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

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by the Professional Conduct Committee of the Chartered Professional Accounts of Ontario in the matter of **STIVE FARRONATO CPA, CA,** of the Decision and Order of the Discipline Committee, made March 8, 2019, under Rule 23 of the Rules of Practice and Procedure.

TO: Mr. Stive Farronato, CPA, CA

AND TO: The Professional Conduct Committee

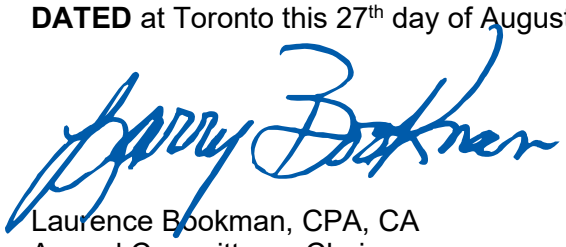
DECISION MADE AUGUST 27, 2020

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 March 8, 2019, finding Stive Farronato not guilty of professional misconduct with respect to Allegation # 3.

Due to the proscription in section 38(2) of the *Chartered Professional Accountants of Ontario Act, 2017*, this appeal is dismissed without costs.

DATED at Toronto this 27th day of August, 2020



Laurence Bookman, CPA, CA
Appeal Committee – Chair

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

APPEAL COMMITTEE

IN THE MATTER OF: An Appeal by the **PROFESSIONAL CONDUCT COMMITTEE** of the Decision and Order of the Discipline Committee, made March 8, 2019, with respect to **STIVE FARRONATO, CPA, CA** a Member of CPA Ontario, under Rule 23 of the Rules of Practice and procedure, as amended

BETWEEN:

Chartered Professional Accountants of Ontario
Professional Conduct Committee

-and-

Stive Farronato

APPEARANCES:

For the Professional Conduct Committee:	Paul F. Farley, Counsel Julia McNabb, Counsel
For Mr. Farronato:	James Lane, Counsel Stive Farronato, in attendance
Heard by teleconference:	May 20, 2020
Decision effective:	August 27, 2020
Release of written reasons:	August 27, 2020

REASONS FOR DECISION MADE AUGUST 27, 2020

I. OVERVIEW

[1] This appeal was brought by the Professional Conduct Committee of the Chartered Professional Accountants of Ontario ("PCC") from the Decision of the Discipline Committee of the Chartered Professional Accountants of Ontario ("Discipline Committee"), dated March 8, 2019, with respect to Stive Farronato ("the Member"). The reasons of the Discipline Committee were released on October 29, 2019. The appeal was heard by a Panel of the Appeal Committee of the Chartered Professional

Accountants of Ontario ("Panel").

[2] The Member obtained his CA designation in 1992, and he became a CPA upon unification of the accounting designations in 2014. In 1995, he became an employee of ITC Capital Corp. ("ITC Capital"), a company controlled by ML. In 2003, he also became employed by ITCC Tax and Accounting ("ITCCTA"), a company controlled by RL, ML's son. The Member registered his own accounting practice with CPA Ontario in 2003 and obtained Professional Liability Insurance for his practice. He maintained the registration of his own practice until 2017.

[3] ITC Capital carried on business as an accounting and brokerage firm. The Member acted as Branch Manager. He was also responsible for the preparation of personal and corporate tax returns for family and friends while at ITC Capital. ITCCTA provided accounting services to the public. The Member's role was to "Oversee Tax Preparation and Financial Statements for Clients". At the same time, the Member provided accounting and tax work through his own practice outside of his employment with ITCCTA and ITC Capital.

[4] In 2016, the Member received remuneration from both ITCCTA and ITC Capital. ITCCTA provided a T4 showing "employment income" of $81,000 and a T4A showing "self employed commissions" of $42,750. ITC Capital provided a T4 showing "employment income" of $81,000 and a T4A showing "self-employed commissions" of $23,850. These amounts were shown as separate items on the financial statements of the two companies under "wages and benefits" and "salaries and benefits".

[5] A complaint by a member of CPA Ontario in August 2016 raised issues regarding the Member's role with ITCCTA. As a result of this complaint, CPA Ontario sought the Member's response and then commenced an investigation. Subsequent to the complaint being made, the Member obtained advice on the structure of his professional affairs and created two personal corporations, separate from ITCCTA, through which he could provide compilation and notice to reader services.

[6] In the course of the investigation, including two interviews with the investigator, the Member provided information regarding the roles he held with both ITC Capital and ITCCTA and the manner in which he had been remunerated for the work he did as an employee of both corporations. When these questions were first raised during the investigation, the Member maintained that he was a salaried employee who received bonuses, not commissions, for his work.

[7] The PCC made three Allegations against the Member. These were the subject of the hearing before the Discipline Committee, which led to the decision under appeal. Allegations # 1 and #2 alleged that the Member had engaged in the practice of public accounting or provided accounting services to the public outside of the firm that he had registered with CPA Ontario[1], and, while engaged in the practice of public accounting or providing public accounting services to the public, he had been associated with ITCCTA, a corporation engaged in the practice of public accounting.

---

1 An additional particular was added to Allegation #1 at the outset of the hearing, but a finding of professional misconduct was not pursued by the PCC. The particular was dismissed, but that dismissal did not form part of this appeal, and references to Allegation #1 in these reasons are to Allegation #1(a).

[8] As it was central to the appeal, the wording of Allegation 3 is set out below:

> That the said Stive Farronato, in or about the period January 1, 2016 to February 28, 2018, signed or associated himself with his Income Tax and Benefit Return (T1) which he filed with Canada Revenue Agency ["CRA"] for the year 2016, which he knew or should have known was false and misleading, contrary to Rule 205 of the Rules of Professional Conduct and the CPA Code of Professional Conduct, in that he reported $66,600 in bonuses as professional income, against which he claimed expenses in the amount of $59,764, when the bonus should have been reported as employment income.

[9] Although the Discipline Committee unanimously found that the Member had committed professional misconduct with respect to the first two allegations, the majority of the Discipline Committee found that the Member had not committed professional misconduct with respect to Allegation 3. The dissenting member of the Discipline Committee would have found that the Member had committed professional misconduct with respect to Allegation 3.

[10] The PCC only appealed the decision of the majority of the Discipline Committee with respect to Allegation #3. The findings with respect to Allegations #1 and #2 were not in issue on this appeal.

[11] The Discipline Committee fined the Member the amount of $10,000, required him to take certain professional development courses and ordered full publicity of the decision. The Committee also ordered that he pay costs in the amount of $54,000. If the Member failed to take these steps within the prescribed periods of time he would be suspended, and his licence would be revoked if he did not take these steps within a further thirty days.

[12] At the conclusion of the argument on the appeal, the Panel reserved its decision. For the reasons set out below, the Panel unanimously concluded that the appeal should be dismissed.

II. DISCIPLINE COMMITTEE DECISION

[13] The hearing of the Allegations proceeded before a panel of the Discipline Committee over a period of three days. The PCC's investigator, the Member, ML and John Grummett, CPA, CA, gave evidence. The Discipline Committee delivered its decision at the end of the third hearing day, with reasons to follow. The issue of sanction was addressed the following day.

[14] The Discipline Committee was unanimous in finding that the Member had engaged in professional misconduct with respect to Allegations #1 and #2. The Member acknowledged that in providing accounting services to the public outside of the firm that he had registered with CPA Ontario he was not compliant with CPA Ontario requirements regarding practice registration. While the Member indicated that he had an honest, but mistaken, belief that he was not required to register for the type of work he was performing, the Discipline Committee found that he had an obligation to be aware of his obligations, and having failed to do so, the Member had committed professional

misconduct in regard to both Allegations. Those findings were not in issue in this appeal.

[15] As noted above, three members of the Discipline Committee concluded that the evidence did not demonstrate on a balance of probabilities that the Member had engaged in professional misconduct in respect of Allegation #3. The fourth member of the Committee dissented and wrote reasons indicating why he concluded that the Member had engaged in professional misconduct with respect to Allegation # 3.

[16] The majority of the Discipline Committee framed the issue that was raised during the investigation, and which resulted on Allegation #3, at paragraph 35 of its reasons:

> The issue raised was whether part of the Member's remuneration reflected on a T4A issued by the companies for whom he worked (ITCCTA, ITC Capital) was properly represented, and whether the Member was in effect attempting to misrepresent the type of remuneration received, i.e., a "bonus" versus "commission"; "employment income" versus "self-employment". There was no question that the Member had reported all income received on his tax returns. The issue was whether his T4A income which allowed him to claim for proper expenses incurred to earn this income should have been reported as "employment income" on a T4.

[17] The majority then proceeded, in paragraphs detailed further below, to summarize the evidence it had heard on this issue, including both the language used to describe the income and the reasons for which it was paid. In paragraph 42, the majority concluded ". . . that the Member did perform duties beyond the day to day operations of the two entities as explained by both ML and the Member."

[18] Having reached that conclusion, the majority framed its penultimate conclusion in paragraph 43 of its reasons:

> During their deliberations, the Panel considered whether the evidence supported that the Member submitted a false or misleading tax return for 2016. Three of the four Panel members concluded that while his filing was aggressive, they did not find that it was false or misleading and therefore with respect to Allegation 3, he did not commit professional misconduct.

[19] The dissenting member found (at paragraph 47 of the dissenting reasons) that the changes in the Member's evidence with regard to how the income could be characterized rendered that evidence not credible. At paragraphs 48 and 57, he also indicated that there was a lack of supporting documentation for the Member's position that the income was self-employment income.

[20] The dissenting member took a broad approach to the Member's conduct and concluded that the inaccuracies in the expenses he claimed from his self-employment were also misleading. At paragraphs 54 to 56, he also rejected the suggestion that the possibility that a Form T2022 could have been issued supporting the Member's characterization of the income.

[21] The dissenting member also dismissed the opinion of Mr. Grummet on the basis that it lacked "a credible and corroborated foundation" (paragraph 61). He consequently

concluded that the Member knew or ought to have known that his 2016 tax filing was misleading.

III. ISSUES RAISED ON APPEAL BY THE PCC

[22] The Appellant, the PCC, raised four issues on this appeal:

i) Did the majority of the Discipline Committee err in law in failing to assess the credibility of the Member and the witnesses called on his behalf?

ii) Did the majority of the Discipline Committee err by not finding that the Member had committed professional misconduct with respect to Allegation 3 based on the clear, cogent and compelling evidence before them?

iii) Did the majority of the Discipline Committee err in accepting the conclusions reached by the expert called on behalf of the Member when the evidence demonstrated that some of the supporting conclusions were incorrect?

iv) If the appeal with respect to the finding of professional misconduct is successful, what is the appropriate sanction to be imposed?

[23] Given the Panel's conclusions with respect to the first three issues, it was not necessary for the Panel to consider the fourth issue.

IV. STANDARD OF REVIEW

[24] The parties agreed that the Panel should review the decision of the Discipline Committee on the basis of the reasonableness standard. Although the parties made reference to a number of cases that dealt with the standard of review to be applied on an appeal, the Panel accepted that the standard of review was determined by the plain language of the *Chartered Professional Accountants of Ontario Act, 2017* ("the *Act*") .

[25] Section 37(4) of the *Act* and section 10 of Regulation 6-3 provide that the Appeal Committee shall review both issues of fact and mixed fact and law on a standard of reasonableness. Section 37(5) of the Act provides that the Appeal Committee shall only allow an appeal where it concludes that the decision of the Discipline Committee is unreasonable.

[26] Section 10 of Regulation 6-3 further defines the scope of the review by the Appeal Committee:

> The 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.

[27] The Divisional Court confirmed that reasonableness was the appropriate standard of review to be applied by the Appeal Committee in *Martin v. Chartered Professional Accountants of Ontario,* 2018 ONSC 2046, at paragraphs 22 and 23. This Appeal Committee has also confirmed this standard of review in its recent decisions: *Re Stephen Wall* (July 19, 2019, CPA Ontario Appeal Committee), at paragraphs 23 to 26;

Re Laird Sweeney (December 27, 2019, CPA Ontario Appeal Committee), at paragraphs 24 and 25.

[28] The Panel gave extensive consideration to the meaning of the reasonableness standard. This standard was framed by the Supreme Court of Canada, in *Law Society of New Brunswick v. Ryan*, [2003] 1 SCR 247, 2003 SCC 20 (CanLII), at paragraph 55, in the following terms:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. *If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere* (see Southam, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, at para. 79). (Emphasis added.)

[29] In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (CanLII) (“*Vavilov”)*, which was cited by both parties extensively and reviewed by the Panel at length, the Supreme Court of Canada again considered what was meant by a reasonableness standard of review. The Court emphasized that both the outcome and the reasoning leading to that decision must be reasonable:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, 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. . . .
>
> . . .
>
> [86] Attention to the decision maker’s reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes”: para. 47. Reasonableness, according to *Dunsmuir*, “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well

> as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. [Emphasis in original.]

[30] With regard to the reasonableness of the rationale behind the decision, the Court in *Vavilov* emphasized the need for a reviewing court (or tribunal) to consider the reasons of the decision-maker, which are the primary means by which a decision maker can demonstrate that the decision is justifiable, transparent and intelligible, from a deferential perspective:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. . . . **[A] reasonable decision is 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. The reasonableness standard requires that a reviewing court defer to such a decision.** [Emphasis added]

[31] Appellate review on a reasonableness standard is not a "line-by-line treasure hunt for error": *Vavilov,* para. 102; para. 128. The Supreme Court emphasized that the question on appeal is not whether the reasons were perfectly drafted:

> A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside . . . [*Vavilov,* para. 91]

[32] The Supreme Court indicated that an appellate tribunal or court had to consider the entire record and all of the circumstances of the hearing leading to the decision under appeal to assist in a generous approach to the interpretation of the Discipline Committee's reasons:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain

> an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. . . . [*Vavilov,* para. 94]
>
> . . .
>
> **It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision**. [*Vavilov,* para. 137] [Emphasis added.]

[33] The emphasis in a review against a reasonableness standard is to determine whether the decision under review was "based on reasoning that is both rational and logical. . ." "without encountering any fatal flaws in its overarching logic. . . " There must be a "line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived… ": *Vavilov,* para. 102. The Court expanded on this concept in the following terms:

> [103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, 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.**
>
> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. **However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".** [Emphasis added.]

[34] At the same time, the "reasons [must] meaningfully account for the central issues and concerns raised by the parties. . . .": *Vavilov,* paras. 127 and 128.

> . . . Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility. [*Vavilov,* para. 98]

[35] Although the parties agreed on the standard of review and, in general, the scope of reasonableness, they diverged on the application of the standard to the facts of this

case. The Panel considered the issues raised on this appeal within the legal framework for a reasonableness standard of review.

V. DECISION

[36] After considering the reasons of the Discipline Committee against the record of the evidence that was before that Committee, and the principles to be applied in the course of appellate review on a reasonableness standard, the Panel concluded that the decision of the majority of the Discipline Committee that Allegation #3 was not established was reasonable. The Panel concluded that the decision of the Discipline Committee was rationally justified on the record. Furthermore, the Panel was satisfied that the reasons of the majority, considered in light of the record, provided a sufficient and cogent line of reasoning to reach their conclusion and there was no basis for this Panel to interfere.

VI. REASONS FOR DECISION

Issue #1: Did the majority of the Discipline Committee fail to assess the credibility of the witnesses?

[37] The PCC submitted that the Discipline Committee made an unreasonable decision because its reasons did not reflect an explicit conclusion regarding the credibility of the Member and the other witnesses and, to the extent it reached a conclusion, it was not possible to understand how that conclusion was reached. The PCC contrasted the reasons of the dissenting member, who set out extensive reasons regarding his findings of credibility with the reasons of the majority, which counsel submitted did not have the same analysis. In oral argument, counsel for the PCC went further and submitted that the issue was not whether the majority properly assessed the Member's credibility, but whether the majority assessed his credibility *at all*.

[38] The Panel started from the proposition that, to reach a reasonable decision, a decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account": *Vavilov,* paragraph 126. If the majority of the Discipline Committee failed to account for the evidence, its decision could be unreasonable. However, the Panel found that it was clear from the *Vavilov* decision that the question to be considered was whether the Discipline Committee had failed to consider the *totality* of the evidence. The credibility of the Member's evidence was one aspect of that consideration. However, ultimately, the Panel had to consider whether, considering the reasons and evidence, the decision was justified and the evidence, overall, had been accounted for or whether "the decision maker showed that his conclusions were not based on the evidence that was actually before him": *Vavilov,* paragraph 126.

[39] At the same time, the Panel recognized that, if the Discipline Committee had considered the evidence, it was not for the Panel to reassess or reweigh that evidence:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not

> interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" . . . [*Vavilov,* para. 125]

[40] The Panel rejected the submission that the majority of the Discipline Committee had not considered the credibility of the evidence given by the Member and the other witnesses at all. In the Panel's view, the reasons of a tribunal, considered in light of the entire record, provide insight into the deliberative process followed by that tribunal. However, that insight is not only discerned from the reasons of the majority. All of the reasons provided by the Discipline Committee, including both the majority and dissent, needed to be considered in their totality when determining if an issue was considered. The dissenting member did not deliberate in isolation from the other members. Deliberations inherently involve discussions among all of the members of a tribunal. While the dissenting member may have reached a different conclusion, and expressed his reasoning more extensively or differently, the fact that the dissenting member expressed this reasoning as a point of departure from the majority confirmed that the issue had been the subject of some part of the deliberations.

[41] The Panel gave weight to the fact that the basis of the dissent was that the dissenting member had a *different* view of the Member's credibility. This was repeated in several instances throughout the dissent. In paragraphs 45 and 57, the dissenting member explicitly framed his findings as contrary to those of the majority. It was implicit that the conclusion of the majority on this point was the opposite, namely that the evidence of the Member and ML could not be discounted in the manner that the dissenting member discounted it.

[42] For these reasons, the Panel unanimously rejected the PCC's submission that the majority had not considered the issue of the Member's credibility at all. Nonetheless, the Panel proceeded to consider whether the reasoning of the Discipline Committee regarding all of the evidence, including the relative credibility of the evidence, considered against the evidentiary record, was sufficiently apparent and coherent to be reasonable. This analysis inevitably overlapped the first and second issues raised by the PCC on appeal.

[43] The PCC emphasized that the majority of the Discipline Committee had not expressly addressed the fact that the evidence about the nature of the Member's income provided by the Member and ML at the hearing diverged from the evidence on the same issue provided during the investigation. However, the Panel found that the majority was alive to this divergence and the varied and changing nature of the responses from the member. In paragraph 40, the majority observed that "[t]he PCC relied upon the shift from the Member's repeated description of payments made to him during his employment with ITCCTA and ITC Capital as bonuses, to describing, and reporting those same payments as self-employment income." This theme was repeated throughout the majority's decision.

[44] The analysis of the majority clearly started from the undisputed fact that the Member reported all of his income. In other words, there was nothing false or misleading about the amount of income he reported. The majority identified, at paragraph 35, that the issue was how that income was characterized and then reviewed the evidence that

suggested different possible characterizations of all or part of that income. In the Panel's view, the majority of the Discipline Committee correctly characterized the issue raised by Allegation #3 in these terms.

[45] Contrary to the suggestion by the dissenting member of the Discipline Committee and the PCC, Allegation #3 did not turn on whether the expenses claimed by the Member were reasonable. While that issue could have been raised, the Panel was satisfied that it was not raised by the language of the Allegation. The matter of expenses was a parenthetical aside, set apart by commas in the Allegation, and did not form part of the essence of the Allegation. The Panel was also satisfied that the evidence presented throughout the hearing and elicited by the investigator during her questioning of the Member, concentrated on the income reporting. In turn, the majority focused on this evidence.

[46] In paragraph 36 of its Reasons, the majority reviewed the evidence regarding the representations by the Member and ML in the course of the investigation interviews. The investigator had "recalled that the Member had described the bonuses paid to him as being recorded on his T4A as extra work performed outside his regular work hours." The majority summarized the differing descriptions of the income and observed that the consistent theme was that the work was done outside regular work for the employer, as assessed by the employer who had defined the role. "[The Member] and ML frequently used both "bonus" and "commission" interchangeably. They both maintained that the Member was to receive additional remuneration for additional work performed outside regular work hours. The additional work was being performed for the benefit of ITCCTA and ITC Capital."

[47] The majority accepted that the evidence of the Member was corroborated by the evidence of ML on these points. In paragraphs 41 and 42 of its reasons, the majority accepted ML's assertion that the extra compensation would not have been paid if the Member had not done extra work. But, ML indicated that extra work was performed by the Member in connection with tax time, which would reasonably fall outside his regular employment. It also accepted that the companies operated by ML and ML's son had prepared the T4As, not the Member (and there was no evidence to the contrary). To the extent that the income could have been otherwise characterized as employment income, ML had testified that he would have issued a Form T2200, to permit the deductions of employment related expenses in a similar way that the Member could have deducted expenses against self-employed income (as set out in the T4A). It was also apparent from its review of ML's evidence that the majority accepted that ML was aware of the distinctions between employment and self-employed income.

[48] Further, in reviewing the factors it considered in its review of the evidence related to Allegation #3, the majority indicated, at paragraph 42, that "The Panel noted that he did report all his income from both ITCCTA and ITC Capital on both his T4 and T4A. They considered the interchangeable usage of bonus, self-employed income, and commission by both the Member and ML." Having made that observation, the majority concluded from its review of the evidence that "the Member did perform duties beyond the day to day operations of the two entities as explained by both ML and the Member."

[49] In the Panel's view, the majority emphasized in the portions of their reasons noted above

the fact that, whatever the characterization given to the income, the evidence indicated that the income could have been paid for work performed outside regular work hours and that the work performed was beyond his role as a salaried employee for which he received salary. This conclusion opened the possibility that the income earned outside the employment relationship would be self-employment income or income beyond the salary he received due to his employment.

[50] In considering the submission of the PCC, the Panel was alert to the caution in the *Vavilov* decision (at paragraph 102) that reasons were not adequate if they only recited the evidence. However, in the Panel's view, when a Discipline Committee highlighted some evidence in contrast to other evidence, it was appropriate to see that differing emphasis as one indication of the Discipline Committee's assessment and weighting of the evidence. The majority clearly gave particular weight to certain evidence, particularly the evidence that the income was earned for work outside the employment relationship, which demonstrated that it was not satisfied that the income in question was necessarily characterized as employment income that should have been shown on a T4.

[51] After making these findings, in paragraph 43 of its Reasons, the majority confirmed that it did not find the Member's tax filing to be misleading, characterizing it instead as "aggressive". The majority proceeded to contrast that with the view of the dissenting member. As noted above, the fact of that contrast emphasized that the majority had a different view, namely that the evidence was sufficiently credible to rebut the submission that the filing was false and misleading. When considered against the other evidence before it, as discussed below, the Panel was satisfied that the majority had not misapprehended the evidence, or failed to properly consider the evidence, of the Member. While different, and reasonable, conclusions could have been reached, as demonstrated by the dissent, the majority's assessment of the Member's evidence was open to it, and it was not for this Panel to interfere with its conclusion in this regard.

[52] In reaching this conclusion, the Panel also considered the reasoning of the Discipline Committee with regard to the first two allegations (the whole Committee being in agreement on these points). The Discipline Committee gave weight to the Member's admission that he ought to have known about the relevant rules of CPA Ontario and based their finding on that position, although it rejected the argument that it did not amount to professional misconduct. In the Panel's view, it would be reasonable to conclude that the Discipline Committee was equally willing to accept the Member's testimony on Allegation #3, given his concessions on the first two allegations.

[53] The record was clear that there was differing evidence provided by the Member and ML as to the nature of the work for which the Member was being paid. The comments of the majority in paragraphs 36 and 43 of its Reasons had to be considered in light of this evidence. Only one version of that evidence, which allowed for the possibility that some of the Member's work was as an independent contractor, could support the conclusion reached by the majority. It followed that the majority accepted that version of events, after considering the contrary statements. If it had not done so, it would have reached the same conclusion as the dissenting member. It did not.

[54] The Panel recognized that the reasons of the majority could have been more explicit in reaching a conclusion on the credibility of the witnesses as part of its overall assessment

of the evidence. The majority could have also gone one step further to express that, having identified the conflicts in the evidence of both the Member and ML, they accepted enough of the evidence of those witnesses to support a conclusion that the income could have been business income. However, the Panel was aware that a reasonableness standard of review did not require the dissection and critique of the Reasons for the decision under appeal. That standard only required the Panel to be satisfied that there was an adequate line of reasoning for the decision. The Panel was satisfied that the reasons, read against the evidentiary record, met this threshold because it was clear that the majority was aware on the conflicting evidence and chose to accept the evidence the Member and ML gave at the hearing.

[55] After carefully considering the reasons of the majority, the reasons of the dissenting member and the evidence that was before the Discipline Committee, the Panel concluded that it was sufficiently clear how the majority had assessed the evidence of the Member and ML, and, implicitly its credibility, as part of the total evidentiary record and reached the conclusion that the Member had not committed professional misconduct in relation to Allegation #3.

Issue #2: Did the majority of the Discipline Committee err by not finding that the Member had committed professional misconduct with respect to Allegation 3 based on the clear, cogent and compelling evidence before them?

[56] The second issue raised by the PCC was intertwined with the first issue. In effect, the PCC argued that the majority of the Discipline Committee erred because it considered evidence that was not credible in dismissing Allegation #3 (the first issue) and it did not consider what was characterized as credible evidence that supported a finding of professional misconduct on the same Allegation. These issues are connected – two sides of the same coin – and, as a result, the Panel's conclusions with respect to the first issue have application to the analysis of the second.

[57] The PCC submitted that the evidence led to only one conclusion, that the Member's tax filing was false and misleading, on the basis that the additional income could only be properly characterized as employment income and should have been reported in the T4 issued by the employers. On this basis, the PCC submitted that the Member's filing was misleading. The PCC did not accept that the evidence before the Discipline Committee allowed for a finding that there were two distinct, but concurrent, forms of income from one entity.

[58] The majority of the Discipline Committee recognized that there could be two types of income based on the evidence. In addition to the evidence of Mr. Grummett, discussed below, the majority identified a number of elements of the evidence that could support a conclusion that the additional income was not necessarily employment income. The language used in the evidence reflected that ambiguity. The additional income was referred to variously as bonus, commission, compensation for additional work and profit sharing by the Member and ML. This ambiguity was repeated in the descriptions used by the investigator.

[59] There was extensive evidence, which the majority referenced in its reasons, that bore on the issue of the proper characterization of the income. The Member reviewed the evidence that supported each of the two alternative characterizations of this income, and the Panel accepted that summary.

[60] Some of the evidence, relied on by the PCC and the dissenting member, supported the conclusion that the income was employment income, specifically a bonus. It was certainly arguable that no adequate audit trail existed to support the characterization of this additional income as self-employment income. There was no employment contract or other documentation to confirm what was basically an oral understanding between the employers and the Member. No invoices for extra services were submitted by the Member to either ITCCTA or ITC Capital. The income reported on the T4A was, at least in part, intended to allow the Member to share in profit of the company. One other employee was remunerated in the same way. Perhaps most significantly, the Member had told the investigator that the income shown on the T4As was in fact bonus income, which was not included on the T4 because the bonuses were paid after the year end.

[61] On the other hand, there was also evidence that supported a characterization of this income as self-employment income beyond the scope of salaried employment. ML and the Member were consistent in describing an oral agreement to pay these additional sums. T4s and T4As were issued year after year reflecting continuity and consistency of the above arrangements. The payments relating to extra services (reported on the T4A) were made at several points in the year, but mostly after the busy tax season. the Member had continued his CPA registration and maintained liability insurance separate from that maintained by ITCCTA. This would not have been necessary if he was working as a salaried employee only. In addition, although one staff member was compensated in the same manner as the Member, the remaining staff received a more typical bonus only after year end and had that income recorded on a T4.

[62] The Panel was satisfied that, having considered this evidence, the majority of the Discipline Committee accepted that it was quite possible for the parties to have a non-traditional business arrangement that combined employment and self-employment relationships. In the Panel's view, it was reasonable for the majority to reach this conclusion. It was not unusual for employers with few employees not to have formalized employment contracts for their employees. The evidence from the employer and the Member was consistent in that there was to be additional compensation for extra work, even it was characterized in differing ways, and that the income reported on T4A slips was for that extra work over and above the expected salary role of the Member. It was clear that the majority had not found the use of the term "bonus" to be determinative of the true nature of the income, given that it was received for work outside the employment relationship.

[63] The expert witness, Mr. Grummett, testified that it was possible under the *Income Tax Act* for an individual to have both employment status and self-employment status with the same employer/contractor. This possibility could arise if services were provided outside the employment relationship. The PCC submitted that the Member could not have both statuses. However, although issues were raised in the application of Mr. Grummett's opinion to the facts of this case, there was no evidence adduced by the PCC

to contradict this evidence as to the possibility of dual statuses. The majority effectively made this observation at paragraph 40 where it stated the investigator only offered her belief, having acknowledged that she was not expert in the area of tax, that one could not have had both an employer/ employee relationship and a self-employed professional relationship. While this could have been more clearly stated, the rationale of the majority was clear when the reasons were considered against all of the evidence. The Panel was satisfied that the majority concluded that the Member could have dual statuses based on Mr. Grummett's expert opinion and the absence of evidence to counter that opinion.

[64] The net effect of this evidence was that it was open to the Discipline Committee to conclude that the income of $66,600 reported on the Member's tax return could just as likely be self-employed income as it could be employment income. The Panel found that the majority reasonably concluded that the Member's tax filing, while aggressive, was transparent to all income received and the tax position being taken and how expenses were claimed. It was not false or misleading. At a minimum, there was an argument to be made that the income was properly shown on a T4A. The Member was within his rights to take the tax position to lower his tax liability. It was open to CRA to challenge the tax position, and the Member would have been aware of that. The role of CPA Ontario is not to assume, or supplant, the role of CRA to audit tax returns.

[65] In addition, this Panel accepted, as apparently the majority of the Discipline Committee did, that an expert panel of CPA Ontario members and public members was entitled to apply its professional judgment and expertise to its assessment of the evidence and reach conclusions with that perspective brought to bear. In the view of the Panel, all of these factors made it reasonable to conclude that, on a balance of probabilities, a T4A approach to the payments in question was not unreasonable.

[66] The PCC contends the Member knew or should have known that reporting the additional income over and above his salary as self-employment income on a T4A was wrong and that he thereby had filed a false and misleading return to CRA. If there was no clear error in characterizing the additional income as self-employment income, it follows that the reporting of that income as self-employment income could not be considered false and misleading. The majority identified the ambiguity in the evidence in reaching the conclusion that the Member's tax filing was not false or misleading. The majority also emphasized that it was not in dispute that the Member reported all of his income, so that there was no misleading in that respect. The Panel unanimously found that there was no basis to interfere with those conclusions.

[67] This Panel agreed that the evidence could have supported either conclusion. The evidence of inadequate documentation by the Member could arguably support the different conclusion urged by the PCC. It was not the role of this Panel under a reasonableness standard of review to pick the "correct" choice. It was enough if there was evidence, identified by the majority, to support its conclusion.

[68] In the Panel's view, the reasons of the majority, particularly paragraphs 42 and 43, indicated that the major issues raised by the PCC were considered by the majority. Although the reasons were not in-depth, the Panel was satisfied that the reasons considered in light of the evidence demonstrated that the conclusions reached by the

majority were reasoned and justified conclusions as required by an application of the standard set out by the Court in *Vavilov*.

[69] Based on a review of the reasons and the evidence, the Panel was satisfied that the conclusion of the majority with respect to Allegation #3 was reasonable.

Issue #3: Did the majority of the Discipline Committee err in accepting the conclusions reached by the expert called on behalf of the Member when the evidence demonstrated that some of the supporting conclusions were incorrect?

[70] The Discipline Committee received an expert report from Mr. Grummett with respect to the reasonableness of the manner in which the Member had reported his income from ITCCTA and ITC Capital. At paragraph 38 of its reasons, the majority indicated that Mr. Grummett had acknowledged that the facts upon which he relied in formulating his opinion were only assumptions, as he had not set out to test them.

[71] The PCC submitted that the majority of the Discipline Committee erred in accepting the conclusions of Mr. Grummett, when Mr. Grummett had conceded that they were based on untested assumptions. In particular, the PCC challenged the statement at paragraph 39 of the majority's reasons in which the majority indicated that Mr. Grummett had concluded in his report that the Member "had both an employer/employee relationship and a self-employed professional relationship" with the two companies.

[72] Although the majority referenced this aspect of Mr. Grummett's opinion, the Panel was satisfied on a review of the reasons, specifically paragraph 40 and following, that the majority did not rest its conclusion on this aspect of Mr. Grummett's opinion. Rather, the majority considered Mr. Grummett's opinion that an individual could have an employer/employee relationship and a self-employed relationship at the same time and applied it to the evidence adduced at the hearing. As discussed above, this aspect of Mr. Grummett's opinion was not challenged. The Panel found that it was reasonable for the majority to proceed in this manner, make its own findings with respect to the evidence, and apply the opinion to those findings.

[73] The Panel found that this issue did not provide any basis to interfere with the decision of the majority of the Discipline Committee.

VII. COSTS ON APPEAL

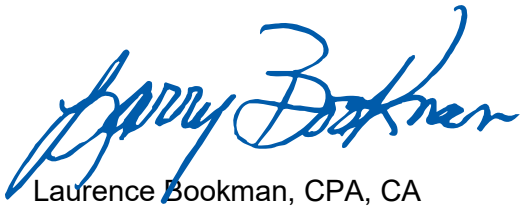
[74] Having concluded for the foregoing reasons that the appeal should be dismissed, the Panel proceeded to consider the request in the factum filed on behalf of the Member for his costs of the appeal. The Panel considered this request to be reasonable in the circumstances of this case and, if it were permitted to award costs against the PCC or CPAO, may have awarded costs in favour of the Member. However, regardless of its view of the reasonableness of this request, the Panel was aware that the ability of the Panel to award costs in favour of a Member was restricted by the provisions of subsection 38(2) of the *Act*.

[75] Subsection 38(2) of the *Act* authorizes the Appeal Committee to award the costs of an

appeal "but only against the member or firm that is the subject of the proceeding." In other words, the clear language of the *Act* prohibits the Panel from ordering the PCC or CPAO to pay the Respondent's costs of the appeal even though the Respondent was successful on the appeal. The Panel is only authorized to award costs against a Member. Given the Member's success on the appeal, the Panel found that it would not be appropriate for him to pay the costs of the appeal.

[76] As a result of subsection 38(2) of the *Act*, the Panel dismissed the appeal without costs.

Dated at Toronto this 27th day of August, 2020



Laurence Bookman, CPA, CA
Appeal Committee – Chair

Members of the Panel
Donald Dafoe, FCPA, FCA
Clyde M. MacLellan, FCPA, FCA
Stephen Meek, FCPA, FCA
Virendra Sahni (Public Representative)

Independent Legal Counsel
Glenn Stuart
StuartLaw