

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **DAVID E. SMITH, CA**, a member of the Institute, under **Rule 203.2(a)** of the Rules of Professional Conduct, as amended.

TO: Mr. David E. Smith, CA

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision and Order Made January 26, 2010)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario ("Institute") met on January 26, 2010, to hear a charge of professional misconduct brought by the Professional Conduct Committee against David E. Smith, CA, a member of the Institute.

2. The Professional Conduct Committee was represented by Alexandra Hersak. Mr. Smith attended and was unrepresented. He acknowledged that he understood he was entitled to be represented by counsel, and that he was waiving that right.

3. The decision of the panel was made known at the conclusion of the hearing on January 26, 2010. The written Decision and Order was sent to the parties on January 28, 2010. These reasons, given pursuant to Bylaw 574, include 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. Smith by the Professional Conduct Committee on October 28, 2009:

1. THAT the said David E. Smith, in or about the period June 19, 2009 to October 6, 2009, failed to co-operate with officers, servants or agents of the Institute who have been appointed to arrange or conduct a practice inspection, contrary to Rule 203.2(a) of the Rules of Professional Conduct.

THE PLEA

5. Mr. Smith entered a plea of guilty to the charge.

THE PROCEEDINGS

6. Ms. Hersak filed two Affidavits, both sworn on January 11, 2010. The Affidavits and the exhibits attached were included in a document brief entitled Affidavits January 2010(Exhibit 2). One Affidavit was sworn by Grant Dickson, FCA, the Director of Practice Inspection. The other Affidavit was sworn by Tatiana Rabinovitch, CA, the Associate Director of Standards Enforcement. Ms. Hersak reviewed the Affidavits and the exhibits to the Affidavits, particularly the letters sent from the Institute to Mr. Smith and Mr. Smith's letter to the Institute dated July 15, 2009. Ms. Hersak did not present any other evidence with respect to the charge.

7. Mr. Smith did not call evidence with respect to the charge. He did make a statement. Ms. Hersak made submissions.

FACTS

8. The evidence was clear and unequivocal, and Mr. Smith confirmed the essential points made by Ms. Hersak. The relevant facts, as found by the panel, are set out in the following paragraphs.

9. On January 30, 2009, Mr. Dickson wrote to Mr. Smith advising him that his practice had been chosen to be practice inspected and asked him to provide the Institute with the appropriate forms. While Mr. Smith did not complete the forms within the time requested in the letter of January 30, 2009, he did submit the required forms later in response to a further letter sent by Mr. Dickson on March 13, 2009.

10. On May 1, 2009, Dennis Martinez, Coordinator, Practice Inspection, wrote to Mr. Smith explaining that his practice inspection would be conducted at the Institute. Mr. Martinez requested that Mr. Smith send to the Institute, on May 28, 2009, a copy of his Quality Control Manual, four specified client working paper files, and copies of his Continuing Professional Development (CPD) logs.

11. Mr. Smith did not respond by the requested deadline. Mr. Dickson wrote to him again on June 4, 2009, requesting the relevant documents and files be sent to the Institute on or before June 19, 2009. When Mr. Smith did not respond as requested, Mr. Dickson made a complaint to the Professional Conduct Committee.

12. Ms. Rabinovitch wrote to Mr. Smith on July 6, 2009. Mr. Smith replied to Ms. Rabinovitch by a letter dated July 15, 2009, stating that he had taken time off work, that he would be back in the office on July 20, 2009, and that the files would be delivered no later than the end of the week ending July 24, 2009.

13. The required files and documents were not sent. Ms. Rabinovitch wrote to Mr. Smith again, on August 11, 2009, advising him that the Professional Conduct Committee would be proceeding with its investigation and advising him that he had 14 days to provide further comments or other information.

14. Mr. Smith acknowledged that he had received the correspondence but had not sent the documents and files as requested. He explained that he was concerned that the Institute would keep the files when he needed them. He also acknowledged that he found risk based approach a daunting task and seemed unsure that the standard of the profession with respect to risk assessment had been settled. Mr. Smith acknowledged, in response to a question from a

member of the panel, that he had not raised these concerns with Practice Inspection at the relevant time. Mr. Smith also acknowledged that he still had not provided the required documents and files at the time of the hearing.

DECISION

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

THAT having heard the plea of guilty to the charge, and having seen and considered the evidence, the Discipline Committee finds David Edward Smith guilty of the charge.

REASONS FOR THE DECISION

16. In light of the relevant facts which are set out above, the panel concluded that the charge had been proven and that Mr. Smith's failure to cooperate with Practice Inspection and Standards Enforcement constituted professional misconduct. Accordingly, the panel found him guilty of the charge.

SANCTION

17. Neither party called evidence with respect to sanction. Ms. Hersak made submissions. Mr. Smith made a brief statement to the panel.

18. The Professional Conduct Committee requested an order which included the following terms: a reprimand in writing by the Chair; a fine of \$3,000; an order that Mr. Smith cooperate with Practice Inspection within 10 days of the Decision and Order becoming final, and in the event he failed to do so that he should be suspended for a period of time, and if he still did not cooperate that he should be expelled; and the usual order with respect to publication. The Professional Conduct Committee also asked for an order requiring Mr. Smith to partially reimburse the Institute for the costs of the proceedings.

19. Ms. Hersak submitted that the aggravating factor in this case was the length of time Mr. Smith failed to respond, despite deadlines being extended and his letter of July 15, 2009, saying that he would provide the required documents by a particular date. Ms. Hersak acknowledged that the mitigating factors included the fact that Mr. Smith had no previous involvement with the discipline process and that he now appeared willing to cooperate, although at the date of the hearing he had still not provided the requested documents.

20. Ms. Hersak submitted that the reprimand, the fine and the notice of the order were required to specifically deter Mr. Smith from failing to cooperate in the future. She also submitted that the fine and notice were required as a general deterrent to dissuade other members from similar misconduct. Ms. Hersak noted that the number of incidences of failure to cooperate with Practice Inspection had increased over the past several months.

21. Ms. Hersak filed a Costs Outline (Exhibit 3) which set out the costs of the hearing, which was estimated to take one day, as \$5,657.05. She acknowledged that the hearing would not last a full day and said that the Professional Conduct Committee requested a partial reimbursement in the amount of \$2,500.

22. Ms. Hersak referred to the cases of *Carson* (2008), *Michaud* (2009), *Lo* (2009), *Zaba* (2009), *Lis* (2010) as precedents which supported the terms of the order requested. In particular, she submitted that the requested fine was at the lower end of the range of fines which would be appropriate.

23. Ms. Hersak submitted that a term in the Order requiring Mr. Smith to cooperate would provide Mr. Smith with the opportunity to show that he was both willing and able to comply with the regulatory requirements of the Institute, and enable Practice Inspection to carry out its mandate.

ORDER

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

IT IS ORDERED in respect of the charge:

1. THAT Mr. Smith be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Smith be and he is hereby fined the sum of \$3,000 to be remitted to the Institute within four (4) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Smith cooperate by providing to the Director of Practice Inspection: the Quality Control Manual; the client working paper files and Continuing Professional Development (CPD) logs, all of which are referred to in the letter to Mr. Smith from the Coordinator of Practice Inspection dated May 1, 2009, within ten (10) days of the date this Decision and Order becomes final under the bylaws.
4. THAT notice of this Decision and Order, disclosing Mr. Smith's name, be given after this Decision and Order becomes final under the bylaws:
 - (a) to all members of the Institute;
 - (b) to the Public Accountants Council for the Province of Ontario;
 - (c) to all provincial institutes/Ordre,and shall be made available to the public.

IT IS FURTHER ORDERED:

5. THAT Mr. Smith be and he is hereby charged costs fixed at \$1,800 to be remitted to the Institute within four (4) months from the date this Decision and Order becomes final under the bylaws.

AND IT IS FURTHER ORDERED:

6. THAT in the event Mr. Smith 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 and his public accounting licence shall thereupon be suspended until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within the three month period, he shall thereupon be expelled from membership in the Institute and his licence shall thereupon be

revoked, and notice of his expulsion and licence suspension and revocation, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Smith's practice. All costs associated with the publication shall be borne by Mr. Smith and shall be in addition to any other costs ordered by the committee.

REASONS FOR THE ORDER

25. The practice inspection program was established and is continued in the public interest to ensure that members practising public accounting do so in accordance with the standards of the profession. Mr. Smith's refusal to cooperate has delayed his practice inspection for one year. It is apparent that at least with respect to risk assessment there is a need to ensure that Mr. Smith understood and applied the standard of the profession. His refusal to cooperate cannot be condoned.

Reprimand

26. The panel ordered that Mr. Smith be reprimanded to emphasize to him the seriousness of his misconduct and the fact that it was unacceptable.

Fine

27. The panel imposed a fine both as a specific deterrent to Mr. Smith and as a general deterrent to other members to dissuade them from similar misconduct. The panel concluded that the amount of the fine should be \$3,000 and that Mr. Smith should be given four months, from the time the Decision and Order becomes final, to pay the fine.

Cooperation

28. The provision in the Order requiring Mr. Smith to cooperate within 10 days of the Order becoming final gives Mr. Smith the opportunity to demonstrate that he can comply with the regulatory requirements of the Institute. If he does so it will enable Practice Inspection to carry out its mandate. The consequences for failure to comply with the terms of the Order are set out below.

Notice

29. Publishing the names of members found guilty of professional misconduct is often the single most significant sanction that may be imposed on a member and is often the most effective general deterrent. As the notice serves both to inform the membership at large and offers a measure of protection to the public, it is only in the most exceptional circumstances that privacy considerations outweigh the need to inform both the membership and the public. No such circumstances were present in this case and, accordingly, the usual order of publication was made.

Suspension and Expulsion for failure to comply

30. An order of the Discipline Committee which did not provide for consequences in the event a member fails to comply with terms of the order would be meaningless. Accordingly, as is usual, this order provides that if the member fails to comply with any of the terms of the order, he shall first be suspended, and if he still does not comply, he will be expelled.

31. This is particularly appropriate with respect to the term of the Order requiring Mr. Smith to cooperate with Practice Inspection within 10 days of the Order becoming final. If he cannot comply with the regulatory requirements of the Institute he should not enjoy the privileges of membership. If he is suspended his licence to practise public accounting will also be suspended. If he is expelled from membership his public accounting licence will be revoked. If his public accounting licence is suspended or if he is expelled and his public accounting licence is revoked, notice of these facts shall be given on the Institute's website and in a newspaper or newspapers distributed in the area where he practised. The costs of the publication, as required by the bylaws, shall be borne by the member.

Costs

32. Mr. Smith, the member responsible for the expense of the investigation and hearing, should himself assume part of the costs of these proceedings. The costs requested were approximately half of the actual cost of the investigation and hearing. In consideration of the fact that the hearing did not last a full day, the panel concluded that Mr. Smith should pay \$1,800 as a partial indemnity and, as with the fine, that he should be given four months, from the time the Decision and Order became final, to pay the costs.

DATED AT TORONTO THIS 23RD DAY OF MARCH, 2010
BY ORDER OF THE DISCIPLINE COMMITTEE

J.A. CULLEMORE, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

P.A. BUSCH, CA
R.H. CARRINGTON (PUBLIC REPRESENTATIVE)
A.R. DAVIDSON, CA