

**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**

Appellant

- and -

OLGA McCARTEN

Respondent

NOTICE OF APPEAL

THE APPELLANT appeals to the Appeal Tribunal from the decision of the Professional Conduct Tribunal dated 7 October 2011.

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.

THE GROUNDS 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 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.

THE APPELLANT certifies that a transcript of the hearing giving rise to the appeal has been ordered. A copy of the letter ordering the transcript is attached.

Date: 2 November 2011

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