

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **BRENT ALBERT BERTRAND**, a suspended member of the Institute, under **Rule 203.2(b)** of the Rules of Professional Conduct, as amended.

TO: Mr. Brent Albert Bertrand

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision and Order made November 19, 2010)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on November 19, 2010, to hear a charge of professional misconduct brought by the Professional Conduct Committee against Brent Albert Bertrand, a member of the Institute.

2. Ms. Alexandra Hersak appeared on behalf of the Professional Conduct Committee. Mr. Bertrand attended, and was represented by counsel, Ms. B. Petrouchinova. Glenn Stuart attended the hearing as counsel to the Discipline Committee.

3. The decision of the panel was made known at the conclusion of the hearing on November 19, 2010, and the written Decision and Order sent to the parties on November 25, 2010. These reasons, given pursuant to Bylaw 574, contain the charge, the decision, the order, and the reasons of the panel for its decision and order.

CHARGE

4. The following charge was laid against Mr. Bertrand by the Professional Conduct Committee on August 9, 2010:

THAT the said Brent A. Bertrand, in or about the period May 1, 2010 to July 20, 2010, failed to co-operate with officers, servants or agents of the Institute who have been appointed to arrange or conduct an investigation on behalf of the Professional Conduct Committee, contrary to Rule 203.2(b) of the Rules of Professional Conduct.

PLEA

5. Mr. Bertrand entered a plea of not guilty to the charge.

EVIDENCE

6. The Professional Conduct Committee called as a witness Karen Ho James, CA, the

investigator retained in this matter. The Professional Conduct Committee filed a Document Brief (Exhibit 4) to which Ms. Ho James referred in the course of her evidence. Mr. Bertrand testified on his own behalf. The facts in this matter are substantially uncontested.

7. A complaint was received from the current property management of a condominium corporation alleging that Mr. Bertrand, in his former capacity as manager of the corporation, had defrauded his clients and falsified documents. Criminal charges have been laid against Mr. Bertrand.

8. The Professional Conduct Committee contacted Mr. Bertrand and attempted, on several occasions, to set up an interview with the investigator. Mr. Bertrand declined to discuss the matter or provide the requested documentation until the criminal proceedings were completed.

9. Mr. Bertrand was advised that, regardless of any other proceedings, members have a duty to respond to and cooperate with investigations of the Professional Conduct Committee. An interview was set up with the investigator, and Mr. Bertrand was provided with a list of documents to bring in connection with the Professional Conduct Committee investigation.

10. After the interview date was changed at Mr. Bertrand's request, his counsel again advised that, since the Professional Conduct Committee investigation mirrored the criminal proceedings, the appointment should be cancelled until the completion of the criminal investigation.

11. Mr. Bertrand and his counsel were again advised of his duty to respond and cooperate, noting that the existence of outstanding criminal charges for fraud did not preclude him from discussing the matter with his regulator.

12. Mr. Bertrand did not participate in the investigation or provide the requested documentation.

13. Mr. Bertrand testified that he had corresponded with the Professional Conduct Committee and had tried to explain that the timing of the investigation and the criminal proceedings prevented him from replying.

14. In light of the criminal charges, Mr. Bertrand stated that, if forced to, he would provide the information to the investigator, although it would be self-incriminating if made available to the alleged victims and the Crown. Mr. Bertrand noted that other bodies wait until criminal proceedings have been resolved and that is why he had not provided the information.

SUBMISSIONS ON FINDING

15. Mr. Bertrand's position is that he had responded to the investigator but did not want to inadvertently provide information that could be used against him in the criminal proceedings. He did not attend interviews arranged by the investigator. If there had been no criminal matter, he would have cooperated.

16. Ms. Hersak provided a Brief of Authorities of recent, similar cases (*Bailey, Croucher, Presta, Carson and Lis*) and also referenced *R. v Wigglesworth*, pointing out that members must abide by the rules of the governing body, the Institute. The *Canadian Charter of Rights and Freedoms* would only take effect if there were a true penal consequence in concurrent criminal proceedings, not an investigation by a professional body.

17. Ms. Petrouchinova submitted that Mr. Bertrand had responded to the investigator, voiced his concerns that information obtained in the course of the investigation could make its way to the complainants and had requested that this matter be deferred until after the criminal proceedings.

FINDING AND DECISION

18. The Rules of Professional Conduct and, in particular, Rule 203.2(b), require Mr. Bertrand to cooperate with an investigation on behalf of the Professional Conduct Committee. Section 49 of *The Chartered Accountants Act, 2010* sets out the powers of the investigator in conducting an investigation. Failure to cooperate in an investigation is professional misconduct.

19. After deliberating, the panel made the following decision:

THAT having seen, heard and considered the evidence, the Discipline Committee finds Brent Albert Bertrand guilty of the charge.

REASONS FOR FINDING

20. As indicated above, the main facts in this matter are not in dispute. There are two issues to be determined: whether Mr. Bertrand co-operated; and, if not, whether his explanation is such that his lack of co-operation does not constitute professional misconduct.

21. The duty of a member to cooperate in an investigation clearly requires that the member's actions be proactive, or at least active, in working with Ms. Ho James in furthering her investigation to determine if there were reasons to conclude that any Rules of Professional Conduct had been breached. Mr. Bertrand's actions fell far short of his cooperating. Mr. Bertrand's attendance at the June 7, 2010 meeting with Ms. Ho James, and various emails and correspondence, cannot be construed as evidence of co-operation as he provided no information that would allow Ms. Ho-James to further her investigation or to conclude that it should not continue.

22. The panel considered the argument that Mr. Bertrand should be allowed to determine when he would cooperate and if he decided that the timing for his cooperation as requested by Professional Conduct Committee was not appropriate that he should then be allowed to defer his cooperation, and still be considered to be cooperating. While the panel appreciates Mr. Bertrand's current situation and the potential impact on him personally, to allow such an argument to stand would mean that the Institute would not be able to regulate its member or protect the public on a timely basis as is its mandate.

23. Ms. Ho James had a responsibility to investigate on behalf of Professional Conduct Committee. Without that investigation the Professional Conduct Committee could not determine what, if any, action might be required to discipline the member or protect the public. A successful investigation is often, and an efficient investigation would generally be, dependent on a member cooperating. Allowing a member to defer his or her cooperation is tantamount to allowing a member not to cooperate with Professional Conduct Committee, and this is contrary to Rule 203.2(b) of the Rules of Professional Conduct.

24. Ms. Petrouchinova's contention that the public would not be concerned by Mr. Bertrand's action when the facts are known is a position without an evidentiary basis. Likewise, the

Professional Conduct Committee would need to investigate to determine what risk the public may be subject to. In order to complete its mandate to regulate its members in the public interest, the Institute, through the Professional Conduct Committee, must be empowered to complete its investigation into complaints against its members on a timely basis.

25. The evidence, on balance, supports the charge against Mr. Bertrand under Rule 203.2(b) of failing to cooperate with an investigation. While certain of the information Mr. Bertrand was asked for may not be available to him to provide to Ms. Ho James, significant data or documents could have been provided, and, under Rule 203.2(b) had to be provided as required by the Professional Conduct Committee, not as determined by Mr. Bertrand in his own interests. Mr. Bertrand's inaction was misconduct.

SANCTION

26. Neither party called evidence on sanction.

27. Ms. Hersak, on behalf of the Professional Conduct Committee, submitted that an appropriate sanction in this matter would be: a written reprimand; a fine in the amount of \$5,000; an order that Mr. Bertrand cooperate with the Professional Conduct Committee investigation by December 10, 2010; and the usual order with respect to publicity. It also sought 50% of the costs of the investigation and hearing in the amount of \$6,500, and filed a Costs Outline (Exhibit 5).

28. Ms. Hersak submitted that refusal to cooperate in an investigation, even on the advice of counsel, shows egregious and willful conduct. Mr. Bertrand had been advised by the investigator that, regardless of the criminal proceedings, he had a duty to cooperate and failure to do so would result in charges. The Professional Conduct Committee cannot carry out its mandate if members do not cooperate. The investigator had been attempting to meet with and interview Mr. Bertrand for five months concerning serious allegations.

29. Ms. Hersak also noted in mitigation that Mr. Bertrand had no discipline history.

30. Ms. Petrouchinova, on behalf of Mr. Bertrand, submitted that her client did make an effort to communicate with the investigator and did not exhibit a complete disregard for the rules. Mr. Bertrand is facing difficult personal and financial circumstances due to the pending criminal trial. While Mr. Bertrand took no issue with the imposition of a fine or the payment of costs, his counsel asked the panel to consider a fine of \$1,500 rather than \$5,000, and costs in the \$3,000 to \$4,000 range rather than \$6,500 as requested by the Professional Conduct Committee.

ORDER

31. After deliberating, the panel made the following order:

IT IS ORDERED in respect of the charge:

1. THAT Mr. Bertrand be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Bertrand be and he is hereby fined the sum of \$3,000 to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Bertrand cooperate with the Professional Conduct Committee investigation by December 10, 2010.
4. THAT notice of this Decision and Order, disclosing Mr. Bertrand's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
 - (a) to all members of the Institute; and
 - (b) to all provincial institutes/Ordre;and shall be made available to the public.

IT IS FURTHER ORDERED:

5. THAT Mr. Bertrand be and he is hereby charged costs fixed at \$4,000 to be remitted to the Institute within nine (9) months from the date this Decision and Order becomes final under the bylaws.

AND IT IS FURTHER ORDERED:

6. THAT in the event Mr. Bertrand fails to comply with any of the requirements of this Order, he shall be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within forty-five (45) days from the date of his suspension, and in the event he does not comply within the forty-five (45) day period, he shall be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Bertrand's practice, employment and/or residence. All costs associated with the publication shall be borne by Mr. Bertrand and shall be in addition to any other costs ordered by the committee.

REASONS FOR SANCTION

32. Mr. Bertrand's misconduct requires sanctions that would do three things: first, provide Mr. Bertrand with an opportunity to demonstrate that he is cooperative; second, specifically deter Mr. Bertrand from similar misconduct in the future; and third, generally deter other members from similar misconduct.
33. The term of the order requiring Mr. Bertrand to provide the requested documents and explanations by December 10, 2010 gives Mr. Bertrand an opportunity to demonstrate that he is cooperative.
34. The reprimand was imposed to stress to Mr. Bertrand that his conduct was unacceptable.
35. The fine is intended to specifically deter Mr. Bertrand from repeating his misconduct and to deter other members from similar misconduct. The appropriate quantum, taking into account Mr. Bertrand's personal circumstances, is \$3,000 and Mr. Bertrand should be given six months to pay it.

36. The purpose of general deterrence will not be achieved if the profession does not know of the Decision and Order. The publication of the notice is also intended to demonstrate to the profession and the public that the Institute takes its role as the regulator of the chartered accounting profession seriously. There was no suggestion that there were rare and unusual circumstances which would justify withholding Mr. Bertrand's name from the notice.

37. The bylaws require that notice be given to the public by publication in a newspaper where Mr. Bertrand resides or practises if he is expelled from membership.

38. The order for costs is made to partially indemnify the Institute for the costs of the investigation, prosecution, and hearing. Mr. Bertrand's misconduct was the sole reason the Institute incurred the costs set out in the Costs Outline, which the panel found to be reasonable. It is not appropriate that the membership as a whole should bear all of these costs; rather it is appropriate that Mr. Bertrand reimburse the Institute for 50% of these costs. The panel accepts and supports the concept of partial indemnification; however, the panel determined that the amount of \$4,000 is more equitable in these circumstances. The panel is also aware of the financial position of Mr. Bertrand and consequently concluded these costs should be paid within nine months.

DATED AT TORONTO THIS 31st DAY OF MARCH, 2011
BY ORDER OF THE DISCIPLINE COMMITTEE

R.J. ADAMKOWSKI, CA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

B.G. ALLENDORF, CA
R.H. CARRINGTON (PUBLIC REPRESENTATIVE)
S.J. HOLTOM, CA