

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

AND IN THE MATTER of the *Statutory Powers Procedure Act*, Revised Statutes on 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 or actions of *Name withheld by Order of the Discipline Committee*.

BETWEEN:

Certified Management Accountants of Ontario (“CMA Ontario”)

(Applicant)

-and-

*Member*

(Respondent)

**DECISION, ORDER AND REASONS OF THE DISCIPLINE COMMITTEE**

In this redacted version of the Decision, Order and Reasons, identifying personal information and certain other information (neither of which is necessary for an understanding of the Decision, Order and Reasons) have been suppressed.

The Discipline Committee held a hearing at Victory Verbatim, Ernst & Young Tower, Suite 900, 222 Bay Street, Toronto, Ontario M5K 1H6, on 2011 to hear evidence, and submissions and argument and to deliver its decision; all to consider matters arising out of complaints regarding the conduct of *Member*, 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)

Hesham Shafie, CMA

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

The Respondent was present in person and was represented by *Counsel for the Respondent*.

Counsel for the Discipline Committee was Mr. John M. Banfill, Q.C.

Ms. Patterson tendered two Notices of Hearing addressed to the Respondent, the first of which is marked as Exhibit 1, was with respect to a complaint made by *Firm A* and the second, marked as Exhibit 2, was with respect to a complaint made by *Firm B*.

### **Preliminary Matters**

No objections were raised against the matter proceeding or as to the jurisdiction of the Discipline Committee. Counsel for the Respondent, however, moved for an Order that the two complaints before the Committee proceed at the same time in view of the fact that both involved similar questions of fact or law and accordingly that it would be appropriate and expeditious to proceed with both complaints at the same time. The Discipline Committee was advised that the Applicant consented to the request and it was so ordered.

Further, counsel for the Respondent moved for an Order requiring that witnesses be excluded from the hearing room until such time as they had completed their evidence. After careful consideration, the Discipline Committee so ordered.

### **The Charges**

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

1. That *Member* was a franchisee of *Firm A* during the period from July 2001 to November 2008 and, as such, collaborated with *Firm A* in subcontractor capacity on a number of *Firm A* client engagements, sharing the fees with *Firm A* in accordance with a pre-agreed formula. In September 2005, *Firm A* was engaged by *Firm C* and contracted him/her to act as its account manager for that client. Notwithstanding that his/her franchise with *Firm A* was terminated by *Firm A* in November 2008, *Member* continued to hold himself/herself out as an *Firm A* consultant to *Firm C* and to invoice *Firm C*. In doing so, *Member* invoiced *Firm C* in *Firm A*'s name, a total of \$70,152.99 without either disclosing his/her continued activities to *Firm A* or paying *Firm A* its share of the fees due to it in accordance with the fee-sharing agreement between him/her and *Firm A*.
2. Another *Firm A* client to whom *Member* provided services as an *Firm A* franchisee prior to November 2008, was *Firm D* and, in that capacity, he/she subcontracted work to *Firm B*. After termination of the franchise with *Firm A*, he/she continued to hold himself/herself out as an *Firm A* consultant to *Firm D* and to perform services for *Firm D* and to engage *Firm B* as a

subcontractor without advising either of them that he/she was no longer authorized by *Firm A* to act on its behalf.

3. That *Member*, as a franchisee of *Firm A*, contracted to provide services to *Firm D* and in that capacity subcontracted work to *Firm B*. *Member* and *Firm A* terminated their relationship in November 2008 but he/she did not inform *Firm B* of his/her status; rather he/she continued to present himself/herself as being a franchisee and to engage *Firm B* on the *Firm D* project without authority and without making arrangements to ensure that it would be paid for work completed and for ongoing work. *Member* actively misrepresented his/her role after November 2008 and failed to disclose significant facts which were material to *Firm B* in its function as a subcontractor.
4. As a result of a dispute between *Member* and *Firm A*, *Firm D* would pay neither *Member* nor *Firm A* until it was determined which of *Member* and *Firm A* had the right to receive payment. *Firm D* agreed to pay *Firm B* for work that it had completed under the subcontract for the benefit of *Firm D* but *Member* refused to consent to that payment being made. *Member* thus prejudiced his/her subcontractor's reasonable expectation of payment within a commercially reasonable time.

By reason of the foregoing, it is alleged that *Member* is guilty of professional misconduct as the term is defined in Section 2.2(b) of the Professional Misconduct and Code of Professional Ethics Regulation and is in breach of Sections 3.1(b), 3.1(c) and 3.4(b) of that regulation; and Section 30 of the Bylaws of CMA Ontario.

The Respondent pleaded not guilty to the charges.

### **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.

## **2. Professional Misconduct**

2.2 For the purposes of the Bylaws, “professional misconduct” means:

- (b) a breach by a Member, Student or Firm of the Act or of the Bylaws;

## **3. Code of Professional Ethics**

All Members, Students and Firms will adhere to the following Code of Professional Ethics of CMA Ontario:

3.1 a Member, Student or Firm will act at all times with:

- (b) fairness and loyalty to such Member’s, Student’s or Firm’s associates, clients and employers; and
- (c) competence through devotion to high ideals of personal honour and professional integrity.

3.4 a Member, Student or Firm will:

- (b) not commit an act discreditable to the profession;

### **Witnesses**

*Witness A*, of *Firm A*, gave evidence on behalf of CMA Ontario as did *Witness B* of *Firm B*.

The Respondent, *Member*, also testified before the Committee.

### **Summary of the Evidence Given by *Witness A***

*Witness A* was called to give evidence on behalf of the Applicant. *Witness A* testified that the Respondent *Member* was a franchisee of *Firm A* during the period July 13, 2001 to November 27, 2008. During this period, *Member* collaborated with *Firm A* on a number of engagements, among them being *Firm C* and *Firm D*. The business of *Firm A* was described as the analysis of the business expenses of its clients with a view to their reduction. In order to achieve a reduction of the clients’ ongoing business expenses, an expert in some particular and relevant field was retained to perform the necessary analysis and to make recommendations as to how costs could be reduced. The expert retained in this instance was *Firm B* which performed its services pursuant to an agreement with *Firm A*, which agreement covered, *inter alia*,

the payment for its services and the allocation of fees between the client and *Firm A*. *Firm B's* expertise was in the field of telecommunications equipment and services. Although it appears that from time to time the arrangement varied insofar as the allocation of the fees, the savings derived from the expert's analysis and the implementation of procedures to reduce costs are generally divided as follows; 50% to the client, with the balance divided 45% to the franchisee and 45% to the expert with 10% going to *Firm A*. *Witness A* testified that in 2008 the relationship between *Firm A* and *Member* became strained and eventually came to an end in or about November 2008. Litigation is pending in the Supreme Court of Ontario between *Firm A*, *Member* and *Firm B* for an accounting arising from the various transactions and for damages. The panel did not seek further particulars of the litigation, being of the view that such was not relevant to the determination of issues before it in accordance with its mandate.

*Witness A* further testified that notwithstanding the termination of the relationship between *Firm A* and *Member*, the latter failed to advise various parties, including *Firm B* and other clients of the termination of his/her franchise and, as a consequence, the end of his/her authority to deal with and to instruct experts such as *Firm B* and the clients for which the work was performed. *Witness A* testified that without the knowledge that *Member* was no longer a franchisee of *Firm A*, *Member* continued to instruct *Firm B* in the performance of its contractual duties. *Witness A* testified that *Member* continued to bill and attempt to collect payment from clients as he/she would have been entitled to do had the relationship of franchisor and franchisee continued. *Witness A* testified that *Member* failed to account to *Firm A* for billings sent to *Firm C* and release the sum of \$25,014.00 for fees due to *Firm B* notwithstanding that the sum was not in dispute by any party.

### **The Evidence of *Witness B* of *Firm B***

*Witness B* was called by Applicant to give testimony. *Witness B* testified that he was unaware of the termination of the relationship between *Member* and *Firm A* until sometime in 2009. He became aware of the termination of the relationship when an email he sent to *Member* was returned which prompted him to contact *Witness A* to verify *Member's* email address.

*Witness B* testified that the work which he performed pursuant to his contract with *Firm A* for the benefit of the client *Firm D* was in fact completed prior to November 2008. What remained to be done was the collection of the account from the client. He confirmed that he was not entitled to receive payment until either *Firm A* or the franchisee *Member* had received payment in full from the client and within 15 days thereafter. He testified that typically, following the completion of his work as an expert, the benefits and costs savings to the client would continue to be split in accordance with the evidence given by *Witness A*

for a period of up to 24 months thereafter. Accordingly, from and after November 2008, the only “work” to be performed was the collection of the monies from the client.

*Witness B's* complaint with respect to *Member* is that *Member* did not facilitate the payment of his fee entitlement of \$25,011.00 which all parties, including *Firm D* and *Firm A* had agreed to notwithstanding the balance of the fee was a matter in dispute as between *Member* and *Firm A*. It was *Witness B's* contention that *Member*, if so inclined, could have easily facilitated the release of these funds to *Firm B*, however *Member* failed to do so to the detriment of *Firm B*.

### **The Evidence of the Respondent *Member***

*Member* gave evidence before the Committee that he/she has been a Certified Management Accountant since 1974 and that he/she has no discipline history. *Member* testified that he/she rescinded the franchise agreement effective as of November 2008 due to the conduct of *Witness A*. He/she was asked why he/she continued to send invoices in the name of *Firm A* to *Firm D* and *Firm C*. His/her response was that he/she was trying to keep the clients out of the internal dispute between himself/herself and *Firm A*. He/she testified that at the time of the termination of the franchise agreement, no actual work was left to be done with these clients. The only function to be performed was to issue invoices and collect the money due and payable by the clients.

He/she confirmed that his/her lawyer holds in trust the sum of \$55,000.00 which money is, in part, in dispute in the context of the Supreme Court of Ontario action as between *Firm A* and himself/herself pertaining to *Firm C*. In the case of *Firm C*, he/she confirmed that all experts had been paid. *Member* testified that he/she has always been an independent contractor and, in fact, that was the relationship that existed between himself/herself and *Firm A* from the beginning of the franchise agreement in July 2001. *Member* testified that he/she did tell certain of the clients that he/she was no longer a franchisee of *Firm A*. In particular, he/she testified that on January 31, 2009 he/she told *Firm C* that he/she was no longer an *Firm A* franchisee. *Member* was asked why he/she did not facilitate the payment to *Witness B* and *Firm B* as the amount of *Firm B's* fee and its entitlement was not in dispute. *Member's* response was that he/she understood that all three parties had to execute a Release so that the client *Firm D* would be “safe”.

On cross-examination *Member* testified that his/her “hands were tied” as *Firm D* required that all parties including *Firm A*, *Firm B* and himself/herself sign off on a Release. *Member* testified that with the assistance of his/her lawyer, he/she attempted to set up a mediation with *Firm A* to resolve the various issues between them, however, *Witness A* cancelled the mediation and this led to the commencement of litigation which is ongoing in the Supreme Court of Ontario.

## **Submissions**

Ms. Patterson submitted that on the evidence, the Respondent had failed in his/her obligations to his/her associates and others and to adhere to the standards of personal honour and professional integrity which he/she was required to maintain in accordance with the Code of Professional Ethics. Ms. Patterson's submission was to the effect that, based upon the evidence of the witnesses and the admissions made by the Respondent, all of the several charges had been established.

Counsel for the Respondent, on behalf of the Respondent, submitted that *Member* was a long-time member of CMA Ontario with an impeccable and unblemished record. He further submitted that following the termination of the relationship between the Respondent and *Firm A*, which occurred in November 2008, the Respondent was simply engaged, not in performing work as if he/she were a franchisee of *Firm A*, but rather, simply, invoicing and collecting for work which had been previously performed and that no party had sustained any loss as a consequence of these actions.

## **Finding on the Charges**

The Discipline Committee considered both the oral and written evidence presented and the submissions made. The Discipline Committee was mindful of the fact that all who testified before them were parties interested in somewhat parallel proceedings ongoing in the Superior Court of Justice. Accordingly, the Discipline Committee considered cautiously the evidence of all those who testified.

The Discipline Committee is satisfied that the Applicant established the facts supporting a breach of the Code of Professional Ethics and, as such, a complaint against the Certified Management Accountant member, *Member*, is found to be established but only in respect of the complaint pertaining to *Firm B* insofar as Section 3.1(b) of the Code of Professional Ethics was breached by the conduct of the member who failed in his/her duty of loyalty to an associate. The Discipline Committee, however, found the Respondent not guilty in respect to all other allegations.

## **Submissions as to Penalty**

Ms. Patterson submitted that *Member's* actions led to *Firm B* being misled as to his/her relationship with *Firm A*. In all the circumstances she submitted that while no costs were sought against *Member*, the appropriate penalty would include a fine of \$5,000.00 and publication of the decision and penalty.

Counsel for the Respondent submitted that no fine and no publication were necessary or appropriate in the public interest. *Member* has a long and unblemished record as a Certified Management Accountant; no

loss has been sustained by any party and the ongoing action in the Supreme Court of Ontario will ultimately determine the substantive issues between the parties.

In considering the matter of penalty the Committee considered, among other matters, the evidence of *Witness A* who testified that the conduct of the Respondent with respect to the matters being the subject matter of the complaints was, “out of character” and a departure from his/her otherwise exemplary conduct.

### **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 *Member* receive a Reprimand, but that such Reprimand not to be recorded on the Respondent’s record.
2. Under authority of paragraph 8 of S.35(4) of the *Certified Management Accountants Act 2010*, the Discipline Committee imposes a fine of \$1,000.00 payable in a lump sum within 60 days of 2011.
3. Under the authority of paragraph 11 of S.35(4) of the *Certified Management Accountants Act 2010*, the Discipline Committee orders that:
  - a. Notice of the Decision and Order of the Discipline Committee and brief particulars of the professional misconduct be published and distributed to the Board and also to the members in the CMA Ontario journal, but without names; and
  - b. The Decision and Order of the Discipline Committee, together with the written reasons for the Decision, with brief particulars of the finding of professional misconduct will be published and maintained in the public area of CMA Ontario’s website. The Discipline Committee has determined that disclosure of the name of a member by publication in the CMA Ontario journal and on the CMA Ontario website is not required in the public interest and its disclosure would be unfair to the member.

Decision and Order rendered on 2011 and these Reasons released on 2011.

**List of Exhibits**

1. Notice of Hearing with respect to the complaint of *Firm A*
2. Notice of Hearing with respect to the complaint of *Firm D*
3. CMA Document Brief re: *Firm A*
4. Document Brief of *Member*, Volume 1
5. Document Brief of *Member*, Volume 2
6. CMA Document Brief re: *Firm B*