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

APPEAL COMMITTEE

IN THE MATTER OF:	An appeal by **MOHAMED DOSTMOHAMED, CPA, CA** and **DEAN V. JONES, CPA, CA** of the Decision and Order of the Discipline Committee, under **Rule 24** of the Rules of Practice and Procedure.
TO:	Mohamed Dostmohamed, CPA, CA Dean V. Jones, CPA, CA
AND TO:	The Professional Conduct Committee

REASONS FOR DECISION MADE FEBRUARY 24, 2017
AND REASONS FOR DECISION AND ORDER MADE MAY 12, 2017

1. This appeal was heard by a tribunal of the Appeal Committee of the Chartered Professional Accountants of Ontario on February 24 and May 12, 2017.

2. Ms. Alexandra Hersak and Ms. Melissa Gentili appeared on behalf of the Professional Conduct Committee (the "PCC").

3. Mr. Dean V. Jones and Mr. Mohamed Dostmohamed (together, the "Appellants") were not present but were represented by their legal counsel, Mr. Mauro Marchioni.

4. Mr. Glenn Stuart attended the hearing as counsel to the Appeal Committee.

Overview

5. On September 23, 2014, the Appellants brought a motion to the Discipline Committee to stay the hearing of allegations against the Appellants on the basis of undue delay in the investigation and prosecution of those allegations. The Discipline Committee dismissed the motion for reasons released on November 14, 2014.

6. The Appellants pleaded guilty on March 2, 2016 to certain allegations of professional misconduct as set out below. The Discipline Committee consequently found that the Appellants had committed professional misconduct and imposed sanctions on them including a reprimand, a fine and an order requiring certain professional development courses.

7. The Appellants appealed the Discipline Committee's decision on three grounds:

   a) the Discipline Committee erred in dismissing a motion for a stay of proceedings on the basis that they amount to an abuse of process arising from inordinate and unacceptable delay on the part of the PCC (the "Stay Decision" described below);

   b) the Discipline Committee erred in ordering costs against the Appellants (the "Costs Order" described below) and in failing to properly consider delay as a factor in its assessment and fixing of costs; and

c) the Discipline Committee erred in failing to award costs in favour of the Appellants as a result of the inordinate and unacceptable delay occasioned by the PCC.

8. For the reasons set out below, the Appeal Committee tribunal dismissed the appeal in its entirety.

9. This appeal raised several issues that were heard by the Appeal Committee tribunal in sequence over the course of two days of hearings. The Appeal Committee tribunal decided the issues as they arose with reasons to follow. These are those reasons.

10. The key issues raised in this appeal, with a summary of the conclusions of the Appeal Committee tribunal with respect to each, were as follows:

a) *Could the Appellants appeal the Stay Decision after pleading guilty*?

The Appeal Committee tribunal determined that a guilty plea in a disciplinary hearing did not act as a waiver of a right to appeal an interlocutory motion like the Stay Decision and that the tribunal could proceed to hear the appeal of the Stay Decision.

b) *What was the standard of review applicable to an appeal of the Stay Decision*?

The Appeal Committee tribunal concluded that the standard of review was as set out in the decision of the Ontario Court of Appeal in *Sazant* v. *The College of Physicians and Surgeons of Ontario* (2012), 113 O.R. (3d) 420 ("*Sazant*") and other relevant decisions: reasonableness in respect of factual findings and correctness in respect of legal principles.

c) *What are the legal principles application to the Stay Decision*?

The Appellants argued for the stay under both the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and their common law rights to a fair hearing. The Appeal Committee tribunal concluded that the Discipline Committee correctly determined that the Appellants did not have a constitutional right in this case to be tried within a reasonable time and that the test under the common law requires a finding of "inordinate delay" that causes "actual prejudice of such magnitude that the public's sense of decency and fairness is affected", as described in *Sazant* and in the Supreme Court of Canada's decision in *Blencoe* v. *British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 ("*Blencoe*"), discussed further below.

d) *Did the Discipline Committee err in refusing to grant the stay of proceedings in the Stay Decision*?

The Appeal Committee tribunal determined that there was no basis on which to interfere with the Stay Decision. It was reasonable for the Discipline Committee to determine that there was no inordinate delay and, if there was, that there was no prejudice resulting therefrom that could justify a stay of proceedings. The Appeal Committee tribunal dismissed the appeal of the Stay Decision.

e) *Did the Discipline Committee err in making the Costs Order against the Appellants*?

The Appeal Committee tribunal confirmed that considerable deference was owed to the Discipline Committee with respect to a cost awards. The tribunal found no error in principle and therefore dismissed the appeal of the Costs Order.

f) *Did the Discipline Committee err in not awarding costs in favour of the Appellants*?

No. The *Chartered Accountants Act, 2010* expressly provided in Section 38(1) only for costs to be awarded against the member or firm that was the subject of a proceeding. Appellants' counsel did not address this ground of appeal at the hearing and stated at the end of his submissions that the Appellants were withdrawing this aspect of the appeal.

g) *Should the Appellants pay costs in respect of the appeal*?

The Appeal Committee tribunal determined that the Appellants should pay $12,000 in respect of costs of the Appeal.

The Allegations

The Allegations against Mr. Jones

11. The following allegations, as amended on consent at the Discipline Committee hearing on March 2, 2016, were laid against Mr. Jones on January 10, 2012 by the PCC:

1. THAT the said Dean V. Jones, in or about the period December 31, 2005 through December 31, 2007, while Jones & Associates was engaged to perform a compilation of the financial statements of "TW Inc." for the year ended December 31, 2005, failed to use due care in performing his professional services contrary to Rule 202 of the Rules of Professional Conduct, in that:

a. he failed to properly supervise the performance of professional services provided by employees with the effect that:

i. a "Notice to Reader" communication was not attached to the financial statements;

ii. the financial statements were not marked "Unaudited – See Notice to Reader";

iii. an investment of $35,000 was not disclosed; and

iv. a "Canadian and Foreign net business loss" in the amount of $33,500 as reflected in the T5013 Statement of Partnership Income was not disclosed.

2. THAT the said Dean V. Jones, in or about the period December 31, 2005 through December 31, 2007, while Jones & Associates was engaged to prepare and file the personal income tax returns of "SB" and the corporate income tax and GST returns for "TW Inc." for 2005, failed to use due care in performing his professional services contrary to Rule 202 of the Rules of Professional Conduct, in that:

a. he failed to properly supervise the performance of professional services provided by employees with the effect that:

b. the T1 return did not include a "Canadian and foreign net business loss" in the amount of $7,000 as reflected in the T5013 Statement of Partnership Income;

c. the basis for the inclusion in the T1 return of "Other Income" in the amount of $9,000 was not documented; and

d. he failed to ensure that staff filed the returns in a reasonable time and obtained evidence of the filing.

The Allegations against Mr. Dostmohamed

12. The following allegations, as amended on consent at the Discipline Committee hearing on March 2, 2016, were laid against Mr. Dostmohamed on January 10, 2012 by the PCC:

1. THAT the said Mohamed Dostmohamed, in or about the period December 31, 2005 through December 31, 2007, while engaged as the accountant for "SB" and her company "TW Inc.," failed to maintain the 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 failed to provide an accounting of and appropriate explanation of the lump sum fee structure to the client; and

b. he used $4,200 of the client's funds for an investment without the client's knowledge or informed consent, and mischaracterized that amount to the client as being part of a lump sum fee for taxes payable, fees and tax planning.

2. THAT the said Mohamed Dostmohamed, in or about the period December 31, 2005 through December 31, 2007, while engaged as the accountant for "SB" and her company "TW Inc.," failed to use due care in performing his professional services contrary to Rule 202 of the Rules of Professional Conduct, in that:

a. he failed to adequately explain to the client that $4,200 of her funds were being used for an investment in limited partnership units; and

b. he failed to adequately explain the related risks of that investment.

3. THAT the said Mohamed Dostmohamed, in or about the period December 31, 2005 through December 31, 2007, while engaged to perform a compilation of the financial statements of "TW Inc." for the year ended December 31, 2005, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, contrary to Rule 206.1 of the Rules of Professional Conduct, in that:

a. he failed to document the agreement on the services to be provided;

b. he failed to attach a "Notice to Reader" communication to the financial statements;

c. he failed to mark the financial statements "Unaudited – See Notice to Reader";

d. he failed to disclose an investment of $35,000 in an "LP";

e. he failed to disclose a "Canadian and Foreign net business loss" in the amount of $33,500 as reflected in the T5013 Statement of Partnership Income; and

f. he failed to properly supervise the performance of professional services provided by employees.

4. THAT the said Mohamed Dostmohamed, in or about the period December 31, 2005 through December 31, 2007, while engaged to prepare and file the corporate income tax and GST returns for "TW Inc." for 2005, failed to use due care in performing his professional services contrary to Rule 202 of the Rules of Professional Conduct, in that he failed to file those returns in a reasonable time.

The Decisions and Orders under Appeal

13. The key dates in the proceedings for this matter were as follows:

a) December 2007: A complaint was filed with the PCC against the Appellants.

b) April 2012: The allegations against the Appellants were served and filed.

c) June 2014: The notice of hearing was issued, and the allegations were posted on the CPA Ontario website.

d) September 23, 2014: The Discipline Committee heard a preliminary motion for a stay of proceedings and made the Stay Decision.

e) November 14, 2014: The Discipline Committee issued the reasons for the Stay Decision.

f) November 24, 2014: The Appellants pleaded not guilty.

g) November 24, 2014, March 2 and 3, 2015: The allegations against the Appellants were heard by the Discipline Committee.

h) March 2, 2016: The Appellants pleaded guilty to amended allegations, and the Discipline Committee found the Appellants guilty (the "Finding Decision") and ordered sanctions against the Appellants (the "Sanctions Order").

i) March 4, 2016: The Discipline Committee made the Costs Order.

j) March 30, 2016: The Appellants filed a notice of the Appeal.

The Stay Decision

14. On September 23, 2014, the Discipline Committee heard a preliminary motion brought by the Appellants. The Appellants sought a stay of the allegations on the basis that there was a delay in bringing forward the disciplinary proceedings violating the Appellants' rights under

Section 7 of the *Canadian Charter of Rights and Freedoms* as well as their common law right to a fair hearing.

15. The Discipline Committee accepted the principles set out in the decision of the Ontario Court of Appeal in *Sazant* as being directly applicable to the preliminary motion and considered them in their analysis, which they summarized as follows:

> In civil or administrative proceedings there is no constitutional right to be tried within a reasonable time. [*Sazant*, paragraph 197]
>
> Delay can constitute an abuse of process in an administrative proceeding provided the delay is "inordinate" and causes "actual prejudice of such magnitude that the public's sense of decency and fairness is affected". [*Sazant*, paragraphs 198-205; 242-244]
>
> The actual prejudice must result from the delay itself, not the underlying circumstances. [*Sazant*, paragraphs 206-207; 246-247]
>
> When an application for a stay on the basis of an abuse of process is considered, part of the context which the tribunal is to consider is the public interest in having the case heard on its merits. [*Sazant*, paragraph 248]

16. The Discipline Committee found as follows and dismissed the application for a stay:

> The tribunal reviewed the submissions and evidence referred to by both parties. The tribunal was not persuaded there was an inordinate delay and, just as important if not more important, the tribunal found that the Members had not demonstrated the prejudice required for a stay. [paragraph 37 of the Motion Reasons]

The Finding Decision

17. The Finding Decision made March 2, 2016 read as follows:

> THAT having determined to hear the Allegations against Mr. Dostmohamed and Mr. Jones together, pursuant to Rule 6 of the *Rules of Practice and Procedure*, and having heard the plea of guilty made by each of the named parties to the Allegations, as amended, regarding that party, and having seen, heard and considered the evidence, the Discipline Committee finds each of Mohamed Dostmohamed and Dean Vincent Jones guilty of the Allegations, as amended, of professional misconduct.

The Sanctions Order

18. The Sanctions Order made March 4, 2016 reads as follows:

> 1. THAT Mr. Dostmohamed and Mr. Jones be reprimanded in writing by the Chair of the tribunal.
>
> 2. THAT Mr. Dostmohamed is hereby fined the sum of $5,000, and Mr. Jones is hereby fined the sum of $3,500, to be remitted to the Chartered Professional

Accountants of Ontario ("CPA Ontario") within twelve (12) months from the date this Decision and Order is made.

3. THAT Mr. Dostmohamed and Mr. Jones attend, within twelve (12) months from the date this Decision and Order is made, the following professional development courses made available through CPA Ontario:

   a. Everyday Income Tax Issues for the General Practitioner; and

   b. Compilation Engagements,

   or, in the event a course listed above becomes unavailable, the successor course which takes its place.

4. THAT notice of this Decision and Order, disclosing the name of Mr. Dostmohamed and Mr. Jones, be given in the form and manner determined by the Discipline Committee:

   a. to all members of CPA Ontario;

   b. to the Public Accountants Council for the Province of Ontario; and

   c. to all provincial bodies;

   and shall be made available to the public.

5. THAT in the event Mr. Dostmohamed fails to comply with the requirements of this Order, he shall be suspended from membership in CPA Ontario until such time as he does comply, provided that he complies within thirty (30) days from the date of his suspension. In the event he does not comply within the thirty (30) day period, his membership in CPA Ontario shall thereupon be revoked, and notice of the revocation of his membership, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Dostmohamed's practice or employment. All costs associated with this publication shall be borne by Mr. Dostmohamed and shall be in addition to any other costs ordered by the tribunal.

6. THAT in the event Mr. Jones fails to comply with the requirements of this Order, he shall be suspended from membership in CPA Ontario and his public accounting licence shall thereupon be suspended until such time as he does comply, provided that he complies within thirty (30) days from the date of his suspension. In the event he does not comply within the thirty (30) day period, his membership in CPA Ontario and public accounting licence shall thereupon be revoked, and notice of the revocation of his membership and public accounting licence, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Jones' practice or employment. All costs associated with this publication shall be borne by Mr. Jones and shall be in addition to any other costs ordered by the tribunal.

IT IS FURTHER ORDERED:

7. THAT Mr. Dostmohamed and Mr. Jones be and they are hereby charged, jointly and severally, costs fixed at $76,000, to be remitted to CPA Ontario within twelve (12) months from the date this Decision and Order is made.

The Relief Sought

19. The Appellants' set out in their notice of appeal dated March 30, 2016 (the "Notice of Appeal") that they sought the following orders:

1. That the proceedings against the Appellants be and are hereby stayed on the basis that those proceedings amount to an abuse of process arising from inordinate and unacceptable delay on the part of the PCC;

2. In the alternative, that the Discipline Committee's decision on costs be set aside and costs of the proceedings be awarded in favour of the Appellants on a substantial indemnity scale; and

3. In the further alternative, that the Discipline Committee's decision no costs be set aside and that each party to the proceeding bear their own costs thereof.

The Appeal Committee Tribunal Hearings

20. At the commencement of the hearing of the appeal, the Index to the Appeal Book was filed as Exhibit 1, and it was noted on the record that the following documents had been reviewed by the Tribunal:

Appeal Book – Volumes I to IX
Factum of the Appellants
Factum of the Respondent
Compendium of the Respondent
Respondent's Book of Authorities

21. Mr. Marchioni made submissions on the appeal, and Ms. Hersak responded to those submissions. Both counsel made reference to their facta and authorities referred to in the facta in addressing the findings of the Discipline Committee. The members of the Appeal Committee tribunal took the opportunity to ask questions for clarification.

Decisions of the Appeal Committee tribunal

Decision on the Stay Decision

22. After the hearing and deliberations on February 24, 2017, the Appeal Committee tribunal made the following decision, which was issued to the parties on March 2, 2017:

DECISION

THAT having heard and considered the submissions on behalf of the Appellants, Mohamed Dostmohamed and Dean V. Jones, and on behalf of the Professional Conduct Committee, the Appeal Committee:

1. determines that the Appeal from the Decision and Order, dated March 4, 2016, of the Discipline Committee shall proceed on the basis of all issues raised in the Notice of Appeal;

2. dismisses the Appeal from the Decision and Order, dated March 4, 2016, of the Discipline Committee as it relates to the interlocutory decision of the Discipline Committee, made September 23, 2014, and the Appellants' request for a stay of the proceedings;

3. confirms that argument of the remaining grounds of appeal identified in the Notice of Appeal shall proceed on April 5, 2017.

Decision on the Costs Order

23. At the request of Mr. Marchioni, the hearing date for the balance of the appeal was postponed from April 5, 2017 to May 12, 2017. After the hearing and deliberations on May 12, 2017, the Appeal Committee tribunal made the following decision, which was issued to the parties on May 25, 2017:

> **DECISION**
>
> THAT having heard and considered the submissions on behalf of the Appellants, Mohamed Dostmohamed and Dean V. Jones, and on behalf of the Professional Conduct Committee, and having previously dismissed the balance of the appeal, by its decision dated February 24, 2017, the Appeal Committee tribunal dismisses the appeal from the decision of the Discipline Committee with respect to costs.

Decision on the Costs of the Appeal

24. The Appeal Committee tribunal heard submissions from the parties at the hearing on May 12, 2017 and made the following order, which was issued to the parties on May 25, 2017:

> **ORDER**
>
> THAT Mr. Dostmohammed and Mr. Jones be and they are hereby charged, jointly and severally, costs related to their appeal to the Appeal Committee fixed at $12,000 to be remitted to CPA Ontario within six (6) months from the date this Decision and Order of the Appeal Committee is made.

Could the Appellants appeal the Stay Decision after pleading guilty?

25. The PCC took the position that the Appellants were not entitled to appeal the Stay Decision because they had pleaded guilty to the allegations and that to grant a stay of proceedings after a plea of guilty would bring the administration of justice into disrepute.

26. Ms. Hersak submitted on behalf of the PCC that when the Appellants pleaded guilty to the allegations, they waived their right to require the PCC to prove its case beyond the evidence already entered, as well as the related procedural safeguards.

27. Ms. Hersak referred the Appeal Committee tribunal to several criminal cases addressing the relationship between guilty pleas and *Charter* rights, including a decision of the Nova Scotia

Court of Appeal in *R.* v. *Davidson* (1992), 110 NSR (2d) 3017 ("*Davidson*"). In *Davidson*, the Court noted that, at common law in Canada, a plea of guilty in a criminal proceeding was simply an admission of the facts stated in the information, but, based on U.S. precedents, the Court found that definition to be too narrow and concluded that the appellant had waived his Section 11(b) rights under the *Charter* (the right to be tried within a reasonable time) by entering a plea of guilty.

28. Neither party submitted cases directly on point involving guilty pleas before disciplinary tribunals. The criminal cases could be distinguished on the basis that guilty pleas were a statutory creation under the *Criminal Code,* as noted by the Ontario Court of Appeal in another case presented by Ms. Hersak, *R.* v. *Fegan*, [1993] OJ No 733 ("*Fegan*").

29. The Court of Appeal noted at paragraph 8 of *Fegan* that an appeal of an interlocutory ruling was prohibited and an accused was obliged to wait until the end of his trial before he could have the ruling challenged in the appeal court. A plea of guilty can shorten the trial process where all other issues are settled by agreement, and the Court stated at paragraph 9: "Obviously, this court should not discourage the abbreviation of trial proceedings simply because of the restrictions in the Code on the pleas available", and yet found that it must do so. The Court went on to state at paragraph 11: "I think it would be a mistake for the court to attempt to fashion a modification to the guilty plea in the interests of the expedition of the trial process. This is a matter best left to Parliament."

30. Furthermore, Ms. Hersak referred to a case from the Court Martial Appeal Court of Canada, *R.* v. *Lachance*, [2002] CMAJ No 7, which tackled the same issue as the court in *Fegan* but noted a substantive difference between the *Criminal Code* and the *Military Rules of Evidence* as they each related to guilty pleas. The Court stated:

> [16] The entry of a guilty plea that is free, voluntary and informed of the consequences it entails for the course of the proceeding implies a waiver of the right to be tried within a reasonable time under paragraph 11(b) of the Charter. [...]
>
> [17] I confess that this conclusion, logical as it is in terms of principles, may nevertheless seem counterproductive in practical terms since it forces an accused who unsuccessfully attempts at trial to enforce his constitutional right to be tried within a reasonable time to plead not guilty and undergo a trial in regard to which he has a nullifying objection, for the sole purpose of preserving on appeal his right to the protection of paragraph 11(b) of the Charter.
>
> [...]
>
> [19] Having said that, I do not exclude the possibility that an accused may, once his motion for a stay of proceedings has been dismissed by the trial judge, in the interest of saving time and judicial resources, plead guilty after first taking pains to indicate clearly that he intends to appeal the denial of his constitutional right and that his plea of guilty, if accepted by the appeal court, cannot constitute a waiver of the paragraph 11(b) right. Paragraph 37(a) of the *Military Rules of Evidence*, supra, unlike the *Criminal Code*, allows an accused to confess his guilt "subject to variations and exceptions" and authorizes the military judge to accept such a plea. [Emphasis added.]

31. The Appeal Committee tribunal was satisfied that a "guilty plea" in a disciplinary hearing is clearly a different creature than a statutorily defined guilty plea under the *Criminal Code* or under the *Military Rules of Evidence.*

32. There was no reference to "pleas" in the *Chartered Accountants Act, 2010.* The entering into of a guilty plea in a disciplinary hearing has no legal effect other than as to the evidence to be considered by the tribunal (which is consistent with the common law position on pleas in criminal cases as noted above).

33. Unlike in a criminal trial, the Discipline Committee did not treat the guilty pleas of the Appellants as bringing the matter to an end, but instead referred to the guilty pleas along with the other evidence in coming to its determination at paragraph 64 of the Guilt Decision:

> [64] The tribunal found that the members' plea of guilty to the Allegations, as amended, and the evidence heard including the documents considered left no doubt that the required standard of proof: clear cogent and compelling, had been met.

The Discipline Committee then went on to examine the evidence in support of the plea of guilty by each of the Appellants.

34. Furthermore, the *Chartered Accountants Act, 2010* permitted an appeal of a decision of a discipline committee only where it is a final decision (Section 37(1)). Mr. Marchioni on behalf of the Appellants asserted that the Stay Decision was an interlocutory motion incapable of appeal until a final decision is made, and Ms. Hersak did not suggest that the Appellants could have brought their appeal of the Stay Decision any sooner than they did. The Appellants upon receipt of the Finding Decision of the Discipline Committee in March 2016 properly filed the Notice of Appeal in accordance with the *Chartered Accountants Act, 2010.* There is no basis in the *Chartered Accountants Act, 2010* or elsewhere to suggest that the right of appeal set out in Section 37(1) is somehow limited by the actions of the Appellants in pleading guilty or that the Appellants waived such right.

35. Finally, as stated in *Blencoe,* "there is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding" (paragraph 102). To accept the position of the PCC would place every member wishing to exercise the statutory right of appeal of the Discipline Committee's interlocutory decisions in an unfair position: they would have to choose to incur the cost and further delay of prolonging the matter until a final determination is made by the Discipline Committee or risk losing their right of appeal by pleading guilty. Both the Ontario Court of Appeal in *Fegan* and the Court Martial Appeal Court of Canada in *Lachance* struggled with the unfortunate consequence of the respective statutory provisions in those cases that required an accused to plead not guilty and undergo a trial in regard to which he has a potentially nullifying objection. To read into the *Chartered Accountants Act, 2010* a similar unfortunate consequence seems contrary to the principles of natural justice and the duty of fairness.

36. There was no indication on the record that the Appellants understood or should have expected that by pleading guilty they were waiving their statutory right to appeal the Stay Decision. The plea of guilty, which was simply an admission that was made through counsel to the Appellants with respect to matters entirely unrelated to, and preceding, the prosecution of the complaint beginning in 2007, cannot be viewed as a waiver of the Appellants' right to appeal the Stay Decision.

37. The Appeal Committee tribunal, after reviewing the materials submitted and hearing oral arguments from both the Appellants' counsel and counsel to the PCC, determined that the appeal of the Stay Decision shall proceed on the basis of all issues raised in the Notice of Appeal.

What was the standard of review for the Stay Decision?

38. The Appeal Committee tribunal heard submissions by the parties and by counsel to the tribunal on the standard of review to be applied to the appeal of the Stay Decision.

39. Counsel to the tribunal referred to the *Sazant* decision of the Ontario Court of Appeal at paragraph 227 for the standard of review of a stay motion:

> The appellant appealed the dismissal of his stay motions to the Divisional Court along with his appeal on the merits. At the outset of its analysis, the Divisional Court noted that deference was owed to the facts found by the Discipline Committee respecting prejudice and the impact of the delay on the hearing process. However, the Discipline Committee was required to be correct with respect to the legal principles that apply to the appellant's claims of abuse of process and denial of natural justice. [Emphasis added.]

40. The Appeal Committee tribunal concluded that the standard of review of the Stay Decision was as set out in *Sazant*: reasonableness in respect of factual matters and correctness in respect of legal principles.

What are the legal principles application to the Stay Decision?

41. The Appellants brought the motion for a stay of proceeding in 2014 on the basis that the delay in bringing forward the disciplinary proceedings had violated the Appellant's rights under Section 7 of the *Charter* as well as their common law rights to a fair hearing.

42. In the Notice of Appeal, the Appellants claimed that the proceedings amounted to an abuse of process arising from inordinate and unacceptable delay on the part of the PCC.

43. The source of the legal principles applicable to a motion for a stay of proceedings on the basis of delay are (i) the *Charter* and (ii) the common law or administrative law principles that an abuse of process may require a stay of proceedings.

The Charter

44. The Appellants in their factum rely primarily on *Blencoe* and *Sazant* to set out the legal principles applicable to the motion. These two cases demonstrated that the Discipline Committee correctly stated that there was no constitutional right to be tried within a reasonable time in civil or administrative proceedings.

45. Section 11(b) of the *Charter* provides that a person charged with an offence has the right "to be tried within a reasonable time", but the Supreme Court of Canada made clear in *Blencoe* that Section 11(b) only applies in criminal proceedings and not to administrative proceedings.

46. The Court went further to say that this guarantee for an accused person to be tried within a reasonable time cannot be imported into Section 7 of the *Charter*, which protects "life, liberty

and security of the person". While Section 7 is not confined to the criminal context, and Bastarache J. in *Blencoe* did not preclude the possibility that state-caused delays in human rights proceedings could trigger an individual's Section 7 rights, there was nothing in the record to suggest that the Appellants were deprived in any way of life, liberty or security of the person. In fact, the PCC did not seek an interim suspension or practice restriction pending the outcome of the proceedings, and, accordingly, the Appellants were able to practice without restriction during the course of the entire investigation and the proceedings.

47. The Appeal Committee tribunal was satisfied that Discipline Committee correctly found that the Appellants did not have a constitutional right in this case to be tried within a reasonable period of time under either section 11(b) or section 7.

The Common Law

48. The parties appeared to agree on the test to be applied under the common law to determine in the administrative context whether there has been an abuse of process as a result of delay. The Appellants (at paragraph 28 of their factum) and the PCC (at paragraph 66 of its factum) both approved of the following statement of law made by the Discipline Committee at paragraph 34:

> Delay can constitute an abuse of process in an administrative proceeding provided the delay is "inordinate" and causes "actual prejudice of such magnitude that the public's sense of decency and fairness is affected". [*Sazant*, paragraphs 198-205; 242-244]

49. There are therefore three steps to the analysis: first, there must be inordinate delay; second, there must be actual prejudice; and third, the prejudice must be of such magnitude that the public's sense of decency and fairness is affected.

50. In *Blencoe*, Bastarache J. wrote the following about the determination of whether a delay was "inordinate" and stated that there is no abuse of process by delay *per se*:

> [122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

51. Bastarache J. identified two types of prejudice: prejudice to the fairness of the hearing and other forms of prejudice such as significant psychological harm or stigma to a person's reputation:

> [102] ... Where delay impairs a party's ability to answer the complaint against him or her because, for example, memories have faded, essential witness have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy.

> [...]
>
> [115] I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

52. While the parties appeared to agree with these common law legal principles, and the Appellants did not claim that the Discipline Committee incorrectly identified the legal principles involved, the parties diverged when it came to determining if the delay in this case was inordinate, and, if the delay was inordinate, whether the Appellants' right to a fair hearing was prejudiced or the Appellants suffered significant psychological harm.

Did the Discipline Committee err in refusing to grant the stay of proceedings in the Stay Decision?

53. The first ground of appeal in the Notice of Appeal was that the Discipline Committee erred in dismissing the Appellant's application for a stay of proceedings on the basis that the proceeding amounted to an abuse of process arising from inordinate delay and unacceptable delay on the part of the PCC.

The Standard of Review

54. It is worth noting that Bastarache J. in *Blencoe* stated at paragraph 117: "Where a respondent asks for a stay, he or she will have to bear a heavy burden." The power to stay proceedings can be exercised only in the "clearest of cases" (paragraph 118) and the court must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (paragraph 119).

55. These statements together with the standard of review for this appeal described above made clear that it was a very high bar indeed for the Appellants to succeed in their appeal of the Stay Decision.

The reasonableness of the facts

56. In determining whether the Discipline Committee erred in applying the legal principles to the facts, as stated above, deference was owed to the facts found by the Discipline Committee respecting the justification for delays, prejudice and the impact of the delay on the hearing process.

57. The Discipline Committee in its Stay Decision carefully reviewed the chronology of events. Attached as "Appendix A" is a brief chronology of relevant events. At the hearing, Ms. Hersak walked the Appeal Committee tribunal through the chronology and identified the supporting evidence where applicable. The Appeal Committee tribunal found that the description of the relevant facts summarized in the Stay Decision was reasonable.

Was there inordinate delay?

58. The Discipline Committee found that the only aspect of the investigation or prosecution that was unusual or not fully justified was the period from July 2012 to July 2013 (paragraph 30 of the Stay Decision). However, the Discipline Committee concluded that this partially unexplained lack of activity and the length of the proceedings as a whole did not constitute inordinate delay (paragraph 43 of the Stay Decision). The Appeal Committee tribunal did not identify any basis to disturb these factual conclusions of the Discipline Committee.

59. The Appellants in their factum, however, identified more than 40 months of unexplained and unjustified delay comprised of two time periods, October 2008 to October 2010 and June 2012 to September 10, 2013. For the reasons below, the Appeal Committee tribunal concluded that the arguments advanced by the Appellants in this regard do not render the conclusions of the Discipline Committee unreasonable, so as to justify intervention by this tribunal.

a) October 2008 – October 2010:

60. The Appellants claimed there was no explanation for the delay during the period October 2008 to October 2010. However, paragraph 19 of the Stay Decision specifically addressed this time period as follows:

> [19] Between October 2008 and May 2009 the PCC counsel engaged in ongoing correspondence with the members and their counsel with respect to the facts underlying the fraud charges and parallel civil action brought by CIBC. Between February 2009 and the fall of 2009 the PCC attempted to obtain the disclosure package underlying the criminal charges (the Crown Brief) but were unsuccessful. Between December 2008 and August 2010, the PCC attempted to obtain cooperation and disclosure from CIBC through its internal fraud investigator and external legal counsel.

61. The Appellants did not allege that this summary of the facts was incorrect, but instead alleged that the PCC failed to provide any explanation of what occurred between August and October 2010, or why the PCC believed it would be able to access a crown brief or documentary disclosure in an unrelated and discontinued criminal and civil proceeding to which it was not a party and over which privilege and confidentiality clearly attached (Appellant's Factum, paragraph 34), or why the proceedings would stall as a result.

62. However, the Discipline Committee expressly turned its attention to these very concerns raised by the Appellants and made the following determination:

> [27] The members also assert that nothing happened between October 10, 2008 and October 2010. However, from October 2008 to August 2010 the PCC attempted to get information about the allegations of fraud. Given the obligation of the ICAO (now CPA Ontario) to act in the public interest and govern its Members, although the efforts to find out the facts concerning the alleged fraud were unsuccessful and the Allegations do not include allegations of fraud, the PCC's efforts were fully justified.

63. Ms. Hersak also identified several instances where counsel to the Appellants refused to respond to requests for information made by the PCC. Ms. Hersak in her factum at paragraph 22 points out that the Appellants had an obligation under the Rules of Professional Conduct to

fully cooperate with an investigation conducted by the PCC. At a minimum, the delay during this period could have been reduced by the Appellants complying with their professional obligations to disclose information related to criminal and civil proceedings that was in their possession and control. Regardless, the Discipline Committee provided a reasonable explanation for its decision to not include this period of time as one of unreasonable delay.

(b) June 2012 to September 10, 2013

64. While the Discipline Committee acknowledged that there was little to no activity during the period from July 2012 to July 2013, the Appellants claimed that this period of inactivity extended a further period of several weeks to September 10, 2013. The Discipline Committee did however identify that in July 2013 Ms. Thomas, the investigator appointed by the PCC to enquire into the complaint made against the Appellants by SB, advised that she was moving permanently to South Korea and prepared several affidavits during this period and so it was reasonable not to characterize this period as "unusual inactivity". In any event, whether the period of inactivity extended to July 2013 or September 10, 2013 seemed to be immaterial to the analysis of the Discipline Committee in the Stay Decision.

65. As noted above, delay *per se* is not sufficient to find an abuse of process. The delay must be inordinate. The findings of the Discipline Committee in the Stay Decision that the delay was not inordinate was a reasonable conclusion based on the application of the correct legal principles to the facts.

If the delay was inordinate, were the Appellants prejudiced?

66. Despite finding that the delay was not inordinate, the Discipline Committee went on to consider if the next part of the test had been met: were the Appellants prejudiced by the delay? The Discipline Committee concluded that the Appellants had not demonstrated the prejudice required for a stay. The Appeal Committee tribunal, after hearing from both parties, found this conclusion to be reasonable.

67. The Discipline Committee noted in the Stay Decision that Mr. Dostmohamed did not present any evidence of prejudice and addressed the assertions of prejudice by Mr. Jones. At the appeal hearing and in the Appellants' factum, no distinction was made between the two Appellants so the discussion that followed presumably applied equally to both Appellants.

68. As noted above, Bastarache J. in *Blencoe* noted that there are two types of prejudice that could result in an abuse of process: fairness of the hearing and psychological harm or stigma.

Fairness of the hearing

69. The sole basis for prejudice relating to the fairness of the hearing put forward by the Appellants was that the initial investigator Ms. Thomas resigned in 2013 and that therefore the Appellants were prevented from cross-examining a key witness. If the PCC had pursued this action with dispatch, argued the Appellants, the hearing could have been conducted prior to Ms. Thomas' resignation.

70. The Discipline Committee addressed this matter in paragraph 41 of the Stay Decision and noted that the affidavit of Ms. Thomas in essence simply put forward the documents from Mr. Jones' file and the transcript of his interviews. Ms. Hersak confirmed at the hearing that Ms.

Thomas was not a key witness for the PCC and that, although she was an investigator, her report was not filed by the PCC and was not relied upon by PCC in support of its case. Instead, the PCC relied upon transcripts of interviews she conducted with the Appellants. Ms. Thomas' affidavits were filed solely for the purpose of confirming the relevant documentation was gathered during the course of her investigation and that the interview transcripts were substantially correct. Ms. Hersak noted at paragraph 72 of her factum that the PCC's key witnesses included SB (the complainant) and Mr. Sanderson, who was appointed by the PCC to report on the Appellants' standards of practice as exhibited by the files gathered by Ms. Thomas in her investigation. While the Appellants cross-examined SB, they did not cross-examine Mr. Sanderson. They also did not retain an expert to respond to Mr. Sanderson's report despite requesting and receiving a year-long adjournment of the hearing to do so.

71. The Appeal Committee tribunal was satisfied that the Discipline Committee's conclusion that the fairness of the hearing had not been impacted by delay, given the limited role Ms. Thomas' evidence played, was a reasonable one on the record.

Psychological harm or stigma

72. The Appellants in their factum argued that they were "subject to the proceedings for over eight years. This alone could be sufficient to give rise to an abuse of process." However, in *Blencoe,* Bastarache J. made clear that delay alone was not sufficient. The Appellants did not assert any other form of psychological or other prejudice in its factum, nor did they put forward any evidence of such prejudice at the first instance.

73. The Discipline Committee in the Stay Decision reviewed the assertions made by Mr. Jones about prejudice, which included prejudice to the development of his practice as a result of the posting of the allegations, stress resulting from the complaint and the difficulty in recollection of specific events that he may be questioned about.

74. Further the Discipline Committee noted that the allegations had been put forward in June of 2014 (not January 2012 as erroneously claimed) and the hearing on the stay motion was November 2014, so the posting could not have caused a decline in his practice. Ms. Hersak also noted in her submissions that the Appellants were able to carry on their practice throughout the entire investigation and prosecution.

75. In any event, the Discipline Committee correctly noted that, based on the case law, actual prejudice must result from the delay and not the underlying circumstances, being the complaint itself.

76. The tribunal also observed that some of the delay was occasioned by the Appellants themselves, including delays in responding to the PCC to set hearing dates and refusing to provide information relating to civil and criminal proceedings against them as discussed above.

77. As a result of the foregoing, the Appeal Committee was satisfied that the decision of the Discipline Committee was reasonable and supported by its reasons. In those circumstances, there was no basis on which the Appeal Committee tribunal could properly interfere with the Stay Decision.

Additional considerations

78. Mr. Machioni included in his brief of authorities the decision of the Ontario Divisional Court in *The Law Society of Upper Canada* v. *Abbott*, 2016 ONSC 641 ("*Abbott*"). The *Abbott* decision involved a case before the Law Society Tribunal in which the Hearing Division dismissed a motion to stay the proceedings on the basis of delay and also declined to vary from the presumptive penalty (in that case, licence revocation) on the basis of the same delay. A majority of the Appeal Division of the Law Society Tribunal affirmed the decision with respect to the stay motion, but overturned the decision with respect to penalty. The majority of the Appeal Division found that a two year suspension, rather than revocation, was an appropriate disposition given the delay in the case proceeding to hearing.

79. Subsequent to the hearing date and prior to the release of these reasons, the Ontario Court of Appeal (2017 ONCA 525) allowed an appeal of the Divisional Court's decision in *Abbott* and addressed the role of an appeal tribunal when reviewing a disciplinary decision similar to the one at hand and did so in clear and forceful language that bears repeating here.

80. Although it did not relate directly to the decision on the stay motion in that case, the Court of Appeal issued a rebuke to the Appeal Division of the Law Society Tribunal with regard to overreaching the established principles of law to "send a message" about delay, stating at paragraph 92:

> The findings of the Appeal Division that the Hearing Division made errors of law reflect its strong resolve to impose a lesser penalty than revocation on Mr. Abbott in order to send a message to the Law Society that delay is unacceptable.

81. The Court of Appeal explained further at paragraphs 52, 54, 58 and 61:

> [...] the Appeal Division was required to identify an overriding error of principle made by the Hearing Division that renders its penalty decision unreasonable, in the sense given metaphorically by Stratas J.A. in *South Yukon Forest Corporation* v. *Canada* [citations omitted]:
>
> > "Overriding" means an error that goes to the very core of the outcome of the case... [I]t is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [...]
>
> Under the *Law Society Act*, questions of policy and resource allocation belong to Convocation, not to the Law Society Tribunal of which the Hearing Division and the Appeal Division form parts. Both Divisions are adjudicative bodies in the disciplinary scheme, with only limited policing functions.
>
> [...]
>
> It is serious business for an adjudicative body to disturb, on grounds of investigative and prosecutorial delay, what would otherwise be the ordinary operation of the disciplinary scheme. [Emphasis added.]

82. Similar to the Convocation under the *Law Society Act*, the Council of CPA Ontario manages and administers the institute's affairs *Chartered Accountants Act, 2010.* The Law Society Tribunal performs the adjudicative roles that the Discipline Committee and Appeal Committee perform for CPA Ontario.

83. The Appeal Committee tribunal was concerned about the length of time this matter took from the laying of the complaint in 2007 to its conclusion in the case at hand. However, the tribunal recognized that it was inappropriate for an adjudicative body to use its position to "send a message" to the PCC in a manner that was inconsistent with the applicable principles of law. The Appeal Committee tribunal recognized that the correct avenue to make such statements would be to the Council of CPA Ontario in their capacities as members and not through its decision in this matter.

Did the Discipline Committee err in making the Cost Order against the Appellants?

The question on appeal

84. The Appellants' second ground of appeal was that the Discipline Committee erred in awarding costs in favour of the PCC and in failing to properly consider delay as a factor in its assessment and fixing of costs in the Cost Order. The Appellants asked in the Notice of Appeal for an order setting aside the Cost Order and that the costs of the proceeding be awarded in favour of the Appellants (discussed further below) on a substantial indemnity scale or in the alternative that each party to the proceeding bear its own costs.

85. Mr. Marchioni in oral argument clarified that the ground of appeal was more narrowly stated as the Discipline Committee failed to properly consider delay, and not more generally that the Discipline Committee erred in awarding costs in favour of the PCC.

86. In any event, the Appeal Committee tribunal found no error that would merit disturbing the Costs Order.

The Legislative Framework

87. Section 38(1) of the *Chartered Accountants Act, 2010* provides that the Discipline Committee may award the costs of a proceeding before it against the member or firm that is the subject of the proceeding, in accordance with its procedural rules.

88. Rule 19.01 of CPA Ontario's Rules of Practice and Procedure states that where a tribunal has made a determination in a hearing that is adverse to a party other than the Institute (now CPA Ontario), the tribunal may make an order requiring the party to pay all or part of the Institute's legal costs and expenses, and costs and expenses incurred in investigating the matter and in preparing for and conducting the hearing as well as the costs and expenses of the hearing.

89. Considerable deference is owed to the Discipline Committee with respect to a costs award. This deference reflects the fact that the award is an exercise of discretion and that the Discipline Committee, having heard the matter, is in the best position to exercise its discretion. The appeal body may interfere with the costs award made by an adjudicative tribunal only if the costs award is clearly wrong or the adjudicator made an error in principle: *Hamilton* v. *Open Window Bakery Limited*, [2004] 1 S.C.R. 303 at paragraph 27.

The Costs Order

90. The Discipline Committee provided its reasons for the Costs Order in its July 8, 2016 decision. The Discipline Committee correctly stated the law. In the view of the Appeal Committee tribunal, there was no error in principle. There was nothing to suggest the Costs Order was clearly wrong. In these circumstances, the Appeal Committee tribunal dismissed the appeal of the Costs Order.

Consideration of Delay

91. The Appellants take the position that failure to consider delay in imposing a penalty was an unreasonable exercise of discretion and that the Appeal Committee tribunal should set aside the Costs Order. Mr. Marchioni submitted that the Discipline Committee did not consider, either explicitly or implicitly, the impact of the delay as it related to the decision on costs and in so doing erred in law.

92. Contrary to Mr. Marchioni's assertions, it was clear from the Cost Order that the Discipline Committee did turn its mind to the length of time (at paragraph 90, the Discipline Committee wrote "The proceedings were prolonged...") and the Discipline Committee summarized the motion for stay as a result of delay and in particular the delay partially caused by the investigator, Ms. Thomas, moving overseas (at paragraphs 3-6 of the Cost Order). Furthermore, the results of perceived delay relating to Ms. Thomas were taken into account by approving a reduction in costs of over 20% as a result of any actual or apparent overlap in the investigators' work (at paragraph 91 of the Cost Order).

93. The Appeal Committee tribunal noted that a review of the hearing transcripts demonstrated that Mr. Marchioni did not raise delay as a factor for the Discipline Committee to consider. In the view of the tribunal, in these circumstances, it is difficult, if not impossible, for the Appellants in the present appeal to argue that the alleged failure of the Discipline Committee to consider the delay was so significant that it was a reversible error. Nevertheless, the Discipline Committee clearly was alive to the facts relating to the length of the proceedings and the cause of the perceived delay when it exercised its discretion in the Cost Order as noted above.

94. Finally, Mr. Marchioni referred to several cases for the propositions that delay should be a factor in cost determinations and that costs may be inappropriate as a result of the delay. The fact that the Discipline Committee did not use the power to award costs in a manner that compensated the Appellants for delay does not mean that delay was "off the table" as Mr. Marchioni suggested, with reference to the language used in *Wachtler* v. *College of Physicians and Surgeons of Alberta* [2009] A.J. No. 347 (C.A.) at paragraph 45. The Discipline Committee reduced the already reduced cost outline presented to it by 50% (as was the practice at the time and as further discussed below), noting at paragraph 93 of the Cost Order: "Other concerns raised by Mr. Marchioni, in the tribunal's view, were more than resolved by the 50% reduction." The Appeal Committee tribunal was satisfied that, even though Mr. Marchioni did not actually raise delay as a concern at the hearing, the Discipline Committee reasonably exercised its discretion in concluding that any concerns about delay would not warrant any further reduction in the costs award.

Should the Discipline Committee have awarded costs in favour of the Appellants?

95. The third and final ground of appeal in the Notice of Appeal was that the Discipline Committee erred in failing to award costs in favour of the Appellants as a result of the delay.

96. Mr. Machioni did not address this ground of appeal at the hearing before the Appeal Committee tribunal and stated following the end of his oral submissions on further questioning that the Appellants were withdrawing this aspect of the appeal.

97. As noted above, the *Chartered Accountants Act, 2010* expressly provided in Section 38(1) only for costs to be awarded against the member or firm that was the subject of a proceeding. Neither the Discipline Committee nor the Appeal Committee tribunal had the statutory authority to order costs against CPA Ontario in favour of the Appellants. This ground of appeal would have failed.

98. Furthermore, given that the Cost Order against the Appellants was upheld for the reasons set out above, it would have been unnecessary to consider this third ground of appeal in any event.

Should the Appellants pay costs in respect of the appeal?

99. After receiving the costs outline prepared by Ms. Hersak and hearing from both parties, the Appeal Committee tribunal ordered the Appellants to pay costs of $12,000 to CPA Ontario in respect of the present appeal.

The statutory framework regarding costs

100. The *Chartered Accountants Act, 2010* provides to the Appeal Committee the same power to award costs as described above in respect of the Discipline Committee. Section 38(2) states:

> An appeal committee may award the costs of a proceeding before it under Section 37 against the member or firm that is the subject of the proceeding, in accordance with its procedural rules.

101. Further, Section 38(3) states:

> The costs ordered under subsection (1) or (2) may include costs incurred by the Institute arising from the investigation, [...], prosecution, hearing and, if applicable, appeal of the matter that is the subject of the proceeding.

102. Section 19.01 of the Rules of Practice and Procedure of CPA Ontario state:

> (1) Where a tribunal has made a determination in a hearing that is adverse to a party other than the Institute, the tribunal may make an order requiring that party to pay all or part of,
>
> a. the Institute's legal costs and expenses;
> b. the Institute's costs and expenses incurred in investigating the matter, including any costs and expenses incurred in any further investigation;
> c. the Institute's costs and expenses incurred in preparing for and conducting the hearing;

d. the costs and expenses of the hearing; and
e. the Institute's costs and expenses incurred in monitoring, ensuring compliance with and fulfilling any decision or order of the tribunal.

103. Section 19.02 of the Rules of Practice and Procedure of CPA Ontario state:

(1) Where a party other than the Institute has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the tribunal may make an order awarding such costs as are just.
(2) An order under subrule (1) may be made by the tribunal on its own motion or on the motion of the Institute.

104. An award of costs is primarily an indemnity and not a penalty. Costs follow the decision and are only ordered against a member where the determination is made against that member and only with respect to costs and expenses contemplated by the provisions referred to above.

The practice of the PCC with respect to costs

105. It is the practice of the PCC to present a very comprehensive costs outline in its submissions on costs. The costs outline includes sufficient detail for the tribunal to assess the calculation of the costs submitted. The cost outline does not address all of the actual costs associated with a matter that could be included pursuant to the Rules of Practice and Procedure, for example it does not include the per diem and travel costs paid to the tribunal members, the costs of photocopies and couriers, etc. The notional hourly rates used to determine counsel fees are far below the market rates. In all respects, the costs outline is a conservative analysis of the actual costs and expenses incurred by CPA Ontario.

106. It has been the practice of the PCC to request only 50% of the costs as calculated in the costs outline, and recently such practice has been changed to request two-thirds of the costs. Presumably the reason that the PCC submits significantly less than the actual cost is so that the costs borne by the member subject to the hearing are determined conservatively and also so that the parties avoid too much haggling over the calculations or the inclusions. In addition, a portion of the costs is to be borne by the member who is the subject of the hearing and a portion is to be borne by the membership as a whole. This cost assignment reinforces the notion that a cost award is an indemnity for costs that are clearly and properly incurred and not a penalty in the nature of a fine.

107. It is also the practice of the PCC in its cost outline to helpfully set out the factors that courts would take into account in situations where the Rules of Civil Procedure would apply to a determination of costs as follows:

a) The amount claimed and the amount recovered in the proceeding;

b) The complexity of the proceeding;

c) The importance of the issues;

d) The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

e) Whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution;

f) A party's denial or refusal to admit anything that should have been admitted;

g) The experience of the party's lawyer;

h) Any other matters relevant to the question of costs; and

i) The hours spent, rates sought for costs and the rate actually charge by the party's lawyer.

108. It is of course open to a tribunal to order costs that are more or less than what the PCC submits.

Application to the present appeal

109. The present appeal was dismissed in its entirety and therefore pursuant to the statutory framework set out above the Appeal Committee tribunal may make an award of costs against the Appellants.

110. Ms. Hersak appeared at the second day of hearings with a costs outline (Exhibit 2) prepared with an estimated total cost of $25,690, comprised of $15,600 in counsel fees for hearing preparation, $5,460 for counsel fees for hearing attendance and $4,630 as disbursements. The disbursements were for the notional fees of counsel to the tribunal and for a court reporter at the hearing. Mr. Marchioni did not object to most of the costs claimed, although he questioned whether the costs of two counsel for the PCC were excessive.

111. After submissions by the parties and at the invitation of Ms. Hersak, the Appeal Committee tribunal suggested reducing the counsel fee for hearing attendance by $1,690 as a result of the fact that the second day of hearings in May 2017 did not take a full day, bringing the total cost to $24,000. In all other respects, the cost outline was accepted by the Appeal Committee tribunal as a fair assessment of the costs and expenses described therein and reasonable, taking into account the complexity of the issues and the following factors:

a) The issues raised in the appeal were important and complex. For example, it is rare for a *Charter* challenge to be brought before the Appeal Committee;

b) The question of whether a party that has pleaded guilty can subsequently appeal an interlocutory motion in these circumstances was novel, and Mr. Marchioni did not reply in writing to this issue once it was raised by the PCC in its factum, resulting in a more lengthy hearing on the topic than might otherwise be required;

c) The Appellants' request for a cost order in favour of the Appellants was clearly outside of the powers granted under the *Chartered Accountants Act, 2010* and was therefore unreasonable. Mr. Marchioni failed to notify the tribunal and Ms. Hersak that he was abandoning this third ground of appeal until after he completed his oral submissions at the hearing, resulting in wasted efforts;

d) Mr. Machioni had not raised the issue of delay in his cost submissions before the Discipline Committee making it more difficult to respond on appeal as the issue had not been fully argued at first instance; and,

e) Ms. Hersak was a very experienced counsel and justifiably required the additional support of Ms. Gentili to address the complex issues raised in this appeal.

112. The Appeal Committee ordered that 50% of this amount, or $12,000, be paid by the Appellants jointly as the costs of the appeal.

113. There was ample justification for a higher cost award as a result of the factors set out above. The PCC could have reasonably asked for a higher percentage than 50% of the total costs in the cost outline, as has become the current practice. The Appeal Committee tribunal, however, in making this award of costs against the Appellants was cognizant that the proceedings had been lengthy and difficult (although there was no suggestion of unreasonable delay in the resolution of the appeal to which the cost order relates) and also that a costs award should not be a deterrent to members to appeal decisions of the Discipline Committee where warranted.

DATED AT TORONTO THIS 22 DAY OF JANUARY, 2018
BY ORDER OF THE APPEAL COMMITTEE

D.A. ROBERTSON, FCPA, FCA – CHAIR
APPEAL COMMITTEE

MEMBERS OF THE TRIBUNAL:
D.W. DAFOE, FCPA, FCA
J.A. NIGHTINGALE, CPA, CA
K. WEST (PUBLIC REPRESENTATIVE)

Appendix A

Chronology of Events

2007

December 2007	SB filed a complaint with the Institute of Chartered Accountants of Ontario and provided a copy of the decision of the Ontario Securities Commission which stated that Mr. Dostmohamed, one of the Appellants. had criminal charges made against him arising from certain transactions with CIBC ("**Criminal Charges**").

2008

April 8, 2008	Ms. Alison Thomas was appointed investigator to enquire into the complaint made against the Appellants by SB.
May 23, 2008 and June 17, 2008	Ms. Thomas conducted interviews with the Appellants.
September 10, 2008	Ms. Thomas delivered a report and a document brief to the PCC (the "**Thomas Report**").
September 23, 2008	The Appellants and their legal counsel meet with the PCC. The Thomas Report was considered by the PCC.
October 10, 2008	The Appellants were advised by the PCC that further information needed to be obtained.

2008 - 2009

October 2008 to May 2009	Thomas and PCC counsel corresponded with the Appellants with respect to the facts underlying the Criminal Charges.

2009

February 2009 to Fall 2009	PCC unsuccessfully attempted to obtain the disclosure package underlying the Criminal Charges from the Toronto Police Services.

2008 - 2010

December 2008 to August 2010	PCC unsuccessfully attempted to obtain cooperation and disclosure form CIBC regarding the Criminal Charges.

2010

October 5, 2010	Mr. W. David Sanderson was appointed by the PCC to report on the Appellants' standards of practice.
December 17, 2010	Mr. Sanderson delivered his report.

2011

June 2011	The Allegations were drafted. The PCC learned that SB had moved to the United Kingdom in January 2011.

2012

January 12, 2012	The Allegations of professional misconduct against the Appellants were signed by the PCC Chair.
April 10 and April 12, 2012	The Allegations were served and filed with the Adjudicative Tribunals Secretary.
April 10 – June 11, 2012	The PCC made several requests for the Appellants' availability for the discipline hearing.
July 2012	Ms. Thomas advised that she had left her firm to return to school.

2013

July 23, 2013	Ms. Thomas advised that she was moving to South Korea permanently and swore affidavits related to her investigation prior to leaving the country.
September 10, 2013	PCC requested a pre-hearing conference be scheduled in October or November 2013.
December, 2013	The pre-hearing conference was held.

2013 - 2014

December 2013 to April 4, 2014	Correspondence between the parties with respect to possible settlement.

2014

April – June 2014	Correspondence between the parties to set a hearing date. The hearing dates were confirmed for June 17-18, 2014 and November 24-26, 2014.
June 24, 2014	Allegations against the Appellants were posted on the CPA Ontario website.
September 23, 2014	The Discipline Committee heard a preliminary motion for stay brought by the Appellants on the basis that there was a delay in bringing forward the disciplinary proceedings. The Discipline Committee dismissed the motion.
November 24, 2014	The hearing was held before the Discipline Committee.
November 24, 2014	The Appellants pleaded not guilty. SB testified, and the hearing was adjourned until March 2 and 3, 2015.

2015

March 2 and 3, 2015	The hearing re-convened. Sanderson provided opinion evidence. Adjournment was requested by the Appellants' counsel in order to obtain an expert.
July, August and September 2015	The PCC wrote to the Appellants' counsel to find out when they would be receiving the expert report. No reply was received.
November 2015	PCC made a request to schedule the balance of the hearing. The Appellants were directed to obtain an expert by December 2015 and to file a report by January 29, 2016. The hearing was set to resume in March or April 2016. An expert report was never provided by the Appellants.

2016

March 2 and 4, 2016	The hearing re-convened. The Appellants changed their plea to guilty of the allegations. The Discipline Committee found the Appellants guilty of professional misconduct. Submissions on costs were also heard at that time.