

**CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO
DISCIPLINE COMMITTEE**

Rebecca Huang, LL.B. Chair]
Hesham Shafie, CMA]
Richard Fung, CMA]

Thursday, 14 November 2013

IN THE MATTER of the *Certified Management Accountants Act, 2010*, Statutes of Ontario 2010, c.6, Schedule B, as amended (the "*Act*");

AND IN THE MATTER of a Hearing of a matter regarding the conduct of Edward Holko, a retired Member, as referred by the Complaints Committee of Certified Management Accountants of Ontario (the "Corporation") to be held according to the *Act* and Bylaws of the Corporation and the Rules of Procedure of the Discipline Committee of the Corporation.

BETWEEN:

CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO

Applicant

and

EDWARD HOLKO

Respondent

DECISION AND ORDER

THIS HEARING was heard at Victory Verbatim, Ernst & Young Tower, Suite 900, 222 Bay Street, Toronto, Ontario on Thursday the 14th day of November 2013, in the presence of the lawyer for the Applicant, and the lawyer for the Respondent.

UPON READING THE NOTICE OF HEARING, as amended, filed on consent;

AND UPON REVIEWING the documents filed on consent;


AND UPON READING the Agreed Statement of Facts, amended and filed on consent,

AND UPON READING the Joint Submissions as to Penalty, filed on consent,

AND UPON hearing the submissions of the lawyers for the Applicant and Respondent, respectively, the Discipline Committee

1. FINDS AND DECLARES that the Respondent, Edward Holko, is guilty of professional misconduct and in breach of sections 21(a)(i) and 21(a)(iii) of the CMA Ontario By-laws in effect at the time of the conduct which includes By-laws issued in August 2001, August 2002 and August 2003.
2. ISSUES a reprimand and DIRECTS that the reprimand be recorded on the Respondent's record.
3. ORDERS that the Respondent pay a fine of five hundred dollars (\$500) payable within sixty (60) days of the date of this Order.
4. ORDERS that in the event that the Respondent fails to comply with the terms of this Order within 6 months from the date this decision and the Order becomes final under the Discipline Committee Rules of Procedure, his membership shall be immediately revoked and notice of the revocation shall be published as outlined in 20.6.1, 20.6.2 and 20.6.3 of the Discipline Committee Rules of Procedure;
5. ORDERS that notice of the Decision and Order of the Discipline Committee disclosing the name of the Respondent and brief particulars of the professional misconduct be published and distributed to the Board and to the members in the CMA Ontario Journal; and
6. MAKES no order as to costs.



Rebecca Huang LL.B.
Chair of the Panel of the Discipline Committee

Richard Fung C.M.A.

Hesham Shafie C.M.A.

**THE DISCIPLINE COMMITTEE OF
CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO**

IN THE MATTER of the *Certified Management Accountants Act, 2010*, Statutes of Ontario 2010, c.6, Schedule B, as amended (the "*Act*");

AND IN THE MATTER of a Hearing of a matter regarding the conduct of Edward Holko, a retired Member, as referred by the Complaints Committee of Certified Management Accountants of Ontario (the "Corporation") to be held according to the *Act* and Bylaws of the Corporation and the Rules of Procedure of the Discipline Committee of the Corporation.

BETWEEN:

CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO

Applicant

and

EDWARD HOLKO

Respondent

REASONS

The Discipline Committee held a hearing at Victory Verbatim, Ernst & Young Tower, Suite 900, 222 Bay St., Toronto, Ontario on Thursday, the 14th day of November 2013, to consider the matter referred by the Complaints Committee regarding the conduct of Edward Holko, a retired Member of Certified Management Accountants of Ontario ("CMA Ontario").

The Discipline Committee conducting the hearing consisted of three panel members: Rebecca Huang LL.B. (Chair), Richard Fung, CMA, and Hesham Shafie, CMA. The Independent Legal Counsel for the Discipline Committee was Mr. Bryan J. Buttigieg, of Miller Thomson LLP, Barristers & Solicitors.

Counsel for the Applicant was Ms. Jennifer Cooper. Counsel for the Respondent was Mr. Michael Magonet of Magonet Law, Professional Corporation. The Respondent and his counsel were present. The hearing was open to the public.

At the end of the hearing, the Discipline Committee issued findings of the Applicant's misconduct and an order as to the penalty ("Order"). Reasons for the findings and Order are as follows.

Referral from the Complaints Committee

The Discipline Committee received a Notice of Referral issued by the Complaints Committee on January 23, 2012 (the "Notice of Referral"), which was amended on consent. It contains the following allegations:

1. Retrocom Investment Management Inc. ("RIMI") and/or Bellport Black were both managers of Retrocom Growth Fund ("Retrocom"). Between 2002 and 2004, while employed by RIMI as a senior finance employee, the Respondent:
 - a. was paid a portion of additional fees by way of a transfer of a condominium unit to a numbered company which was 50% controlled by the Respondent when such fees should have been paid to his employer, RIMI;
 - b. obtained a personal benefit as a result of the condominium unit transfer for which the Respondent did not personally seek consent from Retrocom;
 - c. failed to take any steps to ensure that RIMI sought the required consent for the transfer of the condominium unit as outlined in a management agreement between RIMI and Retrocom; and
 - d. as a result of the actions outlined above, acquiesced and participated in non-compliance with Ontario Securities Law and failed to act in the public interest.
2. The Respondent's alleged misconduct is contrary to section 21(a)(i) and (iii) of the CMA Ontario By-laws in effect at the time of the conduct including the By-laws issued in August 2001, August 2002 and August 2003.

Section 21(a)(i) and (iii) read as follows:

21 Code of Professional Ethics

All members will adhere to the following "Code of Professional Ethics" of the Society:

(a) A Member will act at all times with:

(i) Responsibility for and fidelity to public needs;

...

(iii) Competence through devotion to high ideals of personal honour and professional integrity.

Evidence and Findings on the Respondent's Conduct

The Parties submitted an Agreed Statement of Fact, which was amended on consent during the hearing in response to the questions raised by the Discipline Committee. Also on consent, the Parties filed other documentary evidence including a settlement agreement between the Respondent and the Ontario Securities Commission (the "OSC") dated April 7, 2010 (the "Settlement Agreement"), and an order issued by the OSC on April 12, 2010 approving the Settlement Agreement (the "OSC Order"). The Parties did not call any witness at the hearing.

For the purpose of this hearing, the following facts are not in dispute:

1. The Applicant became a member of CMA Ontario in 1997. He has never been the subject of a finding of professional misconduct by CMA Ontario.
2. Retrocom was incorporated in 1995 and became a reporting issuer in Ontario as a labour-sponsored investment fund. The majority of its holdings were real estate investments.
3. RIMI was registered with the OSC as an Investment Counsel and Portfolio Manager in 1998 and a Limited Market Dealer in 2000. It was Retrocom's manager from 2001 until 2006.
4. Under the applicable agreement between RIMI and Retrocom, RIMI was to receive an annual management fee directly from investee companies for services provided. Without Retrocom's consent, RIMI's employees, directors or officers were not permitted to enter into any arrangement with an investee company, potential investee company or eligible business for any other fee, payment or benefit.
5. Between 2002 and 2005, the Respondent was employed as the Vice-President of Finance and Administration at RIMI. He was one of the principals of RIMI.
6. Between 2003 and 2005, RIMI received payments ("Additional Fees") totalling approximately \$3.5 million from companies/projects in which Retrocom had invested based on RIMI's advice (and in which this Respondent did not have a role).
7. A minor portion of the Additional Fees was paid to the Respondent by way of the transfer of a condominium unit (the "Condo") to a numbered company equally controlled by the Respondent and by another RIMI employee. At the time of the transfer, the Condo was valued at \$490,654.21. Based on the OSC's assessment of the Condo's value, the Respondent obtained a personal benefit of approximately \$245,000.00 (the "Personal Benefit") as a consequence of the transfer.
8. The Respondent did not personally seek consent from Retrocom prior to RIMI's acceptance of the Additional Fees. He did not take any steps to ensure that RIMI did so. Neither did he personally disclose to Retrocom that he had received the Personal Benefit.

9. The Respondent believed that others at RIMI who sat on Retrocom's Board of Directors had informed it of his receipt of the Personal Benefit and obtained Retrocom's approval in respect of same. He acknowledged however, that he ought to have been more careful and sought confirmation in respect of this assumption.
10. The Respondent acknowledged that a conflict of interest was created by the Additional Fees, because RIMI had an incentive to recommend that Retrocom make investments in projects that would generate fees in the nature of Additional Fees.
11. Accordingly, the Respondent acknowledged that RIMI's failure to disclose to Retrocom about the Additional Fees prior to the acceptance of such payments, and RIMI's receipt of the Additional Fees were in breach of RIMI's obligations under the *Securities Act*. Pursuant to Section 116, RIMI was required to have exercised its powers and discharged its duties fairly, honestly, in good faith and in the best interests of Retrocom, and to have exercised the degree of care, diligence and skill expected of a reasonably prudent fund manager in the circumstances.
12. The Respondent acknowledged that he ought to have been more careful in ensuring that the Additional Fees and Personal Benefit received by RIMI were properly disclosed to Retrocom. He therefore acknowledged that he acquiesced in these non-compliances with the Ontario Securities Law contrary to section 129.2 of the *Securities Act*.
13. In 2006, Retrocom filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*. The OSC issued an Order accepting RIMI's surrender of registration.
14. In July 2009, the Respondent was granted retirement status by CMA Ontario.
15. In April 2010, after fully cooperating with the OSC, the Respondent entered into a Settlement Agreement regarding his dealings as an employee of RIMI. For purposes of resolution, the Respondent acknowledged that a conflict of interest was created by his receipt of the Personal Benefit and that he did not personally seek the consent from Retrocom or personally disclose to Retrocom that he had received the Personal Benefit.
16. The Respondent did not fail in any disclosure obligations he may have had to RIMI who was, at all material times, aware of the Personal Benefit. There is no evidence that the Personal Benefit received by the Respondent would not have been approved if consent had been sought. The Respondent admitted that his conduct constituted a breach of section 116 of *The Securities Act*.
17. Pursuant to the Settlement Agreement, the OSC issued the following order against the Respondent:
 - (a) The Respondent be reprimanded;
 - (b) The Respondent shall disgorge to the OSC the greater of \$245,327.10 or 50% of the net sale price from the sale of the condominium unit;

- (c) The Respondent is prohibited from becoming or acting as an officer or director of a reporting issuer, an investment fund, an investment fund manager and a registrant for a period of 3 years from the date of the approval of the Settlement Agreement;
 - (d) The Respondent shall pay the sum of \$5,000.00 in respect to costs of the investigation of the matter; and
 - (e) The Respondent shall cooperate with the OSC in respect of any proceeding commenced with respect to the subject matter of the Settlement Agreement and testify at the hearing of such proceeding.
18. The Respondent has made payment to the OSC of the costs of the investigation as agreed and remitted 50% of the net sales proceeds of the condominium unit to the OSC.
19. In June 2012, a complaint was filed with CMA Ontario by a staff member regarding the Respondent's dealings and findings of the OSC as outlined in the Settlement Agreement. No member of the public has filed any complaint in this regard with CMA Ontario.

After considering the totality of the evidence, the Discipline Committee found that the Respondent engaged in professional misconduct contrary to sections 21(a)(i) and 21(a)(iii) of the CMA Ontario By-laws. A CMA member is expected to be highly vigilant and scrupulous when it comes to the issues of conflict of interest and receipt of personal benefit that is beyond the norm. In cases such as this where additional steps are required, such as disclosure to and consent from another party, before a member or his employer can rightfully receive certain financial benefit, the member cannot and does not meet the standard of responsibility and integrity under CMA Ontario By-Laws by simply assuming that others have taken the necessary steps to allow for the receipt of the financial benefit. In this case, the Applicant should have taken steps to ensure that the conflict of interest had been cleared or to obtain consent for the Additional Fees and Personal Benefit. His failure to take any of these steps violated the professional code of conduct under the CMA Ontario By-laws.

The Parties' Submissions on Penalty

The Parties made the following joint submissions as to penalty:

- 1. issue a reprimand and direct that the reprimand be recorded on the register;
- 2. issue a fine in the amount of \$500.00 to be paid in full within 60 days of the date this decision and order becomes final under the Discipline Committee Rules of Procedure;
- 3. make no order as to costs; and
- 4. that in the event that the Respondent fails to comply with the above three terms within 6 months from the date this decision and Order becomes final under the Discipline Committee Rules of Procedure, his membership shall be immediately

revoked and notice of the revocation, shall be published as outlined in 20.6.1, 20.6.2 and 20.6.3 of the Discipline Committee Rules of Procedure.

The Parties disagreed as to the disclosure of the Respondent's name at the time of publication of the Decision and Order. Ms. Cooper took the position that the Respondent's name shall be disclosed for the purpose of general deterrence and to maintain public confidence in the CMA. Mr. Magonet disagreed. He argued that there was already sufficient public notice of the Respondent's involvement in the matter before the OSC which was based on the same material facts as those before this Committee, and that any further publication would serve no purpose other than to be unfairly punitive to the Respondent.

Based on the totality of the evidence, the Discipline Committee does not entirely agree with the joint submission as to penalty, and would have imposed a higher fine than \$500. However, we are mindful of the principles enunciated in the authorities cited by counsel that we should only interfere with a joint submission as to penalty if the joint submission is contrary to the public interest or would bring the administration of justice into disrepute. The proposed fine of \$500 is low but not so far off that would bring the administration of justice into disrepute. Accordingly, we accept the joint submission as to penalty and make the order as requested.

With respect to the Respondent's name, we conclude that it must be published for the following reasons.

Section 20.6 of the Discipline Committee Rules of Procedure presumes that the name of the member will be disclosed. It further stipulates that the name may be withheld only if publication of the member's name is not required in the public interest and if publication of the member's name would be unfair to the member. This is a conjunctive test. Both parts of the test must be met in order to withhold publication of the member's name.

In this case, publication of the Respondent's name is required in the public interest. As a general rule, the public interest is best served by an open and transparent procedure. The Respondent failed to give compelling reasons to show that publication would not be required in the public interest. The OSC and the CMA proceedings are separate and independent proceedings, and each must be carried out to satisfy the goals and objectives under the governing statute. We see no unfairness to the Respondent in publishing his name simply because his name has already been published by the OSC with respect to the same misconduct. We decline to exercise our discretion to withhold publication of the Respondent's name.

Penalties imposed

Accordingly we impose the following penalties:


1. under the authority of paragraph 6 of section 35(4) of the Act, the Committee orders that a Reprimand will be imposed and such reprimand shall be recorded on the Respondent's record,

2. under the authority of paragraph 8 of Section 35(4) of the Act, the Committee orders that the Respondent shall pay a fine of five hundred dollars (\$500), such payment to be made within sixty (60) days of the date of this order,
3. that in the event that the Respondent fails to comply with the terms of this Order within 6 months from the date this decision and Order becomes final under the Discipline Committee Rules of Procedure, his membership shall be immediately revoked and notice of the revocation, shall be published as outlined in 20.6.1, 20.6.2 and 20.6.3 of the Discipline Committee Rules of Procedure,
4. under the authority of paragraph 11 of section 35(4) of the Act, and in accordance with the provisions of section 15.6 of the Discipline Committee Rules of Procedure, the Committee orders that notice of the Decision and Order of the Discipline Committee disclosing the name of the Respondent and brief particulars of the professional misconduct be published and distributed to the Board and to the members in the CMA Ontario journal,
5. the Decision and Order of the Discipline Committee disclosing the name of the Respondent, together with the written reasons for the decision with brief particulars of the finding of professional misconduct, will be published and maintained in the public area of CMA Ontario's website, and
6. the Committee makes no order as to costs.

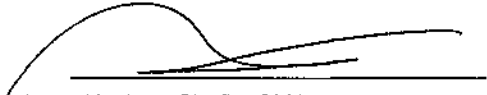
On consent of the parties, the order takes effect on the date of its issuance.

The Discipline Committee wishes to thank counsel for the Applicant and the Respondent for their assistance and in particular for their efforts to resolve substantial issues prior to the hearing by filing a joint agreed statement of facts and joint submissions as to penalty.

All of which is submitted this 18th day of December 2013


Rebecca Huang, LL.B.
Chair of the Panel of the Discipline Committee


per Richard Fung, CMA


per Hesham Shafie, CMA