

## **Gerald W. Francis: Summary, as Published in *CheckMark***

**Gerald W. Francis**, of Markham, was found guilty of one charge under Rule 201.1 of failing to maintain the good reputation of the profession and its ability to serve the public interest, and one charge under Rule 218 of failing to retain for a reasonable period of time such working papers, records or other documentation which reasonably evidenced the nature and extent of work done in the course of a professional engagement. Without a client's knowledge or instructions, Mr. Francis performed a professional engagement on the client's behalf. He certified information which he knew was to be used in connection with the transfer of his client's RRSP funds for the purpose of purchasing shares of a private corporation. In so doing, he certified that the fair market value of the shares to be purchased was correct, and that the shares would be a qualified investment for his client's RRSP, without having any reasonable basis for such certification. He then failed to take reasonable steps to protect his working paper files, resulting in the destruction of his records relating to this matter. Mr. Francis was fined \$5,000, charged costs of \$7,500, ordered to complete a professional development course, and suspended for three months.

## CHARGE(S) LAID re Gerald W. Francis

The Professional Conduct Committee hereby makes the following charges against Gerald W. Francis, CA, a member of the Institute:

1. THAT, the said Gerald W. Francis, on or about the 29<sup>th</sup> day of January 1999, 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;
  - (i) he certified that information set out in an RRSP AND RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE was correct and that the shares in the named corporation would be a qualified investment in the RRSP or RRIF of the annuitant when he had no reasonable basis upon which to base his certification;
  - (ii) he purported to act on behalf of his client, Ronald Hutton, in certifying as correct information contained in an RRSP AND RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE when he had not spoken to nor received instruction from his client to act.
2. *WITHDRAWN BY P.C.C. ON MARCH 11, 2003*
3. THAT, the said Gerald W. Francis, in or about the period January 29, 1999 through February 2001, ~~having been engaged to provide professional services to Ronald Hutton, Essex Capital Management Ltd. And Nelbar Financial Corporation,~~ failed to retain for a reasonable period of time such working papers, records or other documentation which reasonably evidenced the nature and extent of work done in the course of ~~his~~ **a professional engagement to certify information set out in an RRSP and RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE**, contrary to Rule 218 of the Rules of Professional Conduct.

*AMENDED AT HEARING MARCH 11, 2003*

Dated at Toronto, this 19th day of November, 2002

G.W. MILLS, CA - CHAIR  
PROFESSIONAL CONDUCT COMMITTEE

## **DISCIPLINE COMMITTEE re Gerald W. Francis**

**DECISION AND ORDER IN THE MATTER OF:** Charges against **GERALD W. FRANCIS, CA**, a member of the Institute, under **Rules 201.1, 205(a) and 218** of the Rules of Professional Conduct, as amended.

**DECISION AND ORDER MADE MARCH 11, 2003**

### **DECISION**

THAT, having seen, heard and considered the evidence, including the agreed statement of facts, filed, charge No. 2 having been withdrawn by the professional conduct committee, and charge No. 3 having been amended, and having heard the plea of guilty to particular (i) of charge No. 1 and to charge No. 3, the Discipline Committee finds Gerald W. Francis guilty of charges Nos. 1 and 3, as amended.

### **ORDER**

IT IS ORDERED in respect of the charges:

1. THAT Mr. Francis be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Francis be and he is hereby fined the sum of \$5,000, 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. Francis be and he is hereby charged costs fixed at \$7,500, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Francis be suspended from the rights and privileges of membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.
5. THAT Mr. Francis be and he is hereby required to complete, by paying for and attending in its entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the professional development course *Staying Out of Trouble*, made available through the Institute, or, in the event the course becomes unavailable, the successor course which takes its place.
6. THAT notice of this Decision and Order, disclosing Mr. Francis' 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*.

7. THAT Mr. Francis 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. Francis.
8. THAT in the event Mr. Francis fails to comply with any of the requirements of this Order, 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 above and in *The Globe and Mail*.

DATED AT TORONTO THIS 13TH DAY OF MARCH, 2003  
BY ORDER OF THE DISCIPLINE COMMITTEE

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

## **DISCIPLINE COMMITTEE re Gerald W. Francis**

**REASONS FOR DECISION AND ORDER IN THE MATTER OF:** Charges against **GERALD W. FRANCIS, CA**, a member of the Institute, under **Rules 201.1, 205(a) and 218** of the Rules of Professional Conduct, as amended.

### **REASONS FOR THE DECISION AND ORDER MADE MARCH 11, 2003**

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario convened on March 11, 2003 to hear charges brought by the professional conduct committee against Gerald W. Francis, a member of the Institute.
2. The professional conduct committee was represented by Mr. Paul Farley, who was accompanied by Mr. Robert Chambers, the investigator appointed by the professional conduct committee. Mr. Francis, who was present, was represented by Mr. James Lane.
3. The formal decision and order made on March 11 was signed by the discipline committee secretary and sent to Mr. Francis on March 13. These reasons, given pursuant to Bylaw 574, include the charges, the decision and the order as well as the reasons of the discipline committee.

### **DECISION ON THE CHARGES**

4. After the hearing had been called to order, and the notice of assignment hearing, notice of hearing and charges had been marked as Exhibits 1, 2 and 3, respectively, Mr. Farley advised that there were some preliminary matters to be dealt with, namely the withdrawing of charge No. 2 and the amending of charge No. 3. On consent, the amendments were made to charge No. 3, and charge No. 2 was withdrawn.
5. The charges, as amended, read as follows:
  1. THAT, the said Gerald W. Francis, on or about the 29<sup>th</sup> day of January 1999, 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;
    - (i) he certified that information set out in an RRSP AND RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE was correct and that the shares in the named corporation would be a qualified investment in the RRSP or RRIF of the annuitant when he had no reasonable basis upon which to base his certification;
    - (ii) he purported to act on behalf of his client, Ronald Hutton, in certifying as correct information contained in an RRSP AND RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE when he had not spoken to nor received instruction from his client to act.

3. THAT, the said Gerald W. Francis, in or about the period January 29, 1999 through February 2001, failed to retain for a reasonable period of time such working papers, records or other documentation which reasonably evidenced the nature and extent of work done in the course of a professional engagement to certify information set out in an RRSP AND RRIF PRIVATE CORPORATION SHARE QUESTIONNAIRE, contrary to Rule 218 of the Rules of Professional Conduct.
6. Mr. Francis entered a plea of guilty to particular (i) of charge No. 1, a plea of not guilty to particular (ii) of charge No. 1, and a plea of guilty to charge No. 3, as amended.
7. Mr. Francis confirmed for the record that he understood that on the basis of his plea and on that basis alone, he could be found guilty of charges No. 1 and 3.
8. Mr. Farley gave a brief overview of the case for the professional conduct committee, and filed an agreed statement of facts and a document brief. The parties were excused while the panel read these documents.
9. When the hearing reconvened, Mr. Farley called Mr. Chambers who testified concerning his interview with Mr. Francis and the circumstances which gave rise to the charges. Mr. Chambers was not cross-examined by Mr. Lane and Mr. Farley presented no other evidence. Mr. Lane did not call evidence and said he would rely on the agreed statement of facts.
10. The document brief contained, among other things:
  - details of the locked-in pension of Mr. Francis' client Ronald Hutton;
  - various documents and correspondence involving the acquisition by Mr. Hutton's RRSP of shares in the Essex Group of Companies; and
  - an *RRSP and RRIF Private Corporation Share Questionnaire*, pursuant to which Mr. Francis certified that the fair market value of the shares of the Essex Group of Companies Limited stated in the questionnaire document was correct to the best of his knowledge, and that the shares would be a qualified investment in Mr. Hutton's RRSP.
11. The essence of the misconduct alleged against Mr. Francis was that without any instructions from his client Ronald Hutton he performed a professional engagement on his client's behalf and certified information contained in an *RRSP And RRIF Private Corporation Share Questionnaire* which he knew was to be submitted to TD Trust to effect the transfer of Mr. Hutton's RRSP funds to the Essex Group. In doing so, he certified that the fair market value of the Essex shares stated in the questionnaire document were correct, and that the shares would be a qualified investment in Mr. Hutton's RRSP, without having any reasonable basis for such certification.

12. The defence to particular (ii) of charge No. 1, that he acted without instructions from his client, was that it was not professional misconduct for Mr. Francis to act on behalf of Mr. Hutton without speaking to him or receiving explicit instructions from him because in the particular circumstances of this case it was reasonable for him to do so, and because he was in effect acting as an agent of necessity for Mr. Hutton in so doing.

13. Ronald Hutton, a professional engineer, and his wife Gloria, were referred to Mr. Francis in 1992 by Mr. George Allen. Mr. Allen had been the Huttons' financial advisor for a number of years. Mr. Francis had also known Mr. Allen for some time and trusted him, as evidenced by the fact that he had invested his own money with Mr. Allen.

14. Mr. Francis did the Huttons' personal income tax returns from 1992 to 1999. Mr. Hutton retired from employment in 1996 with a company pension. In December 1998 he was advised by his former employer of the partial windup of this pension plan. As a result of this partial winding up, Mr. Hutton received the sum of \$499,103, all of which he used in January 1999 to purchase shares in Mr. Allen's company Essex Group. Mr. Francis did not provide any advice to Mr. Hutton with respect to this investment.

15. On January 29, 1999, Mr. Allen arrived at Mr. Francis' office requesting an urgent meeting regarding Mr. Hutton's investment in Mr. Allen's company. They met for about 90 minutes. Mr. Allen reviewed with Mr. Francis the documentation which Mr. Hutton had signed in respect of the transfer of his pension funds from TD Trust to Essex, including his certification that the Essex shares purchased would be qualified investments, and his undertaking to provide the necessary proof of this. However, in order to qualify private company shares for an RRSP it was necessary that an *RRSP And RRIF Private Corporation Share Questionnaire* be certified by a legal or accounting professional. Mr. Allen told Mr. Francis that Mr. Hutton was out of the country and unavailable to give specific instructions to Mr. Francis, but that Mr. Hutton had instructed Mr. Allen to arrange for Mr. Francis to certify the questionnaire and that if the certification was not signed and filed that day, being the last business day of the month in which the funds had been transferred, Mr. Hutton's investment would fail to qualify as an RRSP investment, in which event the entire \$499,000 would be added to his taxable income for the year and he would be subject to an immediate tax liability of about \$250,000. Mr. Francis signed the certificate.

16. Mr. Lane submitted that because Mr. Francis believed that Mr. Hutton was unavailable to give specific instructions, and that if he did not sign the certification that day his client would face the de-registration of his RRSP and the resulting horrendous tax consequences, Mr. Francis became an agent of necessity for Mr. Hutton enabling him to sign the certification without his client's specific instructions.

17. In fact, Mr. Hutton was not out of the country, as Mr. Francis had been told by Mr. Allen, but was available and could have easily been reached by telephone had Mr. Francis tried to reach him. Further, Mr. Francis, whose suspicions were not aroused by the fact that Mr. Allen already had Mr. Hutton's money, acknowledged that he had no reasonable basis for signing the certification on the questionnaire. In these circumstances, the panel rejected the defence put forward on behalf of Mr. Francis.

18. Charge No. 1 related to the certification which Mr. Francis signed on January 29, 1999. Mr. Francis had no reasonable basis for certifying that the investment was a qualified investment, and he acted without speaking to or receiving instructions from his client in circumstances in which he had no authority to do so. The panel concluded that both particulars of charge No. 1 had been proven.

19. Charge No. 3 related to a failure to maintain working papers and other records, and with his plea of guilty and the admission set out in the agreed statement of facts Mr. Francis acknowledged his misconduct. The panel concluded that charge No. 3 had been proven.

20. The panel then went on to determine that Mr. Francis' departure from the required standard of conduct was serious and constituted professional misconduct.

21. When the hearing reconvened, the chair read the following decision into the record:

#### DECISION

THAT, having seen, heard and considered the evidence, including the agreed statement of facts, filed, charge No. 2 having been withdrawn by the professional conduct committee, and charge No. 3 having been amended, and having heard the plea of guilty to particular (i) of charge No. 1 and to charge No. 3, the Discipline Committee finds Gerald W. Francis guilty of charges Nos. 1 and 3, as amended.

#### **ORDER AS TO SANCTION**

22. Mr. Farley did not call evidence with respect to sanction, but outlined the terms of the order he was instructed by the professional conduct committee to seek, namely, a reprimand, a suspension of between 12 and 18 months, a fine of \$10,000, full publicity including disclosure of the member's name, and an award of a portion of the costs of the investigation and hearing against Mr. Francis.

23. Mr. Farley filed and made reference to a book of authorities, and in his submissions set out what he described as both the aggravating and mitigating factors of the case. Aggravating factors were that:

- the effects of Mr. Francis' misconduct on his client were drastic, as Mr. Hutton went through "two years of hell" before eventually receiving full compensation from the Canadian Investor Protection Fund for the nearly \$500,000 stolen from him by Mr. Allen;
- the case was one of dishonesty – of moral turpitude – in that Mr. Francis certified certain information to be correct when he did not for a fact know that it was; and
- although he claimed he did so in order to help Mr. Hutton, the fact remains that Mr. Francis had no reasonable basis upon which to accede to the request of Mr. Allen to sign the RRSP certification without the specific instructions of his client, and in so doing demonstrated an appalling lack of due care.



Mitigating factors presented by Mr. Farley were that:

- Mr. Francis had no previous history of professional misconduct; and
- he cooperated fully in the professional conduct committee's investigation.

24. Mr. Francis read a statement into the record in which he apologized for his actions, and indicated that at the time he thought he was acting in the best interests of his client. He stated that he would never knowingly have done anything to harm Mr. Hutton, and that he was glad his client had recovered his investments. He admitted that he was ashamed that his mistakes had brought disrespect upon the profession, and assured the panel that in future he would not be pressured into accepting or trusting unverified information, or rushed into making improper decisions.

25. Mr. Lane made submissions on sanction and filed his own book of authorities. He submitted that the sanctions proposed by Mr. Farley were totally out of proportion to the circumstances and the misconduct in this case, in respect of both the amount of the fine and the length of the suspension being sought. He reviewed previous discipline cases, many of them involving intentional deception and dishonesty, in which fines of between \$3,000 and \$5,000, and suspensions of between 3 and 6 months, were levied.

26. The essential nub of the disagreement between Mr. Farley and Mr. Lane as to appropriate sanction in this case boiled down to their polar views as to whether the misconduct of Mr. Francis involved moral turpitude or deceit. Mr. Farley argued that it did, whereas Mr. Lane contended that Mr. Francis had merely made a "perhaps dumb but honest mistake."

27. Mr. Lane submitted that there was no moral turpitude or deceit involved in this case. There was no dishonesty involved in deciding to sign the certification. Mr. Francis did spend some time with Mr. Allen, albeit only 90 minutes, in an attempt to satisfy himself as to the accuracy of the information he was being asked to attest to. The fault was that he accepted the information presented to him by Mr. Allen without further substantiation, but a faulty effort does not constitute moral turpitude.

28. Mr. Lane pointed out that Mr. Francis derived no personal benefit from his actions, and that he only acted in what he believed to be Mr. Hutton's best interest. Mr. Francis was taken in by the fraudster Mr. Allen whom he trusted, and believed that the statements made to him by Mr. Allen were plausible. This was a case of a decent person making an honest mistake, reflecting on his competency not his integrity.

29. Mr. Farley rebutted Mr. Lane's arguments, stating that no competent chartered accountant would have signed the required certification under the circumstances, and that in that regard Mr. Francis willfully blinded himself as to his actions and the potential consequences of his actions.

30. The panel concluded that this was not a moral turpitude case or a case involving deceit on the part of the member. Instead we felt that this was a competence case and that while Mr. Francis had made a serious error which reflected poorly on his judgment, it did not reflect poorly on his integrity.

31. It is also relevant that Mr. Francis' mistake was not the cause of any loss to Mr. Hutton. Mr. Hutton had already given Mr. Allen his money by the time Mr. Francis was asked to sign and did sign the certification.

32. After hearing submissions from both parties, the panel deliberated, following which the chair read the terms of the order into the record. The formal order signed by the discipline committee secretary and sent to Mr. Francis reads as follows:

### ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Francis be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Francis be and he is hereby fined the sum of \$5,000, 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. Francis be and he is hereby charged costs fixed at \$7,500, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
4. THAT Mr. Francis be suspended from the rights and privileges of membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.
5. THAT Mr. Francis be and he is hereby required to complete, by paying for and attending in its entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the professional development course *Staying Out of Trouble*, made available through the Institute, or, in the event the course becomes unavailable, the successor course which takes its place.
6. THAT notice of this Decision and Order, disclosing Mr. Francis' 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*.
7. THAT Mr. Francis 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. Francis.
8. THAT in the event Mr. Francis fails to comply with any of the requirements of this Order, 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 above and in *The Globe and Mail*.

### **Reprimand**

33. The panel ordered that Mr. Francis be reprimanded in writing by the chair of the hearing in order to stress to him the unacceptable nature of his actions.

### **Fine**

34. Though the fine levied was lower than the range of fines recommended by Mr. Farley, the panel felt a fine of \$5,000 was significant enough in the circumstances to serve both as a specific and general deterrent. The panel took into account Mr. Francis' expressions of remorse as well as the fact that he did not personally benefit from his actions in this case.

### **Costs**

35. The committee felt that costs fixed at \$7,500 would be reasonable in this case, taking into account the degree of cooperation that had been provided by Mr. Francis.

### **Suspension**

36. The panel felt that Mr. Francis was truly remorseful and had learned his lesson. A number of the precedents cited showed suspensions of considerably shorter periods than the 12 to 18 months requested by Mr. Farley, for misconduct that involved intentional deception and dishonesty, which was absent in this case. The panel concluded that a three month suspension was sufficient, given the circumstances.

### **Notice**

37. Publishing names of members found guilty of professional misconduct is often the single most significant penalty that can be administered, and is one which addresses both the individual issues of specific deterrence and rehabilitation, and the wider issues of general deterrence, education of the membership-at-large, and protection of the public. The panel therefore ordered the normal publication of this proceeding.

### **Return Of Certificate**

38. Certificates of Institute membership belong to the Institute. As Mr. Francis 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 Failure To Comply**

39. 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.

DATED AT TORONTO THIS 19TH DAY OF AUGUST, 2003  
BY ORDER OF THE DISCIPLINE COMMITTEE

H.B. BERNSTEIN, CA – DEPUTY CHAIR  
THE DISCIPLINE COMMITTEE

#### MEMBERS OF THE PANEL:

R.I. COWAN, CA  
J.A. CULLEMORE, CA  
D.W. DAFOE, FCA  
J.M. MULHALL, CA  
N.C. AGARWAL (Public representative)