

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **JOEL DAVID MENAKER, CA**, a member of the Institute, under **Rule 206.1** of the Rules of Professional Conduct, as amended.

TO: Mr. Joel D. Menaker, CA

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision and Order made July 20, 2011)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on July 20, 2011 to hear charges of professional misconduct brought by the Professional Conduct Committee against Joel David Menaker, a member of the Institute.

2. Ms. Alex Hersak appeared on behalf of the Professional Conduct Committee (PCC). Mr. Menaker attended without counsel. He confirmed that he knew that he had the right to attend with counsel and waived that right. Mr. Robert Peck 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 July 20, 2011, and the written Decision and Order sent to the parties on July 25, 2011. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure of the ICAO, contain the charges, the decision, the order, and the reasons of the panel for its decision and order.

CHARGES

4. The following charges were laid against Mr. Menaker by the Professional Conduct Committee on April 26, 2011:

1. THAT the said Joel D. Menaker, in or about the period August 31, 2008 through October 31, 2008, while engaged to perform a review of the financial statements of "DE Inc." for the year ended August 31, 2008, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, contrary to Rule 206.1 of the Rules of Professional Conduct, in that:
 - (a) he failed to ensure adequate disclosure of related party transactions;
 - (b) he failed to ensure adequate disclosure of cash flows;
 - (c) he failed to ensure disclosure of all significant accounting policies;
 - (d) he failed to ensure disclosure of the nature of measurement uncertainties that are material;

- (e) he failed to ensure proper disclosure of the financial instruments, their fair value and their related price risk;
 - (f) he failed to provide a written communication regarding independence to those having oversight responsibility for the financial reporting process;
 - (g) he failed to ensure that the management representation letter contained all of the representations required by the *CICA Handbook*;
 - (h) he failed to ensure that the engagement letter was signed by the client and that it conformed with the requirements of the *CICA Handbook*; and
 - (i) he failed to document all matters required to support his Review Engagement Report.
2. THAT the said Joel D. Menaker, in or about the period August 31, 2009 through November 30, 2009, while engaged to perform a review of the financial statements of "DE Inc." for the year ended August 31, 2009, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, contrary to Rule 206.1 of the Rules of Professional Conduct, in that:
- (a) he failed to ensure adequate disclosure of related party transactions;
 - (b) he failed to ensure disclosure of all significant accounting policies;
 - (c) he failed to ensure proper disclosure of the financial instruments; and
 - (d) he failed to document all matters required to support his Review Engagement Report.
3. THAT the said Joel D. Menaker, in or about the period August 31, 2008 through November 30, 2008, while engaged to perform an audit of the financial statements of "TBC Inc." for the year ended August 31, 2008, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, contrary to Rule 206.1 of the Rules of Professional Conduct, in that:
- (a) he failed to ensure disclosure of the entity's purpose, intended community of service, status under income tax legislation and legal form;
 - (b) he failed to ensure adequate disclosure of the financial risk management objectives and policies in "Note 5 – Financial Instruments";
 - (c) he failed to ensure disclosure of all significant accounting policies;
 - (d) he failed to ensure disclosure of the nature of measurement uncertainties that are material;

- (e) he failed to ensure that the written communication regarding independence to those having oversight responsibility for the financial reporting process conformed with the requirements of the *CICA Handbook*; and
 - (f) he failed to document all matters required to support his Auditor's Report.
4. THAT the said Joel D. Menaker, in or about the period March 31, 2009 through June 30, 2009, while engaged to perform an audit of the financial statements of "PMC" for the year ended March 31, 2009, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, contrary to Rule 206.1 of the Rules of Professional Conduct, in that:
- (a) he failed to ensure disclosure of the nature of measurement uncertainties that are material;
 - (b) he failed to ensure disclosure of all significant accounting policies; and
 - (c) he was unable to provide evidence that he had obtained the appropriate communication from the client's law firm(s).

Plea

5. Mr. Menaker pleaded guilty to the four charges.

The proceedings

6. Ms. Hersak made an opening statement and filed a Document Brief (Exhibit 2) and a Brief of Authorities (Exhibit 3). She then called Mr. Raymond G. Harris, FCA, the investigator appointed in this matter, and filed a copy of his *curriculum vitae* (Exhibit 4). Ms. Hersak asked that Mr. Harris be accepted as an expert witness qualified to give opinion evidence. The panel accepted Mr. Harris' qualifications and granted Ms. Hersak's request.

7. In his evidence Mr. Harris reviewed the documents set out in the Document Brief, including the relevant financial statements with specific reference to the particulars set out in each of the four charges. Mr. Menaker cross-examined Mr. Harris. Mr. Menaker testified on his own behalf. Ms. Hersak did not cross-examine him. Both Mr. Harris and Mr. Menaker were asked questions by the members of the panel. There was no other evidence called with respect to the charges. Ms. Hersak made submissions with respect to the charges. Mr. Menaker made a brief statement to the panel.

Evidence and Relevant Facts

8. There were few relevant facts in dispute. The Professional Conduct Committee received a complaint from the Practice Inspection Committee of errors and deficiencies in review and audit engagements performed by Mr. Menaker. As a result, the Professional Conduct Committee appointed Mr. Harris to investigate. Mr. Harris interviewed Mr. Menaker and reviewed the files in question. At the time the audits and reviews were performed Mr. Menaker was in a partnership and at the time of the hearing he practised as a sole practitioner.

9. Respecting Charge No. 1, Mr. Menaker prepared the financial statements and affixed the firm's signature to a review report with respect to the financial statements. Mr. Harris referred to and identified as significant deficiencies all of the particulars set out in Charge 1. He indicated that during his investigation and interview Mr. Menaker had agreed there were deficiencies, noting that certain procedures had been carried out but not documented.

10. Charge No. 2 related to the same client as in Charge No. 1 for the subsequent year. Mr. Harris referred to each of the four particulars set out in the charge and expressed the view that they constituted significant departures from the required standards of practice. He noted that while there was some improvement in the performance of the review of the financial statements, there was a failure to ensure adequate disclosure and failure to document matters required to support his review engagement report.

11. The audit of the financial statements referred to in Charge No. 3 was for a company that had been a client of Mr. Menaker since 1961. Mr. Harris made specific reference to the six particulars set out in Charge No. 3 and stated that each constituted a significant departure from the required standard of practice. He stated that Mr. Menaker had acknowledged that adequate disclosure had not been made and there was a lack of required documentation. Mr. Menaker told Mr. Harris that all procedures had been carried out for this long-standing client but had not been documented.

12. The audit engagement referred to in Charge No. 4 was for a company that had been a client for 20 years. Mr. Harris specifically identified the three particulars set out in the charge as significant failures to adhere to the required standards of the profession. Mr. Menaker had failed to make adequate disclosure and had failed to provide evidence that he had obtained appropriate communication from the client's law firm. Mr. Menaker had told Mr. Harris that he thought he had obtained a document from the law firm who subsequently moved offices and he was unable to obtain a letter.

13. Mr. Menaker testified that he was mostly in agreement with Mr. Harris and specifically acknowledged that there were inadequacies in documentation. Mr. Menaker stated that his staff had done the work on the client files and that he had done the analysis. Since he was familiar with these long-standing clients he was confident all work had been done although not necessarily documented. He also said that he did not think all of the deficiencies were serious, and he noted that the values set out in the financial statements were not found to be in error.

DECISION

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

THAT, having heard the plea of guilty to Charge Nos. 1, 2, 3 and 4, and having seen, heard and considered the evidence, the Discipline Committee finds Joel David Menaker guilty of Charge Nos. 1, 2 and 3 and not guilty of Charge No. 4.

Reasons for the Decision

15. The panel found that the particulars set out under each of the four charges had been proven. The departures from the required standards of the profession, the relevant deficiencies as the panel found them to be, are succinctly set out as particulars in each of the four charges.

16. As it is acknowledged that not every deficiency rises to the level of professional misconduct, the panel considered the nature and the impact of the departures from the required standard. If a deficiency (a particular) was not in and of itself a significant enough departure from the standard of the profession to constitute professional misconduct, the panel also considered whether all of the particulars set out under the charge collectively constituted professional misconduct.

Charge 1

17. The panel was unanimous that the extensive deficiencies rose to the level of professional misconduct. Mr. Menaker's review fell far below the standard required by the profession and he was found guilty of the charge.

Charge 2

18. A majority of the panel concluded that while the deficiencies were fewer than in the previous year, the deficiencies in his review were fundamental to the fair presentation of the financial statements. The departures from the required standards were so significant they constituted professional misconduct and he was found guilty of the charge.

19. A minority of the panel, Ms. Pratt, Mr. Allendorf and Mr. Ireland, did not think the deficiencies, either individually or collectively, were significant enough to constitute professional misconduct and would have found the member not guilty of the charge.

Charge 3

20. The majority of the panel concluded that deficiencies listed, particularly the lack of audit documentation, did rise to the level of professional misconduct. Accordingly, Mr. Menaker was found guilty of the charge.

21. A minority of the panel, Ms. Pratt and Mr. Ireland, did not think the deficiencies, either individually or collectively, were significant enough to constitute professional misconduct and would have found the member not guilty of the charge.

Charge 4

22. A majority of the panel concluded that the deficiencies listed were not so significant that they constituted professional misconduct. Accordingly, Mr. Menaker was found not guilty of the charge.

23. A minority of the panel, Ms. Walker and Mr. Duschek, thought the deficiencies demonstrated that Mr. Menaker had not kept himself current with the standards of the profession, that he had not fulfilled his professional services competently and accordingly would have found him guilty of the charge.

Sanction

24. Ms. Hersak, on behalf of the PCC, filed evidence with respect to sanction by way of a Profile Sheet (Exhibit 5) which summarized previous guidance given to Mr. Menaker by the Professional Conduct Committee. Ms. Hersak also filed the Decisions, Orders and Reasons (Exhibits 6 and 7) of two previous appearances by Mr. Menaker before the Discipline Committee.

25. Ms. Hersak submitted that an appropriate sanction would be: a written reprimand, a fine of \$5,000, and the usual order regarding publicity. The Professional Conduct Committee also sought an order for 50% of the costs of the investigation and hearing.

26. Ms. Hersak filed a signed Undertaking of Joel David Menaker (Exhibit 8) that states he will not accept or perform any assurance engagements in the future.

27. Ms. Hersak stated that Mr. Menaker's Undertaking not to engage in assurance engagements had an impact on the sanction requested by the Professional Conduct Committee. Had Mr. Menaker's Undertaking not been given, the Professional Conduct Committee would have asked for

a period of supervised practice.

28. Ms. Hersak submitted that there were concerns over the number of incidents for various matters since 1995 involving four instances of guidance and two discipline hearings. A high level of standards must be adhered to in the interest of protecting the public and that Mr. Menaker had not, despite many warnings, adhered to those standards.

29. Ms. Hersak also noted a number of mitigating factors. Mr. Menaker is making changes to his practice, he cooperated with the investigation, pleaded guilty to the charges and has provided an Undertaking. The proposed sanctions would satisfy the specific and general deterrence principles of sentencing.

30. Ms. Hersak filed a Costs Outline (Exhibit 9) stating that the Professional Conduct Committee sought a partial indemnity of 50% of the costs of the investigation and hearing in the amount of \$10,000. Ms. Hersak distributed a case brief containing similar competence cases: *Baker, Lange, Robins* and *Butler*.

31. Mr. Menaker stated that his financial statements have improved since this matter arose and that he is planning to sell his practice within the next year and a half. Mr. Menaker requested that he be given a reasonable amount of time to pay the fine and costs.

ORDER

32. After deliberating, the panel made the following order which takes effect the day of the hearing:

IT IS ORDERED in respect of Charge Nos. 1, 2 and 3:

1. THAT Mr. Menaker be reprimanded in writing by the Chair of the hearing.
2. THAT Mr. Menaker be and he is hereby fined the sum of \$5,000 to be remitted to the Institute within twelve (12) months from the date this Decision and Order was made.
3. THAT notice of this Decision and Order, disclosing Mr. Menaker's name, be given in the form and manner determined by the Discipline Committee:
 - (a) to all members of the Institute
 - (b) to the Public Accountants Council for the Province of Ontario; and
 - (c) to all provincial institutes/Ordre;
 and shall be made available to the public.

IT IS FURTHER ORDERED:

4. THAT Mr. Menaker be and he is hereby charged costs fixed at \$10,000 to be remitted to the Institute within twelve (12) months from the date this Decision and Order was made.

AND IT IS FURTHER ORDERED:

5. THAT in the event Mr. Menaker 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 and his public accounting licence shall be suspended until such time as he does comply, provided that he complies within thirty (30) days from the date of his suspension, and in the event he does not comply within the thirty (30) day period, his membership in the Institute and public accounting licence shall be revoked, and notice of his membership and licence revocation, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Menaker's practice and/or residence. All costs associated with the publication shall be borne by Mr. Menaker and shall be in addition to any other costs ordered by the committee.

Reasons for Sanction

33. In the first part of the hearing, when considering whether or not Mr. Menaker was guilty of the charges, the panel was not aware that he had twice been found guilty of professional misconduct by the Discipline Committee. In January 2004 he was found guilty of failing to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest as required by Rule 201.1 and of failing to reply in writing to a letter from the Institute contrary to Rule 104. In November 2005 he was found guilty of failing to perform his professional services with integrity and due care contrary to Rule 202 and of failing to reply promptly to a successor contrary to Rule 302.2. The panel did not know, prior to the parties being asked to deal with sanction at this hearing, that on four occasions between 1995 and 2010, Mr. Menaker had been admonished or given guidance by the Professional Conduct Committee.

34. Mr. Menaker demonstrated over the last several years, despite his experience with the discipline process, that he had not maintained the standards of the profession. The sanction to be imposed for this third determination of professional misconduct must, in the interest of the public and the profession, be considered in the context of his continuing misconduct.

35. In light of the Undertaking whereby Mr. Menaker agreed not to accept or undertake any assurance engagements the panel agreed that the sanction proposed by the Professional Conduct Committee was appropriate. The panel wishes to note that without such Undertaking, at a minimum, Mr. Menaker would have been required to practice under supervision.

36. The Chair noted on the record that the panel trusted that Mr. Menaker would abide by the terms of the Undertaking. However, the panel did have some reservations as it was not clear how the Undertaking would be monitored.

37. The panel was of the view that a written reprimand is necessary as a specific deterrent to the member and to stress the unacceptability of his conduct as a chartered accountant.

38. The panel believes that a fine in the amount of \$5,000 is sufficient to meet the principles of general and specific deterrence in light of the Undertaking which has been given and the publicity which will follow.

39. The panel found no reason why the usual publicity should not be ordered. Such publicity is an important specific and general deterrent.

40. The panel concluded that the appropriate partial indemnity to be paid by the member, whose misconduct was responsible for the investigation and hearing with the resulting costs, was \$10,000.

41. The final and standard provision of the order is necessary to ensure that there will be consequences for a failure to comply with terms of the order.

DATED AT TORONTO THIS *15TH* DAY OF AUGUST, 2011
BY ORDER OF THE DISCIPLINE COMMITTEE

A handwritten signature in black ink, appearing to read 'Dineley', with a stylized, flowing script.

S.F. DINELEY, FCA - DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

B.G. ALLENDORF, CA
R.S. DUSCHEK, CA
S.J. HOLTOM, CA
G.G. IRELAND, CA
H.L. PRATT, CA
S.B. WALKER (PUBLIC REPRESENTATIVE)