

**REASONS FOR DECISION OF THE
TORONTO LICENSING TRIBUNAL
(FIRST PANEL – THE FINDING)**

**Dates of
Hearing:**

February 1, June 14, and July 19, 2018

Panel:

Gary Yee, Hearing Panel Chair; and Moira Calderwood, Member (Aly Alibhai, Member on February 1, 2018 only; (resigned in May 2018)

Re:

Regional Stormwater Management Corporation (Report No. 6519)
Jamie Otis Atkinson, President
o/a Regional Stormwater Management
Applicant for Renewal of Drain Contractor Licence (No. T87-4542940)
AND
Jamie Otis Atkinson
Applicant for Renewal of Drain Layer Licence (No. T88-4421488)

Counsel for Municipal Licensing and Standards:

David Gourlay

Counsel for Applicant:

Unrepresented

INTRODUCTION

- [1] The two-member Panel (“the First Panel”) of the Toronto Licensing Tribunal (“Tribunal”) which deliberated on this matter finds that there are reasonable grounds to believe that the Applicants have not or will not carry on their trade, business or occupation in accordance with law, and with integrity and honesty.
- [2] Despite best efforts, the First Panel is unable to arrive at a unanimous decision about the penalty. Under Rule 16(2) of the Toronto Licensing Tribunal Rules and section 4.2(3) of the Statutory Powers Procedure Act, a two-member hearing panel’s decision must be a unanimous one.
- [3] The First Panel obtained Independent Legal Advice, which was forwarded to the parties, and then sought and considered submissions from both parties as to how to proceed.
- [4] The First Panel orders that a new hearing be convened before a newly constituted panel of three members (“the Second Panel”), to address the “order” (or penalty) portion of the hearing.
- [5] This Second Panel may consider evidence it may find appropriate. The Second Panel will decide what new evidence, if any, to receive, before hearing submissions from the parties and making a penalty decision.
- [6] The Applicants requested a hearing before the Tribunal after the Municipal Licensing and Standards Division (“MLS”) of the City of Toronto refused their applications to renew their Drain Contractor and Drain Layer Licences, on February 17, 2017.

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- [7] The Applicant Jamie Atkinson is the owner of the Applicant company, Regional Stormwater Management Corporation (referred to in this decision as “RSM” or “the company”).
- [8] MLS’s refusal to renew these licences arises out of two by-law convictions for operating without the necessary licences, and use of advertisements and materials which the City alleges are misleading.
- [9] The First Panel conducted a lengthy hearing process with three adjournments and two full days of evidence with a large volume of materials and seven witnesses.
- [10] These are the reasons that both members of the First Panel have agreed upon for its unanimous finding of reasonable grounds for belief.

BACKGROUND

- [11] This case involves two licensees, an individual and his company that targeted work under the City of Toronto’s mandatory downspout disconnection program, and a basement flooding subsidy program that allowed eligible homeowners to apply to the City for subsidies to defray costs of certain types of work done on Toronto homes.
- [12] Mr. Atkinson started his business in 2012, specializing in storm water management. His first company was named Toronto Downspout Inc., incorporated in February 2012. His second company was Regional Stormwater Management Corporation, incorporated in November 2012.
- [13] Mr. Atkinson asserts that his companies have disconnected about 2,000 downspouts, with many of the homeowners applying for the City’s subsidies. He has had some problems in determining which licences are required to do this work. He expressed some frustration about what he sees as conflicting or incorrect information from the City, and the City expressed concerns about what it sees as both non-compliance and challenges to their authority to enforce the licensing.
- [14] In addition, Mr. Atkinson and his company have been using advertising and other communications that the City alleges mislead the public into thinking the advertising material is an official City of Toronto communication, due to the visual appearance of the material, and insufficient presence of the company’s name, many references to the City and its website and other detailed information, including enforcement, deadlines and penalties for not disconnecting a downspout.
- [15] Mr. Atkinson’s position is that he has an innovative marketing approach and business model that helps homeowners and the public, and fills gaps in the City’s information. He also asserted that his business has a broader value to the public interest in that he has been in the forefront of, and is a leading expert in, managing water in times of climate change.
- [16] The MLS’s position, which the First Panel generally agrees with, is that the Applicants’ material is misleading because it leaves the impression that the source is the City or that the company is associated with the City, and furthermore, some of

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the materials have language that unduly raises alarm about flooding, enforcement action and fines.

LAW

[17] The Tribunal must apply the following provisions in the Municipal Code, under Chapter 545-4(C). Under paragraph (1), an applicant for a licence (or, as in this case, renewal) is entitled to that licence except where:

(a) The conduct of the applicant affords reasonable grounds for belief that the applicant has not carried on, or will not carry on, his or her trade, business or occupation in accordance with law and with integrity and honesty; or

(b) There are reasonable grounds for belief that the carrying on of the trade, business or occupation by the applicant has resulted, or will result, in a breach of this chapter or any other law; or

(c) The applicant is a corporation and its conduct or the conduct of its officers, directors, employees or agents affords reasonable grounds for belief that its trade, business or occupation has not been, or will not be, carried on in accordance with law and with integrity and honesty; or

. . . .

(e) The conduct of the applicant or other circumstances afford reasonable grounds for belief that the carrying on of the business by the applicant has infringed, or would infringe, the rights of other members of the public, or has endangered, or would endanger, the health or safety of other members of the public.

[18] Also, section B(3)(c) of Chapter 545-3 of the Municipal Code states that the Tribunal shall “have regard for the need to balance the protection of the public interest with the need for licensees to make a livelihood.”

[19] Furthermore, section 545-6(D)(1) states that the Tribunal “may, having regard to the conduct of the business by the licensee, suspend the passing of penalty and direct that the licence continue on such conditions as the Toronto Licensing Tribunal considers just and as are authorized by law.”

EVIDENCE AND ANALYSIS

[20] The first day scheduled for the hearing was September 28, 2017, and it was adjourned to December 7, and then February 1, 2018, when the hearing began. After another adjournment on March 22, 2018, the hearing resumed with a second full day on June 14, 2018. Due to Member Alibhai’s resignation from the Tribunal during the First Panel’s hearing, the remaining two members of the panel continued under the authority of s. 4.4(1) of the Statutory Powers Procedure Act. The parties indicated they did not object to this. The hearing finished with submissions on July 19, 2018.

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[21] Exhibit 1 in this case is the MLS Report, which is 303 pages. MLS also submitted additional documents and presented five witnesses. The Applicants submitted both documentary and witness evidence, with Mr. Atkinson and a former employee as witnesses.

[22] The three main areas of evidence relate to the two convictions against the company on December 17, 2015, and the allegations of misleading advertising. The two convictions both related to offences committed in the summer of 2014 – for being a plumbing contractor hiring an unlicensed helper, and for not having a Building Renovator Licence. There was a suspended sentence for the first offence, and a \$500 fine for the second one, which remains outstanding.

a) No Licensed Master Plumber

[23] The company received its Plumbing Contractor's Licence on May 3, 2013. Under s. 545-424(B) of the Toronto Municipal Code, it was required to employ a full-time licensed master plumber, and it could not perform any plumbing work without a master plumber's supervision.

[24] MLS presented Mr. Sarino as a witness at the hearing. He testified that he was licensed as a master plumber and he started working for the company in May 2013, but worked there for less than a month.

[25] Mr. Atkinson, in cross-examination by the MLS lawyer, explained that he had cash flow problems soon after hiring Mr. Sarino, and had to let him go because he couldn't pay him. It was at a very busy time at the height of flooding problems, and he went over his credit card limit.

[26] While the MLS records showed Mr. Sarino's period of working with the company spanned May 2013 - February 24, 2014, he had actually stopped working for the company in June 2013. There is no evidence about why Mr. Atkinson or his company did not update MLS, so it could amend its records, after Mr. Sarino's departure in June 2013.

[27] The company's next plumber, Mr. Cooper, did not start until January 28, 2014. This means that there was about an eight-month period with no master plumber.

[28] An e-mail from Mr. Cooper to Mr. Stubbings (Exhibit 1, page 55), says that he stopped working for Mr. Atkinson about the first week of April 2014, and then started again about February 2015 but stopped by September 2015. This adds up to about ten months when Mr. Cooper was still listed as the company's master plumber when he was not. There is no evidence about why Mr. Atkinson or his company did not update the MLS, so it could amend its records, after Mr. Cooper's second departure in September 2015.

[29] The e-mails from both plumbers to Mr. Stubbings showed that they were upset to find out that Mr. Atkinson had used their licensed status to fulfill the company's requirements when they were not actually employed by the company.

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- [30] Notably, Mr. Cooper's email to MLS (Exhibit 1, page 53) asserted that Mr. Atkinson still owed him money both for work he did, and for work that Mr. Atkinson/his company did under Mr. Cooper's licence, without his knowledge or permission.
- [31] Mr. Sarino's email to MLS (Exhibit 1, page 52) stated that when he went to an interview for the Master Plumber position with Mr. Atkinson's company, he believed it was a City of Toronto office and that those present were City workers. He recalled that Mr. Atkinson paid for his Master Plumber's Licence but added he had "no idea" Mr. Atkinson was using it to obtain his City licence.
- [32] MLS's February 16, 2017 refusal letter (Exhibit 1, page 23) referred to the company using the Master Plumber Licences of individuals without their consent.
- [33] Mr. Atkinson testified that he then hired a plumber from Australia, named Kyle, about a month after Mr. Cooper left. This plumber showed his Australian plumber's licence, and said he was transferring it. But this information was not accurate, and Mr. Atkinson never saw any Toronto plumber's licence.
- [34] To sum up, the evidence shows:
- May 2013: Company received Plumbing Contractor's Licence.
 - May – June 2013: Master Plumber Mr. Sarino worked for the company.
 - June 2013 – January 2014: Company had no master plumber.
 - January 2014 – April 2014: Master Plumber Mr. Cooper worked for the company.
 - April 2014 – February 2015: Company had no master plumber
 - August 2014: Company was charged with (and later convicted of) "Plumbing Contractor – Hire Unlicensed Helper."
 - February 2015 – September 2015: Master Plumber Mr. Cooper again worked for the company.
 - September 2015 onwards: Company had no master plumber.
- [35] Mr. Atkinson did not want to acknowledge in cross-examination that his company was operating for significant periods of time without a master plumber. Instead, he offered excuses and he avoided taking responsibility for clear violations of the By-law requirements. Mr. Atkinson referred to ambiguities in the By-laws about what licences he needed and his frustration at having to spend so much money on five licences when it was not clear what he needed to operate his business. He even said that this led him to be "less than motivated" to update his master plumber information on time.
- [36] Mr. Atkinson did acknowledge that he should have informed the City of the first plumber's departure, but he also said that he was only in his second year with this company and mistakes can be made when you are new.
- [37] Despite some acknowledgements of responsibility, the First Panel notes that Mr. Atkinson showed a troubling pattern of blaming others for his non-compliance. The evidence is clear that the company had a Plumbing Contractor's Licence for three years, but only had a master plumber for about nine months of that time. Mr. Atkinson tried to blame unclear By-laws or licensing information, as well as the

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plumbers he hired for either not reporting their departure to the City or for not getting a master plumber licence.

[38] The First Panel is concerned about both the lengthy and repeated non-compliance with the master plumber requirement (as proven by the conviction), and Mr. Atkinson's responses at the First Panel hearing about the reasons for this non-compliance. These findings will be considered together with the findings in the two other issues below, to decide if there are reasonable grounds to believe that he and his company have not carried on or will not carry on their trade, business or occupation "in accordance with law and with integrity and honesty."

b) No Building Renovator Licence

[39] The second By-law conviction concerns the company operating without a Building Renovator Licence. Mr. Atkinson's explanations are relevant to findings about any reasonable grounds to believe that his company's business will not be carried on in accordance with law and with integrity and honesty.

[40] Mr. Atkinson's evidence was that he faced a lot of difficulty and frustration in getting clear information from the City staff. Mr. Stubbings agreed that he and Mr. Atkinson had over 30 phone calls. There was also a string of e-mails in November 2016 (Exhibit 5, pages 13 – 17), where Mr. Atkinson was trying to clarify – but also trying to dispute – with Mr. Stubbings exactly what licences his company needed or didn't need. This was after the company's conviction for operating without a Building Renovator Licence.

[41] In the view of the First Panel, Mr. Atkinson wished to run a company licensed under Chapter 545, and ultimately it was his responsibility to determine what requirements applied, not MLS's responsibility to provide him with that information.

[42] The MLS records presented in chart form (Exhibit 1, pages 1-2) show that both Mr. Atkinson and his first company (Toronto Downspout Inc.) have previously had Building Renovator Licences – Mr. Atkinson in 2006-2007 and 2011-2012, and Toronto Downspout in 2012-2013.

[43] The second company (Regional Stormwater Management) is the Applicant in this matter. The records show this company started out with a Plumbing Contractor Licence (May 2013 to May 2016), and then added a Drain Contractor Licence (October 2015, renewed in October 2016 but refused in February 2017). The conviction is for not having a Building Renovator Licence.

[44] Mr. Atkinson argued that the City had provided inaccurate information to him about what licences were needed to do the kind of work that he and his company were doing. As a self-proclaimed flood prevention specialist, he stated that his work was unique and it did not fit clearly into the licensing scheme. He has to work with eavestroughs, downspouts, weeping tiles, sump pumps, backwater valves, etc. He criticized the City for a "silo" approach instead of a more integrated or interdisciplinary approach. He was frustrated that he would be required to get differently licensed workers to come in to do different parts of the work.

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- [45] Mr. Atkinson claimed that Mr. Stubbings said he should have a contractor's licence and then an eavestrough or downspout disconnection licence. But Mr. Stubbings' testimony was that there was no separate licence for eavestrough work, and that it was a Building Renovator Licence that would allow working with aluminum. A drain laying licence would also be needed if the work involved breaking the floor, but reinstalling that concrete would require a Building Renovator Licence.
- [46] Mr. Atkinson said that his company also obtained a Plumbing Contractor Licence on Mr. Stubbings' advice, but Mr. Atkinson later came to believe that he did not need that licence, and he would have been better off having a general contractor's licence.
- [47] Mr. Atkinson submitted that the City should have initially directed him to get a Drain Contractor Licence, because that turned out to be what was needed to disconnect downspouts from weeping tiles, and thereby qualify the homeowner for the City's subsidy.
- [48] The testimony from Mr. Stubbings was that you need to have a Building Renovator Licence to do downspout disconnection, which involved working with aluminum and altering the course of storm water (i.e., clear water) in the exterior of a house. For drainage of "grey water" from inside a house, a Drain Contractor or Drain Layer Licence was needed. Drain laying work that required breaking and reinstalling a concrete floor would require both a Building Renovator Licence and a Drain Layer or Drain Contractor Licence.
- [49] Mr. Atkinson's cross-examination of Mr. Stubbings tried to challenge whether a Building Renovator Licence was required for the downspout disconnection and backwater valve work that the company did. Mr. Atkinson pointed out that not all eavestroughs are made of aluminum. However, even if the First Panel were to believe that non-aluminum eavestrough work can be done without a Building Renovator Licence, there is no evidence that the company worked only with non-aluminum eavestroughs.
- [50] Mr. Atkinson said that his company does not install eavestroughs – it disconnects the downspout and reconnects the drainage to a rain barrel or another part of the property to manage the water. It also caps the weeping tiles, if any. His view is that the company's downspout disconnection work only requires a Drain Contractor Licence because a downspout is a drain, and this does not require a Building Renovator Licence.
- [51] Mr. Atkinson submitted copies of an e-mail stream between him and Mr. Stubbings in November 2016, where he tried to clarify what licences he needed, and he disputed Mr. Stubbings' interpretation. The communications in these e-mails reflect the testimony given by Mr. Atkinson and Mr. Stubbings at the hearing, as set out above.
- [52] The first e-mail is on November 2, 2016. To give some context to this, the First Panel notes that this is almost a year after the by-law conviction for not having a Building Renovator Licence, and just a couple of weeks after Mr. Atkinson paid fees to renew his own Drain Layer Licence and Regional Stormwater Management's Drain Contractor Licence. Mr. Atkinson's e-mail says he wants to clarify a few things before

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he “purchase[s] a trades license. As a drain layer I can do downspout disconnection and weeping tile work?”

- [53] Mr. Stubbings’ reply the next day was clear – he said that drain contractors are only licensed to drain grey water from inside the house to the sewer system, and that “downspout disconnect and weeping tile disconnect is [sic] Licenced under Building Renovator (T85).” This is consistent with his testimony set out above.
- [54] Mr. Atkinson’s reply, also on November 3, 2016, suggests that a Drain Layer Licence also enabled downspout disconnection work, as well as weeping tile disconnection. He pasted in excerpts from the City’s websites, and also a by-law (By-law 681), about drains and drainage systems that included references to downspouts.
- [55] Mr. Stubbings e-mailed back that day and said. “The City of Toronto Bylaw 545 applies. My place is to inform you what the requirement [sic] Licences are. I will not argue the facts.”
- [56] Mr. Atkinson e-mailed back a few more times that day, to ask for information about these requirements, and to also say that Mr. Stubbings had told him over the phone that drain layers could not do weeping tiles, but he found a City web page that referred to the work that drain layers do, and it included weeping tiles.
- [57] This e-mail stream ends with Mr. Atkinson’s November 18, 2016 follow-up to say he has not received a reply yet, and he asked whether he should listen to Mr. Stubbings or the City’s website about what drain layers can do.
- [58] Mr. Atkinson submitted that the City did not issue him the proper licences but still took his licence fees for licences that he did not need. He has relied on alleged disparities between the information from the City website and the enforcement staff, as well as disparities with by-laws. He also pointed out that he was informed by City that he had one year after the invoice date in the subsidy applications to get the required licence, but he acknowledged he was still too late.
- [59] The First Panel notes that its function in this case is not to specifically decide whether the Applicants have been doing work that requires a Building Renovator Licence. The applications before the Tribunal are the renewals of the Drain Layer and Drain Contractor Licences. As such, the First Panel only needs to consider if there are reasonable grounds for belief that the Applicants have not acted or will not act in accordance with law or with honesty and integrity, which is the test in section 545-4(C)(1).
- [60] The First Panel is satisfied that there are reasonable grounds to believe that the Applicants have breached Chapter 545 of the Toronto Municipal Code by not having a Building Renovator Licence when needed. There are reasonable grounds to believe that a Drain Contractor Licence does not permit the kind of work that the Applicants are doing. The scope of this licence or the meaning of drain work is not set out in Chapter 545 of the Municipal Code, unlike building renovation work, which is defined (although fairly generally) as “the business of altering, repairing or renovating buildings or structures ...”

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[61] The lack of definition for the scope of drain work does not mean that the First Panel should rely upon other by-laws or City materials, such as those related to water or to downspout disconnection subsidies, to define the scope of a Drain Contractor Licence. The First Panel notes that a Building Renovator Licence involves certain “endorsements”, which specify in more detail which types of work are included in the Licence – see section 545-441(A):

545-441. Building renovator to ensure work done by licensed workers.

A. No person carrying on business as a building renovator shall perform any type of work as a building renovator unless his or her licence is endorsed to show that he or she has qualified to perform the type of work being done or he or she has in his or her employ, throughout the performance of the work, a person who is licensed as a building renovator and whose licence is endorsed to show that he or she has qualified to perform such work.

[62] Mr. Stubbings mentioned endorsements, such as working with aluminum and installing concrete that could be added to the Building Renovator Licence to permit the work involved in downspout disconnection. The First Panel notes that a Building Renovator Licence issued to Toronto Downspout Inc. in 2011 and 2012 referred to a “Manual Cond.” of “downspout disconnection” (Exhibit 1, pages 17 and 21).

[63] Mr. Atkinson asserted there was a lack of clarity about what licences were needed for the different types of work involved in the Applicants’ approach. In the view of the First Panel, Mr. Atkinson is free to disagree with MLS’s interpretation of Chapter 545 of the Municipal Code. He is perfectly free to approach his municipal councillor and/or City Council and lobby for changes to the by-law. But in the end, he is not free to ignore the actions MLS takes to enforce the current by-law, which have included a by-law conviction. If he chooses to continue operating without the licences that MLS has advised he requires, he can try to fight a by-law charge in court, or bring his dispute with MLS to the Tribunal, with significant risks if he loses, including possible revocation of his licences.

[64] At one point in his cross-examination of MLS witness Mr. Stubbings, Mr. Atkinson referred to an appeal of his by-law convictions, but Mr. Stubbings said there are no records of such an appeal. In any event, the First Panel relies on the currently unchallenged evidence of the two convictions to find that the company was guilty of these by-law offences.

[65] The First Panel finds that Mr. Atkinson’s testimony and submissions suggest he is resisting compliance with requirements that he sees as being unjustified or outdated and overly bureaucratic, because the City somehow does not recognize the ground-breaking nature of his business model. But this does not justify breaking the law, or continuing to break it even after a conviction. The First Panel also notes that the \$500 fine arising from the December 2015 conviction for lack of a Building Renovator Licence has not been paid.

[66] The Tribunal’s task is to consider Mr. Atkinson’s actions (for himself and his company), and decide if there are reasonable grounds to believe that he or his company will not carry on their trade, business or occupation “in accordance with law

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and with integrity and honesty.” In addition to these two by-law convictions, the First Panel will now consider the third issue: MLS’s allegations of misleading materials.

c) Misleading Materials

- [67] Mr. Atkinson and his two companies have a long history of using advertising or promotional materials that have caused concerns and objections from members of the public and from MLS and the City of Toronto’s Legal Services Division. Much of the 303-page MLS Report, Exhibit 1, consists of copies of these materials and correspondence between Mr. Atkinson and various City staff about the content.
- [68] The concerns go back to 2011. A November 16, 2011 City Legal letter (Exhibit 1, page 37) required Mr. Atkinson and his Toronto Downspout company to cease and desist from using door hangers and a website that leave the impression that they originated from the City. The door hangers were of (a particular yellow colour, and a size and shape similar to parking tickets. They used the identical font to that on the City’s website. In addition to using the City logo, the door hanger also stated that the homeowner’s “property has been flagged for non-compliance”, and referred to the City, to the Toronto Municipal Code, chapter 681, and to the City of Toronto website (toronto.ca). It stated that the City “may use its authority...to enforce compliance.” It also had words in very large font saying “Mandatory Downspout Disconnection” and “NOTICE.” The only reference on the entire document to the company name was “Or visit: www.torontodownspout.ca.”
- [69] The letter from City Legal mentions that City Staff had received phone calls from residents advising they thought the material came from the City. City Legal stated, “Your door hanger and website are designed to give the impression that they are communications from the City of Toronto...”
- [70] In a November 28, 2011 e-mail from Mr. Atkinson to Mr. Stubbings (Exhibit 1, page 136), Mr. Atkinson says that he sent out 200 door hangers and received 30 responses, which included five complaints from homeowners who felt they had already done the downspout disconnection work, and about six people who “assumed that we were from the City.” His e-mail states that he informed them that “we are licenced downspout disconnection contractors.” He also stated that due to these calls, he disposed of these door hangers. He stated he removed the City of Toronto and Live Green logos, and a video that was also at issue, from the company website, and he apologized for any problems caused.
- [71] A later revised door hanger (Exhibit 1, pages 42 and 43) still caused concerns. These concerns included the use of words like “Warning: Phase 1 deadline has passed,” and referring to City fines. Again, the only reference in the document to the company’s name is its website.
- [72] City Legal also objected to the form being used by Toronto Downspout for its contracts because it seemed similar to Toronto Water forms.
- [73] In July 2012, the City documented (Exhibit 1, page 40) an instance of what it called “Poor Business Practice” by Toronto Downspout. In that instance, homeowners were reporting “high pressure sales tactics,” which apparently referred to misleading

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advertising regarding mandatory downspout disconnection. Homeowners were receiving “Advisory Notices” that appeared to be from the City. In September 2012, City Legal sent an email to Mr. Stubbings (Exhibit 1, page 41) regarding what changes needed to be made to the advertising.

- [74] The First Panel heard from MLS witness, Tracy Manolakakis, who was the Supervisor in Business and Customer Support for Toronto Water, and also supervisor for the basement flooding protection program. She said that they received complaints about Toronto Downspout; she put the number at less than 50.
- [75] In November 2012, Ms. Manolakakis advised Mr. Atkinson about the complaints, and she said that he apologized but felt there wasn’t anything at issue with what he handed out. He also said he would stop. She testified that she presumed he did indeed stop using the materials in question because the number of calls went down.
- [76] But in April 2013, more correspondence was generated about concerns over the door hangers the Applicants were using at that time. An April 18, 2013 e-mail from Ms. Manolakakis to Mr. Atkinson (Exhibit 1, page 139) outlined the City’s concerns, partly about complaints about the misleading door hangers, and partly about the invoice forms used by Regional Stormwater Management.
- [77] In his April 29, 2013 response, Mr. Atkinson said, “Thanks for helping correct my marketing and invoices”, and he asked for “a few pointers on what you think may help provide further clarity to my advertisement.”
- [78] Further letters from City Legal on May 5, 2014 (Exhibit 1, page 217) and December 17, 2014 (Exhibit 1, page 210), provide detailed objections to the Applicants’ door hangers, with colour copies of two samples attached (Exhibit 1, pages 213 – 216).
- [79] The December 17, 2014 letter from City Legal lists many phrases and sentences that are incorrect or that leave the wrong impression and blur the lines between the City and a private business. For example:
- a. Its title is “ADVISORY NOTICE: MANDATORY DOWNSPOUT DISCONNECTION & MUNICIPAL SUBSIDY OF \$3,400 PER PROPERTY”, which suggests that it is a City notice.
 - b. The words “Regional Stormwater Management”, which do not have the word “Corporation” at the end.
 - c. The flyer does not have the City of Toronto Licence Number, as required in section 545-420(A)(2) of the Municipal Code.
 - d. There are frequent references to City of Toronto websites, which the City claims as its intellectual property.
 - e. The back page of the first flyer states: “Regional Stormwater Management is an independent entity that facilitates the coordination between homeowners and the City to simplify the process of protecting a property from basement flooding.”
- [80] The First Panel generally agrees with the concerns set out by City Legal in these two letters.

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- [81] Around this same time, Mr. Atkinson was also dealing with Joe Viera, who had taken over from Ms. Manolakakis in the Toronto Water department of the City. MLS did not call Mr. Viera as a witness, but the MLS Report shows about a year and a half of e-mail communications involving Mr. Viera and the Applicants.
- [82] On December 30, 2014, Mr. Atkinson e-mailed Mr. Viera revised versions of the door hangers for his review (Exhibit 1, page 142; the same e-mails are at Exhibit 5, page 5).
- [83] In his e-mail, Mr. Atkinson said, "Please provide any suggestions you may have in helping insure [sic] absolute clarity in the separation between the City of Toronto and RSM." He also said, "I think the biggest mistake in the last advertisement was in mentioning whether the city would be liable. This was taken from a source on the internet where it said that there was legislation passed to help cities from the liability that can come from their sewer system. I should have reference [sic] this with you before sending out the ad which I apologize for. To help insure [sic] there is always accuracy in the future, I will send you any new version of the ad before I send it out."
- [84] Mr. Atkinson sent newer versions of the door hanger to Mr. Viera in e-mails on February 9 and 11, 2015. It appears that Mr. Viera asked City Legal to respond, which they did with a letter dated February 18, 2015 (Exhibit 1, page 220). This letter mostly takes issue with various inaccurate statements in the flyer, but also makes a few points about statements that may leave the false impression that Mr. Atkinson's company is involved with the subsidy program.
- [85] Mr. Atkinson responded to City Legal and Mr. Viera that same evening (Exhibit 1, page 148), and provided an updated version of the flyer to address at least some of the concerns in City Legal's letter. He agreed with some changes and did not agree with other ones, providing reasons for why he did not.
- [86] The First Panel notes that he agreed to change how he referred to his company at the end of the flyer – from "This awareness material has been produced by Regional Stormwater Management, a private non-governmental agency" to refer to it as "a private corporation" instead.
- [87] After his February 18, 2015 detailed response to City Legal's concerns, Mr. Atkinson came up with a revised version of the door hanger, which he apparently started distributing in early March (see e-mail stream starting on Exhibit 5, page 8; also found at Exhibit 1, page 153). Mr. Atkinson sent an updated copy to Mr. Viera on March 22, 2015. He followed this with an e-mail the next day to acknowledge that the past two years of his business "were extremely disorganized and chaotic," but he hoped that they were past that, and he thanked them for their patience and understanding in working with him to resolve some of the issues.
- [88] On April 22, 2015, Mr. Atkinson sent a revised flyer to Mr. Viera (Exhibit 1, page 157). Mr. Viera responded by saying he would forward it to City Legal for review, but he also expressed a concern that he did not want to review a new version every month. Mr. Atkinson replied that these were information ads that were based on information that may change, and he said that he didn't think that any new version would be made for a while.

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- [89] In a May 26, 2015 letter to Mr. Atkinson (Exhibit 1, page 230), the City lawyer set out detailed concerns about the newer flyer. This letter referred to a May 1, 2015 flyer that was different from the March 2015 flyer that the City had considered to be acceptable. Both these flyers are attached to this letter (Exhibit 1, pages 233 – 236).
- [90] In its letter, City Legal's concerns about the May 2015 flyer included: deleting the licence number; re-inserting language about the homes being located in flood areas; adding a statistic that unduly inflated fears of basement flooding; deleting the word "eligible" when referring to the City's subsidy; and other wording or statements that City Legal said were not completely accurate or that could be misleading.
- [91] This letter ended by saying that they would refer the matter to MLS for review and action.
- [92] MLS also called Caitlin Martin as a witness. She was the supervisor for the Toronto Water Customer Care Centre after Mr. Viera. Ms. Martin went through City records of homeowner complaints in the MLS Report. The First Panel notes about 16 complaints logged in City charts or e-mails (Exhibit 1, pages 189 – 206), covering a period from August 2014 to November 2016. These communications expressed concerns or asked questions about flyers or door hangers from both of Mr. Atkinson's companies. Some homeowners were afraid that they would be fined or that they had missed deadlines to disconnect their downspouts or apply for exemptions. Some homeowners were calling the City to ask if they were in a chronic basement flooding area because that's what the door hanger or flyer indicated.
- [93] Ms. Martin said that the complaints have not ended, but she could not estimate the volume, and she said complaints are now less frequent than before.
- [94] At the end of 2016, Mr. Atkinson sent two more versions of flyers, first to Ms. Martin on November 16, 2016 (Exhibit 1, page 172), and then to the subsidy program's general e-mail address on December 31, 2016 (Exhibit 1, page 181). In this latter e-mail, Mr. Atkinson said that he agreed that "the advertisements have not been well received" but he noted that the City's deadline had passed and homeowners still had not disconnected their downspouts. He attached his latest revised flyer, and said, "Take a look at the revision. No need for feedback. Just want to make you aware that we do care."
- [95] The most recent letter from City Legal (Exhibit 1, page 297), dated August 18, 2017, set out the history of this issue. It referred to the various letters in 2011, 2014 and 2015; it referred to some recent complaints; and it attached a copy of two flyers that appear to be from late 2016 or in 2017.
- [96] The City Legal letter sets out a number of specific concerns about these flyers. The First Panel notes that the first flyer had the following content:
- a. "Mandatory Downspout Disconnection"
 - b. "Enforcement Advisory"
 - c. "Mandatory Compliance"
 - d. "please take action immediately to avoid potential fines and penalties"

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- e. “Contact your Downspout Disconnection Coordinator
Visit: toronto.ca/downspouts for videos and the most up-to-date information on program requirements
To speak to a Downspout Disconnection Coordinator to find out how to disconnect, request a deadline time extension or to schedule a downspout disconnection:
Call 1-866-392-6097 | downspout@regionalstormwatermanagement.ca |
Monday to Friday 8am-6pm”
- [97] As Mr. Atkinson pointed out, this flyer (Exhibit 1, page 299) also referred to options that included the homeowner’s disconnecting the downspout on their own. He testified that this first flyer was not really designed to make money, and it was more of an awareness campaign. He said it was a rough version with only 200 printed.
- [98] Mr. Atkinson testified that the second flyer (Exhibit 1, page 301) had 5,000 copies printed. The First Panel notes that this flyer included the following content:
- a. “Mandatory Downspout Disconnection”
 - b. “Enforcement Advisory: Immediate Attention Required! December 3rd, 2016 Deadline Has Elapsed”
 - c. “Contact your Area Disconnection and Adaptation Coordinator
Reducing the risk of flooding requires a joint effort between homeowners, the city of Toronto and local entities like us.”
- [99] In response to MLS counsel’s question about whether all 5,000 copies were distributed, Mr. Atkinson answered that he stopped after he received the City Legal letter. The First Panel notes that this suggests some form of compliance or responsiveness by Mr. Atkinson. There was no evidence presented by either party about what materials have replaced these 2017 flyers, and whether there are continuing concerns.
- d) Findings About the Content of the Materials
- [100] The First Panel has no hesitation in finding that the overall effects of the Applicants’ materials, including their most recent 2017 flyers, are still unduly misleading.
- [101] The First Panel finds that Mr. Atkinson’s persistent conduct in using advertising materials that are both misleading and intimidating provides reasonable grounds for belief that he and his company both have not and will not carry on their business in accordance with law and with honesty and integrity.
- [102] In assessing both the materials and Mr. Atkinson’s conduct, the First Panel accepts his evidence that he has a different business or marketing approach than most companies. He attempts to provide homeowners with information about how to prevent basement flooding, and some environmental context for this issue. But this does not mean he has complete freedom to proceed in his business ventures without regard for the requirements of the by-law.

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[103] Mr. Atkinson tried to suggest at various points in his testimony that he was doing a public service to educate homeowners about climate change and its impact, and encourage compliance with the City's mandatory downspout disconnection program. He testified that half of his marketing information was dedicated to providing "pure information." At other points, he acknowledged that this form of informational advertising was also a way to draw potential customers to his business, and to inspire confidence in the expertise of his business.

[104] The First Panel believes that any public service benefits that Mr. Atkinson claims his materials provide are cancelled out by the fact that the content is misleading people to think the materials are associated with or approved by the City, and the content is also causing some homeowners to be intimidated by the warnings in these materials.

[105] In assessing the public interest and Mr. Atkinson's integrity when using this kind of marketing approach, the First Panel does not give any credit to Mr. Atkinson for his unsupported claims of altruistic motivation. Despite his claims to being different, it appears that his motivation is no different from that of less innovative businesses – namely, profit.

[106] The First Panel notes that a marketing approach which provides a lot of useful information may not in itself be improper. But, in this case, it was executed with a great risk of misleading the public. First, with more information and details, there will be more chances that something is wrong or leaves the wrong impression. This is clear from the lengthy City Legal letters that pointed out when an extra word or a missing word could be factually incorrect or incomplete. Some of those concerns may not have a clearly negative impact or fraudulent intent, but could just be errors in describing the program or requirements. One small example of this would be saying "one time subsidy up to \$3400.00" when it is actually a lifetime cumulative subsidy of \$3,400.00 per property (Exhibit 1, page 232).

[107] Another increased risk from a marketing approach with lengthy references to a government program or subsidy is that this could leave the impression that the material is associated with the government. In the view of the First Panel, regardless of what Mr. Atkinson's motivation or intent may be, he must be responsible for any negative impact that may arise from using too much government-sourced content in his materials. He cannot simply say that he has an unrestricted right to use publicly available content, or that there cannot be anything wrong with putting a government website link in his materials. Nor can he be given more leeway to risk misleading consumers by claiming that he is doing a public service or doing a better job than the government in informing the public about the program or subsidy or, indeed, about the implications of global warming for the homeowner.

[108] Mr. Atkinson has pointed out examples of advertising that, he said, do not directly promote a company or its name and its services or products, but instead may leave more of an impression of being a public service announcement. However, this cannot cross the line into misleading the public into thinking that the business is associated with or endorsed by the government. The Applicants' materials have crossed this line.

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- [109] One aspect is misleading the public into thinking that the material and thereby perhaps the company are associated with the City. Another aspect is intimidating the homeowners into thinking that they face greater risks of basement flooding or City enforcement and fines, than they actually do.
- [110] Mr. Atkinson did not agree with MLS counsel that the words “Advisory Notice”, “Warning” and “Please note that a fine will not be issued if ...” may be seen as warnings from the City. He also said that he had advice from a lawyer that “Advisory Notice” was a header like a weather advisory and like some tow truck notices.
- [111] Using the title “Advisory Notice” may not in itself be objectionable or misleading. But when it is combined with other content, and displayed in a particular way (such as large font, etc.), this term can take on a different meaning and leave a different impression.
- [112] In reviewing the various forms of door hangers and flyers since 2011, and the detailed responses from City Legal in their letters, the First Panel finds itself in agreement with almost of the concerns expressed in those letters. Some concerns were addressed in the early years, such as the use of the City logo. Mr. Atkinson stopped using that soon after the City informed him.
- [113] There was only one time when a copy of a flyer sent by Mr. Atkinson appeared to satisfy the City, in March 2015. But for some unknown reason, he made more changes, which led to City Legal’s May 26, 2015 letter to raise further objections and then refer the matter to MLS
- [114] After this May 2015 letter, the evidence does not show any further enforcement action or City Legal warning letters until MLS’s February 16, 2017 letter to deny renewals to the Applicants’ licences. Some internal records show a few more complaints, and several times where Mr. Atkinson continued to send more versions of his flyers to the City, without really asking for their feedback but just to keep them informed.
- [115] The evidence shows that in February 2016, the City staff knew that this matter would end up at the Tribunal (Exhibit 1, page 164). Mr. Viera forwarded Mr. Atkinson’s e-mail and latest flyer to other City staff, saying, “I have already forwarded the material to MLS and it will be part of the MLS Tribunal evidence against RSM.”
- [116] The First Panel notes this timeline because it shows that Mr. Atkinson continued to send the City different versions of his materials, in February, November and December 2016, even when the City did not ask him to do so, and did not appear to be taking any further action against him after City Legal’s May 26, 2015 letter. MLS counsel pointed out wording in Mr. Atkinson’s e-mails that suggested he didn’t care for or want any response. But there is no evidence and no suggestion by MLS counsel that Mr. Atkinson was trying to hide from the City or mislead the City about what material he was actually using.
- [117] It is clear that Mr. Atkinson did not want to be limited in his marketing approach. He was constantly changing his door hangers and flyers, and trying them out in various situations to see what may work better. He asserted that he hired a Ph.D. student

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(although he did not specify her academic discipline) in March 2015 to do some research and writing for his website and advertising materials (Exhibit 2B).

[118] Mr. Atkinson's constant changes to the way he marketed his business caused a lot of frustration with the City, whose staff rightfully did not want to be reviewing and "approving" new versions every month. This was a concern expressed by Mr. Viera in his April 27, 2015 e-mail.

[119] During the times when City staff were pursuing their concerns with Mr. Atkinson, the evidence shows that he was responsive. He replied in a timely manner to Toronto Water staff and City Legal. However, as MLS counsel submitted, Mr. Atkinson would provide some variations to his materials, get some more feedback from the City, apologize and say he would stop, but then very little changed.

[120] In contrast, Mr. Atkinson claimed that he made the majority of the changes requested, and that it wasn't that confusing. It is obvious to the First Panel that Mr. Atkinson's sense of what is misleading or what is an acceptable risk of misleading is neither correct nor reasonable.

[121] For example, in his testimony, Mr. Atkinson volunteered information that at least two out of ten callers to his company asked if they were with the City. He actually said he was not concerned about this and that this is what people may think when you provide so much public information. In his submissions, he said that simply receiving calls about whether his company was part of the City is not evidence of being misleading. But it is indeed very good evidence of exactly that. It is unacceptable to use advertising materials that may lead 20% of people to think that the materials come from the City or that the company is associated with the City.

[122] Another example of Mr. Atkinson's misguided view of what is misleading was highlighted by his argument when trying to convince the First Panel that he was not misleading anyone. He focused on defending the word "Regional" in his company's name, and said that most of the confusion may come from that, because people may connect it with a regional government. The First Panel does not understand this focus when it comes to the City of Toronto, where there is no longer a regional level of government.

[123] Mr. Atkinson testified that they have a script to respond to homeowners who ask if they are with the City – their response is that they are a private company. If the question is whether the company is an approved contractor of the City, the scripted answer is to say that the City has no approved contractors.

[124] Mr. Atkinson also submitted Exhibit 3 as a flyer that he stated they had distributed to 2,000 homes without any complaints from homeowners to the City. He said he has sent out over 100,000 pieces of printed materials, and had no comments on Yelp or with the Better Business Bureau (BBB) about anything being misleading. He also referred to his company having an A+ rating from the BBB. However, the First Panel finds the BBB website printout in Exhibit 6 to be confusing and not very helpful to support Mr. Atkinson's assertion that his company has an A+ rating. In any event, this kind of information has very little weight in the context of the findings that the Tribunal must make in this case.

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e) Other Issues

[125] Some homeowner complaints about the Applicants were not related to the advertising. For example, one person in 2013 said they felt pressured into doing disconnection when it caused water damage (Exhibit 1, page 45). Another one had trouble getting their 25% deposit back in 2014, after no work had been done for a month; the deposit was returned after MLS intervened (Exhibit 1, page 80).

[126] A third homeowner complained in 2014 about a backwater valve installation that led to unsatisfactory and incomplete work, including removal of basement toilet and broken floor (Exhibit 1, page 85). This appears to be the incident that ultimately led to the by-law conviction against the company in 2015 for not having a licensed master plumber.

[127] A fourth homeowner complained in 2014 (Exhibit 1, page 126) about initially being denied a subsidy, and also about some shoddy work with the drain being submerged in water.

[128] MLS counsel did not appear to base its case on any concerns about the quality of the work done by the Applicants, or about the Applicants acting fraudulently by taking money without doing the promised work. These few complaints from over three years ago would likely not be enough to have much impact on the licences in this case, especially when taken in the context of perhaps 2,000 jobs done by the Applicants. That said, these complaints are in evidence and to a limited extent they provide further cause to question the Applicants' honesty and integrity in carrying out licensed activities.

[129] There was also some evidence about subsidy applications that were not approved. Ms. Martin testified about a list of subsidy applications with invoices from Regional Stormwater Management that were denied (Exhibit 1, pages 67 – 68).

[130] In the view of the First Panel, the more compelling homeowner evidence in the MLS Report are the records about various complaints about the Applicants' door hangers and flyers being misleading, already discussed.

[131] The First Panel also notes the following:

1. December 7, 2017: This matter was scheduled for hearing, following an adjournment on September 28, 2017. Mr. Atkinson attended late, and wished to file a great deal of material, none of which he had provided to the City in advance. The Tribunal panel on December 7, 2017 adjourned the matter on two conditions (Exhibit 1, page 303). First, the start time for the next Tribunal date (February 1, 2018) was set peremptory on Mr. Atkinson. Second, the Tribunal ordered Mr. Atkinson to file all material he wished to rely on with the Tribunal office by December 29, 2017. Mr. Atkinson failed to comply with this order. He filed his materials on January 2, 2018.
2. February 1, 2018: Mr. Atkinson failed to comply with the Tribunal's peremptory order on him to attend by 9:30 a.m. The hearing commenced late.

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3. June 14, 2018: On the continuation date of the hearing, Mr. Atkinson attended late.
4. July 19, 2018: On this date set for submissions, Mr. Atkinson attended late and proceedings scheduled for 8:30 a.m. did not commence until after 9:00 a.m.

FINDING AND ORDER

[132] On all of the evidence, the First Panel is satisfied that there are reasonable grounds to believe that Mr. Atkinson and his company have not and will not carry on their trade, business or occupation “in accordance with law and with integrity and honesty.”

[133] The Tribunal orders that a second hearing be convened before a newly constituted panel of three members, to consider and decide the appropriate penalty in this matter.

Originally Signed

Gary Yee, Hearing Panel Chair

Originally Signed

Moira Calderwood, Member concurring

Reference: Minute No. 25/18, 55/18, 97/18 and 126/18

Date Signed: November 5, 2018