

John Roderick Richardson Duncan: Summary, as Published in *CheckMark*

John Roderick Richardson Duncan, of Caledon East, was found guilty, under Rule 201.1, of failing to conduct himself in a manner that maintains the good reputation of the profession and its ability to serve the public interest. The charge arose from his conviction for fraud under the *Criminal Code*. As president of two investment companies, which he incorporated, Mr. Duncan received money from various individuals to be invested on their behalf. Much of the money received was used for improper purposes, such as speculative business ventures, and payment of corporate debt, personal expenses and remuneration. The various investors lost approximately \$1,000,000, and Mr. Duncan lost all the money he personally invested. He was fined \$25,000 and expelled from membership.

CHARGE(S) LAID re John Roderick Richardson Duncan

The Professional Conduct Committee hereby makes the following charges against John Roderick Duncan, a suspended member of the Institute:

1. That, the said John Roderick Duncan failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that, on or about the 5th day of November 1993 at the City of Toronto, in the Municipality of Metropolitan Toronto, he was convicted of an offence under the Criminal Code, namely that during the period from and including the 1st day of January, 1987 to and including the 31st day of December, 1990, at the Municipality of Metropolitan Toronto, by deceit, falsehood or other fraudulent means, committed the offense of fraud in an amount exceeding \$1,000, all of which is contrary to Rule 201.1 of the rules of professional conduct.

DATED at Toronto this 20th day of October 1994.

JENNIFER L. FISHER, CA – CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re John Roderick Richardson Duncan

DECISION AND ORDER IN THE MATTER OF: A charge against JOHN RODERICK RICHARDSON DUNCAN, a suspended member of the Institute, under Rule 201.1 of the Rules of Professional Conduct, as amended.

DECISION. ORDER AND REASONS MADE JULY 24, 1995

These proceedings before this panel of the discipline committee of the Institute of Chartered Accountants of Ontario were heard on May 24 and July 24, 1995. Mr. Paul Farley attended on behalf of the professional conduct committee. Mr. Duncan was not present but was represented by his counsel, Mr. Paul Schabas.

The following charge had been laid against Mr. Duncan under the rules of professional conduct:

1. *THAT, the said John Roderick Duncan failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that, on or about the 5th day of November 1993 at the City of Toronto, in the Municipality of Metropolitan Toronto, he was convicted of an offence under the Criminal Code, namely that during the period from and including the 1st day of January, 1987 to and including the 31st day of December, 1990, at the Municipality of Metropolitan Toronto, by deceit, falsehood or other fraudulent means, committed the offence of fraud in an amount exceeding \$1,000, all of which is contrary to Rule 201.1 of the rules of professional conduct.*

At the outset of the hearing on May 24, counsel for Mr. Duncan brought preliminary motions for the following relief:

- (a) an order requiring the professional conduct committee to disclose all of the contents of its file on this case; and either
- (b) a finding by the discipline committee that it lacks jurisdiction to hear the charge against Mr. Duncan on the basis that Mr. Duncan resigned and is no longer a member of the Institute; or
- (c) alternatively, in the event the committee rules that it has jurisdiction to hear the charge, an order staying the hearing on the basis that to proceed would constitute an abuse of process in the circumstances.

Counsel for the member introduced an affidavit of Mr. Duncan as an exhibit. Counsel for the professional conduct committee introduced as exhibits an affidavit from Peter Carroll, the Institute's director of standards enforcement, an affidavit of Thomas Warner, the Institute's registrar, and a document brief.

Both counsel made submissions to the discipline committee on the three preliminary motions. The hearing was then adjourned to July 24, 1995 so that counsel to the discipline committee could provide written legal advice on the preliminary motions.

Upon the reconvening of the hearing on July 24, 1995, the written legal advice provided by counsel to the committee was presented and entered as an exhibit.

The committee then heard further submissions from Messrs. Schabas and Farley on the preliminary motions, and, after deliberation, made the following rulings:

- (a) that further disclosure of the contents of the professional conduct committee file is refused;
- (b) that Mr. Duncan is a suspended member of the Institute and the discipline committee has jurisdiction to hear the charge against him; and
- (c) that there has been no abuse of process in the circumstances of this case.

The reasons for the committee's rulings on the preliminary motions are as follows:

Disclosure

Counsel for the member asked for the disclosure of the entire professional conduct committee file in this case. Counsel for the professional conduct committee advised that everything in the file had been produced except communications between the committee and its counsel and the deliberations of the committee. The discipline committee found that the communications between the professional conduct committee and its counsel were protected from disclosure by solicitor client privilege. The committee then determined that the professional conduct committee's deliberations were privileged on the basis that the four criteria outlined in *Wigmone* for the establishment of such privilege had been met. The committee concluded that Mr. Duncan would be able to make full answer and defence to the charge against him without the disclosure sought.

Jurisdiction

The discipline committee rejected the argument put forward by counsel for the member that Mr. Duncan had resigned in 1991 and that, therefore, the Institute did not have jurisdiction over him when the charge in this case was laid. The bylaws of the Institute require two acts to occur before a member's resignation becomes effective. First, the member must submit a written application to resign, and, secondly, the membership committee must accept the resignation application, either with or without conditions, and establish the date upon which it is to take effect. It is clear from the evidence that the member submitted what can only be taken as his written application to resign. It is also clear that the institute's membership committee did not accept the resignation application. Therefore the member did not effect a resignation according to the bylaws. Mr. Duncan continued to be a member of the Institute, subject to its jurisdiction and bound by its rules of professional conduct.

Abuse of process

The arguments put forward upon this issue by counsel for the member dealt with the failure of the Institute to inform Mr. Duncan that his resignation had not been accepted, its failure to inform him of the disposition of complaints made against him, and the length of time taken to lay the charge. The discipline committee concluded that the Institute attempted to communicate with the member regarding the status of his resignation request by sending correspondence to him at the address supplied by the member himself. The committee further concluded that the length of time passing between the opening of the professional conduct committee's file and its laying of the charge was due to its waiting for the final disposition of the criminal court proceeding against the member, which was a legitimate and an appropriate course of action on its part, and not one subject to an allegation of abuse of process.

After the discipline committee rendered its rulings on the motions, counsel for the member advised that he had instructions to seek judicial review of the rulings, and requested that the hearing be adjourned until the final disposition of the judicial review application. Counsel for the professional conduct committee opposed this request. After deliberation, the discipline committee decided to proceed with the hearing. Counsel for the member then informed the committee that his instructions were to withdraw from and take no further part in these proceedings. He requested that any order made by the committee against Mr. Duncan be stayed until the completion of the judicial review.

Upon the withdrawal of Mr. Schabas from the hearing, the chair entered a plea of not guilty to the charge on behalf of Mr. Duncan.

After reviewing the document brief, the discipline committee reached the following decision on the issue of guilt or innocence:

DECISION

THAT, having seen and considered the evidence, and having determined to proceed with the hearing in the absence of Mr. Duncan, pursuant to Institute Bylaw 560 (formerly Bylaw 87(2)(c)), being satisfied that he had proper notice of the hearing, and having entered on his behalf a plea of not guilty to the charge, THE DISCIPLINE COMMITTEE FINDS John Roderick Richardson Duncan guilty of the charge.

The evidence before the committee was that Mr. Duncan incorporated and was the president of two investment companies. Between March 1987 and December 1990, Mr. Duncan and an associate received approximately \$2,800,000 from various individuals for investment purposes. Some of the investors were told that their money would be safely invested primarily in mortgages, and some were told that their money would be invested offshore. Though originally the money was invested in various mortgages, beginning in 1988 much of the money was being used for improper purposes, such as speculative business ventures, maintenance of the corporate lifestyle, payment of corporate debt, personal expenses and remuneration, and repayment of other individual investors. In total, the various investors lost approximately \$1,000,000. Mr. Duncan lost all the money he personally invested.

After finding Mr. Duncan guilty of the charge laid, the committee heard submissions from counsel for the professional conduct committee in respect of sanction, and, after further deliberation, made the following order:

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Duncan be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Duncan be and he is hereby fined the sum of \$25,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Duncan be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Duncan'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. Duncan 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.
6. THAT this Order shall be stayed until the final disposition of the application for judicial review to be brought by Mr. Duncan, or until further order of the chair of the discipline committee lifting the stay made upon application brought by the professional conduct committee.

The reasons for the committee's order as to sanction are as follows:

Reprimand

The committee was of the view that a reprimand is necessary as a specific deterrent to the member, to stress to him the unacceptability of his conduct resulting in his criminal conviction.

Fine and Expulsion

The committee was of the opinion that the, criminal conviction of the member for the offence of fraud was very serious. It appears that the funds received by Mr. Duncan were originally intended for legitimate investment purposes, but that the venture turned sour because of non-performing mortgages and the economic downturn and crash of the real estate market. While this turn of events was unfortunate, it by no means provides an excuse for Mr. Duncan's conduct. His offence was one of moral turpitude, and innocent individuals lost significant sums of money. Expulsion and a significant fine in the amount of \$25,000 were considered necessary as a general deterrent to the

membership and as a demonstration to the general public that this type of conduct by chartered accountants will not be tolerated by the Institute.

Publicity

The committee ordered notice of its decision and order in the manner specified, including disclosure of the member's name, as a general deterrent.

Surrender of Certificate

As is usual in cases of expulsion, the member was ordered to surrender his certificate of membership in the Institute.

DATED AT TORONTO, THIS 9th DAY OF November, 1995
BY ORDER OF THE DISCIPLINE COMMITTEE

P.A. CAMPOL, CA - CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:
K.V. CHERNICK, FCA
P.B.A. CLARKSON, CA
F.J. DUNN, CA
H.R. KLEIN, CA
S.F. ANDRUNYK (Public representative)