

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS ACT OF ONTARIO, 2017

THE APPEAL COMMITTEE

IN THE MATTER OF: AN APPEAL BY **SEEMA MAKHIJA**, CPA, CA,
A MEMBER OF CPA ONTARIO OF THE DECISION AND
ORDER OF THE DISCIPLINE COMMITTEE MADE JUNE
15, 2020, PURSUANT TO RULE 24 OF THE RULES OF
PRACTICE AND PROCEDURE

TO: Seema Makhija, CPA, CA

AND TO: The Professional Conduct Committee

NOTICE OF APPEAL

THE APPELLANT, SEEMA MAKHIJA, appeals the Order of the Discipline Committee (the “**Committee**”) made June 15, 2020 revoking her membership, fining her in the amount of \$25,000, and ordering costs of \$30,000 paid to CPA Ontario.

THE APPELLANT ASKS:

1. Setting aside the Order of the Committee revoking the Member’s membership with CPA Ontario;
2. In the alternative, substituting the above with a reasonable period of suspension and reasonable conditions;
3. Setting aside the fine ordered by the Committee in the amount of \$25,000;
4. In the alternative, a reduction of the \$25,000 fine ordered by the Committee;

5. Setting aside the order as to costs against the Member in the amount of \$30,000;
6. In the alternative, a reduction of the order of costs against the Member currently in the amount of \$30,000;
7. Costs of the herein appeal, offset against any costs already ordered against the Member;
8. A stay of the Order pending appeal, as per section 23.02 of the *Rules of Practice and Procedure*; and
9. Such further and other relief as Counsel may request and as the Appeal Committee may permit.

THE GROUNDS FOR THE APPEAL are as follows:

1. The Member's admission of professional misconduct in an Agreed Statement of Facts was uninformed and involuntary due to incompetent counsel and undue pressure from said counsel (not counsel on Appeal);
2. In addition to or in the alternative to the above, the Member was of unsound mind due to the mental health effects of domestic violence and marital breakdown, exacerbated by the disciplinary proceedings, at the time of instructing previous counsel and admitting to the professional misconduct allegations;
3. Due to the above, the Member was unable to appreciate the consequences of admitting to the allegations and therefore the admissions were invalid;
4. Further to the above, the Member was deprived of the right to be heard before admitting to the allegations, constituting a breach of procedural fairness;

5. The member was denied procedural fairness by not being provided an opportunity to submit evidence on domestic violence endured during the course of events that form the basis for the findings of professional misconduct against her and its influence over these events;
6. In light of the above, the Order for revocation and amount of the fine are unreasonable;
7. The Committee was obligated to consider the domestic violence and marital breakdown as mitigating factors as per section 15.1 of Regulation 6-2 (Discipline Committee), as amended March 6, 2020, but did not, rendering the sanctions ordered unreasonable;
8. In addition to or in the alternative to the above, the Committee did not weigh the domestic violence and marital breakdown as mitigating factors in a reasonable manner;
9. Further to the above, insufficient weight was given to section 15.2.4 of Regulation 6-2 (“rehabilitation of the Member”), which by necessary implication, needed to be considered, rendering the sanction disproportionate and unreasonable;
10. The failure to consider and/or reasonably weigh domestic violence and marital breakdown in the decision-making process of the Committee has resulted in a disproportionate sanction that breaches the *Charter of Rights and Freedoms* and is therefore unreasonable;
11. The mental components of the allegations and/or findings of professional misconduct were impacted by domestic violence and this was not factored into determining sanctions, resulting in disproportionate and unreasonable sanctions;
12. Even without factoring in domestic violence, the sanctions imposed are disproportionate, unreasonable and inconsistent with similar disciplinary findings, including but not limited to, the fact that:
 - a. full or near full restitution was made to the complainant before the investigation began; and

- b. the member has no prior disciplinary history;
13. The member has been denied reasons for the Decision and Order despite the fact that her character and livelihood are at stake and that, as a matter of procedural fairness, she is entitled to reasons that explain how these considerations, as well as the circumstances of domestic violence, were balanced against statutory objectives;
14. Further to the above, no reasons have been provided that address how the principles outlined in section 15.2 of Regulation 6-2 were balanced, resulting in a denial of procedural fairness;
15. In light of the numerous procedural flaws outlined above, the costs order is unreasonable;
16. Such further and other grounds as may become apparent upon a review of the record or the Reasons of the Committee, which have not yet been issued; and
17. Such further and other grounds as Counsel may advise and the Appeal Committee may permit.

JURISDICTION OF THE APPEAL COMMITTEE:

The Appeal Committee's jurisdiction to hear this matter is found in section 37 of the *Chartered Professional Accountant of Ontario Act, 2017*, S.O. 2017, c. 8, Sched. 3. The Order made on June 15, 2020 is final. Regulation 6-3 (Appeal Committee) and Rule 23 of the Rules of Practice and Procedure (Appeals) also apply.

Dated at Toronto this 14th Day of July 2020.

Pradeep Chand
Chand Snider LLP
330 Bay Street, Suite 500
Toronto, ON M5H 2S8

pchand@chandsnider.com

Tel: 416.583.2377

Fax: 416.583.1844

Counsel to the Member,
SEEMA MAKHIJA

TO: **Kelvin Kucey**
CPA Ontario
130 King Street West, Suite 3400
Toronto, ON M5X 1E1

Tel: 416.969.4267

Cell: 647.289.1808

Counsel to the Professional Conduct
Committee of CPA Ontario

AND TO: **Bianca D'Souza**
Adjudicative Tribunals Secretary, CPA Ontario
130 King Street West, Suite 3400
Toronto, ON M5X 1E1

Tel: 416.969.4282

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **SEEMA MAKHIJA, CPA, CGA**, a member of the Chartered Professional Accounts of Ontario of the Decision and Order of the Discipline Committee, made June 15, 2020, under Rule 23 of the Rules of Practice and Procedure.

TO: Ms. Seema Makhija, CPA, CGA

AND TO: The Professional Conduct Committee

APPEAL HEARD DECEMBER 9, 2020 AND ORDER MADE MARCH 30, 2021

DECISION

The Appeal Committee, having heard and considered the submissions of the parties, dismisses the appeal and upholds the Decision and Order of the Discipline Committee dated June 15, 2020.

ORDER

The Professional Conduct Committee is directed to make any submissions on costs in writing within 10 days of the date of this Decision and Order, not exceeding five pages excluding the costs outline. The Member may make responding submissions with respect to costs in writing within 10 days of the receipt of the submissions of the Professional Conduct Committee, also not to exceed five pages, excluding a costs outline, if any. The Professional Conduct Committee may make reply submissions within 5 days after receiving the Member's submissions, not to exceed two pages.

DATED this 30th day of March, 2021



Laurence Bookman, CPA, CA
Appeal Committee – Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **SEEMA MAKHIJA**, a revoked member of CPA Ontario, of the Decision and Order of the Discipline Committee made June 15, 2020, pursuant to Rule 23 of the Rules of Practice and Procedure

APPEARANCES:

For the Professional Conduct Committee: Kelvin Kucey

For Ms. Makhija: Pradeep Chand

Heard: December 9, 2020

Decision and Order effective: March 30, 2021

Release of written reasons: March 30, 2021

REASONS FOR THE DECISION AND ORDER MADE MARCH 30, 2021

- [1] Seema Makhija ("Ms. Makhija") appeals the Decision and Order of the Discipline Committee of the Chartered Professional Accountants of Ontario ("Discipline Committee") dated June 15, 2020. This appeal was heard by a Panel of the Appeal Committee of the Chartered Professional Accountants of Ontario ("Appeal Committee").
- [2] The appeal is dismissed. The following are the reasons of the Appeal Committee.

I. OVERVIEW

- [3] The hearing on the merits took place on December 9, 2020. Although it was originally scheduled for a five-day hearing, the parties resolved the matter and proceeded by way of an admission of the allegations, an Agreed Statement of Facts (ASF) and a joint submission on penalty.
- [4] Ms. Makhija admitted that she breached several provisions of the Chartered Professional Accountants of Ontario Code of Professional Conduct ("the Code")

while acting as a mortgage broker. Ms. Makhija and her spouse at the time (Mr. Singh) maintained a business relationship involving real estate and mortgage deals. The facts underpinning the allegations against Ms. Makhija arose from her dealings with funds provided to her and Mr. Singh by the complainant and his spouse for the purpose of investment in mortgages intended to provide funds for business ventures established by Ms. Makhija and Mr. Singh. The essence of the allegations is that Ms. Makhija improperly diverted those funds to projects in which she had a personal interest. Ms. Makhija commenced divorce proceedings against Mr. Singh in November 2017 and they divorced in October 2019.

- [5] The Discipline Committee was satisfied that Ms. Makhija's admission of professional misconduct was supported by the evidence in the ASF.
- [6] The parties jointly submitted that the appropriate sanction was a written reprimand, a fine of \$25,000, the revocation of Ms. Makhija's membership, and publication of the decision. The Discipline Committee found that the joint submission did not fall outside of the reasonable range of sanctions for similar misconduct and accepted it.
- [7] The only point of contention between the parties at the hearing was the length of time Ms. Makhija should be given to pay the costs award of \$30,000. After hearing oral evidence from Ms. Makhija on her financial circumstances and the submissions of both parties, the Discipline Committee ordered costs to be paid within 30 months.
- [8] The primary ground of appeal raised by Ms. Makhija is that the Discipline Committee's decision on sanction was unreasonable because it did not take into account the domestic abuse that Ms. Makhija says she suffered at the hands of her then-husband and business partner, Mr. Singh.

II. PRELIMINARY ISSUES

- [9] Both parties agreed there were no preliminary issues.

III. THE DISCIPLINE COMMITTEE DECISION

- [10] At the outset of the hearing before the Discipline Committee, the PCC indicated it wished to amend the allegations as a result of discussions between the parties which had led to an ASF and a joint submission on sanction.

[11] The amended allegations, which were admitted by Ms. Makhija, can be summarized as follows:

- (1) That Ms. Makhija, acting as a mortgage broker, failed to act in a manner that would maintain the good reputation of the profession and serve the public interest, contrary to Rule 201.1 of the Code, in that she was involved in the solicitation of an investment of over \$310,000 in a syndicated mortgage that she administered, and that she failed to supervise the use of those funds, enabling them to be diverted for benefit of other parties.
- (2) That Ms. Makhija, acting as a mortgage broker, allowed her business judgment to be compromised by a conflict of interest or undue influence of others contrary to Rule 202.2 of the Code, in that she failed to supervise the use of the funds in the syndicated mortgage, enabling them to be diverted for benefit of other parties.
- (3) That Ms. Makhija, acting as a mortgage broker, associated herself with statements which she knew or should have known were false or misleading, contrary to Rule 205 of the Code, in that she drafted, executed and filed Financial Services Commission of Ontario transaction documents which were inaccurate and potentially misleading.

[12] The Discipline Committee accepted the facts set out in the ASF as having been established. It found that both parties were confined to the facts in the ASF and did not consider references to purported facts arising outside the ASF or the documents submitted in conjunction with it. The Discipline Committee decided that the agreed evidence provided clear, cogent and compelling proof of the facts underlying each of the three amended allegations.

[13] In its Reasons for Decision on misconduct the Discipline Committee accepted that “Ms. Makhija had been placed in a difficult position by the unilateral actions of her then-spouse, Singh.” It sympathized with her circumstances but held that even if Mr. Singh was more culpable in causing the result, this did not detract from Ms. Makhija’s responsibility for her failure to meet the standards of the profession as she admitted in the ASF. The Discipline Committee found that her conduct breached the provisions of the Code as set out in the amended Allegations, constituting professional misconduct.

[14] On the issue of sanction, the Discipline Committee accepted the joint submission presented by the parties of a written reprimand, a fine of \$25,000, the revocation

- [15] of Ms. Makhija's membership, and the usual order as to the publication of the decision. The Discipline Committee applied the test that a joint submission should only be rejected where the proposed sanction would bring the administration of justice into disrepute or be otherwise contrary to the public interest. It found that the diversion of funds held under the member's authority was very serious, heightened by the fact that Ms. Makhija gained benefit from the diversion. It held that the failure of Ms. Makhija to live up to her professional responsibility to protect the funds entrusted to her constituted a breach of trust, warranting the severe sanction of the revocation of her membership.
- [16] The Discipline Committee considered and accepted the significant mitigating circumstances that it was the actions of her ex-husband, Mr. Singh, which largely placed Ms. Makhija in this position and that he was the primary beneficiary of the diversion of funds. The Discipline Committee also found that Ms. Makhija showed remorse and repaid the missing money from her own funds. The Discipline Committee concluded that the mitigating factors did not cause the joint submission on sanction to fall outside the reasonable range of sanction for the misconduct.
- [17] The Discipline Committee accepted the joint submission that costs should be set at \$30,000. It heard sworn evidence from Ms. Makhija about her financial circumstances in support of her submission that she should have 36 months to pay the cost award, and considered the PCC submissions in favour of a 24-month period to pay the cost award. The Discipline Committee found Ms. Makhija's evidence to be credible and set a period of 30 months for payment of the cost award.

IV. THE APPEAL OF THE MEMBER

- [18] In this appeal, Ms. Makhija sought the following relief from the Appeal Committee:
- (1) Setting aside the revocation of her membership, or in the alternative substituting the revocation with a reasonable period of suspension;
 - (2) Setting aside the fine of \$25,000, or in the alternative a reduction of this fine;
 - (3) Setting aside the costs order of \$30,000, or in the alternative a reduction in the costs order; and
 - (4) Costs of the appeal, offset against the costs ordered against her.

V. THE STANDARD OF REVIEW

- [19] Section 37(4) of the Chartered Professional Accountants of Ontario Act, 2017, S.O. 2017, c.8, Schedule 3 ("the Act"), empowers the Appeal Committee to determine any question of law or mixed fact and law that arises in an appeal. That power however is limited by s.37 (5) of the Act, which prohibits the Appeal Committee from making a decision under section 37(4)(a) or (b) of the Act unless the Appeal Panel determines that the decision or order of the Discipline Committee is "unreasonable".
- [20] Pursuant to Regulation 6-3 under the Act, the Appeal Committee is not to re-hear the matter, but is to decide whether, on the record, the final decision and order of the Discipline Committee are reasonable on the evidence and on the law.
- [21] The recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [2019] S.C.C.65 clarifies what is involved in a reasonableness review. At paragraph 83 of the decision, the Supreme Court of Canada explained the reasonableness analysis as follows:

... [A] court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. [...] Instead, the reviewing court must consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable.

- [22] The Court described a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." [para. 85] A reasonable decision "is one that is justified in light of the facts" [para. 126] and which meaningfully accounts "for the central issues and concerns raised by the parties." [para. 127]
- [23] The following excerpts from *Vavilov* elaborate what makes a decision unreasonable:

What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. [para. 101]

...[A] decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis... A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken ...or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. [para. 103]

...

The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. [para. 126]

- [24] In summary, for a decision to be reasonable the reasoning by which a decision is reached must be internally coherent, rational and logical, and must not exhibit fatal flaws in its overarching logic. A decision is unreasonable if the conclusion reached cannot follow from the analysis undertaken or if the reasons, read in conjunction with the record, do not make it possible to understand the Discipline Committee's reasoning on a critical point. A reasonable decision is one that is justified in light of the facts. A decision will be unreasonable if the Discipline Committee has fundamentally misapprehended or failed to account for the evidence before it, or if the reasons do not meaningfully account for the central issues and concerns raised by the parties.

VI. THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES

Submissions on behalf of Ms. Makhija

- [25] The Notice of Appeal lists 15 separate grounds in support of the relief sought by Ms. Makhija. However, in the factum and oral submissions, appellate counsel for Ms. Makhija focused on the following submissions.
- [26] Through her appellate counsel, Ms. Makhija asserted that there was factual evidence before the Discipline Committee that Ms. Makhija was a victim of abuse at the hands of her ex-husband, relying on documents that were included in the PCC Document Brief at the hearing. Ms. Makhija also asserted that certain findings of the Discipline Committee were "consistent with financial abuse" specifically, that several of the problematic withdrawals were made by Ms. Makhija's ex-spouse, or made by both Ms. Makhija and her ex-spouse, but not by Ms. Makhija alone.
- [27] Appellate counsel for Ms. Makhija submitted that the Discipline Committee

decision was unreasonable in that it did not consider this evidence in its decision on sanction. Counsel further submitted that the Discipline Committee's failure to address domestic abuse in its decision on sanction constituted a violation of s. 15 of the *Charter of Rights and Freedoms* in that it breached Ms. Makhija's right to be free from discrimination.

- [28] Ms. Makhija's counsel submitted that the Discipline Committee erred in not rejecting the joint submission on the basis that it was unduly harsh and unreasonable, because it did not properly take into account domestic abuse. Appellate counsel submitted that if domestic abuse were taken into consideration, the appropriate sanction would be a suspension, not revocation.
- [29] The final ground raised by Ms. Makhija was that she had been misled by her counsel at the hearing into believing that the joint submission was for a suspension, not for revocation. Appellate counsel for Ms. Makhija submitted that had she known she would face revocation of her membership, she would not have made the joint submission.

Submissions on behalf of the PCC

- [30] Counsel for the PCC argued that the Appellant was improperly asking the Appeal Panel to conduct a hearing de novo, relying on assertions of domestic abuse without having established an evidentiary basis in the record before the Discipline Committee. The PCC further argued that the evidentiary record before the Discipline Committee was limited to the ASF, which made no reference to domestic abuse.
- [31] The PCC took the position that the decision of the Discipline Committee could not be considered unreasonable for failing to address the issue of domestic abuse since that issue was not raised by Ms. Makhija at the hearing.
- [32] The PCC submitted that, before accepting the joint submission, the Discipline Committee did turn its mind to the mitigating factors before properly finding that the joint submission did not bring the administration of justice into disrepute and should therefore be accepted.
- [33] Finally, the PCC submitted that Ms. Makhija's claims that she did not intend to accept revocation as part of the joint sanction, and that she was misled by her counsel at the hearing, lacks any evidentiary foundation and is contradicted by the evidence at the hearing.

VII. ANALYSIS OF THE ISSUES

Was there evidence of domestic abuse in the record before the Discipline Committee?

- [34] As set out in section 10 of Regulation 6-3, the Appeal Panel “shall not rehear a matter, but shall decide if, on the record, the final decision and order made are reasonable on the evidence and law.” [emphasis added]

The ASF

- [35] The ASF includes no reference to domestic abuse.

The Document Brief

- [36] Appellate counsel for Ms. Makhija seeks to rely on information in the PCC’s Document Brief filed at the disciplinary hearing as constituting evidence of domestic abuse that was before the Discipline Committee. Counsel for Ms. Makhija specifically seeks to rely on a statement made by the CPA Ontario investigator to the complainant; an email sent from Ms. Makhija to her ex-husband accusing him of abusing her ‘emotionally, financially and verbally’, and Ms. Makhija’s interview with the CPA Ontario investigator in which she stated that her ex-husband stole money from her companies and did not permit her to access their joint bank accounts. She also told the investigator that her ex-husband had exploited her emotionally and financially.
- [37] The Appellate panel considered whether the record before the Discipline Committee included all of the materials found in the PCC Document Brief. The PCC Document Brief contains over 800 pages and includes, among other things, the entire transcript of interviews conducted by the CPA Ontario investigator with the complainant and with Ms. Makhija, the CPA Ontario Investigator Report, emails between Ms. Makhija and her ex-spouse, pleadings from civil litigation, and a draft affidavit of the complainant. The Document Brief was marked as Exhibit 2 at the hearing.
- [38] The ASF indicates that a Document Brief was to be filed with the Discipline Committee on consent, and the ASF includes reference to many of the documents in the PCC’s Document Brief. The ASF does not state however that the PCC’s Document Brief is incorporated into the ASF or that the parties agree that all of the documents contained within the Document Brief are to be considered uncontested evidence before the Discipline Committee.

- [39] The submissions of the parties during the hearing make clear that in fact, the parties did not agree that all of the documents in the PCC Document Brief were to be considered uncontested evidence before the Discipline Committee. Counsel for Ms. Makhija at the hearing specifically stated that there was no agreement to admit all of the documents in the Document Brief:

... there is not an admission with respect to all the documents. We negotiated an Agreed Statement of Facts, and I don't have a problem for the proceedings today, if the documents are presented to the tribunal for reference, but you will recall that there were disputes over the documents themselves, including the affidavit. [p. 32 of the transcript]

- [40] At the hearing, counsel for Ms. Makhija stated that his client's position would be that "the facts are as they have been admitted." He stated that "there is not a general admission for truth of contents in all the documents." Counsel for Ms. Makhija also noted that he had not reviewed every word in every document included in the PCC Document Brief [p. 32, 33]. Counsel for the PCC at the hearing did not take issue with Ms. Makhija's refusal to accept the contents of the Document Brief as evidence in the hearing and agreed to focus on the ASF on which the two parties had reached a consensus.
- [41] This exchange between the parties at the hearing leaves no doubt that the evidence constituting the record on which the Discipline Committee decided the case was limited to the ASF, and did not include the materials in the PCC Document Brief.

Evidence from Ms. Makhija

- [42] If Ms. Makhija wished to present evidence to the Discipline Committee about domestic abuse, she could have done so through oral evidence, which would have been subject to testing through cross examination by the PCC. Ms. Makhija did not testify during the conduct portion of the hearing. She presented no evidence of domestic abuse at the hearing, even when she gave oral evidence under oath on the issue of her difficulty in paying the cost award. In that evidence she referred to her ex-husband as a "con man" but made no claim that he was abusive towards her.
- [43] If Ms. Makhija wished to tender evidence to the Appeal Committee which was not before the Discipline Committee, Ms. Makhija could have brought a motion to admit fresh evidence pursuant to Rule 23.05 ("Fresh evidence") of the Rules of Practice and Procedure. If she had done so, the PCC would have had the opportunity to challenge the evidence through cross examination, and the Appeal Panel would

have decided whether to admit the evidence by applying the legal test for the admission of fresh evidence: whether with due diligence the evidence could have been adduced at the hearing; whether the evidence is relevant and credible, and whether it could reasonably have been expected to affect the result. Ms. Makhija did not bring a motion to admit fresh evidence of domestic abuse, or fresh evidence of the impact of domestic abuse on her ability to meet her professional obligations, or any other fresh evidence, as part of her appeal. She offered no explanation as to why she did not present such evidence.

Is the Decision of the Discipline Committee on Sanction Reasonable?

- [44] An Appeal Panel may only interfere with the decision of the Discipline Committee if it was unreasonable. Pursuant to Vavilov, to determine the reasonableness of the decision, the Appeal Committee must consider the outcome of the decision and the reasoning process that led to the outcome.

No reference to domestic abuse in the Discipline Committee's reasons

- [45] It was not unreasonable that the Discipline Committee did not address the allegation of domestic abuse in its reasons. There was no evidence of domestic abuse in the written record; Ms. Makhija made no mention of domestic abuse in her oral evidence, and Ms. Makhija did not argue that domestic abuse should be considered by the Discipline Committee, whether in relation to conduct or as a mitigating factor on sanction.

The Charter allegation

- [46] In these circumstances, the failure of the Discipline Committee to address domestic abuse cannot provide the basis for a Charter claim. There is no evidentiary basis to support the claim that the decision of the Discipline Committee engaged the Charter by limiting Charter protections. Accordingly, this ground of appeal cannot succeed.

The Discipline Committee's acceptance of the joint submission

- [47] A review of the reasoning of the Discipline Committee in support of its decision to accept the joint submission on sanction shows that it meets the test for reasonableness.
- [48] The Discipline Committee correctly identified that a joint submission should only be rejected where the proposed sanction would bring the administration of justice into disrepute or be otherwise contrary to the public interest. The Discipline Committee considered the seriousness of the misconduct, involving the diversion

of funds held under Ms. Makhija's authority. It viewed the misconduct as amounting to an abuse of trust, warranting a severe sanction, including the revocation of her membership. The Discipline Committee also considered mitigating circumstances, including that it was Ms. Makhija's husband who was the primary actor and the primary beneficiary of the diversion of funds; the fact that Ms. Makhija admitted to the misconduct; that Ms. Makhija repaid the funds, and that she had no prior disciplinary history.

- [49] In considering the seriousness of the misconduct and the mitigating factors in evidence before it, the Discipline Committee concluded that the joint submission fell within the range of sanction for conduct of this nature, and that it could identify no significant deficiency in the proposed sanction. The Discipline Committee found that whereas a long suspension would not be outside the reasonable range of sanction, the joint submission of revocation was equally within this range.
- [50] The Appeal Panel finds that the reasoning of the Discipline Committee is internally coherent, rational and logical. The Discipline Committee did not misapprehend or fail to account for the evidence before it. As explained above, as there was no evidence of domestic abuse in the record, there was no basis for the Discipline Committee to make reference to domestic abuse in its Reasons. The Discipline Committee did take into account the mitigating factors that were in evidence before it, including the role of Ms. Makhija's ex-husband in the financial transactions at issue, in finding that the joint submission on sanction fell within the reasonable range of sanction.
- [51] The Appeal Panel cannot accept the Appellant's submission that the sanction was demonstrably unfit because of the domestic abuse suffered by Ms. Makhija at the hands of her ex-spouse, as there was no evidence before the Discipline Committee of such domestic abuse.

Is there evidence that Ms. Makhija was misinformed by her counsel about the joint submission?

- [52] Ms. Makhija's appellate counsel makes the extraordinary assertion that she was "misinformed" by her counsel at the hearing, claiming that she did not know that the joint submission on sanction included revocation of her membership.
- [53] Ms. Makhija's appellate counsel relies on case law from the criminal law context for the proposition that, for a guilty plea to be 'informed', the accused "must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea." [*R v Wong*, 2018 SCC 25 at para. 3]

- [54] The assertion by Ms. Makhija's appellate counsel that Ms. Makhija was uninformed of the content of the joint submission on sanction, and further that she was misled by her counsel to believe that the joint submission on sanction was for a suspension not revocation, is made without reference to any evidence in the Appellant's Appeal Book.
- [55] Not only did Ms. Makhija fail to provide evidence in support of the claim she was misinformed as to the content of the joint submission on sanction, the transcript of the hearing supports the conclusion that she was aware that she would lose her membership in CPA Ontario. As noted above, Ms. Makhija provided sworn testimony on her financial circumstances in support of her submission that she required additional time to pay the costs order. In her evidence she stated that she did not "really have any financial capacity," and that "...losing my designation, and losing my employability, I will be... I don't know what more to say."
- [56] Ms. Makhija also failed to bring a motion to admit fresh evidence that she was misled by her counsel at the hearing, pursuant to Rule 23.05 ("Fresh Evidence") of the Rules of Practice and Procedure. The claim that Ms. Makhija's lawyer misled her about the content of the joint submission on sanction raises the allegation of incompetence or ineffective assistance of counsel. To succeed in a claim of ineffective assistance of counsel, an appellant must (a) establish the factual foundation, in the form of "fresh evidence" which includes trial counsel's explanation for the alleged deficiencies; (b) establish that trial counsel's conduct was incompetent, falling below professional standards; and (c) establish that trial counsel's incompetence prejudiced the appellant. [*R v. White* (1997), 32 O.R. (3d) 722 (C.A.); *Law Society of Upper Canada v. Igbinosun*, [2007] L.S.D.D. No. 99]
- [57] In this case appellate counsel for Ms. Makhija failed to meet even the first requirement of establishing the factual foundation by bringing a "fresh evidence" motion, pursuant to Rule 23 of the Rules of Practice and Procedure. Absent a factual foundation, the claim of ineffective assistance of counsel cannot succeed.
- [58] A claim of incompetent or ineffective representation should be raised with caution. In the criminal law context, the Protocol of the Superior Court of Justice regarding allegations of incompetence requires that before raising this allegation, appellate counsel must satisfy themselves that there is some factual foundation for the allegation, apart from the instructions of the appellant. The Protocol also sets out steps that should be taken by appellate counsel to preserve fairness, including providing trial counsel with notice of the potential allegations to give counsel a reasonable opportunity to respond, and seeking a waiver of solicitor-client privilege to preserve the professional integrity of counsel while responding to the allegation.
- [59] Ms. Makhija's appellate counsel confirmed to the Appeal Panel that he provided no notice of the allegation of incompetence to Ms. Makhija's hearing counsel and

did not provide a waiver of solicitor-client privilege from Ms. Makhija so that her counsel from the hearing could address these allegations. It is the view of the Appeal Panel that the steps set out in the Protocol represent good practice. These steps should have been, but were not followed by Ms. Makhija's appellate counsel in this case.

VIII. CONCLUSION

- [60] All of the grounds of appeal argued by Ms. Makhija depend on an evidentiary foundation which does not exist.
- [61] There is no evidence of domestic abuse in the record, and Ms. Makhija did not raise the issue of domestic abuse at the hearing or rely on it in her submissions. That the Discipline Committee did not address domestic abuse in its reasons is a natural consequence of this fact. It does not render the decision unreasonable or give rise to a Charter claim.
- [62] The submission that the sanction is unduly harsh in light of the domestic abuse suffered by Ms. Makhija cannot succeed given the absence of evidence of domestic abuse.
- [63] A reasonableness review of the Discipline Committee's decision to accept the joint submission on sanction shows it to be internally coherent, rational and logical. It does not misapprehend or fail to address the evidence before it, and it properly accounts for the issues and concerns raised by the parties to the hearing.
- [64] The claim that Ms. Makhija was misled by her counsel into believing that the joint submission on sanction would not include revocation lacks an evidentiary basis. There is no evidence in support of this allegation in the record and Ms. Makhija's appellate counsel failed to bring the requisite fresh evidence application as part of the appeal. Ms. Makhija's appellate counsel also failed to provide notice to Ms. Makhija's lawyer at the hearing so that he could respond to the allegation of his incompetence. Accordingly, there was no basis on which this ground of appeal could succeed.
- [65] The appeal is hereby dismissed.

IX. ORDER FOR SUBMISSION ON COSTS

- [66] The Professional Conduct Committee is directed to make any submissions on costs in writing within 10 days of the date of this Decision and Order, not exceeding five pages excluding the costs outline. The Member may make responding submissions with respect to costs in writing within 10 days of the receipt of the

submissions of the Professional Conduct Committee, also not to exceed five pages, excluding a costs outline, if any. The Professional Conduct Committee may make reply submissions within 5 days after receiving the Member's submissions, not to exceed two pages.

Dated at Toronto this 30th day of March, 2021



Laurence Bookman, CPA, CA
Appeal Committee – Chair

Members of the Panel

Daniel Coghlan, CPA, CGA
Stewart Hardacre, CPA, CMA
Daniel Iggers, Public Representative
Jeffrey Nightingale, CPA, CA, LPA

Independent Legal Counsel

Nadia Liva, Barrister & Solicitor

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **SEEMA MAKHIJA**, a revoked member of CPA Ontario, of the Decision and Order of the Discipline Committee made June 15, 2020, pursuant to Rule 23 of the Rules of Practice and Procedure

TO: Ms. Seema Makhija

AND TO: The Professional Conduct Committee

COSTS ORDER MADE MAY 20, 2021

THAT, having considered the submissions of the Professional Conduct Committee and Seema Makhija with respect to costs, the appeal in this matter having been dismissed by the Appeal Committee on March 30, 2021, the Appeal Committee ORDERS:

THAT Seema Makhija shall pay costs of the appeal in the amount of \$10,900 to CPA Ontario by December 15, 2022.

Dated this 20th day of May, 2021

A handwritten signature in black ink, appearing to read 'Laurence Bookman', written in a cursive style.

Laurence Bookman, CPA, CA
Appeal Committee – Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **SEEMA MAKHIJA**, a revoked member of CPA Ontario, of the Decision and Order of the Discipline Committee made June 15, 2020, pursuant to Rule 23 of the Rules of Practice and Procedure

For the Professional Conduct Committee:	Kelvin Kucey
For Ms. Makhija:	Pardeep Chand
Written Submissions Considered:	April 30 and May 3, 2021
Costs Order effective:	May 20, 2021

REASONS FOR THE COSTS ORDER

- [1] Seema Makhija ("Ms. Makhija") appealed the Decision and Order of the Discipline Committee of the Chartered Professional Accountants of Ontario ("Discipline Committee") dated June 15, 2020. The appeal was heard over the course of one day by a Panel of the Appeal Committee of the Chartered Professional Accountants of Ontario ("Appeal Committee"). On March 30, 2021, this Appeal Committee dismissed Ms. Makhija's appeal.
- [2] Following the dismissal of the appeal, the Professional Conduct Committee (PCC) sought costs against Ms. Makhija on a partial indemnity basis, submitting that 2/3 of the costs of the appeal be borne by Ms. Makhija, in the amount of \$10,900. The PCC submitted that time to pay should align with the costs Order of the Discipline Committee, dated June 15, 2020, with payment to be made by December 15, 2022.
- [3] Ms. Makhija takes the position that no costs should be ordered against her and that costs should be ordered against the PCC on a partial indemnity basis in the amount of \$7,587.51. Ms. Makhija did not address the issue of time to pay costs in her submissions, in the event it was decided that costs should be awarded against her.
- [4] S.38(2) of the *Chartered Professional Accountants of Ontario Act, 2017* ("the Act") allows an appeal committee to award costs of a proceeding before it in accordance with its procedural rules, however such costs awards are only permitted against the member or firm that is the subject of the proceeding. The *Act* does not contemplate or allow for costs awards against the PCC. Rule 20.01 of the CPA Ontario's *Rules of Practice and*

Procedure similarly allows an appeal committee to make any order requiring any party other than CPA Ontario to pay costs. As such, there is no jurisdiction to award costs against the PCC as requested by Ms. Makhija. Moreover, in light of our following comments, even if there was jurisdiction to make such an order, there are absolutely no grounds upon which such an order should be made against the PCC.

- [5] The ordering of costs against a party is discretionary and is intended not as a punishment, but rather to indemnify. Pursuant to s.28 of Regulation 6-3, an appeal committee that chooses to order costs against a party, may order costs to be paid on a full or partial indemnity basis.
- [6] In determining whether to exercise its discretion to order costs, the Appeal Panel considered the written submissions of both parties, the Costs Outlines submitted by both parties, as well as cases relied upon by both the PCC and Ms. Makhija to support their submissions.
- [7] In her Notice of Appeal, Ms. Makhija listed fifteen different grounds seeking to set aside the decision of the Discipline Committee – a decision which was made after considering a negotiated resolution which had been reached as between Ms. Makhija and the PCC.
- [8] The issues raised by Ms. Makhija, especially in light of a negotiated resolution, were both important in nature and complex, requiring a proper evidentiary foundation. Despite the complexity of the issues, the appeal was heard within one day.
- [9] As we noted in our Reasons for Decision, “all of the grounds of appeal argued by Ms. Makhija depend on an evidentiary foundation which does not exist.” In challenging the negotiated resolution and the ultimate finding of the Discipline Committee, Ms. Makhija did not properly raise an ineffective assistance of counsel application in which notice was given to her previous counsel and evidence in support of such an application was filed. Ms. Makhija sought to raise various assertions of domestic abuse, yet did not seek to file fresh evidence in support of her assertions.
- [10] Without the proper evidentiary basis upon which to challenge the negotiated resolution of the disciplinary hearing, this Panel concluded that the appeal brought by Ms. Makhija was without merit.
- [11] The Panel concluded that Ms. Makhija failed to advance any argument that would support a departure from the practice of awarding costs to the PCC.
- [12] In light of the finding that the appeal was without merit, this Panel has concluded that it is appropriate that costs be ordered against Ms. Makhija.
- [13] In order to determine the appropriate amount of costs, this Panel considered the Costs Outline submitted by the PCC, the length of the appeal, and submissions of the parties. Ms. Makhija did not challenge the costs as set out in the PCC’s Costs Outline. This Panel found the costs presented by the PCC to be reasonable.
- [14] Substantial and full indemnity awards are reserved for rare and exceptional cases. The PCC, properly in this case, sought costs to be ordered on a partial indemnity basis, submitting that Ms. Makhija should pay 2/3 of the costs incurred, totaling \$10,900.

- [15] The Panel found that 2/3 apportionment of the costs to Ms. Makhija is appropriate. In coming to this amount, the Panel carefully reviewed the record before it to determine whether there was evidence to justify a further reduction of the costs. The Panel agreed that all costs awards to members would “for the most part” create some form of hardship. Ms. Makhija had submitted that she could not afford to pay costs due to the hardships she had endured as a victim of spousal abuse. While this Panel is empathetic to her situation, Ms. Makhija failed to provide any evidence documenting her current financial situation and inability to pay.
- [16] Finally, with respect to the issue of time to pay, the PCC submitted that the time allowed to pay should align with the costs Order of the Discipline Committee, dated June 15, 2020 in which Ms. Makhija was given until December 15, 2022, to pay. Ms. Makhija took no position on the issue of time to pay.
- [17] This Panel concludes that Ms. Makhija should be given until December 15, 2022 to make full payment of the costs ordered by this panel.

Dated this 20th day of May, 2021

A handwritten signature in black ink, appearing to read 'Laurence Bookman', written in a cursive style.

Laurence Bookman, CPA, CA
Appeal Committee – Chair

Members of the Panel

Daniel Coghlan, CPA, CGA
Stewart Hardacre, CPA, CMA
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