

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: An Allegation against **MILTON HARVEY BARBAROSH**, a former member, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

TO: Mr. Milton H. Barbarosh

AND TO: The Professional Conduct Committee

REASONS

(Decision and Order made November 14, 2016)

1. This tribunal of the Discipline Committee met on November 14, 2016 to hear an allegation of professional misconduct brought by the Professional Conduct Committee against Milton Harvey Barbarosh, a former member.

2. Ms. Melissa Gentili appeared on behalf of the Professional Conduct Committee (PCC). Mr. Barbarosh attended without counsel. He confirmed that he knew he had the right to attend with counsel and waived that right. Mr. Glenn Stuart attended the hearing as counsel to the Discipline Committee.

3. The decision of the tribunal was made known at the conclusion of the hearing on November 14, 2016, and the written Decision and Order sent to the parties on November 21, 2016. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, include the allegation, the decision, the order, and the reasons of the tribunal for its decision and order.

Allegation

4. The following allegation was made against Mr. Barbarosh by the Professional Conduct Committee on August 2, 2012:

THAT, the said Milton H. Barbarosh, on or about the 2nd day of September, 2011, was convicted of the offence of conspiracy to commit wire, mail and securities fraud as set out in Schedule "A" attached*, and did thereby fail to act 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.

(*Schedule A is not attached to this document)

Preliminary Matter

5. Ms. Gentili stated that although Mr. Barbarosh's membership had been revoked administratively in 2012, under the *Chartered Accountants Act, 2010* he remains subject to the continuing jurisdiction within a six-year limit in respect of an investigation or disciplinary proceeding involving conduct occurring while the individual was a member. Ms. Gentili filed a Brief of Authorities (Exhibit 1) which contained Section 19 of the *Chartered Accountants Act*,

2010, and the pertinent sections of the Rules of Professional Conduct, Rules of Practice and Procedures, the Regulations and the United States Code dealing with membership, jurisdiction and proof of commission of an offence. Ms. Gentili stated that the PCC file had been opened in 2010 while Mr. Barbarosh was still a member. Under Regulation 4-3, Mr. Barbarosh's attempted resignation at that time was not accepted as he was the subject of an ongoing investigation.

6. Mr. Barbarosh stated that the matter has taken six and one-half years to come before the Discipline Committee, noting that there was a lack of expediency and that this matter was not dealt with on a timely basis.

7. Ms. Gentili stated that the PCC was aware of the criminal charges in 2010 and that Mr. Barbarosh had been told in 2012 that allegations would be laid. Since Mr. Barbarosh's membership had been revoked in 2012 and he lives and works in Florida, there was less risk to the public whose interest is always a paramount concern.

8. Mr. Stuart, counsel to the tribunal, advised that continuing jurisdiction was not at issue given the language of section 19 of the *Chartered Accountants Act* and that Mr. Barbarosh would have to bring a motion if he felt his rights had been prejudiced by any delay in bringing the matter forward.

9. The tribunal deliberated and decided that, under the rules and regulations, the matter could proceed and although concern had been expressed for the length of time this matter has taken, the hearing would proceed.

Plea

10. Mr. Barbarosh pleaded not guilty to the Allegation.

The Case for the PCC

11. Ms. Gentili submitted that Mr. Barbarosh failed to act in a manner that would maintain the good reputation of the profession by virtue of his criminal conviction in the Southern District of Florida. Ms. Gentili filed a Document Brief (Exhibit 2) containing the judgment, indictment, plea agreement and transcript of sentencing. The criminal case involved a large group of hedge funds that were incorporated in the British Virgin Islands. Mr. Barbarosh was the president and director of a Florida corporation which purportedly appraised companies that were being considered as investments by the hedge fund group. Mr. Barbarosh had a financial interest in some of the entities for which he prepared appraisal valuations. Investors were deceived and induced to invest in the hedge funds as a result of false representations, fraudulent inflation of the value of the securities and discouraging redemptions. The hedge fund group would acquire, sometimes at pennies a share, large amounts of stock in shell companies and artificially create the appearance of a higher market value. The purpose of the scheme was to enable the conspirators to receive incentive performance fees and management fees by fraudulently inflating the market value of the securities.

12. Ms. Gentili stated that Mr. Barbarosh, as well as others involved in the fraud, was charged with Count 1 of conspiracy to commit wire, mail and securities fraud and Counts 2 to 7 of Wire Fraud. Mr. Barbarosh entered into a plea agreement whereby he pleaded guilty to Count 1 and Counts 2 to 7 were dismissed. Mr. Barbarosh was sentenced to one month imprisonment, one year of supervised release with conditions including six months of home

confinement, and payment of restitution of \$150,000. Ms. Gentili filed a certified copy of the United States District Court judgment (Exhibit 3).

13. Ms. Gentili submitted that when a member is charged under Rule 201.1 for a conviction on an offence referred to in Rule 102, there is a rebuttable presumption that the member failed to maintain the good reputation of the profession and its ability to serve the public interest

The Case for Mr. Barbarosh

14. Mr. Barbarosh was affirmed as a witness and then gave evidence on his own behalf. Mr. Barbarosh gave background on his employment, stating that he has not worked in Canada since 1986 when he had relocated to Florida. Mr. Barbarosh stated that, while he was not trying to re-litigate his court hearing, just because he had entered a guilty plea did not mean that everything contained in the indictment was true.

15. Mr. Barbarosh submitted that he worked with a securities firm dealing with mergers and acquisitions, and, as part of his duties, he looked at small businesses for valuation at less than one cent per share. At the request of another party in the firm, Mr. Barbarosh prepared hypothetical valuations of what the shares could be worth for the auditors. The reports met all the standards, were never actually used and no money was lost, but the hedge funds received a lot of negative press. The fund was closed down and the matter was investigated by the Securities Exchange Commission. Mr. Barbarosh stated that he was never charged by the SEC. Mr. Barbarosh was charged by the Florida court, along with others, for conspiracy to commit fraud. Although he said he wanted to go to trial, after spending over \$2 million in legal costs, he entered into a plea agreement with the courts.

16. Ms. Gentili objected that Mr. Barbarosh was attempting to re-litigate the court case and that certain documents Mr. Barbarosh was seeking to introduce were not relevant to the case being heard by the tribunal.

17. After considering that Rule 201 refers to a rebuttable presumption, the tribunal decided that Mr. Barbarosh be allowed to file documents pertaining to his membership in other organizations, but information pertaining to what other people found or did not find concerning Mr. Barbarosh's criminal conviction would not be relevant to the case before the tribunal.

18. Mr. Barbarosh referred to the AICPA Rule 7.3.1 (Exhibit 4) concerning criminal conviction of a member, stating that he believes the US code sets a standard as high or higher than that of CPA Ontario. Mr. Barbarosh submitted that, despite his conviction, he is still a member of AICPA as confirmed by his AICPA 2016/17 membership renewal (Exhibit 5).

19. Mr. Barbarosh submitted that all other organizations and professional bodies where he had membership were notified of his criminal conviction. Mr. Barbarosh filed a letter of guidance issued in 2010 in lieu of a finding of probable cause from the Florida Department of Business and Professional Regulation (FDBPR) (Exhibit 6) following an investigation of allegations of violating certain provisions of Chapter 473 of Florida Statutes. Mr. Barbarosh, who is a licensed real estate agent, filed the 2012 final order issued by the Florida Real Estate Commission (Exhibit 7) which ordered he pay costs, take an ethics course and service a period of probation. Mr. Barbarosh filed a 2015 finding of the FDBPR (Exhibit 8) that indicated a complaint made against him had been closed.

20. Mr. Barbarosh filed a reaccreditation certificate document for 2012 and proof of dues paid in 2015 (Exhibits 9 and 10), confirming he still maintained his membership in the American

Society of Appraisers

21. Mr. Barbarosh submitted that the other professional bodies had looked at whether their respective rules had been followed and had allowed him to maintain his membership.

22. Mr. Barbarosh stated that the judge had reviewed hundreds of letters received from various parties in regard to the history and character of Mr. Barbarosh and had based the sentence on his role in the case, his acceptance of responsibility, his cooperation and his unlikelihood to reoffend. Mr. Barbarosh stated that he still does business today with the people who had provided letters on his behalf. Mr. Barbarosh submitted that he has upheld his reputation in the US with the people who endorsed him. Mr. Barbarosh stated that, although he entered a guilty plea, he had become involved with the wrong people and had signed off on reports, which led to his criminal charges.

23. Mr. Barbarosh stated that there was no mention during the trial of his CPA, CA designation in Canada and noted that there had already been a lot of negative publicity concerning the trial, although he felt he had been vindicated in the USA. Mr. Barbarosh submitted that he is fighting the allegation under Rule 201 as he had worked hard for his CA designation in Canada.

24. Mr. Barbarosh stated that he viewed this matter very seriously and had relied on his legal counsel's advice during the criminal proceedings. Mr. Barbarosh stated that he had no prior criminal or disciplinary history and had wanted to resign his membership in CPA Ontario.

25. Mr. Barbarosh filed proof of his current membership in the FDBPR (Exhibit 11), State of Florida real estate licence (Exhibit 12) and renewal of membership in the Florida Institute of Certified Public Accountants (Exhibit 13).

Submissions

26. At the conclusion of the evidence Ms. Gentili submitted that Mr. Barbarosh pleaded and was found guilty by the courts. Mr. Barbarosh admitted under oath that he had exhibited a lack of integrity and dishonesty in his involvement in a conspiracy to commit fraud. The judge, after reviewing the documents filed, had ordered a one-month prison sentence plus probation. Ms. Gentili stated that minimal weight should be placed on the letters supporting Mr. Barbarosh in the courts and the orders of the other organizations with respect to the issue of professional misconduct. Ms. Gentili submitted that the tribunal was being asked to make a decision based on the rules and regulations of this organization. Ms. Gentili submitted that the evidence was clear, cogent and convincing to support the allegation, and that Mr. Barbarosh should be found guilty as alleged.

27. Mr. Barbarosh submitted that his plea before the courts was made on the advice of his lawyer had been a case of willful blindness and was made prior to knowing that others involved had gone free.

Decision

28. The tribunal found that the Allegation had been proven. After deliberating, the tribunal announced the following decision:

THAT having seen, heard and considered the evidence the Discipline Committee finds Milton Harvey Barbarosh guilty of the Allegation of professional misconduct.

Reasons for Decision

29. Mr. Barbarosh was convicted, on or about 2nd day of September, 2011, of the offence of conspiracy to commit wire, mail and securities fraud, a criminal offence. Although there would appear, based on the evidence presented, mitigating circumstances in this case, the actual conviction was not in dispute.

30. The fact that Mr. Barbarosh was convicted of a criminal offence, an offence he pleaded guilty to, is sufficient to find Mr. Barbarosh guilty of professional misconduct.

Sanction

31. Ms. Gentili, on behalf of the PCC, submitted that an appropriate sanction in this matter would be: a written reprimand; a fine in the amount of \$10,000; revocation, publicity excluding newspaper publication, and approximately 50% of the costs incurred in this matter.

32. Mr. Barbarosh requested that he be given a reprimand as an appropriate sanction. Mr. Barbarosh submitted that he does not live in Canada, has resigned his membership and has suffered financial damage through legal fees and fines ordered by the courts. Since he does not live or work in Canada, Mr. Barbarosh requested that there be no notification made to the other provincial bodies.

33. Mr. Barbarosh filed as additional evidence an undated affidavit of Gary Trugman, CPA (US) (Exhibit 14) concerning the preparation of the valuation reports, which were not signed or issued, and which, in Mr. Trugman's opinion, did not violate Florida business valuation standards. Mr. Barbarosh also filed a March 2004 declaration and August 2008 affidavit of Barton Sacher, an attorney (Exhibits 15 and 16) indicating that Mr. Barbarosh had acted as a confidential informant for the SEC.

34. Ms. Gentili submitted that the sanctions proposed by the PCC appropriately deal with the principles of general and specific deterrence which are paramount in a case involving moral turpitude.

35. Ms. Gentili stated that the aggravating factors included the false appraisals prepared by Mr. Barbarosh for the auditors from 1999 to 2003. This was an elaborate scheme involving shell companies and fraudulent inflation of the value of the securities, thereby putting investors at risk. Ms. Gentili stated that Mr. Barbarosh had pleaded guilty and been found guilty by the courts.

36. Ms. Gentili stated the mitigating factors were that Mr. Barbarosh did plead guilty to the criminal charges, assisted the SEC, had served his time and had made restitution through the courts. Mr. Barbarosh has no previous criminal or discipline history. Mr. Barbarosh provided statements from several character witnesses, was highly regarded and had been a contributor in his community. The judge had heard the same statements but had still sentenced Mr. Barbarosh. Ms. Gentili submitted that the aggravating factors far outweigh the mitigating circumstances.

37. Ms. Gentili submitted that a reprimand would address the seriousness of the conduct. The nature of this case involving moral turpitude should result in revocation. A fine of \$10,000 was being recommended, taking into account Mr. Barbarosh's cooperation with the SEC and the US courts. Ms. Gentili stated that publicity to other provincial bodies was always ordered.

The PCC was not asking for newspaper publication as there had already been significant publicity, Mr. Barbarosh lives and works in Florida and his membership was revoked in 2012. Ms. Gentili stated that only in rare and unusual circumstances would the matter not be publicized on the CPA Ontario website.

38. Ms. Gentili filed a Costs Outline (Exhibit 17) showing that the actual costs were just over \$8,000, and stated that the PCC was seeking an order for approximately half the costs in the amount of \$4,000.

39. Ms. Gentili distributed a case brief containing *McIntyre, Spensieri, Humphreys, Eckstein, Khangura* and *Burrill*.

40. Mr. Barbarosh requested that he be given time to pay any fine or costs ordered.

Order

41. After deliberating, the tribunal made the following order, noting that the length of time that has elapsed was a mitigating factor in the tribunal's deliberations:

IT IS ORDERED in respect of the Allegation:

1. THAT Mr. Barbarosh be reprimanded in writing by the Chair of the hearing.
2. THAT Mr. Barbarosh shall not be eligible for reinstatement or readmission to membership in CPA Ontario other than by an application to the Discipline Committee pursuant to Rule 21 of the Rules of Practice and Procedure, and he is precluded from applying for readmission for a period of five (5) years from the date this Decision and Order is made, and must satisfy all of the requirements of Rule 21.03 of the Rules of Practice and Procedure before being readmitted.
3. THAT notice of this Decision and Order, disclosing Mr. Barbarosh's name, be given in the form and manner determined by the Discipline Committee:
 - (a) to all members of CPA Ontario; and
 - (b) to all provincial bodies;
 and shall be made available to the public.

Reasons for Sanction

42. A finding of professional misconduct demands a reprimand to emphasize the seriousness of the charge and its potential impact on the public's view of the profession.

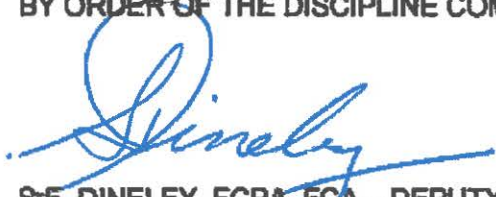
43. Mr. Barbarosh's membership was revoked in 2012 for the non-payment of fees. His membership cannot be revoked for a second time. Accordingly, the tribunal concluded that a five-year period from the current date (which would be ten years from the date of conviction) before Mr. Barbarosh was allowed to re-apply was an appropriate alternative sanction.

44. At the start of the hearing the tribunal expressed its concern and dismay over the delay in holding a hearing. The PCC was aware of the criminal charges in 2010 and indicated to Mr. Barbarosh in 2012 that allegations would be brought forward. The tribunal was of the view that having the allegations outstanding for such an extended period of time, particularly given that the matter was relatively straightforward, was unfair to the former member. Accordingly the

tribunal concluded that no fine or costs should be assessed.

45. The allegations have been posted on the CPA website, which is available to the public. Therefore, the findings of the tribunal should be published on the CPA website. Given the length of time from when allegations were made by the PCC and the residency of Mr. Barbarosh in the United States, publication in the CPA magazine was deemed unnecessary.

DATED AT TORONTO THIS 2ND DAY OF FEBRUARY, 2017
BY ORDER OF THE DISCIPLINE COMMITTEE



S.F. DINELEY, FCPA, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

T. GALVIN, CPA, CA, CMA

P.J. VAILLANCOURT, CPA, CGA

A.B. MINTZ, CPA, CA

R. HUANG (PUBLIC REPRESENTATIVE)