders of certificates of authorization in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected

### Additional objects

Section 2(3) provides:

> For the purpose of carrying out its principal object, the Association has the following additional objects:
>
> 1. To establish, maintain and develop standards of knowledge and skill among its members.
>
> 2. To establish, maintain and develop standards of qualification and practice for the practice of professional surveying.

3. To establish, maintain and develop standards of professional ethics among its members.

4. To promote public awareness of the role of the Association.

5. To perform such other duties and exercise such other powers as are imposed or conferred on the Association by or under any Act. R.S.O. 1990, c. S.29, s. 2 (3); 2009, c. 33, Sched. 22, s. 11 (5).

**Complaint process**

Section 22 provides:

(1) A member of the public or a member of the Association may file a complaint in writing with the Registrar attributing conduct or actions to a member of the Association that may be found to constitute professional misconduct or incompetence. 2009, c. 33, Sched. 22, s. 11 (20).

**Notice to member**

(2) When a complaint is filed under subsection (1), the Registrar shall give written notice of the complaint to the member of the Association who is the subject of the complaint and advise the member that he or she may submit a written response to the complaint to the Registrar within two weeks of receiving the notice. 2009, c. 33, Sched. 22, s. 11 (20).

**Written response**

(3) A member who receives a notice under subsection (2) may submit a written response to the complaint to the Registrar within two weeks of receiving the notice. 2009, c. 33, Sched. 22, s. 11 (20).

**Refusal to consider**

(4) The Complaints Committee may refuse to consider or investigate a complaint filed under subsection (1) if, in the opinion of the Committee, the complaint is frivolous, vexatious or an abuse of process. 2009, c. 33, Sched. 22, s. 11 (20).

**Notice**

(4.1) If the Complaints Committee refuses to consider or investigate a complaint under subsection (4), the Committee shall give written notice of its decision and of the reasons for it to the complainant, the member who is the subject of the complaint and the Council. 2009, c. 33, Sched. 22, s. 11 (20).

**Duty of Committee**

(4.2) Subject to subsection (4), the Complaints Committee shall consider and investigate all complaints filed under subsection (1). 2009, c. 33, Sched. 22, s. 11 (20).

**Power of Committee**

(4.3) Upon consideration of the complaint, of any response received under subsection (3) and of any other information, record or document relating to the complaint that has come to the attention of the Complaints Committee in the course of its investigation, the Committee may,

(a) direct that the matter be referred, in whole or in part, to the Council with a recommendation that Council refer the matter to the Discipline Committee; or

(b) take the action that it considers appropriate in the circumstances and that is not inconsistent with this Act or the regulations or by-laws. 2009, c. 33, Sched. 22, s. 11 (20).

**Decision and reasons**

(4.4) The Complaints Committee shall give its decision in writing to the Registrar for the purposes of subsection (4.5) and, if the decision is to not refer the matter under clause (4.3) (a), its reasons for the decision. 2009, c. 33, Sched. 22, s. 11 (20).

**Notice**

(4.5) The Registrar shall send to the complainant and to the person who is the subject of the complaint by mail a copy of the written decision made by the Complaints Committee and its reasons for it, if any. 2009, c. 33, Sched. 22, s. 11 (20).

**Hearing**

(5) The Committee is not required to hold a hearing or to afford to any person an opportunity for a hearing or an opportunity to make oral submissions before making a decision or giving a direction under this section. R.S.O. 1990, c. S.29, s. 22 (5).

**Discipline Committee**

**Duties**

Sections 25, 26 and 27 of the Act deal with the Discipline Committee, its powers, and proceedings before it. Section 25(7) provides:

> (7) The Discipline Committee shall,
>
> (a) if directed by the Council to do so, hear and determine allegations of professional misconduct or incompetence against any member of the Association in accordance with section 26;
>
> (b) if directed by the Council to do so, prepare for the Council's approval rules governing the practice and procedures before a discipline panel appointed under section 26; and
>
> (c) perform the other duties that are assigned to it by the Council. 2009, c. 33, Sched. 22, s. 11 (25).

**Proceedings before discipline panel**

Section 27 provides direction with respect to the conduct of the hearing**.** The Panel will not reproduce section 27 in its entirety but notes that in summary there are a number of procedural safeguards to be given effect during the proceedings.

During the course of the hearing, the parties were referred to subsection 27(11) and asked for their submissions on it. It provides:

**Findings of fact**

> (11) The findings of fact of a discipline panel shall be based exclusively on evidence admissible or matters that may be noticed under sections 15, 15.1, 15.2 and 16 of the *Statutory Powers Procedure Act*. 2009, c. 33, Sched. 22, s. 11 (43).

**Registrar's investigation**

> 30. (1) Where the Registrar believes on reasonable and probable grounds that a member of the Association has committed an act of professional misconduct or incompetence or that there is cause to refuse to issue or to suspend or revoke a certificate of authorization, the Registrar by order may appoint one or more persons to make an investigation to ascertain whether such act has occurred or there is such cause, and the person or persons appointed shall report the result of the investigation to the Registrar. R.S.O. 1990, c. S.29, s. 30 (1).

**Powers of investigator**

(2) For purposes relevant to the subject matter of an investigation under this section, the person appointed to make the investigation may inquire into and examine the practice of the member or holder of the certificate of authorization in respect of whom the investigation is being made and, upon production of his or her appointment, may enter at any reasonable time the business premises of the member or holder and examine books, records, documents and things relevant to the subject matter of the investigation. 2009, c. 33, Sched. 6, s. 88.

**Application of *Public Inquiries Act, 2009***

(2.1) Section 33 of the *Public Inquiries Act, 2009* applies to the inquiry under subsection (2). 2009, c. 33, Sched. 6, s. 88.

**Obstruction of investigator**

(3) No person shall obstruct a person appointed to make an investigation under this section or withhold from him or her or conceal or destroy any books, records, documents or things relevant to the subject-matter of the investigation. R.S.O. 1990, c. S.29, s. 30 (3).

**Order by provincial judge**

(4) Where a provincial judge is satisfied on evidence upon oath,

(a) that the Registrar had grounds for appointing and by order has appointed one or more persons to make an investigation; and

(b) that there is reasonable ground for believing there are in any building, dwelling, receptacle or place any books, records, documents or things relating to the member of the Association or holder of a certificate of authorization whose affairs are being investigated and to the subject-matter of the investigation, the provincial judge may issue an order authorizing the person or persons making the investigation, together with such police officer or officers as they call upon to assist them, to enter and search, by force, if necessary, such building, dwelling, receptacle or place for such books, records, documents or things and to examine them. R.S.O. 1990, c. S.29, s. 30 (4).

**Execution of order**

(5) An order issued under subsection (4) shall be executed at reasonable times as specified in the order. R.S.O. 1990, c. S.29, s. 30 (5).

**Expiry of order**

(6) An order issued under subsection (4) shall state the date on which it expires, which shall be a date not later than fifteen days after the order is issued. R.S.O. 1990, c. S.29, s. 30 (6).

**Notice not required**

(7) A provincial judge may receive and consider an application for an order under subsection (4) without notice to and in the absence of the member of the Association or holder of a certificate of authorization whose affairs are being investigated. R.S.O. 1990, c. S.29, s. 30 (7).

**Removal of books, etc.**

(8) Any person making an investigation under this section may, upon giving a receipt therefor, remove any books, records, documents or things examined under this section relating to the member or holder whose practice is being investigated and to the subject-matter of the investigation for the purpose of making copies of such books, records or documents, but such copying shall be carried out with reasonable dispatch and the books, records or documents in question shall be promptly thereafter returned to the member or holder whose practice is being investigated. R.S.O. 1990, c. S.29, s. 30 (8).

**Admissibility of copies**

(9) Any copy made as provided in subsection (8) and certified to be a true copy by the person making the investigation is admissible in evidence in any action, proceeding or prosecution as proof in the absence of evidence to the contrary of the original book, record or document and its contents. R.S.O. 1990, c. S.29, s. 30 (9).

**Report of Registrar**

(10) The Registrar shall report the results of the investigation to the Council and the Council may direct the matter to the Discipline Committee or to the other committee that it sees fit. 2009, c. 33, Sched. 22, s. 11 (45).

**R.R.O. 1990, REGULATION 1026**

**Code of Ethics: Section 33**

Section 33 (2) The code of ethics of the Association requires that every member shall,

(a) conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession;

. . .

**Professional Misconduct: Section 35**

Section 35. "Professional misconduct" means,

. . .

21. Conduct relevant to the practice of professional surveying, that having regard to all the circumstances, would reasonably be regarded by members as dishonourable or unprofessional. R.R.O. 1990, Reg. 1026, s. 35; O. Reg. 506/93. s. 2; O. Reg. 327/12, s. 13.

**Case Law**

The Committee was not made aware of case law interpreting Sections 22, 27 or 30 of the Act.

Extensive case law was presented which purported to shed light on the appropriate role and function of the Complaints Committee. This was largely by analogy.

**ANALYSIS**

**A. The AOLS investigation and discipline process must strictly comply with the *Surveyors Act.***

Fundamental to the Member's jurisdictional argument is the role of the Complaints Committee which was characterized by the Member as adjudicative. In essence the Member treated the Complaints Committee as an adjudicative tribunal with the expectation that the Complaints Committee's Decisions be treated as determinative. The Member remained steadfast in that position for the entirety of the hearing.

The Panel does not accept that characterization and in doing so considered the scheme of the Act. The Complaints Committee provides an informal procedure whereby members of the public or other surveyors access timely review of the conduct of a surveyor. There is no cost to have a complaint reviewed and the review is based on written complaints. As the Member acknowledged these are unsworn allegations.

The Complaints Committee's powers are limited to those conferred by the statute and include the power to summarily dismiss on the basis that the complaint is frivolous, vexatious or an abuse of process. The Complaints Committee has the power to direct that the matter be referred to Council and to make recommendations for referral to discipline. The Complaints Committee also has a general power to take action appropriate in the circumstances which is not inconsistent with the statute, regulations or by-laws.

According to the submission of Counsel for the Association, the vast majority of complaints relate to matters which are relatively straight forward and which do not rise to the level of professional misconduct or incompetence. One such example is the power conferred by the Act to enter onto private property for the purpose of conducting a survey. The exercise of this power may give rise to misunderstandings which result in complaints to the Association. Complaints of this nature are usually addressed summarily through information to the property owner and education to the surveyor on avoiding complaints in the future. Sometimes a letter of apology addresses the complaint.

The review conducted by the Complaints Committee does not constitute an evidentiary based hearing and this is reflected in the absence of procedural safeguards. The Complaints Committee is not required to hold a hearing or to afford any person an opportunity for a hearing or to make oral submissions before it prior to it taking action or making a recommendation. Essentially the Complaints Committee exercises a screening function and has the power to screen out complaints or refer complaints. In that sense the Complaints Committee acts as an advisory body.

The Association's understanding of the limits on the powers of the Complaints Committee is set out in the Manual of Procedures for the Complaints Committee, Version 2.4 as approved by Council. Pursuant to the Manual the Complaints Committee may not make findings of fact and may not impose penalties. Based on the statute, these powers are the exclusive purview of the Discipline Committee. The Complaints Committee can in its Reasons for Decision, identify areas of concern arising out of the review. However, the Committee is limited in terms of what it is empowered to do and what it does not have the power to determine. The Committee is empowered to investigate on a written record provided by the complainant and the member, and to recommend. This is in stark contrast to the powers conferred on the Discipline Committee which has power to investigate, determine and adjudicate. It is the power to adjudicate which confers the "judicial or quasi-judicial" function on a body.

The Member argues that a "Final Decision" of the Complaints Committee is determinative of the issues and that these issues may not be re-opened by the

Registrar or another organ of the Association. The Member invokes *Chandler v. Assn of Architects (Alberta),* 1989 CanLII 41 (S.C.C.).

The Panel considered the description “Final Decision” noted on various letters from the Complaints Committee to the parties. The Panel concluded that the complaints in evidence were not dismissed on the merits. The Complaints Committee decision rendered in C-12-01 is illustrative of this: “Although there are too many unknown circumstances within the context of this complaint to judge for either party, the Committee feels that this complaint is the result of a lack of written communication and written contractual obligations between parties. ... The mandate of the Complaints Committee does not allow comment on the hours or rates for service. The Fees Mediation Committee would be the avenue to evaluate this aspect.”

Based on the evidentiary record, the Panel concludes that the appropriate interpretation of the “Final Decision” by the Complaints Committee is that it considered its mandate to be limited, that it could not deal with complaints arising primarily from fees communicated or charged by the Member, and, based on the powers it possessed, it had discharged its mandate. This is a plain reading of the letters from the Complaints Committee to the parties in conjunction with a reading of the statute. Based on our review of the statute, it is the Panel’s view that the so-called “Final Decision” is not conclusory or determinative of the issues that were before the Panel and would not give rise to an argument of *res judicata* or issue estoppel.

The Complaints Committee simply does not have the power to do anything but dismiss summarily or make referrals with recommendations. The Complaints Committee is not exercising a statutory power of decision within the meaning of the *Judicial Review Procedure Act*. For this reason, the Panel does not accept the characterization of the Complaints Committee as a tribunal making final adjudicative decisions.

This conclusion is bolstered by the fact that none of the complaints which form the basis of the proceedings before the Discipline Panel were dismissed on a summary basis. Counsel for the Member had already conceded this to be the case.

Quite the contrary, the evidence heard supports the conclusion that the Complaints Committee was unable to make a determination on the various complaints because the Complaints Committee had concluded that the individual complaints were, for the most part, fees disputes and therefore not within the mandate of the Complaint Committee. The Complaints Committee was not considering patterns of conduct but narrowly considering the individual complaint before it.

The Panel heard from the Association’s civilian witnesses who all expressed in different words that they did not see the Complaints Committee as having resolved their issues,

even partially. Indeed the Member in testimony expressed the view that the Fees Mediation Committee was the appropriate next step in terms of resolving outstanding issues with his former clients. The Member testified that he had been prepared to go to the Fees Mediation Committee and he expressed dismay that none of these former clients were prepared to participate in this process.

This contradicts the jurisdictional argument advanced by the Member that most of the complaints had been determined by the Complaints Committee and that the Discipline Panel was now deprived of jurisdiction.

The Panel accepts the interpretation of the appropriate role of the Complaints Committee as enunciated in the Manual of Procedures for the Complaint Committee, Version 2.4. We therefore do not give effect to the argument that the Complaints Committee acted in excess of its jurisdiction and dismiss this part of the preliminary motion.

## B. The Registrar's purported appointment of Mr. Stanton as an investigator was a nullity

The Member identified six separate and independent reasons in support of his argument that the appointment by the Registrar of Mr. Stanton, O.L.S. as an investigator was a nullity.

### B.1 The Complaints Committee cannot validly delegate its statutory mandate to investigate a complaint

The Member asserts the Complaints Committee cannot validly delegate its statutory mandate to investigate a complaint. While the Panel accepts this general proposition, the Panel was not persuaded by the evidence that there had been improper delegation. In Complaints Committee files C-13-25 (Robert Huras) and C-14-01 (Lisa and Chris Metcalfe) the Complaints Committee decided that the matters should be referred to the Registrar for further investigation. However, in both cases the Complaints Committee had carried out a thorough review of the written documentation provided to it. In both cases the Complaints Committee made two interim decisions allowing the Member to provide further information to it, before making its Final Decision. Both Decisions were issued on the same day (July 7, 2014). In making its Decision in the Huras case the Complaints Committee said:

> "While it is not normally the mandate of the Committee to moderate fees, nor to determine reasonable fees for services rendered, the Committee has the

> mandate to investigate whether the Surveyor in question has been conducting his affairs in a fair and businesslike manner.
>
> In this case there has been no written evidence provided by either party that there was an estimated final amount given to Mr. Houghton's client. The Complainant however claims that they were quoted a verbal estimate. Their signed work order clearly shows the hourly rates charged by Mr. Houghton to do the work. The actual wording of these retainers would normally provide this Committee with the best available evidence of what happened in the individual situations.
>
> In a previous file against him, Mr. Houghton was similarly alleged to have overcharged his client with no warning on impending cost over-runs. …"

Similar language is found in the Final Decision in the Metcalfe case:

> "It is not the mandate of the Committee to moderate fees, nor to determine reasonable fees for services rendered. This is normally the mandate of the Fees Mediation Committee. This Committee is only tasked to ensure that the Surveyor conducted proper research, conducted his work in a proper and professional manner, completed the terms of his contract in a timely manner and gave his client proper advice and direction.
>
> …. The Committee reviewed the Retainer Agreement and found it to be a one-sided and self-servicing document. It lacks clarity in that while it itemizes the rates and fees for services, it does not indicate beyond the cursory mention just what the client is getting for their money. …

The evidence heard supported a conclusion that Complaints Committee believed it had completed its mandate in respect of the various complaints signalled by the description as "Final Decision". The Complaints Committee had completed its review and had made a recommendation in respect of Files No. C-13-25, and C-14-01. Counsel for the Association submitted that the referral to the Registrar found authority in Section 22 (4.3), the general catchall power. We note that there is no provision in the statute or regulations which precludes a direct referral from the Complaints Committee to the Registrar. This may have been a pragmatic choice in the context of the Complaints Committee, by this point in time, having dealt with a number of similar complaints individually and separately, typically as matters for Fees Mediation.

We found that this was not delegation but completion of the Complaint Committee's mandate according to what the Committee was empowered to do under section 22. In every case before the Panel, the Complaints Committee had reviewed the initial complaint in writing from the member of the public and invited a response from the Member which was reviewed. In the two instances noted, the Committee asked for more information to help it in its task.

There was no evidence heard that the Complaints Committee expected to have the results of the Registrar's Investigation referred back to it. Similarly, there was no referral back to the Complaints Committee from Council or any other organ of the Association.

We found as a matter fact that the Complaints Committee did not delegate its mandate in any manner. Therefore, the jurisdictional argument on this ground fails.

### B.2 The Registrar could not validly convert an investigation commenced by the Complaints Committee into a section 30 investigation

The Panel reviewed the characterization of the Registrar's investigation as a conversion of the investigation commenced by the Complaints Committee and found no evidence to support that characterization.

As previously outlined, the evidence heard supports the conclusion that the Complaints Committee had done all it believed it could within its mandate and accordingly referred the matter to the Registrar. The Registrar testified that he commenced the Investigation under section 30 on his own initiative. This was based on a number of factors which included a statistical analysis he did of the number of complaints per OLS between the years 2000 and 2013. This evidence is discussed further below, but in summary this analysis showed that on a straight numerical basis, the vast majority of surveyors had no complaints, 107 had 1 complaint; 17 had two complaints, and so on. Only one OLS, being the Member, had had 15 complaints made against him over this period of time.

There was no evidence that the Registrar's Investigation was a continuation of the investigation by the Complaints Committee or an expectation that the Registrar report back to the Complaints Committee. It was clear that there was an issue with this Member's practice and the need for further investigation.

We found as a matter fact that the Registrar did not convert an investigation commenced by the Complaints Committee into a section 30 investigation. Therefore, the jurisdictional argument fails on this ground.

### B.3 The Registrar's purported appointment of Mr. Stanton failed to delineate any boundaries to his investigation

Once the Registrar had concluded a Registrar's Investigation under section 30 of the Act was appropriate, he appointed Chester Stanton, OLS to carry out the Investigation. Counsel for the Member advanced the position that the Registrar's letter of July 30, 2014 alone served to instruct Mr. Stanton. Counsel for the Association did not accept this position. The Panel found the Member's position to be unsupported by the evidence.

The Panel heard evidence from the Registrar and Mr. Stanton that this was an appointment letter which conferred the necessary authority upon Mr. Stanton to carry out his investigation. Mr. Stanton testified that this appointment letter was provided to the Member and others and we understood this to be in the form of an introduction and authorization to look at the Member's records. As such, the Panel interpreted this letter to be a formality and not a delineation of the parameters of the investigation.

The Registrar testified that he telephoned Stanton to canvass his interest in conducting an investigation and rule out potential conflicts of interest. On July 30, 2014 Stanton met with the Registrar at the AOLS's office and was given oral instructions and provided with the chart of complaints. Stanton was given five complaints files: C-11-01 (Elgin Limited Partnership); C-12-01 (Mr. Frank Sherifi, Prespa Homes); C-12-15 (Redtail Golf Course); C-13-25 (Robert Huras); and C-14-01 (Lisa and Chris Metcalfe). The Registrar testified that he and Stanton went over the Huras and Metcalfe files and discussed the fact that they both related to overcharging and that the other three files were similar fact files. The Registrar described a pattern of client belief that a fee quote had been given; the final invoice far exceeded the fees without any further advice from Mr. Houghton that the job would exceed the quote and the client's credit card being charged without his knowledge.

According to the Registrar there was an expectation that the Investigator would "primarily" (his words) investigate these specific complaints. However, the letter of appointment stated:

> "I hereby appoint you to undertake an investigation under the authority of Section 30 of the Surveyors Act, RSO 1990, c. S.29 to ascertain whether Ward I. Houghton, O.L.S. has committed acts of professional misconduct or incompetence."

In order to carry out this investigation, the Registrar confirmed that the Investigator was authorized to access the Member's files and interview witnesses.

There were no significant inconsistencies in the evidence of the Registrar and Stanton and we accepted their evidence on the scope of the investigation.

The Panel accepts the guidance provided by *College of Physicians and Surgeons of Ontario v. Sazant* 2013 CanLII 22324 (Ont. C.A.). *Sazant* is authority for the principle that the exercise of investigatory powers is limited to obtaining information related to the investigation which had been authorized. In *Sazant* the investigator uncovered information which was unrelated to the original investigation and related to the physician's personal life. The uncovered information resulted in subsequent discipline allegations which were the subject of a separate hearing. The Court of Appeal dismissed the Member's appeal. However, the guidance from the Court of Appeal is helpful to understand the need to delineate the parameters of a disciplinary investigation.

This discipline proceeding can be distinguished from the situation in *Sazant.* The Stanton Investigation was restricted to the practice of the OLS Member and no information was included outside of details of that practice. The information which was included in the Stanton Report related to information provided by other O.L.S.s in the community. A number of O.L.S.s talked about their difficulties with the Member. This was specifically in reference to the exchange of field notes. This information was not new information which was uncovered but already known to the Registrar. Those complaints were the subject of earlier discipline proceedings and did not factor in the Panel's decision making process. We consider that the Member was not prejudiced in any way by the inclusion of evidence respecting the issue of exchange of field notes.

In fact, the only significant piece of information uncovered by Stanton and not already in the possession of the Registrar was the Mills case which will be discussed below. The Mills case fell within the primary focus of the investigation which was client complaints about billing practices. However, due to lack of evidence, the Panel dismissed these allegations of professional misconduct.

We acknowledge that the parameters of the Stanton investigation were broad and not as specifically defined as possible. However, there was no evidence that Stanton was instructed by the Registrar – explicitly or implicitly – to go out and "dig up some dirt" on the Member. Quite the contrary, the Panel was inclined to view the Investigation as an independent review which served to safeguard the Member's rights and provide a counterbalance to the authority of the Registrar. During the course of the Hearing the Panel also accepted the Member's argument that it should not hear evidence on all of the files referenced in the Stanton Report, and limited the evidence to the files referenced below, being only those specifically referenced in Schedules A to Exhibits 1, 2, and 3, the Notices of Hearing.

The Panel does not accept that the Stanton Appointment constituted an unrestrained investigation or a “fishing expedition”. The jurisdictional argument fails on this ground.

### B.4 The Registrar failed to meet mandatory preconditions to appointing an investigator under section 30

The Member takes the position that there has been no documentation disclosed which shows that prior to the appointment of Mr. Stanton as Investigator that the Registrar formed the requisite belief on reasonable and probable grounds that the Member had committed any particular act of professional misconduct.

The Registrar testified in chief on June 7, 2017. His examination in chief and cross examination took the entire day.

The Registrar became involved in this matter following two complaints, the Huras complaint and the Metcalfe complaint which were referred directly to him by the Complaints Committee. He looked at the history of the complaints and discipline history of the Member. As already noted above, he observed that from 2000 to 2013 there were a total of 15 complaints against the Member which significantly exceeded any other member. Two more complaints had been lodged since 2013. The Registrar referenced paragraph 39, page 12 of Exhibit 10. This is the chart that he had prepared for all Members of the Association during that time frame.

Many of the complaints against this Member related to overcharging or unauthorized charges to client’s credit cards, not advising clients that the work was going to cost more than they initially thought it was, contrary to the Code of Ethics and Standards of Practice. The Registrar testified that the Member had the most complaints of any Member from 2000 to 2015. This was in stark contrast to 80% of the Members who did not have any complaints. The Member with the second most complaints had a total of eight complaints. This was half the number of complaints attributed to this Member. That there were 15 or 17 complaints in and of itself was identified by the Registrar as grounds to look at the whole history of the Member's complaints. Many of the complaints were from members of the public and independent from one another. The Registrar noted an escalation in number of complaints from 2012 to 2015. He testified to the striking similarity of the nature of complaints.

As Registrar he was charged with the duty of administering the complaint files and had knowledge of the contents of the written complaints and the Member’s responses. The

Registrar also referenced the direct referral of two complaint files directly from the Complaints Committee.

The Panel determined based on his testimony and the documentary evidence that the Registrar had reasonable and probable grounds to believe that the Member had committed an act of professional misconduct or incompetence. The complaint chart for all Members was strong evidence by which to measure the objective grounds of this belief. We found that the grounds upon which the Registrar formed the belief were ample on both subjective and objective grounds.

This ground of the jurisdictional motion is therefore dismissed as unsupported by the evidence.

### B.5 The Registrar illegally instructed Mr. Stanton to investigate complaints which had already been dismissed by the Complaints Committee

This argument has been considered previously and we do not accept that the Final Decisions of the Complaints Committee that it had no mandate to deal with fees issues was a hearing on the merits of whether the Member was guilty of professional misconduct. The evidence was clear that the Complaints Committee considered that it had done all it could within its mandate.

### B.6 Mr. Stanton's own unconstrained conduct of the investigation was illegal

The Panel reviewed the Stanton Report and heard evidence from Chester Stanton over three days. We heard from Mr. Stanton on his understanding of his mandate and how he carried out his mandate. We do not agree that the conduct of the investigation was accurately characterized as unconstrained.

Mr. Stanton used Section 30 of the Act as his guide and developed what he described as a "fairly focused and streamlined plan for how his investigation was going to proceed". He understood his duty to be a fact finding mission and that he took any information he uncovered along the way at face value and included this in his report.

Somewhat problematic is the scope of the investigation and Stanton's reporting on matters outside the issues identified in the five complaint files. Specifically, Stanton did speak to other surveyors in the community and reported on the issue of the exchange of field notes amongst surveyors. Stanton also reported on other issues amongst surveyors who practice in the same geographic area as the Member. Stanton testified that he did not make this the

focus of his investigation. The Panel saw this to be the case in Stanton's evidence and the Report.

The Registrar's evidence was that the issue of field notes was not the purpose of the investigation and that it was not considered by him or Council in referring the matter to discipline.

The testimony of Stanton leads the Panel to conclude that Stanton was investigating the surveying practice of the Member and not necessarily looking for errors. In fact the Report identified favourable information at several points. At page 14, the Report identified that Terry Dietz had no issues with the work completed by Benedict Raithby on behalf of the Member. While the focus of the investigation was to identify issues with the practice of the Member, favourable information was included.

The Member submitted that the Report was severely flawed because it was not restricted to factual reporting and included Stanton's opinion and in one case unsubstantiated rumour. The Panel was able to identify opinion and conjecture on the part of the investigator and separate this from factual information.

In the final analysis, the Stanton Report did not materially add to the information which was already in the possession of the Registrar. It is noteworthy that the only previously unknown information brought to the Registrar's attention was the Mills case which was almost entirely based on information in the public domain through Small Claims Court documentation.

The Panel accepts that the parameters of the Hearing are found in the Notices. Accordingly the determination of relevance of evidence is based on the allegations in the Notices. The extent to which the Investigation Report touched on matters outside the allegations factored in the weight accorded the Report and the evidence of the Investigator.

We considered that the evidence of the Registrar and the Investigator provided the context or factual background by which the Member was referred to discipline. It is against this backdrop that the Panel considered the evidence of the civilian witnesses.

**C. Council of the AOLS lacked jurisdiction to pass the Motions referring the Member to the Discipline Committee**

The Member made a number of jurisdictional arguments in this regard.

### C.1 Council Motion 14-59 was invalid because the Complaints Committee had not carried out an investigation and made a referral to Council with a recommendation for discipline.

Council Motion 14-59 was a motion whereby Council reviewed the results of the Registrar's Investigation, being the report by Mr. Stanton, and on the basis of that report concluded that the Member should be referred to the Discipline Committee. As we understand the Member's argument under this heading, he is suggesting that this was improper because not all of the matters in the Stanton report had been investigated and referred to Council by the Complaints Committee. However, subsection 30(10) of the Act requires the Registrar to report the results of an investigation to Council, and Council may direct the matter to the Discipline Committee or to another committee as it sees fit. As we have concluded that the Registrar's investigation proceeded properly the Member's argument in this regard fails.

### C.2 Council Motion 14-67 and 14-68 were based on referrals from the Complaints Committee that should be considered nullities

Council Motion 14-67 was based on a Complaints Committee referral arising from its investigation into a complaint by Michael Sloan. The Complaints Committee obtained written submissions from both the complainant and the Member before making its Decision. Its decision was to refer the matter to the AOLS Council with a recommendation that Council refer the matter to the Discipline Committee. In doing so, it was acting within its statutory mandate.

Council Motion 14-68 was based on a Complaints Committee referral arising from its investigation of a complaint by Daniel Salhani. The Committee went through the same process in this case, and came to the same conclusion: a referral to the AOLS Council with a recommendation that Council refer the matter to the Discipline Committee.

The Member argues that the Complaints Committee exceeded its jurisdiction in that it purportedly made "material findings" against the member in both of these cases, including findings of credibility, rendering their decisions in each case a nullity on which the Council could not then proceed with its Motion.

The Member accepts (in his Factum on the Motion) that as a screening committee, the Complaints Committee must determine whether there is "sufficient evidence of sufficiently serious misconduct to warrant a discipline hearing" (paragraph 88). As a volunteer committee of non-lawyers, the Complaints Committee in our view did exactly

this: it assessed the allegations and responses and concluded a hearing by the Discipline Committee was warranted in both cases. We do not agree with the Member that the Complaints Committee referrals are nullities.

### C.3 All 3 Council motions referring the Member to the Discipline Committee are nullities because they refer a person rather than the allegations

The evidence of the Registrar was that Council considered the Registrar's Investigation/Stanton Report and the Complaints Committee referrals and recommendations in the Sloan and Salhani matters, and made 3 separate referrals to the Discipline Committee. Three Notices of Hearing were subsequently prepared: each Notice includes a Schedule A setting out the particulars of the allegations of professional misconduct. There is no dispute that the Member had full knowledge and disclosure months before the hearing began as well as disclosure and will-say statements long before he was required to defend himself from the allegations. He was well aware of the case he had to meet in very specific detail.

The Member argues under this heading that the AOLS Council was required to refer the specific allegations of professional misconduct to the Discipline Committee. The cases relied on by Counsel suggest that the underlying important principle is that a regulated professional must know the case he or she must meet before the Discipline Committee. We are satisfied this principle was met in every way by the AOLS. This ground fails as well.

### C.4 The Discipline Committee has no jurisdiction to hear charges arising from complaints dismissed by the Complaints Committee

As noted above, the Complaints Committee dealt with a number of separate complaints, all of which raised concerns regarding the fees communicated and charged by the Member. The Complaints Committee, as already noted, believed that issues of fees were a matter for a different committee (the Fees Mediation Committee). Eventually the Complaints Committee referred what it now saw as a pattern of behaviour to the Registrar for further investigation, and that further investigation as done by Mr. Stanton. We have already set out our conclusion that this was an appropriate way to proceed. This ground of argument fails.

## D. Bias

The Member alleges that there is a reasonable apprehension of bias on the part of Mr. Stanton, the Complaints Committee, and Eric Ansell, O.L.S. (a member of Council at the time of the referrals to the Discipline Committee).

With respect to Mr. Stanton and the Complaints Committee, we saw no evidence of bias. However, even if there were such evidence, Mr. Stanton was called as a witness where he was very comprehensively cross-examined by the Member's Counsel, including with respect to portions of his evidence suggesting, in Counsel's view, bias against the Member. The Panel gave little weight to any aspects of Mr. Stanton's evidence that was not otherwise supported by the documentary evidence otherwise before it. For example, Mr. Stanton's comments about his personal way of doing things in comparison to the Member were of no assistance to the Panel and were disregarded. That does not, however, in the Panel's view, mean that none of the documentary evidence he collected can be heard and considered by the Panel.

Similarly, it was the Panel's responsibility to assess the substance of the allegations based on the evidence before it, and without reference to any commentary or conclusions of the Complaints Committee.

With respect to Mr. Ansell, the Member relies on the fact that during the course of his investigation Mr. Stanton emailed Mr. Ansell, who worked at the Surveyor General's office to ask about the Crown's general position on Crown reservations. Mr. Ansell provided a short general response to this question, which, it was conceded, is public information and available on a government website. He was not providing a professional opinion in the context of anything to do with this Member.

In light of that innocuous (in our view) communication the Member argued that because Mr. Ansell was also a member of Council at the time the referrals to the Discipline Committee were passed, a reasonable apprehension of bias arose such that the Council motions were void and there was no jurisdiction in the Discipline Committee to proceed. We do not agree: this ground fails.

**CONCLUSION ON JURISDICTIONAL MOTIONS**

Having considered the further submissions advanced by the Member and reviewed the detailed written brief submitted by the Member in support of his position that the Discipline Committee does not have the jurisdiction to consider the Complaints filed against the Member, we consider the motions to dismiss to be unsupported by the evidence. Based on a full evidentiary record and for the foregoing reasons, the Panel does not give effect to the jurisdictional arguments advanced by the Member.

The Panel in considering the evidence of the Registrar, the investigator Stanton along with his Report saw this evidence as background or context as to how the complaints of the former clients came before the Discipline Panel. The weight accorded to the evidence of the Registrar, Stanton and the Stanton Report did not form the sole basis of our findings.

The individual complainants along with the Member's witness Paul Benedict were persuasive witnesses to the Panel and the Panel placed great weight on this evidence. The evidence of these witnesses is outlined below.

In conclusion, the Panel did not give effect to the jurisdictional motions brought by the Member and these motions are hereby dismissed.

In the event that the Panel has erred in interpreting the legislation and caselaw, the Panel has determined in the alternative that it is not deprived of jurisdiction over the stand alone allegations contained in Exhibit 2 (Notice dated March 24, 2015 re Michael Sloan) and Exhibit 3 (Notice dated March 25, 2015 re Daniel Salhani).

We now turn to the substantive allegations contained in Exhibits1, 2 and 3 being the Notices of Hearing and Schedule A Allegations.

## SUBSTANTIVE ALLEGATIONS

In our consideration of the evidence, the Panel was mindful of the principal object of the Association of Ontario Land Surveyors to regulate the practice of professional surveying in order that the public interest may be served and protected. The *Surveyors Act* establishes the regulatory scheme which governs the Association of Ontario Land Surveyors.

The Supreme Court of Canada has consistently emphasized the need for courts to interpret professional discipline statutes to protect the public interest in the proper regulation of the professions: see e.g. *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232, at p. 249; *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 S.C.R. 17, at para. 40. The Panel has been guided accordingly.

What follows is a review of each of the allegations against the Member as set out in Schedule A of Exhibits 1, 2 and 3.

**EXHIBIT 1: SCHEDULE A: PARAGRAPHS 4(a)(b) AND (c): RE: PRESPA HOMES**

These paragraphs set out a number of allegations arising from the Member's work for a client, Prespa Homes. The evidence can be summarized as follows.

Late in 2004 Frank Sherifi ("Sherifi"), the controlling mind of Prespa Homes, approached the Member regarding a property he, through Prespa Homes, was considering purchasing for development. At that time Houghton told Sherifi about potential issues regarding a Crown Reserve which Sherifi then took to his lawyer. Sherifi purchased the property in 2006 having assessed the risk and obtained legal advice. Sherifi asked the Member to prepare a reference plan of the property for an agreed to price of $5,500, and a plan was prepared dated August 24, 2006. The lands were automated in the Land Registration system on February 19, 2007, resulting in a revised plan dated January 14, 2010 prepared by Houghton. This additional work was incrementally invoiced and paid for.

Because the land was to be developed, Sherifi applied for Absolute Title and asked Houghton to revise the plan to support the application and show two lots that had been severed from the original lands. On May 26, 2010 Houghton had Sherifi sign a Document General and proceeded to deposit a copy of the original Crown Patent on title May 28, 2010. The reference plan used for the Land Title application was updated and signed on May 28, 2010 as well to include reference to the Document General deposit of the Crown Patent and a 'caution' about a Crown reservation contained in it.

A Land Titles hearing for Absolute Title was held late 2010/early 2011 with Houghton appearing to testify regarding his plan. The evidence suggests Houghton spent time of 1.5 to 2 hours preparing and 2 to 3 hours at the hearing. In the end, Prespa Homes was successful when a decision was rendered in October 2011 and all objections were dismissed with no issue being raised about the Crown reservation appearing in the Crown Patent. There was no appeal of the decision.

On May 20, 2011, and prior to the Land Titles hearing decision, Prespa Homes received an invoice from Houghton for $55,135.81 which included, amongst other things, 194.5 hours of research and 22.5 hours for attendance at the Land Titles hearing.

On January 12, 2012 the Ministry of Consumer and Government Services Regional Surveyor asked Houghton to update the reference plan used at the Land Titles hearing if required and to remove the 'caution' regarding the Crown reserve, then deposit it to complete Prespa Homes' application for Absolute Title. Houghton told the Regional Surveyor that he would not open the file until he received payment from Prespa Homes/Sherifi.

After meetings with the Regional Surveyor and his lawyer Sherifi was subsequently able to hire another surveyor to complete and deposit a reference plan supporting his Land Titles application for Absolute Title and he filed a complaint against Houghton with the AOLS on January 16, 2012.

**EXHIBIT 1, SCHEDULE A, PARAGRAPH 4(a): PRESPA CROWN PATENT ISSUE**

In this paragraph the AOLS alleges, among other things, the following:

> Contrary to the expectations of his client, contrary to the advice from the Surveyor General's Office, and contrary to the accepted practice of other surveyors in his area of practice, Houghton … proceeded to obtain a Crown Patent for the Prespa property and registered this patent in the Land Titles Office. Evidence provided by the Land Titles Office and the Surveyor General's office revealed that the existence of, and any potential effect of such Crown reserves, was adequately addressed by Section 44(1) of the Land Titles Act and that the registration of the Crown Patent was not necessary and in fact may be detrimental to his client's interests, contrary to Section 33(2)(a) of Regulation 1026.

Sherifi's oral evidence before the Panel on April 10, 2018 was that he didn't know what the Document General and the attached Crown Patent was for (Document General with attached Crown Patent registered as No.E461174 on May 28, 2010, Exhibit 6, Vol.3, Appendix 4 pp.0826-0829) and that it was never explained to him. Sherifi says he signed the Document General on Houghton's advice that it was necessary to complete the plan required for his Land Titles hearing for absolute title. Houghton provided no contemporary or written evidence to show he did explain the effect of the Crown Patent and its registration other than a cover letter to his $55,135.81 invoice, that Sherifi said he never received, (Cover letter to Houghton invoice dated May 20, 2011, Exhibit 6, Vol.1, Tab 8, p.0240) and his response to Sherifi's complaint against him (Exhibit 6, Vol.1, Tab 9, p.0244). Both of these documents are dated well after the signing and registration of the Document General and Crown Patent. Even if Houghton had explained his actions and their effects to Sherifi prior to the registration of the Document General and Crown Patent it was clear any such explanation was insufficient as Sherifi remained unsure why it was done.

Ministry of Natural Resources and Forestry (MNRF) policy PL 4.03.01 "Release and Voidance of Reservations and Conditions in Crown Grants" (Exhibit 13, Vol.2 Tab 105) has been in existence since December 2001 and speaks specifically to the type of Crown reservation mentioned in the Crown Patent relating to the Prespa property. It provides a definition, interpretation and a method to remove it if an owner wishes to. As a practicing surveyor in an area around water bodies this policy would be information Houghton would be expected to know and have available or know where to find. He either didn't know about it or made no attempt to rebut it and only raised it as an issue once he had allegedly expended a great deal of research not authorized by his client.

The Panel heard evidence through Stanton of MNRF clarification on this issue from Eric Ansell. As that clarification was the result of Stanton's Section 30 investigation it was not directly available to Houghton at the time that he registered the Crown Patent. Accepted survey practice and relevant MNRF policies and advice were available however, as they are to all O.L.S.'s.

Houghton, in his oral evidence, said an opinion he received regarding the Crown Reserve from the Ministry of the Attorney General (MAG) conflicted with the one from MNRF. However the MAG opinion was obtained through the local OPP and apparently was given more weight by Houghton than the one available from MNRF, which is the responsible Ministry. The Panel concluded that if there is a discrepancy between Ministries, the MNRF position prevails, or, at the very least Houghton should have clarified any confusion he had before registering the Crown Patent.

There is no evidence Crown Patents are routinely registered against Land Titles PINs in Houghton's area of practice. Contrarily, it is exceedingly rare, if ever, done and unnecessary, as any effect is covered off with a standard statement about lands being subject to Section 44(1) of the Land Titles Act.

The Document General was registered as No. E461174 on May 28, 2010 (Exhibit 6, Vol.3, Appendix 4 pp.0826-0829).

Section 44(1) of the Land Titles Act is expressly printed on PINs to deal with the effect of Crown Patents.

Both by Section 44(1) of the Land Titles Act being noted on the PIN and accepted practice in the Ontario Land Titles system that Crown Patents are not registered on PINs in this area of practice it was not necessary for Houghton to have registered it. The effect of having a Crown Patent as a new registration on a PIN would potentially cloud title and draw unnecessary attention to it from any interested parties, lawyers or title searchers. This would be particularly detrimental given that Prespa Homes was in the process of applying for absolute title and that application was likely to result in a contested hearing. Further, as indicated by communications from Hugh Goebelle (the MCGS Regional Examiner of Surveys), the 'caution' relating to the registration of the Crown Patent shown on Houghton's reference plan had to be removed before the plan could be deposited to complete Prespa Homes' application for absolute title (E-mail from Hugh Goebelle to Houghton Jan.12, 2012 Exhibit 6, Vol.1, Tab 9, p.0268). This would be difficult to do and cause Prespa Homes/ Sherifi time, effort and cost to remove it from the PIN. It is also unusual and rare that a Document General for a deposit like this to be prepared by the surveyor and in hand writing.

The allegation is that Houghton contravened Section 33(2)(a) of Reg. 1026 on these facts. That section provides:

> 33(2)(a) The code of ethics of the Association requires that every member shall conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession;

The Panel concludes that the Member contravened this section of the Regulation in his conduct regarding the registration of the Crown Patent, as summarized above. This allegation has been proven by the AOLS.

**EXHIBIT 1, PARAGRAPH 4(b): ISSUES RE PRESPA HOMES RESEARCH**

In this paragraph the AOLS alleges, among other things, the following:

> **…**Houghton had not advised Prespa Homes or sought permission from Prespa Homes to conduct additional research, that such research was in any case not necessary or required, that Houghton was well aware of what he perceived to be potential title issues in this area [so] that he should have been able to advise Prespa Homes of any potential issues prior to conducting the Prespa Homes survey, and that the research invoiced to Prespa Homes had in fact already been carried out in whole or in part for another client, contrary to the Code of Ethics at Sections 33(2)(a)(e) and (g) of said Regulation 1026.

The Panel was provided with little evidence to show this research was ever done and no evidence was presented of the research documents, plans, photographs or other material that it would have generated. Houghton provided an excerpt from a calendar and a calculation of estimated hours (Exhibit 13, Vol.2 Tab 105) however no calendar for the complete dates covering this research was provided nor were any invoices for copy charges, parking, hotels or other charges that were said to be incurred. Oral evidence given by Sherifi of Prespa Homes (April 10, 2018) was compelling in convincing the panel that Houghton did not advise Sherifi of the proposed research nor seek his approval. Houghton claims his instructions came from Prespa Homes/Sherifi's lawyers, and even if this were true, it doesn't absolve Houghton of his responsibility to keep his client informed. There is no evidence of a direction from Prespa Homes/Sherifi (written or oral) to Houghton for Houghton to take his instructions from Prespa's/Sherifi's agents, nor is there documented evidence of the numerous meetings with Prespa's/Sherifi's lawyers as claimed by Houghton. Contrarily a letter from Prespa's/Sherifi's lawyer, Don Ferguson, refers to participation by Houghton of 1.5 to 2 hours office time and approximately 2 hours of evidence at the hearing (Exhibit 6, Vol.3, Appendix 4, p.0866). The research claimed as completed by Houghton resulted in an invoice of over $55,000 which, given the large amount, would suggest a strong obligation on Mr. Houghton's part to document the research and make clear to and obtain written permission from his client before doing so. To the contrary, the Panel heard evidence that the billable hours the Member charged as part of the $55,000 invoice were based on a weekly estimate extrapolated over time and the only written documentation was sparse notations and coloured highlights on a paper calendar. Clearly this is not adequate documentation to support an invoice for this amount, especially since the Member indicated that his retainer agreement was established to bill by the hour. The supporting documentation on which he relies falls far below the standard expected of a professional serving the public.

The potential Crown Reserve, accretion and fill issues could have been dealt with in a report. Lawyers were informed of these issues and they were available at the Land Titles hearing for absolute title during which they were not brought up as relevant (Land Titles Act decision, Oct. 2011 re: application for First Registration by Prespa Homes, Exhibit 13, Vol.2, Tab 107). As such Houghton had no cause to do extensive research, particularly given that any potential effect of the Crown Reserve was a 'quality of title' issue and not an 'extent of title' one.

Houghton had made Prespa/Sherifi aware of potential problems in 2004 before the purchase of the property and before commencing any survey work. Prespa Homes took an informed gamble and purchased the property anyway (Oral evidence, April 10, 2018 and letter from Houghton & Houghton to Mr. Sherifi Dec. 23, 2004, Exhibit 13, Vol.1, Tab 55). Yet other than this initial warning, Houghton did not inform Prespa/Sherifi that any additional research was being done or provide him with an estimate of the cost for that research beyond his initial estimate of $5,500 (acknowledged in a letter from Prespa Homes to David Raithby dated Nov.19, 2004, Exhibit 13, Vol.1, Tab 45). There is no evidence of a retainer agreement between Prespa Homes or Sherifi and Houghton. It follows that Houghton knew enough about the perceived problems to warn Sherifi yet didn't provide him with an estimate of the research it would take to illustrate them. If there really was a need for Houghton to do the research, then it follows he was not fully aware of the nature of the problem and hence would not have been able to give Prespa/Sherifi his warning.

The Panel was not provided with sufficient evidence to persuade it that the research in question for which Prespa Homes was invoiced had been done in whole or in part for another client. There was conflicting evidence given whether the research Houghton allegedly completed for Prespa Homes had been previously carried out for another client. That other lands Houghton may have surveyed, and hence researched, would have been part of the same Crown Grant as the Prespa lands is possible, however it was not made clear by the AOLS, nor did the AOLS make specific reference to who the other clients were that Houghton had allegedly competed the same research for. Houghton, alternatively, maintained in his evidence that similar research regarding Crown Reserves, fill and accretion were actually in different locations and within different Crown Patents.

As a result, the allegation that Houghton contravened section 33(2)(g) has not been proven.

We do find however that the other allegations have been proven: specifically that Houghton did not advise Prespa/Sherifi or seek permission from it to conduct additional research; that such research was in any case necessary or required, and that Houghton was well aware of what he perceived to be potential title issues in this area prior to conducting the survey. As such we agree that Houghton has contravened Sections 33(2)(a) and (e) of Regulation 1026.

Section 33(2)(a) is already set out above. Sections 33(2)(e) is as follows:

> The code of ethics of the Association requires that every member shall:
>
> (e) ensure that clients are aware of the complexity of a project and the nature of fees for service.

**EXHIBIT 1: SCHEDULE A: PARAGRAPH 4(c): FAILING TO REFER TO ALL DOCUMENTARY EVIDENCE**

Paragraph 4(c) sets out an allegation that, in summary, Houghton certified that his plan of the Prespa property, as submitted to the Land Titles Office, complied with all appropriate Acts and Regulations [specifically Reg. 1026 under the Surveyors Act] when in fact he had not referred to all documentary evidence.

There was no compelling or conclusive evidence that persuaded the Panel that Houghton (or David Raithby, O.L.S. on behalf of Houghton's company) did not refer to all documentary evidence on any of the prepared plans. Three versions of plans were introduced as evidence (Exhibits 25, 26 and 27) and only one of these (Exhibit 27) was used to accompany Prespa Home's application for absolute title and used for the hearing. The plan was not submitted to the Land Titles Office (unless presentation for a Land Titles hearing is presumed to mean a Land Titles Office); explicitly it was not submitted because Houghton said he wouldn't until he was paid his outstanding invoice (as shown by e-mails between Houghton and Hugh Goebelle, Exhibit 6, Vol.3 pp.854-856).

The Panel concludes that the AOLS failed to prove this allegation.

## EXHIBIT 1: SCHEDULE A: PARAGRAPH 4(d): RE: BRIAN VAUGHAN

This allegation, in summary, is that the Member counseled Mr. Frank Sherifi and/or Prespa Homes to file a complaint against a fellow surveyor, Mr. Brian Vaughan, O.L.S. ("Vaughan").

As stated above, Sherifi was the President/controlling mind of Prespa Homes. Prespa Homes owned a piece of property in Port Stanley, Elgin County on which it wanted to build a condominium. Sherifi had hired the Member's firm in 2004 to prepare a survey for this project.

Sherifi attended under Summons by the AOLS. We heard from him that in October, 2009 he was contacted by the Member who claimed that Vaughan, had deposited a Survey Reference Plan on an adjoining property and that this "killed" his condominium project. Through the persuasion of the Member, Sherifi agreed to make a complaint to the Complaints Committee about Vaughan. On October 28, 2009 Sherifi sent a letter to the Registrar on Prespa Homes' letterhead. This letter had been drafted in its entirety by the Member according to Sherifi's testimony. This was corroborated by an email from the Member to Sherifi sent October 28, 2009 which attached, "The revised letter as discussed." There was a further letter to the Registrar dated December 16, 2009 on Prespa Homes' letterhead in response to the Vaughan reply to the complaint. That letter was also drafted by the Member. Sherifi received the Final Decision of the Complaints Committee in February, 2010. Almost two years later, on December 17, 2012 Sherifi wrote to the Registrar to complain about the role of the Member in the Vaughan complaint. According to this letter, in confessing to admitting that it was not a complaint drafted by him, Sherifi was motivated by guilt.

Sherifi's testimony of the Vaughan complaint was detailed and consistent with what he wrote to the Registrar and what he told Stanton. Sherifi testified that the Member had attended Prespa Homes' office and stood over him while he signed the letter of complaint on his letterhead. Sherifi came to regret his involvement in the Vaughan complaint and concluded that he had been manipulated by the Member. Late in 2012 Sherifi attended the office of Vaughan to apologise. Sherifi expressed to the Panel his belief the Member wanted to eliminate a competitor. From his demeanour and tone of voice, the Panel observed that Sherifi continued to be distressed about his role in the Vaughan complaint.

The Member's evidence did not vary from that of Sherifi on the significant points. The Member testified that Vaughan had not circulated his plan and that he was required to do so. The Member brought this matter to his client's attention as he believed that this affected his client's interests. The Member acknowledged that he had prepared a draft letter for the client to use. The Member also acknowledged that he was in the room when Sherifi signed the letter. The Member minimized any manipulation of Sherifi and claimed that, "No one held a gun to his head".

The Panel was impressed by the testimony of Sherifi and accepted the genuineness of his remorse. We were particularly impressed by the unsolicited apology he gave to Vaughan. We preferred the evidence of Sherifi over the Member when it came to the role of the Member in instigating this complaint.

The allegation in this paragraph is that the Member contravened Section 35.15 of Regulation 1026, R.R.O. 1990, as amended, in that the Member's purpose in urging Sherifi to file the complaint was to injure Vaughan's professional reputation and his practice of professional surveying. The Panel agrees that on the evidence provided the Member contravened Section 35.15 through his instigation and drafting of the complaint against Vaughan.

This allegation of professional misconduct was proven.

**EXHIBIT 1: SCHEDULE A: PARAGRAPH 4(3): THE HURAS COMPLAINT**

Mr. Robert Huras ("Huras" or "Mr. Huras") filed a complaint with the AOLS November 22, 2013 alleging Houghton failed to give him a proper estimate of expected survey costs, failed to keep him properly informed as to the complexity of his project and overcharged him $1,508.00 beyond the original estimate. Mr. Huras only received a plan marked preliminary and was concerned he may still be liable for additional fees.

Mr. Huras attended under Summons by the AOLS and gave evidence. He testified that he contacted Houghton for a Surveyors Real Property Report ("SRPR") which he required for a

house purchase scheduled to close in about six weeks, on November 4, 2013. Mr. Huras told Houghton the property was a beach lot in Port Stanley.

Mr. Huras testified that he asked Houghton for an order of magnitude estimate and Mr. Houghton suggested $2,500.00 or less.

Mr. Huras testified that he signed the Houghton + Houghton retainer and signed the Houghton + Houghton Credit Card Authorization allowing Houghton to debit his credit card for the amount of $2,500, and “for all accounts related to the Retainer Agreement. Mr. Huras testified that he was uncomfortable with the retainer format and the Credit Card Authorization but believed his upside cost was $2,500. Mr. Huras testified he understood Houghton was the local surveyor and retaining Houghton would therefore save him time. Huras also testified that the retainer was heavily one sided but he relied on the fact he was dealing with a member of a professional organization and that Houghton would act competently, ethically and professionally.

After retaining Houghton’s firm, Mr. Huras made several inquiries by email for the expected delivery date of the work but by October 24, 2013 he had not received it.

Evidence provided to the Panel indicated that on October 25, 2013, Mr. Huras met with Houghton at Houghton + Houghton’s office expecting to receive the SRPR. At the meeting, Houghton provided Mr. Huras with an unsigned plan marked draft and advised Mr. Huras there were several issues including a 7” discrepancy with a previous survey and a Crown land issue. Mr. Huras testified that Houghton told him it would cost upwards of $30,000 to resolve the issues. Evidence provided to the Panel indicated that a few hours before the meeting, Mr. Huras’ credit card was charged an additional $1,508.00 without notice to Mr. Huras.

Mr. Huras testified that he advised Houghton to not proceed with any other work however Mr. Huras still expected to receive a survey as per the agreement. Evidence presented to the Panel indicated Mr. Huras continued to follow up with Houghton + Houghton and at 4:52 p.m. on November 4, 2013, the day of closing, was emailed the same draft plan he received previously. Mr. Huras closed on the property without a plan from Houghton or his firm.

After closing on the property, Mr. Huras again followed up with Houghton + Houghton and, following his third enquiry, received an email on November 9, 2013 stating “Ward [i.e. Houghton] is still working on it [i.e. the plan]. Should have something finalized next week.”

Mr. Huras never received a final survey and he eventually retained another firm that agreed to do the work for a flat fee of $2,500. That firm was able to resolve the 7” discrepancy in a phone call to the adjoining surveyor and that firm did not consider the Crown land issue to be significant. Upon completion of their work, the firm waived their fee to Mr. Huras because, as Mr. Huras testified, they felt he had been through enough turmoil.

Mr. Huras testified that he was eventually able to recover Houghton + Houghton’s fees from American Express.

Houghton testified that he did not give a quote of $2,500.00 and that he made it clear that he charged by the hour. Houghton testified he was familiar with Port Stanley and has completed many surveys in and around Edith Cavell Blvd. (the Huras parcel is on Edith Cavell Blvd.).

Houghton said he does not believe he has to notify a client of complexity or ballpark prices and that he only starts a job once he has a retainer.

Houghton testified he conducted the research for the Huras SRPR from his files right after he was retained and he only realized the Huras lot was part of what he referred to as “the wetlands” when he did his research. Houghton testified that he started thinking about the Huras parcel in relation to the previous evidence he had gathered for Sherifi file and the Prespa file and that he was concerned where the original natural boundary was located.

Houghton testified that he did not advise the client of his concerns until the Oct. 25 meeting.

Evidence presented to the Panel indicated that the field work and plan preparation were subcontracted to Benedict Raithby, O.L.S. and that Houghton & Houghton’s invoice to Mr. Huras was simply double the invoice amount Houghton & Houghton received from Benedict Raithby.

**THE ALLEGATIONS AND FINDINGS**

In paragraph 4(e) of Schedule A to Exhibit 1 it is alleged that Houghton “had for several years been conducting research in the area of the Huras survey for another client, that he was well aware of what he considered to be potential title issues in the area of the Huras survey and that he should have been able to advise Mr. Huras of any potential issues and the possible costs involved to resolve such issues prior to conducting his survey all of which is contrary to the Code of Ethics at Sections 33(2) (a), (e) and (g) of Regulation 1026 and contravenes Sections 35.3 and 35.12 of Regulation 1026”. Each of these subsections will be reviewed.

As already noted above, Section 33(2)(a) requires surveyors to conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession.

In the Panel’s view, Houghton’s Retainer Agreement, which he used with Mr. Huras and other complainants, is one sided and illustrates heavy handed business practice. It is very difficult for a lay person to comprehend. The associated Credit Card Authorization is clear in that is sets out the initial dollar amount a client is authorizing, leading all of the complainants to whom this applied to believe that they were paying, on their credit card, for the estimated cost of the work up front. However the Retainer Agreement goes on to say that that additional charges to the client’s credit card may be made without notice to the client. Since the clients said they understood they’d been given an accurate estimate that they’d paid for, they were without exception surprised and upset when further payments were billed to their

credit cards. The two documents together are self-serving and in the Panel's view do not maintain public trust and confidence in the profession.

Houghton charged Mr. Huras an initial $2,500, and then an additional $1,508.00 on his credit card just hours before he was scheduled to meet Mr. Huras to review the project. This additional charge was made to Mr. Huras' credit card account without notice to Mr. Huras. This action was counter to maintaining public trust and confidence in the profession.

Subcontracting the vast majority of the work involved in this project to another O.L.S. resulted in double the professional fees for minimal added value. This activity does not protect the public interest and erodes the public trust and confidence in the profession.

Houghton's practice of doubling the disbursement amounts does not maintain public trust and confidence in the profession. A disbursement, by definition, is an amount paid for a specific expenditure for which reimbursement from the client is sought. The disbursements in question were for Benedict Raithby's field vehicle, field equipment and office equipment: none of Houghton + Houghton's equipment or vehicle was used. The concept of disbursements being a profit centre is contrary to maintaining the public trust and confidence in the profession.

Mr. Huras testified he believed Houghton had taken advantage of him.

The Panel considers this allegation proven: Houghton has contravened Section 33(2)(a) of Regulation 1026.

The AOLS also asserts that Houghton contravened Section 33(2)(e) of the Regulation. As referenced above, this section requires every member to ensure that clients are aware of the complexity of a project and the nature of fees for service.

In the Panel's view, Houghton failed to ensure Mr. Huras understood the nature of his fees. Mr. Huras had the impression he received a quote from Houghton, while Houghton testified he did not give a quote. Mr. Huras made several email requests for confirmation of the budget and he did not receive a response. It is the Surveyor's duty and obligation to ensure there is no misunderstanding about the nature of the fees.

Houghton testified he had done many surveys on the same street and was very familiar with the area, but he did not advise Mr. Huras of the potential for perceived Crown land issues even though Mr. Huras told him his property was a beach lot.

Mr. Houghton did not advise his client of the potential for Crown land issues and the associated additional fees once those potential issues became apparent after he conducted his initial research.

For these reasons the Panel concludes that Houghton failed to ensure that Mr. Huras was aware of the complexity of the work Houghton believed was required, or the fees resulting

from that complexity. The Panel concludes that the AOLS established that Houghton contravened Section 33(2)(e), as alleged.

Section 33(2)(g) provides that a member shall not receive compensation for the same service from more than one person without the consent of the persons involved.

Houghton testified that when researching the Huras file he thought about the results of his research in relation to the evidence he had gathered in the Sherifi and Prespa file. However, the AOLS did not provide any direct evidence that Mr. Huras was invoiced for work done for another client.

The Panel concludes that the AOLS did not establish that Houghton contravened this subsection.

The AOLS also references, in this paragraph, sections 35.3 and 35.12 of Regulation 1026. Section 35.3 simply says that a failure to comply with the code of ethics or the standards of practice of professional surveying is professional misconduct. Section 35 (12) specified that professional misconduct also includes charging a fee for professional surveying services not performed or knowingly submitting a false or misleading estimate, account or charge for professional surveying services rendered to a client.

Houghton invoiced his client for disbursements that were not his expenditures; they were Benedict Raithby disbursements. Houghton simply took the disbursement total from Benedict Raithby and doubled it.

The Panel concludes that the AOLS has established that Houghton is guilty of professional misconduct for his conduct in this regard.

There was considerable discussion by both Counsel during the hearing regarding Houghton's practice of sub-contracting jobs to another surveying firm, Benedict Raithby. It is not uncommon for surveyors to sub-contract aspects of a job to others.

In this case, it is clear from the evidence, including Houghton's testimony, that he left the supervision of the field work, survey computations, plan preparation and plan review to Benedict Raithby. Subsection 35.7 of Regulation 1026 states that it is professional misconduct for a surveyor to fail to assume responsibility for all phases of a project carried out under the member's supervision. The Panel had some concern that Houghton's arrangement with Benedict Raithby delegated too much responsibility to that firm. However, Houghton was not charged with a contravention of this Subsection, and the Panel therefore makes no finding in this regard. For the benefit of the profession, the Panel notes that when sub-contracting work to others, surveyors must be careful to comply with this subsection.

**EXHIBIT 1: SCHEDULE A: PARAGRAPH 4(f): THE METCALFE COMPLAINT**

In this paragraph, the AOLS alleged that "Houghton had for several years been conducting research for another client in the area of the Metcalfe survey, that he was well aware of what

he perceived to be title issues in the area of the Metcalfe survey and that he should have been able to advise the Metcalfe's of any potential issues and the possible costs involved in resolving such issues prior to conducting his survey, all of which is contrary to the Code of Ethics at Sections 33(2)(a),(e) and (g) of Regulation 1026 and contravenes Section 35.3 and Section 35.12 of Regulation 1026."

**Review of Evidence**

The complaint by the Metcalfe's against Houghton was related to the preparation of a title survey (SRPR) required by Mr. & Mrs. Metcalfe to support applications to the approving agencies for a minor variance and to obtain a building permit for a building on a property located at 159 Maud Street in the Village of Port Stanley.

Mr. Metcalfe testified that they were given a verbal estimate of the cost of the survey (fee range of $1,500 to $2,500) on October 15, 2012.

Mr. Metcalfe met Mr. Houghton the following day at Houghton + Houghton's office in St. Thomas to confirm the survey requirements, sign an authorization to proceed and to provide a deposit. The deposit amount required by Houghton at that time was $3,500, which exceeded the initial verbal quote provided in the original telephone conversation but was not challenged by Mr. Metcalfe at the time due to the urgency of the work and a presumption that a refund for the difference would be provided to them on completion of the work.

Time constraints were such that in order to meet an application submission deadline to the Town the survey work was to be initiated immediately and provided to the Metcalfe's by October 29, 2012.

Evidence provided indicated that Houghton had undertaken some title search work prior to receiving the written authorization to proceed but indicted this was done to fast track the survey due to the tight time line for delivery of the final survey by October 29, 2012.

The Metcalfes were in contact with Houghton's office on numerous occasions by email and phone for a status report and to arrange to get a copy of the final survey to support their application to the Town.

Evidence provided to the Panel indicated that a preliminary draft copy of the survey was provided to the client (through their lawyer) on October 24, 2012.

Mr. and Mrs. Metcalfe indicated in their testimony that they only heard of some possible title issues on October 25, 2012. They indicated to Houghton that they were only interested in receiving the survey and not did not require or want Houghton to deal with any title issues.

A signed final survey was not provided to the Metcalfes in accordance with the agreed delivery schedule of October 29, 2012. In fact, a final survey was never provided to the Metcalfes by Houghton or his firm. As a result, the Metcalfe's were forced to rely on a draft version of the survey (unsigned) to support their application.

Numerous requests for a detailed explanation (i.e. an itemized statement) and a copy of their final invoice were made by Mrs. Metcalfe. Finally, on May 29, 2013, seven months after the agreed upon delivery date for the survey, an invoice was issued by Houghton's firm which included additional fees in the amount of $2,010.89 (i.e. in addition to the $3,500 already paid). No advance notice that additional costs were being incurred had been provided, nor was an explanation of the fees provided at the time of the invoice. The itemized accounting details were not provided until January 15, 2014.

The additional fees above the initial retainer deposit were challenged and never paid by the Metcalfes, who had not provided authorization to charge the credit card an additional amount.

A subsequent estimate of fees, in the amount of $50,000.00, to complete the survey was submitted by Houghton on behalf of his firm to the Metcalfes for their approval.

**Allegations and Analysis**

As noted above, subsection 33(2)(a) of Regulation 1026 is part of the Code of Ethics, and requires surveyors to conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession. The Panel considers the following evidence relevant to the allegation that Houghton contravened this subsection:

- Houghton failed to complete the terms of the contract, namely he failed to complete the survey in a timely, proper and professional manner;

- Houghton failed to give his clients timely and appropriate advice and direction for the purpose for which the work was being prepared;

- Houghton failed to advise his client in advance of any significant issues as they arose and ultimately held the client hostage (no final signed survey would be provided pending payment);

- Houghton failed to provide a proper accounting of his invoices and time spent on the project in a timely fashion;

- Houghton provided a one sided and self-serving retainer agreement for signature without fully explaining the nature of the agreement and the extent of work to be undertaken;

- Mrs. Metcalfe testified that she had lost confidence and trust in Houghton and did not want to communicate with him unless it was in writing and/or a third party was present.

As also noted above, subsection 33(2)(e) of Regulation 1026 is also part of the Code of Ethics, and requires surveyors to ensure that clients are aware of the complexity of a project and the nature of the fees for service. The Panel considered the following evidence relevant to this subsection:

- Houghton misled his clients by failing to provide an adequate explanation of the complexity of the survey and specifically on the need and extent of research required and what research was conducted specifically on their behalf. On the evidence, including that of Houghton, he was very familiar with Port Stanley and any issues that may arise in preparing a survey of the Metcalfe property;

- Houghton failed to inform his clients that a significant portion of the work was contracted to another firm. While it is not illegal to subcontract some work on a project it is inherently difficult to supervise a project and advise a client in a timely fashion when a significant portion of the work is not performed under a surveyors direct supervision;

- Houghton secured an initial deposit in excess of the verbal fee estimate provided and failed to explain to the client why there was a difference (other than saying the work in Port Stanley can be either ‘pricey’ or ‘dicey’: there was contradictory evidence as to which was said. The Panel concludes that Houghton’s reference to ‘dicey’ or ‘pricey’ survey work in the Port Stanley area indicated he was aware of what would likely be title issues in the area of the Metcalfe survey, but he failed to explain any of this to Mr. Metcalfe;

- Houghton failed to ensure his client understood whether the work was to be invoiced to what the client thought was a maximum of $2,500, or exclusively on a time spent basis in accordance with published hourly rates;

- Houghton failed to advise his client on the escalating fees incurred as the project progressed thereby failing to give the client an opportunity to understand the level of additional work required together with the associated fees or the option to stop work;

- Houghton provided a fee estimate for additional work which included fees for soil testing, borehole drilling and additional professional fees but this work was never authorized by the client and there was no evidence that any of the work was undertaken and no related invoices were rendered

The Panel concludes that Houghton contravened subsections 33(2)(a) and (e) on the basis of this evidence.

The AOLS also included an allegation that on this evidence Houghton had contravened subsection 33(2)(g) of Regulation 1026, which provides that a surveyor shall not receive compensation for the same service from more than one person without the consent of the persons involved.

Houghton indicated in his testimony that the Metcalfe survey may have benefitted from some of the research that was done in connection with the prior Prespa Homes/Sherifi project but there was no direct evidence provided by the AOLS to support the allegation that

work that was done for and invoiced to one client was subsequently reinvoiced to the Metcalfe account.

The Panel therefore considers the allegation of a contravention of subsection 33(2)(g) has not been proven.

The AOLS also references alleged contraventions of subsections 35.3 and 35.12 of Regulation 1026. Section 35.3 provides that a failure to comply with the Code of Ethics is professional misconduct: the panel has found in a number of instances that Houghton has failed to comply with sections 33(2)(a) and (e) of the Code of Ethics and has therefore found Houghton guilty of professional misconduct.

With respect to subsection 35.12 of Regulation 1026 (Charging a fee for professional surveying services not performed or knowingly submitting a false or misleading estimate, account or charge for professional surveying services rendered to a client) the Panel notes the following evidence.

Houghton provided a verbal quote or estimate of fees to his client in a telephone conversation. Subsequently the amount of the retainer exceeded the quote provided.

Evidence was heard that Houghton himself or his office had performed prior surveys in the immediate vicinity of the Metcalfe property. Houghton indicated to the Panel in his testimony that he had performed extensive research and had a comprehensive archival library of plans and documents for the lands in close proximity to the subject lands.

While there does not appear to be deliberate intent to mislead the Metcalfes on the fees required to complete the SRPR there was no indication on the part of Houghton that he prepared a detailed cost estimate for the work but instead provided a ball park number. Mr. Houghton failed to make suitable disclosure to his client on the possible difficulties and increased fees he may encounter given his prior work experience in the subject and adjoining County.

There was no evidence provided to the Panel of any indication on the part of Houghton that he made timely and complete disclosure to his client prior to or during the preparation of the survey. Evidence provided to the Panel indicted that the bulk of the survey work was subcontracted to another firm thus leaving Mr. Houghton somewhat removed from the details of the survey and not in direct supervision of the work being undertaken. The subcontracting of work was not disclosed to the client.

It is the duty and responsibility of the surveyor as a professional to prepare detailed estimates and provide accurate and complete disclosure so that a client is aware and understands the nature and associated costs of survey work to be undertaken on their behalf. Should the nature and cost of the survey change once the work is underway it is the responsibility of the managing surveyor to be aware of the impact of the changes and advise his client at the first opportunity.

Based on this evidence, the Panel concludes that the allegation of professional misconduct is proven.

**EXHIBIT 1: SCHEDULE A: PARAGRAPH 4(g): RE: DONALD AND ANNE MILLS**

This allegation, in summary, arises out of a Small Claims Court action by the Member against Donald and Anne Mills (the "Mills"). The Member had invoiced the Mills for more than $15,000 when the Mills allegedly believed that the total cost for the work they wanted done would not exceed $4,000.

The Mills owned farm property in Elgin County and had hired the Member's firm in the past for surveying work. The Mills hired the Member for more surveying work in 2012. These clients had not complained to the Association and their issue with the Member was uncovered during the Stanton Investigation. Stanton had learned of the Mills in speaking with other O.L.S.'s in the area. Stanton contacted the Mills who referred him to their lawyer. The Mills' lawyer provided Stanton with various documents from a Small Claims Court file. This included the Statement of Claim issued by the Member, the Defence filed by the Mills and the Ruling of the Small Claims Court Judge.

According to those documents, the Member claimed unpaid fees. The Defence alleged that the work untaken was not authorized by the clients and the work that had been authorized was not completed. The matter proceeded to trial and the Member and the Mills testified. The Small Claims Court Judge concluded that the parties had different expectations and that there was no meeting of the minds to establish a contract. The Member's claim was dismissed with costs awarded against the Member.

While these documents were consistent with the pattern that the Member failed to adequately communicate with his clients, the purpose of the Small Claims Court trial was not that of this Panel. These documents were of limited assistance to the Panel. Neither of the Mills was called as witnesses by the AOLS. Stanton had no information beyond the Court documents.

The Panel was not prepared, on the limited evidence before it, to make a finding that the Member had committed professional misconduct in regard to these clients.

This allegation of professional misconduct was not proven.

**EXHIBIT 2: SCHEDULE A: THE SLOAN COMPLAINT**

The allegations against Houghton with respect to Michael Sloan ("Sloan") are set out in Schedule "A" to the Notice of Hearing marked as Exhibit 2. In summary, the Association

alleges that Houghton is guilty of professional misconduct within the meaning of section 35 of Regulation 1026, based on the following particulars:

- That Houghton's Retainer Agreement used with Sloan solely protected Houghton's interests, failed to identify the complexity of the services provided; had no upper fee limit and did not protect the client from giving complete access to his finances (paragraph 4);

- That Houghton failed to advise Sloan of the complexity of his project or the nature of fees for service, contrary to the Code of Ethics, section 33(2)(e);

- That Houghton failed to adequately supervise Sloan's project, and did not advise Sloan that site conditions would result in higher fees, contrary to the Code of Ethics, section 35.3;

- That Houghton failed to advise Sloan in advance of the potential costs of the survey, employed another surveying firm to perform the survey without Sloan's knowledge or consent, and failed to adequately supervise the project, all contrary to section 35.21 of Regulation 1026.

**Review of Evidence**

Sloan attended under Summons by the Association. His complaint against Houghton was related to the preparation of two surveys on two separate properties Sloan owned in the Village of Grand Bend.

One property consisted of 5 vacant residential lots on a plan of subdivision which adjoined an unopen allowance for road. Sloan requested that the lots be surveyed so that he understood where the lots were. He requested that the lot corners be located and verified or re-established and monumented as well as having the lot limits staked. He was conducting some preliminary work to prepare the lots for residential development.

The second property he required to have surveyed was his personal residence located in the same residential neighbourhood. Sloan indicated in testimony that he knew where two of the lot corners were but wanted all of them located so that he could construct a fence.

Sloan contacted Houghton by telephone May 12, 2014, after receiving a referral that Houghton would conduct the staking survey on a time basis. In the telephone conversation he explained his requirements and indicated that he was 'on a budget' and indicated that he would agree to hourly rates as it would be fair for both parties. Sloan testified that he was not given an estimate of the cost of the survey but understood that it did not involve a lot of work as the various properties were the whole of lots on a registered plan of subdivision.

Sloan subsequently received an email (May 14, 2014) from Houghton's office with the retainer agreement document and the credit card authorization form for payment of a retainer. Sloan signed both, although he subsequently, on the same day, asked if the $2,500 could be charged to a different credit card (an American Visa card). Houghton's office

voided the initial debit and charged it to the American Visa card as Sloan requested. As a result of this request, Houghton's office never obtained a written credit card authorization allowing it to bill the American Visa card, which became relevant later.

Sloan testified that he understood the survey work to be undertaken was fairly small and straightforward and therefore he was not concerned that the fees would go above the retainer amount provided, nor was he concerned about the rates indicated in the retainer agreement as he believed that any additional work or difficulties would have been brought to his attention should they exceed the retainer amount.

Sloan testified in cross-examination that he had read both the retainer agreement and the authorization form for payment of the retainer and had no questions regarding either document. He said that Houghton did not explain the details of either document to him, nor did he ensure that Sloan understood the work to be undertaken and the applicable fees.

There was no evidence or testimony provided by either party as to the proposed work schedule or a delivery date. There was no evidence provided (and no details included in the retainer agreement) to indicate what the final deliverables were to include. Sloan indicated that he was interested in identifying where the various lot corners were (found and/or replaced) and to have the property limits staked. He indicated that he may install some fencing to prevent the dumping of material/garbage on his property. There was reference made to a plan of survey prepared by Houghton.

Sloan indicated that there was no communication between him and Houghton until the completion of the surveys and the invoice was provided, on July 4, 2014. Sloan was invoiced an amount in excess of the $2,500 he had already paid. Specifically, he was invoiced $4,998.12, in addition to the $2,500 already paid, for the work.

Sloan gave evidence explaining how Houghton's office paid itself for the additional fees by debiting his American Visa credit card. The credit card authorization signed by Sloan at the time he also signed the retainer agreement was for a different credit card, so Houghton had no written authority to debit the American Visa card. Evidence provided to the Panel indicated that the American Visa card was charged additional fees ($4998.12) on the morning of July 4, 2014. Sloan said a voicemail message was left for him asking for his authorization to charge his card, without any details regarding the amount. As he was away for the long weekend, it wasn't until later that day (3:30 or 4 pm) that Sloan listened to this voicemail. He said he was a bit annoyed that there was any amount being invoiced over and above the $2,500 already paid, but assumed the amount was small and called back and left a message that his credit card should be charged. He would not have done so had he known the amount, and he was not aware when he gave this verbal authorization that his card had already been charged before he left his message.

Houghton, in his evidence, acknowledged that a mistake had been made in that Sloan's credit card had been charged before the plans had been emailed to him. He said the employment of the person in his office who had made this mistake had been terminated.

Sloan indicated that at no time was he informed as to how the survey was progressing, whether there were any difficulties encountered or that there were significant additional charges to the account.

Sloan testified that he attempted several times to approach Houghton in an effort to understand the cost escalations, additional information regarding the detailed billing structure and in particular why so many crew hours were charged together with vehicle charges and related field equipment charges. The Panel noted that 16 field hours were charged in one 24 hour period, a total that was concerning. While not impossible, it is unusually high.

Sloan testified that during telephone conversations in which he challenged Houghton on the site and survey details he realized that Houghton was not familiar with the project details as he provided various responses to his questions. At no point did Houghton advise his client that the work was done by a crew from another firm and was not directly supervised by him.

Sloan testified that he had spoken to the field crew party chief the day they were on site and was given the impression that both site surveys were going well and that they had found the majority of the lot corner monuments (70% on the five residential lots). The field crew also indicated that there was a concrete block structure on the adjacent lands that partially encroached on to his residential property.

Sloan testified that he received a signed copy of the lot survey of his residence property and the encroachment was not indicated on it. The error/omission was brought to the attention of Houghton and a corrected copy of the survey was promptly provided. A subsequent review of the corrected plan revealed that there were additional errors on the plan that had been missed by Houghton prior to him certifying the plan correct. It took more than a year to have the additional corrections made and a final certified survey plan issued to the client.

**Allegations and Conclusions**

1. **Exhibit 2, Schedule "A"; paragraph 4 as a contravention of section 35 of Regulation 1026;**

2. **Exhibit 2, Schedule "A"; paragraph 5 as a contravention of section 33(2)(e) of the Code of Ethics; section 35.3 of Regulation 1026**

3. **Exhibit 2, Schedule "A"; paragraph 6 as a contravention of sections 33(2)(e) and 35.21 of Regulation 1026**

As noted above, the paragraph 4 allegations are based on the retainer agreement used by Houghton: the AOLS asserts that it is one-sided, fails to identify the complexity of the services to be provided, has no upper fee limit and did not protect the client from giving complete access to their finances.

Paragraph 5 overlaps with this allegation to some extent in that it alleges that Houghton failed to advise Sloan of the complexity of his project and the nature of fees for service.

Paragraph 6 also overlaps with these allegations in that it alleges that Houghton did not advise Sloan of the site conditions that would result in higher fees.

As with almost all of the complainants who appeared before the Panel, when Sloan signed the retainer agreement he believed that he was agreeing to have reasonably straightforward survey work done for a maximum of $2,500. He said that he thought that if it turned out to be more complex than anticipated, and that the work would therefore be more costly, that he would be notified and there would be a discussion about how to proceed. Houghton, on the other hand, points to the wording in the retainer agreement, and says that Sloan, like the others, are competent adults who signed it: on its straight wording it says that the $2,500 is a deposit on account of fees and disbursements to be incurred, meaning there was no upper limit to what might be charged.

The scope of work is identified solely as a "Survey of the [identified] lands". As the work progressed, there was no contact with Sloan by Houghton or anyone else regarding the complexity of the work: he was simply billed without explanation after the work was completed for, in total, about 3 times the $2,500 Sloan expected would be the maximum. Houghton's evidence was that there were some unexpected grading issues.

In the Panel's view, Houghton provided a one sided and self-serving retainer agreement for signature without fully explaining the nature of the agreement and the extent of work to be undertaken.

Specifically, Houghton failed to advise Sloan in advance of any significant issues or difficulties as they arose. By failing to advise Sloan of the escalating fees incurred as the project progressed Sloan was thereby denied the opportunity to understand the level of additional work or complexity of the work and was denied the opportunity to stop the work. Sloan was misled by Houghton's failure to provide an adequate explanation, in advance, of the complexity of the work and the fees that would result.

If the work turned out to be more complex than anticipated, Houghton had an obligation to ensure that Sloan was aware of the complexity of the work and the nature of the resulting fees for providing the surveying services: s. 33(2)(e) of the Code of Ethics as set out in Regulation 1026. A failure to comply with the Code of Ethics is professional misconduct pursuant to section 35.3 of Regulation 1026.

Conclusion

The Panel considers the allegations in paragraphs 4, 5 and 6 are proven.

**4. Exhibit 2, Schedule "A", paragraph 7 as a contravention of section 35.21 of Regulation 1026**

The allegation in this paragraph is that by failing to advise Sloan in advance of the potential costs of his survey, and by employing another surveying firm to perform the survey without the client's knowledge or consent, Houghton failed to adequately supervise the survey

project, and that his conduct in this regard would be reasonably regarded by members as dishonourable or unprofessional.

While there does not appear to be deliberate intent to mislead Mr. Sloan on the fees required to complete the surveys there was no indication that Houghton prepared a detailed cost estimate for the work or that he made suitable disclosure to his client on the possible difficulties he may encounter. Houghton testified that he had not been to the site in order to prepare the estimate or during the time the field crew were on site completing the field survey.

There was no evidence provided to the Panel on behalf of Houghton that he made timely and complete disclosure to Sloan prior to or during the preparation of the survey of its complexity or the fees to be expected. Evidence provided to the Panel indicted that the bulk of the survey work was subcontracted to another firm thus leaving Houghton somewhat removed from the details of the survey and not in direct supervision of the work being undertaken.

Houghton did not disclose that he would be subcontracting the field work and plan preparation to another firm. Sloan took issue with the failure to disclose that information to him as he testified that he knew by subcontracting it would cost him more in the end. Sloan maintained that Houghton was acting as a ‘reseller’ of surveying services, doubling the rates charged to him by the subcontractor and thereby failed to act in his best interests. Sloan was adamant that if he’d known Houghton was a ‘reseller’ he would not have retained him.

The evidence shows that Houghton failed to advise Sloan in advance of the potential costs of his survey, above and beyond the initial $2,500. The evidence also shows that Houghton failed to adequately supervise the survey project because virtually all of the survey work was being done by the subcontracting firm. It is the duty and responsibility of the surveyor as a professional to prepare detailed estimates and provide accurate and complete disclosure so that a client is aware and understands the nature and associated costs of survey work to be undertaken on their behalf. Should the nature and cost of the survey change once the work is underway it is the responsibility of the managing surveyor to be aware of the impact of the changes and advise his client at the first opportunity. That did not happen in this case.

With respect to the allegation that Houghton should not have subcontracted this work to another firm without Sloan’s knowledge or consent, as previously noted, it is not unusual for surveyors to sub-contract parts of a job to others: that is acceptable. In this case, and with respect to Sloan, the Panel is again concerned that Houghton delegated virtually total responsibility to Benedict Raithby, and as a result was unable to meet his obligations as set out above to this client. We conclude that this conduct would reasonably be regarded by members as dishonourable or unprofessional.

Conclusion

The Panel considers the allegations in paragraph 7 to have been proven.

## EXHIBIT 3: SCHEDULE "A": THE SALHANI COMPLAINT

The allegations against Houghton with respect to Daniel Salhani ("Salhani") are set out in Schedule "A" to the Notice of Hearing marked as Exhibit 3. In summary, the Association alleges that Houghton is guilty of professional misconduct within the meaning of Section 35 of Regulation 1026, based on the following particulars:

- That Houghton's retainer agreement was written solely to protect Houghton's interests; that it failed to identify the complexity of the services provided to Salhani; that it had no upper fee limit and did not protect Salhani from giving complete access to his finances; (paragraph 4)

- That Houghton failed to advise Salhani of the complexity of the project and the nature of fees for service, contrary to the Code of Ethics, section 33(2)(e) and 35.3 of Regulation 1026; (paragraph 5)

- That Houghton knowingly misled Salhani regarding the estimated cost of the project, contrary to section 35.12 of Regulation 1026; (paragraph 6)

- That Houghton failed to advise Salhani in advance of the potential costs of the project, employed another surveying firm to perform the work without the client's knowledge or consent, failed to adequately supervise the project and improperly charged the client's credit card for services not authorized by the client, all of which would reasonably be regarded by members as dishonourable or unprofessional, contrary to section 35.21 of Regulation 1026; (paragraph 7)

- That Houghton failed to comply with section 33(2)(a) of the Code of Ethics by failing to conduct his professional affairs in such a manner as to maintain public trust and confidence in the profession, contrary to section 35.3 of Regulation 1026.

### Review of Evidence

Houghton was acquainted with Salhani some years prior to the Salhani's 2014 complaint to the Association. Houghton had provided legal and topographic surveying services in 2004/2005 for Salhani on his Wharf Restaurant property. Salhani himself confirms the Wharf Restaurant re-development (a condominium project) was his first land development attempt and was undertaken to improve his own property. As such, he was cautious about investing too much upfront money without the municipality's review and support. There was no evidence presented of any prior history of disputes over accounts or billing procedures, and Houghton referred to Mr. Salhani as a good client.

On February 21, 2014, Houghton was contacted by Mr. Bert Dennis ("Dennis"), an architectural technologist and Salhani's representative, to obtain copies of pre-existing surveys for the Wharf property at 208 Main Street in Port Stanley. Dennis was advised

that Houghton does not release older surveys. Dennis then instructed Houghton to prepare a sketch, utilizing Houghton's existing survey information, to show the proposed condominium building and proposed 6.0-metre easement that had been relocated through the middle of the property. Dennis asked for a sketch preparation quote, and although Houghton would not provide it, Houghton advised it should be a few hours of CAD computer work.

Houghton required a $500.00 signed retainer agreement from the client prior to commencing the work. Dennis made it clear from the outset that he was not authorized to sign such a retainer. However, Dennis obtained Salhani's verbal approval to proceed and Houghton immediately had his staff commence a title search of the subject property at the land titles office. Both the retainer agreement and a credit card authorization/direction were sent to Salhani later that same day, February 21, 2014, for signature by him.

On February 24, 2014 Salhani signed the retainer agreement, and provided the necessary credit card information. However, he did not initial the agreement where indicated (to acknowledge his acceptance of the hourly rates to be charged), and he added the following handwritten note on the bottom of the first page of the executed retainer agreement:

> "I am requesting a sketch (draft) of a survey that is in your possession changing the right of way and building envelope: as per Bert Dennis' instruction. At this point there is no need for any opinion on title or further work required until a review by the municipality of the draft is complete."

Regarding this addition to the retainer, Salhani testified that he was trying to remove all ambiguity about what he wanted Houghton to do. He understood that he would be charged $500 for the limited work that he wanted done.

Houghton accepted Salhani's modified retainer agreement and commenced the work. Salhani's credit card was charged for the agreed $500.00 retainer on February 25, 2014.

The first version of the sketch by Houghton was provided to Dennis on March 4, 2014. As professional surveying standards dictate, Houghton did undertake a title sub-search on February 21, 2014, despite the handwritten note on the retainer. According to Houghton, Dennis contacted Houghton's office on May 21, 2014 to request that the first sketch be revised for new site plan-type information including a more detailed condominium building outline (showing patios, balconies, foyer), covered car ports, additional parking areas, wheelchair parking, and "Boardwalk" location notation. The Panel was provided with no evidence of any verbal or e-mail correspondence between the parties between March 4th, and May 21st.

Salhani alleges that no new instructions were given by Dennis on May 21, 2014, that Dennis would not have done that without Salhani's instructions that he had not given, and that only the correction of sketch errors was asked for. However, the panel notes that Dennis did not contact Houghton until May 21, 2014 (more than 2 months later) to provide new changes. It

can reasonably be presumed that if the reason for the May 21, 2014 contact were only sketch errors, the request for corrections of those errors would have been made immediately following release of the first sketch version in early March.

Houghton testified that the changes required more CAD time and OLS review which contributed to the fees subsequently accrued.

Both Salhani and Houghton agree that there was no discussion regarding who would be working on the file. Houghton + Houghton have no in-house CAD operator and they contract all work. Mr. Trevor Schulman, a computer-assisted draftsman with Benedict Raithby, was retained by Houghton to complete the drafting work, without the knowledge or consent of Salhani.

According to Salhani's testimony, he requested a meeting with Houghton at the end of June 2014 to: "see him about possibly doing a severance application for me with the drawings and all of the things necessary to perform a severance application." However, according to Houghton's testimony, this meeting was requested to discuss the issues stalling Salhani's project (tainted soils at the north end of the property; extended timing for severance application), and to obtain Houghton's opinion on moving the process forward.

Both parties acknowledge that Houghton made the planning suggestion to make the proposed easement into a municipal road, thereby eliminating the need for the severance approval, and an automatic severance. Ultimately, Salhani did pursue this approach and was successful with the municipality.

Salhani and Houghton also differed on where this discussion took place. Salhani said it was an off-hand, very brief discussion in a hallway of Houghton's office. Salhani's evidence was:

> "I did not ask for his opinion. He made the utterance. 'Why don't you do this?' [i.e. make the proposed easement into a municipal road]. That's not asking for an opinion. I didn't go in there and tell him, how am I going to do this? I went in there to see what it would be for a surveyor to do the land work for a severance application."

Houghton maintained it was a more formal sit-down meeting in the boardroom area of his office, where his opinion on how to proceed was sought.

Following this encounter between Salhani and Houghton, Houghton had his staff attend the land titles office on June 30, 2014, to obtain seven (7) additional abutting Parcel Registers, for which Salhani was subsequently invoiced. There was no evidence that this title sub-search was requested by Salhani or approved by him.

On July 9, 2014, Salhani received a Houghton + Houghton invoice dated July 8, 2014 for $1,313.65, as well as a credit card receipt confirming a July 9, 2014 charge of $1,313.65 against Salhani's credit card. Houghton maintained that the retainer agreement document (and credit card authorization/direction), also applied to all subsequent hourly invoices. Salhani's evidence was that he immediately objected to the account and

complained that his credit card was charged contrary to his written authorization/direction on the retainer agreement (he believed he had only authorized a credit card payment of $500.00 for a sketch). Houghton's total account to Salhani was $1,813.65 for all services rendered (this includes the $500.00 initial credit card payment).

On August 25, 2014, Salhani asked the bank to reverse the charges and made a complaint to the AOLS against Houghton (filed on September 11, 2014). Over the next few months, Houghton attempted to arrange a meeting with Salhani to discuss a resolution to the account but was unsuccessful in reaching Salhani. Salhani testified that he was refused a refund when he contacted Houghton's office prior to launching a formal complaint with the AOLS. Salhani then launched a Small Claims Court action against Houghton.

The Small Claims Court dispute was settled on November 24, 2016 with a $1,200.00 offer by Houghton to Salhani in exchange for a Full and Final Release. By this time, these Discipline Panel proceedings had already commenced. In signing the Full and Final Release to Mr. Houghton, Salhani agreed to restrictions on his involvement and disclosure of anything related to his claim. He did, however, attend under Summons before the Panel to provide his evidence.

## Allegations and Conclusions

It is alleged that Mr. Houghton, in his personal capacity and as the supervisor of Houghton + Houghton Inc., is guilty of professional misconduct within the meaning of Section 35 of Regulation 1026, R.R.O. 1990, as amended, the particulars of which are as follows.

### Exhibit 3: Schedule "A": paragraph 4

> It is alleged that the Retainer Agreement used by Houghton was written in such a manner as to solely protect Houghton's interests, that it failed to identify the complexity of the services provided to the client, that it had no upper fee limit, nor did it protect the client from giving complete access to their finances.

The Panel finds Houghton guilty of the allegations. The evidence on which the Panel relies includes the following.

According to Houghton, when Dennis first approached Houghton regarding the required preparation of a sketch, he was advised that Houghton + Houghton did not provide quotes, and that instead, the work would be charged hourly. Houghton estimated the sketch would take a few hours of CAD computer work, in effect providing a rough budget. By his own hourly rates ($100/hour CAD Technician x 3 = $300, + $180/hour for OLS supervision x 1 = $480.00), this would put the approximate project cost at roughly $500.00. A retainer agreement and payment authorization and direction form were prepared for the amount of $500.00.

Though Salhani signed the retainer agreement and authorization and direction on February 24, 2014, he refused to initial his acceptance of the hourly rates on the retainer. Furthermore, he included a handwritten note to further clarify the scope of work. He expressly wrote that "there is no need for any opinion on title or further work required." The Panel concludes Salhani's intention with this note was to avoid the "$360.00/hour Ontario Land Surveyor time for Opinion on Extent of Title by Ward Houghton" as well as any additional survey work. In Salhani's own words:

> "I did not authorize him to do -- if you want to be specific. I'll be specific. I did not authorize $360 an hour for his opinion, which I do not value. I did not authorize all the rest of these things. I simply wanted a sketch."

The completed sketch was provided on March 4, 2014. Work started on the project again on May 21, 2014. Houghton did not provide a new quote or retainer agreement, but maintained the original retainer agreement gave him the right to continuously bill all subsequent work hourly with no limit, even though Salhani had refused to acknowledge hourly billing, and had included his note. Thus, work continued with no upper fee limit, even though the original scope of work provided to Salhani was never amended in writing. Furthermore, Houghton proceeded to charge Salhani's credit card for the additional work (at hourly rates) when the authorization and direction form signed by Salhani was for the amount of $500.00 only. Houghton felt his retainer agreement empowered him to access Salhani's complete finances. Throughout his evidence before the Discipline Committee, Houghton continually reiterated that his retainer agreement was a legal vehicle and irrevocable.

The professional services of Ontario Land Surveyors are not only governed by market competition, but are bound by a high level of ethics so as to maintain public trust in the profession. The Panel's review of the retainer agreement found that it did not clearly communicate Houghton's intention to continue time-based billing once the agreed retainer fee of $500.00 had been expended.

**Exhibit 3: Schedule "A": paragraph 5**

> It is alleged that Houghton failed to advise his client of the complexity of the project and the nature of fees for service, which is contrary to the Code of Ethics at Section 33(2)(e) of Regulation 1026, R.R.O. 1990, as amended. Failure to comply with the Code of Ethics constitutes Professional Misconduct within the meaning of Section 35.3 of Regulation 1026, R.R.O. 1990, as amended.

The Panel finds Houghton guilty of these allegations. The evidence on which the Panel relies includes the following.

Salhani believed that he was retaining Houghton for the simple purpose of adding a few lines on an existing CAD survey that Houghton had in his possession, which was a task that should have been covered by the $500.00 retainer fee paid by Salhani. The Complaints Committee documented in their decision from Dec. 11, 2014 that:

> "after receiving authorization to do the work on February 24th he [Houghton] was able to issue the final corrected plan on March 4, 2014. As far as the Committee could see, this was the moment that all authorized work was completed, the initial contract was done and the final invoice should have been issued."

The Panel agrees with this conclusion.

According to Houghton, Salhani's representative, Dennis, requested further work in May 2014. Houghton did not advise Salhani, who was his client, nor did he identify the complexity and cost increase to Salhani. By Houghton's own admission, the work evolved from a simple sketch to something that resembled more of a site plan. Houghton failed to perform his duty and obtain further and specific authorization from Salhani to perform this work, which was beyond the authority of the original retainer agreement.

There was, as already mentioned, a dispute as to whether Salhani's representative, Dennis, had authorized the additional work: Salhani said he would not have done so without his (Salhani's) approval, while Houghton maintained he was entitled to rely on Dennis' instructions. Neither party called Dennis as a witness. The Panel concludes that in light of Salhani's specific handwritten addition to the retainer agreement, Houghton should have recognized that it was prudent to inform Salhani about the nature, extent and cost of the additional work he was about to undertake.

**Exhibit 3: Schedule "A": paragraph 6**

> It is alleged that Houghton is guilty of Professional Misconduct within the meaning of Section 35.12 of Regulation 1026, R.R.O. 1990, as amended in that he knowingly misled the client regarding the estimated cost of the project.

The Panel finds Houghton guilty of the allegation. The evidence on which the panel relies is as follows.

Houghton provided Salhani with an estimate of 2 -3 hours of CAD work, which provided Salhani with an approximate financial budget based on the hourly rates listed on the retainer. This budget was comparable to the $500.00 retainer fee. The Panel's review of the evidence suggests that Houghton misled the client by providing a retainer fee that was essentially equivalent to the estimated cost, but then refused to recognize it as a quote.

Houghton maintained that all work that he deemed relatable to the retainer would be billed hourly. This created an opportunity for continuous billing and was a clear misrepresentation to Salhani of what the expected costs would be.

When additional work was requested more than two months after the original sketch had been provided, Houghton did not seek authorization from Salhani, however, he did continue to bill Salhani hourly. The panel believes Houghton was aware the scope had increased beyond the original (sketch) contract work, and that he decided to take advantage of what

he believed to be an open-ended unlimited retainer, rather than obtaining further approval from his client.

The Panel also concludes that Houghton misrepresented his public road dedication suggestion as an opinion on title, allowing him to charge Salhani his higher "title opinion" hourly rate. In the Panel's opinion, that planning advice, on the evidence in this case, does not constitute title opinion services.

**Exhibit 3: Schedule "A": paragraph 7**

> It is alleged that Houghton failed to advise the client, in advance, of the potential costs of the project, employed another surveying firm to perform the work without the client's knowledge or consent, failed to adequately supervise the project, and improperly charged the client's credit card for services not authorized by the client, all of which constitutes professional misconduct as set out in Section 35.21 of Regulation 1026 in that such conduct would be reasonably regarded by members as dishonorable or unprofessional.

The Panel finds Houghton guilty of the allegation. The evidence on which the Panel relies is as follows.

As Houghton + Houghton did not have an in-house CAD technician, Mr. Schulman of Benedict Raithby was engaged by Houghton to work on Salhani's file without Salhani's knowledge or consent. However, Salhani admitted he did not inquire about who would be working on the file, nor did he discuss it with Houghton. Contracting out aspects of survey work is not contrary to survey regulations, though the OLS in charge remains responsible for the survey plan content and overall project supervision. Houghton coordinated the preliminary title search and ensured the drafting was done in a timely fashion. Salhani believed that the only thing done subsequently was the correction of plan errors: he said strongly that he never provided any instructions for new work. However, on the Panel's review of the evidence the subsequent changes were not due to errors but were for the addition of new information. Though the drafting work was appropriately supervised by Houghton, he neglected to inform the client that the newly requested work was beyond the scope of the original retainer and that hourly rates would be directly applied to the client's credit card. Thus, Houghton failed to properly manage client communication and financial accounts which is also a part of project supervision.

The Panel's review also determined that Salhani's credit card was improperly charged for unauthorized services. The original authorization and direction was prepared for $500.00 and for "*all accounts related to the Retainer Agreement*." Houghton continued to rely upon and misuse the retainer agreement, asserting that the credit card authorization/direction was unlimited. Whereas the first charge was for only $500.00, Salhani's credit card was then charged for $1,313.65 on July 9, 2014 without his further authorization. In effect, Houghton operated as if the credit card authorization/direction had no upper fee limit and Houghton had unlimited access to Salhani's credit card account. At the time the additional work was requested, the sketch, or scope of work identified on the retainer, had already been

delivered making the retainer no longer valid and not an appropriate basis for further charges to the credit card.

**Exhibit 3: Schedule "A": Paragraph 8**

> It is alleged that Houghton failed to comply with the Code of Ethics at Section 33(2)(a) of Regulation 1026, R.R.O. 1990, as amended in that he has failed to conduct his professional affairs in such a manner as to maintain public trust and confidence in the profession. Failure to comply with the Code of Ethics constitutes Professional Misconduct within the meaning of Section 35.3 of Regulation 1026, R.R.O. 1990, as amended.

The Panel finds Houghton guilty of this allegation. The evidence on which the Panel relied includes the following.

Even before work commenced, Salhani said he was concerned enough to take extra precautions to prevent himself from being victimized. When presented with Houghton's retainer agreement, Salhani was uncomfortable with signing it as drafted, and so clarified the scope with a handwritten note. He also refused to initial the hourly rates in order to protect himself. Salhani stated,

> "Short of going to see an attorney and getting a contract to rebut this, I don't know what else I could have done but wrote what I did on the bottom."

Houghton disregarded the client's express instructions and instead, in the opinion of the Panel, conducted himself in a way that was solely in his interests, and not in the interests of the client. Members of the public seek the expertise of surveyors to guide their projects towards the best possible outcome. Instead Houghton took advantage of his position by, for example, claiming his suggestion for a subdivision plan constituted an "opinion on title." He repeatedly sought instructions to start work on the first application reference plan, even though the municipality's approval for the condominium had not yet been received. In the Panel's view, it appears on the evidence that Houghton was trying to increase his billable hours and solicit more work, neither of which was to the benefit of the client, at this early stage in the project.

Houghton went on to apply charges to Salhani's credit card without Salhani's specific authorization for additional work or an agreement on terms for the new work request. The Panel finds Houghton's actions were not in accordance with the *Code of Ethics* and did not maintain public trust and confidence in the profession.

**COMMENT WITH RESPECT TO THE ASSOCIATION'S WITNESSES**

As mentioned to some extent above, the Panel heard that the Association served summonses to attend on all of its non-expert witnesses: Mr. Sherifi, Mr. Salhani, Mr. Huras,

Mr. Sloan, and Mr. and Mrs. Metcalfe. Some of these witnesses had signed Full and Final Releases when they came to a resolution of their differences with Mr. Houghton. It became evident that their Releases included a clause purporting to preclude the complainant from providing any additional information to the Association regarding the complaint, or otherwise cooperating with the Association, except if required to by law. In at least one instance a Release including these terms was required by Houghton after this hearing had started. Although not an issue that in any way affected the Panel's findings on each of the allegations, the Panel does wish to say that it found this concerning, as it could be interpreted as an effort to thwart or delay the Association's processes of investigation and discipline.

**CONCLUSION**

In conclusion, the Panel has carefully reviewed the evidence before it, and has concluded that the Association has established that Ward I. Houghton O.L.S. is guilty of professional misconduct with respect to each of these complainants. A date will be scheduled for the Panel to hear submissions as to an appropriate penalty.

This Decision and Order may be signed electronically and in counterparts.

**Dated December 18, 2018**

_____
Kathleen Gowanlock (Lieutenant Governor in Council Appointee)
Chair, Discipline Panel

_____
Bruce Parker, O.L.S.
Member, Discipline Panel

_____
Paul Gregoire, O.L.S.
Member, Discipline Panel

_____

Paul Edward, O.L.S.
Member, Discipline Panel

_____

Sasa Krcmar, O.L.S.
Member, Discipline Panel

# PENALTY AND REASONS FOR PENALTY

**DISCIPLINE COMMITTEE**
**OF THE ASSOCIATION OF ONTARIO LAND SURVEYORS**

**IN THE MATTER OF** a hearing by the Discipline Committee of the Association of Ontario Land Surveyors in respect of Ward I. Houghton, O.L.S., pursuant to the *Surveyors Act*, R.S.O. 1990, chapter S.29, as amended, section 26.

**Hearing** held at the office of the AOLS
1043 McNicoll Avenue, Toronto, Ontario
Commencing January 14, 2016 at 10:00 a.m.

**BEFORE:** Kathleen Gowanlock (Chair, Lieutenant Governor Council Appointee)
Bruce Parker, O.L.S.
Paul Gregoire, O.L.S.
Paul Edward, O.L.S.
Sasa Krcmar, O.L.S.

**Also present:** Ward I. Houghton, O.L.S. (Member)
Robert C. Taylor (Counsel for Member)
Allyson Lee (Counsel for Member)
Peter Simm (Counsel for Member on Jurisdictional Motion)
Robert J. Fenn (Counsel for AOLS)
Jonathan Bar (Counsel for AOLS)
Ashleigh Tomlinson (Counsel for AOLS on Jurisdictional Motion)
William D. Buck (Registrar)
Carol Street (Counsel for Panel)

## PENALTY AND REASONS FOR PENALTY

### DATE OF PENALTY HEARING, DECISION AND REASONS

The Panel convened on April 5, 2019 at Toronto, Ontario for the Penalty Hearing following findings of professional misconduct against Ward I. Houghton. The Panel received Written Submissions and a Book of Authorities on behalf of the Association and the Member, respectively. The Association's materials included Victim Impact Statements. The Member's materials included testimonials and other materials in support of the Member. The Panel heard oral submissions from both parties through their counsel. The Member was afforded an opportunity to speak directly to the Panel.

The oral submissions and questions from the Panel members took the entire day. At the conclusion of the hearing, the Panel deliberated in private and was assisted as necessary by Counsel for the Panel.

## THE ASSOCIATION'S POSITION ON PENALTY

The Association submitted that the appropriate penalty in the circumstances was the revocation of the licence of the Member and that the Registrar be instructed to cancel the associated Certificate of Authorization effective on the date determined by the Panel.

The Association submitted in the alternative that the Member should receive a suspension for a period of two years and at the expiration of the two-year suspension period should impose restrictions on the Practice of the Member for a period of four years. These restrictions included a prohibition against engaging in the practice of professional surveying as a sole practitioner and permitting the Member to only engage in the practice of professional surveying under the direction, supervision and control of a non-related member of the Association who is employed by a surveying firm that is not associated with or controlled, directly or indirectly, by the Member or a person related to the Member. The Association relied on Section 26 of the *Surveyors Act.* Clearly this alternative was not urged on the Panel but put forward in the event the Panel finds revocation of the Member's licence not an appropriate penalty.

The Association sought a substantial cost award as discussed below.

## THE MEMBER'S POSITION ON PENALTY

The Member submitted that the appropriate penalty was a reprimand and remediation. Proposed terms of remediation included a requirement to reimburse one client for $3,500.00, periodic monitoring of the Member's practice and completion of courses the Association considered necessary to correct any gaps in the Member's knowledge of client management practices. The Member's Counsel submitted that neither revocation nor suspension was required since there was no issue with the quality of the Member's work, there were no allegations of incompetence and the Association had taken no steps to try to suspend the Member's registration prior to or during the course of the Hearing. Therefore, it was submitted, he was not a danger to the public. The Member

did not accept the Association's position on a cost award. This will be fully reviewed below.

## RULING ON PENALTY

The caselaw provided to the Panel by both parties set out the general principles of sentencing in professional discipline cases of this sort. Primary among them is the protection of the public. The Panel is also to consider the related issues of the degree of risk of the Member reoffending; maintaining public confidence in the integrity of the profession and its ability to effectively govern itself; that it will police itself with the best interests of the community as its primary concern; its duty to the profession at large to enforce and maintain high standards; general and specific deterrence, and the range of penalties. The Panel has considered all of these principles in coming to its decision on penalty but notes that the range of penalties in similar or analogous cases was not a particularly useful principle here because the cases brought to our attention by the Association were not especially helpful. The Panel found this case to be unique as explained in these reasons.

Taking all of these principles into account, the Panel has decided to give effect to the position of the Association and concludes that the immediate revocation of the licence of the Member is an appropriate penalty for the reasons outlined below.

## MITIGATING FACTORS

Counsel for the Member submitted that the discipline history was minimal and limited to one previous finding of professional misconduct in 2012. Counsel characterised the misconduct in that case as writing an inappropriate letter to another OLS. Counsel suggested that this was the result of poor judgment which was remediated through completion of a course on ethics as directed by the discipline panel in that case.

The other discipline matter involving the Member entailed charges of professional misconduct related to the fee charged by the Member for field notes in his possession. At the Discipline Hearing in July of 2013 the Panel was presented with an Agreed Statement of Facts and Joint Submission proposing that the Panel dismiss the charges without costs to either party. The Agreed Statement of Facts indicated that the Member would pursue the issue of the fee for field notes in litigation in the Superior Court of Ontario. During this hearing the Panel heard occasional reference to this litigation to the effect that it raises constitutional issues of the validity of the provision of the *Surveyors Act* (the "Act") requiring surveyors to exchange field notes at a reasonable fee as compared to the provisions of the *Copyright Act*. The Panel made it clear that it

understood that the issue of an appropriate fee for field notes was not before it and not considered by it.

Counsel for the Member argued that the Panel could not, in reviewing the Member's discipline hearing in this case, give any consideration to the charges themselves in the 2013 case, that were dismissed on consent of the parties by a discipline panel at that time. The Panel does not agree with that argument. This is a Penalty Hearing following findings of professional misconduct. The presumption of innocence has been displaced. The Panel has greater latitude to consider relevant information in fashioning a proper disposition. This includes charges which were withdrawn in specific circumstances: while the issue of fees for field notes was not before this Panel and this Panel specifically expresses no thoughts on the parties' positions, we were made aware in the course of the hearing that this litigation is ongoing.

Accordingly, the Panel does not accept the Member's characterisation of the discipline history as minimal.

The Member advised he has stopped using the retainer agreement and credit card authorization that were at issue in this Hearing. He is advising clients of any title issues 'upfront'. It was argued he does not present any risk of reoffending and the public interest does not require revocation or suspension.

## AGGRAVATING FACTORS

### 1. PREVIOUS DISCIPLINE HISTORY

As noted above, in 2012 the Member attended before a differently constituted discipline panel. The charges arose as a result of a complaint brought by another OLS in 2011 and involved attempted bid rigging. This complaint resulted in a referral to discipline: the panel was presented with a guilty plea and joint submission on penalty which it ultimately accepted. The discipline panel made a finding of professional misconduct. As part of the joint submission, the agreed penalty was a reprimand, costs to the Association of $9,500; a fine of $2,500; successful completion of a course in professional ethics, and an Undertaking from the Member that he would cooperate with his fellow members by exhibiting or giving a copy of his regular field notes to any surveyor who asked for them for a reasonable charge, failing which he would be referred back to the Discipline Committee.

It is important to review this matter because it forms part of the overall pattern of how the Member carries on business. The Member in the 2012 case attempted to persuade another OLS to withdraw his successful bid on a public works surveying contract to ensure the Member would then be awarded the contract. The Member proposed to then

hire the other OLS to complete the work. This would have resulted in a higher cost to the client (the public) and profit for the Member with minimal value added. This was a calculated and planned scheme which was clearly dishonest. The scheme failed because the other O.L.S. complained to the Association.

The second disciplinary matter has been summarized above. While the charges were dismissed as part of a Joint Submission, they arose as a result of an issue regarding the fees the Member proposed to charge for providing copies of his field notes to other members.

Both cases share a common denominator of attempting to inflate and collect fees charged to the public without properly supervising the work and claiming it to be his own. The Member showed no recognition that his business practices were objectionable beyond saying that he had stopped using the retainer agreement and credit card authorization in question and would agree to take courses necessary to correct any 'gaps' in his client management practices. The Panel has no confidence that the Member will not reoffend, at the expense of the public and the profession.

## 2. COMMUNICATION OF MEMBER IDENTIFIED PROBLEMS TO CLIENTS

The variation on this theme is the "chicken little" scare tactic. In this scheme the client is warned that they may not own their property because it is situated on the bed of Lake Erie. The solution to the client's apparent problem is to retain the Member who will conduct hundreds of hours of research. Exorbitant fees were quoted to clients (the Metcalfe's for example) who were advised to make a claim to title insurance. The basic flaw in this scenario is that the presumed owner of the land – the Crown- did not at any time assert a claim. Some of these properties have been in existence for more than a hundred years. Giving the Member the benefit of the doubt that an issue existed, the surveyors on the Panel agreed that a statement on the Land Transfer Document "subject to Crown reserve" could have addressed the issue. They saw no justification for a court application. In the Huras case, for example the 'problem' identified by the Member was solved by another OLS, who was able to provide a survey to Mr. Huras.

The Member also emphasized in his evidence that he knew and worked extensively in the Elgin County, St. Thomas and Port Stanley areas and was therefore in a position to warn his clients at the outset of potential problems he believed to exist. He did not do so: instead clients understood that they were retaining the Member for a 'simple survey' only to be subsequently told that it was not in fact simple and would cost them significantly more to complete properly.

Additionally, in the Panel's view, the Member repeatedly focused on providing 'quality of title' opinions rather than 'quantity of title' advice. While there may be a fine line between the two when it comes to matters of accretion, erosion, and reliction, for example, in the Panel's view the Member went beyond his duty to opine on extent of title to opine on matters that were outside of his responsibilities. The role of the surveyor is to demark the limits of those 'quality of title' rights, not their meaning. He showed no willingness to restrict his practice in future to extent of title issues. In the Panel's opinion he is likely to continue to reoffend in this fashion.

For all of these reasons in the view of the Panel the Member continues to pose a threat to the public interest and to the reputation of the profession.

## 3. HARM TO VICTIMS

Counsel for the Member asserted, among other things, that none of the Member's clients were significantly injured since none of them were out of pocket because of the actions of his client, save for one, the Metcalfe's. Counsel undertook to have the Member pay the amount of $3,500.00 to the Metcalfe's on a date directed by the Panel.

We do not agree that the Member's clients did not suffer injury. In their testimony before the Panel, all of the victims claimed emotional and psychological harm of varying degrees. The Metcalfe's expressed in their testimony and Victim Impact Statement the duress under which the actions of the Member placed them and the resultant stress which persists. Mrs. Metcalfe described this as PTSD. The Panel accepted that this was not a clinical diagnosis but an expression of her strongly held views. Mr. Huras noted that his plan to build a new house on his property fell 7 to 8 months behind as a result of not getting a survey from the Member, and that it took about 6 months of his time before he was reimbursed by his credit card company for the cost the Member had charged him.

It is difficult to place a dollar value on the harm inflicted on these people. Many expressed distrust of land surveyors and avoidance of retaining these services in the future. There has been significant damage to the reputation of the profession as a whole and to the public confidence in the profession.

## 4. NON DISCLOSURE AGREEMENTS

The Panel noted in its Reasons for Decision regarding professional misconduct that some of the witnesses were subject to Non Disclosure Agreements ("NDA"'s): they were required to sign these as a condition of the Member settling certain outstanding money

issues between them. The NDAs required the witnesses not to discuss or make known their complaints about the Member. For example, Exhibit 32 was the Full and Final Release signed by Michael Sloan, who was called as a witness. Mr. Sloan gave evidence that his Small Claims Court action was settled on the day scheduled for trial by the Member paying him $7,500. In consideration of that payment Mr. Sloan signed a Full and Final Release that applies not only to the court claim, but also to his complaint to the Association, the underlying facts or factual allegations for his complaint; his Complaints Committee file, his referral by Council to the Discipline Committee, and the specific charges referenced in the Notice of Hearing. He agreed that, unless compelled by law, he would not disclose the fact of the Release or its terms to a third party without consent, and that if he were asked about his complaint to the Association or the underlying facts or factual allegations leading to that complaint, or the outcome, he would respond only that the matter was closed, and would say nothing more. This Release was signed on April 14, 2016, after the Panel began this Hearing, when the Member was well aware that Mr. Sloan's complaint was one of the complaints before this Panel. All of the witnesses who had signed such Releases were thoroughly cross-examined by the Member's Counsel on having signed and dated this document. All of the witnesses were present as the result of having been summonsed to attend and compelled to testify at this quasi judicial hearing, in accordance with the *Statutory Powers Procedure Act*.

We refrained from including or according weight to that evidence in our findings of professional misconduct, out of a concern that the charging information did not reference Non Disclosure Agreements and a duty of fairness to the Member. It was not clear whether any of this information was known or could have been obtained prior to the commencement of the proceedings. This was information made available through cross examination by Counsel for the Member in an effort to impugn the integrity of the witnesses. Counsel for the Member suggested that the witnesses did not respect the terms of the NDA and did not keep their word.

There have now been findings of professional misconduct and the Panel is entitled to consider credible and reliable information for the imposition of penalty. The Panel concluded that the NDAs proffered to the victims at the courthouse door appear to be an attempt to silence them and thwart the discipline process, or at least make it more difficult. On their face, the Releases prevented the Association from questioning the witnesses about their complaints unless and until they were served with summonses.

## 5. OTHER FACTORS

The Panel accepts that the Member is entitled to vigorously challenge the allegations. He has done so. Subsequent to findings of professional misconduct, it is not uncommon for an individual to persist in a belief that they have done nothing wrong. This was the case here. Indeed, the Member made it clear to the Panel that he has commenced an appeal of this Panel's findings to the Superior Court of Ontario on January 17, 2019.

The caselaw provided to the Panel makes it clear that remorse can be considered a mitigating factor in assessing the appropriate penalty, but a lack of remorse cannot be considered an aggravating factor. The Panel accepts this principle.

However, the Member's perception of his conduct goes beyond a lack of remorse and continues to be a concern regarding his risk of reoffending and the necessity of protecting the public from his business practices. The Member continues to maintain that he has done very little that was wrong and denies that he harmed his clients. Frequently, the Member presented himself as a victim at the hands of his clients in that he did not receive compensation for all the work he did. The Member disregarded the fact that all of these clients received little or no benefit from the Member or that his involvement was somewhat detrimental to their interests.

The Panel's concern is the persistent and repeated minimization or mischaracterization of his conduct. There were numerous examples of this. Attempted bid rigging was described as simply an inappropriate letter. The complaints before this Panel were due to lack of knowledge about client management. The Member asserted repeatedly that the retainer agreement was the problem and blamed the Association for not providing him with a precedent. He persisted in his assertion that the Complaints Committee had commended him on his retainer agreement when in fact, the Complaints Committee commended the practice of a retainer agreement. The real problem was his use of the retainer agreement. The Member told the Panel that he has since discontinued the use of a retainer agreement and credit card authorizations and would have us believe that his client management issues have been addressed. His research on the Prespa Homes file of an inadequately substantiated 194.5 hours was characterized as just poor record keeping.

The Member points to the fact that he has had no complaints since 2014. However, he was unable or unwilling to tell us exactly how many clients he has had since 2014. When Counsel for the Association pressed him on this the Member was evasive and no clear answer was provided.

With respect to the number of complaints against the Member, the Panel heard evidence in the form of a graph prepared by the Registrar. It showed that from 2000 to 2013 the vast majority of surveyors had never had a complaint against them. A smaller number had one complaint, dropping to a fraction of that with two complaints and so on. Only one member had more than four complaints: that was the Member who had 15 complaints against him during that period, with two more added to that by the time the Hearing began. The Panel only heard evidence regarding a small number of this total, but the high number of complaints would be of concern to most members of the profession. The Member however showed no recognition that his unusually high record of complaints was something that should be of concern to him: instead he minimized them by stating that all complaints had been dismissed or settled.

The Member's perception of his conduct also raises concern to the Panel that he is a high risk of reoffending, and that his continued registration is a risk to the public and the reputation of the profession.

**DENUNCIATION AND DETERENCE**

This penalty needs to send a clear message to the membership that the conduct of the Member falls far below that which is expected of a member of a regulated profession. There also needs to be a message to the public and future clients that if an OLS behaves discreditably that the Association will take serious measures.

**PENALTY OF REVOCATION**

Regrettably, in all the circumstances of this case, we have come to the conclusion that the Member is fundamentally dishonest, unethical and unprofessional and cannot be governed in a way that would protect the public interest. His licence should be revoked.

**COSTS AND FINE**

Section 26(4)(h) of the Act authorizes the Panel to impose a fine on the Member to be paid to the Minister of Finance for payment into the Consolidated Revenue Fund, to a maximum of $5,000. When the Member pleaded guilty at the discipline hearing in 2012 the parties did not agree in their Joint Submission regarding the amount of a fine: the Association proposed a fine of $5,000, and the Member submitted that no fine was appropriate. The panel in that case decided a fine of $2,500 was appropriate.

As this is a second finding of guilt, a fine in excess of $2,500 is appropriate. In light of its findings as set out above regarding the Member's conduct, the Panel concludes that a fine in the maximum amount of $5,000 should be imposed.

With respect to costs, section 26(4)(k) authorizes the Panel to fix and impose costs to be paid by the Member to the Association.

This Hearing began in January of 2016, more than three years ago. It has required 21 days of attendance by the parties and the Panel members during that time. The Association is a small profession of less than 1000 members and has been required as a profession to shoulder the costs of this proceeding. Apart from the Discipline Hearing itself, the profession has also been obliged to pay the costs of the Judicial Review application pursued by the Member in the midst of this Hearing, as well as the Superior Court of Ontario case raising constitutional and copyright issues about which the Panel was advised.

In the case of *Abrametz v The Law Society of Saskatchewan* 2018 CarswellSask 253 provided to us by the Member's Counsel, the Court sets out some helpful principles in dealing with cost awards in professional regulatory proceedings. Some of those principles are as follows: costs are at the discretion of the Panel which discretion is to be exercised judicially; the theory or purpose of costs in a disciplinary setting is to ensure that the other members of the profession do not bear the full costs of the member's misconduct, such that a cost award reflects one of the burdens of being a member of a profession; a costs order does not necessarily mean full indemnification; costs should not be so prohibitive as to prevent a member from defending his right to practice or from being able to dispute misconduct charges; a member has an obligation to provide financial information to support a contention that a cost award will impose an undue hardship; the regulator should provide full supporting materials for the amount of costs claimed; the regulator should provide the individual with an opportunity to respond to the information and respond to the total quantum of costs requested; the respective degree of success of the parties.

The Member's Counsel also provided the Panel with *Re Donnini* 2005 CarswellOnt 258 (Ontario Court of Appeal). In that case a cost award of more than $186,000 was ordered by the Ontario Securities Commission. The Court of Appeal agreed that the matter of costs had to be returned to the panel to allow Donnini a fair opportunity to test the validity of the cost demand.

In this case, Counsel for the Association provided a Costs Outline. It indicates that on a partial indemnity basis as commonly used in the courts the Association's costs including

disbursements are in excess of $425,000 and on a substantial indemnity basis are almost $573,000. In submissions Counsel stated that the actual costs to the Association specifically related to this Discipline Hearing only are in excess of $600,000.

Association Counsel also referred the Panel to the decisions in *Joseph Groia v The Law Society of Upper Canada*, 2015 ONSC 585 (CanLII) (Div. Ct.) where a cost award of $200,000 against the Member was upheld, and again upheld by the Court of Appeal. (The conviction was however overturned by the Supreme Court of Canada). Similar principles are set out by the Court with respect to an award of costs.

In prior Association cases as provided to the Panel, costs have ranged between no costs on a joint submission partial day hearing, to $10,000 in costs on a partial day joint submission and $7,500 on a 2-day contested hearing in 2010.

In this case, the Panel notes that the Member challenged every issue in this Hearing, beginning from the first day when a motion was brought suggesting the Chair should recuse herself as being tainted, and that possibly the entire Panel was tainted. The jurisdictional arguments were lengthy (taking five days) and unnecessarily complex. The documents we were referred to in the jurisdictional submissions by the Member's Counsel were so heavily redacted as to be meaningless, leading to more arguments. Witnesses had to be called because the Member's Counsel would not agree to certain facts. There were numerous disputes about the admissibility of documents. The volume of documentation put forward was daunting: there was much duplication and many of them were never referenced in the course of the Hearing. In the Panel's view the Member's approach to the Hearing prolonged it and increased the costs.

The Member provided no information regarding his finances or how a cost award would affect him. Nor did he provide any information as to what his legal costs of the discipline hearing are.

In all the circumstances, the Panel accepts that the $250,000 in costs requested by the Association is reasonable. It is a portion of what the Association has expended and is by no means full indemnification. It will mitigate some of the costs the profession has had to pay in order to give this Member his full hearing at the end of which the Association has been substantially successful.

**EFFECTIVE DATE OF PENALTY**

Section 26(9) and (10) of the Act deal with when this decision takes effect. In summary these sections provide that when a panel revokes a licence on the grounds of

professional misconduct, the decision does not take effect until any appeal has been disposed of. However, a panel may order that the decision is to take effect immediately if the panel believes it is necessary for the protection of the public.

In this case, for all of the reasons noted above regarding the risk that this Member continues to pose to the public, and the Association's primary duty of protection of the public, the Panel is of the view that this order should take effect immediately pursuant to section 26(10) of the Act.

**CONCLUSION**

In conclusion, the Panel has carefully reviewed the submissions and case law before it and has concluded that it will give effect to the Association's position.

The Panel is mindful of the serious consequences for the Member and acknowledges the Member's entreaty that revocation of his licence is equivalent to a death sentence for the career of any professional. We are saddened that a family business which has been in existence since, we were told, 1875 may have to be wound up or continue in some other form. We take no joy in our decision but it is one that we find necessary to protect the public interest.

We therefore decide as follows:

a) The license of Ward I. Houghton is revoked effective immediately.

b) Ward I. Houghton is ordered to pay within 30 days the sum of $3,500.00 to Chris and Lisa Metcalfe.

c) Ward I. Houghton shall pay within 30 days a fine in the amount of $5,000.00 payable to the Ministry of Finance pursuant to section 26(4)(h) of the Act.

d) Ward I. Houghton shall pay within 30 days or such later date that may be agreed between the Association and the Member costs in the amount of $250,000 to the Association.

**PUBLICATION**

The Panel is required pursuant to section 26(5) of the Act to cause this decision as well as the previous decision regarding our findings of misconduct to be published. The Registrar is directed to publish both Decisions in the Association's web newsletter, on its website and in the Ontario Professional Surveyor at the earliest opportunity.

This Decision and Order may be signed electronically and in counterparts.

**Dated 21 May, 2019**

_____
Kathleen Gowanlock (Lieutenant Governor in Council Appointee)
Chair, Discipline Panel

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Bruce Parker, O.L.S.
Member, Discipline Panel

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Paul Gregoire, O.L.S.
Member, Discipline Panel

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Paul Edward, O.L.S.
Member, Discipline Panel

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Sasa Krcmar, O.L.S.
Member, Discipline Panel