CHARGE(S) LAID re Ravi Sivakumaran

TO: RAVI SIVAKUMARAN

AND TO: The Discipline Committee of the Institute of Chartered Accountants of Ontario

The Professional Conduct Committee hereby makes the following charge against Ravi Sivakumaran, a student member of the Institute:

1. THAT the said Ravi Sivakumaran, in or about the period March 29 to April 12, 2002, failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he misappropriated $20,000.00 from Resident Medical Group Inc., contrary to Rule 201.1 of the rules of professional conduct.

Dated at Windsor, Ontario this 12th day of September, 2002.

D.D. MELOCHE, CA - DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **RAVI SIVAKUMARAN**, a student of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

TO: Mr. Ravi Sivakumaran
37 Birchbank Lane
TORONTO, ON M3B 2Y2

AND TO: The Professional Conduct Committee, ICAO

DECISION AND ORDER MADE FEBRUARY 19, 2003

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, the charge having been amended at the hearing on consent, and having heard the plea of guilty to the charge as amended, the Discipline Committee finds Ravi Sivakumaran guilty of the charge.

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Sivakumaran be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Sivakumaran be and he is hereby fined the sum of $1,500, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Sivakumaran be and he is hereby struck off the register of students.

4. THAT notice of this Decision and Order, disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, to the Canadian Institute of Chartered Accountants.

5. THAT notice of this Decision and Order, without disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, by publication in *CheckMark*.

6. THAT the discipline file in this case be sealed, and that, except as between the parties, and as provided in paragraph 4, Mr. Sivakumaran's name not be disclosed in any communication or documentation relating to the case, including the charge, this Decision and Order, the reasons, and the exhibits.

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

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

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against a student of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

TO: The student

AND TO: The Professional Conduct Committee, ICAO

REASONS FOR THE DECISION AND ORDER MADE , 2003

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on , 2003 to hear a charge brought by the professional conduct committee against a student of the Institute. As a result of the decision of the majority of the panel at the sanction stage of the hearing not to publish or disclose the student's name, the student will not be named in these reasons. As the names of some of the people involved in the hearing would reveal the identity of the student, their names will also be withheld.

2. Barbara Glendinning represented the professional conduct committee, and was accompanied by Bruce Armstrong, CA, the professional conduct committee investigator.

3. Cynthia Amsterdam represented the student. The student's father and the student's fiancé(e) were also present in the hearing room.

4. The decision and the order of the discipline committee were both announced at the hearing, and the formal decision and order was subsequently signed by the committee secretary and sent to the parties. These reasons, given in writing pursuant to Bylaw 574, set out the charge, the decision, and the order, as well as the reasons of the discipline committee.

DECISION ON THE CHARGE

5. On consent of the student's counsel, the charge laid by the professional conduct committee was amended to read as follows:

> THAT the said student, in or about the period March 29 to April 12, 2002, failed to conduct himself/herself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that (s)he misappropriated $20,000.00 from , contrary to Rule 201.1 of the rules of professional conduct.

6. The student entered a plea of guilty to the charge and confirmed (s)he understood that on the basis of the plea, and on that basis alone, (s)he could be found guilty of the charge.

7. Ms. Glendinning filed an agreed statement of facts and took the panel through the relatively simple facts of the case. At the time of the misconduct, the student was 21 years of age, and had recently commenced full-time employment as a registered CA student with a mid-size firm of chartered accountants (the CA firm). The student had worked for the CA firm as a file clerk while in

university. The student's father had once worked for the CA firm, was well-known by the partners of the firm, and provided bookkeeping and accounting services for a number of the firm's clients.

8. At the time of the misconduct, the student was providing services for his/her father. In particular, (s)he was looking after the books and records of one of his/her father's clients which was also a client of the CA firm. The student drew two cheques on the client's bank account, each in the amount of $10,000, for his/her own personal benefit. When one of the cheques, which was made payable to the student, was presented to the client's bank, the student's theft was discovered immediately because the cheque put the account of the client over its credit limit. The bank contacted the client about the matter, and the client in turn confronted the student. The student told his/her father, whereupon, accompanied by the father, the student met with a partner of the CA firm to disclose the misconduct, and then met with the client to confess and to apologize for what had been done and to make reimbursement. The second cheque drawn by the student on the client's bank account was returned after the client registered a stop payment order. The student was subsequently suspended by the CA firm. The student and his/her father paid for a full forensic audit of the client's books. No other irregularities were found.

9. After deliberating, the panel concluded that there was no doubt that the charge against the student had been proven and that the student was guilty of professional misconduct.

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

> DECISION
>
> THAT, having seen and considered the evidence, including the agreed statement of facts, filed, the charge having been amended at the hearing on consent, and having heard the plea of guilty to the charge as amended, the Discipline Committee finds the student guilty of the charge.

ORDER AS TO SANCTION

11. Both Ms. Glendinning and Ms. Amsterdam made brief opening statements. Ms. Amsterdam then called evidence on behalf of the student. It was apparent from the opening statements that the issue which divided the parties was disclosure of the student's name.

12. Ms. Glendinning stated that the professional conduct committee sought an order striking the student from the Institute's register of students, imposing a fine of between $1,000 and $1,500, and providing for the usual notice including by way of publication in *CheckMark* disclosing the student's name. Ms. Amsterdam advised the panel that the only part of the sanction sought by the professional conduct committee with which the student took issue was the *CheckMark* publication disclosing the student's name.

13. The student and his/her fiancé(e) both testified, and Ms. Amsterdam filed a document brief which contained a report from a psychologist and confirmation from a psychiatrist that the student was receiving medical treatment. As the panel understood the gist of the evidence of the student and the student's fiancé(e), their major concern was that if the student's name was publicized in *CheckMark* they and their families would suffer significant cultural ostracism because of the nature of the particular cultural community of which they were members.

14. The panel also heard testimony from one of the partners of the CA firm, who spoke highly of both the student and the student's father. The accounting and bookkeeping firm owned by the student's father had provided services to the CA firm for approximately ten years. The witness testified that the student had started at the CA firm as a CA student following graduation from

university in 1999, but that (s)he had worked for the firm in the file room on a part-time basis prior to that time. The witness described the student as one of the best students he had seen – hardworking, dedicated and well respected by the partners of the firm. He testified that when told by the student of the student's theft from the client he was totally shocked, and that he never would have expected something like that to occur. He also testified that the student's misconduct was an "absolute tragedy" and "out of character".

15. In her submissions on sanction, Ms. Glendinning outlined the mitigating and aggravating circumstances of this case. She submitted that the mitigating factors included the age of the student; the student's admission of wrongdoing shortly after the thefts were discovered by the client; the immediate and full restitution to the client; the cooperation with the investigation of the professional conduct committee; the plea of guilty at this hearing; the student's indication from the start of the investigation that (s)he would not be contesting guilt in this matter; and the student's evident remorse.

16. Ms. Glendinning also set out the aggravating factors, which included that the offence involved moral turpitude; that the student breached the trust of a client, of his/her father, and of the CA firm; and that the student had no overwhelming need for the funds stolen, which was evidenced by the student's ability to make immediate and full restitution once discovered.

17. Ms. Glendinning submitted that a reprimand was necessary as a specific deterrent to stress to the student the unacceptability of the misconduct. She also submitted that a fine was necessary as both a specific and a general deterrent, to deter the student from similar conduct in the future and to send a message to other students that the misconduct in this case will not be tolerated. Ms. Glendinning indicated that in light of the student's financial circumstances a fine in the amount suggested was appropriate. She also submitted that the student should be struck from the register of students, in effect the equivalent of expulsion of a member, as expulsion would be appropriate for a member who had stolen or attempted to steal $20,000 from a client.

18. With respect to notice and disclosure of the student's name, the professional conduct committee did not ask that notice be published in a newspaper, as it did not think the public needed such protection, but it did ask that notice of the decision and order be published in *CheckMark* and that the notice disclose the student's name. Ms. Glendinning explained that the professional conduct committee did not think the facts and circumstances of this case made it a "rare and unusual" case as contemplated by the appeal committee in the *Finkelman* and *Solmon* cases justifying the withholding of publication of the student's name.

19. Ms. Amsterdam took no issue with striking the student from the register or imposing a $1,500 fine. However, she asked the panel to exercise its discretion under Bylaw 575(4) and not publish the student's name. While acknowledging that publication of name is an effective general deterrent, she submitted that there were extenuating factors which justified and even required the withholding of the student's name from publication in this case, including the student's age and the early end to what could have been a long and successful career as a chartered accountant. The student was very young, and was not even an experienced student, having just commenced employment as a CA student. Not having yet been entrusted with the CA designation, and thus not having enjoyed the privilege of being publicly welcomed to the profession with its attendant respect and prestige, it was appropriate that the student not suffer the humiliation of being publicly struck off the register. Such notice would be a personal blow to the student and make it more difficult for him/her to get started in another career. Counsel also submitted that the particular community of which the student was a member would ostracize the student and the student's family, as well as the student's fiancé(e) and the fiancé(e)'s family, if there were a public blemish recorded against the student's reputation.

20. Ms. Amsterdam submitted that the panel should be guided by the principle of rehabilitation in this case, especially when determining whether or not it was necessary to require publication of the student's name in *CheckMark*. She argued that this youthful student had learned a difficult lesson, was genuinely extremely remorseful, and had demonstrated a strong desire to rehabilitate and embark on a different career. Ms. Amsterdam also pointed out to the panel the further mitigating factor of the student's previous good conduct, and the fact that the student had faced up to his/her misconduct and apologized to the client, the CA firm, and the Institute.

21. Following the panel's deliberations, the chair summarized the order of the majority of the panel. The terms of the formal order were sent to the parties on March 13, 2003. The formal order reads as follows:

> ORDER
>
> IT IS ORDERED in respect of the charge:
>
> 1. THAT the student be reprimanded in writing by the chair of the hearing.
>
> 2. THAT the student be and (s)he is hereby fined the sum of $1,500, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.
>
> 3. THAT the student be and (s)he is hereby struck off the register of students.
>
> 4. THAT notice of this Decision and Order, disclosing the student's name, be given, after this Decision and Order becomes final under the bylaws, to the Canadian Institute of Chartered Accountants.
>
> 5. THAT notice of this Decision and Order, without disclosing the student's name, be given, after this Decision and Order becomes final under the bylaws, by publication in *CheckMark*.
>
> 6. THAT the discipline file in this case be sealed, and that, except as between the parties, and as provided in paragraph 4, the student's name not be disclosed in any communication or documentation relating to the case, including the charge, this Decision and Order, the reasons, and the exhibits.

Reprimand

22. The panel determined that a reprimand was necessary in order to stress to the student the serious nature of the offence and the unacceptability of the misconduct.

Fine and Striking from Register of Students

23. The panel concluded that as a matter of specific and general deterrence, the student should be struck from the Institute's register of students, and that a fine of $1,500 should be imposed.

Notice – Disclosure of Name

24. The panel was not unanimous in its view as to whether the principle of general deterrence required the student's name to be disclosed in the notice which would appear in *CheckMark*.

25. The relevant bylaw of the Institute relating to notice, Bylaw 575, reads as follows:

> **575 Notice of decisions and orders: disclosure of name – publication**

(1) Notice of any decision and/or order made by the discipline committee may be given in such form and manner as the committee may from time to time determine.

(2) Notice of suspension or expulsion of a member shall be given to all members of the Institute.

(3) Notice of expulsion of a member shall be given to the public by publication in a newspaper or newspapers distributed in the geographic area of the members current or former practice, employment and/or residence, or in such other manner as the discipline committee may determine to be appropriate, unless the committee determines that the circumstances of the case are of a nature that such notice is not necessary for the protection of the public and would be unfair to the member, in which case the committee shall provide written reasons for not ordering publication of the notice.

(4) Notice given under this bylaw shall disclose the name of the person or firm disciplined unless the discipline committee otherwise orders.

(5) Such further or other notice of any decision and/or order may be given or published in such a way and at such times as the discipline committee may determine.

(6) When the discipline committee makes an order that a member be suspended or expelled from membership, or that a member's or firm's right to practise be restricted, it shall promptly inform all other provincial institutes.

26. The requirements of the bylaw with respect to publication of notice of the disciplining of a member and publication of notice of the disciplining of a student are different. Notice to all Institute members is to be published if a member is suspended or expelled [Bylaw 575(2)], and notice of a member's expulsion is to be published in a newspaper unless such notice is not necessary for the protection of the public and would be unfair to the member [Bylaw 575(3)]. There is no requirement that the discipline committee publish any notice relating to a disciplined student, although Bylaw 575(1) does give the discipline committee the power to do so, and if notice is to be published the discipline committee has the power to order that the name of the "disciplined person" not be disclosed [Bylaw 575(4)].

27. The *Finkelman* and *Solmon* appeal cases referred to above, which were heard and determined together by the appeal committee in February 1990, established the principle that only rare and unusual circumstances will justify the withholding of a disciplined member's name from publication. The sole issue on the appeals was disclosure of the members' names in *CheckMark*. The applicable bylaw at the time was Bylaw 83(4), which stated: "Notice given under this bylaw shall disclose the name of the person disciplined unless the discipline committee or the appeal committee, as the case may be, otherwise orders". This is essentially the same wording as now contained in Bylaw 575(4) for the discipline committee, and Bylaw 654(4) for the appeal committee. The appeal committee's joint reasons in the *Finkelman* and *Solmon* cases conclude with the following paragraph:

> The appeal committee wishes to make a general comment about Bylaw 83(4). We recognize that as long as the Bylaw provides that the discipline committee or the appeal committee may "otherwise order" some members being disciplined will argue that in the particular circumstances of their case such an order should be made and publication of their name withheld. In light of the principle of general deterrence and the importance of confidence in the openness of the Institute's disciplinary process,

> this committee is of the view that circumstances which could persuade an appeal committee or the discipline committee not to publish a disciplined member's name will be rare and unusual.

28. The *Finkelman* and *Solmon* cases dealt specifically only with the issue of disclosure of members' names. However, the principle of general deterrence and the maintenance of confidence in the openness of the Institute's disciplinary process – the factors identified by the appeal committee in the above excerpt in support of publication of members' names – apply as well to the issue of publication of students' names.

29. While we recognize that publishing the name of the student in this case would serve to reinforce the openness of the disciplinary process, this panel is satisfied that the openness of the process is already well established. Though the student's name has been ordered to be withheld, nevertheless the panel's reasons will be available to members, students and the public. The general openness of the process and the fact that this openness is well known minimize the concern we might otherwise have had that withholding this student's name from publication would undermine the general policy that the disciplinary process be an open one.

30. Publication of notice of this case in *CheckMark* even without the student's name will reinforce what every student already knows – that if they steal money they will be ousted from the Institute. The panel recognized, however, that without disclosure of name such notice will not have the same deterrent effect. Accordingly, the difficult issue for the panel was whether disclosure of the student's name was required as a matter of general deterrence, or whether the principle of general deterrence could be adequately satisfied through notice without name.

31. One of the reasons advanced for withholding the student's name is the impact disclosure of name would have on the student, and on the families of the student and the student's fiancé(e), because of the culture of the ethnic community in which they all live. We did not find this submission persuasive. In the *Waller* case, the discipline committee acknowledged that the impact of local newspaper publication could be greater in towns and smaller cities than in Toronto, and could have more of an impact on a disciplined member who had children than on one who did not, but rejected the ideas of having one rule for members who live in small communities and another for members who live in Toronto, and having one rule for members with children and another rule for members without children. In this case, we were unwilling to treat a disciplined student differently based on the ethnic or cultural community to which the student belongs.

32. Another reason advanced for withholding the student's name was rehabilitation, which was argued by Ms. Amsterdam as the most important principle of sanctioning in this case. The student does not intend to continue his/her career in accounting. It seems the theft may have been a way of communicating to the student's father that the student did not wish to be an accountant. Accordingly, the principle of rehabilitation is not as directly applicable as it is in the case of a member or student who wishes to continue to practise within the discipline of the profession.

33. Nevertheless, the general principle of assisting the student to rehabilitate his/her life in a different career seemed to the panel to be a sufficient reason, in the circumstances of this case, for withholding the student's name from publication.

34. We cannot emphasize enough the impact of the youth of the student on our decision. The student was not only very young in fact, being just 21 years old at the time of the misconduct, and 22 years old at the date of the hearing, but was very young also in both appearance and demeanour. The student made one very serious mistake. It may have been a stupid, impetuous act, or it may have been an unconscious effort to communicate with the father, but it was not a carefully considered scheme, and it disclosed virtually no guile or methodical planning. Given the

financial position and relatively small cash flow of the client, the theft was certain to be discovered immediately. We must also emphasize that the student was at a very early career stage, and had attained little practical experience that will assist in the search for another career or alternative employment.

35. The majority of the panel determined that the circumstances of this case were sufficiently rare and unusual to warrant the withholding of the student's name from the notice to be published in *CheckMark*, and thought it was the appropriate order to help advance the rehabilitation of the student. These panel members were of the view that it was appropriate in this case to base their publication decision on the rehabilitation principal of sanctioning, and were convinced that the student's rehabilitation would be harmed if publication of his/her name in *CheckMark* were ordered. The majority also felt that no additional specific deterrent effect would be achieved through publication of the student's name in *CheckMark* than had already been achieved through this young person's involvement in the discipline process.

36. Two members of the panel, Mr. Hanson and Ms. Bridge, were not convinced that the principle of rehabilitation should outweigh the principles of general and specific deterrence in the publication decision. They were also not convinced that the student no longer posed a threat to the profession and to the public, given that the student was still doing work in the father's bookkeeping and accounting business for clients who were also clients of the CA firm. The minority view was that these clients may be deprived of needed protection by an order of non-publication of the student's name in *CheckMark*. The majority of the panel was satisfied, however, that as the CA firm knew of the student's misconduct, there was not a need to further protect the firm's clients through publication of the student's name.

37. As a result of the decision of the majority of the panel to publish notice in *CheckMark* without the student's name, the panel then determined that such an order would be ineffective without a further order that the panel's decision and order, its reasons and the charges also not include the student's name, and that the record of these proceedings be sealed. An order to that effect was made by the panel.

DATED AT TORONTO THIS 7TH DAY OF JULY, 2003
BY ORDER OF THE DISCIPLINE COMMITTEE

M. BRIDGE, CA – CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

L.G. BOURGON, CA
P.M. CLEVELAND, FCA
A. HANSON, CA
N.A. MACDONALD EXEL, CA
S.J. MURRAY (Public representative)

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by the Professional Conduct Committee of the Decision and Order of the Discipline Committee made against **RAVI SIVAKUMARAN**, a student member of the Institute, on February 19, 2003, pursuant to the bylaws of the Institute, as amended.

TO: Mr. Ravi Sivakumaran
37 Birchbank Lane
Toronto, ON M3B 2Y2

AND TO: The Professional Conduct Committee, ICAO

REASONS FOR THE ORDER MADE OCTOBER 8, 2003

1. This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on October 1, 2003. Mr. Paul Farley appeared on behalf of the professional conduct committee, and Ms. Cynthia Amsterdam appeared for Mr. Sivakumaran. The professional conduct committee was appealing certain parts of the order of the discipline committee made against Mr. Sivakumaran on February 19, 2003.

2. Unable to complete our deliberations and reach a decision on October 1, the panel reconvened and concluded its deliberations by conference call on October 8, and reached the decision to allow the professional conduct committee's appeal. The parties were notified that day of the panel's decision and the formal order was issued on October 10, 2003.

THE DISCIPLINE COMMITTEE'S DECISION AND ORDER

3. The professional conduct committee had laid one charge of professional misconduct against Mr. Sivakumaran pursuant to Rule 201.1 of the rules of professional conduct. Mr. Sivakumaran pleaded guilty to the charge. At its hearing held on February 19, 2003, the discipline committee found the student guilty of the charge, and made the following order:

ORDER

IT IS ORDERED in respect of the charge:

1. THAT Mr. Sivakumaran be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Sivakumaran be and he is hereby fined the sum of $1,500, to be remitted to the Institute within twelve (12) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Sivakumaran be and he is hereby struck off the register of students.

4. THAT notice of this Decision and Order, disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, to the Canadian Institute of Chartered Accountants.

5. THAT notice of this Decision and Order, without disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, by publication in *CheckMark*.

6. THAT the discipline file in this case be sealed, and that, except as between the parties, and as provided in paragraph 4, Mr. Sivakumaran's name not be disclosed in any communication or documentation relating to the case, including the charge, this Decision and Order, the reasons, and the exhibits.

RELIEF SOUGHT FROM THE APPEAL COMMITTEE

4. The Notice of Appeal of the professional conduct committee sought the following relief from the appeal committee:

1. The professional conduct committee asks that the appeal committee exercise its jurisdiction pursuant to Bylaw 601(6) and Bylaw 605 and declare that paragraph 6 of the order of the discipline committee is void and of no effect;

2. The professional conduct committee asks that the appeal committee vary paragraph 5 of the order of the discipline committee by deleting the word “without” prior to “…disclosing the student’s name…” so that the order provides that the name of the student member, Ravi Sivakumaran, be published along with notice of the decision and order in *CheckMark*;

3. The professional conduct committee asks that the notice specified in paragraph 4 of the order of the discipline committee be given to the Public Accountants Council as well as to the Canadian Institute of Chartered Accountants;

4. The professional conduct committee asks for the costs of this appeal;

5. The professional conduct committee asks that all other parts of the order of the discipline committee be confirmed by the appeal committee.

6. The professional conduct committee asks for such other relief as circumstances require or this honourable tribunal permits.

THE APPEAL COMMITTEE’S ORDER

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

1. THAT the professional conduct committee's appeal be and it is hereby allowed.

2. THAT the decision and order of the discipline committee made on February 19, 2003 be and it is hereby varied as follows:

   (a) by adding at the end of paragraph 4 the words "and to the Public Accountants Council for the Province of Ontario", so that the paragraph reads: "THAT notice of this Decision and Order, disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, to the Canadian Institute of Chartered Accountants and to the Public Accountants Council for the Province of Ontario".

(b) by deleting the word "without" in the first line of paragraph 5, so that the paragraph reads: "THAT notice of this Decision and Order, disclosing Mr. Sivakumaran's name, be given, after this Decision and Order becomes final under the bylaws, by publication in *CheckMark*".

(c) by deleting paragraph 6 in its entirety.

3. THAT in all other respects the decision and order of the discipline committee made on February 19, 2003 is confirmed.

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

GROUNDS FOR APPEAL OF THE PROFESSIONAL CONDUCT COMMITTEE

7. The facts upon which Mr. Sivakumaran was found guilty of professional misconduct by the discipline committee were not in issue upon the appeal, and were adequately summarized for our purposes in paragraph 8 of the discipline committee's reasons:

> 8. At the time of the misconduct, the student was providing services for his/her father. In particular, (s)he was looking after the books and records of one of his/her father's clients which was also a client of the CA firm. The student drew two cheques on the client's bank account, each in the amount of $10,000, for his/her own personal benefit. When one of the cheques, which was made payable to the student, was presented to the client's bank, the student's theft was discovered immediately because the cheque put the account of the client over its credit limit. The bank contacted the client about the matter, and the client in turn confronted the student. The student told his/her father, whereupon, accompanied by the father, the student met with a partner of the CA firm to disclose the misconduct, and then met with the client to confess and to apologize for what had been done and to make reimbursement. The second cheque drawn by the student on the client's bank account was returned after the client registered a stop payment order. The student was subsequently suspended by the CA firm. The student and his/her father paid for a full forensic audit of the client's books. No other irregularities were found.

8. The discipline committee ordered that there be publication in *CheckMark* without disclosing the respondent's name. Mr. Farley indicated that the basis for the discipline committee's order of non-disclosure was Mr. Sivakumaran's rehabilitation, and cited paragraphs 33 and 35 of the discipline committee's reasons. Those paragraphs state:

> 33. Nevertheless, the general principle of assisting the student to rehabilitate his/her life in a different career seemed to the panel to be a sufficient reason, in the circumstances of this case, for withholding the student's name from publication.
>
> 35. The majority of the panel determined that the circumstances of this case were sufficiently rare and unusual to warrant the withholding of the student's name from the notice to be published in *CheckMark*, and thought it was the appropriate order to help advance the rehabilitation of the student. These panel members were of the view that it was appropriate in this case to base their publication decision on the rehabilitation principle of sanctioning, and were convinced that the student's rehabilitation would be harmed if publication of his/her name in *CheckMark* were ordered….

9. One of Mr. Farley's main submissions to this panel was that once an adjudicative tribunal of a self-governing professional body such as the discipline committee of the Institute makes the decision to sever the relationship between the professional body and one of its members or students through an order casting the member or student out of the profession, then that tribunal no

longer has any valid interest in the rehabilitation of the individual cast out. Rehabilitation is only a valid and appropriate sanction, Mr. Farley submitted, if the individual before the adjudicative tribunal is to be allowed to continue within his or her profession. He stated that the discipline committee misapplied the principles of sentencing by attaching too much weight to the principle of rehabilitation and not enough weight to the principle of deterrence. This misapplication of the principles of sentencing, he said, amounted to an error in principle on the part of the discipline committee, and resulted in a sanction falling outside the range of sanctions normally imposed by disciplinary panels of the Institute in cases involving dishonesty.

10. Mr. Farley further submitted that even if the principle of rehabilitation were a valid consideration on sentencing after a student had been struck from the register, non-disclosure of the respondent's name in this case would still be outside the range of sanction normally imposed for the type of misconduct engaged in by Mr. Sivakumaran. While conceding that publication of the respondent's name would be a significant consequence for this student, Mr. Farley submitted that the seriousness of that consequence was directly proportionate to the seriousness of the professional misconduct that led to the charges against him. In this case, he indicated, the misconduct of the respondent was not without aggravating circumstances, such as that:

- the respondent had been in a position of trust, and had abused that trust by misappropriating money from a client of his employer;

- the amount of money taken – $20,000 – was significant; and

- the respondent did not confess to his misdeeds until after he was caught.

11. With respect to the discipline committee's order to seal the file, Mr. Farley submitted that even though no application for an *in camera* hearing was made at any time by either party, and though the discipline committee made no *in camera* order during the hearing, that was in essence the effect of paragraph 6 of the committee's order, and was a stipulation the committee had no authority to make. He submitted that all of the powers of the discipline committee flow from its enabling legislation, *The Chartered Accountants Act, 1956* [*CA Act*], and the bylaws passed by the Institute's Council pursuant to that *Act*. He also submitted that the discipline committee is a tribunal that exercises a "statutory power of decision" as defined in the *Statutory Powers Procedure Act* [*SPPA*], and is therefore subject to the provisions contained in that *Act*. Mr. Farley submitted that no provisions are contained in the *SPPA*, the *CA Act*, or the bylaws of the Institute which empower the discipline committee to make a non-publication order and seal a discipline file.

THE RESPONDENT'S POSITION

12. Ms. Amsterdam submitted that the sanctions order made by the discipline committee, and specifically those parts of the order providing for non-disclosure of her client's name and sealing of the discipline file, were appropriate in the circumstances of this case and should be upheld by the appeal committee.

13. Ms. Amsterdam submitted that mitigating factors existed in this case which the discipline committee determined were sufficiently "rare and unusual" to warrant the withholding of the respondent's name from the notice to be published in *CheckMark.* Many of these factors were stated by the discipline committee in paragraph 34 of its reasons as follows:

> 34. We cannot emphasize enough the impact of the youth of the student on our decision. The student was not only very young in fact, being just 21 years old at the time of the misconduct, and 22 years old at the date of the hearing, but was very young also in both appearance and demeanour. The student made one very serious mistake. It may have been a stupid, impetuous act, or it may have been an unconscious effort to

> communicate with the father, but it was not a carefully considered scheme, and it disclosed virtually no guile or methodical planning. Given the financial position and relatively small cash flow of the client, the theft was certain to be discovered immediately. We must also emphasize that the student was at a very early career stage, and had attained little practical experience that will assist in the search for another career or alternative employment.

14. It was submitted by counsel for the respondent that the appeal committee has a duty not to re-try a case that was before the discipline committee or to substitute its own determination for that of the discipline committee, however tempting that might be. The function of the appeal committee, she stated, is to ensure that the discipline committee has not erred in principle.

15. With respect to the disclosure of her client's name, Ms. Amsterdam indicated that the discretionary power given to the discipline committee to withhold the publication of the name of the respondent comes specifically from Bylaw 575(4), which grants the authority to order notice withholding a disciplined person's name. She submitted that Bylaw 575 as a whole makes it clear that the discipline committee has wide authority to determine the form and manner of the notice to be given of its decisions and orders, and pointed out that, whereas the bylaw makes mandatory the giving of notice of a member's suspension or expulsion, and the publishing of notice in a newspaper of a member's expulsion, subject to certain panel discretion, the bylaw contains no mandatory provisions relating to students. She submitted that this was appropriate, as students had not yet "crossed over" into the esteemed ranks of members, or attained the revered professional reputation enjoyed by members.

16. Counsel for the respondent stated that in the context of the above bylaw authority relating to the issue of the giving of notice, the discipline committee had developed the principle over the years, upheld by the appeal committee, that the name of a member found guilty of professional misconduct will only be withheld from publication in "rare and unusual circumstances". She indicated that she took no exception to this principle, and submitted that it was precisely because the discipline committee found there to have been rare and unusual circumstances existing in this case that it ordered the withholding of her client's name from publication.

17. Ms. Amsterdam submitted that, though urged to do so by Ms. Glendinning at the discipline hearing, the discipline committee did not conclude that this was a case of moral turpitude. Rather, as apparent from paragraph 34 of its reasons above referred to, the discipline committee recognized that, while amounting to one very serious mistake, the respondent's actions were more characteristic of a cry for help.

18. Ms. Amsterdam also submitted that precedents exist which demonstrate that non-publication of a person’s name may be appropriate in cases which do not involve moral turpitude, provided the circumstances warrant such an order.

19. With respect to the distinction between sanctioning a student versus a member, Ms. Amsterdam submitted that at the time of his misconduct the respondent was at the very beginning of his training, had not written his exams, did not have a client base of his own, and was not promoting or marketing himself to the public or to the profession as a chartered accountant. She stated that the discipline committee recognized this distinction as one of the mitigating circumstances justifying its imposition of a rehabilitative order withholding the student's name from publication.

20. In its reasons, the discipline committee referred to the *Finkelman* and *Solmon* cases, and decided that, though those cases dealt only with the issue of disclosure of members' names, "the principle of general deterrence and the maintenance of confidence in the openness of the Institute's disciplinary process … apply as well to the issue of publication of students' names" [paragraph 28].

Having reached that conclusion, however, Ms. Amsterdam pointed out, the discipline committee went on to find that the circumstances of this case warranted the withholding of this student's name from publication. She submitted that the discipline committee gave weight to all three principles of sanctioning in fashioning its order, and that, while fully recognizing the importance of the openness of the disciplinary process, nevertheless came to the conclusion that withholding her client's name from publication would not undermine the general principle that the discipline process should be an open one.

21. Ms. Amsterdam submitted that the discipline committee properly considered and applied precedent cases in determining the proper sanction to be applied in this case, and considered all the arguments of counsel. For example, she pointed out that the discipline committee referred to the *Waller* case to reject her argument for not disclosing her client's name on the basis of the impact such disclosure would have within the particular cultural community in which he lived. In *Waller*, on the issue of newspaper publication of the member's expulsion, the discipline committee rejected the idea of having one publication rule for members who live in small communities and another rule for members who live in Toronto, and having one rule for members with children and another rule for members without children. In this case, the discipline committee stated in its reasons [paragraph 31] that it was "unwilling to treat a disciplined student differently based on the ethnic or cultural community to which the student belongs".

22. Ms. Amsterdam submitted before the discipline committee and before this panel that the most important principle of sanctioning in this case was rehabilitation, and that the most important reason for withholding her client's name from publication was so as to enable him to rehabilitate himself. The discipline committee recognized in paragraph 32 of its reasons that as Mr. Sivakumaran was no longer going to be an Institute student "the principle of rehabilitation is not as directly applicable as it is in the case of a member or student who wishes to continue to practise within the discipline of the profession". Nevertheless, the committee came to the conclusion, as expressed in its reasons at paragraph 33 set out above, that in the circumstances of this case assisting Mr. Sivakumaran to rehabilitate himself even in a different career was sufficient reason for withholding his name from publication.

23. With respect to the discipline committee's order to seal the file, Ms. Amsterdam submitted that Bylaw 530(3) lists various specific sanctions that can be imposed after a member or student has been found guilty of professional misconduct, and that Bylaw 530(3)(r) provides the discipline committee with the wide discretionary power to sanction “in such other way as the discipline committee may determine". She argued that the discipline committee’s order to seal the file was within its jurisdiction under the bylaws, and was appropriate in the circumstances so as not to undermine the committee's order to withhold publication of the student’s name in *CheckMark.*

PANEL’S DETERMINATION ON THE APPEAL OF PUBLICATION OF NAME

24. The substantive issue for this panel's determination was whether or not the discipline committee, upon considering all the evidence and submissions before it, properly exercised its discretion and imposed a sanction within the appropriate range of sanctions given the facts of this particular case. Unless the discipline committee made an error in principle, or imposed a sanction outside the appropriate range of sanctions suitable to the misconduct exhibited in this case and inconsistent with sanctions meted out in previous similar cases, the appeal committee should not disturb the penalty and substitute its judgment for that of the discipline committee.

25. Having reviewed the evidence that was before the discipline committee, as well as the materials filed on this appeal, the panel has concluded that the discipline committee erred in principle on the issue of publication in a number of respects:

- in not recognizing the acts of Mr. Sivakumaran as acts of moral turpitude;

- in determining that the circumstances of this case were sufficiently rare and unusual to warrant the withholding of the student's name from publication in *CheckMark*, and
- in giving too much weight to the principle of rehabilitation and not enough weight to the principles of general and specific deterrence and the aim of maintaining public confidence in the Institute's disciplinary process.

26. This case deals with the theft of $20,000 by a student from a client of the student's employer. In fact, the client was both a client of the CA firm for which the student worked on a full-time basis, and a client of the bookkeeping and accounting firm owned by the student's father for which the student worked on a part-time basis. Counsel for the professional conduct committee argued that the discipline committee erred in failing to find that this student's conduct amounted to moral turpitude, while counsel for the student submitted that the discipline committee was correct in concluding that the misconduct was not moral turpitude but instead either a "stupid, impetuous act" or an "unconscious effort to communicate with the father". This panel is of the opinion that the acts of theft committed by Mr. Sivakumaran were indeed acts of moral turpitude, and that the discipline committee erred in failing to so find.

27. This was not a case of someone happening across a sum of money left unattended and scooping it up without any forethought. Such an act could be characterized as impetuous. In this case, the respondent drew two cheques on his client's bank account, one payable to Canada Customs and Revenue Agency which he mailed to CCRA for credit to his personal income tax account, and the other payable to himself which he deposited to his own bank account and subsequently drew cheques on. He attempted to cover up the unauthorized cheques by posting them to trade suppliers in his client's books. In preparing the cheques he used a cheque-signing machine knowing that this would avoid the necessity of having to present the cheques to his client for approval and signature. While we do not disagree with the discipline committee's finding that this "was not a carefully considered scheme" [paragraph 34], it was a scheme nevertheless, and one involving moral turpitude. Mr. Sivakumaran had to have known that what he was doing was dishonest, and he had the time and opportunity to put an end to it. Instead he was caught and confronted.

28. The precedent cases put before the panel, most of which dealt with members, held that publication, including disclosure of name, was appropriate in matters of moral turpitude. The principle of general deterrence and the importance of fostering public confidence in the openness of the Institute's disciplinary process were the primary factors leading to the publication orders in those cases.

29. The discipline committee in this case concluded that the principle set out in *Finkelman* and *Solmon*, that the names of disciplined members should only be withheld from publication in rare and unusual circumstances, applied as well to the publication of the names of disciplined students. This panel concurs with the discipline committee in this regard, and is of the opinion that, as a matter of principle, at least in cases involving moral turpitude, the same considerations that apply in a determination as to whether or not to publish the name of a guilty member should apply to such a determination in respect of a guilty student.

30. Having decided that rare and unusual circumstances were as necessary to justify the withholding of students' names from publication as the names of members, the discipline committee went on to find in paragraph 35, as noted above, that the circumstances of this case were sufficiently rare and unusual to warrant the withholding of Mr. Sivakumaran's name from publication, and that it was the appropriate order to help advance his rehabilitation. We find that the discipline committee erred in coming to this conclusion.

31. We do not find the respondent's youth and inexperience, nor the fact that he was a student and not a member, to be rare and unusual factors justifying the withholding of publication of his name.

Nor do we find the ethnic or cultural community in which the respondent lives to be a rare and unusual factor justifying withholding his name. The discipline committee rejected this argument and so do we.

32. We found it unnecessary to our conclusion in this case to reach a definitive decision on the proposition urged upon us by Mr. Farley that rehabilitation is not a relevant consideration in cases in which the disciplinary tribunal is severing the guilty person's relationship with the Institute, whether by expelling a member or striking a student from the student register. We did, however, conclude that the discipline committee erred in placing too much emphasis on the principle of rehabilitation and not enough on the principles of specific and general deterrence. The principle of rehabilitation should not outweigh the principles of deterrence, especially general deterrence, in cases involving moral turpitude, whether on the part of a member or a student.

33. For these reasons, the discipline committee's order that Mr. Sivakumaran's name be withheld from the publication to be made in *CheckMark* cannot stand, and must be replaced with an order that his name be published.

PANEL'S DETERMINATION ON THE APPEAL OF THE SEALING OF THE FILE

34. Having decided that Mr. Sivakumaran's name is not to be withheld from publication, it follows that paragraph 6 of the discipline committee's order providing for the sealing of the discipline file must fall. In addition, however, quite independent of the publication of name issue, we are of the view that the discipline committee was without jurisdiction in this case to make the sealing order it made. The powers of the discipline committee flow from its enabling legislation, the *CA Act*, and the bylaws passed pursuant to that *Act*. In addition, the discipline committee is subject to the provisions contained in the *SPPA*. The panel is of the opinion that nothing contained in the legislation or bylaws gave authority to the discipline committee in this case to order that the discipline file be sealed and the name of the student withheld from all communications and documentation relating to the case.

35. Bylaw 554, which is in virtually the same wording as *SPPA* Section 9(1), sets out the general principle that formal hearings of the discipline committee are to be open to the public, subject to certain specified exceptions. The bylaw states:

> 554 Any formal hearing shall be open to the public except where the discipline committee is of the opinion that
>
> (a) matters involving public security may be disclosed; or
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the committee may hold the hearing concerning such matters *in camera*.

36. At no time during its hearing was the discipline committee asked to make a ruling that the hearing be held *in camera*, either in whole or in part, nor did the discipline committee at any time on its own decide that all or part of the hearing should be held *in camera* in accordance with the provisions of Bylaw 554. By ordering that the discipline file be sealed, and that the student's name not be disclosed in any communication or documentation relating to the case, including the charge, the decision and order, the reasons, and the exhibits, the discipline committee in effect made a retroactive order that the hearing already completed be held *in camera*, and did this without any reference to the provisions of Bylaw 554.

37. While it is not necessary to decide the issue for the purposes of this appeal, it seems to the panel that had an *in camera* order been made by the discipline committee pursuant to Bylaw 554, then the sealing of the file would have been appropriate and perhaps necessary to give effect to the letter and spirit of that order. The discipline committee, however, did not make an *in camera* order, and therefore no authority to seal the file derived from Bylaw 554. Furthermore, there appears to be no other bylaw giving jurisdiction to the discipline committee to order the sealing of the file in this case. We disagree with Ms. Amsterdam's submission that such jurisdiction derives from Bylaw 530(3)(r). That provision gives the discipline committee the power to sanction a guilty member or student in a manner not otherwise specifically provided for in the bylaw, and can be useful where the circumstances of a particular case call out for a sanction not specified. We cannot accept the argument, however, that an order sealing the file and withholding the student's name amounts to an order that the student be "disciplined in such other way as the discipline committee may determine", as provided in Bylaw 530(3)(r). As a result, having been made in the absence of authority to do so, the discipline committee's sealing order cannot stand.

DATED AT TORONTO, THIS 23RD DAY OF DECEMBER, 2003
BY ORDER OF THE APPEAL COMMITTEE

E.W. SLAVENS, FCA – CHAIR
THE APPEAL COMMITTEE

MEMBERS OF THE PANEL:

P.B.A. CLARKSON, CA
P.A. GOGGINS, CA
S.R. MEEK, FCA
S.F. MITCHELL, CA
M.A. PORTELANCE, CA
J.I. FRID (Public representative)

Mr. Sivakumaran brought an application for judicial review of the order of the Appeal Committee to the Ontario Superior Court of Justice (Divisional Court), Court File No. 137/04. The application was dismissed with costs on July 14, 2005.