

Indexed as:

D'Andrade v. Society of Management Accountants of Ontario

Between

**Francis D. D'Andrade, applicant, and
The Discipline Committee of the Society of Management
Accountants of Ontario Society of Management Accountants of
Ontario, respondents**

[1997] O.J. No. 2843

102 O.A.C. 97

72 A.C.W.S. (3d) 762

Court File No. 479/96

Ontario Court of Justice (General Division)
Divisional Court

Southey, Meehan and Matlow JJ.

Heard: June 18, 1997 (at Toronto).

Judgment: July 14, 1997.

(12 pp.)

Professional occupations -- Accountants -- Discipline -- Professional misconduct -- Disciplinary proceedings -- Jurisdiction.

Application by D'Andrade for judicial review of a decision of the Discipline Committee of the Society of Management Accountants of Ontario finding him guilty of three breaches of its Code of Ethics, fining him \$3,000 and awarding costs of \$4,000 against him. Joyce Charles retained D'Andrade to prepare her income tax returns for five years, and later for an additional year. After Charles' death four years later, D'Andrade submitted an invoice to her estate for unpaid fees of \$600, interest of \$414, and administration charges of \$250. The fees actually owed were \$350. He refused to return completed tax returns and back-up documents to her executor until the account was paid in full. He was found guilty of failing to act with fairness and loyalty to his clients by not returning the client's files and documents, of not acting with competence, and in not preparing an estimate of costs prior

to undertaking the work. On review, D'Andrade claimed that, since preparing income tax returns was not management accounting, it was outside the Society's jurisdiction to regulate.

HELD: Application allowed in part to strike payment of costs by D'Andrade. Otherwise, the application was dismissed. The Discipline Committee had no jurisdiction to award costs. The work D'Andrade was doing, while not management accounting, was work frequently done by an accountant, and he was bound by the provisions of the Code of Ethics and subject to the Society's disciplinary authority in respect of it. The Discipline Committee's decision was not patently unreasonable.

Statutes, Regulations and Rules Cited:

Code of Professional Ethics of the Management Accounting Society of Ontario, s. 21(a)(ii), 21(a)(iii), 21(c)(iv), 21(d)(vi).
Statutory Powers & Procedures Act, s. 15(1).

Counsel:

Raj Napal, for the applicant.
Catherine Patterson, for the respondents.

Reasons for judgment were delivered by Southey J., concurred in by Meehan J. Separate reasons were delivered by Matlow J.

1 SOUTHEY J.:-- This is an application for judicial review of a decision of the Discipline Committee of the Society of Management Accountants of Ontario (the "Society") in which the applicant was found guilty of 3 breaches of the Code of Ethics of the Society. The penalty imposed was a reprimand, a fine of \$3,000, of which \$2,000 would be suspended on release of the client's documents, and payment of the costs of the hearing in the amount of \$4,000.

2 Counsel for the Society conceded that the requirement that the applicant pay costs of the hearing below in the amount of \$4,000 could not stand in view of the recent decision (March 3, 1997) of this court in *Persaud v. The Society of Management Accountants of Ontario*, [1997] O.J. No. 884. The court there held that the Discipline Committee of the Society had no jurisdiction to award costs.

3 The charges arose out of work done by the applicant in connection with the preparation of income tax returns for one Joyce Charles. Ms Charles had engaged the applicant in December, 1990, to prepare her income tax returns for the years 1985 to 1989. She later engaged him to prepare her return for 1990.

4 Ms. Charles died on January 30, 1994. After her death, the applicant submitted an invoice to the executor of the estate of Ms Charles claiming payment of \$1,264. This amount consisted of \$600 for unpaid fees, interest at 1 1/2% per month of \$414, and administration charges of \$250. By the applicant's own documents, the fees owed by Ms Charles were only \$350.

5 The applicant also refused to return completed tax returns and back up documents to the son and executor of Ms Charles until his account was paid in full.

6 The applicant was charged with 4 breaches of the Code of Professional Ethics of the Society. The Notice of Hearing before the Discipline Committee stated that the allegations were as follows:

1. That in or about December 1990, Francis D. D'Andrade failed to establish a clear understanding of the scope, objectives and cost of work to be undertaken on behalf of Ms Joyce Charles before commencing such work.
2. That Francis D. D'Andrade failed to return original files and documents to Ms Joyce Charles or her son, Makepeace Charles, upon request.

7 The Discipline Committee found the applicant guilty of 3 of the 4 charges. The provisions of the Code alleged to have been breached and the disposition thereof are stated in the decision of the Discipline Committee as follows:

1. Guilty as charged of Section 21(a)(ii) "A member will act at all times with fairness and loyalty to such Member's associates, clients and employers" -- in that he failed to return the client's original files and documents upon request, thereby contravening the Rules for Certified Members in Private Practice.
2. Guilty as charged of Section 21(a)(iii) "A member will act at all times with competence through devotion to high ideals of personal honour and professional integrity" -- in that proper invoices were not prepared by the Member in a professional manner.
3. Guilty as charged of Section 21(c)(iv) "A member will take all reasonable steps in arranging any engagement as a Consultant, to establish a clear understanding of the scope and objectives of the work before it is commenced and will furnish the client with an estimate of cost, preferably before the engagement is commenced, but in any event as soon as possible thereafter" -- in that an Engagement Letter was not prepared by the Member as required by the Rules for Certified Members in Private Practice.
4. Not guilty as charged of Section 21(d)(vi) "A member will uphold the principle of adequate compensation for management accounting work."

8 The section numbers of the Code of Ethics quoted in the decision are those in the September, 1992, version of the By-Law of the Society, but identical provisions were contained in s. 20 of the 1986 version of the By-Law.

9 The services rendered by the applicant for Ms Charles in preparing her personal income tax returns were not management accounting. Management accounting is accounting for use by the management of business and governmental organizations. In this case, the services performed by the applicant were carried out as part of the activities of F.D'A Enterprises Inc., a company owned by the applicant, which was engaged in the preparation of income tax returns for members of the public. The principal issue in the application for judicial review was whether the Society has jurisdiction to discipline one of its members when the conduct of complained of was outside the scope of management accounting.

10 The letterhead of F.D'A Enterprises Inc. contains the words "Corporate & Personal Financial Services" and the words:

Management Consulting; Accounting/Tax Services Personal & Corporate Financial Planning

11 The applicant was at all material times a member of the Society. The work that he was doing for Ms Charles was work frequently done by an accountant. In my judgment, he was bound by the provisions of the Code of Ethics and subject to the disciplinary authority of the Society in respect of such work, even if the work was not management accounting.

12 The applicant raised two other points which should be mentioned:

1. the admission of hearsay evidence; and
2. the age of the complaint.

As to the first, the Discipline Committee was entitled to receive hearsay evidence under s. 15(1) of the Statutory Powers Procedure Act. It was necessary for the Committee to do so in this case, because of the death of Ms Charles. As to the second, I am not satisfied that the passage of time prejudiced the applicant. The essential facts are largely apparent from the documents.

13 In my judgment, the decision of the Discipline Committee was not patently unreasonable.

14 The application is allowed and the decision of the Discipline Committee is varied by striking out the provision for payment of costs by the applicant. In all other respects, the application is dismissed.

15 As success has been divided, there will be no order as to costs.

SOUTHEY J.

MEEHAN J. -- I agree.

16 MATLOW J. (dissenting):-- With respect, I am unable to agree with the disposition of the majority. I would allow the application for judicial review and quash the findings of guilt made by the Society and the penalty imposed by it on the applicant with costs.

17 The charges made against the applicant alleged that he had violated various provisions of the Code of Ethics of the Society. That Code is contained in section 21 of a by-law enacted by Society "relating to the administrative and domestic affairs of the Society ..."

18 The Society is a creature of statute, the Society of Management Accountants of Ontario Act, 1981. Its object, as set out in section 2 of the statute, state that they "shall be to provided an organization for accountants particularly interested in the preparation and interpretation of financial statements and reports for use by the management of business and governmental organizations ... and to promote and increase by all lawful means the knowledge, skill and proficiency of its members in all things relating to management accounting."

19 The alleged conduct of the applicant underlying the charges occurred in connection with dealings between the applicant and a client who had engaged him through a part-time business that he operated preparing income tax returns for individuals. Although the applicant was, at all material times, a duly qualified management accountant, it was submitted on his behalf that his activity as a preparer of income tax returns for private individuals fell outside the scope of his work as a management accountant. It was also his undisputed evidence before the Disciplinary Committee that he made no reference to his designation as a management accountant to the client and that it was only after his work was completed that he began billing the client on a printed form of "F.D'A Enter-

prises Inc." which disclosed that its business included "Corporate & Personal Financial Services, Management Consulting, Accounting/Tax Services, Personal & Corporate Financial Planning."

20 I am satisfied that the preparation of income tax returns for private individuals is not part of management accounting although it may be a skill with which accountants generally may have some familiarity. Indeed, many individuals and corporations without any professional qualifications whatsoever lawfully provide that service for those who require it.

21 It was submitted by counsel on behalf of the applicant that, despite the fact that he was a management accountant and generally subject to the regulatory power of the Society, the provisions of the Code of Ethics under which he was found guilty did not apply to the conduct of the applicant in his role as a preparer of income tax returns and that he was not obliged to comply with those provisions.

22 I agree with that submission and would hold that the Society was without jurisdiction to discipline the applicant in the circumstances of the case at bar. Although the Society is entitled to deference in the interpretation and application of its own-by-law, I regard its application of the by-law to the facts of the case at bar patently unreasonable.

23 I respectfully disagree with the characterization of the principal issue in this application by the majority. In my view the principal issue is not "whether the Society has jurisdiction to discipline one of its members when the conduct (of) complained of was outside the scope of management accounting." Rather, the principal issue is whether, as applied to the facts of this case, the Society has effectively exercised that jurisdiction.

24 I accept that the Society is empowered under its enabling legislation to regulate its members in ways that would reasonably advance the proper interests of the Society, its members and the public.

25 I also accept that the Society is empowered to regulate its members in relation to matters falling outside the scope of work done by management accountants provided, however, that the purpose of the regulation be to reasonably advance a proper objective of the Society. A good example of this can be found in section 20(2) of the by-law which renders the conviction of a member of any criminal offence a matter of "professional misconduct." It is easy to understand that such a criminal conviction need not be related to a member's conduct as a management accountant in order to fall within the scope of the Society's regulatory power.

26 The Society may not, however, in my view intrude into the lives of its members and purport to regulate their conduct in ways that could have no legitimate relationship to the proper objects of the Society.

27 Once the Society purports to regulate its members by its by-law, it must then do so in terms that are sufficiently clear to bring impugned conduct within the ambit of its regulation. In particular, when the Society purports to reach out to regulate matters falling outside the scope of work done by management consultants and interfere with their right to earn income, it must do so in language that is sufficiently clear to reflect the intended scope and application of the regulation.

28 With these principles in mind, I turn to an examination of the decision of the Society's Discipline Committee, section 21 of the by-law which contains the "Code of Professional Ethics" and the Society's 1986 "Rules for Certified Members in Private Practice" which were in force at the material times.

29 The findings of guilt made by the Discipline Committee were expressed in its decision as follows:

30 "1. Guilty as charged of Section 21(a)(ii) "A member will act at all times with fairness and loyalty to such member's associates, clients and employers" - in that he failed to return the client's original files and documents upon request, thereby contravening the Rules for Certified members in Private Practice.

31 2. Guilty as charged of Section 21(a)(ii) "A member will act at all times with competence through devotion to high ideals of personal honour and professional integrity" - in that proper invoices were not prepared by the Members in a professional manner.

32 3. Guilty as charged of Section 21(c)(iv) "A member will take all reasonable steps in arranging any engagement as a Consultant to establish a clear understanding of the scope and objectives of the work before it is commenced and will furnish the client with an estimate of cost, preferably before the engagement is commenced, but in any event as soon as possible thereafter" - in that an Engagement Letter was not prepared by the member as required by the Rules for Certified members in private Practice."

33 In my view, it is clear from the wording of these three provisions of section 21 and the Rules referred to that they were not intended to apply to conduct outside the scope of the work of a management accountant. The Rules, by their own terms, "are for CMA's in private practice as Management Accountants." By clear implication, they are not for CMA's who prepare income tax returns for individuals as a sideline. It would be absurd, for example, to require a preparer of income tax returns for individuals who happens to be a management accountant to prepare formal engagement letters before taking on the preparation of the simplest income tax return when others in that business are not.

34 As well, there are other provisions in the Rules which demonstrate that they apply only to work that falls within the scope of management accounting. The best example is section 4 of the Rules which provides, in part, that;

"4. Certified members of the Society may offer their services to the public provided that:

(a) such services;

(i) are within the scope of Management Accounting, and

(ii) are offered only for use by management and not by any third parties;"

35 I interpret this section to mean that a management accountant, in his professional capacity as a management accountant, may provide to the public only services that fall within the scope of management accounting and that such services must be restricted to the exclusive use of management. The preparation of income tax returns for private individuals could not possibly fall within this description and yet there is nothing in the Rules or the by-law which prohibits a management accountant from performing such services.

36 The inescapable inference to be drawn is that management accountants may prepare income tax returns for private individuals but not as part of their work as management accountants. And, as

stated above, there is nothing in the sections of the Code of Ethics applied in the case at bar that purports to make them applicable to such activity and the decision of the Society which purported to do so was made without jurisdiction.

37 I agree with the holding of the majority with respect to the issues raised regarding the jurisdiction of the Discipline Committee to award costs, "the admission of hearsay evidence" and "the age of the complaint".

38 I also would observe parenthetically that the Discipline Committee's decision with respect to counts one and three reflects that it found the applicant guilty on those counts for violating the Rules whereas the allegations against the applicant were that he had violated the Code of Professional Ethics. It would appear that, at least with respect to count three, this is a matter of substance rather than of form and might have formed the basis for an alternative attack on the decision. However, because this issue was not addressed by either counsel, I prefer to say no more than to indicate that it is an issue which attracted my attention.

MATLOW J.