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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **ROBERT GEORGE BENSON SWAYNE, CA**, a member of the Institute, under **Rule 205** of the Rules of Professional Conduct, as amended.

TO: Mr. Robert G. Swayne, CA

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision and Order made December 9, 2010)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met December 7, 8 and 9, 2010 to hear charges of professional misconduct brought by the Professional Conduct Committee against Robert G. Swayne, CA, a member of the Institute.

2. Alexandra Hersak appeared on behalf of the Professional Conduct Committee. Mr. Swayne attended without counsel. He confirmed that he knew that he had the right to attend with counsel and waived that right. Mr. Robert Peck attended the hearing as counsel to the Discipline Committee.

3. The decision of the panel was made known at the conclusion of the hearing and the written Decision and Order was sent to the parties on December 15, 2010. These reasons, given pursuant to Bylaw 574, contain the charges, the decision, the order and the reasons of the panel for its decision and order.

CHARGES

4. The following charges were laid against Mr. Swayne by the Professional Conduct Committee on March 29, 2010:

1. That the said Robert G. Swayne, in or about the period April 30, 2006 through January 26, 2007, while CFO of "DA 2000 Inc." associated himself with monthly listings of "DA 2000 Inc." accounts receivable to the Bank of Montreal which significantly overstated the value of the month-end accounts receivable and which he knew or ought to have known were false or misleading contrary to Rule 205 of the Professional Conduct.

2. That the said Robert G. Swayne, in or about the period December 1, 2006 through January 26, 2007, signed or associated himself with a management representation letter to the auditors of "DA 2000 Inc." dated December 1, 2006 which he knew or ought to have known was false or misleading contrary to Rule 205 of the Rules of Professional Conduct.

PLEA

5. Mr. Swayne pleaded not guilty to Charge No. 1 and Charge No. 2.

THE PROCEEDINGS

6. On December 7, 2010, after a brief opening statement, Ms. Hersak called Ms. Jodie Wolkoff, CA·CBV, the investigator appointed by the Professional Conduct Committee, as her first witness. She filed a Document Brief (Exhibit 4) and a transcript of Ms. Wolkoff's interview with Mr. Swayne (Exhibit 5). Ms. Hersak then called Mr. Brian Heinrichs, CA, a senior manager who practices assurance work with Deloitte & Touche in Saskatchewan. He was the senior manager on the DA 2000 Inc. (the Company) audit for the relevant years. Also on December 7, Ms. Hersak called Mr. John Herman, who is employed with the BMO Bank of Montreal in the Special Accounts Management Unit in Edmonton, Alberta.

7. On December 8, 2010, Mr. Swayne testified on his own behalf.

THE FACTS

8. The relevant facts, as the panel finds them to be are set out in paragraphs 9 to 25 below. Most of the facts which the panel found to be relevant were not in dispute.

9. The Company is located in Saskatchewan. The Company manufacturers heating, thawing and curing equipment for the construction industry. Commencing in 2000, Mr. Swayne worked part time for the Company primarily for the purpose of raising funds. Subsequent to 2000, Mr. Swayne became the Chief Financial Officer on a part time basis until January 2007. Mr. Swayne's permanent residence is Ottawa, Ontario.

10. BMO Bank of Montreal (the "Bank") was the Company's bank at the relevant time. Pursuant to a loan agreement dated May 20, 2005, the Bank made available a revolving credit facility of a maximum amount of $7,500,000 (the "Operating Facility") and a demand revolving equipment line of credit to a maximum of $500,000. The loan agreement required the Company to keep proper books of account in accordance with Canadian generally accepted accounting principles.

11. The Operating Facility was subject to margin requirements and a number of covenants typical of such facilities. The margin requirements limited the amount that could be drawn on the operating line to a percentage of the inventory and a percentage of current accounts receivables, as defined in the agreement.

12. The agreement required a margin calculation to be provided monthly to the bank. Mr. Swayne, in his capacity as CFO, signed each monthly submission (often electronically).

13. Mr. Swayne prepared the margin calculation using the Customer Aged Summary generated from the records of the Company maintained on Simply Accounting software.

14. The Company's customers purchased the heating, thawing and curing equipment in the cold months of the year, primarily the late fall and winter. The Company had an "Early Order Program" each spring to obtain orders in an attempt to even out production. Generally speaking the program consisted of taking firm equipment orders at prices which represented a discount from the prior year's pricing. To obtain this discounted price, the customer had to place the order and provide a 10% deposit prior to April 30, the Company's year-end.

15. The Company had this program in 2006. All such early orders were recorded in the general ledger as sales for the year ended April 30, 2006 and the full amounts of the early orders were included as accounts receivable.

16. The Company's auditor, Deloitte & Touche, in conducting their year-end audit, proposed that such early order transactions be reversed as these orders did not meet sales criteria under

generally accepted accounting principles. The audit team consulted with Deloitte's National Office and provided the results of the consultations to the Company and Mr. Swayne. In July 2006, as a result of the position taken by the auditors, Mr. Swayne approved the reversal of the early order transactions.

17. In August 2006, Mr. Swayne authorized the recording of journal entries setting up the early order receivables in the general ledger.

18. Mr. Swayne prepared the monthly margin calculations submitted to the Bank for the months of July to December 2006. In doing so the adjustments he made to the accounts receivables, including receivables recorded under the Early Order Program, had the effect of including the early orders as receivables in the allowable margin.

19. By December 31, 2006 all the early orders had been shipped, invoiced and for the most part paid for.

20. The audit of the fiscal 2006 financial statements was not completed until December 1, 2006. On that date the President/CEO and Mr. Swayne, as CFO, signed the representation letter to Deloitte & Touche.

21. The representation letter contained the following two items:

> 20. We have disclosed to you all known related parties and related party transactions, including guarantees and transactions for your consideration. Related party transactions have been measured and disclosed in the financial statements in accordance with Canadian generally accepted accounting principles.
>
> 28. The commission payable to Jim McCormick has been properly and completely recorded as $38,396 USD at April 30, 2006 and there are no outstanding disputes for this payable.

22. On August 25, 2005 there was a Resolution Authorizing a Guarantee by the Company signed by the President guaranteeing up to $380,000 and $226,000 of Bank debt for the President and Mr. Swayne respectively, who had borrowed money to purchase shares of the Company pursuant to option agreements. The loans were secured from the Company's Bank. These guarantees were not disclosed in the 2006 financial statements.

23. During the course of the audit for the year ending April 30, 2006, the auditors became aware of a dispute of the amount of commissions owed to a US salesman, Mr. McCormick. The dispute was over the commission rate to be applied to US sales. The year-end accounts reflected an accrual at a lower percentage than Mr. McCormick believed he was entitled to.

24. In August 2006 the Sales Manager agreed to pay additional amounts to Mr. McCormick. A total of $75,000 was paid to Mr. McCormick through to April 2008.

25. In January 2007 Mr. Swayne's employment was terminated by the Company.

DECISION

26. After considering the evidence, and the submissions by counsel and Mr. Swayne, the panel made the following decision:

THAT, having seen, heard and considered the evidence, the Discipline Committee finds Robert George Benson Swayne guilty of Charge No. 1 and not guilty of Charge No. 2

REASONS

Charge No. 1

27. Mr. Swayne asserted two defences to this charge. The first was that the Bank knew or ought to have known that he was including the early orders in the margin calculations. To support this claim he submitted answers to questions (Exhibit 7) asked by the Bank when they were performing their due diligence for the loan agreement. He also provided an extract from the loan agreement with the Company's previous bankers, the Royal Bank. The definition of "Eligible Accounts Receivable" precluded:

> "(e) any receivables granted extended credit terms beyond standard terms (30-45 days) unless pre-approved by the Bank in writing with the exception of extended term accounts currently outstanding which resulted from the 2004 early incentive purchase programme which will be deemed eligible."

28. Mr. Swayne asserted that the credit personnel at the local branch of the Bank was aware of the Early Order Program and explicitly allowed such amounts be included in the margin calculation. The problem with this defence is that there is no provision in the best evidence, the contemporaneous documents, including the loan agreement with the Bank, which allows for such inclusion, as there was in the previous agreement with the Royal Bank. Also, the agreement with the bank required the Company to keep proper books of account in accordance with Canadian generally accepted accounting principles.

29. Mr. Swayne approved the reversal of the early program sales at April 30, 2006 upon the auditors concluding that they did not meet the criteria for a sale according to generally accepted accounting principles. Yet, in August 2006, Mr. Swayne authorized the recording of journal entries recognizing the Early Order Program amounts as receivables. He had accepted the auditor's decision that the early orders could not be included in revenue and accordingly he must have known, or should have known, that the early orders could not generate receivables as defined by the agreement with the Bank. Accordingly, the panel rejected this defence.

30. Mr. Swayne's other defence to Charge 1 was that the early order amounts were also covered by credit insurance. He submitted a form from EULER American Credit Insurance Indemnity Company with respect to credit insurance. The policy summary indicated that the maximum terms of sale were 120 days.

31. Although the insurance allowed for sales with terms of 120 days, the early program orders did not meet the revenue criteria under generally accepted accounting principles and thus were not accounts receivable. Accordingly, the panel rejected this defence.

32. The panel concluded that the action of recording the early order amounts as receivables, subsequent to the posting of the audit adjustment in the books of accounts of the Company in July, and including them in the margin calculations submitted to the Bank constituted professional misconduct.

Charge No. 2

33. The contention of the PCC is that two representations in the 2006 audit general representation were incorrect. The first was number 20 on related parties and the second number 28 on commissions payable to Mr. McCormick.

34. With respect to Mr. McCormick's commission the auditors had noted amounts being paid to him that exceeded the amount accrued at April 30, 2006.

35. Mr. Swayne indicated there had been a dispute and that the sales manager had settled the dispute with Mr. McCormick in August of 2006 by agreeing to pay $75,000 over a period to April 2008. Per the agreement, these were to be treated as general commissions and an expense to be recorded in fiscal 2007 and 2008. Although the auditors asked for the representation that the commissions payable to Mr. McCormick at April 30, 2006 had been properly and completely recorded, they appear not to have questioned the accounting in the completion of their 2006 audit. Accordingly, the representation as of December 1, 2006 that the accrual at April 30, 2006 was properly recorded and there were no "outstanding disputes" would appear to be correct from Company's point of view.

36. Mr. Swayne freely admitted that the guarantees were incorrectly omitted from the financial statements and as such his representation on related parties was incorrect. He stated this was an oversight, an error of omission not commission. As the guarantees were authorized by the Company and the loans were advanced by the Company's Bank the panel accepted his explanation as it would have been pointless to try and hide the existence of the guarantees.

37. The signing of an audit representation is not to be taken lightly and members should exercise due care before signing such representations. However, in the panel's view this omission did not rise to a level of professional misconduct. Accordingly, Mr. Swayne was found not guilty of Charge No. 2.

SANCTION

38. Neither party called evidence with respect to sanction, although Mr. Swayne had testified about his current employment and finances.

39. On behalf of the Professional Conduct Committee Ms. Hersak characterized the conduct as lacking integrity with the resultant negative impact on the reputation of the profession. She submitted that Mr. Swayne, in his capacity as a chartered accountant acting as a CFO, let down the Company, the Bank, the public and the profession, and that recording receivables after being advised that this was not appropriate was dishonest. Ms. Hersak noted that Mr. Swayne cooperated with the investigation and has no disciplinary history as mitigating factors.

40. Ms. Hersak submitted that the principle sanction which should be given priority in this case was general deterrence with a view to protecting the public. Accordingly, the Professional Conduct Committee sought an order which included: a reprimand in writing; a fine of $10,000; expulsion and full publicity. She also sought an order for costs. Ms. Hersak provided the panel with Brief of Authorities which included the cases: *Davies* (December 1994); *Coleman* (November 2000); *Stewart* (May 2003); *Lee* (June 2007); and *Whiting* (Appeal Committee August 2009). She also submitted a Costs Outline (Exhibit 9).

41. The panel questioned Ms. Hersak with respect to the numerous allegations made in the letter of complaint which did not result in charges. Ms. Hersak was also asked why rehabilitation was not addressed. She stated the Professional Conduct Committee considered rehabilitation but as Mr. Swayne exhibited no remorse and admitted no wrongdoing, rehabilitation was rejected.

42. Mr. Swayne suggested to the panel there was malice and vindictiveness on the part of certain parties at the Company as was evidenced by the numerous allegations. He admitted he made a mistake with the representation letter, but asserted there was no dishonesty involved.

43. Mr. Swayne pointed out that there was no financial loss. The early orders were filled, invoiced and collected. He pointed out that the Board of Directors of the Company were well aware of these early orders. He also maintained that the local Bank officials, none of whom testified, were aware the early order amounts were included in the margin calculation.

ORDER

44. After considering the facts of this case, the submissions of counsel, and the evidence of Mr. Swayne on sanction, the Panel made the following order:

IT IS ORDERED in respect of the charges:

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

2. THAT Mr. Swayne be and he is hereby fined the sum of $10,000 to be remitted to the Institute within eighteen (18) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Swayne be suspended from the rights and privileges of membership in the Institute for a period of twelve (12) months from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. Swayne surrender his certificate of membership in the Institute to the Discipline Committee Secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Swayne.

5. THAT Mr. Swayne be and he is hereby required to complete, by paying for and attending in their entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the following professional development courses made available through the Institute:
   (a) Practical Corporate Governance
   (b) Practical Tips for controllers & CFOs
   or, in the event a course listed above becomes unavailable, the successor course which takes its place.

6. THAT notice of this Decision and Order, disclosing Mr. Swayne's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
   (a) to all members of the Institute; and
   (b) to all provincial institutes/Ordre;
   and shall be made available to the public.

IT IS FURTHER ORDERED:

7. THAT Mr. Swayne be and he is hereby charged costs fixed at $25,000 to be remitted to the Institute within eighteen (18) months from the date this Decision and Order becomes final under the bylaws.

AND IT IS FURTHER ORDERED:

8. THAT in the event Mr. Swayne fails to comply with any of the requirements of this Order, he shall be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within thirty (30) days from the date of his suspension, and in the event he does not comply within the thirty (30) day period, he shall be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Swayne's practice, employment and/or residence. All costs associated with the publication shall be borne by Mr. Swayne and shall be in addition to any other costs ordered by the committee.

REASONS FOR THE SANCTION

45. The first question which the panel had to resolve was whether or not Mr. Swayne should be expelled. There is some misconduct, such as a breach of trust for personal financial gain, which in and of itself requires expulsion. Expulsion is also required if the member is ungovernable or unwilling or unable to rehabilitate himself or herself.

46. The panel did not think that Mr. Swayne's misconduct, in and of itself, required expulsion. While his representations to the bank were wrong they did not result in financial loss. The early orders did result in real sales with payment to the company as Mr. Swayne was convinced they would. The misrepresentations were an expedient way for Mr. Swayne to achieve the desired end, financing until the anticipated sales were made and paid for. He was wrong to do this, but he was not fabricating a scheme to enrich himself. He made a serious error in judgment and he has and will pay a significant price for that error.

47. The Professional Conduct Committee did not think Mr. Swayne met the requirements for rehabilitation, as he did not acknowledge his wrongful conduct or show remorse. The panel understood the position of the Professional Conduct Committee. However, it does not seem appropriate to preclude rehabilitation because the member pleads not guilty and defends himself. The panel, which had the benefit of observing Mr. Swayne over a two and a half-day hearing, concluded that he is governable and that he is capable of and deserves the opportunity to rehabilitate himself.

48. The panel concluded this was a case where the principles of general and specific deterrence, both of which were relevant, could be achieved by the imposition of a significant fine and suspension. With respect to the precedent cases cited by Ms. Hersak, the panel concluded the case that was most like this case was the *Whiting* case which resulted in a $10,000 fine and a six-month suspension. The panel in that case found that the conduct bordered on moral turpitude and that Mr. Whiting had deliberately withheld relevant information. The panel also found that he had acted expediently with altruistic motives, namely the preservation of the company.

Suspension and Fine

49. In the circumstances of this case, the panel concluded that a fine of $10,000, a suspension for one year and publicity would be a significant sanction for Mr. Swayne, and would be seen by the profession and the public as a significant sanction. The panel is aware that an order for costs is intended to be a partial indemnity and not a sanction. However, the amount of the costs ordered will have a financial impact on Mr. Swayne and the amount of the fine was set bearing his financial circumstances in mind.

50. The terms of the order intended to achieve specific deterrence should ensure that Mr. Swayne will not make the same errors again and in that sense he will be rehabilitated. The panel also concluded that Mr. Swayne would benefit from the courses outlined above.

Publication

51. The importance of publication, including the disclosure of member's name, has been well-established by previous decisions of the Discipline and Appeal Committees. The order would not be an effective general deterrent if it was not publicized and if the name of the member disciplined is not disclosed. Accordingly, the panel made the usual order with respect to publication in cases such as this.

Costs

52. The Cost Outline submitted by the Professional Conduct Committee discloses that the cost of the investigation and prosecution of this case was almost $130,000. In her submissions with respect to costs, Ms. Hersak said that it was reasonable to reduce the amount suggested in the Cost Outline to $88,000 and to charge Mr. Swayne half of that amount as he was found guilty of one of the two charges. In all the circumstances, the panel concluded that the cost award of $25,000 would be appropriate.

DATED AT TORONTO THIS 26th DAY OF APRIL, 2011
BY ORDER OF THE DISCIPLINE COMMITTEE

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

MEMBERS OF THE PANEL:
B.G. ALLENDORF, CA
R.H. CARRINGTON (PUBLIC REPRESENTATIVE)
H.G. TARADAY, CA
D.G. WILSON, CA

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

APPEAL COMMITTEE

IN THE MATTER OF:	An appeal by **ROBERT GEORGE BENSON SWAYNE, CA**, a member of the Institute, of the Decision and Order of the Discipline Committee made on December 9, 2010, pursuant to the *Chartered Accountants Act, 2010.*
TO:	Mr. Robert G. Swayne, CA
AND TO:	The Professional Conduct Committee, ICAO

REASONS
(Decision and Order made December 13, 2011)

1. This appeal was heard by a tribunal of the Appeal Committee of the Institute of Chartered Accountants of Ontario on December 13, 2011. Alexandra Hersak appeared on behalf of the Professional Conduct Committee, accompanied by Jodie Wolkoff, the investigator. Mr. Swayne was present and was represented by his legal counsel, James Lane. Peter Carey attended the hearing as counsel to the Appeal Committee.

2. The following charges were laid against Mr. Swayne by the Professional Conduct Committee on March 29, 2010:

    1. That the said Robert G. Swayne, in or about the period April 30, 2006 through January 26, 2007, while CFO of "DA 2000 Inc." associated himself with monthly listings of "DA 2000 Inc." accounts receivable to the Bank of Montreal which significantly overstated the value of the month-end accounts receivable and which he knew or ought to have known were false or misleading contrary to Rule 205 of the Professional Conduct.

    2. That the said Robert G. Swayne, in or about the period December 1, 2006 through January 26, 2007, signed or associated himself with a management representation letter to the auditors of "DA 2000 Inc." dated December 1, 2006 which he knew or ought to have known was false or misleading contrary to Rule 205 of the Rules of Professional Conduct.

3. Mr. Swayne had pleaded not guilty to the charges and the decision of the Discipline Committee read as follows:

    THAT, having seen, heard and considered the evidence, the Discipline Committee finds Robert George Benson Swayne guilty of Charge No. 1 and not guilty of Charge No. 2

4. The Order appealed from, dated December 15, 2010, reads as follows:

    IT IS ORDERED in respect of the charge:

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

2. THAT Mr. Swayne be and he is hereby fined the sum of $10,000 to be remitted to the Institute within eighteen (18) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Swayne be suspended from the rights and privileges of membership in the Institute for a period of twelve (12) months from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. Swayne surrender his certificate of membership in the Institute to the Discipline Committee Secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Swayne.

5. THAT Mr. Swayne be and he is hereby required to complete, by paying for and attending in their entirety, within twelve (12) months from the date this Decision and Order becomes final under the bylaws, the following professional development courses made available through the Institute:
   (a) Practical Corporate Governance
   (b) Practical Tips for controllers & CFOs
   or, in the event a course listed above becomes unavailable, the successor course which takes its place.

6. THAT notice of this Decision and Order, disclosing Mr. Swayne's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
   (a) to all members of the Institute; and
   (b) to all provincial institutes/Ordre;
   and shall be made available to the public.

IT IS FURTHER ORDERED:

7. THAT Mr. Swayne be and he is hereby charged costs fixed at $25,000 to be remitted to the Institute within eighteen (18) months from the date this Decision and Order becomes final under the bylaws.

AND IT IS FURTHER ORDERED:

8. THAT in the event Mr. Swayne fails to comply with any of the requirements of this Order, he shall be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within thirty (30) days from the date of his suspension, and in the event he does not comply within the thirty (30) day period, he shall be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Swayne's practice, employment and/or residence. All costs associated with the publication shall be borne by

Mr. Swayne and shall be in addition to any other costs ordered by the committee.

5. On this appeal, Mr. Swayne seeks an order for an acquittal to be entered in respect of Charge No. 1. Mr. Swayne also seeks an order to admit fresh evidence before the Appeal tribunal. The Index to the Appeal Book was filed as Exhibit 1.

Submissions on Motion to Admit Fresh Evidence

6. As a preliminary matter, Mr. Lane requested leave to file an affidavit of Mr. Swayne. Ms. Hersak advised that there was no evidentiary foundation laid to file the affidavit that had just been sworn by Mr. Swayne that morning, and she objected to the late filing. Ms. Hersak submitted that if the tribunal accepts the document, she should have the right to cross-examine Mr. Swayne.

7. With the consent of the tribunal, Mr. Lane distributed Rules 1, 2 and 3 of the Rules of Practice and Procedure of the Institute. Mr. Lane stated that it is usual procedure for counsel to confer on procedural matters. Ms. Hersak referred the tribunal to Rule 24.05 which sets out the procedures for filing a notice of motion to tender fresh evidence, noting that it is the moving party's obligation to adhere to the timelines for filing documents. Ms. Hersak submitted that her response was prepared based on the notice of motion only, as no factual evidentiary material had been filed. Mr. Lane stated that the affidavit would provide the foundation for the motion to admit fresh evidence and indicated that he had no objection to cross-examination of Mr. Swayne by the PCC.

8. Mr. Lane stated that he had conferred with Ms. Hersak about his intention to not file any supporting material. Mr. Lane filed a document containing emails between himself and Ms. Hersak (Exhibit 2) indicating that the motion could be addressed on the basis of the Reasons of the Discipline Committee.

9. After deliberating, the tribunal Chair stated that Ms. Hersak's conduct in this matter had been faultless. Although the affidavit was late, in order not to disadvantage Mr. Swayne, the tribunal would allow it to be filed and would allow cross-examination by the PCC. The tribunal recessed to read the affidavit (Exhibit 3).

10. Mr. Swayne was sworn as a witness and cross-examined by Ms. Hersak on statements contained in the affidavit. Mr. Swayne submitted that prior to the discipline hearing, he was provided with disclosure material including the report of the investigator, Ms. Wolkoff. Mr. Swayne stated that he was not made aware that Ms. Wolkoff had made contemporaneous notes of her interviews with the two bank employees, Messrs. Weaver and Kirkham. It had not occurred to Mr. Swayne that such notes existed or that he might be entitled to copies of them until he retained Mr. Lane as counsel for his appeal.

11. Mr. Swayne has now reviewed the notes and compared them to the transcript of Ms. Wolkoff's evidence before the discipline hearing that neither Mr. Weaver nor Mr. Kirkham recalled knowing about the early order sales program. He submitted that the notes indicate Mr. Kirkham informed Ms. Wolkoff that he did have a vague recollection of the discussion. Mr. Swayne agreed with Ms. Hersak that the notes of the investigator state that Mr. Weaver did not recall a discussion and Mr. Kirkham had a vague recollection of a discussion. Ms. Hersak stated that the handwritten notes had been summarized and Ms. Wolkoff's report was provided to Mr. Swayne in April. Mr. Swayne agreed with Ms. Hersak that he had presumed the

information in the report was correct, took the report at face value and had asked no questions of Ms. Wolkoff during the discipline hearing about discussions with the bank employees.

12. Mr. Lane submitted that the main issue relates to discussions between Mr. Swayne and Messrs. Weaver and Kirkham. Mr. Swayne maintained that approval had been given and had the Discipline Committee accepted that such approval was given, then the finding of guilty on the charge would not have occurred. Mr. Lane stated that the investigator's report indicated Messrs. Kirkham and Weaver denied knowing about the early order sales program but Ms. Wolkoff's handwritten notes indicated Mr. Kirkham did recall talking about the program. Mr. Lane stated that at the time of the discipline hearing, Mr. Swayne was unrepresented, it was his first time through the discipline process and he did not realize that through due diligence he could have obtained information additional to the investigator's report. Mr. Swayne trusted that the PCC had made complete disclosure to him and would not have suspected that evidence was being withheld. Mr. Lane stated that the notes could have had a significant influence on the final decision of the Discipline Committee but there was no suggestion that there had been any deliberate misstatement by Ms. Wolkoff.

13. Ms. Hersak submitted that the investigator's report was made available to Mr. Swayne eight months prior to the discipline hearing. Mr. Swayne did not ask any questions about Ms. Wolkoff's discussions with Messrs. Kirkham and Weaver. All information was available to Mr. Swayne at all times and although handwritten notes are not typically given out, no request was made by Mr. Swayne. Mr. Swayne had been provided with a list of witnesses prior to the discipline hearing and full disclosure was made. There are no requirements in law for the prosecution to call all witnesses at a hearing and Mr. Swayne could have called Messrs. Kirkham and Weaver as witnesses himself or cross-examined Ms. Wolkoff if he thought it would assist his case. Ms. Hersak stated that the Discipline Committee was very fair in its dealings with Mr. Swayne.

14. Ms. Hersak referred to cases included in the PCC's written argument on the appellant's motion for fresh evidence: *Law Society of New Brunswick vs. Ryan* and *R. vs.* Palmer. Ms. Hersak submitted that the investigator's handwritten notes, the second report of the investigator and the email from PCC counsel to Mr. Swayne were all available at the time of the discipline hearing. Mr. Swayne's disagreement with the guilty finding does not entitle him to another "kick at the can". Ms. Hersak submitted that there was no proper foundation by the appellant for the introduction of fresh evidence and the test for admissibility was not met. Ms. Hersak stated that the motion to introduce fresh evidence must fail. It would be against the interest of justice and it would not be reasonable to expect that the evidence the member seeks to adduce on appeal could affect the result.

15. Mr. Lane submitted that he felt the Discipline Committee had struggled with the evidence given at the hearing and had relied on the documentation available. The fresh evidence may have had a significant impact and caused a different finding.

Decision on Motion

16. After deliberations, the tribunal made the following decision:

THAT the motion for fresh evidence on appeal be dismissed.

Reasons

17. At issue was whether or not the "fresh evidence" that was being introduced had been available with due diligence at the time of the discipline hearing. The tribunal chose to confer on the matter of fresh evidence in advance of the hearing. The application was submitted late under the rules. However, the tribunal looked to Rule 2.02(1):

> On the motion of a party, or on a panel's own motion, an order dispensing with compliance with any procedural requirement in these Rules may be made where it is necessary in the interests of justice.

18. The tribunal also looked at Rule 3.02(1), as follows, and so decided to hear the arguments regarding fresh evidence.

> On the motion of a party, an order extending or abridging any time prescribed by these rules, or prescribed by an order made under these Rules, may be made where it is just.

19. The bar is set high for fresh evidence and we had to consider the full record of what happened. The tribunal had considered the Notice of Motion to introduce fresh evidence and considered the evidence provided in support of that motion. The tribunal held that the Notice of Motion to introduce fresh evidence is dismissed.

20. The tribunal's reasons were twofold:

(1) We believe there was full opportunity for due diligence to get any relevant information and it was exercised with both Mr. Weaver and Mr. Kirkham and their testimony was introduced during the original discipline hearing.
(2) The information the appellant considered to be fresh evidence that would have been introduced to the panel of the day would not have changed the decision that was ultimately made.

Submissions on Appeal

21. Mr. Lane submitted that the main issue that led to Mr. Swayne being found guilty of Charge No. 1 was whether the Bank of Montreal, in discussions with Mr. Swayne, gave permission for the inclusion of early orders in the accounts receivable figures. Bank representatives have the discretion to make decisions on issues and if Messrs. Weaver and Kirkham did give such permission, then a conviction under Charge No. 1 should not have occurred. Mr. Lane submitted that the PCC did not adduce evidence at the discipline hearing to refute Mr. Swayne's sworn evidence on this matter and that the Discipline Committee erred in disregarding such testimony and instead made its decision based on evidence that was irrelevant and inconclusive.

22. Mr. Lane stated that during Mr. Swayne's interview with Ms. Wolkoff, he explained his inclusion of the early orders in the BMO report. Mr. Swayne told Ms. Wolkoff he had had discussions with Messrs. Weaver and Kirkham, who had no issue with this being done. Ms. Wolkoff had spoken to Messrs. Weaver and Kirkham who were both involved in negotiating the terms of the BMO loan agreement and Mr. Ross who worked in the BMO special loans department. At the discipline hearing, PCC called a different representative of BMO, Mr. Hermann, who had no involvement with the account until well after the period of time at issue. Mr. Hermann had testified that there was nothing in the files to indicate BMO agreement with

the recognition of early order sales. Mr. Lane submitted that it was within the power of the PCC to have called Messrs. Weaver and Kirkham as witnesses which would have given Mr. Swayne an opportunity to cross-examine. Mr. Lane referenced *Sopinka, The Law of Evidence in Canada, 3rd ed* contained in the Factum and Authorities of the Appellant.

23. Mr. Lane stated that Mr. Swayne had given sworn evidence that when negotiating the loan agreement with Messrs. Weaver and Kirkham, they agreed that 90% of the total of early order sales could be included in receivables provided they were credit-insured and it would not be necessary to include a provision in the loan agreement explicitly referencing the early sales. The items sold under the early order program were set aside for later shipment and the accounting and physical inventory treatment of the early orders was consistent with Mr. Swayne having the honest belief that early orders could be included as a discrete category of accounts receivable in the margin reports provided oral direction had been given by the account manager.

24. Mr. Lane submitted that the Discipline Committee's reasoning was flawed in that the loan agreement in no way undermined Mr. Swayne's defence to Charge No. 1 that there was an oral agreement with bank representatives to include the early order sales in the margin report. The PCC had failed to direct BMO to make an adequate search of the bank records prior to April 2006. Mr. Lane stated that the Discipline Committee's conclusion that including early orders in the margin agreement was not in accordance with GAAP is flawed as Mr. Swayne's testimony indicates that the provision of the agreement relating to GAAP compliance was waived by the account representatives' oral permission. Mr. Lane stated that if Mr. Swayne did receive such oral approval, as he testified, the inclusion of the early orders could not amount to professional misconduct and the margin report could not be false or misleading.

25. Mr. Lane submitted that the Discipline Committee's reasons indicated the panel had rejected Mr. Swayne's defence in part on the basis that the prior year credit insurance policy summary indicated that the maximum terms of sale were 120 days and some of the early order sales remained pending beyond that time. Since this issue was not raised by the PCC or any panel members at the discipline hearing, Mr. Swayne did not have an opportunity to respond. Accordingly, the weight attached to it in the reasons creates a serious risk of unfairness to Mr. Swayne and should not have formed a significant part of the panel's deliberations. Mr. Lane referred the tribunal to *Labatt Brewing Company v. NHL Enterprises Canada*.

26. Mr. Lane submitted that the PCC's unexplained decision not to call evidence from Messrs. Weaver or Kirkman, rather than Mr. Hermann, should have been seen as a fatal flaw by the Discipline Committee, as these two witnesses would have been able to give first-hand evidence of what had been agreed to in negotiations.

27. Mr. Lane stated that the PCC had failed to call sufficient evidence to refute the sworn testimony of Mr. Swayne on an issue that the prosecution had the onus of proving. The conviction on Charge No. 1 was not reasonable on the evidence and law. Mr. Lane requested, on behalf of Mr. Swayne, that the decision on Charge No. 1 be set aside and an acquittal be substituted.

28. Ms. Hersak stated that the main issue in this case is whether the Appeal Committee should interfere with findings of fact made by Discipline Committee. She submitted that the deference to be accorded findings of fact by a tribunal is high and the standard of proof to be applied in disciplinary proceedings is that of proof on the balance of probabilities based on clear, cogent and convincing evidence. The evidence before the Discipline Committee met this test.

Ms. Hersak referenced *Carruthers v. College of Nurses of Ontario* contained in the Respondent's Compendium and Brief of Authorities.

29. Ms. Hersak submitted that Mr. Swayne, the CFO of the company, directed that all orders under the Early Order Program be recorded in the company's book as sales and that the full amounts be included as accounts receivable. On the instructions of the auditors, Mr. Swayne reversed the Early Order transactions as these orders did not meet the sales criteria under GAAP; specifically, the orders did not qualify as "bill and hold" sales. In the following month, notwithstanding the advice of the auditors, Mr. Swayne again directed that all orders under the Early Order Program be recorded as sales and set up as receivables in the general ledger. Mr. Swayne, in preparing and submitting monthly margin calculations to the bank, knowingly included the full amount of the Early Order transactions as accounts receivable. Ms. Hersak stated that the Discipline Committee had found as fact that Mr. Swayne must have known, or should have known, that the early orders could not generate receivables as defined by the agreement with the bank.

30. In respect of credit insurance, the Early Order transactions exceeded the maximum terms of sale of 120 days, and therefore did not meet the sales criteria under GAAP. Ms. Hersak submitted that the Discipline Committee concluded that Mr. Swayne's actions in recording these Early Order amounts as receivables subsequent to the posting of the audit adjournment in the books of accounts of the company in July, and including them in the margin calculations submitted to the Bank, constituted professional misconduct.

31. Ms. Hersak noted Mr. Swayne's defence that because the company held credit insurance it was permissible for him to include the Early Order amounts as receivables in the monthly listings of accounts receivable provided by the bank. The Discipline Committee had disagreed that Early Order amounts qualified as sales under GAAP. These amounts did not qualify as receivables under the terms of the loan agreement.

32. In response to Mr. Lane's contention that the PCC had failed to direct the bank to perform an adequate search of records in the course of its investigation, Ms. Hersak stated that Mr. Hermann and his predecessor, Mr. Ross, had conclusively stated that there was no documentation on the bank files to indicate that the bank had agreed to allow the company to recognize Early Order amounts as accounts receivable. There had been no objection by Mr. Swayne to this evidence before the Discipline Committee. This issue could have been the subject of cross-examination of the bank witness at the hearing, but was not raised.

33. Ms. Hersak submitted that the PCC had provided evidence of two bank representatives as well as documentary evidence to support the position that the bank did not agree to the inclusion of the Early Order amounts in the company's monthly accounts receivable listings. Ms. Hersak disagreed with Mr. Lane's contention that an adverse inference should be drawn since the PCC did not call Messrs. Weaver and Kirkham as witnesses. Messrs. Weaver and Kirkham had been interviewed by the investigator and neither had any specific recollection of the inclusion of Early Order amounts. Ms. Hersak submitted that an adverse inference could be drawn based on Mr. Swayne's failure to call evidence in support of his own defence.

34. Ms. Hersak requested that the Appeal Committee not vary the Decision or Order of the Discipline Committee and that the appeal be dismissed. Ms. Hersak also stated that the PCC was requesting costs of this appeal.

Decision

35. This panel of the Appeal Committee considered all the submissions, as well as the material filed in this matter and, after deliberations, made the following decision. The parties were informed of the decision at the conclusion of the appeal, and were provided with a written Order dated December 15, 2011, as follows:

> HAVING heard and considered the submissions made on behalf of Robert G. Swayne and on behalf of the Professional Conduct Committee, and having reviewed all of the documentation provided by the parties, the Appeal Committee dismisses the appeal of the Discipline Committee's Decision made on December 8, 2010 and Order made on December 9, 2010.

Reasons

36. Mr. Swayne knew the early order sales were not qualified sales to be included in the accounts receivable figures for the Bank of Montreal and did not meet the sales criteria under Generally Accepted Accounting Principles.

37. There was no evidence to suggest that the Bank of Montreal had waived the provision in the loan agreement that the financial statements provided, and specifically the recording of sales, were to be anything other than sales recorded in accordance with Generally Accepted Accounting Principles.

38. The sequence of events issue is solved because Mr. Swayne started adding back the early order sales starting in July 2006 knowing that the early order sales were not in accordance with Generally Accepted Accounting Principles and without the entry his financial statements for the year end would not have been in accordance with GAAP. This would have put the financial statements offside for the auditors.

39. The Discipline Committee correctly points out that there was nothing to corroborate the testimony of Mr. Swayne that the Bank of Montreal had approved the inclusion of Early Order Sales in the financial statements presented to the bank and in fact the evidence from both the loan agreement and the bank officials contradicted Mr. Swayne in this matter.

40. The Discipline Committee's conclusion in this matter appears to the Appeal Committee to be reasonable and supportable in all the circumstances and evidence provided.

41. This tribunal of the Appeal Committee has considered all the submissions on appeal in this matter and have decided to dismiss the appeal.

Submissions on Costs

42. Ms. Hersak requested costs under the *Chartered Accountants Act, Section 38.2* and filed a Costs Outline (Exhibit 4). The fees and disbursements totalled over $12,000 and much of the investigator's time had been spent on the issue of fresh evidence. Ms. Hersak stated that the amount of the costs ordered would be left to the discretion of the tribunal.

43. Mr. Lane responded that there should be a reduction in the costs and proposed that $5,000 would be appropriate. He took exception to the amount of investigator's fees in the Costs Outline.

Order on Costs

44. After deliberations, the tribunal made the following order:

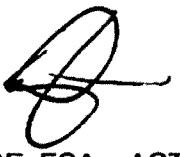
> THAT Mr. Swayne be and he is hereby charged costs fixed at $7,000 to be remitted to the Institute within eighteen (18) months from the date this Decision and Order is made.

Reasons

45. The tribunal considered the request of Mr. Swayne's counsel for a reduction in the costs requested by the PCC, noting his objection to the amount of the investigator's costs. However, the investigator had to spend considerable preparation time with counsel for the PCC reviewing notes and dealing with the fresh evidence matter.

46. The tribunal felt that costs in the amount of $7,000 for this proceeding were appropriate and should be awarded against Mr. Swayne.

DATED AT TORONTO THIS 13TH DAY OF DECEMBER, 2012.
BY ORDER OF THE APPEAL COMMITTEE



D.W. DAFOE, FCA – ACTING CHAIR
APPEAL COMMITTEE

MEMBERS OF THE PANEL:

K. ARMSTRONG (PUBLIC REPRESENTATIVE)
J.A. NIGHTINGALE, CA
D.O. STIER, CA