CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **JOHN WILLIAM MARTIN, CPA, CA** and a cross-appeal by the Professional Conduct Committee of the Decision made January 21, 2015 and the Order made April 16, 2015 of the Discipline Committee, under **Rule 24** of the Rules of Practice and Procedure.

TO: John William Martin, CPA, CA

AND TO: The Professional Conduct Committee

REASONS FOR DECISION MADE OCTOBER 5, 2016

1. The tribunal which heard this appeal on March 30 and 31, 2016, is a panel of the Appeal Committee of the Chartered Professional Accountants of Ontario and is referred to hereinafter in these reasons as the "AC". The tribunal convened on a number of subsequent dates to make its decision and to articulate the reasons for its decision. On the 30th and 31st of March, Mr. Martin was present and was represented by his legal counsel, Michael Kerr and co-counsel Christine O'Donohue. Paul Farley appeared on behalf of the Professional Conduct Committee, accompanied by his co-counsel Alexandra Hersak. Robert Peck attended the hearing as counsel to the AC.

2. The following allegations were laid against Mr. Martin by the Professional Conduct Committee (hereinafter the "PCC") on February 24, 2014:

1. THAT the said John W. Martin, in or about the period May 1, 2002 through March 31, 2003, while providing accounting services to "TM" and his company "TCMD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TM" and "TCMD," contrary to Rule 201.1 of the Rules of Professional Conduct.

2. THAT the said John W. Martin, in or about the period October 1, 2002 through January 31, 2007, while providing accounting services to "TW" and his company "JEWM," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TW" and "JEWM," contrary to Rule 201.1 of the Rules of Professional Conduct.

3. THAT the said John W. Martin, in or about the period December 1, 2002 through January 31, 2003, while providing accounting services to "BB" and his company

"BRMC," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BB" and "BRMC," contrary to Rule 201.1 of the Rules of Professional Conduct.

4. THAT the said John W. Martin, in or about the period May 1, 2007 through May 31, 2009, while providing accounting services to "BC" and his companies "A-S A" and "242 Ontario Inc.," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BC," "A-SA" and "242 Ontario Inc.," contrary to Rule 201.1 of the Rules of Professional Conduct.

5. THAT the said John W. Martin, in or about the period June 1, 2009 through January 31, 2010, while providing accounting services to "GC" and his company "GCML," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "GC" and "GCML," contrary to Rule 201.1 of the Rules of Professional Conduct.

6. THAT the said John W. Martin, in or about the period August 1, 2009 through November 30, 2010, while providing accounting services to "CL" and his company "SBIC," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "CL" and "SBIC," contrary to Rule 201.1 of the Rules of Professional Conduct.

7. THAT the said John W. Martin, in or about the period August 1, 2009 through December 31, 2010, while providing accounting services to "ASML," and its shareholders "CM," "S&RB," TM," and "D&KD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "ASML" and its shareholders "CM," "S&RB," TM," and "D&KD," contrary to Rule 201.1 of the Rules of Professional Conduct.

8. THAT the said John W. Martin, in or about the period January 1, 2007 through May 31, 2007, failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by "AC" and his company "KC," contrary to Rule 201.1 of the Rules of Professional Conduct.

3. Mr. Martin had pleaded not guilty to the allegations and the decision of the Discipline Committee (hereinafter the "DC") made January 21, 2015, being appealed and cross-appealed, read as follows:

THAT having seen, heard and considered the evidence, the Discipline

Committee finds John William Martin guilty of Allegation Nos. 1 and 2, and not guilty of Allegation Nos. 3, 4, 5, 6, 7 and 8.

4. The Order being appealed and cross-appealed, dated April 16, 2015, reads as follows:

IT IS ORDERED:

1. THAT Mr. Martin be reprimanded in writing by the Chair of the tribunal.

2. THAT Mr. Martin be and he is hereby fined the sum of $25,000 to be remitted to CPA Ontario within three (3) months from the date this Order is made.

3. THAT Mr. Martin be and he is hereby suspended from the rights and privileges of membership of CPA Ontario for a period of six (6) months from the date this Order is made.

4. THAT notice of the Decision and Order, disclosing Mr. Martin's name, be given in the form and manner determined by the Discipline Committee:
   (a) to all members of CPA Ontario; and
   (b) to all provincial bodies;
   and shall be made available to the public.

5. THAT Mr. Martin surrender his CA and CPA certificates of membership in CPA Ontario to the Discipline Committee Secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Martin.

6. THAT in the event Mr. Martin fails to comply with the requirements of this Order, he shall be suspended from membership in CPA Ontario until such time as he does comply, provided that he complies within six (6) months from the date of his suspension. In the event he does not comply within the six-month period, his membership in CPA Ontario shall thereupon be revoked, and notice of the revocation of his membership, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Martin's practice and/or residence. All costs associated with this further publication shall be borne by Mr. Martin and shall be in addition to any other costs ordered by the committee.

IT IS FURTHER ORDERED:

7. THAT Mr. Martin be and he is hereby charged costs fixed at $144,000 to be remitted to CPA Ontario within thirty-six (36) months from the date this Order is made.

The Relief Sought

5. Mr. Martin appeals the finding of guilty by the DC on Allegation Nos. 1 and 2 and asks that the finding of guilty be quashed and the Order imposing the sanction be set aside.

6. The PCC opposes the appeal, and cross-appeals the finding of not guilty by the DC on Allegation Nos. 4, 5, 6, 7 and 8; and asks that Mr. Martin be found guilty on Allegation Nos. 1, 2, 4, 5, 6, 7 and 8. The PCC also asks that the Order revoke Mr. Martin's membership in CPA

Ontario and the Order provide for notification of the revocation in a newspaper. The PCC abandoned its cross-appeal with respect to the finding of not guilty to Allegation No. 3.

7. Mr. Martin opposes the cross-appeal on the findings of not guilty on Allegation Nos. 4, 5, 6, 7 and 8; and he opposes the requested revocation of his membership.

8. At the commencement of the hearing, the following documents were filed:

Exhibit 1	Appeal Book – Volumes 1 to 18
Exhibit 2	Appeal Factum of John William Martin
Exhibit 3	Brief of Authorities to Appeal Factum of John William Martin
Exhibit 4	Factum of the Respondent (Appellant by Cross-Appeal)
Exhibit 5	Respondent's Book of Authorities
Exhibit 6	Reply Factum of John William Martin
Exhibit 7	Reply Factum Brief of Authorities of John William Martin
Exhibit 8	Compendium of the Respondent (Appellant by Cross-Appeal)
Exhibit 9	*Boucher v. Public Accountants Council for the Province of Ontario*
Exhibit 10	*Hague v. Liberty Mutual Insurance Co.*
Exhibit 11	An annotated copy of Allegation No. 1

9. Mr. Kerr made submissions on the appeal and Mr. Farley responded to those submissions and made submissions on the cross-appeal on March 30, 2016. Mr. Kerr replied to the PCC submissions on the appeal and by way of his reply expanded on his submissions on the appeal and responded to the cross-appeal on March 31, 2016. Mr. Farley both responded to the expanded submissions on the appeal and replied on the cross-appeal on March 31, 2016. Both counsel made reference to their factums and authorities referred to in the factums in addressing the findings of guilty and not guilty, sanction and costs. The members of the AC took the opportunity to ask questions for clarification.

Submissions on behalf of Mr. Martin

10. Mr. Kerr in his factum (paragraph 81) said that on any reasonable reading of the particulars and evidence of the PCC, the offence alleged was implicitly a violation of s. 239 of the *Income Tax Act* ("ITA"). In his submissions he used the terms "tax evasion" and "evade" to mean the criminal offence of tax evasion contrary to s. 239 of the ITA. He submitted that the DC did not find that Mr. Martin had participated in and profited from an arrangement to evade the payment of tax properly owing by his clients, nor did Mr. Martin make such arrangements or counsel clients to evade the payment of taxes. The finding by the DC that Mr. Martin engaged in professional misconduct with respect to Allegation Nos. 1 and 2 by engaging in the tax minimization plan ("TMP") without having the plan reviewed by a tax specialist was not a finding available based on the Allegations and the evidence.

11. Mr. Kerr submitted that no witnesses at the hearing had testified that the TMP constituted tax evasion or counselling tax evasion. The DC could not make a finding of tax evasion as there was no such evidence. Mr. Kerr stated that to bifurcate the decision on the Allegations was irrational. Mr. Martin was found not guilty on all the Allegations relating to the TMP subsequent to his meeting with his former partner, Mr. Church, who, as a tax specialist, had given evidence that he did not counsel Mr. Martin and that he did not commit tax evasion.

12. Mr. Kerr submitted that there was no evidence provided at the hearing that Mr. Martin participated in, counselled or profited from an arrangement to evade taxes and since the DC found that Mr. Martin did not have that intent, he should have been found not guilty on all the

Allegations.

13. Mr. Kerr stated that Ms. Bennett, the investigator and expert witness of the PCC on tax matters, had analyzed the TMP with regard to the ITA, in particular s. 239. In her cross-examination, Mr. Kerr stated that Ms. Bennett had agreed that the criminal offence of tax evasion under the Act had to be shown to be intentional. Mr. B. Greenspan, who was called as an expert witness in the field of criminal law and procedure for Mr. Martin at the hearing, had opined that to prove the criminal offence of tax evasion, it is necessary to establish the act (*actus reus*) and the intention (*mens rea*) to contravene s.239 of the ITA. It was Mr. Greenspan's opinion that it was wrong to have alleged that Mr. Martin counselled tax evasion, as his clients would not have committed this offence and Mr. Martin did not intend or believe his TMP contravened the *Income Tax Act*.

14. Mr. Kerr submitted that Mr. Church, a former tax partner of Mr. Martin, who was called as a witness for the PCC, was a conservative accountant who thought the TMP was aggressive but not illegal.

15. Mr. Kerr submitted that Mr. Cherniawsky, an expert in income tax and income tax planning, called as a witness for Mr. Martin, had given evidence that Mr. Martin did not counsel tax evasion and his clients did not commit tax evasion. Mr. Cherniawsky had stated that in the early 2000s, this type of plan would have been considered aggressive but a valid plan to participate in. Mr. Martin relied on the advice of two chartered accountants who approved the validity of the plan.

16. Mr. Kerr submitted that the DC had erred in law in finding that Mr. Martin had engaged in professional misconduct by proceeding with the TMP without discussing the plan with a tax advisor. The DC had also erred in law by concluding that criminal tax evasion need not be proven to establish professional misconduct. He submitted that the DC did not act on clear, cogent and convincing evidence by concluding that Mr. Martin's recollection of events was clearer during the interviews in 2013 than at the hearing in 2014.

17. Mr. Kerr stated that when the PCC could not prove its Allegations, counsel had ignored the particulars of misconduct in the Allegations and had asserted the offence that Mr. Martin failed to conduct himself in a manner that would maintain the good reputation of the profession and its ability to serve the public interest. Mr. Kerr submitted that Mr. Martin maintained the view that the TMP was viable and that the DC had found he was negligent for not obtaining expert tax advice directly from a tax expert, not that he misconducted himself intentionally or deliberately.

18. Mr. Kerr also raised matters of procedural fairness, stating that the PCC is required under the Rules of Practice and Procedure 9.01(2) to particularize the Allegations made against a member, and ensure that the member has notice of the case against him, without the element of surprise. Mr. Kerr stated that the DC erred in not applying the test of whether the PCC had to prove professional misconduct on the particulars provided, and in converting the Allegations of tax evasion into an issue of professional standards. Mr. Kerr referred to the court cases *Takahashi and the College of Physicians and Surgeons of Ontario*, *Liberman v. College of Physicians* and *Venneri v. College of Chiropractors of Ontario*.

19. Mr. Kerr stated that lack of jurisdiction was an issue as the DC did not adhere to the express provisions of the *Chartered Accountants Act 2010*. The convictions were founded on a basis that did not enable Mr. Martin to identify the general allegations. Therefore, the committee

lost its jurisdiction and acted beyond its powers. Mr. Kerr referenced *Henderson v. College of Physicians and Surgeons of Ontario*. Since the discipline process can result in serious consequences, Mr. Kerr submitted that Mr. Martin should be entitled to strict adherence by his regulator to the provisions of its mandate.

20. Mr. Kerr submitted that the DC did not apply the proper onus of proof with respect to Allegation Nos. 1 and 2. The PCC had the burden of proving, on the balance of probabilities, that Mr. Martin engaged in professional misconduct by participating in and profiting from an arrangement to evade the payment of tax properly owing by his client. The onus of proof had been reversed by the DC by requiring Mr. Martin to provide evidence of a cheque that never existed, and to produce evidence of bank records that no longer exist due to the passage of time.

21. Mr. Kerr stated that the sanctions imposed of a six-month suspension and a fine of $25,000 are disproportionate to the offences. Mr. Martin is no longer in practice so there is no protection of the public issue, he fully cooperated with the investigators and the PCC, there is no disciplinary history, he did not personally evade taxes and the TMP is no longer being used.

22. Mr. Kerr submitted that the costs of $144,000 are unfair based on the facts in this case, as Mr. Martin was found not guilty on six of the Allegations, and none of the Allegations were proven as particularized.

23. Mr. Kerr stated that the opportunity for a pre-hearing conference, which may have narrowed some of the issues and could have resulted in reduced hearing time, was not arranged as requested once it was known the hearing would take more than two days, as originally estimated.

24. Mr. Kerr stated that the DC found Mr. Martin changed his evidence between the interviews and the hearing. Mr. Kerr submitted that Mr. Martin was interviewed on matters that took place more than a decade ago and his admissions were accepted without further investigation. Mr. Martin was not made aware that the focus of the investigation was tax evasion until the third interview and he was not given an opportunity to ensure the evidence was accurate. Mr. Martin may not have understood the gravity of the situation during the interviews and as he did not realize he was facing possible charges, he may have responded to questions based on faulty recollections.

25. Mr. Kerr submitted that the finding of guilt on Allegation Nos. 1 and 2 should be overturned and the sanctions levied against Mr. Martin should be set aside.

Submissions on behalf of the PCC

26. Mr. Farley submitted that Mr. Martin should have been well aware of the gravity of the situation as the letter of the complainant referred to sheltering income of clients to avoid the payment of taxes. Mr. Martin was interviewed on three separate occasions accompanied by his former legal counsel. Mr. Farley stated that Mr. Martin was fully aware of the PCC's concerns and was given every opportunity to fully respond to questions raised by the two investigators. Mr. Martin met with the PCC and should have understood the gravity of the situation by then.

27. Mr. Farley submitted that the DC made clear findings with respect to the credibility of Mr. Martin, noting that there was conflicting evidence in what he told the investigator and what was said at the hearing. The DC understandably accepted the evidence of Mr. Martin at the hearing only where it was corroborated by other evidence.

28. Mr. Farley stated that the findings of fact are that Mr. Martin participated in and profited from an arrangement to evade the payment of tax properly owing by his clients by creating fictitious invoices which were "paid" by clients. At the outset, the expectation of the clients was that it would cost them nothing to do so and they would secure a profit from each transaction. For every $1,000 paid the client received $500 in tax avoided and a cheque back from Mr. Martin as a "gift" for $750. Mr. Martin kept $250 for himself for every $1,000 received and the only loser was the Government of Canada.

29. Mr. Farley submitted that the DC gave undue weight to the fact that in 2007 Mr. Church, a former tax partner of Mr. Martin, participated in the TMP on two occasions. The DC concluded that by his participation Mr. Church gave tacit approval to the TMP, and Mr. Martin had reason to believe he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP. There had been no discussion with Mr. Church as to whether the TMP complied with the ITA. Mr. Farley submitted that since Mr. Church was a participant in the TMP and had a personal interest, he could not be considered as an independent tax advisor. In his evidence, Mr. Church had said he would not have paid the $20,000 invoice if he had not been assured he would receive a $15,000 payment back from Mr. Martin. Mr. Church subsequently became concerned about the defensibility of the plan and reversed his involvement.

30. Mr. Farley submitted that there was nothing to distinguish the facts in Allegation Nos. 1 and 2 from the *modis operandi* in Allegation Nos. 4 to 8, and the finding of guilt should have been the same for those Allegations.

31. Mr. Farley submitted that the DC erred in law by not imposing a sanction of revocation in a case involving lack of integrity and serious misconduct. The evidence showed that Mr. Martin assisted his clients in the evasion of taxes properly owing to CRA by embarking on a course of action to hide what he was doing from the CRA. Earlier decisions by the DC where a member has been found guilty of dishonest conduct and involved clients in that misconduct have resulted in revocation of membership, rather than suspension.

32. With respect to the submission that the Allegations were that Mr. Martin was guilty of the criminal offence of tax evasion Mr. Farley stated that the Allegations did not allege that Mr. Martin committed the criminal offence of tax evasion. Mr. Farley submitted that since *Stevens v. the Law Society of Upper Canada,* the issue is whether it has been established on clear and convincing evidence that the member has engaged in professional misconduct. There is no requirement to prove a Criminal Code offence in order to prove professional misconduct (*Milstein and Ontario College of Pharmacy* case). The term "evade" in the Allegations before the DC was used in the common usage sense and there was no allegation that Mr. Martin was guilty of the criminal offence of income tax evasion contrary to the *Income Tax Act*. Mr. Farley submitted that the *Slavens* case heard by the DC involved a scheme to improperly reduce tax payable. In that case, the DC found that Mr. Slavens, a senior, well-respected member of the profession, conceived and carried out a scheme which he knew to be tax evasion which he stood to benefit from.

33. Mr. Farley submitted that, on the issue of alleged lack of jurisdiction as a result of procedural unfairness and the suggestion Mr. Martin did not know the case he had to meet, the Allegations before the DC clearly stated the misconduct of Mr. Martin.

34. Mr. Farley stated that the DC erred in accepting the defence by Mr. Martin that

participation in the TMP by a tax practitioner colleague absolved Mr. Martin from complying with Rule 201.1. Erroneously, Mr. Martin was found not guilty of Allegation Nos. 4 through 8 on the basis he had obtained tax advice on the validity of the plan which transformed the conduct that was found to be unprofessional in Allegation Nos. 1 and 2 to conduct that was professional in Allegations 4 to 8.

35. After Mr. Martin's interviews with the investigators, during which he was accompanied by his legal counsel, he was given six months to collect corroborating evidence and information to support what he told the investigators. Mr. Martin's explanations only changed after the Allegations were laid and he appeared before the DC. Mr. Martin conceded that the clients named in Allegation Nos. 1, 4, 5, 6 and 8 were involved in the TMP, and the DC also found as fact that the transactions in Allegation Nos. 2 and 7 were TMP transactions. Mr. Farley submitted that the DC concluded that the TMP was an improper scheme put into place by Mr. Martin to evade the payment of taxes owing by his client.

36. There was no reversal of the onus of proof by the DC. Mr. Farley submitted that the DC relied on the statements given by Mr. Martin to the investigators, and evidence provided by Mr. Martin to support his revised position that certain transactions were not part of the TMP. The DC took that evidence into consideration in making its findings.

37. Mr. Farley stated that the PCC accepts that the AC should not intervene to reverse a finding of fact by the DC unless the finding is unreasonable, and agrees that the decision of the DC that Mr. Martin's conduct with respect to Allegation Nos. 1 and 2 was professional misconduct was reasonable.

38. Mr. Farley submitted that given the evidence of Mr. Church, there is no credible evidentiary basis to support a finding that Mr. Church's involvement provided a defence to Allegation Nos. 4 to 8. It would be unreasonable to conclude that a participant in the TMP could somehow provide tacit approval of the TMP as an appropriate tax savings plan. Mr. Farley stated that the AC is in a position to come to a conclusion as to whether Mr. Church's involvement absolves Mr. Martin from responsibility for proceeding with transactions the DC believed were inappropriate transactions for an accountant to involve himself in. This is not the same as a case where a member who is unsure about an aggressive tax strategy seeks out advice from an independent expert who provides assurance that the strategy is compliant with the *Income Tax Act*.

39. In respect of the issue of costs, Mr. Farley referred to *Boucher v. PA Council* (Exhibit 9) and *Hague v. Liberty Mutual* (Exhibit 10). Mr. Farley submitted that costs are an indemnity, not a penalty, noting that high costs were incurred in this matter. There were numerous delays and the need for additional hearing days became apparent during the course of the hearing. The hearing before the DC had originally been scheduled as a two day hearing but due to the complexity, it evolved to 11 days. The request for a pre-hearing conference was received shortly before the hearing itself was scheduled to commence and a pre-hearing would not have minimized the issues to be resolved.

40. Mr. Farley stated the issue of costs being reduced on a *pro rata* basis was rejected by the AC in the *Whiting* case where the member was found not guilty of some of the Allegations. In that case, the committee stated that the purpose of costs is to recover a portion of the costs of the investigation and hearing, and it would be inappropriate to apportion costs on a mathematical formula based on a degree of success.

41. Mr. Farley submitted that the findings of guilty with respect to Allegation Nos. 1 and 2 should be upheld and the findings of not guilty to Allegation Nos. 4 through 8 should be overturned, and a finding of guilty substituted. The PCC also requests the Order be varied to include revocation of Mr. Martin's membership. In addition to the usual publication, the PCC requests publication of the revocation in a newspaper, with costs to be paid by Mr. Martin. The PCC also requests costs for this appeal.

Reply Submissions

42. Both counsel on March 31, 2016 reiterated a number of points made previously.

43. With respect to the PCC request that Mr. Martin's membership be revoked, Mr. Kerr submitted that unlike the precedent cases of *Slavens* and *Marcus* where the members knew their scheme was illegal, the DC accepted that Mr. Martin thought the TMP was valid. He also referred to the *Mintz* case for promoting an invalid scheme involving millions of dollars.

44. Mr. Farley responded that the AC should look at the TMP transactions, that 75% of the fictitious invoices were rebated back to the client, the corporations paid substantially less than they should have paid, and that the TMP was designed to be a tax evasion plan.

45. The Appeal tribunal requested clarification concerning the invoices issued to clients as part of the TMP that Mr. Martin said he would not have issued otherwise. Mr. Kerr stated that these were real, not bogus, invoices based on work done for the client. Mr. Farley stated that these invoices were issued as part of the scheme to deceive Revenue Canada.

46. The hearing was adjourned on March 31, 2016 and the parties were advised that the appeal tribunal would deliberate on its decision at a later date. Once that decision was made known there would be an opportunity for the parties to make submissions on costs, if necessary. These are the reasons of the AC for its decision and order.

Reasons for the decision

47. The appellant submitted the finding of guilty on Allegation Nos. 1 and 2 should be set aside because: the issue in this case is whether or not Mr. Martin engaged in tax evasion contrary to the provisions of the ITA and this was not proven; the Allegations do not comply with the requirements of the Rules of Practice and Procedure and accordingly the high degree of procedural fairness was not met and therefore there was no jurisdiction to hear and determine the Allegations; and the DC committed an error in law by reversing the onus of proof in rejecting the exculpatory evidence of Mr. Martin at the hearing and accepting the inculpatory admissions he made to the investigators.

48. The AC concludes the issue in this case is whether Mr. Martin has committed professional misconduct by failing to maintain the reputation of the profession and its ability to serve the public interest. Included in all of the Allegations against Mr. Martin was an allegation in part that "he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients".

49. Counsel for Mr. Martin advanced the position that for Mr. Martin to be found guilty of professional misconduct, it must be proven that he committed the criminal offence of counselling "tax evasion" as that action is defined in the ITA. This was not the position of the PCC before the DC as is evident from paragraphs 53 to 55 of the DC's Reasons. Counsel for the PCC had objected to Mr. Martin calling expert witnesses to testify about the criminal offence of tax

evasion as it was not relevant because the case was not about the criminal offence of tax evasion but professional misconduct.

50. The position of the PCC is that the principles set out in the Divisional Court in *Re: Stevens and the Law Society of Upper Canada,* 55 O.R. (2d) 405 and the Ontario Court of Appeal in *Re Milstein and Ontario College of Pharmacy et al*., 20 O.R. (2d) 283 govern these proceedings and charges of professional misconduct are to be treated as such; the function of a professional discipline committee is to determine whether the impugned conduct is improper in a professional respect, not whether it constitutes a crime as defined in the Criminal Code.

51. The DC concluded, and the AC concurs, that this case is not about whether the criminal act of tax evasion has occurred but rather the case is about whether it was professional misconduct to participate in arrangements which were intended to and did evade, in the everyday meaning of the word, the payment of tax properly owing. An essential component of each Allegation is that, as a result of the TMP, taxes properly owing were not paid.

52. Mr. Martin received consulting fees for consultations he gave to his clients. In addition, he participated in and profited from the arrangement he had recommended to clients. The evidence before the DC, both the evidence of the PCC and of Mr. Martin, was that the arrangement (the TMP) was invalid and would not be effective if properly scrutinized. Taxes which were properly payable were not paid and thus taxes were, in the everyday meaning of the word, evaded.

53. At the hearing before the DC, there was no disagreement on two fundamentally important points. First there was no disagreement about the validity of the TMP. It was invalid. Second taxes properly owing were not paid by Mr. Martin's clients. The tax not paid included both the taxes not paid by the corporations who paid the invoices from Mr. Martin's company and the taxes not paid as a result of the payments, equal to 75% of the amount of the tax not paid by the corporations, which were paid directly to the individual shareholders, or their designees, rather than to their company.

54. The evidence of the PCC tax expert, Ms Bennett, was that Mr. Martin knew or should have known that the TMP was invalid, it did not pass the "smell test" and he took steps to make it difficult for CRA to find out about it. Mr. Cherniawsky, Mr. Martin's tax expert, said it would have been possible to create a valid tax product but that the TMP was not a valid tax product.

55. Mr. Martin did not call any evidence that the TMP was valid and no witness testified that the TMP was valid.

56. As indicated at paragraphs 18 and 19 above, Mr. Kerr stated that Mr. Martin did not know the case he had to meet, the Allegations were not particularized and failed to meet the requirements of the Rules of Practice and Procedure and thus the DC did not have jurisdiction.

57. Subsection 9.01(2) of the Rules of Practice and Procedure states "each allegation shall specify the rule or rules of professional conduct alleged to have been breached, and shall provide sufficient information to enable the subject member or firm to identify the general allegation(s)".

58. The PCC detailed to Mr. Martin the allegations of professional misconduct on Form 9A dated February 24, 2014. In each of the eight Allegations listed on Form 9A, the PCC set out that "Mr. Martin had failed to conduct himself in a manner that will maintain the good reputation

of the profession and its ability to serve the public interest". The Allegations state the time period in which the allegedly improper conduct occurred and who was involved. Each Allegation included how he failed to meet the standard required, with the words "in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing". Allegation Nos. 1 to 7 indicate by initials the individuals and clients involved and Allegation No. 8 indicates by initials the individual involved. Each Allegation identifies the relevant rule with the words "contrary to Rule 201.1 of the Rules of Professional Conduct".

59. Mr. Martin, accompanied by his counsel, had been interviewed on three occasions about his conduct. Mr. Martin was the main source of information including documents and admissions which the PCC relied upon. Further, as is clear from paragraph 93 of the DC's Reasons Mr. Martin understood there was a problem with what he did.

60. The AC concluded the Rules of Practice and Procedure had been followed, there was no basis on which Mr. Martin could claim to be surprised, and that the high standard of procedural fairness required in the discipline process had been met.

61. Mr. Kerr submitted that the DC erred in law and reversed the onus of proof when it refused to accept Mr. Martin's evidence at the hearing that certain transactions were not TMP transactions unless he provided documentation to support his change in evidence.

62. Allegation No. 2 involved a series of transactions over an extended period of time from October 2002 to January 2007. Mr. Martin's testimony at the hearing differed from the information he gave to the investigators as to whether the transactions between 2002 and 2006 related to the TMP. The absence of corroboration supporting a change in the representations made in the investigative interviews, the ambiguity in his testimony before the DC and his willingness to present different versions to the CRA, caused the DC to question the accuracy of his testimony.

63. In rejecting Mr. Martin's exculpatory evidence at the hearing that transactions in Allegation No. 2 (and 7) were not TMP transactions in favour of the inculpatory admissions, explanations and documents he provided to the investigators, the DC made specific findings of credibility against Mr. Martin. The AC concluded there was no reversal of the onus of proof in accepting the earlier inculpatory admissions and no basis for setting aside the findings of credibility made in this regard against Mr. Martin.

64. Mr. Martin and the PCC agreed that at least one transaction in Allegation No. 1, 4, 5, 6 and 8 were TMP transactions. The DC found and the AC agrees that one transaction was sufficient to prove an Allegation.

65. Accordingly, for the reasons set out in Paragraphs 48 to 64 above, the AC would dismiss Mr. Martins appeal with respect to the finding of guilt on Allegations 1 and 2 on the basis of the grounds set out in paragraph 47 above.

66. In addition to the grounds of appeal dealt with above, the appeal and the cross-appeal both require the AC to consider the basis on which the DC found Mr. Martin guilty of professional misconduct on Allegation Nos. 1 and 2, and not guilty on Allegation Nos. 3, 4, 5, 6, 7 and 8.

67. Mr. Kerr submitted that the DC erred when it held that Mr. Martin was guilty of professional misconduct "when he proceeded with the TMP without discussing the validity of the

plan directly with a tax advisor" (paragraph 103 of the DC's reasons). The PCC's position is that the DC erred when it found that the consultation with Mr. Church in 2007 was "tacit approval" of and a reasonable basis to confirm the validity of the TMP (paragraphs 118 & 119).

68. Members who propose, participate and profit from invalid tax minimization plans fail to maintain the reputation of the profession and its ability to serve the public interest. While there are no specific procedures mandated to be followed before a member may propose, participate and profit in such plans, clearly the member must act prudently, take reasonable steps and have a clear basis for concluding that the plan is valid. A formal written opinion from a recognized tax expert would be prudent.

69. The DC concluded that Mr. Martin was "engaged in professional misconduct when he proceeded with the TMP without discussing the validity of the plan directly with a tax advisor". The AC acknowledges that while there is no requirement to consult with a tax advisor in situations such as this, it is a prudent practice to do so. However, the AC concluded that the failure to consult with an expert does not, in and of itself, constitute professional misconduct and therefore disagrees with the basis on which the DC found Mr. Martin guilty of Allegation Nos. 1 and 2.

70. Mr. Martin participated in misleading transactions including generating invoices which he admitted his clients would not pay and would not have been issued in the absence of the TMP. Further, Mr. Martin entered into a series of transactions including the issuance of personal cheques from his own funds to the shareholders of the client corporations. These actions resulted in Mr. Martin's clients and their companies paying less tax than would otherwise have been applicable. This latter step was rationalized by Mr. Martin on the basis that the funds advanced were his own after-tax dollars and he could do with them as he chose. But it is obvious he was only providing the money as part of the TMP.

71. The fact that Mr. Martin took steps to try and conceal the transaction from the CRA by involving a second party, Clientco shareholder(s) and agreeing to make payments to that person from his personal funds equal to 75% of the management fee invoiced by Mr. Martin's company to the client's company is professional misconduct in the opinion of the AC tribunal.

72. The act of issuing cheques from your personal account to Clientco shareholders who have entered into a transaction or transactions with one of your companies in situations where the client would never have paid the invoice were it not for the existence of the TMP is harmful to the good reputation of the members of the profession and its ability to serve the public interest. Mr. Martin was issuing invoices to his clients that he knew were not legitimate in as much as the invoice would neither have been issued nor paid in the absence of the TMP. The invoices were overstated to create an offset for the resulting tax implications as corroborated by his own expert witness, Mr. Cherniawsky.

73. Mr. Martin knew that he was receiving a significant financial benefit from the transactions and that he was giving shareholders of corporations significant financial benefits, on account of payments made by the corporation, without the money going to and through the corporation. His conduct was so far outside of proper professional conduct that it constitutes professional misconduct.

74. This tribunal confirms the finding that Mr. Martin is guilty of professional misconduct as alleged in Allegation Nos. 1 and 2, not because of a failure to consult a tax expert before proceeding with the TMP but rather because he issued invoices which he knew his clients would

not pay but for the tax savings that they received by participating in the TMP. Further, he distributed his personal funds to shareholder clients who entered into the TMP transactions knowing that the invoices he issued to their corporations would otherwise not have been paid to the shareholders personally without the return flow of funds originating under the TMP.

75. Allegation Nos. 4, 5, 6, and 7, were dismissed by the DC because of its decision on Allegation No. 8 which was considered out of sequence to the other allegations but in chronological order. The DC found that while the conduct asserted was proven, Mr. Martin had not engaged in professional misconduct under this Allegation because he had a reasonable basis for believing the TMP was valid. The Allegation involved a tax partner of Mr. Martin, Mr. Allen Church. Mr. Church and his company were active participants in the TMP. Mr. Church characterized himself as a conservative tax practitioner. Tacit approval to the plan was drawn from Mr. Church's participation in the plan which Mr. Church acknowledged as being aggressive; however, he believed the plan did not constitute tax evasion or an otherwise inappropriate plan at the time he became a participant in it.

76. The DC was heavily influenced in its decision by the fact that Mr. Martin had conferred with Mr. Church on the TMP before Mr. Church participated, notwithstanding the fact that there appears to be a great deal of uncertainty surrounding the extent of the consultation, if any, between the two, going to the extreme where Mr. Church said he could not remember the discussion and later changed his mind and reversed the TMP "expenses" in his company when he became aware of the number of participants in the TMP.

77. The DC concluded "that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP (paragraphs 118 and 119). The AC finds this conclusion unreasonable. This was not a consultation which met the standard required of a member of the profession.

78. In any event, there is no uncertainty about Mr. Church's independence. He was not independent or objective as he was an investor in the TMP. He could not provide the kind of independent objective advice required to justify a reasonable belief in the validity of the TMP.

79. The AC concludes the DC erred in accepting Mr. Church's participation as a tacit approval which justified Mr. Martin's belief in the validity of the TMP. The DC has erred in accepting the involvement of Mr. Church who was securing a significant tax advantage by participating in the plan as providing tacit approval that the TMP was a legitimate tax savings product.

80. The AC is of the opinion that with respect to his TMP that Mr. Martin cannot discharge his professional responsibility to follow the Rules of Professional Conduct by reliance on or delegation to a third party such as Mr. Church. Whether a member who consulted with an acknowledged independent expert who fully understood the nature and scope of a tax minimization plan would be a defence to an allegation of professional misconduct is a case for another day.

81. As the tacit approval and participation of Mr. Church was the only basis for the conclusion of not guilty of professional misconduct with respect to Allegation Nos. 4, 5, 6, 7 and 8, as the AC rejects the other grounds of appeal raised by Mr. Martin, the AC concludes that Mr. Martin is guilty of Allegations 4, 5, 6, 7 and 8.

82. Mr. Martin, a member of a self-governing profession, failed to take the steps necessary

to ensure he had complied with his own professional standards so as to meet his own obligations and the needs of his clients. He failed to maintain the good reputation of the profession as required by Rule 201.1 of the Rules of Professional Conduct of the Chartered Professional Accountants of Ontario and is guilty of professional misconduct.

83. As is indicated in paragraph 6 above the PCC abandoned it cross-appeal with respect to Allegation No. 3.

84. It is for the reasons above that the Decision of the Appeal Committee is as follows:

DECISION

THAT having seen, heard and considered the submissions made on behalf of Mr. Martin on his appeal and in response to the cross-appeal of the Professional Conduct Committee, the submissions made by the PCC on the appeal of Mr. Martin and its cross-appeal, the PCC having abandoned its cross-appeal with respect to the finding of not guilty on Allegation No. 3, the Appeal Committee hereby sets aside the Decision of the Discipline committee and finds Mr. Martin guilty on Allegation Nos. 1, 2, 4, 5, 6, 7 and 8, and not guilty of Allegation No. 3.

SANCTION/COSTS

85. In light of the previous comments by the AC that the parties would be given an opportunity to make further representations regarding sanction and costs after the decision was made by this tribunal and in view of the additional findings of guilt, the AC recommends that a further hearing to hear the representations from either party who wishes to do so be scheduled as soon as possible.

DATED AT TORONTO THIS 18th DAY OF OCTOBER, 2016
BY ORDER OF THE APPEAL COMMITTEE

Stephen R Meek

S.R. MEEK, FCPA, FCA – CHAIR
APPEAL COMMITTEE

MEMBERS OF THE TRIBUNAL:
R. RAMOTAR, CPA, CGA
B. RAMSAY (PUBLIC REPRESENTATIVE)
W.R. SCHMIDT, CPA, CA

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **JOHN WILLIAM MARTIN, CPA, CA** and a cross-appeal by the Professional Conduct Committee of the Decision made January 21, 2015 and the Order made April 16, 2015 of the Discipline Committee, under **Rule 24** of the Rules of Practice and Procedure.

TO: John William Martin

AND TO: The Professional Conduct Committee

REASONS
(Order made February 16, 2017)

1. This tribunal of the Appeal Committee of the Chartered Professional Accountants of Ontario ("CPA Ontario"), reconvened on February 16, 2017 to hear submissions on sanctions.

2. Mr. Martin attended with his counsel, Gavin Finlayson. Paul Farley appeared on behalf of the Professional Conduct Committee ("PCC"), accompanied by his co-counsel Alexandra Hersak. Robert Peck attended the hearing as counsel to the Appeal Committee.

3. The Decision of the Appeal Committee was made on October 5, 2016, and the written Reasons for the Decision are dated October 18, 2016. The Order of the Appeal Committee was made on February 16, 2017, and was sent to the parties on February 21, 2017. These reasons for sanctions, given pursuant to Rule 20.04 of the *Rules of Practice and Procedure*, include the order, and the reasons of the Appeal Committee for its order.

4. The Order appealed from, dated April 16, 2015, reads as follows:

> IT IS ORDERED:
>
> 1. THAT Mr. Martin be reprimanded in writing by the Chair of the tribunal.
> 2. THAT Mr. Martin be and he is hereby fined the sum of $25,000 to be remitted to CPA Ontario within three (3) months from the date this Order is made.
> 3. THAT Mr. Martin be and he is hereby suspended from the rights and privileges of membership of CPA Ontario for a period of six (6) months from the date this Order is made.
> 4. THAT notice of the Decision and Order, disclosing Mr. Martin's name, be given in the form and manner determined by the Discipline Committee:
>   (a) to all members of CPA Ontario; and
>   (b) to all provincial bodies;
>
>   and shall be made available to the public.
> 5. THAT Mr. Martin surrender his CA and CPA certificates of membership in CPA Ontario to the Discipline Committee Secretary within ten (10) days from the date this Order is made, to be held during the period of

suspension and thereafter returned to Mr. Martin.

6. THAT in the event Mr. Martin fails to comply with the requirements of this Order, he shall be suspended from membership in CPA Ontario until such time as he does comply, provided that he complies within six (6) months from the date of his suspension. In the event he does not comply within the six-month period, his membership in CPA Ontario shall thereupon be revoked, and notice of the revocation of his membership, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Martin's practice and/or residence. All costs associated with this further publication shall be borne by Mr. Martin and shall be in addition to any other costs ordered by the committee.

IT IS FURTHER ORDERED:

7. THAT Mr. Martin be and he is hereby charged costs fixed at $144,000 to be remitted to CPA Ontario within thirty-six (36) months from the date this Order is made.

Submissions on Sanction

4. The PCC sought to have the sanction Order of the Discipline Committee varied to include revocation of Mr. Martin's membership. The PCC requested that the Order of the Discipline Committee be further varied to include, in addition to the publication ordered, publication in the *Globe and Mail*, with Mr. Martin bearing the cost of such publication. Mr. Farley also submitted that the Appeal Committee should allow costs to the PCC on this appeal.

5. Mr. Farley, on behalf of the PCC, asserted that, as Mr. Martin has now been found guilty of not two but seven of the eight Allegations, the circumstances to consider in determining sanction have changed from those considered by the Discipline Committee.

6. Mr. Farley submitted the Discipline Committee, in finding the key issue to be that Mr. Martin did not seek out or obtain expert tax advice, imposed a penalty that does not meet the facts of the case as found by the Appeal Committee. The Discipline Committee, having misapprehended the facts of the case and gave too much weight to mitigating factors, imposed a suspension of Mr. Martin's membership. Mr. Farley argued this was an inadequate penalty even on the findings of the Discipline Committee and is now even more insufficient in light of the findings of the Appeal Committee.

7. In respect to the test to be met before an Appeal Committee can or should interfere with sanctions imposed by a Discipline Committee, Mr. Farley referred to *R. v. Shropshire* and *Matthews* cases contained in the PCC's Book of Authorities (Exhibit 5), noting that both precedents stressed that a variation should only be made where there was an application of incorrect sanctioning principles resulting in excessive or inadequate penalty.

8. Mr. Farley submitted that the Appeal Committee, in finding Mr. Martin to have participated in a sophisticated plan to evade the payment of tax, must assess sanctions appropriate to cases of moral turpitude in order to protect the public and serve the public's interest. That Mr. Martin did not personally evade taxes is irrelevant as Mr. Martin benefitted nonetheless.

9. In respect of general and specific deterrence in cases of moral turpitude, Mr. Farley referred to *Marcus, Matthews, Inglis* and *Slavens* contained in the PCC's Book of Authorities

(Exhibit 5). A Supplemental Book of Authorities (Exhibit 12) containing *Washburn* was also submitted. Mr. Farley noted that the gist of the misconduct in the precedents involve misappropriation of funds, tax evasion and association with knowingly false or misleading documents which resulted in revocation of membership.

10. Mr. Farley distinguished the *Fryers* case presented in the Book of Authorities of Mr. Martin (Exhibit 13) by noting Mr. Martin neither pleaded guilty nor did he demonstrate any remorse for his actions, both factors considered in mitigation in *Fryers* who was not expelled.

11. Mr. Farley stated that the costs awarded by the Discipline Committee were based on recovering half of the actual costs incurred for investigation and prosecution. Referring to *Hoff v. Alberta Pharmaceutical Assn.* (Exhibit 12), Mr. Farley asserted the rationale for imposing costs on members subject to the disciplinary process is that tribunals of self-governing professions must be conducted as part of their public protection mandate and in so doing, costs should be shared by the member whose conduct is at issue.

12. Mr. Farley stated that a cost order is a discretionary determination that an appeal tribunal should not interfere with lightly. Mr. Farley noted the specific considerations of the Discipline Committee in coming to their order on costs and stated that their discretion was applied reasonably.

13. The PCC filed a Costs Outline (Exhibit 14) showing costs for the appeal hearing at approximately $60,000. Mr. Farley stated that although the PCC is changing their practice of asking for one half of the costs to asking for two thirds, in this case, the PCC would only be seeking half of the costs, amounting to $30,000, in addition to the costs already awarded by the Discipline Committee.

14. Mr. Finlayson, on behalf of Mr. Martin, submitted that revocation is the most severe punishment available from this tribunal and should be reserved for the most extreme cases. He contended that cases warranting revocation generally involve a member either misleading clients in a fundamental manner or misappropriating funds from clients, neither of which applies to Mr. Martin's conduct.

15. Mr. Finlayson acknowledged that the sanctions imposed by the Discipline Committee are entitled to substantial deference and should only be disturbed by an appeal tribunal where they are found to be unreasonable and outside the range of sanctions for similar conduct in similar circumstances. Mr. Finlayson stressed that the standard for displacing a finding on sanctions is so high because determination of sanctions is extremely contextual.

16. Mr. Finlayson submitted that the Discipline Committee articulated their consideration of the nature of Mr. Martin's conduct, acknowledging that the misconduct was serious, and determined a significant sanction was required to convey that adequately. He emphasized the Discipline Committee properly considered the findings of fact and credibility, which included the factors set out in the Appeal Committee reasons of October 18, 2016.

17. Mr. Finlayson referred the Appeal Committee to the *Fryers* case and asserted that additional findings of guilt made by the Appeal Committee should not be considered additional aggravating factors as it is not the quantity of findings of guilt but the nature of the conduct at issue that should govern the sanctions.

18. Mr. Finlayson compared the *Gary* (Exhibit 13) and *Granelli* cases in support of his assertion that there are gradations of moral turpitude and that not all cases should result in revocation.

19. Mr. Finlayson stated the protection of the public interest does not require the expulsion of Mr. Martin as he is no longer in public practice or using the tax minimization plan and Mr. Martin is not going to engage in similar behaviour in the future. Mr. Finlayson asserted that Mr. Martin was not considered ungovernable by the Discipline Committee; that tribunal decided rehabilitation was possible despite the seriousness of the conduct at issue.

20. Mr. Finlayson referred to the cases of *Washburn*, *Marcus* and *Slavens* and emphasized that unlike the findings in this matter, the precedents, all resulting in revocation, related to circumstances involving unlawful misappropriation of funds from clients, criminal tax evasion or association with knowingly false or misleading documents.

21. Mr. Finlayson also referred to *Cuke* and *Gera* (Exhibit 13), noting these precedents contained similar circumstances of knowingly associating with false or misleading documents or participation in tax schemes, and resulted in suspension of the member. Mr. Finlayson also referred to the *Mintz* (Exhibit 13) settlement and maintained that sanctions must be consistently applied in settlement agreements and disciplinary hearings where the misconduct at issue is similar in nature.

22. In respect of publication, Mr. Finlayson referred to the *Mintz* settlement and asserted that there is no need to depart from the publicity ordered by the Discipline Committee as this is not a case of protecting the public. Mr. Finlayson reiterated that Mr. Martin is not practising public accounting and there is no risk of him using the tax scheme at issue again. Mr. Finlayson claimed that, regardless of where notice appears, the particulars of Mr. Martin's conduct will be provided to the public.

23. In respect of appeal costs, Mr. Finlayson acknowledged that it is appropriate for members of self-regulating bodies whose conduct is the subject of a hearing bear some of the costs, however, those costs should be reflective of actual time spent. Mr. Finlayson submitted that hearing days are not seven hour days and, in exercising his procedural right to appeal, Mr. Martin has incurred additional costs of his own.

24. In respect of the costs ordered by the Discipline Committee, Mr. Finlayson maintained that Mr. Martin's earning potential is limited due to his age and publicity may impact negatively on his ability to continue earning, therefore, an additional 24 months for Mr. Martin to pay was requested.

Decision

25. Having considered the record and the submissions of the parties, this panel of the Appeal Committee varies the Order of the Discipline Committee as follows:

> IT IS ORDERED that paragraphs 3 and 6 of the Order of the Discipline Committee dated April 16, 2015 are set aside and that paragraphs 1, 2, 4, 5 and 7 of the Order of the Discipline Committee dated April 16, 2015 are hereby varied. The Order of the Appeal Committee is as follows:
>
> 1. THAT Mr. Martin be reprimanded in writing by the Chair of the Appeal tribunal.
> 2. THAT Mr. Martin be and he is hereby fined the sum of $25,000 to be remitted to CPA Ontario within three (3) months from the date this Order of the Appeal Committee is made.
> 3. THAT Mr. Martin's membership in CPA Ontario be and he is hereby revoked.

4. THAT notice of the Decision and Order, disclosing Mr. Martin's name, be given in the form and manner determined by the Appeal Committee:
   (a) To all members of CPA Ontario; and,
   (b) To all provincial bodies;
   and shall be made available to the public.

5. THAT notice of the revocation of membership disclosing Mr. Martin's name, be given by publication on the CPA Ontario website and in the Globe and Mail. All costs associated with the publication shall be borne by Mr. Martin and shall be in addition to any other costs ordered by the Appeal Committee.

6. THAT Mr. Martin surrender his CPA and CA certificates of membership in CPA Ontario to the Adjudicative Tribunals Secretary within ten (10) days from the date this Order of the Appeal Committee is made.

AND IT IS FURTHER ORDERED:

7. THAT Mr. Martin be and he is hereby charged costs fixed at $144,000 related to the Discipline Committee hearing to be remitted to CPA Ontario within thirty-six (36) months from the date this Order of the Appeal Committee is made.

8. THAT Mr. Martin be and he is hereby charged additional costs related to the Appeal Committee hearing fixed at $28,000 to be remitted to CPA Ontario within thirty-six (36) months from the date this Order of the Appeal Committee is made.

Reasons for the sanction

26. The Appeal Committee does not rehear a matter but decides on the record whether the final decision and order made are reasonable on the evidence and the law (Regulation 7-3, s.16). The Appeal Committee has the power to vary the final decision and order of the tribunal appealed from, and make any decision and order that the tribunal appealed from could have made (Regulation 7-3, s. 19).

27. The sanction imposed by the tribunal must be appropriate for the misconduct being sanctioned. Accordingly, the tribunal must consider the nature, extent and impact of the misconduct.

28. When determining a sanction the tribunal must act fairly, which among other things requires the sanction imposed be consistent with sanctions imposed in similar cases. It is recognized that few, if any, cases are exactly alike. Even where the misconduct in two cases has breached the same Rule of Professional Conduct, the nature, extent and impact of the misconduct may be quite different. Often the tribunal has to decide which of the principles of sanction – general deterrence, specific deterrence and rehabilitation – shall have priority given the facts and circumstances of the misconduct.

29. The Discipline Committee found two allegations of misconduct had been proven. It characterized the misconduct as a failure to seek expert tax advice before putting the TMP into effect. The Discipline Committee, at paragraph 155 of its reasons, said: "Mr. Martin did not take the steps expected of an accountant in the circumstances. The tribunal declined to make a finding that Mr. Martin engaged in the misconduct with the knowledge that it was wrong."

30. This is not the basis for the decision made by the Appeal Committee as is clear from the reasons of October 18, 2016. More specifically, we concluded that Mr. Martin knew the invoices he submitted to his clients were not legitimate and he reimbursed his clients for 75% of the money they paid for the bogus invoices (see paragraphs 70 to 74 of the reasons). Simply put, the nature, extent and impact of the misconduct as determined by the Appeal Committee is significantly more egregious than the misconduct found by the Discipline Committee.

31. The Appeal Committee now has the responsibility to impose a sanction appropriate for the misconduct it found: egregious misconduct involving moral turpitude. The long-established principle cited by both parties, that the Appeal Committee does not interfere with the sanction imposed by the Discipline Committee unless the sanction imposed is clearly inadequate or excessive, is not directly applicable. The misconduct being sanctioned is distinctly different.

32. The invalid tax avoidance scheme put into effect by Mr. Martin, which was planned and deliberate, took place on seven occasions over almost five years, made substantial money for Mr. Martin and caused substantial losses for the CRA (all other taxpayers) and involved clients or former clients.

33. The fact that Mr. Martin knew there was, at a minimum, a problem with the perception of the overall effect of the TMP and that he took steps to conceal it from the CRA are part of the misconduct itself, not just aggravating circumstances to the misconduct found by the Discipline Committee. The evidence called by Mr. Martin at the hearing before the Discipline Committee acknowledged the TMP was invalid. Accordingly, he exposed his clients to serious risks, yet he expressed no remorse.

34. The fact Mr. Martin did not personally avoid taxes, which the Discipline Committee found to be a mitigating circumstance, is irrelevant given that he made substantial money from the taxes his clients avoided paying.

35. The Discipline Committee also found that Mr. Martin's cooperation with the investigation was a mitigating factor. But his cooperation was not complete. He changed his evidence at the hearing on important points, arguing that he had not taken the investigation seriously when he made the admissions he subsequently denied at the hearing. The Discipline Committee, while not finding that he lacked credibility on all matters, did make a finding of credibility against him. A member is entitled to defend the allegations made against him, but Mr. Martin's conduct both with his clients and during the investigation demonstrated an aggravating lack of professionalism.

36. The principle of sanction which must have priority in cases such as this is general deterrence. The profession simply cannot tolerate misconduct of this kind with respect to tax matters; a core activity of the profession which is fundamentally important to CPAs and the clients they serve.

37. Mr. Martin's conduct is so egregious that he must not be permitted to retain his membership and consequently his membership must be revoked. The interests of the profession and the public require revocation.

38. The fine of $25,000 imposed by the Discipline Committee is also appropriate in this case as it helps serve as a general deterrent. The Appeal Committee concluded the fine of $25,000 is consistent with fines levied in cases where the misconduct is similar to the misconduct in this case.

39. The Appeal Committee is also of the opinion that general deterrence requires publication of a notice disclosing Mr. Martin's name and the revocation of his membership. In cases such as this, a clear message must be conveyed to the profession and the public at large that this type of conduct will not be tolerated under any circumstance.

40. It has been long recognized that publication of notice is a significant general deterrent. Members should know that if they engage in similar misconduct that it will become public knowledge. Further, the public and members of the profession should both be made aware that CPA Ontario takes its responsibility to govern its members seriously. Accordingly, the Appeal Committee ordered the usual publication.

41. The Appeal Committee did consider the submissions that Mr. Martin did not need to be specifically deterred from similar misconduct in the future, that he is not in public practice so the public is not at risk, and that he can be rehabilitated. Given the adverse finding of credibility made against Mr. Martin by the Discipline Committee, the fact the misconduct involved bogus invoices, which any CPA should know is unacceptable, and the fact he either didn't take the investigation seriously or provided false evidence at the hearing, the Appeal Committee did have doubts about his willingness to be governed by the standards which apply to all members. While these doubts were a factor in our conclusion that the principle of general deterrence was to have priority, the misconduct itself was the overwhelming reason for our conclusion. Neither the profession nor the public interest can tolerate such conduct and revocation is the clearest way to send that message.

42. The Appeal Committee did consider the cases referred to by both counsel. We agree with Mr. Finlayson's submissions that the imposition of sanction is not a formulaic exercise requiring expulsion or revocation if the misconduct involved moral turpitude but rather the tribunal must look at the context, including the facts and circumstances of the case. When we did, we found that similar cases almost always resulted in expulsion or revocation. There are no extraordinary circumstances in this case which suggests the misconduct does not require revocation.

43. The Appeal Committee concluded the cases of *Marcus, Matthews, Inglis* and *Slavens* included in the PCC's Book of Authorities (Exhibit 5) and the case of *Washburn* included in the Supplemental Book of Authorities (Exhibit 12) are the precedent cases most similar to this case.

44. As Mr. Martin is no longer a member he must surrender his certificate of membership as a Chartered Professional Accountant.

Reasons for Costs

45. The Discipline Committee is in the best position to determine the indemnity for costs. Thus this committee owes a significant deference to the Discipline Committee with respect to its award of costs.

46. The Discipline Committee understood the applicable principle to be followed in assessing costs, the member should be responsible for a portion of the costs of the hearing and the profession should bear a portion of the costs as part of their public mandate and its responsibility as a self-regulating profession. The member should bear a portion of the costs as it was his/her actions that required the investigation and hearing and caused the costs to be incurred. As Mr. Farley correctly submitted, costs are an indemnity, not a penalty.

47. It is to be noted that notwithstanding the increase in the number of allegations which Mr. Martin found were proven, the PCC is not proposing that the amount of costs levied be increased. This is consistent with the decision of the Discipline Committee which ordered the indemnity on

the basis that Mr. Martin's conduct required the investigation and hearing and did not divide the costs by the proportion of the allegations proven.

48. The magnitude of the costs of the Discipline Committee hearing is attributable to the fact that the hearing took place over eleven days.

49. The PCC filed an estimate of the costs associated with the appeal aggregating approximately $60,000. Mr. Farley indicated that although the PCC has been changing the practice of asking for one-half of the costs to asking for two-thirds over the last two years, in this case, the PCC would only be seeking one half of the costs of the Appeal Committee hearing amounting to $30,000 in addition to the costs already awarded by the Discipline Committee which aggregated approximately $288,000.

50. The Appeal Committee finds that the costs awarded against the appellant by the Discipline Committee of $144,000 are reasonable and in line with other costs awarded in other cases of this magnitude. The Appeal Committee has reduced the costs awarded against the appellant for the appeal to $28,000 in recognition of the comments made by Mr. Finlayson to reflect the fact that hearing days are not the seven hour days outlined in the hearing cost estimate.

51. Mr. Finlayson had asked for an extended period of time over which Mr. Martin could pay the costs and fine levied against him. The Appeal Committee took into consideration that it is approximately twenty-four months since the costs ($144,000) and fine ($25,000) were initially levied against Mr. Martin. The Appeal Committee agreed to extend the payment time frame as follows: the fine of $25,000 is to be paid within 3 months of the date of the Order; and, the costs of $172,000 ($144,000 + $28,000) within thirty-six months of the date of the order that is by February 16, 2020.

DATED AT TORONTO THIS 26th DAY OF JUNE, 2017
BY ORDER OF THE APPEAL COMMITTEE

S. R. MEEK, FCPA, FCA – CHAIR
APPEAL COMMITTEE

MEMBERS OF THE TRIBUNAL
R. RAMOTAR, CPA, CGA
W. R. SCHMIDT, CPA, CA
B. RAMSAY (PUBLIC REPRESENTATIVE)