

Edward Le Marchand Foster: Summary, as Published in *CheckMark*

Edward Le Marchand Foster, of Oakville, was found guilty of a charge under Rule 201.1 of failing to maintain the good reputation of the profession and its ability to serve the public interest, and a charge under Rule 213 of lending himself or his name or services to an unlawful activity. The charges arose from Mr. Foster's conviction for income tax evasion under the Income Tax Act, both personally and on behalf of his company. He was fined \$5,000 and expelled from the Institute. Mr. Foster's appeal of the discipline committee's decision was dismissed by the appeal committee.

CHARGE(S) LAID re Edward Le Marchand Foster

The Professional Conduct Committee hereby makes the following charges against Edward L. Foster, CA, a member of the Institute:

1. THAT, the said Edward L. Foster, on or about May 6, 1997, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he was convicted by the Ontario Court of Justice (Provincial Division) of a criminal offence, namely that:
 - between the 31st day of December 1989, and the 1st day of May, 1994, in the Town of Oakville and elsewhere in the Province of Ontario committed an offence contrary to the provisions of paragraph 239(1)(d) of the *Income Tax Act* by failing to report income in respect of the 1990, 1991, 1992 and 1993 T-1 Returns of Income in the total amount of \$333,230.32 and did thereby evade the payment of Federal Income Taxes in the amount of \$83,921.97 as imposed by the *Income Tax Act*, R.S.C. 1952 Chapter 148 as amended,

contrary to Rule 201.1 of the rules of professional conduct.
2. THAT, the said Edward L. Foster, between the 30th day of April 1990 and the 31st day of July 1994, as officer, director or agent of LeMarchand Foster Consultants Inc., participated with LeMarchand Foster Consultants Inc. in failing to report income and claiming false operating expenses in respect of its 1991, 1992, and 1993 T-2 Returns of Income in the total amount of \$133,859.81, which caused LeMarchand Foster Consultants Inc. to evade the payment of Federal Income Taxes in the amount of \$17,000.79 as imposed by the *Income Tax Act*, R.S.C. 1985 Chapter 1 (5th) Supp) as amended, and did thereby lend himself or his name or services to an unlawful activity, contrary to Rule 213 of the rules of professional conduct.

Dated at this day of , 1997.

JENNIFER L. FISHER, FCA – CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Edward Le Marchand Foster

DECISION AND ORDER IN THE MATTER OF: Charges against **EDWARD LE MARCHAND FOSTER, CA**, a member of the Institute, under **Rules 201.1 and 213** of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE AUGUST 14, 1997

DECISION

THAT, having seen and considered the evidence, the Discipline Committee finds Edward Le Marchand Foster guilty of charges No. 1 and 2.

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Foster be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Foster be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Foster be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Foster's name, be given after this Decision and Order becomes final under the bylaws:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants and the Ordre des Comptables Agréé du Quebec;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The Globe and Mail*.
5. THAT Mr. Foster surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws.

DATED AT TORONTO THIS 25TH DAY OF AUGUST 1997
BY ORDER OF THE DISCIPLINE COMMITTEE

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

DISCIPLINE COMMITTEE re Edward Le Marchand Foster

REASONS FOR THE DECISION AND ORDER IN THE MATTER OF: Charges against **EDWARD LE MARCHAND FOSTER, CA**, a member of the Institute, under **Rules 201.1 and 213** of the Rules of Professional Conduct, as amended.

REASONS FOR THE DECISION AND ORDER MADE AUGUST 14, 1997

This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on August 14, 1997 to hear a charge brought by the professional conduct committee against Mr. Edward Le Marchand Foster, CA. Mr. Foster was charged with failing to maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the rules of professional conduct, arising from his conviction for evading the payment of federal income taxes, both on his own behalf and on behalf of his consulting firm, Le Marchand Foster Consultants Inc. Upon the application of the professional conduct committee, and with Mr. Foster's agreement, the charge before the discipline committee was amended, so that it became two charges. The second charge was that he lent himself to an unlawful activity, contrary to Rule 213. Mr. Foster pleaded guilty to the charges before the discipline committee, and indicated that he understood that he could be found guilty solely on the basis of his plea.

The professional conduct committee was represented by Ms. Deborah McPhadden. Mr. Foster represented himself. He confirmed for the record that he was aware of his right to be represented by counsel.

The determination and sanctions imposed were made known at the hearing. These are the written reasons for the decision and order that has already been distributed to the parties.

DECISION ON THE CHARGES

Facts

Counsel for the professional conduct committee filed a document brief that contained copies of the information against Mr. Foster and Le Marchand Foster Consultants Inc., a transcript of the guilty plea of Mr. Foster and Le Marchand Foster Consultants Inc. in the Ontario Court (Provincial Division), and an agreed statement of facts that was filed with the court. The originals of these documents were filed with the secretary to the discipline committee.

This evidence indicated that Mr. Foster had been found guilty, based on a submission agreed to by himself and the Crown, of evasion of income taxes, both personally and on behalf of Le Marchand Foster Consultants Inc. The offence, on Mr. Foster's own behalf, was failing to report income for the 1990, 1991, 1992 and 1993 fiscal years. The offence with regard to Le Marchand Foster Consultants Inc. was failing to report income and claiming false operating expenses for 1991, 1992 and 1993.

Conclusion

Where, as here, a member has been convicted of a criminal offence, such as tax evasion, there is a reputable presumption in Rule 201.2 that the member has failed to maintain the good

reputation of the profession and its ability to serve the public interest, in breach of Rule 201.1. No evidence was offered to rebut the presumption of guilt in this case. In fact,

- Mr. Foster entered a plea of guilty;
- the evidence established that he had been convicted of a criminal offence; and
- he did not call any evidence to attempt to rebut the presumption.

In addition, the evidence clearly established that the member had engaged in an unlawful activity. The panel therefore found Mr. Foster guilty of the charges laid.

SANCTIONS ORDER

In reaching its conclusions as to the appropriate sanctions in this case, the panel considered the principles of general deterrence, specific deterrence and rehabilitation.

On behalf of the professional conduct committee, Ms. McPhadden requested:

- a letter of reprimand;
- a fine of between \$7,500 and \$10,000;
- a two year suspension; and
- publication of the discipline committee's decision and order in *CheckMark*, and notification to the Ordre des comptables agréés du Québec.

Ms. McPhadden stated that the fine and suspension should be considered together, because the amount of the fine and the length of suspension being suggested were balanced to produce an effective deterrent sanction. She also stated that the precedents set by the 1991 decision of the discipline committee in the *G.D. White* case, and the 1997 decision in the *D.J. McConomy* case, were considered by the professional conduct committee to be relevant precedents, noting that the facts in those cases were very similar to those in this case.

Mr. Foster filed an exhibit which provided background information on himself, names of references, a curriculum vitae, his assessment of the basis for his defence in court, an analysis of adjustments to the income tax assessed and proposed revisions to those assessments, and an account of what he felt were areas of negotiation and error. He submitted that:

- He felt that not reporting income, claiming fictitious expenses on his company's returns, and claiming as deductible some expenses for which he was in fact reimbursed, constituted the only actions open to him, in light of the perceived unfairness of the *Income Tax Act*.
- He had been unfairly treated by Revenue Canada -- in that the tax law with regard to capital gains is different than the tax law with regard to stock options -- for no justifiable reason, in his opinion.
- He did not benefit from his actions, which were not, in any event, wilful.
- Circumstances had conspired to prevent him from selling his stock options at the time that he wished to do so.

- He has always been a responsible citizen.

After commencing its deliberations, the panel recalled Ms. McPhadden and Mr. Foster and requested submissions with respect to whether or not expulsion was an appropriate sanction to be considered in this case. Ms. McPhadden submitted that, in the view of the professional conduct committee, expulsion was within the range of sanctions that would be appropriate in a case like this, involving moral turpitude. She stated, however, that the professional conduct committee, after reviewing the precedents cited, had concluded that the recommended fine and suspension was the most appropriate sanction in this case. Mr. Foster reiterated his position that he was not responsible for the actions that had caused his conviction, and that, consequently, expulsion was not appropriate.

Conclusion

The panel decided that a letter of reprimand would be a specific deterrent, and serve to emphasize to Mr. Foster that moral turpitude is not acceptable in a chartered accountant. The panel ordered that such a letter be prepared by the chair of the panel and sent to Mr. Foster.

With respect to the issue of an expulsion and fine or a suspension and fine, the panel compared the misconduct and the attitude of the members in the precedent cases with the misconduct and attitude demonstrated in this case. The panel concluded that the misconduct in this case was more serious than that in the cases of Mr. White and Mr. McConomy. The facts that underlie the income tax evasion conviction, which supports the guilty finding under Rule 201.1, were more egregious in this case than in the other cases cited. In addition, there was a guilty finding made under Rule 213 in this case.

Mr. White evaded taxes, which would have otherwise been payable by his company, by claiming personal and other non-deductible expenses during a four year period. Mr. McConomy evaded taxes for both himself and his company by not filing any returns for a five year period. Neither individual created fictitious expenses, double counted deductions, or deducted expenses for which he had been reimbursed.

Neither Mr. White nor Mr. McConomy was charged with a failure to comply with Rule 213 of the rules of professional conduct.

The differences in conduct alone, however, were sufficient only to convince the panel that a more serious sanction should be ordered for Mr. Foster. The panel also heard Mr. Foster's explanations for his actions, and concluded that, despite his assertions to the contrary, the actions were taken willfully and knowingly. In addition, after listening to Mr. Foster, the panel did not have confidence:

- in his ability to distinguish between right and wrong;
- in his understanding of the difference between aggressive tax planning and unlawful actions; or
- that, faced with similar circumstances in the future, he would not repeat the actions that brought him before the discipline committee.

For these reasons, the panel ordered that Mr. Foster be expelled from membership in the Institute.

The panel took into account Ms. McPhadden's suggestion that a fine and suspension should be balanced against each other to achieve an appropriate sanction when it concluded that a fine of \$5,000 was appropriate to serve as both a general and a specific deterrent in this case. The panel believed that this amount, in concert with expulsion, would emphasize to Mr. Foster, and

other like-minded chartered accountants, the significant consequences of failing to uphold the good reputation of the profession and of participating in unlawful activities.

The principle of general deterrence is also served by publication of the panel's decision and order. The panel therefore ordered publication of its decision and order, including Mr. Foster's name. As is generally required in cases of expulsion, notice will include newspaper publication. In this case, the panel ordered publication in *The Globe and Mail*. In addition, since Mr. Foster is a member of the Ordre des comptables agréés du Québec, the panel concluded that its order should specify notice to the Ordre.

DATED AT TORONTO THIS DAY OF OCTOBER 1997
BY ORDER OF THE DISCIPLINE COMMITTEE

F.A. DROZD, FCA - CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL

E.R. ARCHIBALD, CA
H.B. BERNSTEIN, CA
M. BRIDGE, CA
S.W. SALTER, CA
J.T. ANDERS (Public representative)

APPEAL COMMITTEE re Edward Le Marchand Foster

REASONS FOR THE DECISION AND ORDER IN THE MATTER OF: An appeal by **EDWARD LE MARCHAND FOSTER, CA**, a member of the Institute, of the decision and order of the discipline committee made on August 14, 1997, pursuant to the bylaws of the Institute, as amended.

DECISION AND REASONS FOR DECISION MADE MARCH 26, 1998

This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on March 26, 1998.

Ms. Deborah McPhadden appeared on behalf of the professional conduct committee. Mr. Foster attended and was represented by his counsel Mr. James McReynolds.

Mr. Foster was asking for the following relief from the appeal committee:

- that the decision and order of the discipline committee made on August 14, 1997 be reviewed and set aside; or
- that he be granted a hearing *de novo* before the appeal committee, or, alternatively, before the discipline committee; or
- that, in the alternative, an order be made reinstating him as a member of the Institute, and substituting the expulsion order made by the discipline committee with the recommendation that had been made by the professional conduct committee, which provided for a reprimand, a fine, a two year suspension, and publication in *CheckMark*.

After hearing the parties' submissions and reviewing the documentation, the appeal committee dismissed Mr. Foster's appeal and confirmed the decision of the discipline committee made on August 14, 1997.

All parties were informed of the appeal committee's decision and were advised that written reasons for its decision would follow in due course. These are those reasons.

BACKGROUND

The original charge dated May 13, 1997 alleged that Mr. Foster had contravened Rule 201.1 of the rules of professional conduct by failing to conduct himself in a manner which maintains the good reputation of the profession and its ability to serve the public interest, in that he had been convicted under the *Income Tax Act* of evading the payment of federal income taxes owing by him personally and by his company, LeMarchand Foster Consultants Inc.

By Notice of Application dated July 17, 1997, the professional conduct committee gave notice pursuant to Bylaw 564(1) that an application to amend the charges against Mr. Foster would be brought at the hearing on August 14, 1997. The purpose of the amendment was to split the one original charge laid under Rule 201.1 into two charges, the first charge alleging a breach of Rule 201.1 for personal income tax evasion, and the second charge alleging a breach of Rule 213 for participating in the tax evasion of LeMarchand Foster Consultants Inc. as an officer, director or

agent of the company. The amended charges were accepted by the discipline committee and filed as an exhibit. Mr. Foster pleaded guilty to, and was found guilty of, both charges.

Before the appeal committee, Mr. McReynolds submitted that the amendment procedure followed by the professional conduct committee and discipline committee was improper, and constituted a violation of the principles of natural justice and the duty of fairness. He also submitted that Mr. Foster was not given clear notice of his right to counsel in respect of the new charge. The amendment of the original charge was improper, he said, because the result was not simply the amendment of the one charge, but the introduction of a new second charge. In addition, he said that the discipline committee should have been obliged to provide an assignment hearing in respect of the new second charge, to which the member would have been entitled to at least 15 days notice. Mr. McReynolds submitted that, as a result of the above deficiencies, the discipline committee acted improperly in dealing with the second charge under Rule 213. Counsel for the professional conduct committee indicated to the discipline committee that Mr. Foster was not being prejudiced by the amendment of the charges. Mr. Foster did not object to the amendment, and pleaded guilty to the charges, after having been advised that he could be found guilty solely on the basis of his plea. Mr. McReynolds stated that Mr. Foster pleaded guilty to the two charges only because he was not represented by legal counsel at the hearing.

As to the matter of sanction, Mr. McReynolds submitted that the discipline committee differentiated between Mr. Foster and previous similar fact cases that had been before it, and imposed expulsion rather than a lesser sanction on account of finding his client guilty of the additional Rule 213 charge which had been improperly introduced. He stated that the discipline committee disregarded the precedents of the *White* and *McConomy* cases, in which the sanctions imposed for similar misconduct were suspensions and fines, rather than expulsion and a fine. He submitted that the discipline committee had a duty to act fairly and consistently with those precedents, particularly as the sanctions consistent with those cases were the sanctions recommended by the professional conduct committee for Mr. Foster. Mr. McReynolds also submitted that the discipline committee had acted improperly when it failed to consider alternatives to expulsion, or to address the sentencing principle of rehabilitation in its reasons for decision.

Ms. McPhadden submitted that the professional conduct committee originally charged Mr. Foster under Rule 201.1 on the basis that his conviction of two counts of tax evasion was conduct which failed to maintain the good reputation of the profession and its ability to serve the public interest. The amendment to the charge became necessary, she submitted, when it was discovered that, in the criminal court, Mr. Foster had been convicted of only one count, while his company had been convicted of the other count. Ms. McPhadden submitted that, though Mr. Foster was not personally convicted of his company's evasion of income taxes, as the principal and directing mind of the company, Mr. Foster was, nevertheless, involved in his company's evasion of income taxes, which was why this portion of the original Rule 201.1 charge was changed to a new Rule 213 charge.

REASONS

The appeal committee considered whether or not the discipline committee had jurisdiction to proceed when it considered the amendment to the charges on August 14, 1997, and concluded that sufficient notice had been given to Mr. Foster by the Notice of Application dated July 17, 1997 to enable the committee to deal with the matter. The appeal committee then went on to consider the issue of the appropriateness of expulsion and noted that, in its reasons for decision, the discipline committee compared the misconduct and attitude of the members in the precedent cases of Mr. White and Mr. McConomy with the misconduct and attitude

demonstrated in this case, and found that the facts that supported "the guilty finding under Rule 201.1 were more egregious in this case than in the other cases cited". The discipline committee went on to state that the differences in conduct alone were sufficient only to convince it that a more serious sanction should be ordered for Mr. Foster. Its decision to expel him was not reached until after it heard his explanations for his actions, and concluded that, despite his assertions to the contrary, his actions were taken willfully and knowingly. The discipline committee stated in its reasons that, after listening to Mr. Foster, it did not have confidence:

- in his ability to distinguish between right and wrong;
- in his understanding of the difference between aggressive tax planning and unlawful actions; or
- that, faced with similar circumstances in the future, he would not repeat the actions that brought him before the committee.

After listening to the submissions made and reviewing the materials filed, the appeal committee concluded that the discipline committee had properly ordered expulsion for the charge under Rule 201.1 alone, that the decision to expel did not result from the addition of the second charge under Rule 213, and that the discipline committee had properly considered and consistently applied the principles of sentencing and imposed a sanction within the range of sanctions appropriate for a breach of Rule of Professional Conduct 201.1. Accordingly, the appeal committee determined that there was no basis upon which to vary the sanction of expulsion imposed on Mr. Foster by the discipline committee. Having reached this conclusion, the appeal committee declined to consider whether Mr. Foster had been prejudiced by the procedure to amend the original charge into two charges. Accordingly, the appeal was dismissed in its entirety, and the decision and order of the discipline committee was confirmed.

DATED AT TORONTO, THIS
BY ORDER OF THE APPEAL COMMITTEE

DAY OF AUGUST, 1998

D.L. CHANT, FCA – CHAIR
THE APPEAL COMMITTEE

MEMBERS OF THE PANEL

A.R. BYRNE, CA
R.J.L. BOWMAN, CA
D.J. HERLICK, CA
M.B. MARTENFELD, FCA
E. ZAVERSHNIK, CA
J.I. FRID (Public representative)