

Lisa Ann Bailey: Summary, as Published in *CheckMark*

Lisa Ann Bailey, of Perth, was found guilty of two charges under Rule 201.1 of failing to maintain the good reputation of the profession and its ability to serve the public interest. While engaged to perform professional services for three related companies, she misappropriated funds in excess of \$138,000 from her clients. She also participated in a scheme to reduce the amount of money paid to the county sheriff pursuant to a notice of garnishment issued against her common law spouse. Ms. Bailey was fined \$7,500 and expelled from the Institute.

CHARGE(S) LAID re Lisa Ann Bailey

The Professional Conduct Committee hereby makes the following charges against Lisa A. Bailey, a member of the Institute:

1. THAT, the said Lisa A. Bailey, being engaged to perform professional services for three companies, namely Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, failed to conduct herself in a manner which 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:
 - (a) during the period December 1994 to November 1995, having responsibility for making bank deposits for Morrison Fuels, a division of 503373 Ontario Limited, she participated in a scheme to misappropriate approximately \$10,700 from Morrison Fuels;
 - (b) during the period March 1993 to December 1994, she misappropriated approximately \$18,500 from Morrison Fuels, a division of 503373 Ontario Limited, by making unauthorized payments from Morrison Fuels to her own credit card account;
 - (c) during the period March 1993 to April 1995, she misappropriated approximately \$1,700 from 548761 Ontario Limited, operating as X-Cel Water, by making unauthorized payments from 548761 Ontario Limited to her own credit card account;
 - (d) during the period April 1994 to April 1995, she misappropriated approximately \$8,500 from 503372 Ontario Limited, operating as Harper Fuels, by making unauthorized payments from 503372 Ontario Limited to her own credit card account;
 - (e) during the period May 1992 to October 1995, having agreed to an annual remuneration of \$60,000, she paid herself approximately \$32,000 more than she was entitled to;
 - (f) during the period May 1992 to September 1995, she misappropriated approximately \$10,400 from Morrison Fuels, a division of 503373 Ontario Limited, by causing the company to make payments to third parties in payment of her own personal expenses;
 - (g) during the period June 1994 to September 1995, she misappropriated approximately \$2,000 from 503372 Ontario Limited, operating as Harper Fuels, by causing the company to make payments to third parties in payment of her own personal expenses;
 - (h) during the period September 1992 to August 1995, she participated in a scheme with David Blair to misappropriate approximately \$53,400 from Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels; and

- (i) in or about November 1994, she had installed in her home a bathroom sink and a gas fireplace costing approximately \$1,700 which were paid for by Morrison Fuels, without the knowledge or authorization of Morrison Fuels.
2. THAT, the said Lisa A. Bailey, on or about October 5, 1993, while engaged to perform a review of the financial statements of Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, for the year ended July 31, 1993, signed or associated herself with financial statements which she knew or ought to have known were false or misleading, contrary to Rule 205 of the rules of professional conduct, in that the statements understated the amounts paid by the companies for professional fees by a total of approximately \$11,700.
3. THAT, the said Lisa A. Bailey, on or about November 28, 1994, while engaged to compile the financial statements of Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, for the year ended July 31, 1994, signed or associated herself with financial statements which she knew or ought to have known were false or misleading, contrary to Rule 205 of the rules of professional conduct, in that the statements understated the amounts paid by the companies for professional fees by a total of approximately \$25,000.
4. THAT, the said Lisa A. Bailey, during the period December 1993 to October 1995, failed to conduct herself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that she participated in a scheme to reduce the amount of money paid to the sheriff of the County of Lanark pursuant to a notice of garnishment issued against David Blair, contrary to Rule 201.1 of the rules of professional conduct.
5. THAT, the said Lisa A. Bailey, in or about April 1995, signed or associated herself with a document which she knew or should have known was false or misleading, contrary to Rule 205 of the rules of professional conduct, in that:
 - (a) she filed her tax return for the year 1994 when she knew that it did not include income she received in the amount of approximately \$8,500; and
 - (b) she filed her tax return for the year 1994 when she knew that it did not disclose her receipt of goods or services from Morrison Fuels with an approximate value of \$1,700 which should have been included in her reported income.
6. THAT, the said Lisa A. Bailey, in or about April 1996, signed or associated herself with a document which she knew or should have known was false or misleading in that she filed her tax return for the year 1995 when she knew that it did not include income she received in the amount of approximately \$11,200, contrary to Rule 205 of the rules of professional conduct.

Dated at Toronto this 18th day of March, 1999.

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

DISCIPLINE COMMITTEE re Lisa Ann Bailey

DECISION AND ORDER IN THE MATTER OF: Charges against **LISA ANN BAILEY, CA**, a member of the Institute, under **Rules 201.1 and 205**, of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE DECEMBER 1, 1999

DECISION

THAT, having seen, heard and considered the evidence, the Discipline Committee finds Lisa Ann Bailey not guilty of charges Nos. 2 and 3, and guilty of charges Nos. 1, 4, 5 and 6.

ORDER

IT IS ORDERED in respect of charges Nos. 1, 4, 5 and 6:

1. THAT Ms. Bailey be reprimanded in writing by the chair of the hearing.
2. THAT Ms. Bailey be and she is hereby fined the sum of \$7,500, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Ms. Bailey be and she is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Ms. Bailey's 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 *Perth Courier* and the *Smiths Falls Record News*.
5. THAT Ms. Bailey surrender her 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 3RD DAY OF DECEMBER 1999
BY ORDER OF THE DISCIPLINE COMMITTEE

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

DISCIPLINE COMMITTEE re Lisa Ann Bailey

REASONS FOR DECISION AND ORDER IN THE MATTER OF: Charges against **LISA ANN BAILEY, 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 DECEMBER 1, 1999

This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on October 26 and 27, November 30 and December 1, 1999, to hear evidence concerning charges brought by the professional conduct committee against Ms. Lisa Ann Bailey. A member of the panel present on October 26 and 27 was unable to continue, as a result of which, upon the consent of the member and the professional conduct committee, the hearing concluded on November 30 and December 1 before a reduced panel of four, pursuant to Bylaw 580.

The professional conduct committee was represented by Ms. Deborah McPhadden. Ms. Bailey represented herself, and confirmed for the record that she understood she had the right to be represented by legal counsel.

The hearing concluded on December 1, and the panel's decision and order was issued on December 3, 1999. 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 CHARGES

Prior to submitting evidence on the charges, the professional conduct committee, upon consent, amended charge No. 1(d). The amended charges read as follows:

THAT, the said Lisa A. Bailey, being engaged to perform professional services for three companies, namely Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, failed to conduct herself in a manner which 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:

- (a) during the period December 1994 to November 1995, having responsibility for making bank deposits for Morrison Fuels, a division of 503373 Ontario Limited, she participated in a scheme to misappropriate approximately \$10,700 from Morrison Fuels;
- (b) during the period March 1993 to December 1994, she misappropriated approximately \$18,500 from Morrison Fuels, a division of 503373 Ontario Limited, by making unauthorized payments from Morrison Fuels to her own credit card account;
- (c) during the period March 1993 to April 1995, she misappropriated approximately \$1,700 from 548761 Ontario Limited, operating as X-Cel Water, by making

- unauthorized payments from 548761 Ontario Limited to her own credit card account;
- (d) during the period April 1994 to October 1995, she misappropriated approximately \$8,500 from 503372 Ontario Limited, operating as Harper Fuels, by making unauthorized payments from 503372 Ontario Limited to her own credit card account;
 - (e) during the period May 1992 to October 1995, having agreed to an annual remuneration of \$60,000, she paid herself approximately \$32,000 more than she was entitled to;
 - (f) during the period May 1992 to September 1995, she misappropriated approximately \$10,400 from Morrison Fuels, a division of 503373 Ontario Limited, by causing the company to make payments to third parties in payment of her own personal expenses;
 - (g) during the period June 1994 to September 1995, she misappropriated approximately \$2,000 from 503372 Ontario Limited, operating as Harper Fuels, by causing the company to make payments to third parties in payment of her own personal expenses;
 - (h) during the period September 1992 to August 1995, she participated in a scheme with David Blair to misappropriate approximately \$53,400 from Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels; and
 - (i) in or about November 1994, she had installed in her home a bathroom sink and a gas fireplace costing approximately \$1,700 which were paid for by Morrison Fuels, without the knowledge or authorization of Morrison Fuels.
2. THAT, the said Lisa A. Bailey, on or about October 5, 1993, while engaged to perform a review of the financial statements of Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, for the year ended July 31, 1993, signed or associated herself with financial statements which she knew or ought to have known were false or misleading, contrary to Rule 205 of the rules of professional conduct, in that the statements understated the amounts paid by the companies for professional fees by a total of approximately \$11,700.
 3. THAT, the said Lisa A. Bailey, on or about November 28, 1994, while engaged to compile the financial statements of Morrison Fuels, a division of 503373 Ontario Limited, 548761 Ontario Limited, operating as X-Cel Water, and 503372 Ontario Limited, operating as Harper Fuels, for the year ended July 31, 1994, signed or associated herself with financial statements which she knew or ought to have known were false or misleading, contrary to Rule 205 of the rules of professional conduct, in that the statements understated the amounts paid by the companies for professional fees by a total of approximately \$25,000.
 4. THAT, the said Lisa A. Bailey, during the period December 1993 to October 1995, failed to conduct herself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that she participated in a scheme to reduce the amount of money paid to the sheriff of the County of Lanark

pursuant to a notice of garnishment issued against David Blair, contrary to Rule 201.1 of the rules of professional conduct.

5. THAT, the said Lisa A. Bailey, in or about April 1995, signed or associated herself with a document which she knew or should have known was false or misleading, contrary to Rule 205 of the rules of professional conduct, in that:
 - (a) she filed her tax return for the year 1994 when she knew that it did not include income she received in the amount of approximately \$8,500; and
 - (b) she filed her tax return for the year 1994 when she knew that it did not disclose her receipt of goods or services from Morrison Fuels with an approximate value of \$1,700 which should have been included in her reported income.
6. THAT, the said Lisa A. Bailey, in or about April 1996, signed or associated herself with a document which she knew or should have known was false or misleading in that she filed her tax return for the year 1995 when she knew that it did not include income she received in the amount of approximately \$11,200, contrary to Rule 205 of the rules of professional conduct.

Ms. Bailey pleaded not guilty to all the charges.

DECISION ON THE CHARGES

After deliberating on the evidence presented, the panel made the following decision:

DECISION

THAT, having seen, heard and considered the evidence, the Discipline Committee finds Lisa Ann Bailey not guilty of charges Nos. 2 and 3, and guilty of charges Nos. 1, 4, 5 and 6.

The Facts

Much of the evidence presented to the panel was not contested by Ms. Bailey. In fact, she acknowledged she received substantial compensation over and above her stated salary, but asserted that the payments were made to her pursuant to an agreement with George Morrison, the owner of Morrison Fuels, Harper Fuels and X-Cel Water.

Ms. McPhadden presented a document brief, called a number of witnesses, and produced exhibits in support of the charges. In summary, the essence of charge No. 1 was that, while engaged to perform professional services for the three companies noted in the charges, Ms. Bailey received, over a three and a half year period, remuneration of approximately \$139,000 in excess of the amount agreed upon by her employer, Mr. Morrison. Much of the evidence was directed to the issue of whether or not Mr. Morrison had authorized Ms. Bailey to have his companies pay personal expenses on her behalf, to pay herself other monies out of cash contained in corporate bank deposits, and to receive the personal benefit of one of the company's paying for improvements to her home. At issue was not that the payments had been made and the benefits received, but whether Ms. Bailey had the authorization to act as she did.

With respect to charge No. 1, the document brief and testimony of witnesses provided the panel with summaries and details of the alleged misuse of corporate funds by Ms. Bailey.

The evidence showed that Ms. Bailey was originally engaged by the corporations on July 8, 1991 to provide consulting services, and, at year end, to prepare financial statements with a review engagement report attached. In May 1992 the nature of her employment was changed from one remunerated on a per diem basis to one paying an annual lump sum of \$60,000. Ms. Bailey's engagement letter of May 8, 1992 addressed to Mr. Morrison stated that she would continue to work in the office on a daily basis, as required. In the fall of 1992, David Blair, Ms. Bailey's husband, was engaged by the corporations to assist Ms. Bailey, on an annual remuneration package of \$75,000 for the two of them. The panel noted that Ms. Bailey had signing authority on the bank accounts of the various corporations, initially as one of two required signatures, and later as sole required signature. In view of the fact that Ms. Bailey handled all the accounting for Harper Fuels and X-Cel Water, including preparation of cheques, and monitored the day-to-day accounting at Morrison Fuels, the panel had some concern about Ms. Bailey's objectivity as she was also engaged to conduct a review of the year-end financial statements. However, the professional conduct committee did not address this issue.

With respect to charges Nos. 2 and 3, Exhibit 19 provided details supporting the position of the professional conduct committee that the financial statements of the various companies in total understated professional fees paid to Ms. Bailey by approximately \$11,781 in 1993, and \$26,137 in 1994. Pages 3 and 10 of Exhibit 22 contained reconciliations provided by Ms. Bailey of the amounts paid to her directly compared with the amounts for professional fees shown on the financial statements. The panel noted that Ms. Bailey's reconciliations did not take into account indirect payments received by her, such as payments to the credit of her personal Visa account.

With respect to charge No. 4, David Blair, who had been working for the companies as an independent contractor, was re-engaged as an employee at a reduced salary in order to reduce garnishee payments. The amount of the reduction was paid to Ms. Bailey, who in turn paid it back to her husband through her professional practice.

Charges Nos. 5 and No. 6 relate to the failure of Ms. Bailey to report the diverted garnishee monies referred to above on her personal income tax returns.

After reviewing the document brief and other evidence filed, and hearing all the witnesses called, the panel deliberated and made the following findings.

Charge No. 1

The panel did not find either Mr. Morrison or Ms. Bailey to be entirely credible, and ultimately concluded that it preferred the evidence of the former over that of the latter. Ms. Bailey's evidence about informing Mr. Morrison she was going to pay herself more because she was working longer hours was not credible.

There is no doubt that Ms. Bailey falsified documents, and, in particular, altered the name of the payee on Morrison company cheques to her personal benefit. On a number of occasions, either she or her husband falsified bank deposit slips in order to receive cash intended for deposit to one of the Morrison companies. She had complete control

over the accounting procedures of Mr. Morrison's companies, and was a direct participant in an elaborate scheme to conceal the true nature of the transactions.

Ms. Bailey's defence was that Mr. Morrison authorized her actions, which Mr. Morrison denied. The difficulty with the defence was that Ms. Bailey's actions amounted to professional misconduct, with or without authorization. In taking cash, altering cheques for her personal benefit, and having the companies make unauthorized payments to her credit card account, Ms. Bailey conducted herself in a manner that failed to maintain the good reputation of the profession and its ability to serve the public interest.

The panel was persuaded that Ms. Bailey had been hired because she was a chartered accountant, and therefore honest and trustworthy, and that she had betrayed that trust. The panel accordingly found her guilty of charge No. 1.

Charges Nos. 2 and 3

The panel accepted the reconciliations provided by Ms. Bailey, and concluded that although amounts paid to her Visa account were not included, there was no material misstatement in the amounts shown for professional fees for the years ending July 31, 1993 and 1994. The panel found Ms. Bailey not guilty of charges Nos. 2 and 3.

Charge No. 4

The panel concluded that the elaborate scheme invented by Ms. Bailey to reduce the amount of her husband's garnishee payments, and then through her practice return to him the amount he was originally earning, constituted a deliberate attempt to thwart the intention of the garnishee order, and found Ms. Bailey guilty of charge No. 4.

Charges Nos. 5 and 6

The panel concluded that these charges essentially arose out of the scheme referred to in charge No. 4. According to Ms. Bailey's own testimony, she included the amounts of the diverted garnishee income in her return, but showed identical amounts as an expense for services rendered by David Blair. Ms. Bailey was found guilty of charges Nos. 5 and 6.

ORDER AS TO SANCTION

After making its findings on the charges, the panel heard submissions from the professional conduct committee and Ms. Bailey on the issue of sanction in respect of the guilty findings.

The professional conduct committee submitted that the misappropriation of funds under charge No. 1 was a clear case of moral turpitude, and referred the panel to the case of Barry Michael Garside as being of a similar nature. In both situations, a chartered accountant was hired as an honest and trustworthy person, and in both cases payments were received by the CA without the knowledge or authorization of his employer. On behalf of the professional conduct committee, Ms. McPhadden asked for the most serious sanction the discipline committee can impose, submitting that the principles of general and specific deterrence required that Ms. Bailey be expelled. She also submitted that a reprimand, a fine of \$15,000, and full publicity of the decision and order should be ordered.

Ms. Bailey did not take issue with any part of the proposed sanction except the matter of publication. She stated that all her clients were aware of her situation, and that publication in a local newspaper would be adequate for the purpose of informing the public.

The panel acknowledged that all three general principles of sentencing, namely rehabilitation, general deterrence and specific deterrence, were relevant to its consideration of appropriate sanction in this case, and concluded that general and specific deterrence were the priorities.

The panel made the following order:

ORDER

IT IS ORDERED in respect of charges Nos. 1, 4, 5 and 6:

1. THAT Ms. Bailey be reprimanded in writing by the chair of the hearing.
2. THAT Ms. Bailey be and she is hereby fined the sum of \$7,500, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Ms. Bailey be and she is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Ms. Bailey's 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 *Perth Courier* and the *Smiths Falls Record News*.
6. THAT Ms. Bailey surrender her 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.

Reprimand

The panel believes that a reprimand in writing from the chair of the hearing stresses to Ms. Bailey the unacceptability of her conduct as a chartered accountant.

Fine

The professional conduct committee submitted that a fine of \$15,000 should be levied against Ms. Bailey, both as a general deterrent to like-minded members, and as a demonstration to the public of the profession's intolerance for the type of conduct engaged in by this member. Ms. McPhadden noted that in the Garside case a fine of \$25,000 was levied, and submitted that, as the amount of misappropriated funds was considerably higher in Garside than here, in Ms. Bailey's case a fine of \$15,000 would be appropriate. The panel noted that Ms. Bailey had made a settlement with Mr. Morrison in the amount of \$110,000, whereas in the Garside case no recoveries were made. In addition, Ms. Bailey reported most of the additional income taken, which Mr. Garside did not. The panel accordingly concluded that a fine in the amount of \$7,500 was appropriate.

Expulsion

Expulsion from the Institute is usually ordered in cases involving moral turpitude, and the panel determined that the serious nature of this case, involving misappropriation of funds, left it no alternative but to expel Ms. Bailey, as both a specific and a general deterrent. The profession cannot tolerate members who, being placed in positions of trust, breach that trust for personal gain.

Notice

The panel was aware that dispensing with publication of Ms. Bailey's expulsion was within its discretion. However, it concluded that it is important to inform the public that the profession is regulating itself in the public's interest. Publication in the *Perth Courier* and *Smiths Falls Record News*, which are both located in the geographical area of Ms. Bailey's practice, was considered adequate protection.

Certificate

It is important that Ms. Bailey no longer appear to be a member of the chartered accounting profession after her expulsion. Accordingly, the panel ordered her to surrender her certificate of membership to the committee secretary.

DATED AT TORONTO THIS 24TH DAY OF MARCH, 2000
BY ORDER OF THE DISCIPLINE COMMITTEE

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

MEMBERS OF THE PANEL:

P.A. GOGGINS, CA
B.L. HAYES, CA
R.W. WARKENTIN (Public representative)

APPEAL COMMITTEE re Lisa Ann Bailey

IN THE MATTER OF: An appeal by **LISA ANN BAILEY, CA**, a member of the Institute, and a cross-appeal by **THE PROFESSIONAL CONDUCT COMMITTEE**, of the Decision and Order of the discipline committee made on December 1, 1999, pursuant to the bylaws of the Institute, as amended.

ORDER MADE NOVEMBER 21, 2000

HAVING heard and considered the submissions made on behalf of Lisa Ann Bailey, and on behalf of the professional conduct committee, upon Ms. Bailey's appeal of the Decision and Order of the discipline committee made on December 1, 1999, the cross-appeal of the professional conduct committee having been withdrawn, the appeal committee orders:

1. THAT the appeal in respect of charge No. 1, of which Ms. Bailey was found guilty by the discipline committee, be dismissed and the finding of guilty upheld.
2. THAT the appeal in respect of charges Nos. 5 and 6, of which Ms. Bailey was found guilty by the discipline committee, be allowed and the findings of guilty set aside and substituted with findings of not guilty.
3. THAT in all other respects, the decision of the discipline committee on the charges, and the order of the discipline committee as to sanction, be and are hereby confirmed.

DATED AT TORONTO THIS 29TH DAY OF NOVEMBER, 2000
BY ORDER OF THE APPEAL COMMITTEE

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

APPEAL COMMITTEE re Lisa Ann Bailey

REASONS FOR THE DECISION AND ORDER IN THE MATTER OF: An appeal by **LISA ANN BAILEY, CA**, a member of the Institute, and a cross-appeal by **THE PROFESSIONAL CONDUCT COMMITTEE**, of the Decision and Order of the discipline committee made on December 1, 1999, pursuant to the bylaws of the Institute, as amended.

DECISION AND REASONS FOR DECISION MADE NOVEMBER 21, 2000

This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on November 21, 2000.

Mr. Paul Farley appeared on behalf of the professional conduct committee, and Mr. Robert Reynolds appeared for and with Ms. Bailey.

As a preliminary matter, Mr. Farley advised that the professional conduct committee would not be proceeding with its cross-appeal.

THE DISCIPLINE COMMITTEE'S DECISION AND ORDER

The professional conduct committee had laid six charges of professional misconduct under the rules of professional conduct. The discipline committee found Ms. Bailey not guilty of charges Nos. 2 and 3, and guilty of charges Nos. 1, 4, 5 and 6, two of which had been laid under Rule 201.1, and two under Rule 205. The discipline committee then went on to make the following order:

1. *THAT Ms. Bailey be reprimanded in writing by the chair of the hearing.*
2. *THAT Ms. Bailey be and she is hereby fined the sum of \$7,500, to be remitted to the Institute within six (6) months from the date this Decision and Order becomes final under the bylaws.*
3. *THAT Ms. Bailey be and she is hereby expelled from membership in the Institute.*
4. *THAT notice of this Decision and Order, disclosing Ms. Bailey's name, be given after this Decision and Order becomes final under the bylaws:*
 - (a) to the Public Accountants Counsel for the Province of Ontario;*
 - (b) to the Canadian Institute of Chartered Accountants;*
 - (c) by publication in CheckMark; and*
 - (d) by publication in the Perth Courier and the Smiths Falls Record News.*
5. *THAT Ms. Bailey surrender her 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

Ms. Bailey's Notice of Appeal sought the following relief from the appeal committee:

- that the findings of guilt made by the discipline committee on charges Nos. 1, 4, 5 and 6 be set aside, and that findings of not guilty be substituted in their place;
- that all sanctions ordered by the discipline committee be set aside, or in the alternative that they be varied to a lesser penalty;
- that in the further alternative, the findings and orders of the discipline committee be set aside and a new hearing directed before a differently constituted panel of the discipline committee.

At the hearing, Mr. Reynolds varied the relief sought in the Notice of Appeal by not seeking any relief in respect of charge No. 4, though he indicated he would be seeking a reduction in the sanctions order in the event this charge was the only one remaining at the end of the day.

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 the appeal in respect of charge No. 1, of which Ms. Bailey was found guilty by the discipline committee, be dismissed and the finding of guilty upheld.*
2. *THAT the appeal in respect of charges Nos. 5 and 6, of which Ms. Bailey was found guilty by the discipline committee, be allowed and the findings of guilty set aside and substituted with findings of not guilty.*
3. *THAT in all other respects, the decision of the discipline committee on the charges, and the order of the discipline committee as to sanction, be and are hereby confirmed.*

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

MEMBER'S GROUNDS FOR APPEAL

The appellant did not appeal from the finding of guilty on charge No. 4, but confined her appeal to charges Nos. 1, 5 and 6. The grounds for the appeal are as set out below.

With respect to charge No. 1, the appellant advanced the ground of appeal that the line of reasoning employed by the discipline committee to reach its conclusion of guilty contained two material errors of law, as a result of which the finding of guilty must be set aside. The errors cited were as follows:

- The discipline committee failed to apply the correct standard of proof to the prosecution's case against Ms. Bailey. Mr. Reynolds submitted that the standard of proof applied by the discipline committee required only that the professional conduct committee establish guilt on a simple balance of probabilities, rather than requiring, as it should have, that it establish guilt to a clear and convincing degree on the basis of cogent evidence.
- Charge No. 1 involved serious allegations of misappropriation of funds, which is the taking of funds without authorization. The discipline committee stated in its reasons, however, that "[t]he difficulty with the defence was that Ms. Bailey's actions amounted to professional misconduct, with or without authorization." Thus, Mr. Reynolds submitted, the discipline committee concluded that the appellant could be

found guilty of professional misconduct on this misappropriation charge even if she was found not to have misappropriated. It was argued that this was clear legal error.

- As charge No. 1 alleged professional misconduct in that the appellant misappropriated funds, it was not open to the discipline committee to find the appellant guilty on the basis that, even if she had not misappropriated funds, she had committed some other form of discreditable conduct.

It was the position of the appellant that as a result of the above errors the finding of guilty on charge No. 1 must be set aside.

Mr. Reynolds submitted that the discipline committee would have made a finding of not guilty on charge No. 1 had it not made errors relating to the proper standard of proof to be applied. Referring to various court decisions, in particular *Re Bernstein v. College of Physicians and Surgeons of Ontario*, he argued that in a case where a professional's right to practise is at stake, the prosecution, in order to obtain a finding of guilty, must meet a standard of proof going beyond a simple balance of probabilities. It must establish the probability of guilt by clear and convincing proof based on cogent evidence. A finding of guilty based on evidence held to a lesser standard, such as a simple balance of probabilities, constitutes fatal legal error, he submitted.

Mr. Reynolds emphasized that the discipline committee recognized there was a conflict in the evidence provided by Mr. Morrison and Ms. Bailey, and indicated in its reasons that "[t]he panel did not find either Mr. Morrison or Ms. Bailey to be entirely credible, and ultimately concluded that it preferred the evidence of the former over that of the latter." This statement of preferring the evidence of one witness over that of another supported the defence position, Mr. Reynolds submitted, that the discipline committee applied the lower standard of proof on a simple balance of probabilities rather than the higher standard of proof on clear and cogent evidence.

Mr. Reynolds argued that the prosecution's case was weak, and that there was considerable difference of opinion as to the extent of Ms. Bailey's authority. As raised in paragraph 20 of the Appellant's Factum, he submitted that:

- the documentation confirmed the appellant's sole signing authority;
- the evidence of a prosecution witness confirmed, contrary to Mr. Morrison's assertions, that the appellant had the authority to hire and set remuneration levels for employees;
- the discipline committee found as a fact that the appellant was accurately reporting her supposedly excessive compensation in the corporate financial statements;
- the appellant was disclosing the supposedly misappropriated income in her income tax returns; and
- the professional conduct committee's own investigator expressed the opinion that the authority conferred on the appellant appeared to be unusually wide.

Given the discipline committee's finding, clearly stated in its reasons, that Ms. Bailey's employer George Morrison was "not entirely credible", the prosecution was without the proof necessary to meet the standard of proof properly applicable to it, being clear and convincing proof on the basis of cogent evidence. He argued that a finding of not guilty should therefore be entered to charge No. 1, or in the alternative, that a new hearing should be directed.

As to the second error of law he submitted the discipline committee committed in respect of charge No. 1, Mr. Reynolds argued, as stated in paragraph 30 of the Appellant's Factum, that "[t]he prosecution in a professional misconduct proceeding, although not bound by the rules governing criminal prosecutions, is nevertheless required to specify with reasonable particularity the allegation of misconduct made against the professional. Once the allegation is framed, then the prosecution, in order to secure a finding of guilty, must prove the misconduct which it has alleged. Proof of some other misconduct cannot support a finding of guilt." He referred to the case of *Re Golomb and College of Physicians and Surgeons of Ontario*, cited in his factum, which relates to a doctor who was charged with certain malfeasance but convicted of other malfeasance. Mr. Reynolds indicated that Ms. Bailey had been charged with taking money to which she was not entitled. He stated however that, although the prosecution had shown that certain cheques written were subsequently altered or substituted with other cheques by Ms. Bailey, the charge of misappropriation of funds had not been conclusively proven.

With respect to charges Nos. 5 and No. 6, Mr. Reynolds indicated that there was evidence the income diverted from the Morrison group of companies by Ms. Bailey had, in fact, been reflected in Ms. Bailey's personal income tax returns. He argued that on page 4 of its reasons, the discipline committee accepted the evidence that these fees had been recognized by Ms. Bailey in her records. Thus, Mr. Reynolds submitted that charges Nos. 5 and No. 6 should be set aside because the findings of guilty were inconsistent with the evidence presented and the acknowledgements of the discipline committee.

RESPONDENT'S SUBMISSIONS

Mr. Farley responded to Mr. Reynolds' submissions as set out below.

This appeal was not about errors in law made by the discipline committee, Mr. Farley submitted, but rather whether or not the discipline committee had enough information before it to warrant its decision. He argued that the discipline committee had the advantage over the appeal committee of having personally heard the evidence presented, and that it weighed the evidence and made its findings, including its findings as to credibility, based upon it. He submitted that, contrary to the position taken by the appellant that the discipline committee had insufficient clear and cogent evidence to support the decisions it reached in the case, in fact the evidence was overwhelming.

As to the credibility of Ms. Bailey versus that of Mr. Morrison, Mr. Farley submitted that the discipline committee clearly came to the conclusion that it preferred the evidence of Mr. Morrison over that of Ms. Bailey. He submitted that the discipline committee had no doubt that Ms. Bailey had falsified documents and financial statements by understating the professional fees expense, and by not reporting the cash taken from the daily receipts, and stated that all of these facts went to the assessment of credibility made by the discipline committee.

Mr. Farley referred to the case of *L(G) v. College of Physicians and Surgeons of the Province of Alberta*, in which the Alberta Court of Appeal concluded, in reference to the council of the College hearing an appeal of a decision made by the College's investigating committee, that "[t]he committee had the special advantage of seeing and hearing the witnesses. The council did not. The council should be very slow to interfere with findings based on credibility".

On the issue of the correct standard of proof, Mr. Farley submitted that there are only two accepted standards, the one being the civil standard of proof on a balance of probabilities, and the second being the higher criminal standard of proof beyond a reasonable doubt, and acknowledged that even the lesser civil standard required clear, convincing and cogent evidence. He referred the appeal committee to Sopinka, Lederman and Bryant's *The Law of Evidence in Canada*, 2nd edition (1999) pages 154 to 159, filed at Tab 1 of the Respondent's Supplemental Table of Authorities, and submitted that this authority supported his position that the proper standard of proof to be applied in this case was proof on a balance of probabilities supported by clear and convincing evidence.

With respect to charge No. 1, it was Mr. Farley's submission that the discipline committee concluded on the basis of the evidence it heard that Ms. Bailey had misappropriated funds. He argued that Mr. Reynolds was attempting to dissect the wording of the discipline committee's reasons, and find fault on the basis that the committee did not use appropriate legal language. Mr. Farley stated however, referring to the wording used by the discipline committee on page 6 of its reasons under the heading "Expulsion", that the committee made clear that it had dealt with the issue of misappropriation of funds under charge No. 1. He then took the appeal committee through certain areas of the transcript to underscore the clarity of the evidence against Ms. Bailey. He emphasized that even though Ms. Bailey disputed the allegation that she was not authorized to pay certain amounts to herself and to Mr. Blair, and to take cash balances from the daily deposits, she acknowledged that these actions were committed without the knowledge of Mr. Morrison. Mr. Farley also emphasized that though the discipline committee made findings as to credibility, even in the absence of such findings the evidence presented to it was overwhelming that Ms. Bailey had taken money from the Morrison group of companies and then tried to hide the fact that the funds had been taken. The finding of guilty on charge No. 1 should therefore stand, he submitted.

With respect to charges Nos. 5 and 6, Mr. Farley submitted it was open to the discipline committee to conclude that, in the preparation of her personal income tax returns, Ms. Bailey had concealed certain income amounts received. He indicated that, while Ms. Bailey said she included these amounts in her income tax returns, by virtue of the fact that the information in her tax returns was simply a summary of her accounting records which reflected all of the income transactions and payments to Mr. Blair, no evidence other than her testimony was forthcoming. Mr. Farley submitted that Ms. Bailey's evidence with respect to these amounts was inconsistent throughout her testimony.

APPELLANT'S REPLY

Mr. Reynolds stated that the appeal committee was required to determine whether or not an error of law had been made by the discipline committee, and reiterated that such an error was made by the acceptance of proof of the professional conduct committee's case on a simple balance of probabilities, as a result of which the guilty finding on charge No. 1 should be set aside.

With respect to charges Nos. 5 and 6, Mr. Reynolds submitted that the evidence presented supported Ms. Bailey's position that she recorded all monies received in her books and records, and in her personal income tax returns. He pointed out that the testimony of the professional conduct committee's investigator was that, while he did not look specifically at the expenses recorded, he did analyze the total revenue, and, on the basis of the information he reviewed, he felt that all income had been properly included in Ms. Bailey's records.

QUESTION FROM THE PANEL

After hearing submissions from both counsel, the appeal committee asked their views on the following question: If the appeal committee were to conclude that the evidence was so overwhelming that any discipline committee panel using the correct standard of proof would come to the same conclusion as to guilt as was reached by the discipline committee in this case, or in other words, if no reasonable discipline committee panel would have found Ms. Bailey not guilty, should the appeal committee set aside the decision even if it determined that an error of law had been made?

Both counsel agreed that if the appeal committee came to the view that the evidence presented was so clear and convincing that another panel of the discipline committee would reach the same conclusions as those reached by the panel appealed from, then the determination of guilt should not set aside, and the case should not be sent back for retrial.

PANEL'S DETERMINATION

The appeal committee considered the evidence presented and submissions made, and determined that:

- with respect to charge No. 1, the discipline committee applied the correct standard of proof, being the lower standard of proof on a balance of probabilities as applied in civil cases, rather than the higher standard of proof beyond a reasonable doubt as required for a conviction in criminal cases. In reviewing the reasons of the discipline committee, it was felt that that committee did not err in its determination that, on a balance of probabilities, the professional conduct committee had made its case with respect to charge No. 1, and thus the appeal committee could find no reason to warrant interference with the finding of guilty on the charge; and
- with respect to charges Nos. 5 and 6, the evidence was inconclusive and therefore incapable of supporting the decisions reached, as a result of which the findings of guilty could not stand.

Accordingly, the appeal in respect of charge No. 1 was dismissed, and the finding of guilty was upheld; and the appeal in respect of charges Nos. 5 and 6 was allowed, and the findings of guilty were set aside and replaced by findings of not guilty.

Counsel were requested to return to the hearing room, notified of the appeal committee's decision, and asked to make submissions as to appropriate sanction in light of the setting aside of the guilty findings on charges Nos. 5 and 6. Mr. Reynolds advised that given the dismissal of the appeal on charge No. 1, there was no basis upon which he could offer a case for a variance in the sanctions. As a result, the sanctions ordered by the discipline committee were confirmed.

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

MARVIN B. MARTENFELD, FCA – DEPUTY CHAIR

THE APPEAL COMMITTEE

MEMBERS OF THE PANEL:

C.J. BURKE, FCA
S.F. MITCHELL, CA
V. RAJA, CA
E.W. SLAVENS, FCA
B. L. STEPHENS, CA
J. I. FRID (Public representative)