

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **JOHN JEFFERY HERMANN**, a suspended member of the Institute, under **Rule 201** of the Rules of Professional Conduct, as amended.

TO: Mr. John Jeffery Hermann
336 Wortley Road
LONDON, ON N6C 3R9

AND TO: The Professional Conduct Committee, ICAO

REASONS FOR THE DECISION AND ORDER MADE DECEMBER 1, 2004

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on December 1, 2004 to hear a charge brought by the professional conduct committee against Mr. John Jeffery Hermann, a suspended member of the Institute.
2. The professional conduct committee was represented by Mr. Paul Farley. Mr. Hermann was present and was represented by Mr. James R. Lane.
3. The decision and the order of the discipline committee was made known at the hearing on December 1, 2004. The formal decision and order made on December 1, 2004 was signed by the secretary on December 6, 2004 and sent to the parties that day. These reasons, given pursuant to Bylaw 574, include the charge, the decision, the order and the reasons of this panel of the discipline committee for its decision and order.

THE CHARGE AND THE PLEA

4. The charge made by the professional conduct committee on September 13, 2004, reads as follows:

1. THAT, the said J. Jeffrey Herman, in or about the period April 1, 1996 through December 3, 2003, 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 misappropriated from his employer, Masterfeeds Inc., money in the approximate amount of \$71,000; contrary to Rule 201 of the rules of professional conduct, in that;
 - a) He caused his employer to make payments in the approximate amount of \$23,855 to MTS Consulting, a proprietorship registered in

his name, when neither he nor MTS Consulting was entitled to these payments;

- b) He caused his employer to make payments to the Receiver General of Canada in the amount of \$23,700, purportedly to reduce his employer's tax liability, which he improperly applied to his or his spouse's personal tax account;
- c) He caused his employer to pay to the CIBC bank \$12,340, purportedly to pay company expenses, which he improperly applied to his personal CIBC Visa account;
- d) He claimed expenses from the company in the approximate amount of \$12,000 and was reimbursed by the company for that amount when he was not entitled to the reimbursement.

5. Mr. Hermann entered a plea of guilty to the charge and confirmed for the record that he understood that upon the basis of his plea of guilty, and on that basis alone, he could be found guilty of the charge.

THE CASE FOR THE PROFESSIONAL CONDUCT COMMITTEE

6. Mr. Farley filed an Agreed Statement of Facts which was marked as Exhibit No. 4 and a Document Brief, containing 25 pages of relevant documents, which was marked as Exhibit No. 5. The Agreed Statement of Facts made reference to the relevant documents in the Document Brief.

7. Mr. Farley gave an opening statement or summation of the case for the professional conduct committee.

8. Mr. Lane also made an opening statement. He acknowledged that the facts set out in the Agreed Statement of Facts support a conviction. He also advised the panel that it would hear evidence at the sanction stage of the hearing to the effect that Mr. Hermann suffered from a gambling addiction.

9. The hearing recessed while the panel reviewed the Agreed Statement of Facts and Document Brief. Our finding with respect to the charge is set out in paragraphs 10, 11 and 12 below.

10. The particulars of the charge succinctly summarize Mr. Hermann's misconduct. He was the controller of a company and over a period of seven years he misappropriated approximately \$71,000. The exact sum of money is not in issue or relevant. Particular (d) of the charge refers to "the approximate amount of \$12,000" because there is some uncertainty as to which expenses were legitimate and which were not.

11. As the controller of the company Mr. Hermann was in a position to direct payments for his benefit and he did. The misappropriations were carefully planned, took place over a period of many months and were well concealed. Mr. Hermann did not recognize the error of his ways and stop. He was caught after his employment had been terminated. When the first misappropriation was discovered Mr. Hermann attempted to explain it away. Even when he had to acknowledge the first misappropriation, he would not

acknowledge other misappropriations. Eventually, he did admit the truth, but only when he had no choice. He did pay back the money he misappropriated. It was not clear whether or not Mr. Hermann would face criminal charges.

12. Mr. Hermann's conduct was unquestionably professional misconduct and we found him guilty of the charge. When the hearing resumed, the chair read for the record, the decision. This decision was set out in the formal written decision and order sent to the parties on December 6, 2004. The decision reads:

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to the charge, the Discipline Committee finds John Jeffery Hermann guilty of the charge.

SANCTION

13. Mr. Farley did not call evidence with respect to sanction. Mr. Lane called Mr. Hermann, Mrs. Hermann and Dr. Toneatto.

14. Mr. and Mrs. Hermann testified about their marital relationship and Mr. Hermann's addiction to gambling. The panel thought that both Mr. and Mrs. Hermann were honest witnesses who spoke candidly about matters which have and continue to cause them much grief. They testified about three distinct periods of time in their marriage. The first was from the time they married until 1994 when they separated. The second period was the time of separation. The third was subsequent to their reconciliation in 1999 until the time of the hearing.

15. Mr. Hermann testified that he was introduced to gambling and in particular, Black Jack, in 1986. He said he did gamble from time to time prior to the separation but not to a large extent. He traveled a great deal in Western Canada on business where he had ready access to casinos. He liked to gamble because when he did he focused entirely on the game and completely escaped from the problems of life, including the problems with his family and marriage. He described gambling as being like a drug.

16. Mr. Hermann testified that during the period of separation from his wife, 1994 to 1999, his gambling increased. He thinks that in total he lost in excess of \$150,000. He also testified that he did not appreciate that his gambling was a problem, that he lost relatively small amounts of money at any one time and that he was unaware of the cumulative financial impact of the losses.

17. Mr. Herman testified that while he had assets which would have paid his debts, he could not use them because they were joint assets and he did not want his wife to know about the gambling problem. Mr. Hermann acknowledged that there was considerable stress within the family, including between he and his wife as a result of his wife's illness and the conduct that she demanded of others, including and in particular the children. He testified that his family was very important to him and he was attempting to keep it together and effect a reconciliation.

18. After the reconciliation, Mr. Hermann's gambling continued, particularly when he was traveling on business. After the reconciliation, his concern that his wife not know about his gambling problem was as great as it was during their separation.

19. Mr. Hermann explained his gambling addiction as an illness. He acknowledged in his evidence that the family had enough money to live on and that his income satisfied Mrs. Hermann's very high need for financial security. It seemed clear from his evidence that his performance at work suffered because of the nights he spent gambling. It was also clear from his evidence that people at work had told him he had a problem.

20. Mr. Hermann said that he knew it was wrong to misappropriate money from his employer and that he did not try to justify the theft to himself.

21. He testified that he had taken steps to deal with the gambling addiction. He went to the gambling addiction centre and had received and was continuing to receive treatment to help him understand his gambling problem. He sees a psychiatrist on a regular basis. He has been put on an anti-depressant drug because the psychiatrist identified that he was depressed. He has filled out the self-exclusion forms so that he is excluded from casinos and he has told his family, including his children, his father, his siblings, his in-laws and his friends. He does not intend to gamble in the future but had not joined Gambling Anonymous at the date of the hearing.

22. Mr. Hermann testified that he is concerned about an uncertain future; that he will seek employment in accounting and related fields because they are the fields that he knows. He testified that he wanted to remain a chartered accountant and that he had a lot invested in becoming and being a chartered accountant.

23. Under cross-examination, Mr. Hermann confirmed that he was addicted to gambling but said that he had not gambled since December 2003. Also in cross-examination, with respect to the misappropriations which he did not immediately acknowledge when he was caught, Mr. Hermann testified that he had forgotten some of the misappropriations, including the misappropriation of \$37,000.

24. Prior to their marriage, Mrs. Hermann said that she needed the security of a steady pay cheque. She made it clear to Mr. Hermann, who was attracted to the lifestyle of a musician, that financial security was her paramount concern, and she would not be married to a musician. She worked for the first several years of their marriage but suffered from depression in 1990 and left her employment. At the time of the hearing, she was recognized as disabled by the Canada Pension Plan and by her once employer's insurance company. She continued to take medication for anxiety, depression, epilepsy, arthritis and for difficulty sleeping.

25. The Hermanns have three children. Mrs. Hermann is compulsive. She said the atmosphere in their home was often tense. She had conflicts with the children, particularly their oldest child. From 1991 on, Mr. Hermann had to shoulder much of the responsibility for dealing with the children.

26. For a time, Mrs. Hermann moved out of the house. She lived in an apartment close by and saw Mr. Hermann and the two youngest children frequently. She and Mr. Hermann continued counseling with the hope of reconciliation. Ultimately, they were

reconciled. Mrs. Hermann moved back into the house and the oldest child moved into the apartment where Mrs. Hermann had been staying.

27. Mr. Hermann's employer terminated him and the misconduct which led to the charge came to light after the reconciliation. Mrs. Hermann did not know that Mr. Hermann had a gambling problem when they reconciled. If she had known, she would have remained separated.

28. Mrs. Hermann testified that she and Mr. Hermann have a different and better relationship now than they had previously. She describes their relationship as more open and honest. She thought that her illness was in part responsible for Mr. Hermann's gambling problem.

29. Mrs. Hermann also testified that she thought Mr. Hermann was making progress with his gambling addiction and had not gambled even though he had the opportunity. Under cross-examination, Mrs. Hermann acknowledged she was afraid that Mr. Hermann would gamble again.

DR. TONEATTO

30. During the course of the evidence, the panel had to rule on whether or not Mr. Lane would be allowed to call expert witnesses. Mr. Farley objected on the basis that he had not received notice in a timely way and would not be able to properly cross-examine the witnesses. The panel permitted Mr. Lane to call one of the witnesses, Dr. Toneatto who, in fact, had not seen Mr. Hermann or treated him. The panel thought Dr. Toneatto's evidence might help it understand gambling addiction.

31. While throughout the hearing gambling was referred to as an addiction, Dr. Toneatto said that it was not a true addiction and that there was no drug to treat it. He said that gambling was an impulse disorder or compulsive disorder. In his evidence-in-chief Dr. Toneatto outlined the three criteria which had been identified as necessary for a gambler to refrain from gambling. He confirmed the three criteria on cross-examination. They were: (1) the gambler recognizes that he or she has a problem; (2) the gambler gets treatment for the problem; and (3) the gambler has a support system.

32. Dr. Toneatto said there is a one-third rescission rate for gamblers who had broken the habit. He also said that if one of the three criteria were to be knocked out there was a high risk that the person would gamble again.

THE SUBMISSIONS OF THE PARTIES

33. Mr. Farley submitted that general deterrence and specific deterrence were the most important principles which the panel should consider when determining the appropriate sanction in this case. He submitted that the misconduct was serious, that it went to the heart of the profession – honesty, integrity and trust. In Mr. Farley's submission, Mr. Hermann had abused the trust and one of the primary objectives of the order should be to protect the public from further abuse of the trust which chartered accountants are given. This could be achieved by expelling Mr. Hermann from the Institute so that people would not be misled into thinking that he was a trustworthy

chartered accountant. His expulsion would also serve as an example and warning to other chartered accountants.

34. In Mr. Farley's submission, the mitigating circumstances in this case related entirely to the discipline process itself. Mr. Hermann had entered a guilty plea at the earliest opportunity. He had cooperated fully and completely with the investigation.

35. The professional conduct committee did acknowledge that Mr. Hermann had made restitution. But it was of the view that this was made only after the misappropriations were discovered when Mr. Hermann's employer had recourse to the courts and an opportunity to recover the lost money.

36. In Mr. Farley's view, the aggravating circumstances were many. Mr. Hermann had stolen over \$70,000. His conduct showed moral turpitude and his breach of trust lasted seven years with many instances of misappropriation. The misappropriations involved a well thought out and calculated scheme. Further, Mr. Hermann lied when his misappropriations were discovered when he had the opportunity to regain some integrity.

37. Mr. Farley stressed that one-third of the people who had a crisis and stopped gambling ultimately took up gambling again. In his submission, Mr. Hermann's support system, and particularly his family, was on shaky ground. In those circumstances, his future conduct was uncertain and it was clear that if he resorted to gambling he would have a need for money and that he ought not to continue to enjoy the CA designation which would help him to obtain positions of trust.

38. On behalf of the professional conduct committee, Mr. Farley requested an order including the following terms: a reprimand; a fine; expulsion from the Institute; notice in the usual manner disclosing Mr. Hermann's name; and a requirement that Mr. Hermann pay part of the costs of the investigation and hearing.

39. Mr. Lane said the point which formed the heart of his submissions was that Mr. Hermann had stolen money from his employer to preserve his family from his gambling addiction. Mr. Lane submitted that Mr. Hermann had his own mental or psychological problems, that he suffered a gambling disorder, that he was depressed and in denial about the gambling disorder, and one of the reasons for being in denial was that to acknowledge it would likely destroy his family. Mr. Lane noted that paradoxically pressures from his family were, in part, responsible for his gambling problem. He submitted that the committee need not be concerned that Mr. Hermann would resort to gambling in the future.

40. In Mr. Lane's view, the principle of general deterrence could be addressed by imposing a lengthy suspension. Mr. Lane referred to the *Gary* decision where the root cause of the misconduct was an addiction to cocaine and Mr. Gary had been permitted to remain a member of the Institute.

ORDER WITH RESPECT TO SANCTION

41. After deliberating, the hearing resumed and the Chair summarized for the record the terms of the order. The formal written order, which was sent to the parties on December 6, 2004, provided as follows:

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Hermann be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Hermann be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Hermann be and he is hereby charged costs fixed at \$5,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Hermann be and he is hereby expelled from membership in the Institute.
5. THAT notice of this Decision and Order, disclosing Mr. Hermann'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;
 - (c) by publication in *CheckMark*; and
 - (d) by publication in *The London Free Press*.
6. THAT Mr. Hermann 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.

REASONS FOR THE ORDER

42. There was no issue between the parties with respect to a reprimand or the notice of the decision and order disclosing Mr. Hermann's name. The parties did not agree on the quantum of the fine or costs. The main issue was whether or not Mr. Hermann would be expelled or suspended.

EXPULSION NOT SUSPENSION

43. The panel concluded that Mr. Hermann was genuinely remorseful. It was difficult not to have considerable sympathy for Mr. and Mrs. Hermann. The panel recognized that an order of expulsion would not facilitate the Hermanns' reconciliation, and that without the support of Mrs. Hermann, there was a greater likelihood that Mr. Hermann would resort to gambling.

44. We did not agree with Mr. Farley that the only mitigating factors in this case related entirely to the discipline process and Mr. Hermann's co-operation with the professional conduct committee and the discipline committee. Mr. Hermann made full restitution. He has sought help with respect to his gambling. He has been open and honest with his wife

with respect to his gambling problem. He has told his family and friends about the gambling problem. He has recognized that he must own up to the problem in order to face it and resist it. As of the date of the hearing, he has done so.

45. As much as we would like to assist Mr. Hermann with his rehabilitation, he has not demonstrated the extent of rehabilitation required by someone who the public will trust as a chartered accountant. Mr. Gary was allowed to remain a member on the condition that each month he provide to the secretary of the discipline committee evidence that he has refrained from the use of cocaine. The reasons of the discipline committee in the *Gary* case make it clear that they thought the public was protected by the condition imposed. In Mr. Hermann's case, there is no objective medical test which can establish that he has not resorted to gambling again.

46. While Mr. Hermann has refrained from gambling since 2003, the evidence was that one-third of people with a gambling problem resorted to gambling again and that if one of the three critical criteria for resisting gambling was removed, a strong support system, there was an even higher likelihood that the person would resort to gambling again. It was apparent from their testimony that the Hermanns' marriage is somewhat unstable and that they both appear rather fragile.

47. Further, we concluded that as a matter of general deterrence, Mr. Hermann should be expelled. His misconduct was egregious. Chartered accountants, who do what Mr. Hermann did, should know that when such conduct is discovered it will result in their expulsion from the Institute. We also concluded that expulsion was appropriate as a general deterrent to chartered accountants who might be gamblers. The evidence was to the effect that many people gamble. It is possible there are other chartered accountants who need to be warned that if they misconduct themselves as a result of a gambling problem, they are unlikely to continue to be chartered accountants.

REPRIMAND

48. It was determined that Mr. Hermann should be reprimanded to stress to him the unacceptability of his conduct.

FINE

49. We concluded a fine was required as both a general and specific deterrent. The egregious misconduct, given orders in other similar cases, suggests a substantial fine is appropriate. In Mr. Hermann's financial circumstances a \$5,000 fine is substantial. In light of Mr. Hermann's financial position we provided for a year to pay the fine.

COSTS

50. Mr. Hermann's misconduct brought about the investigation and required the hearing. His cooperation did minimize the expense which the Institute has to bear. Mr. Hermann does face financial challenges. But the cost of a one-day hearing, even on a partial indemnity scale, exceeds \$5,000 and we did think the costs should be reduced below \$5,000. One of the reasons we focused on the cost of the hearing itself was that we did not think the cost of the investigation was reasonable, given that Mr. Hermann did

not deny the relevant facts. As with the fine, we allowed a year for Mr. Hermann to pay the costs.

NOTICE

51. It is important that the discipline process be an open process. The Institute of Chartered Accountants of Ontario does take its role as a self-governing body seriously. The public should know the process is a serious open process and the public should know when members are expelled. The bylaws provide for notice of expulsion to be published in a newspaper in circulation where the former member resides or works. In this case the appropriate newspaper is *The London Free Press*.

52. The principle of general deterrence is best served by disclosing Mr. Hermann's name in the notice to be published in *CheckMark*. There were no rare and unusual circumstances which would warrant withholding his name from the notice.

DATED AT TORONTO THIS 23RD DAY OF JUNE, 2005
BY ORDER OF THE DISCIPLINE COMMITTEE

B.A. TANENBAUM, FCA - DEPUTY CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL

R.J. ADAMKOWSKI, CA
D.M. FORTNUM, FCA
D.O. STIER, CA
R.A. VICKERS, FCA
B. RAMSAY (Public Representative)