

Brian David Mulligan: Summary, as Published in *CheckMark*

Brian David Mulligan, of Nepean, was found guilty of two charges under Rule 201.1 of failing to maintain the good reputation of the profession. Mr. Mulligan was retained to make the applicable tax filings for the estate of a deceased client and for the estate of the deceased client's mother. He failed to complete the estate work until after a complaint had been filed and the professional conduct committee had commenced its investigation. It took Mr. Mulligan more than three years to complete the work on one estate, and more than seven years to complete the work on the other estate. He eventually produced and delivered the required documentation, and the estate returns were filed. Mr. Mulligan paid the outstanding penalties and interest to the Canada Customs and Revenue Agency, and agreed to pay any future penalties and interest assessed. The professional conduct committee's investigation revealed that, though untimely, the estate returns prepared by Mr. Mulligan were correct, and that the untimeliness demonstrated by the member in this case was not a systemic problem in his practice. Mr. Mulligan was fined \$2,500 and charged costs of \$7,000.

CHARGE(S) LAID re Brian David Mulligan

The Professional Conduct Committee hereby makes the following charges against Brian David Mulligan, CA, a member of the Institute:

1. THAT the said Brian David Mulligan, in or about the period December 1998 through August, 2002, while engaged as the accountant for the Estate of Dorothy McGurk, failed to conduct himself in a manner that will maintain the good reputation of the profession, contrary to Rule 201.1 of the rules of professional conduct, in that he failed to carry out his professional services in a timely manner.
2. THAT the said Brian David Mulligan, in or about the period February 1996 through March 2003, while engaged as the accountant of the Estate of Ronald McGurk, failed to conduct himself in a manner that will maintain the good reputation of the profession, contrary to Rule 201.1 of the rules of professional conduct, in that he failed to carry out his professional services in a timely manner.

Dated at London, Ontario this 3rd day of April 2003.

G.W. MILLS, CA - DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Brian David Mulligan

DECISION AND ORDER IN THE MATTER OF: Charges against **BRIAN DAVID MULLIGAN, CA**, a member of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE AUGUST 21, 2003

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1 and 2, the Discipline Committee finds Brian David Mulligan guilty of charges Nos. 1 and 2.

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Mulligan be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Mulligan be and he is hereby fined the sum of \$2,500, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Mulligan be and he is hereby charged costs fixed at \$7,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.
4. THAT notice of this Decision and Order, disclosing Mr. Mulligan'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 the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
5. THAT in the event Mr. Mulligan fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within six (6) months from the date of his suspension, and in the event he does not comply within this six (6) month period, he shall thereupon 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 the *Ottawa Citizen*.

DATED AT TORONTO THIS 22ND DAY OF AUGUST, 2003
BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY – DISCIPLINE COMMITTEE

DISCIPLINE COMMITTEE re Brian David Mulligan

REASONS FOR DECISION AND ORDER IN THE MATTER OF: Charges against **BRIAN DAVID MULLIGAN, CA**, a member of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

REASONS FOR THE DECISION AND ORDER MADE AUGUST 21, 2003

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on August 21, 2003 to hear charges brought by the professional conduct committee against Brian David Mulligan, a member of the Institute.
2. Ms. Barbara Glendinning represented the professional conduct committee, and she was accompanied by Mr. Bruce Armstrong, CA, the investigator appointed by the professional conduct committee.
3. Mr. Mulligan appeared on his own behalf and was not represented by counsel. He confirmed for the record that he understood that he had the right to be represented by legal counsel at the hearing.
4. The decision and order of the panel were announced at the hearing on August 21, 2003. These reasons, given in writing pursuant to Bylaw 574, set out the charges, the decision and the order as well as the reasons of the discipline committee.

THE CHARGES AND THE PLEA

5. The Affidavit of Service of the Notice of Assignment Hearing and a letter from Mr. Mulligan to Ms. Glendinning were filed as Exhibits 1 and 2, respectively, at the assignment hearing of May 6, 2003. The Notice of Hearing and the charges were marked as Exhibits 3 and 4, respectively. The charges laid by the professional conduct committee read as follows:
 1. THAT the said Brian David Mulligan, in or about the period December 1998 through August, 2002, while engaged as the accountant for the Estate of Dorothy McGurk, failed to conduct himself in a manner that will maintain the good reputation of the profession, contrary to Rule 201.1 of the rules of professional conduct, in that he failed to carry out his professional services in a timely manner.
 2. THAT the said Brian David Mulligan, in or about the period February 1996 through March 2003, while engaged as the accountant of the Estate of Ronald McGurk, failed to conduct himself in a manner that will maintain the good reputation of the profession, contrary to Rule 201.1 of the rules of professional conduct, in that he failed to carry out his professional services in a timely manner.
6. Mr. Mulligan pled guilty to each of the charges, and confirmed that he understood he could be found guilty by reason of his plea alone.

DECISION ON THE CHARGES

7. Ms. Glendinning filed an agreed statement of facts and document brief which were marked as Exhibits 5 and 6, respectively. She then took the panel through the agreed statement of facts, which are fairly simple.

8. The two charges both relate to Mr. Mulligan's failure to provide professional services to the McGurk family in a timely manner. The McGurk family filed a complaint with respect to both matters in July 2002.

9. The first charge relates to tax filings for the estate of Dorothy Brownell McGurk. Mrs. McGurk passed away in December 1998, and Mr. Mulligan was retained to make the applicable tax filings. In early 2002, the filings for the estate had still not been made, and Mrs. McGurk's family requested that Mr. Mulligan return the applicable tax documents to them so that they could engage another accountant. In May 2002, the completed but unfiled estate returns for 1999, 2000 and 2001 were handed over by Mr. Mulligan. However, the underlying documents were not returned until August 2002 following a request from a solicitor. The McGurk family had the returns reviewed by another accountant and then filed them with the Canada Customs and Revenue Agency without amendment by the end of August 2002. The penalties and interest charged were paid by Mr. Mulligan, who has also agreed to pay any other penalties and interest charged in the future.

10. The second charge relates to tax filings for the estate of Ronald McGurk, who passed away in December 1995. Mr. Mulligan was retained to make the applicable tax filings. Despite repeated requests from the McGurk family, the completed tax filings for his estate were not made until the spring of 2003.

11. After deliberating, the panel concluded that there was no doubt that the charges against Mr. Mulligan had been proven, and that his failure to provide the services he had agreed to provide in a timely manner constituted professional misconduct. When the hearing reconvened, the chair read the following decision into the record:

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1 and 2, the Discipline Committee finds Brian David Mulligan guilty of charges Nos. 1 and 2.

ORDER AS TO SANCTION

12. The professional conduct committee did not call evidence with respect to sanction, but Ms. Glendinning made submissions and set out the order requested by the professional conduct committee.

13. The professional conduct committee requested the following sanctions: a reprimand, a fine in the range of \$2,500 to \$3,000, costs in the amount of \$10,270, and the usual order as to notice.

14. Ms. Glendinning submitted that the fine was required as both a specific and a general deterrent, and that the amount suggested would be significant for a sole practitioner with a small practice. She also submitted that the reprimand would be a specific deterrent.

15. She listed the aggravating factors in this case as:

- the lengthy period of time it took Mr. Mulligan to complete his professional obligations to the McGurk family;
- the fact that lack of timeliness was a problem present on more than one file; and
- the fact that Mr. Mulligan did nothing about either estate matter until after a complaint was made, and in the case of the Ronald McGurk matter did nothing even after receiving a letter from the professional conduct committee until contacted by the investigator.

16. She listed the mitigating factors in this case as follows:

- Mr. Mulligan cooperated in the investigation;
- he pleaded guilty at the first opportunity, which meant that out of province and out of town witnesses did not have to attend the hearing to testify;
- the tax filings as ultimately prepared by Mr. Mulligan were correct;
- there was no evidence that untimeliness was a systemic problem in Mr. Mulligan's practice, as no evidence of other issues of this type were found by the investigator;
- Mr. Mulligan apologized to the McGurk family; and
- he paid the applicable interest and penalties assessed against the McGurk family, and has undertaken to pay any future penalties that may be levied.

17. Ms. Glendinning also made submissions as to costs. She reviewed the amendments to the Institute bylaws that, together with the amendments to the *CA Act*, empower the discipline committee to order a member found guilty of professional misconduct to pay costs.

18. Ms. Glendinning referred to court cases which addressed the question of whether or not it was appropriate for a member of a professional self-governing body found guilty of professional misconduct to pay costs, and which also dealt with some of the factors which should be considered if an order for costs is made.

19. In the case of *Hoff v. Alberta Pharmaceutical Association*, referred to in the past discipline committee case of *Alan Weisbrod* filed by Ms. Glendinning, Justice Dea of the Alberta Court of Queen's Bench said the following in the last paragraph [*because the Weisbrod reference does say paragraph 25*] of the court's reasons:

As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting.

20. In the case of *Jaswal v. Newfoundland Medical Board*, also referred to in the *Weisbrod* decision, Justice Green of the Newfoundland Supreme Court outlined what he termed a non-exhaustive list of factors that should be considered when making an award of costs in circumstances such as these. In essence, Justice Green set out factors to help determine the reasonableness of steps taken by the prosecution in a case for which it was seeking a costs order from the tribunal. The factors he identified were the degree of success of the member in resisting any of the charges laid, the necessity for calling all the witnesses who were called and for incurring hearing expenses, the reasonable expectations of the prosecution prior to the hearing as to the outcome of the case and the necessity for calling certain witnesses and incurring certain expenses, whether the member cooperated in the investigation and hearing, and the financial circumstances of the member.

21. After deliberating, the hearing was reconvened and the chair set out on the record the essential terms of the order. The formal order was signed by the discipline committee secretary and sent to the parties on August 22, 2003. It reads:

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Mulligan be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Mulligan be and he is hereby fined the sum of \$2,500, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Mulligan be and he is hereby charged costs fixed at \$7,000, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.
4. THAT notice of this Decision and Order, disclosing Mr. Mulligan'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 the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.

5. THAT in the event Mr. Mulligan fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within six (6) months from the date of his suspension, and in the event he does not comply within this six (6) month period, he shall thereupon 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 the *Ottawa Citizen*.

Reprimand

22. The panel determined that a reprimand to Mr. Mulligan was necessary in order to stress to him the serious nature of his offence and the unacceptability of his conduct as a chartered accountant.

Fine

23. The panel concluded that a fine in the amount of \$2,500 was appropriate.

Costs

24. The panel concluded that it was appropriate that Mr. Mulligan bear some of the costs that resulted from his misconduct, but had difficulty with the quantum of the costs requested. We concluded that the factors the court in *Jaswal* said should be considered when making an award of costs required us to consider the reasonableness of the time taken to investigate the complaint. Mr. Mulligan acknowledged his misconduct from the outset of the investigation. The facts were straightforward. The departure from the required standard was so significant that it was obvious the failure to provide the services over the course of years, not just months, amounted to professional misconduct. Accordingly, we concluded that Mr. Mulligan ought not bear the entire amount of the costs requested in connection with the investigation.

25. Based on the information provided by Ms. Glendinning, the panel came to the conclusion that the amount of \$7,000, which would amount to a partial indemnity only, and not a substantial or full indemnity of the costs of the investigation and hearing, should be paid by Mr. Mulligan, and accordingly made that order.

DATED AT TORONTO THIS 24TH DAY OF NOVEMBER, 2003

BY ORDER OF THE DISCIPLINE COMMITTEE

M. BRIDGE, CA – CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

P.J. HOLT, CA
M.S. LEIDERMAN, CA
H.G. TARADAY, CA
N.C. AGARWAL (Public representative)