

## **Kenneth Gregory Derry Fitz-Andrews: Summary, as Published in *CheckMark***

**Kenneth Gregory Derry Fitz-Andrews**, of Mississauga, was found guilty of five charges 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 205 of making or associating himself with representations which he knew or should have known were false or misleading. Mr. Fitz-Andrews caused a company of which he was a director to issue an invoice for professional services rendered without charging or collecting goods and services tax although required by law to do so. He received payments from clients for professional services rendered while a partner of a chartered accounting firm for which he did not account to the partnership, and failed to report to Revenue Canada [as it then was] all or a portion of the monies received. When questioned by the Professional Conduct Committee investigator about a payment made to him by a client, Mr. Fitz-Andrews first told the investigator that the payment was for professional services rendered, and then subsequently told him that the payment was reimbursement for expenses paid on the client's behalf. Mr. Fitz-Andrews was fined \$15,000 and expelled from the Institute.

## **CHARGE(S) LAID re Kenneth Fitz-Andrews**

The Professional Conduct Committee hereby makes the following charges against Kenneth G.D. Fitz-Andrews, CA, a member of the Institute:

1. THAT, the said Kenneth G.D. Fitz-Andrews, on or about November 10, 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he caused Ampito Investments Inc., a company of which he was a director, to issue an invoice in the amount of \$130,500 to Narendra and Sulekha Patel for professional services rendered, and did not charge or collect goods and services tax on his invoice although required by law to do so contrary to Rule 201.1 of the rules of professional conduct.
2. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period November to December 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he caused Ampito Investments Inc. to issue and receive payment on an invoice in the amount of \$130,500 for professional services he rendered to Narendra and Sulekha Patel while he was partner of the firm ~~Savage + Moles~~ **Savage Moles & Co.**, Chartered Accountants, and did not account to the partnership for this amount, contrary to Rule 201.1 of the rules of professional conduct
3. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period September to November 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he received the sum of approximately \$15,500 from Prodigy Industrial Printers Inc. for professional services he rendered while he was a partner of the firm ~~Savage + Moles~~ **Savage Moles & Co.**, but did not account to the partnership for this amount, contrary to Rule 201.1 of the rules of professional conduct.
4. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period November 1992 to June 1996, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he failed to report to Revenue Canada all or a portion of the \$130,000 paid to him or his companies in November and December 1992 by Narendra and Sulekha Patel which should have been reported for professional services he rendered, contrary to Rule 201.1 of the rules of professional conduct.

## **CHARGES AMENDED ON CONSENT MARCH 1, 2000**

5. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period April 1992 to June 1996, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he failed to report to Revenue Canada all or a portion of the \$25,500 paid to him or his companies between April and November 1992 which he received from Prodigy Industrial Printers Inc. which should have been reported for professional services he rendered, contrary to Rule 201.1 of the rules of professional conduct.

6. THAT, the said Kenneth G.D. Fitz-Andrews, during the period May 1995 to May 1997, made or associated himself with representations made to an agent of the professional conduct committee which he knew or ought to have known were false or misleading, in that he first told John Howard, CA, the investigator appointed by the professional conduct committee, that \$10,000 paid to him or his companies in or about 1992 by Prodigy Industrial Printers Inc. was a payment for professional services rendered, and subsequently told the investigator that the payment was a reimbursement to him for expenses he paid on behalf of Prodigy Industrial Printers Inc., contrary to Rule 205 of the rules of professional conduct.

Dated at Toronto this 6th day of April 1999.

E.M. REITEROWSKI, CA – DEPUTY CHAIR  
PROFESSIONAL CONDUCT COMMITTEE

## **DISCIPLINE COMMITTEE re Kenneth Fitz-Andrews**

**DECISION AND ORDER IN THE MATTER OF:** Charges against **KENNETH GREGORY DERRY FITZ-ANDREWS, CA**, a member of the Institute, under **Rules 201.1 and 205** of the Rules of Professional Conduct, as amended.

**DECISION AND ORDER MADE APRIL 5, 2000**

### **DECISION**

THAT, having seen, heard and considered the evidence, and having determined to continue with and conclude the hearing on April 5, 2000 in the absence of Mr. Fitz-Andrews, being satisfied that he knew the hearing was continuing on this date, the Discipline Committee finds Kenneth Gregory Derry Fitz-Andrews guilty of charges Nos. 1, 2, 3, 4, 5 and 6.

### **ORDER**

IT IS ORDERED in respect of the charges:

1. THAT Mr. Fitz-Andrews be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Fitz-Andrews be and he is hereby fined the sum of \$15,000, to be remitted to the Institute within thirty (30) days from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Fitz-Andrews be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Fitz-Andrews' name, be given after this Decision and Order becomes final under the bylaws:
  - (a) to the Public Accountants Council for the Province of Ontario;
  - (b) to the Canadian Institute of Chartered Accountants;
  - (c) by publication in *CheckMark*; and
  - (d) by publication in *The Globe and Mail*.
5. THAT Mr. Fitz-Andrews 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.

DATED AT TORONTO THIS 6TH DAY OF APRIL, 2000  
BY ORDER OF THE DISCIPLINE COMMITTEE

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

## **DISCIPLINE COMMITTEE re Kenneth Fitz-Andrews**

**REASONS FOR THE DECISION AND ORDER IN THE MATTER OF:** Charges against **KENNETH GREGORY DERRY FITZ-ANDREWS, CA**, a member of the Institute, under **Rules 201.1 and 205** of the Rules of Professional Conduct, as amended.

### **REASONS FOR THE DECISION AND ORDER MADE APRIL 5, 2000**

This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on February 23 and 24, March 1 and 2, and April 5, 2000 to hear evidence concerning charges brought by the professional conduct committee against Kenneth Gregory Derry Fitz-Andrews.

The professional conduct committee was represented by Ms. Deborah McPhadden, who was accompanied by the committee's investigator Mr. John Howard.

Mr. Fitz-Andrews appeared without the benefit of counsel, and confirmed that he was aware of his right to be represented by counsel, and that he had been made aware of this right prior to the hearing.

The hearing concluded on April 5, 2000 and the panel's decision and order was issued on April 6, 2000.

These reasons, issued in writing pursuant to Bylaw 574, contain the panel's decision and order, and the charges laid by the professional conduct committee, as well as the reasons of the panel.

### **The Proceedings**

On February 23, before entering a plea to the charges, Mr. Fitz-Andrews submitted a number of reasons as to why the charges should be dismissed. The reasons put forward by him were that:

- the Statute of Limitations applies since the acts of Mr. Fitz-Andrews referred to in the charges date back to 1992;
- Bylaw 510(5)(a) requires that a complaint of professional misconduct must be received in writing;
- the file re: Meisener contained privileged information;
- the rights of Gina Fitz-Andrews concerning privacy had been breached;
- Mr. Fitz-Andrews was not a partner in the firm Savage Moles & Co.;
- he had been discriminated against;
- he had applied for judicial review to stay the proceedings; and
- it was not in his interest to discuss the matters referred to in the charges in view of his ongoing civil trial.

Ms. McPhadden on behalf of the professional conduct committee submitted that the application should be rejected and pointed out that at an assignment hearing in May 1999 the hearing had originally been set for December 1999. Mr. Fitz-Andrews had requested an adjournment which had been granted, and the dates for this hearing were set at a subsequent assignment hearing in December 1999. Mr. Fitz-Andrews had ample time to bring his application for judicial review but he had not.

Further, Ms. McPhadden advised the panel that the trial in the Superior Court had concluded except for submissions by the parties, and that in any event the proceedings before the discipline committee were separate from and independent of the proceedings in the Ontario Superior Court and that there was no prejudice to Mr. Fitz-Andrews.

She further submitted that:

- there was no requirement that a complaint be in writing;
- any legitimate concern about evidence which Mr. Fitz-Andrews had could be raised at this hearing and be dealt with as is appropriate;
- the Statute of Limitations did not apply to discipline proceedings, and, whereas undue delay by the professional conduct committee could be a reason for dismissing the charges, the delay was caused by Mr. Fitz-Andrews' refusal to cooperate, as was clear from the decision and order of the discipline committee made on May 21, 1997 at a previous hearing into charges laid against him, and Mr. Fitz-Andrews could not use the delay he caused as grounds for dismissing the charges laid in April 1999; and
- the issue of invasion of privacy would only have been relevant with respect to the charge in the 1997 hearing that Mr. Fitz-Andrews failed to cooperate, and could have been dealt with at that hearing at which he pleaded guilty to the charge.

The panel concluded that the reasons advanced by Mr. Fitz-Andrews were without substantial merit, and unanimously decided to proceed with the hearing.

### **The Charges**

The charges, as amended, laid against Mr. Fitz-Andrews read as follows:

1. THAT, the said Kenneth G.D. Fitz-Andrews, on or about November 10, 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he caused Ampito Investments Inc., a company of which he was a director, to issue an invoice in the amount of \$130,500 to Narendra and Sulekha Patel for professional services rendered, and did not charge or collect goods and services tax on his invoice although required by law to do so contrary to Rule 201.1 of the rules of professional conduct.
2. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period November to December 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he caused Ampito Investments Inc. to issue and receive payment on an invoice in the amount of \$130,500 for professional services he rendered to Narendra and Sulekha Patel while

he was partner of the firm Savage Moles & Co., Chartered Accountants, and did not account to the partnership for this amount, contrary to Rule 201.1 of the rules of professional conduct.

3. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period September to November 1992, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he received the sum of approximately \$15,500 from Prodigy Industrial Printers Inc. for professional services he rendered while he was a partner of the firm Savage Moles & Co., but did not account to the partnership for this amount, contrary to Rule 201.1 of the rules of professional conduct.
4. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period November 1992 to June 1996, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he failed to report to Revenue Canada all or a portion of the \$130,000 paid to him or his companies in November and December 1992 by Narendra and Sulekha Patel which should have been reported for professional services he rendered, contrary to Rule 201.1 of the rules of professional conduct.
5. THAT, the said Kenneth G.D. Fitz-Andrews, in or about the period April 1992 to June 1996, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he failed to report to Revenue Canada all or a portion of the \$25,500 paid to him or his companies between April and November 1992 which he received from Prodigy Industrial Printers Inc. which should have been reported for professional services he rendered, contrary to Rule 201.1 of the rules of professional conduct.
6. THAT, the said Kenneth G.D. Fitz-Andrews, during the period May 1995 to May 1997, made or associated himself with representations made to an agent of the professional conduct committee which he knew or ought to have known were false or misleading, in that he first told John Howard, CA, the investigator appointed by the professional conduct committee, that \$10,000 paid to him or his companies in or about 1992 by Prodigy Industrial Printers Inc. was a payment for professional services rendered, and subsequently told the investigator that the payment was a reimbursement to him for expenses he paid on behalf of Prodigy Industrial Printers Inc., contrary to Rule 205 of the rules of professional conduct.

Mr. Fitz-Andrews entered a plea of not guilty to each charge.

### **The Proceedings after the Plea**

The panel heard evidence over a period of four days. The professional conduct committee called four witnesses, Mr. and Mrs. Patel, Mr. Meisener and the investigator, Mr. John Howard. Mr. Fitz-Andrews cross-examined the witnesses. Mr. Fitz-Andrews himself testified on his own behalf and was under cross-examination when the proceeding adjourned on March 2.

On April 5, 2000, the date for the resumption of the hearing, Mr. Fitz-Andrews did not appear. Ms. McPhadden read a letter Mr. Fitz-Andrews had written to her stating that he would not be attending the hearing because of another judicial proceeding. Mr. Fitz-

Andrews had been asked for particulars of the other proceeding but he had not replied. The panel determined that it would continue with the hearing.

Submissions were made by Ms. McPhadden on the question of guilt or innocence. Upon deliberation, the panel found Mr. Fitz-Andrews guilty of all six charges.

When the hearing resumed and the decision was announced, Ms. McPhadden then made submissions with respect to sanction. After deliberation, the committee made its order with respect to sanction.

The panel's decision and order made on April 5, 2000 reads as follows:

## **DECISION**

THAT, having seen, heard and considered the evidence, and having determined to continue with and conclude the hearing on April 5, 2000 in the absence of Mr. Fitz-Andrews, being satisfied that he knew the hearing was continuing on this date, the Discipline Committee finds Kenneth Gregory Derry Fitz-Andrews guilty of charges Nos. 1, 2, 3, 4, 5 and 6.

## **ORDER**

IT IS ORDERED in respect of the charges:

1. THAT Mr. Fitz-Andrews be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Fitz-Andrews be and he is hereby fined the sum of \$15,000, to be remitted to the Institute within thirty (30) days from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Fitz-Andrews be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Fitz-Andrews' name, be given after this Decision and Order becomes final under the bylaws:
  - (a) to the Public Accountants Council for the Province of Ontario;
  - (b) to the Canadian Institute of Chartered Accountants;
  - (c) by publication in CheckMark; and
  - (d) by publication in The Globe and Mail.
5. THAT Mr. Fitz-Andrews 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.

## **Reasons for the Decision on the Charges**

The evidence called by the professional conduct committee was relatively clear and for the most part straightforward. Much of the evidence arose from Mr. Fitz-Andrews' working papers or other documents which he gave to the Investigator.

While the member was not present to make submissions with respect to guilt or innocence, he had made his position clear, in part if not entirely, during the proceedings



when he was present. The defences to the charges, as we understood them, are hereinafter set out.

In order to succeed, the defence presented by Mr. Fitz-Andrews required the panel to disregard documents [charges Nos. 2 and 3] or piece together expenses which were not recorded as one would expect by a CA [charges Nos. 4 and 5] and, in all cases, believe Mr. Fitz-Andrews' evidence in preference to the evidence called by the professional conduct committee. In this case, it was not possible to make a finding with respect to the charges without determining whether or not Mr. Fitz-Andrews was a credible witness. The panel concluded that he was not.

Perhaps the most compelling evidence of this lack of credibility related to charge No. 6, and will be found in our discussion of that charge. However, underlying this lack of credibility was Mr. Fitz-Andrews' contention that evidence he gave in one judicial proceeding was absolutely privileged and could not be referred to in any other judicial proceeding. It simply is not creditable for a member of the

Institute to assert that the oath he swears in a proceeding, whether it is a trial or a proceeding before the discipline committee, applies only to that process and that he or she is entitled to change his or her evidence on the same point under oath in another process.

### **Charge No. 1**

Charge No. 1 relates to the failure to charge GST on an invoice issued by a company of which Mr. Fitz-Andrews was a director.

The evidence before the panel was clear. Mr. Fitz-Andrews caused Ampito Investments Inc. to issue an invoice to Narendra & Sulekha Patel for \$130,500 and did not charge GST on this amount. Mr. Fitz-Andrews' explanation that Ampito did not have a GST registration, and that in any case since the billing was to another corporation no GST was required, was not credible or acceptable to the panel.

### **Charges Nos. 2 and 3**

Charges Nos. 2 and 3 relate to invoices issued by Mr. Fitz-Andrews in his own name or in the name of a corporation controlled by him while still a partner in the firm of Savage Moles & Co.

Considerable evidence was heard relating to the issue as to whether Mr. Fitz-Andrews was a partner in the firm of Savage Moles & Co. at the time that invoices were issued and payments received for \$130,500 and \$15,500. Mr. Fitz-Andrews took the position that the work which was billed to Narendra & Sulekha Patel for \$130,500 was done on his own time during vacations, holidays, weekends, and evenings, and that Mr. Meisener, his partner, had agreed he would be entitled to the income. However, the evidence was quite clear to the effect that the work was carried out over the period January 1991 to July 1992, that Mr. Fitz-Andrews was a partner of Savage Moles & Co. at least until mid-December 1992, and that he did not account to the partnership for this amount. The signed partnership agreement between Carol Meisener and Kenneth Fitz-Andrews dated May 1, 1990 states that "the partners shall devote their full time and attention to the partnership

and shall not, without the consent of the other partners, engage directly or indirectly in any other business or hold any office or appointment”.

Mr. Meisener in his evidence denied that there was any agreement with Mr. Fitz-Andrews that would allow Mr. Fitz-Andrews to provide services to the Patels without accounting for such to the partnership.

According to the evidence, Mr. Fitz-Andrews not only billed for hours spent “in his own time” but also billed for time spent during normal working hours. His actions were in flagrant contravention of the partnership agreement.

With respect to charge No. 3, Mr. Fitz-Andrews acknowledged receiving the funds and that he had not accounted for the income to Savage Moles & Co. This income was received between April 6 and November 4, 1992 while he was still a partner in the firm.

Mr. Fitz-Andrews contended the partnership was dissolved earlier than mid-December 1992. While the panel concluded on the evidence, including documents [letters and cheques] Mr. Fitz-Andrews signed, that the partnership did not dissolve before mid-December, it is difficult to see how a dissolution even at the end of August 1992 would permit Mr. Fitz-Andrews to do what he did. In his evidence, Mr. Fitz-Andrews said he told Mr. Meisener after he returned from his summer holiday in August 1992 that the partnership was going to dissolve. But even if it had dissolved at the end of August 1992, the work he says he billed for was completed in July 1992 when on his own evidence he was a partner of the firm.

#### **Charges Nos. 4 and 5**

Charges Nos. 4 and 5 relate to failure to report to Revenue Canada certain income paid to him. Mr. Fitz-Andrews acknowledged that he had received the money set out in the charges for professional services. Accordingly, it was his obligation to report the receipt of the money as income. He was unable to show he had reported the income.

The best he could do was to attempt to piece together information based in large part on the analysis and exhibit prepared by Mr. Howard. Using Mr. Howard’s framework analysis, Mr. Fitz-Andrews had prepared exhibits which he said indicated that the income was reported. He was being cross-examined on this point when proceedings adjourned on March 2, 2000. As Mr. Fitz-Andrews did not attend on April 5, Ms. McPhadden was not able to complete her cross-examination with respect to these charges. But when the hearing adjourned, the cross-examination had discredited much of the evidence Mr. Fitz-Andrews gave.

Mr. Howard had done an analysis of the information provided by Mr. Fitz-Andrews in an effort to determine and show that the income had [or had not] been reported. Ultimately, Mr. Howard was unable to get enough information from Mr. Fitz-Andrews, despite repeated requests, to conclude that the income had been reported.

The panel did not accept Mr. Fitz-Andrews’ evidence and concluded that the income had not been reported.

## **Charge No. 6**

Charge No. 6 related to inconsistent representations made by Mr. Fitz-Andrews to the investigator for the professional conduct committee.

In May 1995 the investigator, John Howard, was told by Mr. Fitz-Andrews that \$10,000 received from Prodigy Industrial Printers Inc. was a payment for professional services rendered. On April 2, 1996 the professional conduct committee directed Mr. Fitz-Andrews to produce information to the inspector including invoices for services rendered to support the \$10,000. No invoice was ever provided. The professional conduct committee received a letter from Mr. Fitz-Andrews' lawyer stating that the \$10,000 was primarily for reimbursement of expenses paid on behalf of Prodigy Industrial Printers Inc. No credible information was provided by Mr. Fitz-Andrews to support this contention.

In the afternoon of March 1, 2000, Ms. McPhadden cross-examined Mr. Fitz-Andrews on his evidence with respect to this charge, and his contention that the invoice was a reimbursement for money paid on behalf of Prodigy. The cross-examination confirmed Mr. Fitz-Andrews had originally told the investigator the \$10,000 received was for professional services.

The trial in the Ontario Superior Court, in which the evidence had been completed some weeks before the commencement of this discipline hearing, involved in some way the \$10,000 referred to in Charge No. 6. At that trial, Mr. Fitz-Andrews testified that the invoice was for services performed, which is what he originally told the investigator. In this proceeding, subsequent to his testimony at trial, Mr. Fitz-Andrews testified that the invoice was reimbursement for expenses he paid, in particular for meat. Further, he tried to mislead the discipline committee and in doing so lied under oath.

## **Reasons for the Order as to Sanction**

The panel only heard submissions as to sanction from Ms. McPhadden since Mr. Fitz-Andrews was not present at this stage of the proceedings.

The professional conduct committee submitted that this was a case in which all the offences contained elements of moral turpitude and dishonesty. Mr. Fitz-Andrews was dishonest with his partner, with the professional conduct and discipline committees, and with Revenue Canada. The degree of dishonesty was pervasive and there were clear mis-statements to this panel while he was under oath. Further, it appeared that Mr. Fitz-Andrews is not governable.

Essentially the panel agreed with the submissions of the professional conduct committee. More specifically, the panel concluded that the principles of sanction which were most applicable in this case were general and specific deterrence.

The panel concluded that Mr. Fitz-Andrews was ungovernable. He had been convicted of failing to cooperate with the professional conduct committee on a previous occasion. At this hearing, it was apparent that Mr. Fitz-Andrews was not prepared to discipline himself to the extent of being truthful.

The charges of which Mr. Fitz-Andrews was found guilty involve moral turpitude and dishonesty. While the panel had some sympathy for Mr. Fitz-Andrews in his dealings with Mr. Meisener, and recognizes that in any partnership dispute it is unlikely that the causes of the dispute lie entirely with one partner to the exclusion of the other, this did not justify Mr. Fitz-Andrews' conduct which the panel concluded was characterized by pervasive dishonesty.

### **Reprimand**

The panel believes that a reprimand in writing from the chair of the hearing will stress to Mr. Fitz-Andrews the unacceptability of his conduct as a chartered accountant.

### **Fine**

Ms. McPhadden asked that a fine be levied against Mr. Fitz-Andrews in the amount of \$15,000. The panel agreed that a fine was appropriate in this case, both as a deterrent to like-minded members, and as a demonstration to the public of the profession's intolerance of the type of behaviour demonstrated by this member. Accordingly, the panel levied a fine of \$15,000.

### **Expulsion**

The panel concluded that expulsion was required in this case as a general deterrent. An expulsion from the Institute is often ordered in cases of moral turpitude, and the panel determined that the serious nature of this case involving misrepresentation and dishonesty left it no alternative but to expel Mr. Fitz-Andrews.

There was no realistic evidence to suggest that Mr. Fitz-Andrews could be rehabilitated. He did not recognize any need of rehabilitation.

Mr. Fitz-Andrews does seem ungovernable. Any member who is prepared to disregard the truth when it is convenient for him to do so, even under oath, is unlikely to be governable.

### **Notice**

The giving of notice of the panel's decision and order, disclosing Mr. Fitz-Andrews' name, is in the opinion of the panel a general deterrent. It is the discipline committee's responsibility to ensure that members of the profession and the general public are made aware that the type of conduct demonstrated by Mr. Fitz-Andrews will result in the imposition of serious sanctions.

### **Certificate**

It is important that Mr. Fitz-Andrews no longer appear to be a member of the chartered accounting profession after his expulsion. Accordingly, the panel ordered Mr. Fitz-Andrews to surrender his certificate of membership to the committee's secretary.

DATED AT TORONTO THIS 22ND DAY OF AUGUST, 2000  
BY ORDER OF THE DISCIPLINE COMMITTEE

P.B.A. CLARKSON, CA – DEPUTY CHAIR  
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

D.W. DAFOE, FCA  
G.R. PEALL, CA  
S.W. SALTER, CA  
B.L. STEPHENS, CA  
J.T. ANDERS (Public representative)

## **APPEAL COMMITTEE re Kenneth Fitz-Andrews**

**DECISION AND REASONS IN THE MATTER OF:** An appeal by **KENNETH GREGORY DERRY FITZ-ANDREWS**, a member of the Institute, of the Decision and Order of the Discipline Committee made on April 5, 2000 pursuant to the bylaws of the Institute, as amended.

### **DECISION AND REASONS FOR DECISION MADE JULY 17, 2001 UPON APPLICATION FOR HEARING DE NOVO**

This panel of the appeal committee of the Institute of Chartered Accountants of Ontario met on July 17, 2001, to hear submissions in the matter of an application for a hearing *de novo* brought by Mr. K.G.D. Fitz-Andrews, upon his appeal of the decision and order of the discipline committee made on April 5, 2000. Mr. Robert Maxwell appeared as legal counsel for the appellant, who was also present.

Mr. Paul Farley appeared on behalf of the respondent, the professional conduct committee, to request that the appellant's application for a hearing *de novo* be dismissed, with costs in the amount of \$3,000 to be paid by Mr. Fitz-Andrews within thirty days failing which his appeal would be dismissed.

After reviewing the written materials filed by both parties, and hearing and considering the submissions of Mr. Maxwell and Mr. Farley, the panel denied the application for a hearing *de novo* and ordered that the appeal proceed as a normal appeal on the record. With respect to the matter of costs, it was the panel's decision that the issue of costs should be left to and decided by the panel hearing the appeal.

The parties were advised that written reasons would follow in due course, and these are those reasons. It is not our intention in these reasons to deal with every issue put forward by counsel, but only the major issues addressed by them or considered by the panel to be the important issues upon this application.

### **APPELLANT'S SUBMISSIONS**

On behalf of the appellant, Mr. Maxwell made the following submissions:

- There was a denial of natural justice and fairness to the appellant in his hearing before the discipline committee as a result of numerous errors made by the committee, as specified in the appellant's Notice of Application for Hearing *De Novo* filed as Exhibit 1. Mr. Maxwell spoke at length to many of the 35 purported errors of the discipline committee set out in Exhibit 1, directing the panel to various sections of the discipline hearing transcript as he did so.
- An appeal on the record will not cure the errors made by the discipline committee, and will result in a further denial of natural justice to the appellant.
- The record is deficient, as the appellant did not complete his evidence, and did not make submissions with respect to either the disposition of the charges by the discipline committee or the sanctions imposed by it.

## RESPONDENT'S SUBMISSIONS

Mr. Farley responded to Mr. Maxwell's submissions as follows:

- Many of the purported errors of the discipline committee submitted by the appellant are more properly dealt with on an appeal than on an application for a hearing *de novo*, as partially evidenced by the fact that they are included in the Notice of Appeal as well as the Notice of Application for Hearing *De Novo*.
- A good many of the grounds set out by the appellant deal with the fact that the appellant was not competent to defend himself on the charges and therefore the result was unfairness. Mr. Farley submitted that it is not a denial of natural justice to permit a member, who has been advised of the right to counsel, to defend himself.
- Only three main issues put forward by Mr. Maxwell are in Mr. Farley's opinion appropriate to deal with upon this application:
- the purported reliance by the discipline committee on evidence of Mrs. Patel when she was not actually called as a witness. Mr. Maxwell's position was that this purported reliance on evidence that was not given amounted to error on the part of the discipline committee resulting in a denial of fairness and natural justice to Mr. Fitz-Andrews. Mr. Farley submitted that, although the discipline committee's reasons indicate that both Mr. and Mrs. Patel were called as witnesses, this was a simple error in the drafting of the reasons. Mrs. Patel was named in some of the charges, and was present during part of the hearing, but only three witnesses were called, one of whom was Mr. Patel. The discipline committee's reasons do not misstate any of the evidence given by the witnesses called, and do not refer to any evidence given by Mrs. Patel.
- proceeding with the hearing on April 5, 2000 in the absence of Mr. Fitz-Andrews. Mr. Maxwell argued that continuing the hearing on April 5, 2000 in the absence of Mr. Fitz-Andrews was unfair to his client. He submitted that in light of Mr. Fitz-Andrews' written notification received by counsel for the professional conduct committee on March 31, 2000, informing her that Mr. Fitz-Andrews would not be in attendance on April 5, 2000, there were other routes the discipline committee could have taken than proceeding in Mr. Fitz-Andrews' absence. Mr. Farley submitted that administrative tribunals have the discretion to grant or not grant adjournments, so long as they exercise that discretion within the rules of fairness and natural justice. In this case, the appellant knew that the discipline panel expected to proceed with the hearing on April 5, 2000, which was the date chosen at the end of the previous hearing day on March 2, 2000 when he was present, and he also knew that the professional conduct committee did not consent to an adjournment of the April 5 date. Nevertheless, he made no formal request for an adjournment but simply failed to appear on April 5. In such circumstances, Mr. Farley submitted, there cannot be said to have been any unfairness or breach of natural justice in the discipline panel's decision not to adjourn but to proceed in Mr. Fitz-Andrews' absence.

- denying the appellant the right to call evidence and cross-examine. Mr. Maxwell submitted that his client was denied the opportunity to fully present his case and cross-examine Mr. Carroll Meisner on their partnership agreement. Mr. Farley submitted that a review of the transcript shows that the discipline panel “bent over backwards” in giving Mr. Fitz-Andrews every opportunity to present his case and call evidence, and in granting him considerable leeway in cross-examination.

## **PANEL’S DETERMINATION**

After hearing the submissions of both the appellant and the respondent, the issue the panel had to determine was whether or not Mr. Fitz-Andrews had been treated unfairly at the discipline committee hearing held on February 23 and 24, March 1 and 2, and April 5, 2000. The panel concluded that to make this determination it had to deal with the following four questions:

1. Did Mr. Fitz-Andrews receive from counsel for the professional conduct committee prior to the commencement of the hearing disclosure of all relevant materials and evidence upon which she intended to rely to make her case?
2. Did counsel to the discipline committee take part in the committee’s deliberations, make rulings with respect to evidence, and otherwise direct the conduct of the hearing?
3. Did the discipline committee act unfairly toward Mr. Fitz-Andrews when it continued with the hearing in his absence on the scheduled date of April 5, 2000?
4. Was Mr. Fitz-Andrews denied the opportunity to submit relevant evidence?

### **Re: 1. Non-Disclosure of Relevant Materials**

The appellant asserted that the transcript of the cross-examination of Mr. Fitz-Andrews on February 10, 2000 in the Superior Court of Justice (Civil Division) action commenced against him and others should not have been allowed in evidence, as the professional conduct committee had failed to disclose to the appellant prior to the hearing its intention to seek the admission of the transcript into evidence and to provide the appellant with a copy of the transcript. However, as revealed in the discipline hearing transcript of March 2, 2000, the civil court transcript was only introduced in the professional conduct committee’s cross-examination of Mr. Fitz-Andrews for the purpose of testing his credibility. The courts have held that this is proper, as evidenced by the case of *Johnstone v. Law Society of British Columbia* (1987), set out at Tab 11 of the Respondent’s Book of Authorities. Counsel for the professional conduct committee could not disclose prior to the hearing that she intended to use the transcript as she did not know until the cross-examination of Mr. Fitz-Andrews that he would contradict himself. Mr. Fitz-Andrews was not treated unfairly or denied natural justice.



## **Re: 2. Conduct of Proceedings by Discipline Committee Counsel**

The appellant was unable to provide the panel with any evidence in the transcript that would show that legal counsel to the discipline committee participated in the committee's deliberations. The panel also noted, as evidenced by the transcript, that the parties consistently addressed the chair, who made rulings throughout the hearing, and that the participation of discipline committee counsel was generally for the purpose of assisting the unrepresented member. It was therefore determined by this panel that legal counsel to the discipline committee restricted his role to that of an advisor, and that the chair of the discipline committee did not delegate his responsibilities to counsel. The appellant was not treated unfairly or denied natural justice.

## **Re: 3. Continuation of Hearing in Appellant's Absence**

Mr. Maxwell argued that the discipline committee acted unfairly when it proceeded with the hearing on April 5, 2000 in the absence of Mr. Fitz-Andrews, whereas Mr. Farley submitted that in the circumstances the decision to proceed was justified. The transcript shows that the discipline committee heard and considered the submissions of counsel for the professional conduct committee prior to reaching its decision to continue. The committee took into account that the appellant was told by counsel for the professional conduct committee that she did not consent to an adjournment, that the appellant did not reply to the request from counsel for the professional conduct committee for particulars of the other judicial proceeding for which he said he had to absent himself on April 5, and that the appellant made no formal request to the discipline committee for an adjournment. The appeal panel determined that it was not unfair or in breach of the rules of natural justice in these circumstances for the discipline committee to continue its hearing on April 5 in the absence of Mr. Fitz-Andrews. The panel noted as well in this regard that no adequate explanation has ever been given as to why Mr. Fitz-Andrews absented himself on April 5, 2000.

## **Re: 4. Denial of Opportunity to Submit Evidence**

The appellant alleges that the discipline committee denied him the opportunity to explore the meaning of the partnership agreement between him and Mr. Meisner, and any alterations to the agreement by the conduct of Mr. Meisner. However, as pointed out by the respondent, the transcript shows that the appellant was permitted to explore all aspects of the partnership agreement while giving evidence. The appellant's own testimony goes on for approximately 46 pages of the transcript, and during that time only two objections were made to his evidence. The first objection related to a witness previously called by the prosecution and cross-examined by the appellant, and the appellant agreed with the objection once it was explained to him. The second objection related to inadmissible hearsay evidence. The panel determined that the transcript supports the respondent's position that the appellant was not improperly restricted from submitting evidence with respect to the agreement between himself and his former partner Mr. Meisner, and that therefore there was no unfairness or denial of natural justice.

Having found no evidence of unfairness or a denial of natural justice, there was no basis upon which to order a hearing *de novo*. Accordingly, the appeal committee dismissed Mr. Fitz-Andrews' application that his appeal be heard by way of a hearing *de novo*, and ordered that the appeal proceed in the normal course as an appeal on the record, to be heard by a different panel of the appeal committee on the September 2001 dates already established, the issue of costs being reserved for determination by the panel at the end of the appeal hearing.

DATED AT TORONTO, THIS 30TH DAY OF AUGUST 2001  
BY ORDER OF THE APPEAL COMMITTEE

R.E. PARISI, CA – CHAIR  
THE APPEAL COMMITTEE

**MEMBERS OF THE PANEL**

S.F. MITCHELL, CA  
M.A. PORTELANCE, CA  
E.W. SLAVENS, FCA  
E. ZAVERSHNIK, CA  
B.W. BOWDEN (Public representative)

**APPEAL COMMITTEE re Kenneth Fitz-Andrews**

**ORDER IN THE MATTER OF:** An appeal by **KENNETH GREGORY DERRY FITZ-ANDREWS**, a member of the Institute, of the Decision and Order of the Discipline Committee made on April 5, 2000 pursuant to the bylaws of the Institute, as amended.

**ORDER MADE DECEMBER 14, 2001**

HAVING heard and considered the submissions made on behalf of Kenneth Gregory Derry Fitz-Andrews, and on behalf of the professional conduct committee, upon Mr. Fitz-Andrews' appeal of the Decision and Order of the Discipline Committee made on April 5, 2000, the Appeal Committee orders:

1. THAT Mr. Fitz-Andrews' appeal be and it is hereby dismissed.
2. THAT the Decision and Order of the Discipline Committee be and it is hereby confirmed in its entirety.
3. THAT the Decision and Order of the Discipline Committee becomes final, binding and conclusive pursuant to the bylaws effective December 14, 2001, and that Mr. Fitz-Andrews' expulsion and all time periods stipulated in the Order begin December 14, 2001.

DATED AT TORONTO THIS 18TH DAY OF DECEMBER, 2001  
BY ORDER OF THE APPEAL COMMITTEE

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

## **APPEAL COMMITTEE re Kenneth Fitz-Andrews**

**DECISION AND REASONS IN THE MATTER OF:** An appeal by **KENNETH GREGORY DERRY FITZ-ANDREWS**, a member of the Institute, of the Decision and Order of the Discipline Committee made on April 5, 2000 pursuant to the bylaws of the Institute, as amended.

### **REASONS FOR THE ORDER MADE DECEMBER 14, 2001**

This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on September 12 and 13, and December 10 and 14, 2001.

Mr. Paul Farley appeared on behalf of the professional conduct committee, and Mr. Robert Maxwell appeared for Mr. Fitz-Andrews.

The professional conduct committee had laid six charges of professional misconduct under the rules of professional conduct, to which Mr. Fitz-Andrews entered a plea of not guilty. On April 5, 2000, the discipline committee found Mr. Fitz-Andrews guilty of all six charges, and then went on to make the following order:

1. THAT Mr. Fitz-Andrews be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Fitz-Andrews be and he is hereby fined the sum of \$15,000, to be remitted to the Institute within thirty (30) days from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Fitz-Andrews be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Fitz-Andrews' name, be given after this Decision and Order becomes final under the bylaws:
  - (a) to the Public Accountants Council for the Province of Ontario;
  - (b) to the Canadian Institute of Chartered Accountants;
  - (c) by publication in CheckMark; and
  - (d) by publication in The Globe and Mail.
5. THAT Mr. Fitz-Andrews 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.

### **RELIEF SOUGHT**

Mr. Fitz-Andrews' Notice of Appeal sought the following relief from the appeal committee:

**THE APPELLANT** asks that the Decision and Order of the Discipline Committee dated August 22, 2000 be set aside and that an Order be granted dismissing all charges.

## **THE APPEAL COMMITTEE'S DECISION**

After reviewing the documents filed, and hearing the submissions of both counsel, the appeal committee made the following order:

1. THAT Mr. Fitz-Andrews' appeal be and it is hereby dismissed.
2. THAT the Decision and Order of the Discipline Committee be and it is hereby confirmed in its entirety.
3. THAT the Decision and Order of the Discipline Committee becomes final, binding and conclusive pursuant to the bylaws effective December 14, 2001, and that Mr. Fitz-Andrews' expulsion and all time periods stipulated in the Order begin December 14, 2001.

These are the reasons for the appeal committee's Order.

## **APPELLANT'S SUBMISSIONS ON THE CHARGES**

The Notice of Appeal, which listed 95 grounds of appeal, was filed at the outset of the hearing on September 12, 2001 as Exhibit 1.

Mr. Maxwell advised the committee that the facts in this case do not support the findings of guilt with respect to the six charges based on the evidence produced by the professional conduct committee. He submitted that there were three witnesses called by the professional conduct committee – Mr. Sulekha Patel, Mr. Carroll Meisner and Mr. John Howard – and that the professional conduct committee was obliged to prove its case through the testimony of these witnesses.

Mr. Maxwell submitted that Mr. Patel's testimony was that the monies paid to Mr. Fitz-Andrews were not for fees owing, but were trust funds advanced to pay Revenue Canada for employees' deductions relating to Prodigy Industrial Printers Inc. Mr. Maxwell's position was that the professional conduct committee was bound by the testimony of its witness Mr. Patel, and that therefore the funds received by Mr. Fitz-Andrews could not be characterized as fees upon which he was obliged to pay GST, account to the partnership, or pay income taxes, as alleged in charges Nos. 1 to 5. Even if Mr. Fitz-Andrews received the funds from Mr. Patel for a specific purpose and did not use the funds for that purpose, Mr. Maxwell submitted, he was not charged with theft of those funds, but rather with failure to collect goods and services tax on fees under charge No. 1, failure to account to the partnership for the fees under charges Nos. 2 and 3, and failure to report the fees as income under charges Nos. 4 and 5. Mr. Maxwell stated that, as a result, the findings of guilt on these charges must fail. He later conceded that the finding of guilt on charge No. 1 may have been correct, on the basis that goods and services tax had not been included in Mr. Fitz-Andrews' account for professional services, though he submitted that guilt on this charge alone was not enough to sustain the penalties ordered by the discipline committee.

With respect to charges Nos. 2 and 3, Mr. Maxwell submitted that there was an agreement between Mr. Fitz-Andrews and Mr. Meisner that Mr. Fitz-Andrews could perform services for Mr. Patel and bill for those services outside the partnership. Alternatively, he submitted that should it be found that there was no such agreement then his client was still entitled to the fees because they were billed and collected after the dissolution of the partnership. Mr. Maxwell submitted that Mr. Fitz-Andrews had verbally withdrawn from the partnership in

August 1992, and that therefore there was no partnership in effect with Mr. Meisner as of September 1992. As a result, since charges Nos. 2 and 3 allege failure to account to the partnership for billings issued and received from and after September 1992, when there was no partnership, the findings of guilt on those charges must fail.

With respect to charges Nos. 4 and 5, Mr. Maxwell submitted that Mr. Howard did not state unequivocally that Mr. Fitz-Andrews failed to report the amounts in income, but rather that he was not able to follow the accounting information and verbal explanations of Mr. Fitz-Andrews, and therefore could not conclusively determine whether or not these amounts had been properly recorded in total. As Mr. Howard was not able to reconstruct the information to positively determine whether or not the income had been reported, and as the burden to prove that it had not fell upon the professional conduct committee, it therefore had failed to prove its case beyond a reasonable doubt, which is the appropriate standard, Mr. Maxwell submitted, when a person's livelihood is at stake.

Mr. Maxwell argued that the discipline committee erred in proceeding with the hearing on April 5, 2000 when Mr. Fitz-Andrews did not show up for the continuation of his cross-examination, and stated that it should have granted an adjournment of the hearing. He advanced the position that Mr. Fitz-Andrews, as the defendant, had no obligation to testify, and that although it may have been improper for him not to show up for the completion of his cross-examination, as he was not obliged to testify at all, no adverse inferences could be drawn from his failure to complete his cross-examination.

As to charge No. 6, Mr. Maxwell characterized the differing stories alleged to have been told by his client to the professional conduct committee investigator as no more than inconsistent statements made at different times throughout a lengthy investigation, and that they should be seen as the result of inadvertence and not as amounting to professional misconduct.

## **RESPONDENT'S SUBMISSIONS ON THE CHARGES**

Mr. Farley began his submissions by stating that he had never seen such clear reasons given by the discipline committee on the issue of credibility, and referred the panel to various parts of the reasons, specifically to the following extracts relating to Mr. Fitz-Andrews' lack of credibility:

- page 4, second last paragraph:

"In this case, it was not possible to make a finding with respect to the charges without determining whether or not Mr. Fitz-Andrews was a credible witness. The panel concluded that he was not."

- page 6, paragraphs 1 through 4:

“Charges Nos. 4 and 5 relate to failure to report to Revenue Canada certain income paid to him. Mr. Fitz-Andrews acknowledged that he had received the money set out in the charges for professional services. Accordingly, it was his obligation to report the receipt of the money as income. He was unable to show he had reported the income.

The best he could do was to attempt to piece together information based in large part on the analysis and exhibit prepared by Mr. Howard. Using Mr. Howard’s framework analysis, Mr. Fitz-Andrews had prepared exhibits which he said indicated that the income was reported. He was being cross-examined on this point when proceedings adjourned on March 2, 2000. As Mr. Fitz-Andrews did not attend on April 5, Ms. McPhadden was not able to complete her cross-examination with respect to these charges. But when the hearing adjourned, the cross-examination had discredited much of the evidence Mr. Fitz-Andrews gave.

Mr. Howard had done an analysis of the information provided by Mr. Fitz-Andrews in an effort to determine and show that the income had [or had not] been reported. Ultimately, Mr. Howard was unable to get enough information from Mr. Fitz-Andrews, despite repeated requests, to conclude that the income had been reported.

The panel did not accept Mr. Fitz-Andrews’ evidence and concluded that the income had not been reported.”

- page 6, paragraphs 5 through 8:

“Charge No. 6 related to inconsistent representations made by Mr. Fitz-Andrews to the investigator for the professional conduct committee.

In May 1995 the investigator, John Howard, was told by Mr. Fitz-Andrews that \$10,000 received from Prodigy Industrial Printers Inc. was a payment for professional services rendered. On April 2, 1996 the professional conduct committee directed Mr. Fitz-Andrews to produce information to the inspector including invoices for services rendered to support the \$10,000. No invoice was ever provided. The professional conduct committee received a letter from Mr. Fitz-Andrews’ lawyer stating that the \$10,000 was primarily for reimbursement of expenses paid on behalf of Prodigy Industrial Printers Inc. No credible information was provided by Mr. Fitz-Andrews to support this contention.

In the afternoon of March 1, 2000, Ms. McPhadden cross-examined Mr. Fitz-Andrews on his evidence with respect to this charge, and his contention that the invoice was a reimbursement for money paid on behalf of Prodigy. The cross-examination confirmed Mr. Fitz-Andrews had originally told the investigator the \$10,000 received was for professional services.

The trial in the Ontario Superior Court, in which the evidence had been completed some weeks before the commencement of this discipline hearing, involved in some way the \$10,000 referred to in Charge No. 6. At that trial, Mr. Fitz-Andrews testified that the invoice was for services performed, which is what he originally told the investigator. In this proceeding, subsequent to his testimony at trial, Mr. Fitz-Andrews testified that the invoice was reimbursement for expenses he paid, in particular for meat. Further, he tried to mislead the discipline committee and in doing so lied under oath.”

With respect to the testimony of Mr. Patel, Mr. Farley indicated that the discipline committee had the opportunity to hear the evidence and testimony of all witnesses, including that of Mr. Fitz-Andrews, first hand, and concluded that Mr. Fitz-Andrews’ testimony was the least credible of all the witnesses heard.

Mr. Farley referred the panel to the case of *G.L. v. College of Physicians and Surgeons of the Province of Alberta* (tab 4 of the Respondent’s Book of Authorities), specifically to page 217 d, where it is stated: “Moreover, when the dispute is over a credibility finding, we should recognize the special advantage of the trier who saw and heard the witness, and not intervene unless the finding is “palpably” wrong”; and to page 218 a, where it is stated: “The council [i.e. the appeal committee] should be very slow to interfere with findings based on credibility.”

Mr. Farley also referred to the case of *Re Carruthers and College of Nurses of Ontario* (tab 6 of the Respondent’s Book of Authorities), specifically page 388 c:

Appellate review of findings of fact made at first instance is strictly confined. A substantial degree of deference is accorded the tribunal in connection with its findings of primary facts. The advantages of first-hand observation of witnesses afforded the tribunal are denied a reviewing court. Provided an evidentiary basis exists to support a finding of primary fact, there should be no appellate substitution therefor absent a palpable and overriding error at first instance...

With respect to the issue relating to burden of proof, Mr. Farley argued that administrative cases such as Mr. Fitz-Andrews’ fall under the civil standard rather than the criminal standard of proof, and referred the panel to *The Law of Evidence in Canada, Second Edition*, by Sopinka, Lederman and Bryant (tab 2 of the Respondent’s Book of Authorities), specifically page 155:

## **B. Civil Cases**

**5.43** The degree of probability required to discharge the burden of proof in a civil case has been defined by several leading jurists. Lord Denning defined it in these terms:

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.



Cartwright J. in *Smith v. Smith*, articulated the test as follows:

...that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgement is formed including the gravity of the consequences of the finding.

Simply put, the trier of fact must find that “the existence of the contested fact is more probable than its non existence.” Conversely, where a party must prove the negative of an issue, the proponent must prove its absence is more probable than its existence.

### **PANEL'S DETERMINATION ON THE CHARGES**

In the course of its deliberations on the charges, the panel raised various questions and issues, upon which it asked for and received further submissions from Mr. Maxwell and Mr. Farley, and obtained legal advice from its own counsel Mr. Scott.

With respect to the issue of the role of the appeal committee, the panel accepted the advice of Mr. Scott that the committee's role is not to retry the case on the evidence that was before the discipline committee, nor to hear new evidence. The role of the appeal committee is to determine whether or not there were errors made by the discipline committee of such a nature that would warrant that committee's determinations being overturned.

With respect to findings of fact and credibility, the appeal committee should be extremely reluctant to interfere with findings of fact or findings of credibility unless there is a palpable or overriding error. The discipline committee had the opportunity to hear and question the witnesses directly, and therefore was in a better position to assess credibility and give weight to the respective evidence.

The appellant has the obligation of convincing the appeal committee that the discipline committee either did not have the evidence before it to make the factual determinations it made, or erred in law in making those determinations.

The panel also accepted the advice of its counsel on the issue of the correct standard of proof. Mr. Scott's advice to the panel was that in professional discipline proceedings such as this the standard of proof to be utilized is that of proof on a balance of probabilities, being the standard in civil matters, and not that of proof beyond a reasonable doubt, as is required in criminal proceedings. He stated, however, that the more serious the charge, and the greater the likelihood that the member charged is going to lose the right to practise his or her profession, the more cogent the evidence must be.

Much was said about the state of the partnership and the partnership agreement between Mr. Fitz-Andrews and Mr. Meisner. One factual determination for the discipline committee was whether there was an agreement between the partners that Mr. Fitz-Andrews could perform and charge for services outside the partnership. The discipline committee found that there was no such agreement, and this panel found no basis upon which to disagree with this factual finding.

A second issue relating to the partnership between Mr. Fitz-Andrews and Mr. Meisner was as to when the partnership actually ended. Both counsel made submissions to the appeal committee as to the wording and effect of various provisions of the partnership agreement, and as to the wording of the Partnerships Act to deal with matters about which they submitted the partnership agreement was silent or confusing. We also took advice from Mr. Scott on this issue.

Paragraph 6 of the partnership agreement reads: "The Partners shall devote their full time and attention to the Partnership and shall not, without the consent of the other Partners, engage directly or indirectly in any other business or hold any office or appointment". Section 30 of the Partnerships Act provides: "If a partner, without the consent of the other partners, carries on a business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by the partner in that business." The issue here is Mr. Fitz-Andrews' failure to account to the partnership for the billings he submitted to Mr. Patel or his company Prodigy Industrial Printers Inc. Although there was disagreement between Mr. Fitz-Andrews and Mr. Meisner as to the exact date that their partnership terminated, there was consensus that the partnership existed until at least August 1992. Any asset acquired by the partnership up until then, including work in process, should have been accounted for to the partnership, and it was clear from the evidence that the work done by Mr. Fitz-Andrews for Mr. Patel occurred before August 1992.

Mr. Maxwell argued that his client was not obligated to account for the proceeds of the Patel invoices on the basis of paragraph 30(d) of the partnership agreement, which allows each partner to take with him upon a dissolution of the partnership his accounts receivable, work in progress and client base. The panel found this to be an untenable argument. Paragraph 30 of the partnership agreement begins in clause (a) by providing: "The partnership shall be dissolved only if all the partners agree", and the panel did not find that there had been any such agreement between the partners to dissolve the partnership. Mr. Meisner testified at the discipline hearing that Mr. Fitz-Andrews withdrew from the partnership in December 1992. If there was no dissolution on consent of all partners, then one must refer either to other paragraphs of the partnership agreement which relate to the withdrawal from the partnership of one partner, or to Section 44 of Partnerships Act which deals with the settlement of accounts between partners at the end of a partnership. In either case, Mr. Fitz-Andrews cannot escape a responsibility to account to Mr. Meisner for the Patel invoices. The panel rejected Mr. Maxwell's submission that paragraph 30(a) of the partnership agreement was wrong in law because it enabled dissolution of the partnership only on consent when in law the withdrawal of one partner from a two person partnership automatically dissolves the partnership.

The parties made submissions as to what evidence the discipline committee was entitled to consider in reaching its determinations on the charges, including the effect of Mr. Fitz-Andrews' failure to complete his cross-examination.

The panel accepted that Mr. Fitz-Andrews was not required to testify at the discipline committee hearing, and could have decided instead to simply make submissions based on the evidence presented by the prosecution. We determined, however, that once he began to testify, any evidence given by him was available to be used against him and be weighed by the trier of fact, and that the law required him to make himself available to be cross-examined on his evidence. Mr. Fitz-Andrews was due to be cross-examined, among other things, on whether he had properly recorded the income in question and reported this income for income tax purposes. Because he did not show up for cross-examination, the questions of the prosecution could not be asked, and it was open to the discipline committee to draw some degree of inference from Mr. Fitz-Andrews' absence in terms of whether or not there were satisfactory answers to the questions that would have been asked had he been present.

Mr. Maxwell argued that as the discipline committee found Mr. Fitz-Andrews not to be a credible witness, it was not entitled to accept his evidence that the monies received from Mr. Patel were for fees owing over Mr. Patel's evidence that the sums paid to Mr. Fitz-Andrews were for payment of Mr. Patel's taxes. The fact that Mr. Fitz-Andrews' testimony with respect to the amounts he received from Mr. Patel differed from Mr. Patel's testimony should be considered in its context. Mr. Patel testified that the payments were trust funds advanced to Mr. Fitz-Andrews' company in order that Mr. Fitz-Andrews could make payments to Revenue Canada Taxation on Mr. Patel's behalf for employee tax deductions. Mr. Fitz-Andrews testified that these amounts represented fees for services performed by him. As the charges against him were based, not on misappropriation of client funds, but on improprieties relating to monies received as fees for professional services, the discipline committee determined that the testimony of Mr. Fitz-Andrews on this issue amounted to an admission against his own interest, and on that basis decided that his testimony on the issue was credible. On other issues where Mr. Patel and Mr. Fitz-Andrews disagreed, it was open to the discipline panel to accept Mr. Patel's evidence over that of Mr. Fitz-Andrews. The appeal panel could find no fault with the reasoning of the discipline committee in this regard, nor with its findings as to the credibility or lack of credibility of the witnesses before it.

At the end of the third day of the appeal on December 10, 2001, after having reviewed and deliberated on all the evidence filed and submissions made, and having taken into account the advice received from our counsel, the appeal panel determined that there was no basis upon which to interfere with the findings of guilty made by the discipline committee, and dismissed Mr. Fitz-Andrews' appeal of the findings of guilty on the charges.

## **THE INVESTIGATOR'S REPORT**

At the beginning of the fourth day of the appeal on December 14, 2001, before beginning submissions on sanctions, Mr. Maxwell advised the panel that he had only discovered two nights before that the discipline committee had not had available to it at its hearing the report of the professional conduct committee investigator Mr. Howard. Mr. Maxwell submitted that counsel for the professional conduct committee should have produced this report at the discipline hearing, particularly if the conclusions reached in the report were exculpatory to Mr. Fitz-Andrews. The prosecution, he submitted, had an obligation to put forward the report at the hearing and this was not done.

Mr. Maxwell did admit that although the report was not entered into evidence in its entirety, Mr. Fitz-Andrews had a copy of the report at the hearing and could have, had he chosen to do so, entered the report into evidence or used the report in his cross-examination of Mr. Howard.

Mr. Maxwell requested that the appeal committee reopen the appeal on the issue of guilt or innocence, to enable him to file the investigator's report and make submissions on it, submitting that this would be like a fresh evidence application.

Mr. Farley argued that the appeal committee had already dismissed the appeal on the charges, which effectively completed that part of the appeal. He indicated that the professional conduct committee does not usually enter an investigator's report into evidence, preferring instead to have the investigator enter the details of the report into evidence through oral testimony. The member then has the opportunity to either enter the report into evidence if he or she feels it helps the defence's case, or use the report to cross-examine the investigator during his or her oral testimony on the basis that the oral testimony is inconsistent with the comments or conclusions in the investigator's written report. Mr. Fitz-Andrews did not use the investigator's report for either of these purposes during the discipline hearing.

Mr. Scott asked Mr. Maxwell whether this matter was raised at the de novo application hearing attended by Mr. Maxwell before a different appeal panel. Mr. Maxwell responded that it was not as he did not recall seeing this report although the report was probably in the documents available to him.

A discussion took place as to the basis for admission of fresh evidence on appeal. On questioning by Mr. Scott, Mr. Maxwell conceded that a copy of the investigator's report was actually received by Mr. Fitz-Andrews prior to the discipline hearing.

Mr. Farley brought to the attention of all parties that Bylaws 612 and 620 precluded raising this new ground of appeal at the hearing. A reading and review of these bylaws indicated that Mr. Maxwell was in fact precluded from raising this new ground of appeal. In addition, Mr. Farley advised that the test that is to be applied in determining whether or not fresh evidence may be introduced on an appeal is whether or not the evidence was reasonably available at the time of the original hearing, which it was in this case.

After obtaining advice from Mr. Scott and hearing additional submissions from Mr. Maxwell and Mr. Farley, the panel denied Mr. Maxwell's motion on the basis that Mr. Fitz-Andrews was not being denied natural justice because he had not come up with a plausible explanation as to why this evidence and this ground of appeal could not have been argued sooner.

## **APPELLANT'S SUBMISSIONS ON SANCTION**

Mr. Maxwell submitted that the penalties imposed by the discipline committee were "essentially the harshest penalties possible."

With respect to charge No. 1, Mr. Maxwell conceded that GST was not included in the accounts that went out.

With respect to charges Nos. 2 and 3, Mr. Maxwell submitted that the penalty was not appropriate to the findings, and suggested that Mr. Fitz-Andrews did no more than what his partner Mr. Meisner did in taking his accounts receivable and work in process.

With respect to charges Nos. 4 and 5, Mr. Maxwell questioned Mr. Howard's findings and conclusions, and the fact that the discipline committee simply decided not to accept Mr. Fitz-Andrews' evidence on these matters, and reiterated that the sanctions in totality were too harsh.

With respect to charge No. 6, Mr. Maxwell again questioned Mr. Howard's evidence and the conclusions reached by the discipline committee on this evidence.

Mr. Maxwell submitted that under the circumstances of this case, in totality, the sanctions were too extreme.

### **RESPONDENT'S SUBMISSIONS ON SANCTION**

Mr. Farley submitted that the appeal committee could not reasonably come to the conclusion that the discipline committee made a palpable and overriding error, as we are required to do in law before interfering with the discipline committee's order. He further submitted that Mr. Fitz-Andrews had been shown to be dishonourable, dishonest and lacking in integrity.

Mr. Farley cited several precedent cases which, he submitted, dealt with offences of moral turpitude similar to that displayed by Mr. Fitz-Andrews, and described the penalties imposed in those cases.

Mr. Farley summarized by indicating that in considering the principles of sentencing, the discipline committee always has a serious task to deal with, and does so on the basis of the facts of the case and the precedents generated by other cases.

With respect to the sanctions imposed, Mr. Farley emphasized that the issues to be determined are:

- does the penalty imposed by the discipline committee fall within the proper range of penalties; and
- should the appeal committee interfere with the order of the discipline committee if it finds that the discipline committee considered all the things it was obliged to?

Mr. Farley quoted from the appeal committee reasons in the Matthews case, which stated: "Unless there is error in principle, unless the punishment clearly does not fit the crime, the appeal committee should not disturb the penalty and substitute its judgment for that of the discipline committee."

Mr. Farley referred the panel to the discipline committee's reasons for its order as to sanction in this case, which set out its findings of fact and which indicate why it felt compelled to impose the penalty it did. He concluded that the penalty imposed by the discipline committee was not outside the penalty range that is reasonable in the circumstances of this case.

## **APPELLANT'S REPLY**

Mr. Maxwell again submitted that the sentence imposed by the discipline committee is unreasonable in all the circumstances of this case.

## **PANEL'S DETERMINATION ON SANCTION**

The panel deliberated and agreed that Mr. Fitz-Andrews' actions constituted moral turpitude, that on the basis of the precedents cited the discipline committee's order was within the range of penalties appropriate for the misconduct, that the appeal committee did not have the benefit of hearing the testimony of witnesses directly, and that it should not seek to retry the case. The issue before the appeal committee was whether or not the discipline committee, upon consideration of all the evidence and submissions before it, properly exercised its discretion and imposed a sanction within an appropriate range of sanctions given the facts of this particular case. Having determined that no error in principle had been made by the discipline committee, and that the sanctions imposed were within the appropriate range of sanctions consistent with earlier similar cases, the appeal committee concluded that it should not disturb the sanctions order made by substituting its judgment for that of the discipline committee.

Accordingly, Mr. Fitz-Andrews' appeal was dismissed, and the discipline committee's Decision and Order Made April 5, 2000 was confirmed in its entirety.

DATED AT TORONTO THIS 21ST DAY OF MARCH, 2002  
BY ORDER OF THE APPEAL COMMITTEE

M.B. MARTENFELD, FCA – CHAIR  
THE APPEAL COMMITTEE

### **MEMBERS OF THE PANEL:**

R.J.L. BOWMAN, CA  
C.J. BURKE, FCA  
J.J. LONG, CA  
L.L. WORTHINGTON, FCA  
J. I. FRID (Public representative)