

Fraser Paul Kelly: Summary, as Published in *CheckMark*

Fraser Paul Kelly, of Sault St. Marie, was found guilty of a charge of professional misconduct, under Rule 202, of failing to perform his professional services with integrity and due care. He signed or associated himself with the personal tax returns of two clients without taking adequate steps to satisfy himself as to the requirement to report the clients' receipt of approximately \$250,000 each from the sale of certain site rights. After deciding that the clients' tax returns should report these receipts, Mr. Kelly improperly signed or associated himself with the returns when the amounts were not reported, and continued to act for the clients knowing that they were aware that their returns substantially understated the tax owing by them. He was fined \$10,000 and suspended for six months.

Mr. Kelly returned to MEMBERSHIP IN GOOD STANDING on December 14, 1994

CHARGE(S) LAID re Fraser Paul Kelly

The Professional Conduct Committee hereby makes the following charges against Fraser P. Kelly, CA, a member of the Institute:

1. ~~THAT, the said Fraser P. Kelly, CA, in or about April 1989 signed or associated himself with the 1988 tax returns of Douglas Seal and Peter Mitchell when he knew or should have known that the said returns were false or misleading, contrary to Rule 205 of the rules of professional conduct. (*withdrawn by the PCC. BWS*)~~
2. ~~THAT, the said Fraser P. Kelly, CA, in or about April 1989 failed to conduct himself in a manner which will maintain the good reputation of the profession contrary to Rule 201 of the rules of professional conduct in that while engaged by Douglas Seal and Peter Mitchell to prepare their 1988 tax return he failed to take reasonable steps to ensure the accurate reporting of all income which he believed should have been reported. (*withdrawn by the PCC. BWS*)~~
3. THAT, the said Fraser P. Kelly, CA, in or about the period April 1989 to July 1991 failed to perform his professional services with integrity and due care contrary to Rule 202 of the rules of professional conduct in that:
 - (a) he signed or associated himself with the 1988 personal tax returns of his clients Douglas Seal and Peter Mitchell without taking adequate steps to satisfy himself as to the requirement to report their receipt of approximately \$250,000 each as their respective shares of the sale of certain site rights in 1988;
 - (b) having decided that the 1988 personal tax returns of his clients Douglas Seal and Peter Mitchell should report approximately \$250,000 each as their respective shares of the sale of certain site rights, he improperly signed or associated himself with those returns when those amounts were not reported; and
 - (c) he continued to act for his clients Douglas Seal and Peter Mitchell knowing that they were aware that their filed 1988 personal tax returns substantially understated the tax owing by each of them.

DATED at Toronto this 21st day of January 1994.

J.L.M. BADALI, FCA – CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Fraser Paul Kelly

DECISION AND ORDER IN THE MATTER OF: Charges against **FRASER PAUL KELLY, CA**, a member of the Institute, under **Rules 201, 202 and 205** of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE FEBRUARY 8, 1994

DECISION

THAT, having seen, heard and considered the evidence, and having heard the plea of guilty to charge No. 3, charges Nos. 1 and 2 having been withdrawn, THE DISCIPLINE COMMITTEE FINDS Fraser Paul Kelly guilty of charge No. 3.

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Kelly be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Kelly be and he is hereby fined the sum of \$10,000, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Kelly 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.
4. THAT notice of this Decision and Order, disclosing Mr. Kelly's name, be given after this Decision and Order becomes final under the bylaws:
 - (a) by publication in *CheckMark*;
 - (b) to the Public Accountants Council for the Province of Ontario; and
 - (c) to the Canadian Institute of Chartered Accountants.
5. THAT Mr. Kelly surrender his certificate of membership in the Institute to the registrar of the Institute within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held by the registrar during the period of suspension and thereafter returned to Mr. Kelly.
6. THAT in the event Mr. Kelly fails to comply with any of the requirements of this Order within the time periods specified, he shall thereupon be suspended from the rights and privileges of membership in the Institute, and notice of his suspension, disclosing his name, shall be given in the manner specified in paragraph 4 hereof.
7. THAT in the event Mr. Kelly is suspended pursuant to paragraph 6 hereof, the suspension shall terminate upon his compliance with all the terms of the Order, provided that he complies within thirty (30) days from the date of his suspension.

8. THAT in the event Mr. Kelly fails to terminate a suspension imposed pursuant to paragraph 6 hereof within the thirty (30) day period specified in paragraph 7, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified in paragraph 4 hereof.

DATED AT TORONTO THIS 10TH DAY OF FEBRUARY, 1994
BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY - DISCIPLINE COMMITTEE

DISCIPLINE COMMITTEE re Fraser Paul Kelly

REASONS FOR THE DECISION AND ORDER IN THE MATTER OF: Charges against **FRASER PAUL KELLY, CA**, a member of the Institute, under **Rules 201, 202, and 205** of the Rules of Professional Conduct, as amended.

WRITTEN REASONS FOR THE DECISION AND ORDER MADE FEBRUARY 8, 1994

These proceedings before this panel of the discipline committee of the Institute of Chartered Accountants of Ontario were held on February 7 and 8, 1994.

Ms. D.A. McPhadden attended on behalf of the professional conduct committee. Mr. Kelly attended with his counsel, Mr. D.C. McTavish.

Three charges had been laid against Mr. Kelly by the professional conduct committee. At the commencement of the hearing, counsel for the professional conduct committee brought a motion to amend these charges. After hearing submissions from both counsel, the panel allowed the amendment, noting that proper notice of the proposed amendment, pursuant to Bylaw 87(2)(l), had been given to Mr. Kelly. As a result, amended charges dated January 21, 1994 were filed as an exhibit, and Mr. Kelly pleaded not guilty to them.

At the commencement of the second day of the hearing, the professional conduct committee withdrew charges Nos. 1 and 2, whereupon Mr. Kelly pled guilty to charge No. 3, which read as follows:

THAT, the said Fraser P. Kelly, CA, in or about the period April 1989 to July 1991 failed to perform his professional services with integrity and due care contrary to Rule 202 of the rules of professional conduct in that:

1. he signed or associated himself with the 1988 personal tax returns of his clients Douglas Seal and Peter Mitchell without taking adequate steps to satisfy himself as to the requirement to report their receipt of approximately \$250,000 each as their respective shares of the sale of certain site rights in 1988;
2. having decided that the 1988 personal tax returns of his clients Douglas Seal and Peter Mitchell should report approximately \$250,000 each as their respective shares of the sale of certain site rights, he improperly signed or associated himself with those returns when those amounts were not reported; and
3. he continued to act for his clients Douglas Seal and Peter Mitchell knowing that they were aware that their filed 1988 personal tax returns substantially understated the tax owing by each of them.

Counsel for the professional conduct committee and Mr. Kelly's counsel each filed a document brief. Based upon the evidence filed, the testimony of the professional conduct committee's investigator Mr. F.S. Mallett, FCA, and Mr. Kelly's plea of guilty, the panel found Mr. Kelly guilty of charge No. 3.

Counsel then presented submissions on the issue of sanction, in which they agreed that a fine of between \$3,000 and \$5,000, and a suspension of between three and six months, were appropriate in this case. A majority of the panel, however, did not agree. After advising counsel of its position, and giving them the opportunity to make further submissions, the panel deliberated and made the following order:

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Kelly be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Kelly be and he is hereby fined the sum of \$10,000, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Kelly 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.
4. THAT notice of this Decision and Order, disclosing Mr. Kelly's name, be given after this Decision and Order becomes final under the bylaws:
 - (a) by publication in *CheckMark*;
 - (b) to the Public Accountants Council for the Province of Ontario; and
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5. THAT Mr. Kelly surrender his certificate of membership in the Institute to the registrar of the Institute within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held by the registrar during the period of suspension and thereafter returned to Mr. Kelly.
6. THAT in the event Mr. Kelly fails to comply with any of the requirements of this Order within the time periods specified, he shall thereupon be suspended from the rights and privileges of membership in the Institute, and notice of his suspension, disclosing his name, shall be given in the manner specified in paragraph 4 hereof.
7. THAT in the event Mr. Kelly is suspended pursuant to paragraph 6 hereof, the suspension shall terminate upon his compliance with all the terms of the Order, provided that he complies within thirty (30) days from the date of his suspension.
8. THAT in the event Mr. Kelly fails to terminate a suspension imposed pursuant to paragraph 6 hereof within the thirty (30) day period specified in paragraph 7, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified in paragraph 4 hereof.

The reasoning behind the panel's order as to sanction is set out below. In reaching its conclusions, the panel considered the issues of general deterrence and specific deterrence. Because the panel heard representations that Mr. Kelly had retired from public practice as of January 1, 1994, the panel did not consider rehabilitation to be an issue. The panel was unanimous in its view as to the appropriate sanctions except in respect of the quantum of fine.

Reprimand

The panel believes that a reprimand in writing from the chair of the hearing serves to stress to Mr. Kelly the inappropriateness of his conduct as a chartered accountant. Such a document also serves as a reminder to him of his failure to comply with the standards of the profession and to execute his duties with the requisite integrity and due care.

Fine

In determining a suitable quantum for a fine, the panel considered that the imposition of a fine was not only a specific deterrent, but also a general one. The panel also considered the general deterrent impact of the coupling of a fine with a suspension. As both counsel's original submissions dealt with a fine only as a specific deterrent, the panel thought it appropriate to ask counsel to consider and make submissions on the issue of a fine coupled with a suspension as a general deterrent. The subsequent submissions of counsel, however, focused on the specific dollar amount of a fine and the specific term of a suspension rather than on the reasoning for their imposition.

In view of the evidence submitted and argument heard, a majority of the panel concluded that a larger fine than that proposed by counsel should be coupled with a suspension, in order to most effectively send the message to other members of the profession, whether in public practice or not, and to the general public, that integrity and due care are considered hallmarks of the profession and breaches of them are dealt with seriously. The opinion of two members of the panel, who disagreed with the size of the fine imposed by the majority, is set out at the end of these reasons.

Suspension

As Mr. Kelly is retired from practice, the panel is aware that a suspension may have little if any specific deterrent impact upon him. Nevertheless, the panel is of the view that a suspension is appropriate as a general deterrent and that, considering the accompanying fine, six months is an appropriate term.

On hearing the order of the panel, counsel for Mr. Kelly asked that the commencement of the suspension be deferred to a stated date to be more convenient to Mr. Kelly. The panel refused the request.

Notice

Publication of the decision and order, disclosing Mr. Kelly's name, is one of the most effective general deterrents available. Notifying members of the Institute's efforts in disciplining those in breach of its rules of professional conduct is an important function to the governance of the profession, which, in the opinion of the panel, helps to promote compliance.

Minority opinion as to the appropriate fine

Two members of this panel dissented in respect of the size of the fine imposed by the majority against Mr. Kelly. The dissenting panel members had no disagreement with the finding of the member guilty, or with the other sanctions imposed.

The panel was presented with a joint submission on sanctions recommending a period of suspension of between three and six months, and a fine of between \$3,000 and \$5,000. Upon deliberation, the dissenting panel members came to the view that the upper end of the

recommended range for both the suspension and the fine represented the appropriate penalty in this case, considering the nature of the charge and Mr. Kelly's retirement from practice.

Accordingly, the minority would have imposed a fine of \$5,000. In all other respects, the dissenting panel members concur in the decisions of the majority.

DATED AT TORONTO, THIS _____ DAY OF _____, 1994
BY ORDER OF THE DISCIPLINE COMMITTEE

F.A. DROZD, FCA - DEPUTY CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

L.P. BOOKMAN, CA
F.J. DUNN, CA (*dissenting in part*)
P. RAYSON, CA
S.F. ANDRUNYK (Public representative) (*dissenting in part*)