

This matter proceeded before a Panel of the Discipline Committee on March 27 and 28, 2013. The Member had retained Mr. Jamie Helm and both Mr. Warren, O.L.S. and Mr. Helm were present. The Association was represented by Mr. Izaak de Rijcke, O.L.S. and Counsel; Mr. de Rijcke and the Association Registrar, Mr. Bill Buck, were also present. The Panel was assisted by Independent Legal Counsel, Carol Street.

THE FACTS

The Association alleged that Mr. Warren was guilty of professional misconduct, in his personal capacity and as the official representative for the firm Land Survey Group Inc. In summary, the following facts were established or not disputed:

1. J. D. Barnes Limited (“JDB”) is a large land surveying and mapping firm carrying on business in Ontario, and also in Canada and internationally. Mr. Joseph Young, President of JDB attended and gave evidence. He explained that JDB owns the registered internet domain name www.jdbarnes.com. However, at the time in question JDB had not registered and did not own the domain name www.jdbarnes.ca.
2. In February of 2012, Mr. Warren purchased, for a small fee, the internet address www.jdbarnes.ca. He was legally entitled to buy this domain name. He admitted that he purposely reconfigured this address so that anyone accessing it would automatically be directed to the Land Survey Group Inc. (“LSG”) website. Mr. Warren is a shareholder of LSG.
3. In June of 2012 JDB became aware that anyone typing in the internet address www.jdbarnes.ca would be automatically directed to the website of LSG. On June 22, 2012 Mr. Young, on behalf of JDB, made a complaint against LSG to the Association, and requested that the Association begin an investigation into the complaint. (Exhibit 1, Tab 1)
4. The Association advised Mr. Warren and LSG of this complaint and asked for a response. (Exhibit 1, Tab 3)
5. On the same day, JDB’s lawyers also wrote to LSG and demanded, in summary, that LSG cease and desist making any use of the www.jdbarnes.ca registration. (Exhibit 2, Tab 1)
6. Mr. Warren, on behalf of LSG, replied that LSG was not the owner of the domain name www.jdbarnes.ca. (Exhibit 2, Tab 2), but had voluntarily ensured that anyone typing in this domain name would no longer be directed to the website of LSG. Mr. Warren also responded, on behalf of LSG, to the Association’s letter in the same way: he said that LSG did not own the domain name in question, but had taken voluntary steps to ensure that there was no “redirect” to LSG. (Exhibit 2, Tab 3)
7. Mr. Warren’s responses, on behalf of LSG, were technically correct: LSG was not the registered owner of the domain name www.jdbarnes.ca. Mr. Warren did not disclose that he personally was the registered owner.
8. Mr. Warren believed that he had satisfactorily dealt with the

Mr. Warren’s counsel pointed out, correctly in the view of the Panel, that Mr. Warren had at no time directed clients or potential clients away from the JDB website. The JDB website is www.jdbarnes.com not www.jdbarnes.ca. Mr. Warren had no ability to, and did not, direct or try to direct clients or potential clients away from the JDB website.

The Panel agrees with counsel’s submissions that this Panel is

issue, and no further action was required. However, Mr. Young, by email to the Association dated August 24, 2012 (Exhibit 1, Tab 8) advised that JDB had contacted the Canadian Internet Registration Authority (“CIRA”). In response to JDB’s request, CIRA advised that the registered owner of the domain name www.jdbarnes.ca was Mr. Warren personally.

9. Mr. Warren did not dispute CIRA’s information. He maintained that it was a CIRA concern and not an Association issue. He denied that there had been any financial gain by LSG or him personally, and correspondingly no loss to JDB. (Exhibit 1, Tab 12)
10. JDB’s complaint was considered by the Complaints Committee, which referred it to Council with a recommendation that it be forwarded to the Discipline Committee (Exhibit 1, Tab 13). Council subsequently considered the matter and referred it for a hearing by the Discipline Committee. (Exhibit 1, Tab 21)

THE ALLEGATIONS

Schedule A of Exhibit 3 sets out the allegations made by the Association. In summary, it was alleged that:

3. Mr. Warren had failed to comply with the Code of Ethics of the Association in that he had failed to conduct his professional affairs in such a manner as to maintain public confidence and trust in the profession, contrary to Section 33(2)(a) of Regulation 1026, R.R.O. 1990, as amended, which in turn constitutes Professional Misconduct within the meaning of Section 35(3) of that Regulation;
4. That Mr. Warren had committed an act of professional misconduct as defined by section 35(14) of the said Regulation in that his misdirection of the public was not factual and was therefore contrary to section 32 of the Regulation;
5. That Mr. Warren had committed an act of professional misconduct as defined in section 35(15) of the said Regulation in that his misdirection of potential clients from the JDB website may have caused a loss of business to that firm;
6. That Mr. Warren had committed an act of professional misconduct as defined by section 35(16) of the said Regulation in that his misdirection of potential clients from the JDB website was an attempt to solicit work from another member;
7. That Mr. Warren had committed an act of professional misconduct as defined by section 35(21) of the said Regulation in that his actions would reasonably be regarded by members as dishonourable or unprofessional.

[note that the numbering above is from Schedule A to the Notice of Hearing, Exhibit 3]

DECISION

bound by the wording of the allegations and cannot rewrite that wording to find a member guilty of a different allegation than what has been set out by the Association in Exhibit 1. Accordingly, the Panel does not find Mr. Warren to have committed professional misconduct pursuant to paragraphs 5 and 6 above.

With respect to the remaining allegations, Mr. Warren argued,

through his counsel, that the issue was properly characterized as a CIRA registration issue, and that CIRA had the exclusive right to deal with issues of this sort. In response, the Association provided the Panel with a number of cases. Although they are in the context of other professional regulatory bodies, the Panel is satisfied that whatever CIRA's jurisdiction, the Association, through its Discipline Committee, has the obligation to investigate and determine allegations of professional misconduct. (See *Krieger v. Law Society of Alberta* [2002] S.C.J. No. 45; *Nowoselsky v. Alberta College of Social Workers (Appeal Panel)* (2011, A.J. No. 413; *Histed v. Law Society of Manitoba* [2007] M.J. No. 460.)

The Panel finds on the facts that Mr. Warren is guilty of professional misconduct as alleged in paragraphs 3, 4, and 7 above. His motivation in acquiring the domain name www.jdbarnes.ca is questionable. His response to the initial complaint, in which he said that LSG was not the owner of this domain name, while technically correct, was misleading. He

The Panel heard that Mr. Warren is an experienced and competent member of the Association who has volunteered his time on the Academic and Experience Requirements Committee and the Survey Record Index Committee over a number of years. There have been no prior proceedings by the Association against him. The Registrar of the Association conceded in cross-examination that he held Mr. Warren in high esteem as a person and as a professional.

Pursuant to section 26(4)(k) of the *Surveyors Act*, R.S.O. 1990, c. S. 29, as amended, the Panel, after making a finding of professional misconduct, has the authority to fix and impose costs to be paid by the member to the Association. The Association sought costs in the amount of \$15,000. Counsel for Mr. Warren pointed out that there had been some negotiations between the parties regarding a Joint Submission that would have included an admission of professional misconduct by Mr. Warren to some of the allegations against him, and would therefore have made a complete hearing on the merits unnecessary. In these circumstances, the Panel considered it inappropriate to award the Association the full amount of costs that it sought.

The Panel orders as follows:

1. Mr. Warren is found guilty of the allegations of professional misconduct as set out in paragraphs 3, 4, and 7 of Schedule A of the Notice of Allegations (Exhibit 3);

ensured that those who accessed this domain name would be automatically directed to the website of LSG, potentially misleading the public as to who they were dealing with. In the view of this Panel, Mr. Warren's conduct in this regard:

1. Shows a failure to conduct his professional affairs in a manner that will maintain public trust and confidence in the profession, contrary to the *Code of Ethics*, and to section 33(2)(a) of Regulation 1026, and is professional misconduct pursuant to section 35(3) of the said Regulation;
2. Was a form of advertising that was not factual in that a member of the public could conclude, for example, that JDB had changed its name to LSG. This action constitutes professional misconduct pursuant to section 35(14) and section 32 of the said Regulation; and
3. Would reasonably be regarded by members as dishonourable or unprofessional pursuant to section 35(21) of Regulation 1026.

PENALTY

2. Mr. Warren has been reprimanded by this Panel and the fact of the reprimand is not to be recorded on the Register of the Association;
3. Mr. Warren will pay to the Association within ninety (90) days of March 28, 2013 the all-inclusive sum of \$10,500 for costs;
4. This Order and Decision will be published, with Mr. Warren's name identified, in the Ontario Professional Surveyor magazine and posted on the public side of the Association website;
5. Mr. Warren is required to successfully pass a course in professional ethics at a College or University level on or before July 24, 2014, such course to be pre-approved by the Registrar of the Association.

This Order may be signed electronically and in counterparts.

Oral Decision given March 28, 2013.

Travis Hartwick, O.L.S.: Chair

Tom Packowski, O.L.S.

Terry Dietz, O.L.S.

Peter Moreton, O.L.S.

Patricia Meehan, Lieutenant-Governor Appointee