

IN THE MATTER of the *Certified Management Accountants Act, 2010*, Statutes of Ontario 2010, C.6, Schedule B;

AND IN THE MATTER of the *Statutory Powers Procedure Act*, Revised Statutes of Ontario 1990, c.S.22, as amended;

AND IN THE MATTER of a disciplinary proceeding pursuant to Sections 32 and 33 of the Bylaws of the Certified Management Accountants of Ontario, as to complaints regarding the conduct of or actions of Alex Dowell.

BETWEEN:

Certified Management Accountants of Ontario
("CMA Ontario")

(Applicant)

-and-

Alex Dowell (the "Respondent")

(Respondent)

DECISION, ORDER AND REASONS OF THE DISCIPLINE COMMITTEE

The Discipline Committee held a hearing at Victory Verbatim, Ernst & Young Tower, Suite 900, 222 Bay St., Toronto, Ontario M5K 1H6, on Thursday, 28 July 2011, to hear evidence, and submissions and argument and to deliver its decision; all to consider matters arising out of a complaint regarding the conduct of Alex Dowell, a Member of Certified Management Accountants of Ontario.

The panel of the Discipline Committee conducting the hearing was composed of:

Eran Goldenberg, FCMA (Chair)

Ellen Bessner (Public Member)

Ken Diebel, FCMA

Pursuant to subsection 35(6) of the *Certified Management Accountants Act, 2010*, Statutes of Ontario 2010, C.6, Schedule B (the "*CMA Act*"), the Discipline Committee combined this Hearing with the Hearing respecting the conduct of or actions of Member B, a Member of Certified Management Accountants of Ontario

Counsel for the Applicant was Ms. Catherine M. Patterson of Ferguson Patterson, Barristers & Solicitors.

The Respondent was not present in person, and was not represented by counsel or an agent.

Counsel for the Discipline Committee was Mr. Hugh M. Kelly, Q.C., of Miller Thomson, Barristers & Solicitors.

Ms. Patterson tendered a document respecting Member B; this was marked as Exhibit 1.

Mr. Alex Dowell, CMA – July 28, 2011

Ms. Patterson tendered a Notice of Return of Hearing in this matter dated June 24, 2011; this was marked as Exhibit 2.

On a motion made by Ms. Patterson, the Discipline Committee ordered that, in the first unnumbered paragraph on the second page of Exhibit 1, the numbers and letters “1(2)(b)” and “1(2)(e)” in the second and third line be corrected respectively to “2.2(b)” and “2.2(e)”; and that the numbers “22” and “31” in the last line be corrected respectively to “30” and “39”.

On a further motion made by Ms. Patterson, the Discipline Committee ordered that, in the first unnumbered paragraph on the second page of Exhibit 2, the numbers and letter “1(2)(b)” in the third line be corrected to “2.2(b)”; and that the number “22” in the fifth line be corrected to “30”.

Ms. Patterson tendered an Affidavit of Service sworn 24 June 2011 respecting the service of Exhibit 2 on Alex Dowell on 24 June 2011; this was marked as Exhibit 3.

Ms. Patterson tendered a copy of the courier UPS Tracking Details respecting the delivery to Alex Dowell of the Notice of Return of Hearing (Exhibit 2); this was marked as Exhibit 4.

Ms. Patterson tendered document respecting Member B; this was marked as Exhibit 5.

Preliminary Matters

As no objections were raised against the matter proceeding or as to the jurisdiction of the Discipline Committee to hear the matter, the hearing commenced.

Charges

Ms. Patterson read the charges against Member B; Member B pleaded not guilty to the charges.

Ms. Patterson read the charges (as set out in the Notice of Hearing, Exhibit 2), as follows:

That Alex Dowell failed to report the required number of Continuous Professional Learning and Development activities for the period July 1, 2004 to June 30, 2007, as was required by Section 19 of the By-laws of CMA Ontario in 2005, 2006 and 2007.

By reason of the foregoing, it is alleged that Alex Dowell is guilty of professional misconduct as that term is defined in Sections 20(2)(b) of the Bylaws of CMA Ontario in effect in 2005, 2006 and 2007, as is currently defined in Sections 2.2(b) of the Professional Misconduct and Code of Professional Ethics Regulation, and is in breach of Section 19 of the Bylaws of CMA Ontario in effect in 2005, 2006 and 2007 and Section 30 of the current Bylaws of CMA Ontario.

As the Respondent was not present, the Discipline Committee proceeded as if the Respondent had pleaded not guilty to the charges.

Statute

The *CMA Act* provides in part:

17. Subject to the by-laws, a member of the Corporation has the right to use the designations "Certified Management Accountant", "comptable en management accrédité", "Registered Industrial Accountant" and "comptable en administration industrielle", and to use the initials "C.M.A.", "CMA", "R.I.A." and "RIA".

35. (1) The discipline committee shall hear every matter referred to it by the complaints committee.

(3) The discipline committee shall find a member or firm guilty of professional misconduct if in the committee's opinion the member or firm is guilty of professional misconduct as defined in the by-laws.

(4) If the discipline committee finds a member or firm guilty of professional misconduct, it may by order do one or more of the following:

1. If at least two-thirds of the committee panel hearing the matter agrees, revoke the member's membership or the firm's registration.
2. Suspend the member's membership or the firm's registration for a period determined in accordance with the by-laws.
3. Despite section 17, direct that a member whose membership is suspended refrain from using any designation, term, title, initials or description implying that the member is practising as a Certified Management Accountant or a Registered Industrial Accountant during the period of suspension.
4. Determine the timing and manner of the return of a certificate of membership to the Corporation by an individual whose membership is suspended or revoked.
5. Impose restrictions or conditions on the right of the member or firm to practise as a Certified Management Accountant.
6. Issue a reprimand and, if the committee considers it appropriate, direct that the reprimand be recorded in the register.
7. Direct the member or firm to take any specified rehabilitative measure, including requiring the member or any member practising as a Certified Management Accountant through the firm to successfully complete specified professional development courses or to seek specified counselling or treatment.
8. Direct the member or firm to pay a fine and specify the timing and manner of payment.

9. Direct that the imposition of a measure under this subsection be postponed for a specified period or on specified terms, including the successful completion of specified courses of study.

10. Direct that a failure to comply with the committee's order shall result in the revocation of the member's membership or the firm's registration.

11. Make any other order that the committee considers appropriate in the circumstances.

(5) Unless the discipline committee orders otherwise, a final decision or order of the committee under this section takes effect on the day on which the time to appeal ... expires, if no notice of appeal is filed with the appeal committee in accordance with that subsection.

By-laws

The Bylaws of CMA Ontario in effect in 2005, 2006 and 2007 provided in part as follows:

19. Rules of Conduct

All Members will comply with and their conduct will be governed by the by-laws and Code of Professional Ethics of the Corporation and rules established by the Board from time to time.

20. Professional Misconduct

(2) For the purposes of the by-laws, "professional misconduct" means:

...

(b) a breach by a Member of the Act or the by-laws;

...

(e) the failure of a Member to respond promptly and cooperate fully with respect to requests for information and other communications from the Corporation.

The current By-laws of CMA Ontario provide in part as follows:

22. Rules of Conduct Governing Members

All Members shall be familiar with and comply with the bylaws, regulations and Code of Professional Ethics of the Corporation and the rules and standards established or adopted by the Board from time to time. The "Code of Professional Ethics" of the Corporation is set forth in the regulations.

25.6 Whenever the Discipline Committee finds a Member is guilty of professional misconduct, unless an appeal of the decision and order has been filed with the Chair of the Appeal Committee,

- (a) notice of the decision and order of the Discipline Committee, disclosing the name of the Member and brief particulars of the professional misconduct, will be published and distributed to the Board and to the Members and may at the discretion and by Order of the Discipline Committee be published in the local or daily newspaper of the community or communities where the Member resides and/or carries on business; and
- (b) the decision and order of the Discipline Committee, together with the written reasons for the decision and the name of the Member with brief particulars of the finding of professional misconduct, will be published and maintained in the public area of the Corporation's website;

unless the Discipline Committee determines that disclosure of the name of the Member in any or all of the above publications is not required in the public interest and its disclosure would be unfair to the Member.

31. Obligation to Reply to Corporation Requests

A Member will, in respect of any matter of professional conduct, reply in writing to any letter from the Corporation in which a reply is specifically requested within thirty (30) days of the date of receipt of such letter.

32. Continuous Professional Learning and Development

- 32.1 Every Certified Member shall undertake continuous professional learning and development relevant and appropriate to the Certified Member's work and professional responsibilities, as required by Section 32 and the regulations, and shall demonstrate compliance with the requirements as set out in Section 32 and the regulations, unless the Certified Member is exempt from such requirements under the provisions of the regulations.
- 32.2 The content and required minimum amount of continuous professional learning and development, the penalties and procedures applicable to non-compliance with the continuous professional learning and development provisions of Section 32 and the regulations and the exemptions available from the continuous professional learning and development obligations are set forth in the regulations.
- 32.3 Every Certified Member subject to the continuous professional learning and development requirement of Section 32 and the regulations shall submit annually, on or before the due date prescribed in the notice sent by the Corporation by mail, by electronic mail, or published in a publication of the Corporation generally circulated to its Members, a declaration in the prescribed form attesting whether the requirements of Section 32 and the regulations have been met.

Professional Misconduct and Code of Professional Ethics Regulation

The Professional Misconduct and Code of Professional Ethics Regulation of CMA Ontario (the “Code”) provides in part as follows:

1. Professional Misconduct

(2) For the purposes of the by-laws, “professional misconduct” means:

- ...
- (b) a breach by a Member of the Act or the by-laws;
- ...
- (e) the failure of a Member to respond promptly and cooperate fully with respect to requests for information and other communications from the Corporation.

Witnesses

Ms. Patterson called one witness for CMA Ontario, Ms. Katharine M. Harvey, who was at the time of the majority of the events recounted in her evidence, Vice President, Regulatory Affairs and Registrar of CMA Ontario; and is currently Director of Compliance for CMA Ontario.

As the Respondent was not present, there was no evidence led on behalf of the Respondent.

Summary of Evidence

The Discipline Committee heard the witness, and reviewed all of the exhibits tendered as evidence. It is convenient to summarize this evidence.

Continuous Professional Learning and Development

Ms. Patterson tendered a binder titled “CPLD Prosecution Document Brief”; this was marked as Exhibit 6.

Ms. Harvey explained the contents of CMA Ontario’s Document Brief, Exhibit 6.

Policy Requirements

The Board of Governors of CMA Ontario approved a policy dated May 8, 2004, requiring all Members, except retired Members (and except on a temporary basis, Members unable to work due to illness or disability), to undertake Continuous Professional Learning and Development (“CPLD”). The purpose of the requirement stated in the policy is:

to facilitate continuous professional development of CMA's competencies to ensure they provide services of high quality to clients, employers, other stakeholders, and the public at large.¹

The Continuous Professional Learning and Development Policy Guidelines² and the Policy Profile³ dated May 8, 2004, set out CMA Ontario's requirements for CPLD.

Certified Members are required to obtain a minimum of 120 learning credits over a three year period beginning July 1, 2004, and 30 learning credits annually. The range of qualifying activities articulated in the Policy⁴ is very broad, and many of the routine activities undertaken by Members qualify for the credits. Members are required to report the achievement of their CPLD activities using CMA Ontario's on-line reporting system.

Communications Prior to Introduction of CPLD Requirements

Commencing in February 2004, CMA Ontario communicated extensively with the Members, explaining the nature of the CPLD requirements, alerting them of the time-lines for compliance, and generally offering suggestions upon how the credits could be achieved.⁵ Included in the communications was information as to what would happen if a Member failed to meet the CPLD requirements.⁶

All communications provided an access point for further information, by way of website particulars, an email address and a name and telephone number that the Member could call.

Communications After Introduction of CPLD Requirements

Although the communications to Members prior to the introduction of the CPLD requirements were general in nature, after CPLD has become a requirement, CMA Ontario began to target individual Members who were not recording their CPLD credits on-line⁷. These communications were focused upon trying to encourage Members to comply with CMA Ontario requirements. For the approximately 70% of Members who had provided email addresses, the earlier of these communications took the form of email messages; and for those who had not provided email addresses (or for those to whom the sent email messages had "bounced back"), CMA Ontario sent the same message via mail.

¹ Exhibit 6, p.2

² Exhibit 6, pp. 2 - 7

³ Exhibit 6, p. 8 - 11

⁴ Exhibit 6, p. 4 – 5

⁵ Exhibit 6, pp. 12 through 43

⁶ See in particular the specific question and answer to the last question on the CMA Ontario website, reproduced in Exhibit 6, at pp. 19-20

⁷ Exhibit 6, pp. 44 - 65

As time went on, emails and letters were sent to Members delinquent in their reporting urging them to comply, and noting that failure to comply could result in disciplinary proceedings on the basis of professional misconduct. In addition, CMA Ontario arranged for telephone calls to non-compliant Members advising them of their failure to report the required credits, or if the telephone call went to a voicemail system, leaving a message to the same effect. As time went on, the email, letter and telephone messages became somewhat more aggressive.

In those circumstances in the 2008-2009 year in which non-compliant Members had paid their membership dues, CMA Ontario notified them specifically that to keep their memberships up-to-date, they would have to become compliant with the CPLD requirement, and warning them that disciplinary proceedings would follow if they failed to do so⁸.

As with communications before the CPLD requirement came into force, all communications provided an access point for further information, by way of website particulars, an email address and a name and telephone number that the Member could call.

Complaint to Complaints Committee, and Notice to Respondent

By letter dated November 21, 2008, Mr. Merv Hillier complained to the Complaints Committee that the Respondent was guilty of professional misconduct for failure to report his CPLD activities for the period July 1, 2004 to June 30, 2007 as required by the Policy. Ms. Patterson tendered the following which were marked as Exhibit 7:

letter⁹ dated December 1, 2008, in which Ms. Harvey wrote to the Respondent advising him of the complaint and attaching a copy, and requiring his to reply to the Complaints Committee with an explanation or representations within 30 days of receipt of the letter;

letter¹⁰ dated January 1, 2009, addressed to Dr. George Gekas, Chair of the Complaints Committee received January 5, 2009, in which the Respondent advised that he had been unemployed for the previous three years; that he planned to retire within another three years; and “hoped that the policy exemption for impending retirees can be assumed”.

Ms. Patterson tendered documents respecting Member B (marked respectively as Exhibits 8 and 9).

Status of Respondent's Credits

The Respondent did not enter any credits into the on-line system, did not seek an exemption, and did not submit a plan for how he might achieve compliance.

⁸ Exhibit 6, p.65

⁹ Exhibit 7, p.1

¹⁰ Exhibit 7, p.2

Response of Respondent

As the Respondent was not present, there was no response on behalf of the Respondent.

Submissions On Charges

Ms. Patterson submitted that CMA Ontario had proven that the Respondent had breached his obligations respecting CPLD and was therefore guilty on both counts of professional misconduct.

There were no submissions as to the charges, made on behalf of the Respondent.

Ms. Patterson made submissions respecting the charges against Member B, and Member B made submissions in response.

Findings on the Charges

The Discipline Committee considered both the oral and written evidence presented and the submissions made, and found the evidence presented to be credible and reliable. The Discipline Committee is satisfied that CMA Ontario has established the facts supporting the charges and the allegations set out in paragraphs 1 and 2 of the Notice of Return of Hearing (Exhibit 2). Accordingly, the Discipline Committee finds that the Respondent failed to comply with the By-laws and Code of Professional Ethics of CMA Ontario in that:

contrary to the requirements of the “Continuous Professional Learning and Development (CPLD)” Policy approved by the Board of Governors of CMA Ontario on May 8, 2004, the Respondent failed to report the required Continuous Professional Learning and Development for the period July 1, 2004 through June 30, 2007; and

such failure constituting professional misconduct by the Respondent as that term is defined in the By-laws, and the Professional Misconduct and Code of Professional Ethics Regulation of CMA Ontario.

The Discipline Committee finds that the Respondent, Alex Dowell, is guilty of professional misconduct as that term is defined in Sections 20(2)(b) of the Bylaws of CMA Ontario in effect in 2005, 2006 and 2007, as is currently defined in Sections 2.2(b) of the Professional Misconduct and Code of Professional Ethics Regulation, and is in breach of Section 19 of the Bylaws of CMA Ontario in effect in 2005, 2006 and 2007 and Section 30 of the current Bylaws of CMA Ontario.

The Discipline Committee made findings respecting the charges against Member B.

Submissions on Penalty

Ms. Patterson requested the following penalty:

the Respondent be reprimanded, with the reprimand to be recorded on the Respondent's record;

the membership of the Respondent be revoked and the removal of the name of the Member for the record of Members;

the imposition of a fine of \$2,500 payable within 30 days;

require the Respondent to return his certificate of membership to CMA Ontario forthwith;

the notice of the decision and order of the Discipline Committee disclosing the professional misconduct be published and distributed to the Board of Directors of CMA Ontario, to the Members in the CMA Ontario journal, and on the CMA Ontario website, including the name of the Respondent.

As the Respondent was not present, there were no submissions respecting the penalty to be imposed upon the Respondent.

Ms. Patterson made submissions respecting the penalty to be imposed upon Member B; and Member B made submissions in reply.

Order

Having found the Respondent guilty of professional misconduct as noted above, the Discipline Committee unanimously orders as follows:

1. Under the authority of paragraph 6 of s.35(4) of the *Certified Management Accountants Act, 2010*, the Discipline Committee orders that Alex Dowell be reprimanded the particulars of which Reprimand are attached to this Order, and that such Reprimand be recorded on the Respondent's record.
2. Under the authority of paragraph 1 of s.35(4) of the *Certified Management Accountants Act, 2010*, the Discipline Committee revokes the membership of Alex Dowell, and directs that the name of Alex Dowell be removed from the record of Members of CMA Ontario.
3. Under the authority of paragraph 8 of s.35(4) of the *Certified Management Accountants Act, 2010*, the Discipline Committee imposes a fine of two thousand, five hundred dollars (\$2,500) payable in a lump sum within thirty (30) days.
4. Under the authority of paragraph 4 of s.35(4) of the *Certified Management Accountants Act, 2010*, requires the Respondent to return his certificate of membership to CMA Ontario forthwith;

5. Under the authority of paragraph 11 of s.35(4) of the *Certified Management Accountants Act, 2010*, the Discipline Committee Orders that:

notice of the decision and order of the Discipline Committee disclosing the name of the Member and brief particulars of the professional misconduct be published and distributed to the Board and to the Members in the CMA Ontario journal, and be published in the local or daily newspaper of the community or communities where the Member resides and/or carries on business; and

the decision and order of the Discipline Committee, together with the written reasons for the decision and the name of the Member with brief particulars of the finding of professional misconduct, will be published and maintained in the public area of the CMA Ontario's website;

the Discipline Committee has determined that disclosure of the name of the Member by publication in the CMA Ontario journal and on the CMA Ontario website, and in the local or daily newspaper of the community or communities where the Member resides and/or carries on business, is required in the public interest, and that its disclosure would not be unfair to the Member.

The Discipline Committee made orders respecting Member B.

Decision and Order rendered on the 28th day of July 2011, and these Reasons released on the 23rd day of September 2011.

LIST OF EXHIBITS

- 1 Document respecting Member B
- 2 Notice of Return of Hearing respecting Alex Dowell
- 3 Affidavit of Service on Alex Dowell
- 4 UPS Tracking Details respecting Service on Alex Dowell
- 5 Document respecting Member B
- 6 CPLD Prosecution Document Brief
- 7 Letter dated December 1, 2008 from Katharine Harvey to Mr. Alex A. Dowell, and letter dated January 01st, 2009 from Alex Dowell to Dr. George Gekas, FCMA, Chair, Complaints Committee, The Society of Management Accountants of Ontario
- 8 Document respecting Member B
- 9 Document respecting Member B