

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

APPEAL COMMITTEE

**IN THE MATTER OF:** An appeal by **Thomas Andrew SILVERMAN**, a suspended member of the Institute, of the decision and order of the discipline committee made on March 29 and June 9, 1995, pursuant to the bylaws of the Institute, as amended.

**TO:** Thomas Andrew Silverman  
21 Breanna Court  
Willowdale, Ontario  
M2H 3N8

**AND TO:** Professional Conduct Committee, ICAO

**DECISION AND REASONS FOR DECISION MADE JANUARY 25, 1996**

**DECISION**

Having reviewed the decision and order and reasons of the discipline committee, the transcript of the discipline committee hearing and the exhibits filed at the hearing, and having heard the submissions made by the parties, the appeal committee decided:

1. That the appeal of Mr. Silverman is dismissed; and
2. That the order of the discipline committee, made on June 9, 1995, is confirmed.

**REASONS FOR THE DECISION**

This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on January 25, 1996. The member, Thomas A. Silverman, was appealing the order of the discipline committee made on June 9, 1995 whereby he was fined the sum of \$25,000, and expelled from membership in the Institute. The order also provided that in addition to giving notice of the decision and order by publication in *CheckMark*, to the Public Accountants Council for the Province of Ontario, and to the Canadian Institute of Chartered Accountants, notice was also to be given to the local newspapers in the Richmond Hill area, and the Toronto Star.

Mr. Silverman was represented by Mr. Robert G. Schipper. Mr. Paul Farley represented the professional conduct committee.

**Application to Admit New Evidence**

At the outset of the hearing, Mr. Schipper sought leave to file in evidence a written report dated June 6, 1995 prepared by Dr. Robert Collins, a psychiatrist at the Clarke Institute. Mr. Schipper stated that this report, which had been referred to in his submissions to the discipline committee on June 9, 1995, had not been filed as an exhibit at the hearing before the discipline committee due to an oversight on his part. After hearing submissions from counsel for both parties, and considering the authorities cited by them, the appeal committee decided that the appellant would not be permitted to introduce the report.

It was common ground that the appeal committee had a broad discretion and could allow new evidence to be filed on the appeal.

Mr. Schipper submitted that the report of Dr. Collins should be received by the appeal committee as it was relevant to the issue of what the appropriate sanction should be, and, in particular, spoke to the remorse of the appellant and the possibility of his rehabilitation.

Mr. Schipper relied on the decision of the Court of Appeal of Ontario in *Sengmueller v. Sengmueller*, [1994] 25 C.P.C. (3d) 61, where the court stated at page 64:

However, in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted.

On behalf of the professional conduct committee, Mr. Farley submitted that the broad discretion was qualified as set out by the Court of Appeal of Ontario in *Cook v. Mounce*, [1979] 26 O.R. (2d) 129 wherein, at page 130, the court stated that

new evidence should be refused unless: (1) it is apparently credible; (2) if admitted it would probably have an important influence on the result; and (3) it could not have been obtained by reasonable diligence at the time of the original hearing.

The report of Dr. Collins dated June 6, 1995 could have been put before the discipline committee on June 9, 1995. On March 29, 1995, the first day of the discipline hearing, counsel for Mr. Silverman had requested an adjournment of the hearing, and in doing so said (at page 15 of the transcript):

What I propose when it comes time to do so, is to call several character witnesses in support of the character of Mr. Silverman, but more importantly and the factor that I would like to stress is, that Mr. Silverman is presently under the care of a psychiatrist and it is my intention to obtain a psychiatric report to present to this Committee at the appropriate time.

The report is not available and Mr. Silverman has only recently begun his treatment. I think once the reasonable opportunity is allowed for that treatment to proceed, that it will be of some considerable assistance to this Committee when it comes time to determine what the appropriate disposition should be.

When the hearing resumed on June 9, 1995, Mr. Schipper said with reference to the psychiatrist's report (at page 82 of the transcript) that

the reason I do not file a report from him [i.e. Dr. Collins] is because I will just simply state to you that he cannot find a specific explanation that would be of assistance to this committee.

There is no personality disorder of some form. There was no state of depression that one might expect at the time. There was no medical condition that might be of use to this committee. Mr. Silverman was not on medication. He was not drinking excessively. There were not any factors that would be of some form of a psychiatric disorder in some way.

Dr. Collins' report could have been put before the discipline committee, but Mr. Schipper decided it would be of no assistance. The appeal committee, following the principles set out in the two cases cited above, concluded that Dr. Collins' report should not be admitted into evidence on the appeal.

### **Appeal as to Sanction**

The appeal committee has in the past referred to the principle set out in *R. v. Basha* (1980), 61 A.P.R., 23 Nfld & P.E.I.R. 286, at page 299, where it is stated that

a court of appeal should only interfere with a trial judge's discretionary powers as to sentencing if it is apparent that the judge has misapplied one or other of the accepted principles of sentencing, in all the circumstances of the case, with the result that the sentence imposed is outside the range of sentencing for that type of offence.

The appeal committee has accepted that it should not interfere with the sanction imposed by the discipline committee unless it concludes that the discipline committee misunderstood or misapplied one of the governing principles so that in the circumstances of the case the sanction imposed is outside the range of what would be appropriate.

### **Expulsion**

Mr. Schipper submitted that the discipline committee erred in ignoring the evidence that Mr. Silverman could be rehabilitated. This evidence included his plea of guilty, the agreed statement of facts, his previous unblemished record, and the character evidence which was before the discipline committee. Mr. Schipper also submitted that Mr. Silverman had shown remorse at the discipline hearing by not forcing his victim to testify. Also, he contended that in making payments over a four year period as though the funds were properly invested, he had demonstrated an intention to honour his commitment. All of these factors, Mr. Schipper submitted, should have caused the discipline committee to facilitate Mr. Silverman's re-entry into the profession after a period of suspension.

Mr. Schipper referred to a number of cases, including *Regina v. Scherer* (1984), 16 C.C.C. (3d) 30 (Ont.C.A.), and *Regina v. Ansley* (1974), 22 C.C.C. (2d) 113 (Ont.C.A.) where the Ontario Court of Appeal made it clear that in sentencing someone to time in jail, even someone who deserved a heavy sentence, the court should look to that offender's productive re-entry into the community at some future time. Unless a court imposes a life sentence on an offender, it seems clear that the offender will re-enter the community when his sentence is over.

When the discipline committee considers expulsion or suspension, one issue is whether or not the member being disciplined should have a right to automatic re-entry into the professional community. Expulsion precludes automatic resumption of membership in the Institute. In a sense, suspension presumes the disciplined member either will be rehabilitated by the end of the suspension or does not need rehabilitation.

With respect to the question of rehabilitation, the discipline committee held:

Nothing in the evidence and submissions relevant to sanction indicated to the committee that there was any action that could be taken to ensure that, in circumstances similar to those upon which these charges were based, Mr. Silverman would not react in the future in the same way that he did in this case. The evidence did not satisfy the committee that Mr. Silverman could be rehabilitated.

For purposes of our decision, it is not necessary to repeat the facts as set out in the agreed statement of facts which were before the discipline committee. It is sufficient to note that Mr. Silverman pleaded guilty to five charges arising from the fact that he had taken \$100,000 from a client of quite modest means to be invested for her benefit, and converted those monies to his own use. He then attempted to cover up that misdeed by purporting to pay interest on the monies which he used as if they had been invested. It was only when the client requested the return of part of her capital that Mr. Silverman's misconduct was uncovered. But even then Mr. Silverman attempted to mislead even the investigator appointed by the professional conduct committee. It appears to us that the decision to plead guilty was only made after it was evident that a plea of not guilty was hopelessly futile.

At the conclusion of the appeal, when Mr. Schipper was responding to the argument of Mr. Farley, it appeared that he conceded that the expulsion was justified but that the fine and publication were unwarranted. This apparent concession was not a factor in our decision. We think the argument that the expulsion was unwarranted fails on its own merits. Expulsion was warranted.

#### **Fine**

The appeal committee is satisfied that the amount of the fine imposed upon Mr. Silverman by the discipline committee was both appropriate and within the reasonable range to be expected in all the circumstances.

#### **Publication**

There was no argument that the discipline committee did not have within its authority the right to order publication of its decision and order in the local press where Mr. Silverman carried on business. Given the specific facts agreed upon in this case as to the nature of Mr. Silverman's misconduct, the appeal committee considered the order to publish in the local press appropriate and consistent with the Institute's mandate to protect the public interest.

In concluding there was no basis upon which to find that the discipline committee had erred in reaching its decision, or that there had been any misapplication of the discipline committee's authority, the appeal committee dismissed the appeal and confirmed in its entirety the order of the discipline committee made on June 9, 1995.

DATED AT TORONTO, THIS 16TH DAY OF MAY, 1996  
BY ORDER OF THE APPEAL COMMITTEE

*R.G. Stackhouse*

R.G. STACKHOUSE, FCA - CHAIR  
THE APPEAL COMMITTEE

#### MEMBERS OF THE PANEL:

J.M. BALFE, CA

D.L. CHANT, CA

B.N. GORY, FCA

F.J. WELSH, FCA

GENERAL A. BROWN (Public representative)

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

DISCIPLINE COMMITTEE

**IN THE MATTER OF:** Charges against **THOMAS ANDREW SILVERMAN**, a suspended member of the Institute, under **Rules 201.1, 205 and 212.1** of the Rules of Professional Conduct, as amended.

**TO:** Thomas Andrew Silverman  
21 Breanna Court  
Willowdale, Ontario  
M2H 3N8

**WRITTEN REASONS FOR THE DECISION AND ORDER MADE MARCH 29 AND JUNE 9, 1995**

These proceedings before this panel of the discipline committee of the Institute of Chartered Accountants of Ontario were held on March 29 and June 9, 1995. Mr. Paul Farley attended on behalf of the professional conduct committee, and Mr. Silverman attended with his counsel, Mr. Robert Schipper.

Thomas A. Silverman, a suspended member of the Institute, was charged with five breaches of the rules of professional conduct:

- failing to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1;
- failing to handle money provided to him, while acting as a trustee, in accordance with the terms of the trust agreement, contrary to Rule 212.1;
- making statements or representations, over a period of four years, to the individual for whom he was acting as trustee, which he knew or should have known were false or misleading, contrary to Rule 205;
- signing or associating himself with a letter to the individual for whom he was acting as trustee, which he knew or should have known was false or misleading, contrary to Rule 205; and
- signing or associating himself with a letter to the Institute's associate director of standards enforcement, which he knew or should have known was false or misleading, contrary to Rule 205.

On March 29, 1995, Mr. Silverman pleaded guilty to the five charges, and confirmed that he understood he could be found guilty of the charges solely on the basis of his plea of guilty to them.

Counsel for the professional conduct committee filed a document brief and an agreed statement of facts. The agreed statement revealed the following:

- A potential client approached Mr. Silverman on September 12, 1990 for investment advice. The potential client had received an inheritance of \$120,000 and had no investment experience.

- Subsequently, Mr. Silverman received the amount of \$100,000 from the individual to invest on her behalf. The investment was described in a document entitled "Trust Agreement", set out on letterhead of Silverman & Associates, as a participation in a first mortgage, with a one year term, paying 18% per annum on a monthly basis. Mr. Silverman told the investor that she would not have to declare the interest income from this investment on her income tax return.
- The investor was informed that she would be part of a group providing secured first mortgage financing on a property in Guelph, Ontario. At the time the representations were made, however, first, second and third mortgages in favour of other parties were already in place on the property.
- Contrary to the terms of the "Trust Agreement" and numerous subsequent representations made by him, Mr. Silverman used the \$100,000 for his own benefit and the benefit of his accounting practice.
- Mr. Silverman paid what was purported to be interest to the investor on a monthly basis, and did not include these "interest" payments on the personal income tax returns that he prepared for the investor in 1990, 1991 and 1992.
- On October 1, 1993, the investor requested the return of \$10,000 of her investment. In response, Mr. Silverman commenced a series of false representations and delaying tactics. Despite repeated requests, no portion of the investment was returned to her.

Mr. Silverman never invested any of the investor's money in any investments whatsoever. Instead, within five days of receiving the \$100,000 given to him in trust to invest for the benefit of the investor, he spent it all to pay his firm's and his own personal bills.

Based on the evidence filed, and his plea of guilty, the discipline committee found Thomas A. Silverman guilty of the charges.

Mr. Silverman's counsel then requested an adjournment of the sanctioning stage of the hearing. Counsel for the professional conduct committee took no position on the request. Upon receiving a commitment from Mr. Silverman that he would undertake not to hold himself out as a chartered accountant during the period of the adjournment, the discipline committee granted the request. Mr. Silverman's written undertaking was filed with the committee secretary.

At the continuation of the hearing on June 9, 1995, the discipline committee heard testimony from the investigator for the professional conduct committee, and from a character witness on behalf of Mr. Silverman. Counsel then made their respective submissions, during which counsel for the professional conduct committee filed as an exhibit a letter from the investor to the discipline committee setting out the impact of Mr. Silverman's actions upon her life and her future.

At the conclusion of the parties' presentations on the issue of sanction, the discipline committee, upon deliberation, made the following order:

#### **ORDER**

IT IS ORDERED in respect of the charges:

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

2. THAT Mr. Silverman be and he is hereby fined the sum of \$25,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Silverman be and he is hereby expelled from membership in the Institute.
4. THAT notice of this Decision and Order, disclosing Mr. Silverman's name, be given after this Decision and Order becomes final under the bylaws:
  - (a) by publication in *CheckMark*;
  - (b) to the Public Accountants Council for the Province of Ontario;
  - (c) to the Canadian Institute of Chartered Accountants; and
  - (d) to the local newspapers in the Richmond Hill area, and the Toronto Star.
5. THAT Mr. Silverman 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.

The reasoning behind the discipline committee's order on sanction is set out below. In reaching its conclusions, the committee considered the principles of general deterrence, specific deterrence and rehabilitation.

Nothing in the evidence and submissions relevant to sanction indicated to the committee that there was any action that could be taken to ensure that, in circumstances similar to those upon which these charges were based, Mr. Silverman would not react in the future in the same way that he did in this case. The evidence did not satisfy the committee that Mr. Silverman could be rehabilitated. Accordingly, a sanction intended to facilitate and ensure rehabilitation was not considered appropriate. Instead, the committee determined that the governing principles that should guide it in this case are specific and general deterrence. The sanctions are intended to implement those principles.

Mr. Silverman's conduct was a very serious departure from the level of conduct that the public is entitled to expect from a chartered accountant. The public should be able to trust a CA to act with integrity and objectivity in all circumstances. This is an image of the profession that the profession must protect. Mr. Silverman's actions tarnish that image, not only for himself, but also for the profession as a whole.

### **Reprimand**

The committee believes that a reprimand in writing from the chair of the hearing is appropriate to stress to Mr. Silverman the unacceptability of his conduct as a chartered accountant. A reprimand also serves as a reminder to him that he has failed to comply with the standards of the profession.

### **Fine**

Counsel for the professional conduct committee submitted that the seriousness of Mr. Silverman's conduct warranted that a fine in the range of \$20,000 - \$25,000 be imposed. Mr. Silverman's counsel submitted to the committee that Mr. Silverman was an undischarged bankrupt, and that a fine in the amount proposed by the professional conduct committee would impact upon Mr. Silverman's ability to make restitution to the victim in this case.

As it considered a substantial fine to be appropriate as a general deterrent in the circumstances of this case, the committee levied a fine in the amount of \$25,000 in order to emphasize to members of the profession and the general public that actions such as those of Mr. Silverman are not tolerable.

### Expulsion

Counsel for the professional conduct committee requested Mr. Silverman's expulsion from the profession on the grounds that Mr. Silverman was the worst type of offender, whose actions constituted the worst type of violation of the rules of professional conduct. Counsel for Mr. Silverman contended that expulsion was not appropriate because Mr. Silverman:

- was a "victim" of the recession;
- had always had the intention of restoring the funds wrongly used;
- had demonstrated his honour by paying so-called interest to the investor;
- had acknowledged his guilt and shown his remorse by pleading guilty to the charges before the discipline committee;
- had not previously been charged by the professional conduct committee with any breach of the rules of professional conduct;
- had fully cooperated with the professional conduct committee and the discipline committee; and
- had not been charged, or convicted, of any criminal offense relating to the charges before the discipline committee.

It is not the task of this committee to determine whether Mr. Silverman is the worst offender, or whether his violations of the rules of professional conduct are the worst violations. Instead, this committee's task is to weigh Mr. Silverman's conduct and to assess what he has done in order to determine whether or not it is appropriate that he remain a member of the Institute. The test is whether or not the type of offender and the type of violation warrant expulsion.

Mr. Silverman's counsel submitted that his client was a victim of the recession. The committee, however, does not consider Mr. Silverman to have been any greater a victim of the recession than many others. Mr. Silverman's counsel submitted that his client's making interest payments to the investor out of his own pocket should be considered a mitigating factor. The committee, however, does not consider this behaviour to have been meritorious but self-serving, in that it relieved Mr. Silverman of having to account for the capital of the investment for so long. Whether Mr. Silverman always had the intention of restoring the funds wrongly used, as his counsel argued he did, was not something that was established. What was established was that he took the money, used it as his own and then kept fabricating explanations as to why the money could not be repaid. One of his false explanations was given to the investigator appointed by the professional conduct committee. He finally cooperated with the professional conduct committee but by the time he did his cooperation was irrelevant.

In using his position as a chartered accountant to steal \$100,000 from a client, whom he knew could not bear the risk of such a loss, Mr. Silverman displayed great moral turpitude. If, as his counsel submitted, he took the money thinking he would be able to repay it with no one the wiser



and no one losing any money, then in addition to displaying moral turpitude his conduct also demonstrated a serious lack of judgment. In either case, he should not be a chartered accountant, and the decision to expel him from the Institute is the only decision this committee can come to.

Counsel for the professional conduct committee asked the discipline committee to address the possibility that Mr. Silverman might some day apply to the Institute to be readmitted. In the event he does, the committee expects that these Reasons will be put before the committee considering his application for readmission. The discipline committee believes its views are clear.

### **Notice**

Publication of the decision and order, including Mr. Silverman's name, is, in the opinion of the committee, a general deterrent. Communication of the fact that the profession views breaches of its bylaws and rules of professional conduct seriously is an important factor in the governance of the profession. Such notification is also necessary to demonstrate to the public that the profession is regulating itself, so as to retain public confidence in the profession's ability to self-govern. For these reasons, the committee ordered that, in addition to the usual forms of notice, notice of this decision and order, disclosing Mr. Silverman's name, be placed in the newspapers published in the area in which Mr. Silverman had his practice, and in the Toronto Star.

### **Surrender of Certificate**

As is usual in cases of expulsion, the member was ordered to surrender his certificate of membership in the Institute.

DATED AT TORONTO, THIS 12<sup>th</sup> DAY OF SEPTEMBER, 1995  
BY ORDER OF THE DISCIPLINE COMMITTEE



F.A. DROZD, FCA - DEPUTY CHAIR  
THE DISCIPLINE COMMITTEE

### MEMBERS OF THE PANEL:

L.P. BOOKMAN, CA  
K.V. CHERNICK, FCA  
L.R. FLEMMING, CA  
R.G. HARRISON, FCA  
S.F. ANDRYK (Public representative)

