

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

DISCIPLINE COMMITTEE

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

TO: Mr. Stephen L. Shessel, CA
17070 Yonge Street Suite 205
Newmarket, ON L3Y 8Z4

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision and Order Made November 5, 2007)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on November 5, 2007 to hear charges of professional misconduct brought against Stephen Lorne Shessel, CA, a member of the Institute.
2. Ms. Alexandra Hersak appeared on behalf of the Professional Conduct Committee. She was accompanied by Mr. John Douglas, CA, the investigator appointed by the Professional Conduct Committee in this matter. Mr. Shessel attended and was represented by counsel, Mr. Christopher Hluchan.
3. The decision of the panel was made known at the conclusion of the hearing, and the written Decision and Order sent to the parties on November 6, 2007. These reasons, given pursuant to Bylaw 574, 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. Shessel by the Professional Conduct Committee on May 29, 2007:
 1. THAT, the said Stephen L. Shessel, in or about the periods June 30, 1996 through December 31, 1997, while engaged to compile the financial statements and prepare the tax returns for SC. Limited for the fiscal years June 30, 1996 and June 30, 1997, failed to perform his professional services with due care in that he used a tax reserve of \$300,000 and an accounting reserve of \$200,000 on a total mortgage portfolio of approximately \$1,012,811 without obtaining sufficient appropriate evidence to support those reserves, contrary to Rule 202 of the rules of professional conduct.

2. THAT, the said Stephen Shessel, in or about the period June 30, 1996 through December 31, 1997, failed to maintain the good reputation of the profession and its ability to serve the public interest in that, in preparing the Federal and Ontario corporate tax returns for SC. Limited for the fiscal years June 30, 1996 and June 30, 1997 he claimed the Small Business Deduction knowing that the company did not have sufficient employees to meet the applicable tax rules for claiming the deduction, contrary to Rule 201.1 of the rules of professional conduct.

PLEA

5. Mr. Shessel entered a plea of guilty to each of the charges and acknowledged that he understood that, on the basis of the plea of guilty and on that basis alone, he could be found guilty of the charges.

EVIDENCE

6. The evidence in this matter was entered by way of an Agreed Statement of Facts (Exhibit 2), along with an accompanying Document Brief (Exhibit 3) and Book of Authorities (Exhibit 4).

7. From the evidence, Mr. Shessel prepared financial statements and tax returns for "SC Limited" for the fiscal years 1996 and 1997. The financial statements were prepared on a "notice to reader" basis.

8. For both years, the financial statements compiled by Mr. Shessel included an accounting reserve of \$200,000 on a mortgage portfolio of approximately \$1 million. In the agreed statement of facts, a typical reserve would be between 1 and 4% of the value of the portfolio. There was no evidence of any extraordinary circumstances to justify the higher reserve.

9. For the same years, Mr. Shessel also claimed a tax reserve on the same mortgage portfolio in the amount of \$300,000. There was no evidence he had conducted any analysis of risk or collection concerns, or that management knew of or agreed with the reserve.

10. For those same years, Mr. Shessel also claimed the Small Business Deduction for "SC Limited," although he knew that the company did not have five unrelated employees and thus was not eligible for the deduction.

SUBMISSIONS

11. Ms. Hersak, on behalf of the Professional Conduct Committee, submitted that the evidence clearly established the reserves were not appropriate or documented. She submitted that, despite the financial statements having been prepared on a "notice to reader" basis, Mr. Shessel still had an obligation to look into the figures and assure himself they were reasonable. She framed the tax deduction issue as one of integrity.

12. Mr. Hluchan, on behalf of Mr. Shessel, called no evidence and made no submissions on the issue of guilt.

DECISION

13. After considering the evidence and submissions, and deliberating, the panel was satisfied the charges had been made out on clear, cogent, and compelling evidence, and made the following decision:

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1 and 2, the Discipline Committee finds Mr. Stephen Lorne Shessel guilty of charges Nos. 1 and 2.

SANCTION

14. Mr. Shessel gave evidence on his own behalf on the issue of sanction. He testified that he had made mistakes, and realized he needed to take steps to ensure he maintained a high level of competence. He indicated he was remorseful and embarrassed by the reflection his actions had not only on him but on the profession, and assured the panel he had not acted intentionally.

15. The Professional Conduct Committee sought an order which includes: a written reprimand; two named courses of professional development; a fine in the amount of \$5,000; and full publicity of the matter. It also sought costs.

16. With respect to the sanction, Ms. Hersak submitted that the principles of general deterrence, specific deterrence and rehabilitation were all important and should be considered. She reviewed a number of recent cases addressing similar conduct to support her submission that the quantum of the fine sought was appropriate for the lack of due care demonstrated. With respect to the reprimand, she submitted it was necessary to emphasize the need to maintain the reputation of the profession, and the professional development was required to address the concern that Mr. Shessel had failed to obtain evidence and perform any analysis.

17. Ms. Hersak also sought costs in the amount of \$7,800, and provided a Costs Outline (Exhibit 8) setting out the total costs of the hearing and investigation as \$29,363.80. She indicated that the Professional Conduct Committee was only seeking 40% of the investigative cost, as the investigation had been wide-ranging. Not all matters investigated resulted in charges. She then suggested a further reduction of 50% of the costs, to the \$7,800 sought, was appropriate, as recovery is on a partial indemnity basis. Mr. Shessel had taken no action to lengthen or obstruct the process, but had instead cooperated and pleaded guilty.

18. On behalf of Mr. Shessel, Mr. Hluchan agreed with the sanction submitted by the Professional Conduct Committee, but disagreed on the issue of costs. He submitted that Mr. Shessel has been rehabilitated by the process itself; and has been significantly affected by what he characterized as a one-time unfortunate incident. He reminded the panel that the matter was not one of moral turpitude but lack of due care, and the sanction sought was consistent with the nature of the conduct.

19. On the issue of costs, Mr. Hluchan submitted that the panel has no jurisdiction to award costs against Mr. Shessel in the circumstances of the hearing. He argued that

the Discipline Committee has no inherent jurisdiction to order costs, but must be granted that authority legislatively. The purported authority is derived from an amendment made December 6, 2000 to the *Chartered Accountants Act*, s. 8 (1)(g)(ii) and a subsequent amendment to Bylaw 530 to award costs.

20. He submitted that the Institute and its tribunals are subject to the *Statutory Powers Procedure Act*, and that the provisions of that *Act* apply unless other legislation specifically provides otherwise. He drew the panel's attention to s. 17.1 of the *SPPA*, which provides that costs may be awarded against a party if that party's conduct has been "unreasonable, frivolous, vexatious or ... in bad faith." He pointed out other restrictions on the awarding of costs and submitted that, as the panel cannot fit within the confines of that section, and cannot avail itself of the "grandfathering" provision in s. 17.1 (6), as the amendments to the *CA Act* were made after February 14, 2000, the panel had no jurisdiction to award costs.

21. In the alternative, Mr. Hluchan argued that, if there was jurisdiction, the quantum sought by the Professional Conduct Committee was excessive as the issues and the investigation into them were both simple. He further argued that a recovery of 33%, rather than 50%, was appropriate for partial indemnity, and submitted an amount of \$5,000 should be ordered.

22. In reply, Ms. Hersak stated that 50% was standard for partial indemnity recovery. The remainder of her reply addressed the jurisdictional issue raised by Mr. Hluchan with respect to costs.

23. Ms. Hersak conceded that the processes of the Institute are subject to the *Statutory Powers Procedure Act* in general, but not to s. 17.1. She noted the permissive language used in that section with respect to ordering costs, and the same permissive language used with respect to a tribunal making rules (s. 25.1). As the Discipline Committee has not enacted rules of procedure, it is removed from s. 17.1. She submitted that the *Chartered Accountants Act* was amended specifically to provide authority to the Discipline Committee to award costs and that, therefore, the jurisdiction to award costs is not derived from the *SPPA* or any rules, but directly from the *CA Act*. She provided the panel with the case of *Re Butler* (Exhibit 5), a recent decision of a different panel of the Discipline Committee, which had considered the issue and decided the Committee had jurisdiction to order costs, and did inform the panel that case is under appeal on the issue of costs.

24. In surreply, Mr. Hluchan submitted that the language in s. 17.1(2) of the *SPPA* is mandatory, not discretionary: "shall not make an order". He further submitted that *Butler* had been incorrectly decided on the point.

ORDER

25. After considering the submissions, the circumstances of the misconduct and the circumstances of the member, the panel made the following order:

IT IS ORDERED in respect of the charges:

1. THAT Mr. Shessel be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Shessel be and he is hereby fined the sum of \$5,000 to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Shessel be and he is hereby charged costs fixed at \$5,000 to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Shessel be and he is hereby required to complete, by paying for and attending in their entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the following professional development courses made available through the Institute:
 - (a) *Basic But Essential Income Tax Issues for the General Practitioner; and*
 - (b) *Staying Out of Trouble.*or, in the event a course listed above becomes unavailable, the successor course which takes its place.
5. THAT notice of this Decision and Order, disclosing Mr. Shessel'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 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.
6. THAT in the event Mr. Shessel fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within the three month period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Shessel's practice, employment and/or residence. All costs associated with the publication shall be borne by Mr. Shessel and shall be in addition to any other costs ordered by the committee.
7. THAT in the event Mr. Shessel fails to comply with any of the requirements of this Order, his public accounting licence shall thereupon be suspended until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within the three month period, his licence shall thereupon be revoked. Notice of his licence suspension and revocation, disclosing his name, shall be

given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Shessel's practice, employment and/or residence. All costs associated with the publication shall be borne by Mr. Shessel and shall be in addition to any other costs ordered by the committee.

REASONS

26. Mr. Shessel has been found guilty of failing to exercise due care and failing to uphold the reputation of the profession. His misconduct is not so much the result of carelessness but inattentiveness. He did not question, he did not maintain skepticism, he did not test. He was complacent, instead of watchful. This is a failing Mr. Shessel, and all members of the profession must guard against. It is also one he can overcome. For these reasons, all three principles of sanctioning – general deterrence, specific deterrence and rehabilitation – are important in this matter.

Reprimand

27. A reprimand will serve to stress to Mr. Shessel the necessity of maintaining his professional skepticism at all times, and the consequences to him and the profession should he fail to do so.

Fine

28. A fine is necessary to act as a deterrent to Mr. Shessel and to any other member of the profession who might become inattentive and complacent. The quantum proposed by the Professional Conduct Committee was supported by counsel for Mr. Shessel and, based on the precedents which have been brought to our attention, is appropriate.

Professional Development

29. Mr. Shessel has testified that he is proud to be a member of this profession, and he has the ability to contribute to that profession. To ensure he understands the competencies required, the two courses of professional development have been ordered.

Notice

30. Publication of a disciplinary matter has been described as the greatest deterrence. Publication also serves to educate and warn other members of the profession, and to indicate to the member charged the unacceptable nature of his conduct. To regulate the profession in the public interest, the public must be aware of that regulation. Transparency serves both the profession and the public, and notice will be ordered in all but the most extraordinary of circumstances. No such circumstances were urged on the panel.

Failure to Comply

31. To encourage compliance with this order, and to provide an immediate sanction should the member not comply, the panel orders that if the member fails to comply, he

shall be suspended for a period of time and then, should the lack of compliance continue, be expelled.

Costs

32. The panel has carefully considered the matter of costs and, in particular, its jurisdiction to award costs. It has concluded it does have that jurisdiction. The Institute and all its processes are empowered and governed by its enabling legislation, the *Chartered Accountants Act*. In December, 2000, that *Act* was amended to clearly and specifically grant the authority to award the costs of investigation and hearing to the Discipline Committee of the Institute.

33. At the time that amendment was made, s. 17.1 of the *Statutory Powers Procedure Act* was already in existence. Yet the amendments to the *CA Act* do not reference either the *SPPA* or its provisions regarding costs. This panel cannot conclude that the legislative drafters were unaware of the provisions of the *SPPA* in December, 2000, or that they deliberately drafted an amendment which could be of no force and effect. It therefore concludes that it was not intended that the costs provisions of the *SPPA* should apply to disciplinary hearings of the Institute.

34. Further, the panel notes the provisions of s. 17.1(1) are permissive: “a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party’s costs in a proceeding.” As Ms. Hersak has pointed out, the Institute has no rules made under s. 17.1(4) under which such costs could be ordered, which lends support to the conclusion that the costs ordered are not ordered pursuant to this section.

35. Mr. Hluchan has argued that the language in s. 17.1(2) is mandatory, and therefore does not admit of any manner of ordering costs except through that section. With respect, the panel disagrees. Section 17.1(2) reads, in part: “a tribunal shall not make an order to pay costs **under this section** unless ...” (emphasis added). That restriction is clearly limited to costs ordered under the auspices of the *SPPA*, and does not affect the jurisdiction of a tribunal, otherwise derived, to order costs. It is irrelevant to a determination of jurisdiction here, as the panel has found that its jurisdiction to award costs is derived from its enabling statute.

36. Argument has been made that, as the *CA Act* lacks an express provision that it prevails over the *SPPA*, the latter Act must take primacy. That is true, pursuant to s. 32 of the *SPPA*, in the case of any conflict. Here, however, the panel has not found there is a conflict but that the *SPPA* does not apply, for the reasons previously set out.

37. Having determined it had the authority to order costs, the quantum of the costs caused the panel some concern. There is no doubt there was a wide-ranging investigation, and the panel accepts the extent of the investigation was necessary. However, it is also cognizant of the fact that, out of that extensive investigation, only the charges before us were laid. It would be unfair to expect the member to bear the expense of such an investigation with such a result, as has been acknowledged by the Professional Conduct Committee. It is appropriate, however, to require him to bear a portion of those costs, and so spare the membership as a whole that burden.

38. The panel has been provided with two different percentages and urged to use one or the other to arrive at the appropriate quantum. The panel specifically declines to use a percentage to arrive at a quantification of partial indemnity. Instead, the panel has considered the amount of the costs incurred, the degree of culpability of the member, and the member's conduct in responding to the investigation and the charges and has determined that \$5,000 is the appropriate amount he should be assessed for costs.

DATED AT TORONTO THIS 9TH DAY OF JANUARY, 2008
BY ORDER OF THE DISCIPLINE COMMITTEE

J.A. CULLEMORE, FCA – CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

R.J. ADAMKOWSKI, CA
S.F. DINELEY, FCA
R.H. CARRINGTON (PUBLIC REPRESENTATIVE)