

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **BRIAN KEITH MCWILLIAMS, CA** a member of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

TO: Mr. Brian K. McWilliams, CA
4936 Yonge Street
Suite 148
Toronto, ON M2N 6S3

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision And Order Made July 20, 2005)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on July 20, 2005 to hear charges brought by the Professional Conduct Committee against Brian K. McWilliams, a member of the Institute.

2. Mr. Paul Farley appeared on behalf of the Professional Conduct Committee. Mr. McWilliams was in attendance and was represented by his counsel, Mr. James Klein.

3. The decision of the panel was made known to the parties at the conclusion of the hearing on July 20, 2005, and the written Decision and Order sent to them on July 21, 2005. These reasons, pursuant to Bylaw 574, include the charge, the decision, the order, and the reasons of the panel for its decision and order.

CHARGE

4. The following charge was laid by the Professional Conduct Committee against Mr. McWilliams on April 13, 2005:

THAT the said Brian K. McWilliams, in or about the period June 1, 2000 thru July 31, 2002, failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the rules of professional conduct in that:

- a. he used funds that had been invested by persons in the Affinity Platinum Income Fund Inc. pursuant to a Confidential Information Memorandum, in a fashion not contemplated by the offering memorandum;
- b. he participated in a plan involving the solicitation of funds from the public pursuant to a Confidential Information Memorandum pertaining to Affinity Platinum Income Fund Inc. when he knew that the officers and directors of the company named in the information memorandum were not officers and directors of the company.

5. Mr. McWilliams entered a plea of guilty to the charge and acknowledged that on the basis of the plea of guilty and on that basis alone he could be found guilty of the charge.

EVIDENCE

6. The evidence in this matter was presented by way of an Agreed Statement of Facts, (Exhibit 4), along with an accompanying Document Brief (Exhibit 5). Neither party called any further evidence.

7. After hearing submissions from the parties and deliberating, the panel finds the following facts:

- a. Mr. McWilliams, while in public practice, incorporated a financial planning and investment services company. By 1998, most of his professional time was consumed by that company;
- b. In 2000, Mr. McWilliams and others created Affinity Platinum Income Fund Inc. ("the fund") as one of the company's investment products, and directed the creation of a confidential information memorandum for the fund;
- c. The offering required a minimum subscription of \$5 million prior to the closing date (June 30, 2000), failing which all funds would be returned to the investors;
- d. The persons named in the information memorandum as officers and directors of the Administrator of the fund were not, in fact, its officers and directors and had no knowledge of being so named;
- e. By the closing date, the fund, which was not marketed by Mr. McWilliams, had only \$450,000 in subscriptions.
- f. Two weeks after the closing date, another \$200,000 was subscribed. These monies were not deposited into the Trust account established for the fund (Exhibit 5, Tab 9);
- g. Mr. McWilliams, as President of the fund, did not return the funds to the investors as required by the Subscription Agreements, but caused the funds to be invested in securities and by way of loan, investments which would have qualified as fund investments had the minimum subscription been met;
- h. The monies invested in the securities were all lost by the end of December 2000. Mr. McWilliams attempted to cover the loss by injecting further funds from his financial planning company, but the losses continued; and,
- i. Mr. McWilliams was responsible for the option trading decisions and the resultant trading losses. He did not make the losses known to the investors until the summer of 2002.

DECISION

8. The panel had no doubts that the conduct of Mr. McWilliams constitutes professional misconduct and found him guilty of the charge. The chair read the following decision:

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to the charge, the Discipline Committee finds Brian Keith McWilliams guilty of the charge.

SANCTION

9. The panel heard submissions from the parties on the issue of the appropriate sanction. The parties made a joint submission to the panel that Mr. McWilliams be reprimanded in writing by the Chair, that he be fined in the amount of \$10,000, suspended for a period of six months and surrender his

certificate for that time, pay costs in the amount of \$10,000, be expelled if he failed to comply with any of the terms and that there be full publicity of the matter.

10. Mr. Farley did not call evidence with respect to sanction. He submitted that this was not an offence of moral turpitude or dishonesty but rather an instance in which lack of professional care resulted in investor losses and directed the panel accordingly to the matter of *Re Francis*, 2003 ON Trib 4 (ICAO)(Exhibit 6).

11. Mr. Farley described as mitigating factors the fact that restitution to the investors has been made (a fact not contained in the Agreed Statement of Facts but presented orally to the panel and agreed to by the parties), the guilty plea and Mr. McWilliams' cooperation in the Professional Conduct Committee's investigation. Mr. Farley submitted an aggravating factor had been Mr. McWilliams' naming in the Confidential Information Memorandum as officers and directors persons who were not officers and directors and who had no knowledge that they had been so named.

12. Mr. Farley submitted that the primary principle for consideration by the panel was general deterrence to members engaged in, or considering engagement in, financial planning, investment services, and other activities in which members of the public entrust their monies. He argued that the penalty needs to be significant enough not to be seen as a licensing fee.

13. Mr. Klein submitted that this is not an offence of moral turpitude or dishonesty, but rather a case in which an error of professional judgment resulted in investors' losses for which restitution had been made. He made further submissions as to the deleterious effect this matter has had on both Mr. McWilliams' professional and his personal life.

14. Mr. McWilliams addressed the panel personally, and expressed an acknowledgment of the inappropriateness of his actions, and his contrition at his conduct and its consequences.

ORDER

15. After deliberations, the panel decided to adopt the joint submission, and made the following order:

IT IS ORDERED in respect of the charge:

1. THAT Mr. McWilliams be reprimanded in writing by the chair of the hearing.

2. THAT Mr. McWilliams be and he is hereby fined the sum of \$10,000, to be remitted to the Institute within three (3) years from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. McWilliams be and he is hereby charged costs fixed at \$10,000, to be remitted to the Institute within three (3) years from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. McWilliams be suspended from the rights and privileges of membership in the Institute for a period of six (6) months from the date this Decision and Order becomes final under the bylaws.

5. THAT notice of this Decision and Order, disclosing Mr. McWilliams' name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:

- (a) to the Public Accountants Council for the Province of Ontario;
- (b) to the Canadian Institute of Chartered Accountants; and
- (c) by publication in *CheckMark*.

6. THAT Mr. McWilliams surrender his certificate of membership in the Institute to the Discipline Committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. McWilliams.

7. THAT in the event Mr. McWilliams fails to comply with any of the requirements of this Order, he shall thereupon be expelled from the membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified in paragraph 5 hereof, and in a newspaper distributed in the geographic area of Mr. McWilliams' employment and/or residence.

REASONS FOR THE ORDER

Reprimand

16. The panel orders Mr. McWilliams be reprimanded in writing by the Chair of the panel to make clear to Mr. McWilliams that his conduct is unacceptable.

Suspension

17. While the panel finds this is not an offence of moral turpitude, the panel struggled with the characterization of Mr. McWilliams' conduct as an error in professional judgment. The panel has considered whether or not Mr. McWilliams' behaviour was more accurately characterized as dishonest given he invested contrary to the terms of the Confidential Information Memorandum, he failed to inform investors of their losses for two years following the date at which the funds should have been returned and he named in the Confidential Information Memorandum as directors and officers individuals he acknowledged had no knowledge that they had been so named and who were not in fact, directors. The parties agree that the investments made would have qualified for the purpose of the fund had the minimum subscription been met. The nature and extent of any indirect benefit to Mr. McWilliams is not clear from the evidence.

18. The nature and gravity of the misconduct causes the panel concern with the appropriateness of the joint submission. After careful consideration, the panel finds that the submission is within the appropriate range and does give effect to it. In assessing the appropriateness of the proposed sanction, the panel gives great weight not only to the fact it is a joint submission but to the absence of evidence of intentional deception or dishonesty. It is also relevant that the charge involved only one fund, and that Mr. McWilliams made restitution to the subscribers. Further, we accept as sincere Mr. McWilliams' expression of remorse.

19. With respect to the length of the suspension, the panel finds that six months is appropriate. The only precedent cited for the panel was *Re Francis*, 2003 ON Trib 4 (ICAO) (Exhibit 6) in which a suspension of three months was imposed for misconduct in the absence of intentional deception and dishonesty.

Fine

20. The panel finds that a fine of \$10,000 is significant enough in the circumstances to serve as a specific and general deterrent. The panel accepts the joint submissions that Mr. McWilliams be given three years in which to pay the fine.

Costs

21. The panel accepts the joint submission for costs fixed at \$10,000 to be repaid within three years.

Notice

22. Publishing names of members found guilty of professional misconduct is often the single most significant sanction that can be administered for general deterrence, education of the membership at large, and protection of the public. The panel therefore orders notice of this order in *Checkmark* disclosing the member's name, and orders that notice be given to the Public Accountants Council for the Province of Ontario and to the Canadian Institute of Chartered Accountants. The panel also orders notice as set out in the Order to address issues of specific deterrence and rehabilitation of Mr. McWilliams.

Return of Certificate

23. Certificates of Institute membership belong to the Institute. As Mr. McWilliams has been suspended from membership in good standing, the membership certificate issued to him must be surrendered for the period of his suspension.

Expulsion for Failing to Comply

24. To encourage compliance with discipline orders in cases in which members are not expelled outright, orders of the discipline committee generally specify expulsion with newspaper notification to the public as an ultimate consequence for non-compliance. The panel so orders in this proceeding.

DATED AT TORONTO THIS 12TH DAY OF OCTOBER, 2005
BY ORDER OF THE DISCIPLINE COMMITTEE

B.L. HAYES – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

N.C. AGARWAL (Public Representative)
S.F. DINELEY, FCA
D.L. FLEWELLING, CA
B.D. LOVE, CA
G.R. PEALL, CA