

**IN THE MATTER OF a Proceeding under
the *Certified General Accountants Act, 2010* and the Bylaws**

**IN THE MATTER OF Olga McCarten, a member of
The Certified General Accountants Association of Ontario**

BETWEEN:

The Discipline Committee of The Certified General Accountants Association of Ontario

- and -

Olga McCarten

DECISION AND REASONS FOR DECISION OF THE PROFESSIONAL CONDUCT TRIBUNAL

Members of the Professional Conduct Tribunal Panel:

Betty Kuchta, Public Representative, Chair
Jane Rivers, CGA
Peter Vaillancourt, CGA

Appearances:

Karen E. Jolley, Counsel for the Discipline Committee
Olga McCarten, Member
Lisa Braverman, Registrar and Independent Legal Counsel to the Professional Conduct Tribunal

Hearing Date:

July 26, 2011, Toronto

OVERVIEW

A panel of the Professional Conduct Tribunal of The Certified General Accountants Association of Ontario heard this matter on July 26, 2011, at Toronto.

The Chair made opening remarks. The member confirmed that she did not seek legal counsel and was representing herself. The member requested clarification of the meaning of the reference to the hearing being open, and confirmed that she would not be making a motion requesting that the hearing be closed. Both parties consented to the standard procedure of the Tribunal to conduct one hearing where evidence and submissions on whether there is a breach of the Code of Ethical Principles and Rules of Conduct and Penalty are heard together at the same hearing.

At the conclusion of the opening remarks, the hearing proceeded. At the conclusion of the hearing, the panel reserved its decision.

ALLEGATIONS

Counsel for the Discipline Committee, Ms. Karen Jolley, entered into evidence the Notice of Hearing dated May 30, 2011, contained in the Discipline Brief Exhibit # 1, and the Affidavit of Service Exhibit # 2, relating to the Notice of Hearing.

The allegations against the member are that Ms. Olga McCarten breached the following provisions of the Code of Ethical Principles and Rules of Conduct as stated in the Notice of Hearing:

Rule 514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

Rule 515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

Rule 516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

Rule 601 Compliance

A member shall comply with By-Law Four and the *Code of Ethical Principles and Rules of Conduct* of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

Rule 610 Requirement to Reply in Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

Rule 611 Assistance to the Board

A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

The particulars of the allegations against the member as stated in the Notice of Hearing are as follows:

1. Olga McCarten ("McCarten") became a member of CGA Ontario (the "Association") in 1984. McCarten was never registered in public practice with the Association.
2. In each of 2008 and 2009, McCarten prepared corporate tax returns for clients.
3. In each of 2008 and 2009, McCarten also prepared personal income tax returns for clients.

4. The Code of Ethical Principles and Rules of Conduct (the "Code") defines a "professional practice" as "a proprietorship, partnership, limited liability partnership or professional corporation that provides professional services."
5. The Code further defines "professional services" as "any accounting, assurance, taxation services, management advisory or consulting services or other related services as may from time to time be recognized by the Association that is performed or offered to be performed by a member for a client or employer, whether or not the member asserts membership in the Association."
6. By providing professional services, specifically the preparation of corporate tax returns for the public, McCarten was operating a professional practice, as defined by the Code.
7. Rule 514 of the Code requires a member engaged in a professional practice to register with the Association.
8. McCarten did not register her professional practice.
9. Members who prepare personal income tax returns are also required to register with the Association.
10. McCarten did not register with the Association to prepare personal income tax returns.
11. As McCarten was not registered for the preparation of personal income tax returns, she was also not permitted to prepare such returns for the years 2008 or 2009.
12. Rule 515 of the Code requires a member engaged in a professional practice to adhere to the practice inspection requirements of the Association.
13. McCarten did not undergo a practice inspection with the Association as she was not registered to carry on the public practice work she was doing.

14. Rule 516 of the Code requires a member engaged in a professional practice to maintain professional liability insurance.
15. McCarten did not maintain insurance for her practice.
16. The total cost of professional liability insurance for the years 2008 and 2009 was approximately \$2,271.24 inclusive of tax.
17. Members who are engaged in a professional practice are required to purchase the Public Practice Manual (the "PPM") and the CICA Handbook (the "Handbook").
18. McCarten did not purchase the PPM or the Handbook for either of 2008 or 2009.
19. The total cost of the PPM and the Handbook and applicable renewals was \$1,475.25 inclusive of tax for the two years in question.
20. McCarten was not permitted by the Association to offer the professional services that she provided to the public.
21. McCarten earned income from carrying on a professional practice operated in violation of the Code.
22. Rule 601 of the Code requires members to comply with the Association's Bylaws and the Code.
23. By carrying on a professional practice without being registered to do so, and by preparing tax returns when she was not registered to do so, McCarten did not comply with the Association's Code and therefore also did not comply with Rule 601.
24. By email dated 8 October 2010 the Association asked McCarten for a list of her clients for each of the years that she operated her professional practice to date, along with the particulars of the work done for each client. She was also asked to provide evidence of professional liability insurance.

25. When the information was not forthcoming, the Association emailed McCarten again on 21 October 2010 asking for a response.
26. The Association sent McCarten a further email dated 17 December 2010 asking that she provide a written response by December 31 and noting that she was required to respond by virtue of Rules 610 and 611 of the Code.
27. The Association followed up with McCarten by email dated 6 January 2011 for the information.
28. By email dated 6 January 2011 McCarten responded that she had "no clients" but did not respond with information for the years prior to 2011. She did not provide evidence of insurance.
29. The Association followed up with McCarten by telephone on 10 January 2011, sent an email confirming its understanding of the content of its discussion with McCarten and asked her to confirm same by January 12 in time for the committee meeting.
30. McCarten did not respond.
31. Rule 610 of the Code requires members to reply promptly and in writing to any request from the Association in which a written reply is requested.
32. By not providing a written response to the Association when one was requested, McCarten breached Rule 610.
33. Rule 611 of the Code requires members to comply with a request of any Association committee and, when required, to produce any documents in the member's possession, custody or control.

34. By not responding to the Association, not providing proof of insurance and not providing particulars of the professional services she provided to her clients, McCarten breached Rule 611.

35. McCarten's conduct amounted to professional misconduct and conduct unbecoming a certified general accountant.

MEMBER'S PLEA

The member made submissions regarding the allegation of her failure to respond in the Notice of Hearing. Counsel for the Tribunal, upon request of the panel and during the hearing, provided advice to the panel that because the member did not respond to the Request to Admit Facts and Documents within the required 20 day period, all the facts in the document become deemed admissions including the fact that the member did not respond, and that any evidence presented by the member could not be contrary to the deemed admissions. Counsel for the Tribunal suggested that the information being provided by the member, namely that the member did not respond but had an explanation, went more to the matter of penalty.

The member initially admitted the allegations set out in the Notice of Hearing with a condition. Then, the member denied the allegations set out in the Notice of Hearing.

FACTS AND EVIDENCE

The hearing proceeded without any testimony from witnesses. Counsel for the Discipline Committee presented an Affidavit of Service Exhibit #3, establishing that the member had been served on June 30, 2011 with a Request to Admit Facts and Documents Exhibit # 5. The member was advised that she had 20 days to respond to the Request to Admit Facts and Documents, and that if she failed to respond, she would be deemed to admit the truth of the facts and the authenticity of the documents, for the purposes of this proceeding. The member did not respond to the Request to Admit Facts and Documents. Based on the facts and documents deemed to be admitted by the member at this hearing, the panel makes the following findings of fact:

1. Ms. Olga McCarten became a member of CGA Ontario in 1984.
2. Ms. Olga McCarten's CGA Ontario certificate number is 5110; her CGA Canada certificate number is 318956.
3. Ms. Olga McCarten is not and has not been registered in public practice with CGA Ontario (the "Association").
4. The Code of Ethical Principles and Rules of Conduct (the "Code") defines a "professional practice" as "a proprietorship, partnership, limited liability partnership or professional corporation that provides professional services."
5. The Code further defines "professional services" as "any accounting, assurance, taxation services, management advisory or consulting services or other related services as may from time to time be recognized by the Association that is performed or offered to be performed by a member for a client or employer, whether or not the member asserts membership in the Association."
6. In 2008 and 2009 Ms. Olga McCarten prepared corporate tax returns for clients.
7. Ms. Olga McCarten was not registered with the Association to prepare corporate tax returns in 2008 or 2009.
8. Ms. Olga McCarten also prepared income tax returns when she was not registered with the Association to do so.

9. By providing professional services, specifically the preparation of corporate tax returns for the public, Ms.Olga McCarten was operating a professional practice, as defined by the Code.

10. Rule 514 of the Code - Registration - provides as follows:

R514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

11. Ms. Olga McCarten did not register her professional practice with the Association.

12. Rule 515 of the Code - Practice Inspection Requirements - provides as follows:

R515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

13. Ms.Olga McCarten did not undergo a practice inspection with the Association as she was not registered to carry on the public practice work she was doing.

14. Rule 516 of the Code - Professional Liability Insurance - provides as follows:

516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements of tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

15. Ms.Olga McCarten did not maintain insurance for her practice.

16. The total cost of professional liability insurance for the years 2008 and 2009 was \$2,271.24 inclusive of tax.

17. Ms.Olga McCarten was required to but did not purchase the Public Practice Manual (the "PPM") or the CICA Handbook (the "Handbook") for either of 2008 or 2009.

18. The total cost of the PPM and the Handbook and applicable renewals was \$1,475.25 inclusive of tax for the two years in question.

19. Further, Ms. Olga McCarten is not and has not been registered with the Association to prepare income tax returns.

20. In 2008 and 2009, Ms. Olga McCarten prepared personal income tax returns for clients without being registered to do so.

21. Rule 601 of the Code - Compliance - provides as follows:

R601 Compliance

A member shall comply with By-Law Four and the Code of Ethical Principles and Rules of Conduct of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

22. By carrying on a public practice without being registered to do so and by preparing income tax returns without being registered to do so, Ms. Olga McCarten did not comply with the Association's Code and therefore also did not comply with Rule 601.

23. Rule 610 of the Code - Requirement to Reply in Writing - provides as follows:

R610 Requirement to Reply in Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

24. By email dated 8 October 2010 the Association asked Ms. Olga McCarten for a list of her clients for each of the years that she operated her professional practice to date, along with the particulars of the work done for each client. Ms. Olga McCarten was also asked to provide evidence of professional liability insurance.

25. When the information was not forthcoming, the Association emailed Ms. Olga McCarten again on 21 October 2010 asking for a response.

26. The Association sent Ms. Olga McCarten a further email dated 17 December 2010 asking that she provide a written response by December 21 and noting that she was required to respond by virtue of Rules 610 and 611 of the Code.

27. The Association followed up with Ms. Olga McCarten by email dated 6 January 2011 for the information.

28. By email dated 6 January 2011 Ms. Olga McCarten responded that she "had no clients" but did not respond with information for the years prior to 20 11. Ms. Olga McCarten did not provide evidence of insurance.

29. The Association followed up with Ms.Olga McCarten by phone on 10 January 2011, sent an email confirming its understanding of the content of Ms.Olga McCarten's discussion and asked her to confirm same by January 12 in time for the discipline meeting.
30. Ms.Olga McCarten did not respond.
31. By not providing a written response to the Association when one was requested, Ms. Olga McCarten breached Rule 610.
32. Rule 611 - Assistance to the Board - provides as follows:
R611 Assistance to the Board
A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the Code of Ethical Principles and Rules of Conduct, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.
33. Rule 611 of the Code requires members to comply with a request of any Association committee and, when required, to produce any documents in the member's possession, custody or control.
34. By not responding to the Association, not providing proof of insurance and not providing particulars of the professional services Ms. Olga McCarten provided to her clients, Ms.Olga McCarten breached Rule 611.
35. By failing to register her professional practice, failing to undergo a practice inspection, failing to purchase the PPM and the Handbook, failing to carry insurance, failing to respond in writing to the Association and failing to provide the discipline committee with the information it requested of her, Ms. Olga McCarten's conduct amounted to professional misconduct.
36. The applicable provisions of the Code are as set out in the discipline brief in this matter.

DECISION

The Discipline Committee has the onus of proving the allegations in the Notice of Hearing in accordance with the civil standard of proof. The standard of proof applied by the panel was a balance of probabilities based on clear, convincing and cogent evidence.

In coming to a decision, the panel relied upon the evidence that was provided in the form of deemed admissions arising from the Request to Admit Facts and Documents, Exhibit #5. The Tribunal made findings of fact based on these deemed admissions.

Having considered the evidence and the submissions of the parties and the onus and standard of proof, the panel finds that the member breached the following provisions of the Code of Ethical Principles and Rules of Conduct:

Rule 514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

Rule 515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

Rule 516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

Rule 601 Compliance

A member shall comply with By-Law Four and the *Code of Ethical Principles and Rules of Conduct* of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

Rule 610 Requirement to Reply in Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

Rule 611 Assistance to the Board

A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

The panel also finds the member guilty of professional misconduct.

REASONS FOR DECISION

Rule 514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

Rule 514 of the Code requires a member engaged in a professional practice to register with the Association.

The Code of Ethical Principles and Rules of Conduct define a "professional practice" as "a proprietorship, partnership, limited liability partnership or professional corporation that provides professional services." The Code further defines "professional services" as "any accounting, assurance, taxation services, management advisory or consulting services or other related services as may from time to time be recognized by the Association that is performed or offered to be performed by a member for a client or employer, whether or not the member asserts membership in the Association."

Ms. Olga McCarten became a member of the Association, CGA Ontario, in 1984. She was never registered in public practice with the Association. In each of 2008 and 2009, she prepared corporate tax returns for clients and she also prepared personal income tax returns for clients.

By providing professional services, specifically the preparation of corporate tax returns for the public, Ms. Olga McCarten was operating a professional practice, as defined by the Code. Ms. Olga McCarten did not register her professional practice.

Members who prepare personal income tax returns are also required to register with the Association. Ms. Olga McCarten did not register with the Association to prepare personal income tax returns. As Ms. Olga McCarten was not registered for the preparation of personal income tax returns, she was also not permitted to prepare such returns for the years 2008 or 2009.

Based on the evidence, the panel concludes that Ms. Olga McCarten is in breach of Rule 514.

Rule 515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

Rule 515 of the Code requires a member engaged in a professional practice to adhere to the practice inspection requirements of the Association.

Ms. Olga McCarten engaged in professional practice and failed to register with the Association to carry on the public practice work she was doing, namely the preparation of corporate and personal income tax returns for clients. Since she failed to register, she did not undergo the required practice inspection with the Association.

A standard of practice for a member who is engaged in a professional practice is the requirement for the member to purchase the Public Practice Manual and the CICA Handbook. Ms. Olga McCarten purchased neither of these in either 2008 or 2009, the years in which she engaged in professional practice.

Based on the evidence, the panel concludes that Ms. Olga McCarten failed to adhere to the practice inspection requirements of the Association as she did not undergo the required practice inspection and accordingly she breached Rule 515.

Rule 516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

Rule 516 of the Code requires a member engaged in a professional practice to maintain professional liability insurance.

Ms. Olga McCarten engaged in a professional practice, namely the preparation of corporate and personal income tax returns, and failed to maintain professional liability insurance for her practice. Based on the evidence, the panel concludes that Ms. Olga McCarten breached Rule 516.

Rule 601 Compliance

A member shall comply with By-Law Four and the *Code of Ethical Principles and Rules of Conduct* of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

Rule 601 of the Code requires members to comply with the Association's Bylaws and the Code. The Association's Code requires individuals engaged in professional practice and individuals engaged in the preparation of tax returns to be registered with the Association. The panel reviewed the following evidence related to the breach of Rule 601: i) Ms. Olga McCarten was engaged in professional practice and in the preparation of tax returns and she failed to register with the Association, and ii) Ms. Olga McCarten was not permitted by the Association to offer the professional services that she provided to the public.

By carrying on a professional practice and preparing tax returns without being registered to do so and by offering professional services to the public when she was not permitted to do so by the Association, the panel concludes that Ms. Olga McCarten did not comply with the Association's Code and accordingly is in breach of Rule 601.

Rule 610 Requirement to Reply In Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

Rule 610 of the Code requires members to reply promptly and in writing to any request from the Association in which a written reply is requested.

The evidence pertaining to the breach of Rule 610 is as follows:

- By email dated 8 October 2010 the Association asked Ms. Olga McCarten for a list of her clients for each of the years that she operated her professional practice to date, along with the particulars of the work done for each client. She was also asked to provide evidence of professional liability insurance.
- When the information was not forthcoming, the Association emailed Ms. Olga McCarten again on 21 October 2010 asking for a response.
- The Association sent Ms. Olga McCarten a further email dated 17 December 2010 asking that she provide a written response by December 21 2010 and noting that she was required to respond by virtue of Rules 610 and 611 of the Code.
- The Association followed up with Ms. Olga McCarten by email dated 6 January 2011 for the information.
- By email dated 6 January 2011 Ms. Olga McCarten responded that she had "no clients" but did not respond with information for the years prior to 2011. She did not provide evidence of insurance.
- The Association followed up with Ms. Olga McCarten by telephone on 10 January 2011, sent an email confirming its understanding of the content of its discussion with Ms. Olga McCarten and asked her to confirm same by January 12 2011 in time for the committee meeting. Ms. Olga McCarten did not respond.

Based on the evidence, the panel concludes that Ms. Olga McCarten did not provide a written response to the Association when one was requested, and accordingly Ms. Olga McCarten breached Rule 610.

Rule 611 Assistance to the Board

A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

Rule 611 of the Code requires members to comply with a request of any Association committee and, when required, to produce any documents in the member's possession, custody or control.

The evidence is that Ms. Olga McCarten did not respond to the Association, did not provide proof of insurance and did not provide particulars of the professional services she provided to her clients. Accordingly the panel finds that Ms. Olga McCarten breached Rule 611.

The conduct of Ms. Olga McCarten as established by the evidence, leads the panel to conclude that Ms. Olga McCarten is also guilty of professional misconduct. Specifically, she failed to register her professional practice, she failed to submit to practice requirements, she failed to maintain professional liability insurance, she failed to comply with the Association's Code of Ethical Principles and Rules of Conduct, she failed to reply promptly in writing to a request from the Association, and she failed to

comply with a request of the Association to produce documents. These failures were related to her professional practice; it clearly is conduct sufficient to be considered professional misconduct.

PENALTY SUBMISSIONS

In terms of penalty, counsel for the Discipline Committee submitted that the panel should make the following penalty order:

1. A reprimand.
2. An order imposing a fine of \$6,000.00 (\$1,000.00 per breach of the Code).
3. Payment of an amount equal to the cost of the professional liability insurance inclusive of tax, that should have been purchased for the years 2008 and 2009, namely \$2,271.24.
4. Payment of an amount equal to the cost of the PPM and Handbook inclusive of tax, that should have been purchased for the years 2008 and 2009, namely \$1,475.25.
5. Contribution towards the costs incurred by the Association in this matter in the amount of \$2,000.00.

Counsel for the Discipline Committee referred to the Discipline Committee's submission as being consistent with the following Decisions of the Professional Conduct Tribunal: Aslam Decision dated August 16, 2010; Joshi Decision dated July 6, 2010; Mansoor Decision dated July 30, 2009; Singh Decision dated February 3, 2011; and Gougeon Decision dated June 8, 2011. Counsel for the Discipline Committee noted that costs are being requested as there was no attempt at settlement on the part of the member and, further that even at the hearing the member did not admit to the facts in the face of her failure to respond to the Request to Admit Facts and Documents, all of which made the request for a contribution towards the costs of the Association a reasonable request.

The member made the following submission on the penalty order:

She should not be penalized for not responding to the request for financial information and the request to settle the matter as she was overwhelmed by the penalty proposed in the letter accompanying the Request to Admit Facts and Documents. She is a single parent, working for her sister in a clerk's position, with a marginal annual income and no RRSPs, pensions or RIFs.

She did not have the stamina or the time to respond due to extremely unfortunate circumstances of both her mother's serious illness and her daughter's serious illness at the time she received the request for information. She was caring for a very ill mother who did pass away, as well as caring for her young adult daughter.

She noted that she had total billings of \$8,000.00 during the two year period of 2008 and 2009, and that the facts of this case can be distinguished from those presented by Counsel for the Discipline Committee, for example, Aslam in which the member Aslam had 22 corporate clients and 200 individual clients and Gougeon invoiced for \$20,000.00, and his penalty was lesser at \$5,000.00.

Counsel for the Discipline Committee responded as follows:

The argument that more robust practices should be distinct from the facts at hand cannot now be put forward by the member given that the Association never received a client list from the member.

The member had the option of resigning but she never did and has put the Association through this long process.

The Association did give the member more time to respond at the request of the member.

The member clarified that she was given a few weeks when she really needed a year.

The panel wishes to note that the member did not present a specific recommendation regarding the penalty; however, the panel appreciates the submissions of both parties.

PENALTY DECISION

The panel deliberated and decided not to accept the Discipline Committee's submission in terms of penalty. Having heard the submissions of both parties, the panel orders the following penalty:

1. Olga McCarten is reprimanded for breaching Rules 514, 515, 516, 601, 610, and 611 of the Code.
2. Olga McCarten pays a fine of \$1,000.00.
3. Olga McCarten pays an amount of \$1,000.00 representing the approximate cost of the professional liability insurance that should have been paid for the years 2008 and 2009.
4. Olga McCarten pays an amount of \$1,475.25 inclusive of tax, representing the approximate cost of the PPM and Handbook that should have been purchased for the years 2008 and 2009.
5. Publication in statements.

The panel recommends that the parties set out a payment schedule suitable to both parties.

REASONS FOR PENALTY DECISION

The panel found the member to have breached Rules 514, 515, 516, 601, 610, and 611 of the Code of Ethical Principles and Rules of Conduct and to be guilty of professional misconduct.

The reprimand, publication in Statements and the combined total of the fine of \$1,000.00, payment of an amount of \$1,000.00 representing the approximate cost of the professional liability insurance that should have been paid for the years 2008 and 2009, and payment of an amount of \$1,475.25 inclusive of tax, representing the approximate cost of the PPM and Handbook that should have been purchased for the years 2008 and 2009, for a total of \$3,475.25 will serve to deter members of the profession from engaging in similar misconduct and will serve to deter this member from engaging in similar misconduct in the future. Deterrence protects the public from the likelihood of this member or other members engaging in similar misconduct.

The panel chose not to accept the recommendation of the Discipline Committee with respect to the payment representing insurance cost, as the panel is of the opinion that the figure of \$1,000.00 more suitably represents the costs of professional liability insurance for a part-time practice. There was no evidence presented as to the size of the practice; the panel was left to draw conclusions from the submissions and demeanour of the member as well as the fact that the Association presented no evidence in this regard. The Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel. This also led the panel to conclude that although the allegations were considered serious by the Association, they were not necessarily considered sizable by the Association.

The panel chose not to accept the recommendation of the Discipline Committee with respect to the payment representing a contribution towards the Association's costs, based on the mitigating circumstances presented by the member in her submissions, namely her seriously ill mother, and

seriously ill young adult daughter both of whom for which she was providing care and support at the time of the request for information. The panel considered the situation of the member to be sufficiently compelling and of such a serious nature that an order of costs would be unduly harsh.

The panel in determining the appropriate penalty considered a number of factors as set out by the Newfoundland Supreme Court in its decision in the case of *Jaswal v. Newfoundland Medical Board*.

The nature and gravity of the proven allegations are, indeed, considered serious by the panel. There were no prior complaints about this member. The conduct of preparing corporate and personal income tax returns, when not registered with the Association to do so, was proven to have occurred over a period of two years in 2008 and 2009, with no occurrences since 2009. The member has suffered no other penalties as a result of the allegations. There was no evidence led as to the impact of the incidents; it is sufficient to say that the panel recognizes that there is likely some impact on members of the public, whether clients or colleagues, when an unregistered member offers services. There are mitigating circumstances as presented by the member in her submissions which were significant and contributed to her failure to respond. Given the serious nature of the misconduct, there is a need to provide general deterrence to members of the profession. As well, there is a need to provide specific deterrence, but it is the opinion of the panel that the member is unlikely to engage in professional practice again given that she has not done so since 2009. The public's confidence in the integrity of the profession in the face of such proven allegations must be maintained; however, there is limited risk given that the member has not engaged in professional practice since 2009 and the extent of the exposure in 2008 and 2009 is unproven. Clearly and unequivocally, the panel is of the opinion that the proven allegations fall outside the type of conduct expected of Certified General Accountants.

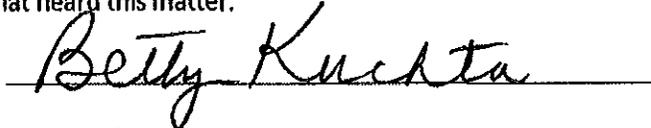
The cases presented by Counsel for the Discipline Committee were reviewed by the panel; the panel was of the opinion that the cases could be distinguished from this case. They are similar in that all members in these cases as with the case at hand were engaging in professional practice without registration. Counsel for the Discipline Committee is asking for a total of \$11,746.49 including the fine, payment representing the cost of insurance, payment representing the cost of PPM and Handbook, and contribution towards Association's cost of proceeding. In the Aslam case, the member prepared 22 compiled financial statements and corporate tax returns and 200 personal tax returns over a course of 3 years; his total penalty payment was \$13,000.00 as a result of a hearing. In the Joshi case, the member prepared 7 corporate tax returns in total for the years ended 2006, 2007 and 2008 and 45 personal tax returns for the years ended 2006, 2007 and 2008; his total penalty payment was \$5,000.00 as the result of an agreed upon statement of facts and resolution. In the Mansoor case, the member was fined \$2,000.00 for advertising professional services on a website without registration and without liability insurance; this was as a result of an agreed upon statement of facts and resolution. In the Singh case, the member continued to practice after deregistration by the Association; his total penalty payment was \$10,500.00 as a result of a hearing and a Consent Joint Submission on Penalty. In the Gougeon case, the member engaged in professional practice over a 2 year period, and expected to invoice \$20,000 in 2010; his total penalty payment was \$5,000.00 as a result of an agreed upon statement of facts and resolution. In Aslam, Joshi and Gougeon the proven allegations occurred over a longer period of time and/or with significant numbers of clients. In the Singh case, the issue was continuing to practice after de-registration by the Association, which was not the situation in the case at hand. In the Mansoor case, there were no clients involved; the panel is of the opinion that the total amount of the penalty payment in the case at hand ought to be higher than in the Mansoor case given that the case at hand involved

work for clients but not as high as Aslam, Joshi and Gougeon where the length of time over which the proven allegations occurred and/or the number of clients was greater than that in the case at hand.

Taking all of these factors into consideration the panel is of the opinion that the penalty determination is suitable in the circumstances of this case.

Dated this 7th day of OCTOBER 2011

I, Betty Kuchta, sign this Decision and Reasons for Decision as Chair of the panel of the Professional Conduct Tribunal on behalf of the members of the panel that heard this matter.


Betty Kuchta

NOTICE

This decision of the Professional Conduct Tribunal may be appealed to an Appeal Tribunal within thirty (30) days of the date of this decision.

The Notice of Appeal must be in writing, addressed to the Secretary of the Association (Certified General Accountants of Ontario, 240 Eglinton Avenue East, Toronto, Ontario, M4P 1K8) and must contain the grounds for the appeal.

TAKE NOTE THAT, in an appeal, the Appellant bears the onus of obtaining and delivering copies of the transcript of the hearing before the Professional Conduct Tribunal for the Appeal Tribunal (4 copies) and for the Respondent (1 copy).

According to Article 9 of the Bylaws, a Notice of Appeal that fails to contain the grounds for the appeal, together with evidence that demonstrates that a transcript of the hearing giving rise to the appeal has been ordered, shall be void.

**IN THE MATTER OF a Proceeding under
the *Certified General Accountants Act, 2010* and the Bylaws**

**IN THE MATTER OF Ms. Olga McCarten, a member of
The Certified General Accountants Association of Ontario**

BETWEEN:

The Discipline Committee of The Certified General Accountants Association of Ontario

- and -

Ms. Olga McCarten

DECISION AND REASONS FOR DECISION OF THE APPEAL TRIBUNAL

Members of the Appeal Tribunal Panel:

David Handley, Public Representative, Chair
Dave Laventure, CGA
Doug White, CGA

Appearances:

Karen Jolley, Counsel for the Discipline Committee
Olga McCarten, Member
Lisa Braverman, Registrar and Independent Legal Counsel to the Appeal Tribunal

Appeal Hearing Date:

January 31, 2012, Toronto

OVERVIEW

A panel of the Appeal Tribunal of The Certified General Accountants Association of Ontario heard this appeal on January 31, 2012, at Toronto. At the conclusion of the appeal hearing, the panel reserved its decision.

The appeal by the Discipline Committee arises from a decision of a panel of the Professional Conduct Tribunal of The Certified General Accountants Association of Ontario dated October 7, 2011.

APPEAL

The following documents were entered into evidence:

1. Appeal Book as exhibit 1, containing the Notice of Appeal dated November 2, 2011
2. Affidavits of Service as exhibits 2 and 3, relating to service of the Notice of Appeal and notice of the date of the appeal hearing
3. Transcript dated July 26, 2011 as exhibit 4
4. Sentencing Brief as exhibit 5

ALLEGATIONS BEFORE THE PROFESSIONAL CONDUCT TRIBUNAL

The allegations against the member were that Ms. Olga McCarten breached the following provisions of the Code of Ethical Principles and Rules of Conduct as stated in the Notice of Hearing:

Rule 514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

Rule 515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

Rule 516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

Rule 601 Compliance

A member shall comply with By-Law Four and the *Code of Ethical Principles and Rules of Conduct* of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

Rule 610 Requirement to Reply in Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

Rule 611 Assistance to the Board

A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

The particulars of the allegations against the member as stated in the Notice of Hearing were as follows:

1. Olga McCarten ("McCarten") became a member of CGA Ontario (the "Association") in 1984. McCarten was never registered in public practice with the Association.
2. In each of 2008 and 2009, McCarten prepared corporate tax returns for clients.
3. In each of 2008 and 2009, McCarten also prepared personal income tax returns for clients.
4. The Code of Ethical Principles and Rules of Conduct (the "Code") defines a "professional practice" as "a proprietorship, partnership, limited liability partnership or professional corporation that provides professional services."
5. The Code further defines "professional services" as "any accounting, assurance, taxation services, management advisory or consulting services or other related services as may from time to time be recognized by the Association that is performed or offered to be performed by a member for a client or employer, whether or not the member asserts membership in the Association."
6. By providing professional services, specifically the preparation of corporate tax returns for the public, McCarten was operating a professional practice, as defined by the Code.
7. Rule 514 of the Code requires a member engaged in a professional practice to register with the Association.
8. McCarten did not register her professional practice.
9. Members who prepare personal income tax returns are also required to register with the Association.
10. McCarten did not register with the Association to prepare personal income tax returns.
11. As McCarten was not registered for the preparation of personal income tax returns, she was also not permitted to prepare such returns for the years 2008 or 2009.
12. Rule 515 of the Code requires a member engaged in a professional practice to adhere to the practice inspection requirements of the Association.
13. McCarten did not undergo a practice inspection with the Association as she was not registered to carry on the public practice work she was doing.
14. Rule 516 of the Code requires a member engaged in a professional practice to maintain professional liability insurance.
15. McCarten did not maintain insurance for her practice.
16. The total cost of professional liability insurance for the years 2008 and 2009 was approximately \$2,271.24 inclusive of tax.
17. Members who are engaged in a professional practice are required to purchase the Public Practice Manual (the "PPM") and the CICA Handbook (the "Handbook").

18. McCarten did not purchase the PPM or the Handbook for either of 2008 or 2009.
19. The total cost of the PPM and the Handbook and applicable renewals was \$1,475.25 inclusive of tax for the two years in question.
20. McCarten was not permitted by the Association to offer the professional services that she provided to the public.
21. McCarten earned income from carrying on a professional practice operated in violation of the Code.
22. Rule 601 of the Code requires members to comply with the Association's Bylaws and the Code.
23. By carrying on a professional practice without being registered to do so, and by preparing tax returns when she was not registered to do so, McCarten did not comply with the Association's Code and therefore also did not comply with Rule 601.
24. By email dated 8 October 2010 the Association asked McCarten for a list of her clients for each of the years that she operated her professional practice to date, along with the particulars of the work done for each client. She was also asked to provide evidence of professional liability insurance.
25. When the information was not forthcoming, the Association emailed McCarten again on 21 October 2010 asking for a response.
26. The Association sent McCarten a further email dated 17 December 2010 asking that she provide a written response by December 31 and noting that she was required to respond by virtue of Rules 610 and 611 of the Code.
27. The Association followed up with McCarten by email dated 6 January 2011 for the information.
28. By email dated 6 January 2011 McCarten responded that she had "no clients" but did not respond with information for the years prior to 2011. She did not provide evidence of insurance.
29. The Association followed up with McCarten by telephone on 10 January 2011, sent an email confirming its understanding of the content of its discussion with McCarten and asked her to confirm same by January 12 in time for the committee meeting.
30. McCarten did not respond.
31. Rule 610 of the Code requires members to reply promptly and in writing to any request from the Association in which a written reply is requested.
32. By not providing a written response to the Association when one was requested, McCarten breached Rule 610.
33. Rule 611 of the Code requires members to comply with a request of any Association committee and, when required, to produce any documents in the member's possession, custody or control.
34. By not responding to the Association, not providing proof of insurance and not providing particulars of the professional services she provided to her clients, McCarten breached Rule 611.
35. McCarten's conduct amounted to professional misconduct and conduct unbecoming a certified general accountant.

DECISION OF THE PROFESSIONAL CONDUCT TRIBUNAL

The decision of the Professional Conduct Tribunal was as follows:

DECISION

The Discipline Committee has the onus of proving the allegations in the Notice of Hearing in accordance with the civil standard of proof. The standard of proof applied by the panel was a balance of probabilities based on clear, convincing and cogent evidence.

In coming to a decision, the panel relied upon the evidence that was provided in the form of deemed admissions arising from the Request to Admit Facts and Documents, Exhibit #5. The Tribunal made findings of fact based on these deemed admissions.

Having considered the evidence and the submissions of the parties and the onus and standard of proof, the panel finds that the member breached the following provisions of the Code of Ethical Principles and Rules of Conduct:

Rule 514 Registration

A member shall, if engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time, register in accordance with the requirements prescribed by the Association. This rule also shall apply to members who own, operate or control a professional corporation engaged in the practice of public accounting or the preparation of compilation engagements or tax returns.

Rule 515 Practice Inspection Requirements

A member shall comply with, and adhere to, the practice inspection requirements of the Association and the standards contained therein.

Rule 516 Professional Liability Insurance

A member engaged in the practice of public accounting or the preparation of compilation engagements or tax returns part-time or full-time shall maintain professional liability insurance as specified, and provide evidence as required, by the Association.

Rule 601 Compliance

A member shall comply with By-Law Four and the *Code of Ethical Principles and Rules of Conduct* of the Association as amended from time to time, and with any order or resolution of the board of governors or its committees under the By-Law.

Rule 610 Requirement to Reply In Writing

A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

Rule 611 Assistance to the Board

A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

The panel also finds the member guilty of professional misconduct.

PENALTY DECISION OF THE PROFESSIONAL CONDUCT TRIBUNAL

The penalty decision of the Professional Conduct Tribunal is as follows:

PENALTY DECISION

The panel deliberated and decided not to accept the Discipline Committee's submission in terms of penalty. Having heard the submissions of both parties, the panel orders the following penalty:

1. Olga McCarten is reprimanded for breaching Rules 514, 515, 516, 601, 610, and 611 of the Code.
2. Olga McCarten pays a fine of \$1,000.00.
3. Olga McCarten pays an amount of \$1,000.00 representing the approximate cost of the professional liability insurance that should have been paid for the years 2008 and 2009.
4. Olga McCarten pays an amount of \$1,475.25 inclusive of tax, representing the approximate cost of the PPM and Handbook that should have been purchased for the years 2008 and 2009.
5. Publication in statements.

The panel recommends that the parties set out a payment schedule suitable to both parties.

RELIEF SOUGHT ON APPEAL

In her Notice of Appeal, Ms. Jolley, sought the following relief:

THE RELIEF SOUGHT is as follows:

1. An order varying the decision of the Professional Conduct Tribunal with respect to the amount of professional liability insurance it ordered the respondent to pay for 2008 and 2009. Specifically the appellant requests that the present order requiring the respondent to pay \$1,000 in respect of professional liability insurance for a part time practice be replaced with an order that the member pay the sum of \$2,271.24 for her professional practice for the years 2008 and 2009.
2. The appellant does not seek costs from the respondent with respect to the appeal.

GROUND OFS OF APPEAL

In her Notice of Appeal, Ms. Jolley sets out the following grounds for her appeal:

THE GROUND OFS OF THE APPEAL are as follows:

1. The issue on this appeal is who bears the consequences of a member failing to respond to the Association in breach of Rules 610 and 611 of the *Code of Ethical Principles and Rules of Conduct* – the member or the Association. It is submitted that the Tribunal panel erred in holding that the committee bears the burden and the member obtains the benefit when a member fails to respond.

2. The appellant brings this appeal to correct this misunderstanding or misapplication of the consequences of a breach of Rules 610 and 611 in the decision of the Professional Conduct Tribunal. It requests that the appeal tribunal correct the interpretation of the panel concerning the extent of the appellant committee's obligation to either conduct an investigation or commence a hearing to obtain information from a member who has refused many requests to respond to the demands of the committee for information and the consequences of a member's repeated failure to respond.
3. Respectfully, the Association should be entitled to rely on members' obligations to respond under the *Code of Ethical Principles and Rules of Conduct*. If a member fails to respond to numerous requests from the discipline committee for information about her practice and her clients, it should be the member rather than the Association who is penalized for that failure to respond and to provide assistance.
4. As explained below, the impact of the Tribunal decision as it stands would require the committee to conduct two hearings in every case where a member has refused to respond with information about their practice, or any other matter, as required by Rules 610 and 611 – one hearing to either compel the member to respond in the face of numerous ignored requests and to seek an order for an investigation and then a further hearing to deal with the ordered responses.
5. For the reasons noted below, it is the position of the committee that it should not be required to conduct a full investigation or start a hearing to compel a member to reply but should be allowed to follow the provisions for obtaining information as set out in the *Code* – namely make a request of members who are then required to respond in compliance with Rules 610 and 611.
6. In 2008 and 2009 the respondent operated a professional practice preparing corporate income tax returns and personal income tax returns for clients.
7. The respondent did not carry insurance for this professional practice.
8. Professional insurance for the years 2008 and 2009 was \$2,271.24.
9. Upon receipt of a complaint about her practice, on 8 October 2010, the discipline committee asked the respondent for a list of her clients for each of the years she operated her professional practice to present, along with the particulars of the work done for each client. The member did not respond.
10. When the information was not forthcoming, the committee wrote the member again on 21 October 2010 asking for a response. The member did not respond.
11. The committee sent the member a further email dated 17 December 2010 asking that she provide a written response about the nature and extent of her professional practice by 21 December 2010 and noting that she was required to respond by virtue of Rules 610 and 611 of the Code. The member did not respond.

12. The committee followed up with a further email to the member dated 6 January 2011 for the information.
13. By email dated 6 January 2011 the member advised that she presently had no clients, but she refused or neglected to respond with information for the years prior to 2011.
14. The committee followed up with a telephone call to the member on 10 January 2011, the content of which it confirmed in an email and asked the member to respond. The email noted that the respondent had given contradictory information about her practice. The member did not respond.
15. In this case, the panel benefitted the member for her failure to respond by reducing the costs of professional liability insurance from \$2,271.24 for a full time professional practice to \$1,000.00 for a part time professional practice. The panel ordered this reduced insurance based on its finding that there was no information before it about the scope of the member's practice.
16. In its decision the panel noted that there was no evidence about the size of the respondent's practice and so it was "left to draw conclusions from the submissions and demeanour of the member as well as the fact that the Association presented no evidence in this regard." It surmised that the member had a part time professional practice.
17. The panel also found there was limited risk to the public given the extent of the member's exposure to the public in 2008 and 2009 was unproven.
18. As noted, the evidence was that the discipline committee had repeatedly requested information from the respondent about her professional practice and she repeatedly refused to provide that information.
19. The evidence (and the finding of the panel) was that the respondent had refused or neglected to respond to the committee's request for information about her practice, what its size was, and refused to provide a list of clients and an outline of the services she provided to those clients. (The complaint noted that the respondent had prepared the complainant's spouse's income tax returns for 10 years.) The panel found the respondent guilty of a breach of Rules 610 and 611 as a result of her failures to respond.
20. In reducing the amount of insurance payable based on a lack of information about the member's practice, the Panel effectively rewarded the member for not responding to the committee's requests for information about her practice.
21. Further, it placed a very high (and costly) burden on the committee in the situation where a member does not honour her professional and ethical obligations under the *Code* and respond to the committee in violation of Rules 610 and 611. The panel held that "the Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel."

22. Respectfully, the committee *should* be able to rely on non-disclosure by the member and the member's breach of the *Code* in support of its case rather than be compelled to commence a hearing to either obtain an order for it to conduct an investigation into her practice or an order compelling her to respond. She is already required to respond by virtue of her obligations under the *Code*.
23. In the committee's view, it is inconsistent for the panel to have placed a further onus on the committee to conduct a further investigation into the member's practice at the time as finding her in breach of her obligation to respond to the committee about her practice. With such an interpretation, a breach of Rule 611 by a member only adds to the burden of the committee to conduct a further investigation or obtain an interim order to do so.
24. The committee should not be penalized or put to extra expense where a member refuses to respond to repeated requests made to her. The consequences of the failure to respond should be visited on the member rather than on the committee, as is the case under the present decision.
25. In the precedents relied upon by the panel, all cases relied on the reporting by the members as to the size and nature of their practice. No case required the committee to go first to a panel for a hearing to compel the member to disclose their clients or permit an investigation of their practice before proceeding based on the member's response (or lack thereof) to the committee. There is no precedent for such an order.
26. Lastly, in this case it was admitted that the member carried on a professional practice – not a part time professional practice – and it is submitted that the consequences of that fact, as set out in the deemed admissions in the request to admit served on the respondent – are binding. Had the member wished to assert that she had a part time professional practice, or assert that she should pay a reduced insurance amount because she had a part time practice, she was obliged to disclose to the committee her clients and the nature of the work she undertook. She refused or neglected to do so and, respectfully, should not obtain the benefit of that failure at the hearing stage.
27. In presuming that the respondent had a part time practice and reducing the insurance costs accordingly, the panel allowed the respondent to benefit from her failure to respond to the Association and her breaches of Rules 610 and 611.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant/Discipline Committee:

Counsel for the Discipline Committee requested that the appeal be allowed.

Ms. Jolley noted the following:

- The Professional Conduct Tribunal of The Certified General Accountants Association of Ontario erred in its decision in both interpretation and application of the law and made a factual error in this case.
- The Association is not appealing the reduction in the fine from what was proposed by the Discipline Committee, which was reduced from \$6,000 to \$1,000, nor is it seeking costs from the Respondent, Ms. McCarten, for this appeal.
- Ms. Jolley conceded that if this appeal is successful and the order is granted then it would mean that Ms. McCarten's penalty for not carrying professional liability insurance would be changed from \$1,000 to \$2,271.24.
- This appeal is focused on the decision reached by the panel of the Professional Conduct Tribunal of The Certified General Accountants Association of Ontario on October 7, 2011.
- The Association is concerned with the potential precedent set by the Professional Conduct Tribunal's misinterpretation or misunderstanding of the application of Rules 610 and 611 of the Code of Ethical Principles and Rules of Conduct, and the future ramifications to the Association if this decision stands.
- Ms. Jolley noted that:
 - Rule 610 states A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.
 - Rule 611 states A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.
- After repeated requests from the Discipline Committee for Ms. McCarten to comply with Rules 610 and 611 and disclose information about her practice she refused or neglected to respond, did not comply with these Rules and did not provide any records or statements that the Discipline Committee requested.
- The Professional Conduct Tribunal found, in their decision, that she had breached these Rules.
- The Professional Conduct Tribunal erred in their Penalty Decision and the Reasons for the Penalty Decision when they made a finding, based on no evidence provided, that Ms. McCarten was in part-time practice, this finding is noted in their decision where it states:

The panel chose not to accept the recommendation of the Discipline Committee with respect to the payment representing insurance cost, as the panel is of the opinion that the figure of \$1,000.00 more suitably represents the costs of professional liability insurance for a part-time practice. There was no evidence presented as to the size of the practice; the panel was left to draw conclusions from the submissions and demeanour of the member as well as the fact that the Association presented no evidence in this regard. The Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel. This also led the panel to conclude that although the allegations were considered serious by the Association, they were not necessarily

considered sizable by the Association.

- The Discipline Committee did complete an investigation, demonstrated by the several occasions that the Discipline Committee contacted Ms. McCarten asking her to comply with Rules 610 and 611 and provide information.
- The Professional Conduct Tribunal erred in law by interpreting that Rules 610 and 611 were not used by the Discipline Committee to investigate this issue.
- The Professional Conduct Tribunal made the finding that Ms. McCarten ran a part-time business, yet there was no evidence presented for them to reach this conclusion.
- In the Facts and Evidence section of the decision, the Professional Conduct Tribunal made findings of fact based on the member not responding to the Request to Admit Facts and Documents.

Paragraph 6. In 2008 and 2009 Ms. Olga McCarten prepared corporate tax returns for clients.

Paragraph 15. Ms. Olga McCarten did not maintain insurance for her practice.

Paragraph 16. The total cost of professional liability insurance for the years 2008 and 2009 was \$2,271.24 inclusive of tax.

- These are deemed admissions and cannot be changed, dismissed or ignored at the discretion of a Tribunal.
- The Request to Admit Facts and Documents does not specifically state the size of the business Ms. McCarten was running (full-time vs. part-time).
- The Request to Admit Facts and Documents does state that the "total cost of professional liability insurance for the years 2008 and 2009 was \$2,271.24 inclusive of tax". This amount is the cost for a full-time practice.
- As Ms. McCarten did not object to this point within the 20 day period, nor brought any evidence to counter this statement within the 20 day period, therefore it became a deemed admission in the case.
- It therefore can be inferred that Ms. McCarten was running a full-time business.
- It was not for the Discipline Committee to provide further evidence as to the size of Ms. McCarten's practice. That responsibility lay with Ms. McCarten and there was no evidence from Ms. McCarten that it was a part-time practice.
- The Tribunal made an incorrect assumption about the facts of the case presented to them.
- As noted in the Notice of Appeal, Ms. Jolley noted:
 - Paragraph 20 - In reducing the amount of insurance payable based on a lack of information about the member's practice, the Panel effectively rewarded the member for not responding to the committee's requests for information about her practice.
 - Paragraph 21 - Further, it placed a very high (and costly) burden on the committee in the situation where a member does not honour her professional and ethical obligations under the Code and respond to the committee in violation of Rules 610 and 611. The panel held that "the Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel."
 - Paragraph 22 - Respectfully, the committee should be able to rely on non-disclosure by the member and the member's breach of the Code in support of its case rather than be compelled to commence a hearing

to either obtain an order for it conduct an investigation into her practice or an order compelling her to respond. She is already required to respond by virtue of her obligations under the Code.

Submissions of the Respondent:

The member requested that the appeal be dismissed. Ms. McCarten noted the following:

- She thought that she had told the Discipline Committee that she had 5 clients.
- The Discipline Committee's investigation was insufficient and they could have asked for her T4 slips if they needed to know her income.
- She admitted that she did fail to comply with the Discipline Committee's requests to comply, but at that time her mother was dying, and her daughter was very ill.
- She had requested an extension and that one was given for a period of 2 weeks by the CGA Ontario, which was not enough time.
- Where the CRA investigates you they provide you with a year, this was not the case here.
- During that time she had limited access to email.
- The CGA Ontario should have been more understanding in her case.
- Even the Professional Conduct Tribunal got 3 months to write their decision. I was not provided enough time to respond.
- The Association should be here to serve and assist the member.

DECISION

Having considered the documentation provided and the submissions, the panel finds that the Appellant has satisfied this Appeal Tribunal panel that there are obvious errors of fact and law. The panel orders that the Discipline Committee's appeal of the decision of the Professional Conduct Tribunal dated October 7, 2011 be allowed.

The Appeal Tribunal panel grants the relief sought in paragraph 1 of the Notice of Appeal, that being:

An order varying the decision of the Professional Conduct Tribunal with respect to the amount of professional liability insurance it ordered the respondent to pay for 2008 and 2009. Specifically, the Appeal Tribunal orders that the order requiring the respondent to pay \$1,000 in respect of professional liability insurance for a part time practice be replaced with an order that the member pay the sum of \$2,271.24 for her professional practice for the years 2008 and 2009.

REASONS FOR DECISION

The Appeal Tribunal's decision is based on the following reasons:

1. The Appeal Tribunal agreed with Ms. Jolley in her opening statement that this appeal is about who bears the consequences where a member chooses **not** to comply with the Rules of the Association. This appeal was not about recapturing the additional insurance premium amount. It is to ensure that the right decisions are made without obvious errors of fact and law and to ensure precedents are established in which both the Association and their members can rely. Any member that does not comply with the Rules of the Association to which they belong must bear the burden of that decision.
2. Ms. McCarten was found to have breached, among other Rules as noted in the original decision, the following:
 - **Rule 610 Requirement to Reply in Writing**
A member shall reply promptly in writing to any request from the Association in which a written reply is specifically required.

The Professional Conduct Tribunal stated in their decision "Based on the evidence, the panel concludes that Ms. Olga McCarten did not provide a written response to the Association when one was requested, and accordingly Ms. Olga McCarten breached Rule 610".

- **Rule 611 Assistance to the Board**
A member shall, when required, comply with the request of the board or its committees in the exercise of their duties in matters of the Act, By-Law Four or the *Code of Ethical Principles and Rules of Conduct*, and when required, produce any documents in the member's possession, custody or control, subject to Rules R104.2, R104.3 and R201.

The Professional Conduct Tribunal stated in their decision "The evidence is that Ms. Olga McCarten did not respond to the Association, did not provide proof of insurance and did not provide particulars of the professional services she provided to her clients. Accordingly the panel finds that Ms. Olga McCarten breached Rule 611".

3. The importance of the "Request to Admit Facts and Documents" document cannot be stressed enough. Once served with a Request to Admit Facts and Documents, Ms. McCarten had twenty days to respond to the Association. Failure to have served a response to the Request to Admit Facts and Documents meant that Ms. McCarten accepted the facts contained therein and they became deemed admissions.
4. Ms. McCarten in this case did not challenge the Request to Admit Facts and Documents.
5. Therefore, it is a deemed admission that Ms. McCarten carried on a professional practice, not a part time professional practice.
6. A member is required to comply with the Association's Rules at all times. In this case, Ms. McCarten was required to comply with Rules 610 and 611. Ms. McCarten did not comply.
7. Ms. McCarten could have responded to any of the Association's requests for information, or the request to comment on the Request to Admit Facts and Documents, Exhibit #5. Ms. McCarten did not respond.
8. There is no question as to whether Rules 610 and 611 were breached.
9. The Professional Conduct Tribunal, in its decision stated:

The panel chose not to accept the recommendation of the Discipline Committee with respect to the payment representing insurance cost, as the panel is of the opinion that the figure of \$1,000.00 more suitably represents the costs of professional liability insurance for a part-time practice. There was no evidence presented as to the size of the practice; the panel was left to draw conclusions from the

submissions and demeanour of the member as well as the fact that the Association presented no evidence in this regard. The Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel. This also led the panel to conclude that although the allegations were considered serious by the Association, they were not necessarily considered sizable by the Association.

10. In regards to the size of the practice Ms. McCarten was running, the Appeal Tribunal did not agree with the Professional Conduct Tribunal's deduction that:

the panel was left to draw conclusions from the submissions and demeanour of the member as well as the fact that the Association presented no evidence in this regard

Based on the deemed admissions, Ms. McCarten was carrying on a professional practice and the cost for professional liability insurance for a professional practice at that time was \$2,271.24.

11. The Appeal Tribunal did not agree with the Professional Conduct Tribunal's deduction that:

The Association could have chosen to conduct an investigation into the circumstances of the practice but instead relied solely on the non-disclosure by the member and therefore was unable to provide any useful information to the panel. This also led the panel to conclude that although the allegations were considered serious by the Association, they were not necessarily considered sizable by the Association.

12. As part of investigating allegations against a member, the Discipline Committee relies on the member complying with the Rules.
13. The Discipline Committee considered the allegations against Ms. McCarten as most serious and as a result, required her to comply with Rules 610 and 611 and then required the case to be put before a Professional Conduct Tribunal when Ms. McCarten did not respond.
14. The Appeal Tribunal concluded that there was a misinterpretation by the Professional Conduct Tribunal as to the process the Discipline Committee must follow when allegations are made against a member regarding a breach of Rules 610 and 611.

The Appeal Tribunal concluded that the Professional Conduct Tribunal made obvious errors of fact and law:

In particular, the Professional Conduct Tribunal made an obvious error of law:

- The Professional Conduct Tribunal's misinterpretation of the consequences of the failure to respond to the Discipline Committee's requests to disclose, as required under Rules 610 and 611. This misinterpretation provided Ms. McCarten with a benefit of reduced costs of professional liability insurance from \$2,271.24 for "professional practice" to \$1,000.00 for a "part time professional practice".
- To allow this to stand would send a message that it is better not to cooperate or comply with the Association's Membership Rules, as this may prove to provide a lesser penalty.
- Ms. McCarten's not responding to the repeated requests by the Discipline Committee to comply with Rules 610 and 611 should have been seen as a member ignoring or avoiding an investigation, not the Discipline Committee's lack of investigatory work in this matter.
- The Appeal Tribunal agreed with Ms. Jolley in that if this decision is allowed to stand it could require the Discipline Committee to conduct additional hearings in cases where a member refuses to respond to any requests made by the Association.

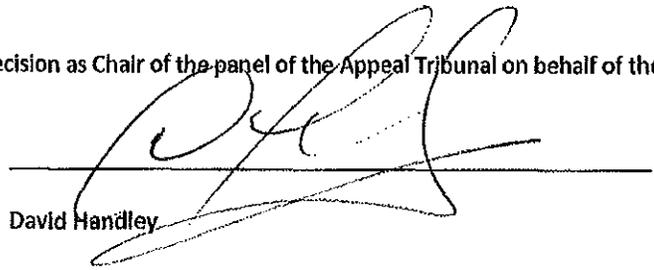
- It is a professional and ethical obligation of the CGA Ontario membership to comply with all Rules of the Association.

In particular, the Professional Conduct Tribunal made an obvious error of fact by:

- The Professional Conduct Tribunal deciding that Ms. McCarten was running a part-time business without clear evidence to support such conclusion.
- In finding that the Respondent had a part time practice and reducing the insurance costs accordingly, the panel allowed the Respondent to benefit from her failure to respond to the Association and her breaches of Rules 610 and 611.
- The deemed admissions from the Request to Admit Facts and Documents state that Ms. McCarten was carrying on a professional practice and the professional liability insurance premium for that period was \$2,271.24.
- The Professional Conduct Tribunal made an obvious error of fact when it found that the Respondent had a part-time practice, which was contrary to the deemed admissions.

Dated this 19th day of MARCH, 2012

I, David Handley, sign this Decision and Reasons for Decision as Chair of the panel of the Appeal Tribunal on behalf of the members of the panel that heard this matter.



David Handley