

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

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **RICHARD DONALD ELES**, a suspended member of the Institute, of the Decision and Order of the Discipline Committee made on October 2, 2007, pursuant to the bylaws of the Institute, as amended.

TO: Mr. Richard D. Eles
1301 Sunnyside Road
Sudbury, ON P3G 1J2

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Order made November 18, 2008)

1. This appeal was heard by a panel of the Appeal Committee of the Institute of Chartered Accountants of Ontario on November 18, 2008. Paul Farley appeared on behalf of the Professional Conduct Committee. Mr. Eles attended and was unrepresented by counsel.
2. The following charges, as amended at the hearing before the Discipline Committee, were laid against Mr. Eles by the Professional Conduct Committee on February 27, 2007:
 1. THAT, the said Richard D. Eles, in or about the period June 1, 2005 through February 9, 2006, while employed as a Controller for "TTCC Inc." 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, "TTCC Inc.", money in the approximate amount of \$3,700; contrary to Rule 201.1 of the rules of professional conduct.
 2. THAT, the said Richard D. Eles, in or about the period May 1, 2004 through February 13, 2006, while employed as a Controller for "TTCC Inc." failed to perform professional services with integrity and due care contrary to Rule 202 of the rules of professional conduct, in that, having the responsibility for doing so;
 - i) He failed to ensure monthly income tax installments were made on behalf of his employer from November 2005;
 - ii) He failed to ensure that employee benefits plans were administered properly and that the required premiums for employee insurance were paid in a timely manner commencing in or around September 2004;
 - iii) He failed to ensure that GST remittances were made for the periods ending June 30, 2005 and December 31, 2005;
 - iv) He failed to ensure that bank reconciliations were prepared on a monthly basis;
 - v) *withdrawn*

- vi) He failed to ensure that Employer Health Tax Installments were made as required for the year ended December 31, 2005.

3. The Decision and Order appealed from, dated October 2, 2007, reads as follows:

DECISION

THAT, having seen, heard and considered the evidence, charge No. 2(v) having been withdrawn by the Professional Conduct Committee, and having determined to proceed with the hearing in the absence of Mr. Eles pursuant to Bylaw 560, being satisfied that he had proper notice of the hearing, and having entered on his behalf a plea of not guilty to each of the charges, the Discipline Committee finds Mr. Richard Donald Eles guilty of charges Nos. 1 and 2, as amended.

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Eles be reprimanded in writing by the chair of the hearing.
 2. THAT Mr. Eles be and he is hereby fined the sum of \$7,500 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. Eles 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 becomes final under the bylaws.
 4. THAT Mr. Eles be and he is hereby expelled from membership in the Institute.
 5. THAT notice of this Decision and Order, disclosing Mr. Eles' 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 all members of the Institute; and
 - (b) to all provincial institutes/Ordre,and shall be made available to the public.
 6. THAT notice of the expulsion disclosing Mr. Eles' name, be given by publication on the Institute's website and in *The Sudbury Star*. All costs associated with the publication shall be borne by Mr. Eles and shall be in addition to any other costs ordered by the committee.
 7. THAT Mr. Eles 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.
4. On this appeal, Mr. Eles seeks to have the quantum of the fine imposed reduced. He also seeks a reduction in the costs assessed.

Submissions

5. Mr. Eles made submissions to this panel concerning allegations of fraudulent activity at TTCC Inc. during the time period covered by the charges. He also submitted that the quantum of the fine was outside the appropriate range, and should be reduced. He drew the panel to his personal circumstances, including the fact he has not worked since 2006 and is receiving only a small pension.

6. In his submissions, Mr. Farley noted that Mr. Eles did not attend the discipline hearing, despite being given notice of it and warned it would proceed in his absence and he would forfeit any right to present evidence should he not attend. Mr. Farley submitted that all of the information provided to this panel could have been available to the Discipline Committee, and urged the panel not to receive it as it failed to meet the test for fresh evidence.

7. Mr. Farley took the panel to a number of precedents and addressed the issue of the quantum of the fine. He submitted that, considering the precedents and the circumstances of the conduct, the fine imposed by the Discipline Committee was at the low end of the range and should not be disturbed by this panel.

8. Mr. Farley also addressed the issue of costs and noted the extent and difficulties of the investigation. He pointed out that Mr. Eles was only charged approximately 25% of the costs incurred in the investigation and hearing, and urged the panel to find the assessment was reasonable and not to interfere with it.

9. In reply, Mr. Eles submitted that \$17,500 was beyond his ability to pay. He had no further submissions.

Order

10. This panel of the Appeal Committee considered all the submissions, as well as the material filed in this matter and, after deliberations, dismissed the appeal. The parties were informed of the decision at the conclusion of the appeal, and were provided with a written Order dated November 20, 2008, as follows:

HAVING heard and considered the submissions made by Richard Donald Eles, and on behalf of the Professional Conduct Committee, upon Mr. Eles' appeal of the Decision and Order of the Discipline Committee made on October 2, 2007, and upon reviewing all of the documentation filed by the parties, the Appeal Committee confirms the Decision and Order of the Discipline Committee made on October 2, 2007.

Reasons

11. It has been stated on numerous occasions that the role of this Committee is not to retry the matter before it, but to determine whether the Discipline Committee committed any errors in its consideration of the evidence before it. Even greater deference is owed to the Discipline Committee in its consideration of sanctions and costs, and those orders should not be interfered with except in the clearest of instances. The mere fact the Appeal Committee might have reached a different conclusion on sanction does not justify altering the sanction imposed, unless that sanction is beyond the range of sanctions for similar conduct in similar circumstances.

12. Mr. Eles had the opportunity to make his submissions to the Discipline Committee. He chose not to do so when he failed to attend his hearing. The information as to fraud at TTCC

Inc. was available at the time of that hearing, and could have been placed before that Committee. The Discipline Committee was in the best position to test the evidence against the other evidence it heard. This evidence was not presented to the Discipline Committee. This panel finds it should not be presented to us, and rules that the information as to fraud should not be considered.

13. The panel has considered the submissions as to the quantum of the fine and the amount of costs assessed. It is unfortunate that information as to Mr. Eles' personal circumstances was not available to the Discipline Committee. But for that he has only himself to blame. Even considering the information as to his circumstances, the panel has heard nothing to indicate he cannot pay the amounts ordered, particularly given the time he has been granted in which to make payment.

14. Further, and equally important, with respect to the quantum of the fine, a review of the precedents and the circumstances of this matter make it clear the quantum imposed is well within the appropriate range of fines.

15. Mr. Eles was assessed one quarter of the costs incurred in the investigation and hearing of this matter. The investigation and hearing were occasioned solely by his conduct. The membership as a whole must bear the remainder of those costs. We might have expected Mr. Eles to be ordered to pay a greater proportion of the costs and can only conclude he was not because the Discipline Committee considered the global effect of the sanctions. There is no basis upon which it would be appropriate for this panel to reduce the costs.

16. Mr. Eles' conduct was extremely serious, and must be sanctioned as such by this Institute. The Discipline Committee made no errors in considering the evidence before it, or in ordering an appropriate sanction and costs. Their order should not be disturbed.

17. For these reasons, this panel of the Appeal Committee dismisses the appeal and confirms the order of the Discipline Committee.

DATED AT TORONTO THIS 1st DAY OF MAY, 2009
BY ORDER OF THE APPEAL COMMITTEE

A.R. BYRNE, FCA – CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

E.R. ARCHIBALD, CA
P.B. CLARKSON, CA
K.N. ARMSTRONG (PUBLIC REPRESENTATIVE)

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **RICHARD DONALD ELES, CA**, a member of the Institute, under **Rules 201.1 and 202** of the Rules of Professional Conduct, as amended.

TO: Mr. Richard D. Eles, CA
1301 Sunnyside Road
Sudbury, ON P3G 1J2

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision and Order made October 2, 2007)

2. This panel of the Discipline Committee convened on October 2, 2007, to hear charges brought by the Professional Conduct Committee against Richard Donald Eles, CA, a member of the Institute.

3. Mr. Paul Farley appeared as counsel for the Professional Conduct Committee. He had with him the investigator appointed by the Professional Conduct Committee, Ms. Alison Thomas, CA.

4. Mr. Eles was not in attendance when the hearing was called to order. The panel reviewed the documents which had been marked as Exhibits at the assignment hearings. The Notice of Hearing, originally scheduled for September 17 and 18, 2007, with Mr. Eles' acknowledgment that he had received it, was marked as Exhibit 4. Mr. Farley filed a Notice of Rescheduling of the hearing to October 2, 2007, (Exhibit 5) and an e-mail from Mr. Eles acknowledging that the hearing had been rescheduled (Exhibit 6). The panel reviewed the documents and concluded that Mr. Eles had notice of the hearing, and ruled that it would proceed in his absence, pursuant to Bylaw 560.

The Charges

5. Mr. Farley advised the panel that the Professional Conduct Committee wished to withdraw particular (v) of charge No. 2. The charges (Exhibit 7), which the Professional Conduct Committee laid against Mr. Richard Douglas Eles, CA, on February 27, 2007, as amended by the withdrawal of particular (v) of charge No. 2, read as follows:

1. THAT, the said Richard D. Eles, in or about the period June 1, 2005 through February 9, 2006, while employed as a Controller for "TTCC Inc." 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, "TTCC Inc. ", money in the approximate amount of \$3,700; contrary to Rule 201.1 of the rules of professional conduct.

3. THAT, the said Richard D. Eles, in or about the period May 1, 2004 through February 13, 2006, while employed as a Controller for "TTCC Inc." failed to perform professional services with integrity and due care contrary to Rule 202 of the rules of professional conduct, in that, having the responsibility for doing so;
 - i) He failed to ensure monthly income tax instalments were made on behalf of his employer from November 2005;
 - ii) He failed to ensure that employee benefits plans were administered properly and that the required premiums for employee insurance were paid in a timely manner commencing in or around September 2004;
 - iii) He failed to ensure that GST remittances were made for the periods ending June 30, 2005 and December 31, 2005;
 - iv) He failed to ensure that bank reconciliations were prepared on a monthly basis;
 - v) *withdrawn*
 - vi) He failed to ensure that Employer Health Tax Instalments were made as required for the year ended December 31, 2005.

6. The Chair directed that a plea of not guilty be entered to the charges.

The Case for the Professional Conduct Committee

7. Mr. Farley made an opening statement outlining the case for the Professional Conduct Committee, after which he filed a Document Brief (Exhibit 8) and a Supplementary Document Brief (Exhibit 13). Mr. Eles had been employed by a corporation which is hereinafter referred to as "TTCC". Exhibit 8 included computer printouts from TTCC's payroll system, "Simply Accounting", which showed the details of Mr. Eles' remuneration from May 2004 to February 2006; Mr. Eles' T4 from TTCC for the year 2005; copies of group benefit documents from Manulife Financial; notices of assessment from the Ontario Ministry of Finance for both Employer Health Tax and Corporate tax; and, notices of assessment from Canada Customs and Revenue Agency. The index to Exhibit 8 describes the type of documents which are included after each of the 40 tabs of the Exhibit. Exhibit 13 consisted of documents which Ms. Thomas had produced showing, among other things, the chronology of key events and a reconciliation of Mr. Eles' T4 working paper and his 2005 T4.

8. Mr. Farley called the owner of TTCC, John Beaudry, who testified about hiring Richard Eles as a controller and the relevant terms of Mr. Eles' employment, namely that he was paid \$1,000 per week. Mr. Beaudry testified about the events of the week of February 6, 2006, when on reviewing the payroll records in connection with a problem relating to another employee, he discovered that Mr. Eles had been receiving \$1,100 per week since June 2005 rather than \$1,000 per week. Mr. Beaudry also testified that he had not been made aware of any problem with lack of money to pay the obligations of TTCC.

9. On the week of February 6, 2006, after the office was closed, with the assistance of Ms. Clarissa Maristela and Ms. Sarah Fitchett, Mr. Beaudry reviewed the payroll records and other documents. He was attempting to determine whether other money, particularly money from petty cash for which Mr. Eles was responsible, had gone missing. He determined that the only

irregularity or impropriety was an unauthorized increase of \$100 per week for the period of June 1, 2005 through to February 9, 2006.

10. On Monday, February 13, 2006, Mr. Beaudry called Richard Eles into his office and recorded their conversation. He played a recording of this conversation at the hearing and a transcription of the conversation is set out at Tab 7 of Exhibit 8. He testified that Mr. Eles' employment was terminated that day. Mr. Beaudry also testified about the claim TTCC brought in the Small Claims Court against Mr. Eles and the settlement which was reached.

11. Ms. Clarissa Maristela testified that when reviewing payroll records and other documents during the week of February 6, 2006, she found a document in Richard Eles' office, a copy of which is found at Exhibit 3, Tab 8. She testified that the handwriting on the second page of this document, reducing the gross pay from \$59,460 to \$53,640, was Richard Eles' handwriting.

12. Ms. Sarah Fitchett had been responsible for administering the group benefits plan with Manulife Financial from April 2002 until she left TTCC in October 2004. She resumed her employment with TTCC in January 2006 and she assumed responsibility for the group benefit plan after Mr. Eles left in February 2006. She testified that Mr. Eles had not done an efficient job of administering the benefit program. He had not kept the records current and the insurers had not always been notified about employees leaving, new employees joining or increases in remuneration which would require an adjustment of their benefits.

13. Mr. Farley filed an Affidavit of Deborah Woods (nee Kenyon) sworn on May 1, 2007 (Exhibit 12). In this Affidavit, Ms. Woods deposed that she was the accounting and payroll clerk from on or about March 1, 2005, through May 27, 2005. She deposed that she reported to Ms. Teena Fraser, who was in charge of operations, and Mr. Richard Eles, the Controller. She deposed that Mr. Eles trained her on the payroll system and that when she left at the end of May 2005, Mr. Eles received \$1,000 per week which was paid to him automatically through the "Simply Accounting" payroll system. She deposed that she was not asked to increase Mr. Eles' salary to \$1,100 per week and that she did not do so.

14. Ms. Woods also deposed that she began training her successor, Ms. Christina Craig, the day after the Victoria Day holiday in May 2005, and that the increase of \$100 per week did not take place while she was training Ms. Craig.

15. Ms. Craig testified that she did not change the payroll to increase Mr. Eles' pay to \$1,100 per week. She testified that she understood from Mr. Eles that the \$100 of the \$1,100 was a non-taxable meal allowance.

16. Ms. Natalie Langlois, a student of the Institute, worked for Arthur Rogers & Topp, Chartered Accountants, who had been engaged to review the financial statements of TTCC in previous years and who provided accounting services to TTCC in February 2006. She testified that she discovered that the bank statements had not been reconciled for many months and there were discrepancies which totalled approximately \$500,000. She herself did the reconciliations for the months of April and May 2005 and thereafter she and her employer, Richard Arthur, CA, recommended that TTCC hire a service to do the reconciliations from June 2005 to March 2006.

17. Ms. Langlois also testified that TTCC was required to remit monthly, both federal and provincial tax. With reference to Exhibit 8, she reviewed the notices of assessment from both Canada Customs and Revenue Agency, and the Ontario Ministry of Finance, Corporate Tax Branch and Employer Health Tax Branch which had been found in Mr. Eles' old office. She testified that the required tax payments had not been made. Also with reference to Exhibit 8, Ms. Langlois testified that there was unpaid GST of \$46,499 between April 2005 and the end of March 2006.

18. The investigator, Ms. Thomas, testified that she had interviewed Mr. Eles, who acknowledged that he received an additional \$100 per week from June 2005 that had not been agreed to as part of his remuneration. He confirmed that only he and the accounting clerk had access to the payroll program on the computer system. Further, Mr. Eles acknowledged that he had changed the records so that the T4 he received disclosed an income of \$53,640 and not \$59,460 which he had actually received in 2005.

19. Ms. Thomas also testified that Mr. Eles acknowledged that he was responsible for making federal and provincial tax instalments, Provincial Employer Health Tax payments, and GST payments, and that such payments had not been made. He said the payments had not been paid because there was insufficient money. Mr. Eles also acknowledged that he was responsible for the bank reconciliations and that he had not completed them for many months when he left in February 2006.

The Relevant Facts

20. The panel found the evidence set out above to be clear, cogent and compelling. The relevant facts as the panel finds them to be can be succinctly stated. In June 2005, without authorization, Mr. Eles increased his remuneration by \$100 per week. In the period of June 2005 through February 9, 2006, Mr. Eles received \$3,700 more than he ought to have received. Further, Mr. Eles did not perform his professional services with integrity and due care: he did not ensure that monthly tax instalments were made; he failed to ensure that GST remittances were made; he failed to ensure that employer health tax instalments were made; he failed to properly administer the employees benefit plan; and, he failed to ensure that the bank reconciliations were prepared on a monthly basis.

Decision

21. The panel concluded on the facts set out above that the charges had been proven, and that Mr. Eles was guilty of professional misconduct. Accordingly, he was found guilty of each charge.

22. When the hearing reconvened, the Chair read the following decision on the record:

THAT, having seen, heard and considered the evidence, charge No. 2(v) having been withdrawn by the Professional Conduct Committee, and having determined to proceed with the hearing in the absence of Mr. Eles pursuant to Bylaw 560, being satisfied that he had proper notice of the hearing, and having entered on his behalf a plea of not guilty to each of the charges, the Discipline Committee finds Mr. Richard Donald Eles guilty of charges Nos. 1 and 2, as amended.

Sanction

23. Mr. Farley did not call evidence with respect to sanction.

24. Mr. Farley outlined the order sought by the Professional Conduct Committee which included: a reprimand; expulsion; a fine in the amount of \$7,500; full publicity; and, costs in the amount of \$21,000.

25. Mr. Farley submitted that as Mr. Eles misappropriated \$3,700, his misconduct involved moral turpitude. Further, he submitted that the precedents were clear, that CAs who acted dishonestly and breached the trust of their employers had consistently been expelled. He submitted that the public trusted chartered accountants to be honest and act with integrity. Accordingly, as a matter of general deterrence to other members who might be tempted to misconduct themselves as Mr. Eles did, and as a matter of specific deterrence to Mr. Eles, expulsion was required.

26. Mr. Farley reviewed the aggravating circumstances including the facts that: Mr. Eles had been given a position of trust as he was in effect made the CFO of the company; he took an amount of money which was not insignificant over a period of 37 weeks; and, he did not come forward and acknowledge the truth, but rather, he was caught. Further, he expressed no remorse, he did not make restitution until he was sued in the Small Claims Court, and he appeared to be indifferent to the discipline process of the Institute.

27. Mr. Farley also submitted that the appalling lack of due care which lead to the conviction of the second charge under Rule 202.1 warranted expulsion.

28. Mr. Farley submitted that a fine of \$7,500, according to the precedents, was appropriate. He also submitted there was no evidence of a lack of ability to pay.

29. With respect to costs, Mr. Farley filed a bill of costs which totalled \$42,232 (Exhibit 16). He said that the Professional Conduct Committee sought approximately half of this amount: \$21,000.

Order

30. After considering the submissions and precedents, and deliberating, the panel made the following order:

IT IS ORDERED in respect of the charges:

1. THAT Mr. Eles be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Eles be and he is hereby fined the sum of \$7,500 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. Eles 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 becomes final under the bylaws.

4. THAT Mr. Eles be and he is hereby expelled from membership in the Institute.
5. THAT notice of this Decision and Order, disclosing Mr. Eles' 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 all members of the Institute; and
 - (b) to all provincial institutes/Ordre,and shall be made available to the public.
6. THAT notice of the expulsion disclosing Mr. Eles' name, be given by publication on the Institute's website and in *The Sudbury Star*. All costs associated with the publication shall be borne by Mr. Eles and shall be in addition to any other costs ordered by the committee.
7. THAT Mr. Eles 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

30. This panel, as all panels of the Discipline Committee do when imposing sanction, considered the nature of the misconduct and the circumstances of the member, in the context of sanctions imposed on other members found guilty of similar misconduct.

Expulsion and fine

31. The reputation which chartered accountants have for honesty and integrity, and the principle of general deterrence, requires that Mr. Eles, who breached the trust of his employer and misappropriated money, be expelled.

32. The principle of specific deterrence requires that Mr. Eles, who misappropriated money and whose unexplained lack of due care amounts to virtually ignoring his responsibilities for many months, should be required to pay a substantial fine as well as to be expelled.

Notice

33. As Mr. Eles is to be expelled, it is appropriate that notice be given to the profession and to the public. This was not a rare and unusual case where the member's name should be withheld from publication. Further, the bylaws provide that notice of Mr. Eles' expulsion should be published on the Institute's website and in a newspaper which is published where he lives or practised. For these reasons, the panel ordered that notice of the decision disclosing Mr. Eles' name be given to the members of the Institute and to all provincial Institutes, and that in addition, his name be published in *The Sudbury Star*.

Certificate

34. As Mr. Eles is to be expelled, he will no longer be a member of the Institute and accordingly, he should return his certificate of membership to the Institute.

DATED AT TORONTO THIS 16th DAY OF JANUARY, 2008
BY ORDER OF THE DISCIPLINE COMMITTEE

D.W. DAFOE, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

S.F. DINELEY, FCA
H.G. TARADAY, CA
P. MCBURNEY (Public Representative)