

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **TIMOTHY JAMES O'HARA, CA**, a member of the Institute, under **Rules 201.1 and 203.2** of the Rules of Professional Conduct, as amended.

TO: Mr. Timothy J. O'Hara, CA
1015 Gold Crescent
OTTAWA, ON K2B 8C4

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision and Order made October 17, 2007)

1. This panel of the Discipline Committee convened on October 17, 2007, to hear charges brought by the Professional Conduct Committee against, Timothy James O'Hara, a member of the Institute.
2. Ms. Alexandra Hersak appeared as counsel for the Professional Conduct Committee. She had with her the investigator appointed by the Professional Conduct Committee, Mr. Raymond Harris, FCA and the Director of Standards Enforcement, Ms. Patricia Roberts, CA.
3. Mr. O'Hara was not present when the hearing was called to order shortly after 10:15 a.m. Ms. Hersak filed an Affidavit of Service (Exhibit 2) sworn by Ms. Roberts which deposed that she sent the Notice of Hearing to Mr. O'Hara by ordinary mail and by electronic mail to the addresses Mr. O'Hara provided to the Institute. Ms. Hersak advised the panel that the Notice of Hearing had been sent to Mr. O'Hara in accordance with the direction made at the assignment hearing on July 31, 2007.
4. The panel concluded that Mr. O'Hara had proper notice of the hearing and ruled it would proceed in his absence pursuant to the provisions of Bylaw 560. The Chair directed that a plea of not guilty be entered on the record.
5. The decision of the panel was made known at the conclusion of the hearing on October 17, 2007. The written Decision and Order was sent to the parties on October 22, 2007. These Reasons, given pursuant to Bylaw 574, include the Charges, the Decision and Order and the reasons of this panel of the Discipline Committee for its Decision and Order.

The charges and the plea

6. The charges, made by the Professional Conduct Committee on July 2, 2007 (Exhibit 3) read as follows:

1. THAT, the said Timothy J. O'Hara, CA, in or about the period March 1, 2006, through May 31, 2007, failed to maintain the good reputation of the profession and its ability to serve the public interest in that he failed to respond to or provide service to his clients in a timely manner, contrary to Rule 201.1 of the Rules of Professional Conduct.
2. THAT, the said Timothy J. O'Hara, CA, in or about the period January 22, 2007, through May 31, 2007, failed to co-operate with officers, servants or agents of the Institute who have been appointed to arrange or conduct an investigation on behalf of the Professional Conduct Committee, contrary to Rule 203.2 of the Rules of Professional Conduct.

The case for the Professional Conduct Committee

7. Ms. Hersak made an opening statement. She also filed two Document Briefs and an Affidavit. The first Document Brief (Exhibit 4) contained documents set out after three Tabs. The documents which followed Tab 1 included: letters of complaint from two clients; a notice to Mr. O'Hara requiring him to attend the Professional Conduct Committee meeting of December 12, 2006; and a letter from Mr. O'Hara's landlord advising the Director of Standards Enforcement that Mr. O'Hara's business lease had been terminated for failure to pay rent. Included after Tab 2 of Exhibit 4 were the letters of complaint which were provided to the investigator. The documents included after Tab 3 of Exhibit 4 include: a Notice of Application to the Superior Court of Justice for Ontario for the appointment of a custodian to take possession of the client files and records held by Mr. O'Hara; an Affidavit of Elizabeth Cowie, the Director of Legal and Regulatory Affairs of the Institute, in support of that application; and a copy the Order of Justice Roy, dated August 10, 2007, appointing Daniel Elliott CA as the custodian.

8. In an Affidavit sworn on July 30, 2007, (Exhibit 5) Ms. Sarah Jane Hennessey deposed that she sent a letter to Mr. O'Hara advising him he was to attend at the Professional Conduct Committee meeting of May 29, 2007.

9. The second Document Brief (Exhibit 6) consisted of letters of complaint from clients or former clients set out after two Tabs. Following Tab 1, there were letters of complaint from thirteen clients or former clients which had been forwarded to Mr. O'Hara for his response. The letters set out behind Tab 2 of Exhibit 6, were letters received from more than 30 other clients or former clients of Mr. O'Hara. These complaints had not been sent to Mr. O'Hara for his response, in part because many of them were received after the decision to bring the charges against Mr. O'Hara.

10. Ms. Hersak called three witnesses. The first, Ms. Patricia Roberts, reviewed the complaints which were received prior to the December 12, 2006 meeting of the Professional Conduct Committee. She testified about Mr. O'Hara's attendance at that meeting and also about the subsequent Professional Conduct Committee meeting on February 7, 2007, when Mr. Harris was appointed to investigate the complaints. With reference to Exhibit 6, Ms. Roberts also testified about the complaints from more than 40 other clients or former clients of Mr. O'Hara which had been received. Ms. Roberts testified that Mr. O'Hara had not attended the

Professional Conduct Committee meeting on May 29, 2007, or contacted Standards Enforcement with respect to that meeting.

11. Mr. Harris, the second witness, testified that he was appointed to investigate seven complaints. He met with Mr. O'Hara in Ottawa on March 30, 2007. He also interviewed the seven complainants, five in person and two over the telephone. Mr. Harris filed a copy of his report to the Professional Conduct Committee (Exhibit 8) in which he set out details of his meeting with Mr. O'Hara as well as his interviews with the seven complainants.

12. The third witness, Mr. Thomas Warner, the Vice-President and Registrar of the Institute, testified with respect to the application to the court for the appointment of a custodian. Finally, Ms. Hersak filed an Affidavit of Daniel Elliott, the custodian appointed by the court, which set out some of the steps he had taken after his appointment. Mr. Elliott obtained 53 bankers boxes of documents from Mr. O'Hara, after attending at his residence on September 5, 2007. The residence is owned with another individual.

The relevant facts

13. The number of incidents of complaints, and the overt lack of response by Mr. O'Hara, were of a volume such that the evidence against the member was extensive. The panel hereinafter sets out the relevant facts as we find them to be. On December 12, 2006, Mr. O'Hara met with the Professional Conduct Committee. At that time Standards Enforcement had received two complaints from clients or former clients of Mr. O'Hara to the effect that he did not provide his services in a timely way. Mr. O'Hara advised the Professional Conduct Committee that he had suffered from some unidentified problems or issues; that he realized there were times when he needed assistance to properly serve his clients; and that he was negotiating with another chartered accountant to assist him should problems arise in the future.

14. As the arrangement between Mr. O'Hara and the other chartered accountant was to be finalized in the near future, and as Mr. O'Hara would provide the committee with written confirmation of the arrangement, the Professional Conduct Committee deferred consideration of the complaints to its meeting scheduled for February 6, 2007.

15. In late January, in response to an inquiry from Ms. Roberts as to the finalization of the arrangement, Mr. O'Hara said he was waiting for a letter to be signed back from the other chartered accountant. Mr. O'Hara did put Mr. Elliott's name and telephone number on his voice mail as someone his clients could contact "in case of emergency". However, Mr. O'Hara did not provide an agreement for Mr. Elliott to sign and the arrangement was never finalized. Mr. O'Hara did not attend the Professional Conduct Committee meeting of February 6, 2007. At that meeting, the Professional Conduct Committee appointed Mr. Harris to investigate the complaints.

16. Mr. Harris met with Mr. O'Hara in Ottawa on March 30, 2007. He reviewed seven complaints with Mr. O'Hara in some detail. Mr. O'Hara acknowledged that he had not responded to or provided his professional services to his clients in a timely manner. Mr. O'Hara did refer to "illness", "sickness" and in the case with respect to one client, a problem which was "medically related and incorrectly diagnosed" in his meeting with Mr. Harris. However, Mr. Harris did not find out just what, illness, sickness or problem precluded Mr. O'Hara from serving his clients as he should have between March 2006 and their meeting on March 30, 2007.

17. Mr. Harris determined that three of the complainants were still awaiting information or documents which Mr. O'Hara said he would provide. He also agreed to provide files to the

investigator. Mr. Harris followed up in early April with e-mails to Mr. O'Hara with respect to the outstanding undertakings. Mr. Harris did not hear further from Mr. O'Hara subsequent to their meeting of March 30, 2007.

18. In addition to the complaints which Mr. Harris reviewed with Mr. O'Hara, Standards Enforcement received complaints from more than 30 other clients or former clients of Mr. O'Hara. The letters show that the clients found his failure to respond stressful and upsetting; and that his failure to provide information and return relevant documents prejudiced them, particularly in their dealing with tax authorities.

19. Mr. O'Hara did complete the work for one of the clients who was among the first to complain to the Institute. Mr. O'Hara wrote to the client, apologized for not completing the work sooner, said he would charge no fee and said he would reimburse the client for any penalty incurred with CRA. The letter also included the following paragraph:

When a person engages a Chartered Accountant to assist with any matter, it is expected that the services will be rendered with due care, within a reasonable time frame and with acceptable correspondence. My inability to respond to your telephone queries in a timely manner cannot be excused. Again, please accept my apologies. The fact that my actions reflect not only upon myself but also upon all Chartered Accountants is truly noted. (Exhibit 4)

20. A number of the clients expressed the view that they went to Mr. O'Hara because he was a chartered accountant and as such they expected that their accounting and bookkeeping would be done correctly in a timely fashion and professionally without any questions regarding integrity. They found Mr. O'Hara's conduct inconsistent with the reputation of the profession. One former client wrote that he had chosen to deal with a member of the Institute but perhaps he should just deal with someone who is not a member as the treatment might be more professional

Decision

21. After deliberating, given the relevant facts set out above, the panel found Mr. O'Hara guilty of the charges. He had failed, in a pervasive and unprecedented manner, to respond to or provide services to his clients in a timely manner. In doing so he prejudiced his clients and failed to maintain the reputation of the profession and its ability to serve the public interest. He also had failed to cooperate with the officers, servants or agents of the Institute who were attempting to carry out an investigation.

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

THAT, having seen, heard and considered the evidence, and having determined to proceed with the hearing in the absence of Mr. O'Hara 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 the charges, the Discipline Committee finds Mr. Timothy James O'Hara guilty of charges Nos. 1 and 2.

Sanction

23. Ms. Hersak opened her submissions with respect to sanction by noting that this case was virtually unique, and that the member's failure to respond to and provide services to his clients was unprecedented in the history of the discipline proceedings of the Institute.

24. Ms. Hersak outlined the terms of the order sought by the Professional Conduct Committee which included: a reprimand; expulsion; full publicity; a fine in the amount of \$1,000; and costs of \$1,000.

25. Ms. Hersak informed the panel that the Professional Conduct Committee took into account Mr. O'Hara's difficult financial position in requesting a fine of only \$1,000. She said that Mr. O'Hara's expulsion, which was sought by the Professional Conduct Committee, would likely make it more difficult for Mr. O'Hara to earn income. Ms. Hersak acknowledged that the fine sought was low given other decisions of the Discipline Committee.

26. With respect to costs, Ms. Hersak filed a Bill of Costs (Exhibit 11) in the amount of approximately \$24,500. Again, she said the Professional Conduct Committee was seeking only \$1,000 because of Mr. O'Hara's financial position.

27. Ms. Hersak submitted that the misconduct which resulted in the charge and conviction for a breach of Rule 201.1 was so serious that expulsion was the appropriate sanction. She also submitted that Mr. O'Hara's failure to cooperate demonstrated that he was ungovernable and accordingly should be expelled.

Order

28. 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. O'Hara be reprimanded in writing by the chair of the hearing.
2. THAT Mr. O'Hara be and he is hereby fined the sum of \$10,000 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. O'Hara be and he is hereby charged costs fixed at \$7,500 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. O'Hara be and he is hereby expelled from membership in the Institute.
5. THAT notice of this Decision and Order, disclosing Mr. O'Hara'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 all provincial institutes/Ordre, and shall be made available to the public.

6. THAT notice of the expulsion disclosing Mr. O'Hara's name, be given by publication on the Institute's website and in *The Ottawa Citizen*. All costs associated with the publication shall be borne by Mr. O'Hara and shall be in addition to any other costs ordered by the committee.
7. THAT Mr. O'Hara 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

29. 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

30. It was clear that Mr. O'Hara was ungovernable and as such expulsion was appropriate. Also, as a matter of general deterrence, the neglect of his clients which constituted a breach of Rule 201.1, required expulsion.

Notice

31. As Mr. O'Hara 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. As the bylaws provide, the notice of Mr. O'Hara's expulsion should be published on the Institute's website and in the *Ottawa Citizen*, a newspaper published where he lives and practiced.

Certificate

32. As Mr. O'Hara will no longer be a member of the Institute, it is not appropriate he should retain his certificate of membership. The certificate is the property of the Institute and is to be returned to it.

Fine

33. The panel had significant difficulty with the requested fine of \$1,000. The panel understood that the Professional Conduct Committee had concluded that Mr. O'Hara was in a difficult financial position. His landlord had locked him out as he had not paid the rent on his business premises. His practice and his income from the practice, as he advised Mr. Harris, had been relatively modest. Mr. O'Hara had been unable to service clients properly since March 2006, and it is assumed that his income would decline as a result. Nevertheless, the evidence did not establish that Mr. O'Hara was destitute or that he did not have other sources of income or capital. The evidence was that in September 2007 he had an interest in a house in Ottawa.

34. While the panel did not wish to cause undue hardship for Mr. O'Hara, it concluded a fine of \$1,000 was inadequate as either a general or specific deterrent. Mr. O'Hara did not fail one or two clients, or fail all of his clients for a relatively short period of time. Mr. O'Hara failed to provide appropriate services for many, if not all of his clients, for many months. He not only did not do the work which he said he would do, but he failed to return telephone calls, provide

information and return clients' documents which put them in an intolerable position. Moreover, when given the opportunity by the Professional Conduct Committee to complete arrangements with another chartered accountant, which would minimize the difficulty his clients faced, and the consequences of his misconduct, he failed to complete the agreement he said he was working on and thereafter he failed to cooperate with the officers, servants and agents of the Institute. His failure was such that the Institute, for the first time in its history, had no choice but to apply to the court to have a custodian appointed to look after the client files and documents. Ms Hersak described the case against Mr. O'Hara's as virtually unique, and the panel concluded that a larger fine than requested was appropriate in view of the number of complaints and the member's lack of cooperation.

35. All members of the Institute face potential illness and other difficulties, which could preclude them from providing appropriate services to their clients. A fine of only \$1,000, even when the order also provides for expulsion, would not be a sufficient general deterrent to other members. By reason of their membership in the Institute, the members enjoy a reputation for honesty, integrity and professionalism. Members have an obligation to ensure that should circumstances prevent them from providing their professional services in an appropriate and timely way, that they will make other arrangements to ensure that their clients are not prejudiced. Members, including Mr. O'Hara, do face problems or illnesses beyond their control, but they do control how they respond to the illness or problems and, in particular, how they deal with their clients in such circumstances. The representations Mr. O'Hara made to the Professional Conduct Committee and Ms. Roberts with respect to the arrangement he was making with another chartered accountant to assist him when his workload was too heavy were not truthful. The panel concluded that a fine of \$10,000 was required as a general deterrent and as a specific deterrent to Mr. O'Hara.

Costs

36. The panel concluded that it would be appropriate to order costs in the amount of \$7,500, approximately one-third of the costs incurred to investigate Mr. O'Hara's conduct and prosecute the case. The costs incurred were entirely the result of Mr. O'Hara's misconduct. Mr. O'Hara had the opportunity in December 2006, to cooperate with the Professional Conduct Committee, which as we have said above, would have helped him and his clients. Instead his conduct necessitated an extensive investigation. The Institute continued to receive complaints from Mr. O'Hara's clients up to September 27, 2007. The membership as a whole should not bear all of the costs of the investigation and prosecution.

DATED AT TORONTO THIS 6TH DAY OF DECEMBER 2007
BY ORDER OF THE DISCIPLINE COMMITTEE

J.A. CULLEMORE, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

S.R. LOWE, CA
S.M. DOUGLAS, FCA
R.H. CARRINGTON (PUBLIC REPRESENTATIVE)