

IN THE MATTER of the Society of Industrial and Cost Accountants of Ontario Act, 1941, Statutes of Ontario 1941, c.77; as amended by Statutes of Ontario 1967, c.129; Statutes of Ontario 1971, c.126; Statutes of Ontario 1981, c.100; and Statutes of Ontario 2004, c.8;

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 25 and 26 of the Bylaws of The Society of Management Accountants of Ontario, as to complaints regarding the conduct of or actions of Alex N. Kolapak

BETWEEN:

The Society of Management Accountants of Ontario

(Applicant)

-and-

Alex N. Kolapak

(Respondent)

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#### **DECISION, AND REASONS FOR DECISION 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 August 31, 2009 and September 1, 2009 to consider matters arising out of a complaint regarding the conduct of the Respondent.

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

J. Allan Thom, CD, FCMA (Chair)

Ted Brabers, FCMA

Ken Diebel, FCMA

Eran Goldenberg, FCMA

Ray Jones, FCMA

James Karas, Public Member

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

The Respondent was present in person, and represented by an agent, Dr. Kostyk.

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

Ms. Patterson tendered the Affidavit of Catherine M. Patterson, sworn the 31<sup>st</sup> day of August 2009, confirming service of the Notice of Hearing upon the Respondent; this Affidavit was marked as Exhibit 1. The Respondent acknowledged that he received Notice of Hearing.

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.

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

1. In late 2006, Mr. Kolapak approached the complainants Tony Sevelka and Eileen Markell at their place of business, International Forensic & Litigation Appraisal Services Inc. ("IFL") to solicit donations to the ParkLane Donations for Canada Program ("ParkLane").
2. At the time he approached them, Mr. Kolapak gave the complainants his business card which described his business as "Kolapak Financial Services" and referred to his CMA designation.
3. Mr. Sevelka asked Mr. Kolapak whether in making the solicitation to them the member was working for ParkLane or Mr. Sevelka and Ms. Markell and Mr. Kolapak replied that he was working for Mr. Sevelka and Ms. Markell.
4. The member described ParkLane to Mr. Sevelka and Ms. Markell as a donation program that would generate tax credits in excess of the actual amount of the donations which could be used to reduce the donor's income for tax purposes.
5. The member did not advise Mr. Sevelka and Ms. Markell that ParkLane was in the business of promoting what is known in the industry as "gifting trust arrangements" and that gifting trust arrangements were under scrutiny at that time by the Canada Revenue Agency ("CRA"). He did not tell them that in December 2003 the Department of Finance announced proposed changes to the Income Tax Act to limit the tax benefits from certain tax shelter arrangements and that it was CRA's position that these proposed changes would apply to gifting trust arrangements. This information was available in November 2004 from a Fact Sheet issued by CRA and posted to the CRA web-site.
6. The member also did not advise Mr. Sevelka and Ms. Markell that in October 2006 CRA, by way of a Taxpayer Alert available on its web-site and entitled "**Warning: Tax shelter gifting arrangements are risky**" warned taxpayers that it continually audited gifting trust arrangements and that generally, CRA reduced the amount of the gift to no more than the cash paid by the taxpayer, in many cases it reduced the amount of the gift to less than that and in some cases it reduced the amount of the gift to nil.
7. This information was or should have been known to the member and should have been disclosed to Mr. Sevelka and Ms. Markell. Had it been, Mr. Sevelka and Ms. Markell would not have participated in ParkLane.

8. On December 4, 2006 Mr. Sevelka and Ms. Markell issued a cheque payable to ParkLane in the amount of \$14,500 which was to generate tax credits for 2006 for each of them.

9. The member approached Mr. Sevelka and Ms. Markell again in early 2007 advising them that if they made their donation to ParkLane early in 2007 their donation would be discounted and they would receive a larger receipt for tax purposes. Mr. Sevelka and Ms. Markell made further donations of \$12,000 to ParkLane on March 8, 2007.

10. Ms. Markell was informed by letter dated February 23, 2009 that 100% of her donation to ParkLane would be disallowed on the basis that it was not a valid gift.

11. Mr. Sevelka was informed by letter dated February 23, 2009 that 100% of his donation to ParkLane would be disallowed on the basis that it was not a valid gift.

12. Mr. Sevelka and Ms. Markell asked the member whether he could prepare the financial statements and federal and provincial income tax returns for IFL for the year 2008. The member agreed to do so but did not provide or obtain a Letter of Engagement although the fees anticipated to be charged were greater than \$500.00.

13. In providing these services the member was offering management accounting services to the public on a fee for service basis.

14. The member had not registered his practice with the Society and either did not carry Professional Liability Insurance or did not provide the Society with satisfactory proof of coverage.

15. The member did not abide by the Independent Consulting CMA's Offering Services to the Public Regulation.

16. The member sub-contracted some of the services for which he was retained to a chartered accountant without the knowledge or consent of the clients. The chartered accountant sent the clients a bill for his services.

17. The member also convinced Mr. Sevelka and Ms. Markell to purchase a \$10,000 Guaranteed Investment Certificate ("GIC") which he represented was issued jointly by Borealis International, The Laiki Group and the Atlantic Trust Company. The GIC was for a one year term and was to pay 10% interest per annum.

18. Mr. Sevelka and Ms. Markell purchased the GIC by a cheque issued by IFL on November 30, 2007 to Alex Kolapak in the amount of \$10,000.00.

19. The member knew, or ought to have known, that on November 15, 2007 Borealis International was subject to a "Cease Trading Order" made by the Ontario Securities Commission. The Cease Trading Order was prominently publicized on the Borealis International web-site.

20. The GIC as actually received by Mr. Sevelka and Ms. Markell was issued \$5,000.00 to Mr. Sevelka and \$5,000.00 to Ms. Markell by Kolapak Financial Services "in conjunction with the participation of Borealis International Inc., the

investment company, an Alternative Income Strategy. Principal and interest payable at maturity.” The date of maturity was stated to be November 30, 2008 on each Certificate.

21. Neither the member, nor Kolapak Financial Services, nor any other entity has paid Mr. Sevelka and Ms. Markell the \$11,000.00 payable pursuant to the GIC on November 30, 2008 or at any time.

22. When Mr. Sevelka and Ms. Markell complained to the member and demanded their money after November 30, 2008 he represented to them that the GIC had a two year term and refused to pay them.

23. After Mr. Sevelka and Ms. Markell complained to the Society regarding the actions of the member, the member issued to IFL an invoice in the amount of \$11,156.25 for services described in the invoice. Mr. Sevelka and Ms. Markell deny that any of the services described in the invoice were requested by, or provided to, IFL at any time by the member. If the services were in fact provided no Letter of Engagement was prepared by Mr. Kolapak.

24. The member failed to reply in writing to a letter from the Society which specifically requested a reply within thirty (30) days of the date of receipt of such letter. In fact, the Complaints Committee acceded to Mr. Kolapak’s request that he be given additional time in which to respond although no response was ever received from him.

By reason of the foregoing, it is alleged that Alex N. Kolapak is guilty of professional misconduct as that term is defined in Section 22 of the Bylaws and Sections 1(2)(b), 2(1)(a),(b),(c), (2)(a), (3)(a),(b),(c),(d), (4)(b),(c), and (5)(a) of the Professional Misconduct and Code of Professional Ethics Regulation, Sections 7(1),(2), 11(1), 14(6), and 17(1) of the Independent Consulting CMAs Offering Services to the Public Regulation and Section 31 of the Bylaws.

The Respondent pleaded “Not Guilty” to all of the charges.

Ms. Patterson tendered the Notice of Hearing, which was marked as Exhibit 2.

Ms. Patterson called and examined one of the complainants, Tony Sevelka. During his examination-in-chief, his *curriculum vitae* was entered as Exhibit 3; and a binder titled “Hearing Brief” containing twenty-three (23) tabbed documents was entered as Exhibit 4.

After Ms. Patterson concluded the examination-in-chief of Mr. Sevelka, Dr. Kostyk applied to defer the cross-examination of Mr. Sevelka until after Eileen Markell, wife of Mr. Sevelka, had given evidence. After hearing the representations of Dr. Kostyk and Ms. Patterson on the issue, the Discipline Committee refused to defer the cross-examination as requested, but ordered that Ms. Markell leave the hearing room until all of the evidence of Mr. Sevelka had been concluded.

During cross-examination by Dr. Kostyk, a copy of ParkLane Financial Group Ltd. “Donations for Canada” form dated 8 March 2007, (containing fifteen (15) pages including a copy of certified cheque number 9 issued by International Forensic and Litigation Appraisal Services Inc. in the amount of \$12,000.00), as signed by Antonin Sevelka, was entered as Exhibit 5. It was pointed out that this was apparently a signed copy of Exhibit 4, Tab 8.

On completion of the evidence of Mr. Sevelka, Ms. Patterson called and examined Eileen Markell. Thereafter, Dr. Kostyk cross-examined Ms. Markell.

Ms. Patterson next called and examined Ms. Katharine Harvey, Vice President of Regulatory Affairs and Registrar of the Applicant.

Following examination and cross-examination of Ms. Harvey, the hearing was recessed until 9:00 (extended at the request of Dr. Kostyk until 9:30) the following day, 1 September 2009.

When the hearing reconvened on Tuesday, 1 September 2009, Mr. Kolapak took the witness stand and was examined by Dr. Kostyk. After a recess in the middle of the cross-examination of Mr. Kolapak, Dr. Kostyk advised the hearing that Mr. Kolapak wished to change his plea. The Discipline Committee ordered a further recess, and instructed its counsel to confer with counsel for the Applicant and the agent for the Respondent to ensure that the Respondent was fully aware of the implications of changing those pleas. When the hearing resumed, the Respondent confirmed to the Discipline Committee that he understood the implications of changing his pleas to the charges.

Ms. Patterson then read out in full detail each of the charges, following each of which, the Respondent confirmed that he pleaded guilty to each such charge. In the case of the charges of breaches of sections 7(1), 7(2) and 11(1) of the Independent Consulting CMAs Offering Services to the Public Regulation, the pleas were "guilty with an explanation".

In light of the guilty pleas, the Respondent remained in the witness box and was questioned by Ms. Patterson with respect to certain aspects of the events that were relevant to what penalty the Discipline Committee should consider. In respect of nearly all questions as to where the monies that the complainants (the first two witnesses) had passed over to the Respondent were now to be found, the Respondent answered "I am not able to answer questions related to Borealis at this time", "Borealis" being the organization referred to at Tabs 18 and 19 of Exhibit 4. After several instances of this answer, Ms. Patterson noted to the Respondent that there was no other time with respect to the Discipline Committee process, but the Respondent did not alter or augment his statement.

Ms. Harvey was recalled and introduced a Certified Copy of the Order and Minutes of Settlement for Alexander Kolapak made August 29, 2006, signed by Executive Director, Licensing and Market Conduct Division of the Financial Services Commission by Delegated Authority from the Superintendent of Financial Services of Ontario, revoking the Life insurance agent's licence of Alexander Kolapak. This was marked as Exhibit 6.

Having heard the witnesses and observing them as they each gave evidence, the Discipline Committee is satisfied that the Applicant established the facts recited in paragraphs 1 through 24 of the Notice of Hearing. The Discipline Committee is left with no doubt that the evidence of Tony Sevelka, Eileen Markell and Katharine Harvey was quite straight-forward and entirely reliable.

Equally, however, the Discipline Committee is satisfied that the Respondent was not forthcoming in his testimony, particularly during the part of the hearing considering the possible penalty, during which he intentionally and consciously breached his legal obligation to answer the questions put to him.

The Discipline Committee is quite satisfied that the evidence placed before the Committee, taken as a whole, supported all of the charges even if the Respondent had not changed his plea to guilty.

IT WAS THE UNANIMOUS DECISION OF THE DISCIPLINE COMMITTEE that the Respondent is guilty on all counts set out in the Notice of Hearing.

THE DISCIPLINE COMMITTEE ORDERS IN A UNANIMOUS DECISION:

that under s. 25.1(c) of the Bylaws of The Society of Management Accountants of Ontario, the membership of Alex N. Kolapak be cancelled, and the name of Alex N. Kolapak be removed from the record of Members;

that under s. 25.1(d) of the Bylaws of The Society of Management Accountants of Ontario, Alex N. Kolapak pay a fine of \$20,000.00 to the Society on or before December 31, 2009;

that under s. 25.1(h) of the Bylaws of The Society of Management Accountants of Ontario, the Membership certificate of Alex N. Kolapak shall be returned to The Society of Management Accountants of Ontario forthwith;

that under s. 25.6(a) of the Bylaws of The Society of Management Accountants of Ontario, notice of this decision and order of the Discipline Committee, disclosing the name of Alex N. Kolapak and brief particulars of the professional misconduct be published in a local newspaper having a circulation in Mississauga, Ontario.

Decision rendered on the 1<sup>st</sup> day of September 2009, and Decision and these Reasons released on the 1<sup>st</sup> day of October 2009.

Respectfully submitted

J. Allan Thom E.G.  
Allan Thom, CD, FCMA  
Chair of Discipline Committee

In concurrence:

Ted Brabers, FCMA	<u>Ted Brabers E.G.</u>
Ken Diebel, FCMA	<u>Ken Diebel E.G.</u>
Eran Goldenberg, FCMA	<u>Eran Goldenberg</u>
Ray Jones, FCMA	<u>Ray Jones E.G.</u>
James Karas	<u>James Karas E.G.</u>