

**IN THE MATTER OF a Proceeding under
the *Certified General Accountants Act, 2010* and the Bylaws**

**IN THE MATTER OF Arthur Bailey, a member of
The Certified General Accountants Association of Ontario**

B E T W E E N:

The Discipline Committee of The Certified General Accountants Association of Ontario

- and -

Arthur Bailey

**DECISION AND REASONS FOR DECISION OF THE PROFESSIONAL CONDUCT
TRIBUNAL**

Members of the Professional Conduct Tribunal Panel:

Alexis Perera, CGA, Chair
Alan Jones, CGA
Victoria Corbett, Public Representative

Appearances:

Karen E. Jolley, Counsel for the Discipline Committee
George Krusell, Counsel for the Member, Arthur Bailey
Arthur Bailey, Member
Lisa Braverman, Independent Legal Counsel to the Professional Conduct Tribunal

Hearing Dates:

July 9th, 10th, 11th and 12th, 2012, Toronto
September 13th, 2012, Toronto

OVERVIEW

A panel of the Professional Conduct Tribunal of The Certified General Accountants Association of Ontario (CGAO) heard this matter on July 9th, 10th, 11th and 12th, 2012, and September 13th, 2012, at Toronto. At the conclusion of the hearing, the panel reserved its decision.

PRELIMINARY MATTERS

ONE

The original hearing was scheduled to be heard on April 7th, 2011 in Toronto.

On March 31st, 2011, a request made by Mr. George Krusell (Mr. Krusell), counsel for Mr. Arthur Bailey (Mr. Bailey), for an adjournment of 4 - 6 weeks, in order to prepare for the hearing, was heard. Ms. Karen Jolley (Ms. Jolley), counsel for the CGAO Discipline Committee, did not oppose the adjournment request.

Decision of the panel

The panel of the Professional Conduct Tribunal, has considered Mr. Krusell's request for an adjournment of the hearing of 4 – 6 weeks to prepare for the hearing. Ms. Jolley does not oppose the adjournment request. The panel grants Mr. Krusell's request and adjourns the hearing currently scheduled for April 7, 2011. Having been provided with the dates that Mr. Krusell and Ms. Jolley are not available in May - August 2011, the panel of the Professional Conduct Tribunal adjourns this hearing to June 27, June 28, June 29 and June 30, 2011. This adjournment is peremptory to Mr. Krusell.

TWO

On June 27th, 2011, Mr. Krusell, made a request for an order excluding all witnesses and for an adjournment of the hearing to bring a motion :

- Mr. Krusell requested an order to exclude all witnesses from the hearing room until they are called to give evidence.

- Mr. Krusell also stated that the investigation of the complaint by Ms. Di Giacomo had not been conducted properly and that it was unfair to his client.
- Mr. Krusell also stated that Ms. Di Giacomo should not be in the hearing room when Ms. Lana Tom gave her evidence during the course of the hearing of Mr. Krusell's motion.
- Mr. Krusell also requested an adjournment to bring a motion.

Ms. Jolley, counsel for the Discipline Committee, objected to these requests.

Decision of the Panel

Having considered the submissions of Mr. Krusell and Ms. Jolley, the Professional Conduct Tribunal panel orders the following :

1. The panel makes an order excluding all witnesses. All witnesses will stay out of the hearing room until they are called to give evidence. In particular, the complainant Ms. Di Giacomo, will not be in the hearing room when Ms. Tom gives her evidence during the course of the hearing of Mr. Krusell's motion.
2. The panel makes an order adjourning today's hearing to allow for Mr. Krusell's motion to be dealt with, in compliance with The Certified General Accountants of Ontario Procedural Rules for Hearings and the *Statutory Powers Procedure Act*. In particular, the panel will be making an order setting a timetable for delivering motion materials by both parties.

The panel will first set a date for the hearing of the motion and then will set a timetable:

- a) Date for hearing of the motion
- b) Date for Mr. Krusell to deliver motion materials, which should be at least 10 days before the hearing of the motion
- c) Date for Ms. Jolley to deliver responding materials which should be at least 3 days before the hearing of the motion
- d) Date for Mr. Krusell to deliver reply materials

The Time Table is :

- a) Mr. Krusell to deliver motion materials by July 29
- b) Responding materials to be delivered by Ms. Jolley by August 19
- c) Reply materials to be delivered by Mr. Krusell by August 29
- d) Cross examinations to be completed by September 30
- e) Transcripts to be delivered by October 28
- f) Ms. Braverman to deliver all materials to the panel by November 1
- g) Hearing of the motion set for November 15

Both parties have consented to the panel reviewing the materials before the hearing of the motion. Mr. Krusell consents to Ms. Di Giacomo attending the hearing of the motion.

The panel expects that both parties will comply with the requirements of Rule 7, Motions, in the CGAO Procedural Rules for Hearings.

The panel also expects that if either party intends to bring any other motions forward, they will comply with the CGAO Procedural Rules for Hearings.

3) The panel requires that any witness who is summoned to give evidence and/or produce documents, must be served personally on the witness and any other requirements in the Procedural Rules for Hearings and the *Statutory Powers Procedure Act* must be followed.

MOTION

On November 15th, 2011, the motion by Arthur Bailey was heard. The Discipline Committee of The Certified General Accountants Association of Ontario opposed the motion. The motion was for an Order of the Tribunal that disciplinary proceedings initiated against Arthur Bailey by the Certified General Accountants Association of Ontario by Notice of Hearing dated February 22nd, 2011, be permanently stayed.

Decision on the Motion : December 7th, 2011

Having considered the evidence and the submissions of the parties, the Professional Conduct Tribunal panel dismisses the motion.

Costs of the Stay Motion

The parties are invited to make submissions in writing regarding costs, including responding to written advice from independent legal counsel. Written advice from independent legal counsel regarding costs will be included when this Decision and Reasons for Decision is released to the parties. Written submissions by the Discipline Committee and by Mr. Bailey are to be filed with Lisa Braverman within 28 days after the release of this Decision and Reasons for Decision i.e., the date on the letter enclosing a copy of this Decision and Reasons for Decision. Once Lisa Braverman has received written submissions from both the Discipline Committee and Arthur Bailey, Lisa Braverman will deliver the written submissions along with written advice from independent legal counsel, to the panelists. The panel will advise the parties about their decision relating to costs.

On February 15th, 2012, the Professional Conduct Tribunal panel held a teleconference to consider the submissions and make a decision on costs of the stay motion. Having considered the submissions of the parties and the legal advice by Ms. Braverman, the Professional Conduct Tribunal panel has decided that it will defer the issue of costs of this motion for a permanent stay of the disciplinary proceedings, until the conclusion of the hearing in this matter. The Professional Conduct Tribunal panel wishes to thank the parties for their submissions on costs.

On October 31st, 2012, at the conclusion of the hearing in this matter, the panel made the following decision on costs of this motion:

Mr. Bailey is ordered to pay \$15,000 in costs for the stay motion.

The Professional Conduct Tribunal panel held a teleconference on April 30th, 2012 to set the following dates for this hearing.

1. Monday, July 9th, 2012
2. Tuesday, July 10th, 2012
3. Wednesday, July 11th, 2012
4. Thursday, July 12th, 2012

ALLEGATIONS

Counsel for the Discipline Committee entered into evidence the Notice of Hearing dated February 22nd, 2011, as exhibit one, and the Affidavit of Service, as exhibit two, relating to the Notice of Hearing.

The allegations against the member are that he breached the following provisions of the Code of Ethical Principles and Rules of Conduct as stated in the Notice of Hearing:

Code of Ethical Principles - Trust and Duties:

Members shall act in the interests of their clients, employers, and interested third parties, and shall be prepared to sacrifice their self-interest to do so. Members shall honour the trust bestowed on them by others, and shall not use their privileged position without their principal's knowledge and consent. Members shall strive to be independent of mind and in appearance.

Code of Ethical Principles - Due Care and Professional Judgment:

Members shall strive to continually upgrade and develop their technical knowledge and skills in the areas in which they practise as professionals. This technical expertise shall be employed with due professional care and judgment.

Code of Ethical Principles - Deceptive Information:

Members shall not be associated with any information that the member knows, or ought to know, to be false or misleading, whether by statement or omission.

The particulars of the allegations against the member as stated in the Notice of Hearing were as follows:

1. In or about the summer of 2009 Arthur Bailey ("Bailey") was retained by Carmie Di Giacomo (Di Giacomo) to assist her at a Farm Debt mediation.
2. As part of that mediation, which took place on or about 4 August 2009, it was agreed that Bailey would prepare a farm restructuring plan (the "Plan") for Di Giacomo.
3. The Plan was to be presented to Di Giacomo's creditors by 25 November 2009.
4. It was agreed that Bailey would provide Di Giacomo with a draft of the Plan by 15 November 2009.
5. Bailey did not provide Di Giacomo with the Plan or a draft of the Plan by 15 November 2009 or at any time in the balance of 2009.

6. The Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA") had a program in place where it paid qualified consultants, on behalf of farmers who found themselves in financial difficulty, to prepare Plans to assist the farming clients to work with their creditors to remedy their financial affairs.
7. Bailey was a qualified consultant for the purposes of OMAFRA.
8. Although Bailey had not yet provided Di Giacomo with the Plan or a draft of the Plan, in January 2010 he asked her to attend at his office and sign documents to ensure that he would be paid by OMAFRA for preparing the Plan.
9. It was express or implied in having Di Giacomo sign the documents that Bailey would deliver a Plan to her, as had been earlier agreed.
10. As of March 2010 when Di Giacomo terminated Bailey's retainer, he still had not provided her with a Plan.
11. However, even though Bailey did not have Di Giacomo's authority to deliver the Plan to OMAFRA and had not shown a draft of any Plan to her, he delivered a Plan to OMAFRA by its deadline for funding of 15 January 2010 to ensure he would be paid by OMAFRA. Bailey did not advise Di Giacomo that he had filed any Plan with OMAFRA and never gave her a copy of what he had filed.
12. Bailey knew that Di Giacomo would not have given him her consent to file the Plan with OMAFRA as, during their discussions she was clear that she disagreed with his view of the economic viability of her farm.
13. Further, Bailey did not consider alternative courses of action that Di Giacomo had asked him to consider in any Plan as their consideration may not have allowed Bailey to file the Plan by the deadline for his payment.
14. Having submitted the Plan, Bailey was paid \$2,000.00 by OMAFRA.
15. Bailey knew the Plan that he did submit to OMAFRA was inaccurate as he was waiting for further information. The information Bailey needed for the Plan to be accurate was not available by the deadline by which he had to submit the Plan to OMAFRA to be paid. Bailey did not wait for the information as he was concerned that he would then not be paid for his work.
16. Bailey did not qualify the Plan to note that it was inaccurate as he was waiting for further information.
17. Bailey failed to recognize that it was not his decision to submit a Plan to OMAFRA or to Ontario Crop and Soil or any other third party without Di Giacomo's prior review and approval of the Plan and her consent to submit it.
18. The Code Principle of Trust and Duties requires members to act in the interest of their clients and to be prepared to sacrifice their self-interest to do so.
19. In submitting the Plan to OMAFRA so that he would be paid, without having provided his client with a draft, without considering his client's alternative proposals and without

receiving her approval to submit the Plan, Bailey preferred his interests over the interests of his client.

20. In the fall of 2009, Bailey concluded that it was in Di Giacomo's best interest that she "step down" from the farm business. Bailey believed that it was his job to demonstrate to her that his view was correct.
21. Bailey was not retained to convince Di Giacomo to sell or otherwise "step down" from her farm. He was retained to provide her with a draft Plan, which he did not do as he felt it would be futile.
22. Bailey made negative comments about Di Giacomo to third parties, sharing with them his view that she did not have sufficient knowledge to manage the herd on the farm and maximize revenue and did not have sufficient attention to detail. It was not within the mandate given to Bailey by Di Giacomo to provide this negative commentary to any third party.
23. At the time he submitted the Plan, Bailey knew that Di Giacomo had sold \$900,000 worth of quota but he did not make an adjustment on the liability side of the Plan, as he was not certain against which of her debts the \$900,000 was being applied. Bailey knew that the Plan was inaccurate to the extent that it overstated the liabilities as a result. That information was available to Bailey 19 January 2010. He did not wait for that information, but instead submitted the plan on 15 January 2010 with the inaccuracy.
24. Further, Bailey did not make a note in the Plan that there would be a reduction in Di Giacomo's liabilities of \$900,000 although he was unable to identify which liability would be reduced as at the date of submission.
25. The Code Principle concerning Due Care requires a member to carry out his work with professional care and judgment.
26. The Code Principle concerning Deceptive Information requires that a member not be associated with information he knows, or ought to know to be false or misleading, whether by statement or omission.
27. In submitting a report that he knew to be inaccurate, without explanation or qualification, Bailey did not use the due care or professional judgment expected of him.
28. In filing the Report as he did, Bailey was also associated with information that he knew, or ought to have known was false or misleading, whether by statement or omission.
29. Bailey's conduct amounted to professional misconduct and conduct unbecoming a certified general accountant.

MEMBER'S PLEA

The member denied the allegations set out in the Notice of Hearing.

FACTS AND EVIDENCE:

Counsel for the Discipline Committee entered into evidence the following documents:

<u>Exhibit #</u>	<u>Description</u>
3.	Series of seven sheets of paper from Mr. Bordin's file
4.	Complainant's Document provided by Ms. Di Giacomo
5.	Document Brief of Arthur Bailey
6.	Letter from Mr. Bordin to Mr. Ted Oldfield dated January 29 th , 2010
7.	Letter from Mr. Oldfield to Mr. Bordin dated February 23 rd , 2010
8.	Discipline Brief
9.	Email from Carmie Di Giacomo to Art Bailey and his reply dated October 19 th , 2009
10.	Excised interaction notes on Sabluc Dairy/Carmelina Di Giacomo
11.	Package of hole punched notes from files of Dan Reason
16.	Invoice from Mr. Bailey to OSCIA dated January 13 th , 2010

Counsel for the member entered into evidence the following documents:

<u>Exhibit #</u>	<u>Description</u>
12.	Farm Business, Expansion Feasibility and Herd Production Assessment
13.	Business Plan for Sabluc Dairy prepared by Arthur Bailey dated March 15 th , 2008
14.	Email from Mr. Bailey to Ms. Di Giacomo dated January 8 th , 2010
15.	Email from Arthur Bailey to Martin Van Boxtel dated January 18 th , 2010

Counsel for the Discipline Committee called the following witnesses to give evidence:

1. Mr. Michael Bordin (Mr. Bordin)
2. Ms. Carmelina Di Giacomo (Ms. Di Giacomo)
3. Mr. Martin Van Boxtel (Mr. Van Boxtel)
4. Mr. Dan Reason
5. Mr. Angelo Di Giacomo

Counsel for the member called the following witnesses to give evidence:

1. Dr. Tom Armstrong (Dr. Armstrong)
2. Mrs. Elizabeth Bailey (Mrs. Bailey)
3. Mr. Arthur Bailey (Mr. Bailey)

Witnesses for the Discipline Committee

Mr. Michael Bordin

During his evidence, Mr. Bordin stated the following:

- He was a Lawyer and had been admitted to the Bar in Ontario in 1998.
- He was retained by Ms. Di Giacomo between the fall of 2008 and early 2009 to bring an application to the court to obtain an injunction to appoint Ms. Di Giacomo as having control of the day to day management of the farm. He also said that if that application was successful, to also allow her to purchase Mr. Marriott's (her estranged husband) interest in the farm.
- Even though he did not attend the Farm Debt Mediation (FDM) meeting in August 2009, it was his understanding, that Mr. Bailey would be preparing the business plan.
- He had cited documents and notes from Exhibit 3 (Mr. Bordin's file), to support his testimony.
- He has had a conversation with Mr. Van Boxtel regarding the Plan and Mr. Van Boxtel said he was expecting this business Plan from Mr. Bailey.
- Mr. Bordin exchanged correspondence with Mr. Oldfield regarding the Plan. Mr. Bordin advised Mr. Oldfield that Ms. Di Giacomo continues to work on a business Plan with Mr. Bailey but there has been some delay in obtaining a formal business Plan from Mr. Bailey. Mr. Oldfield asked Mr. Bordin about the status of the business Plan.
- Despite Mr. Bordin's 3 emails dated 22nd and 28th January 2010 and February 10th, 2010, and a phone message on March 1st, 2010, enquiring about the status of the business Plan, Mr. Bailey had not responded.
- He was able to contact Mr. Bailey by phone on March 5th, 2010, and had asked him about the status of the business Plan. Mr. Bailey had told him that he could not do a business Plan because he did not think it could work. Mr. Bailey did not tell him that there was a Plan that had been prepared and submitted. Mr. Bailey also told Mr. Bordin that Ms. Di Giacomo was not capable of running the farm. He said that Mr. Bailey had made other negative remarks about her.

The panel found Mr. Bordin to be a credible witness during his evidence. He had provided answers to the questions clearly and had referred to his notes to clarify. Mr. Bordin appeared to be honest and his evidence made sense. His evidence supported some of the allegations in the Notice of Hearing.

Carmelina Di Giacomo

During her evidence, Ms. Di Giacomo stated the following :

- She and her husband, Len Marriott, had previously owned a dairy farm in British Columbia (B.C.) and that they were milking 100 cows in 2004. They had sold the farm in 2004 and had purchased the Sabluc dairy farm in Caistor Centre, near Hamilton, Ontario and she moved to Hamilton, Ontario.
- In 2005, Mr. Bailey was engaged to prepare a business plan to be presented to Farm Credit Canada (FCC) to obtain more funding for expansion of the farm.
- Mr. Bailey had been retained to provide a second plan in 2008 because they wanted to build another barn. However, when this plan was presented to her FCC advisor, he did not like it and she was asked to get someone else to do the plan.
- Subsequently, she and Mr. Marriott had retained Dr. Armstrong to develop another plan. Dr. Armstrong had visited the farm twice. However during the discussions, Dr. Armstrong had mentioned to her that she should get a divorce and she was upset with that remark of Dr. Armstrong. She had thought that this advice was not part of his mandate.
- She had received a questionnaire in the mail from the organization that Dr. Armstrong had worked for, asking for feedback on the service she had received. She then called the number given and complained that Dr. Armstrong had been unprofessional.
- In February to March 2009, the financial position of the farm had deteriorated due to the unexplained and catastrophic loss of 45 cows. Due to cash-flow problems, the creditors were closing in. At that time, she and her husband were separated and through a court order in April 2009, she had complete control of the management of the farm.
- In May 2009, she had contacted Mr. Bailey and had explained to him about her farm situation. He had suggested Farm Debt Mediation, to help her to negotiate with her creditors better. Mr. Bailey had told her that he knew Mr. Van Boxtel at FCC and had dealt with him previously.
- In May 2009, she had sold 36 kilograms of quota worth \$900,000.
- She had some discussions with Mr. Bailey about asking FCC for permission to use \$200,000 from the quota sale, to purchase some replacement cows. It was her understanding that he did not have that conversation with FCC.
- The FDM meeting had taken place on August 4th, 2009 and resulted in an agreement with her secured creditors to delay any recovery action, pending the delivery of a

restructuring Plan for recovery. This Plan was to be provided by Mr. Bailey. In return, FCC had agreed that she pay only the interest portion of the debt. A draft Plan was to be prepared by Mr. Bailey due November 15th, 2009 and the final Plan to be submitted by November 25th, 2009, to the creditors.

- In order to pay for writing of the recovery Plan, Mr. Bailey had suggested that she could call OMAFRA for eligibility in the business planning program and apply for a farm financial assessment under the Special Circumstance section. After filling out the application, Ms. Di Giacomo received a letter from the Ontario Soil and Crop Improvement Association setting out the details for completing a farm financial assessment by the farm business advisor, Mr. Bailey.
- Throughout the fall of 2009, there was ongoing discussion between her and Mr. Bailey about the farm finances and the Plan. She described the meetings as short and infrequent as Mr. Bailey seemed to be very busy with other clients, especially pig farmers. She thought that the pig farmers were Mr. Bailey's priority and wondered why he was divulging their confidential information to her.
- In the fall 2009, Mr. Bailey was reassuring her that he was working on her recovery Plan.
- The deadline came and went and by end of 2009, she still did not have the recovery Plan by Mr. Bailey.
- In early January 2010, Mr. Bailey asked her to come to his house to sign some papers, to ensure that he would get paid for his work. Ms. Di Giacomo went to Mr. Bailey's home. Mr. Bailey was not there. She had signed some papers that Mrs. Bailey had given her, even though she did not know what she was signing. While she was there, Mrs. Bailey had complained about the price of pork and a bathing suit that she had lost on a recent cruise. There was no report attached to the papers that she had signed.
- Mr. Bailey had said by email to Ms. Di Giacomo, that he would have 'something' to her the week of February 8th, 2010. This did not happen. By March 3rd, 2010, she still did not have a Plan and she was still expecting a restructuring Plan from him.
- The farm had substantial assets and she could not understand why it was so difficult for Mr. Bailey to have a recovery Plan in place.
- Her business lawyer (Mr. Bordin) had made a few efforts to get in touch with Mr. Bailey and that when they finally spoke, Mr. Bailey had made negative comments to Mr. Bordin about Ms. Di Giacomo as a dairy farmer.
- On March 10th, 2010, Mr. Bailey had e-mailed her about the Plan. He said that the Plan did not work, the farm was too far in debt and too far in arrears with creditors. She said that this was the first time she had heard from Mr. Bailey that the Plan did not work.
- Ms. Di Giacomo e-mailed Mr. Bailey on March 20th, 2010, terminating her relationship with him. The reasons for the termination were his failure to produce a farm restructuring Plan, his failure to communicate with her in a timely manner and the disparaging remarks made about her ability to operate the farm to various third parties.
- She had received a copy of the report Mr. Bailey had filed, via Purolator towards the end of May 2010. She said that she had no prior knowledge of that report, had never seen it,

and had not approved of the contents. When she had read the report, there was a \$900,000 error, omitting the sale of the milk quota.

- She was completely dissatisfied with the report and she disagreed with most of it.
- She said that if only Mr. Bailey had produced the Plan within the agreed timelines, she could have negotiated with the creditors and saved the farm.
- She subsequently hired another advisor who, within a month, had prepared a recovery Plan.
- In May 2010, the creditors had called in the loans and the farm had to be sold.

Cross Examination by Mr. Krusell.

- Mr. Krusell produced an email dated March 10th, 2010, sent by Mr. Bailey to her about the various scenarios Mr. Bailey had worked on, when writing the Plan. She replied that these scenarios included selling of the heifer farm, selling her land in B.C. She said she disagreed with Mr. Bailey that Mr. Van Boxtel of the FCC was adamant that he would not have allowed her to keep any proceeds from the sale of the quota or the heifer farm. Ms. Di Giacomo also said that Mr. Van Boxtel suggested to her that if she gets 65 cows and keeps 50 cows, this is the road to recovery. She described Mr. Van Boxtel as very reasonable, very accommodating and wanting to work with her.
- Mr. Krusell questioned her as to whether she had asked Mr. Bailey to do a recovery Plan. She replied yes, at the FDM meeting of August 4th, 2009. She had mentioned that she was told later Mr. Bailey could have written a recovery Plan before the FDM meeting of August 4th, 2009.
- Mr. Krusell stated she fired Mr. Bailey when she had learned from Mr. Bailey's email of March 10th, that the farm was too far in debt and that the Plan would not work. She said that she fired him only after she had learned from Mr. Bordin about the negative comments Mr. Bailey had made against her.
- Mr. Krusell stated her farm was the highest leveraged farm as a result of her poor management. She disagreed. She replied that the farm suffered the catastrophic loss of 45 cows in February to March 2009.
- Mr. Krusell said that Mr. Bailey could not produce a Plan for her on time as he could not come up with a scenario that could be successful because the farm was so far in debt that nobody could get the farm out of it. Ms. Di Giacomo disagreed.

The panel found that for the most part, Ms. Di Giacomo's evidence was credible. Her evidence that Mr. Bailey agreed to prepare a recovery Plan for FDM creditors, was amply supported from several documents and the testimony of the other witnesses.

Mr. Martin Van Boxtel

In his evidence, Mr. Van Boxtel stated the following :

- He was employed by Farm Credit Canada (FCC) since 2007, and FCC was a Crown Corporation under the Federal Government which lent money to primary agricultural businesses. He said that he was an account manager in Special Credit and that he had worked with files that were experiencing financial difficulty.
- He gave an overview of Farm Debt mediation and that throughout the process, clients would have the services of a consultant, who would have the skill-set to put together a recovery Plan which would be submitted to the FCC.
- He first became aware of Sabluc Dairy around June 2008 when the file was transferred from the local office in Vineland to Special Credit, based in Kanata. At that time, FCC had not given any Notice of Intent to the farm.
- As part of his daily routine, he would take notes and diarize conversations regarding farm clients very carefully.
- He had received an email in June, 2009 from Mr. Bailey, advising that Mr. Bailey had told Ms. Di Giacomo to pay only the interest portion of the debt to FCC.
- He had participated in a FDM meeting on August 4th 2009 via teleconference and the Bank of Nova Scotia and somebody from John Deere participated as well.
- At the meeting, FCC agreed to forebear any recovery action until November 25th, 2009, provided that some conditions were met. These conditions were that a full recovery Plan would be submitted by November 10th, to be prepared by Art Bailey of FDMS, or an equivalent accountant and that if the recovery Plan was not viable, FCC expected the farm assets to be sold or that the farm would make an alternative financing arrangement to pay out FCC loans.
- FCC agreed to receive only the interest portion of the debt in the intervening three month period. FCC had not retained the services of Mr. Bailey. His expectation was for the client to provide the recovery Plan either prepared by Mr. Bailey or by an equivalent accountant. He expected that the relationship between Mr. Bailey and Sabluc Dairy would continue.
- He visited Sabluc Dairy in October 2009 as a follow up to the Farm Debt Mediation meeting, to meet with Ms. Di Giacomo, to see how things were going at the farm and to check on the recovery Plan, which was due the following month.
- When discussing with Mr. Van Boxtel the status of the recovery Plan, Ms. Di Giacomo had said that she was in discussions with Mr. Bailey about putting the Plan together.
- The onus of coming up with the Plan was the responsibility of the client and it was up to the client to work with the professional or by themselves, if they had the skill-set to prepare a recovery Plan.

- He thought the security on the farm debt was fine but there were 'big, big issues to overcome with the business' and there were 'big viability concerns'.
- On December 21st 2009, Mr. Van Boxtel had a discussion with Mr. Bailey. He had received information from Mr. Bailey that the Plan was being worked on, under the Growing Forward program. FCC was still expecting to receive a Plan, they did not really care how it came about, as long as there was something to analyze and assess the viability of the farm.
- Since security for the loan was not an issue, he was willing to be quite patient as long as progress was being made on the restructuring Plan.
- On January 18th, 2010, he had received an email from Mr. Bailey requesting the 'loan balances' for Sabluc farm. Mr. Van Boxtel had assumed this request for information had to do with the progress that was being made on the Plan. The requested information was sent to Mr. Bailey.
- He was expecting the recovery Plan from Mr. Bailey in January 2010.
- In his conversation with Mr. Bordin on January 22nd, 2010, Mr. Van Boxtel told Mr. Bordin that he had not seen a Plan, he was waiting for a recovery Plan. In that conversation, some mention was made about selling the heifer farm. He had told Mr. Bordin that he did not think that this was a good idea. He also told Mr. Bordin that borrowing more money was not an option.
- He had made a second visit to the farm on February 2nd, 2010, Ms. Di Giacomo had told him that she had an appraised value on the main farm and on the heifer farm, from a third party.
- On February 2nd, 2010, he had received an inquiry from a lawyer for the Bank of Nova Scotia (BNS) suggesting that the FDM stay had been terminated and asking for an update on the status of the file. He had replied: the client is currently working on an updated recovery Plan with Art Bailey, consultant with the Growing Forward Program. I have a message out to Art Bailey requesting his feedback on timing of the report. I will keep you posted.
- Mr. Van Boxtel was still expecting the report from Mr. Bailey as of February 2nd, 2010.
- Another email on April 14th, 2010, had come from the BNS lawyer, asking for an update on the progress of the file. He was told by the BNS lawyer on April 23rd, 2010 that they issued a Notice of Intent to the farm.
- FCC had not issued a Notice of Intent at that point. He could not give further evidence on Sabluc Dairy because the file was transferred from him to one of his colleagues.
- He had never seen a copy of the Plan prepared by Mr. Bailey.
- When Ms. Jolley asked him if he had been expecting a Plan that would deal with each of the three issues of the sale of the quota, the heifer farm or the severance of the house, he had replied that the plan did not necessarily have to deal with these three issues but had to be a Plan that would show or prove, the viability of the business.

Cross Examination by Mr. Krusell.

- When Mr. Van Boxtel was asked if a possible allocation of the proceeds from the sale of the milk quota (\$900,000) had been discussed on August 4th, 2009, he could not recall.
- When asked whether he would have allowed Ms. Di Giacomo to keep \$200,000 from the proceeds to use as she saw fit, he said if it was in a proposal that made sense, maybe he would have allowed it.
- FCC had not paid Mr. Bailey for his services.
- When asked if he had ever been furious with Mr. Bailey or express anger or frustration towards Bailey, he replied that he never got furious.

The panel found that Mr. Van Boxtel was a credible witness in that he had constantly looked at his notes before answering and he did answer all questions very clearly. If he disagreed or did not know the answer to the questions, he would say so boldly. He appeared truthful and independent and most of his evidence was consistent with the evidence of Mr. Bordin and Ms. Di Giacomo.

Mr. Dan Reason

During his evidence, Mr. Dan Reason stated the following :

- He is a partner in the London law firm of Harrison Pensa and had been called to the Bar of Ontario. His area of practice was in commercial litigation, insolvency and reorganization work.
- His firm represented the Bank of Nova Scotia
- He had taken notes as evidenced in Exhibit 11, fresh from his memory after each conversation relating to Sabluc Dairy, through 'Collectlink'.
- On July 3rd, 2009, he had sent a letter introducing himself to Mr. Bailey and setting out what the Bank of Nova Scotia is owed from the farmer.
- According to his notes, it was Mr. Bailey who had sent the notice of the Mediation meeting.
- He had participated in the mediation meeting of August 4th via conference call. FCC had agreed to provide a 90 day window for the farmer to attempt to generate funds in order to normalize the debts with FCC and other creditors, including the Bank of Nova Scotia.
- Since he had not received the Plan by February 2010, his associate had emailed FCC about the status of the Plan. In reply, Mr. Van Boxtel had stated that he was working with Mr. Bailey on the recovery Plan.

- By April 14th, 2010, as he still had not received a Plan from the farm, his associate had emailed Mr. Van Boxtel enquiring about its status.
- Finally, a demand note was issued to the farm on April 23rd, 2010.

The panel found Mr. Dan Reason to be a credible witness. He was professional and he gave clear answers by looking at his notes (Exhibit 11) and answered with authority. Mr. Reason's testimony was consistent with testimony of several other witnesses.

Mr. Angelo Di Giacomo

During his evidence, Mr. Angelo Di Giacomo stated the following :

- He is the brother of Ms. Di Giacomo, the complainant, and is employed by the Ministry of Government Services in a unit called Policy Analysis, Performance Measurement and Quality Assurance.
- He had attended the FDM meeting on August 4th, 2009 with his sister and he recalled the meeting being brief and positive, with everyone working towards a solution.
- He recalled that FCC agreed to allow Ms. Di Giacomo to go forward on interest only for 90 days and had agreed not to take any action against the farm. In the meantime, a restructuring Plan was going to be developed for the farm to recover from the difficulties it was facing.
- His understanding was that Mr. Bailey would prepare the restructuring Plan along with his sister and FCC had wanted the Plan to be completed in ninety days.
- At the mediation meeting, Mr. Bailey did not say that he would not do the restructuring Plan.
- His impression was that Mr. Bailey was going to prepare the Plan. Mr. Bailey was fairly upbeat at the meeting and Mr. Bailey had exuded a large degree of confidence, which left him with the impression that Mr. Bailey was quite capable of delivering the Plan.
- In November 2009, he had contacted his sister to see if the Plan had been delivered. His sister told him that she has not received the Plan. She had told him that she was making efforts to contact Mr. Bailey to get an update on the Plan and expressed that she too was concerned.
- He had seen a copy of the Farm Financial Assessment that had been prepared by Mr. Bailey. He was not sure how Ms. Di Giacomo had obtained it, but recalled that there were difficulties in obtaining a copy of it.
- After looking at the Plan, he had realized that there was a mistake in terms of the number of kilos of quota and that the numbers did not reflect the previous sale of quota.

- He recalled that at the mediation meeting in August 2009, FCC had been interested in how the proceeds from the sale of quota were going to be used. He recalled that at the mediation, the money was allocated to reducing the debt load.
- He had agreed with an email from Mr. Bordin, that Mr. Bailey's report contained at least one significant error, in that, he had used assets based on 103 kilos of quota but debt was being based on 139 kilos of quota.
- He said the sale of the quota had occurred in May or June of 2009.

The panel found Mr. Angelo Di Giacomo to be a credible witness. He testified clearly and his evidence was consistent with some of the testimony of other witnesses.

Witnesses for the Member

Mr. Krusell, counsel for the member, called upon the following witnesses.

Dr. Tom Armstrong

During his evidence, Dr. Armstrong stated the following :

- He was a veterinarian and after obtaining his MBA, he became a business consultant to dairy farmers. In 2001, he also had started doing contract work with the Federal Government under their Farm Consultative Services and he was one of the contractors for the Farm Debt Mediation as well.
- He had prepared between 200 to 250 assessments during his career.
- Ms. Di Giacomo had contacted him in June 2008 and told him she was interested in expanding her business. He had told her about a program called Canadian Farm Business Advisory Services (CFBAS) who would pay his fee and Ms. Di Giacomo would only have to pay \$100.
- Ms. Di Giacomo told him that Mr. Bailey had done some work for her and she would not be entitled to further government funding. He then discussed his fees with her.
- He knew Mr. Bailey professionally. Since Ms. Di Giacomo indicated that Mr. Bailey had already done some projections, he had requested a copy of Mr. Bailey's projections as well as other data including a copy of her last milk cheque, herd production and herd health records, and some updated financial information. Once he had received all that information, he went through it before preparing his report. He prepared a report containing an assessment of Sabluc Dairy's financial situation, and an assessment of herd production and herd health, and an assessment of the feasibility of the expansion.
- In his report, he had stated that in comparison to provincial averages, the farm had about half the equity and a considerable amount of debt (about 4 million dollars), the financial ratios were cautionary or weak, and the farm had lost more than \$100,000 on a cash flow basis in 2007. Though the business plan was to expand to 160 kilograms of

purchase quota and to build a new free style barn, the farm did not have sufficient cash flow and therefore it was not feasible.

- In his report, he also stated the farm herd production and herd health parameters were at or above provincial averages.
- In his report, he also stated numerous changes had to be made to the farm involving bank loan structures, cost control, management changes, and increased production, in order to become more profitable.
- When he had met them at the farm, he noted that there was very little communication between Mr. Marriott and Ms. Di Giacomo. He had told them that if the business was to survive, they had to be on the same wavelength and had suggested marriage counselling. He flatly denied that he had ever suggested a divorce.
- He was late in receiving the second half of the payment from Ms. Di Giacomo and ultimately they compromised and both agreed to a lower fee.
- Ms. Di Giacomo had told him that she was not satisfied with his work and that she had contacted his supervisor in the federal government program. Ms. Di Giacomo told him that she said to his supervisor that he was unprofessional, he did not do good work and he should not have said anything about her marriage status.

Cross Examination by Ms. Jolley

Under cross examination, Dr. Armstrong stated the following :

- He does some work on a program called the Growing Forward program, run by the Ontario Soil and Crop Improvement Association, which is within OMAFRA.
- Under the Growing Forward program, it was his practice to review his report with the farmer and he would have delivered a copy of his report to the farmer. The farmer had to sign a paper to acknowledge that the consultant had done the work; this would enable him to get paid.
- He went through the report with the farmer so that the farmer could approve what he did.
- He said that it was also his practice as the farm business advisor, to have the Farm Financial Assessment signed by the farm business.
- He had no formal training in relationship issues, psychology issues or marital therapy issues, but he had experience in those issues.
- It is the policy of the CFBAS program to send a questionnaire to the farmer after the farm consultant had done his work, enquiring about the report, the process and the consultant.
- He had an obligation of confidentiality to Ms. Di Giacomo and he would get Ms. Di Giacomo's consent before he shared information about her. Yet, he admitted that he had written a letter to the Certified General Accountants of Ontario, divulging information without Ms. Di Giacomo's consent.

The panel found that Dr. Armstrong was a credible witness and was quite knowledgeable about farm business matters. However, his assessment of the farm had no relevance to the allegations made by the Discipline Committee as this hearing was not about the economic viability of the farm.

Three facts became very clear from the cross examination: a) By the farmer signing a paper, the consultant was able to claim his fee b) The consultant had to review the report with the farmer, c) The consultant had the Farm Financial Assessment signed by the farmer. This testimony was vital to the hearing.

Mrs. Elizabeth Bailey

During her evidence, Mrs. Elizabeth Bailey stated the following :

- She is the wife of Arthur Bailey.
- She had previously worked in the banking industry and then in Municipal Government Finance. She was currently doing bookkeeping for a few clients and answered the phone at home for Mr. Bailey.
- On January 12th or 13th , 2010, Ms. Di Giacomo came to her house to sign papers for the program that Mr. Bailey was doing for her.
- Ms. Di Giacomo told her that signing the papers was not a problem for her because she wanted to make sure Mr. Bailey got paid for the work that he had done.
- Mr. Bailey talked with Ms. Di Giacomo for a few minutes and then took a phone call in his office. She signed the papers. She had then talked to Ms. Di Giacomo for quite some time because she did not know if Mr. Bailey had finished with Ms. Di Giacomo.
- During the conversation, Ms. Di Giacomo had told her about terrifying events at the farm such as her neighbors seeing lights being on in the barn at off hours, her cattle were ill and dying and that vandalism and poisoning were suspected. After hearing this, she had expressed concerns for Ms. Di Giacomo's safety.
- Ms. Di Giacomo also discussed the insurance claim which Ms. Di Giacomo hoped would be settled soon. She had asked Ms. Di Giacomo if it had been approved and Ms. Di Giacomo had said that it had been denied.
- She did not talk with Ms. Di Giacomo about losing a bathing suit.
- Mr. Bailey came out of his office and talked to Ms. Di Giacomo again.

Cross Examination by Ms. Jolley

Under cross examination, Mrs. Bailey stated the following :

- She knew that her husband was working on a report for the Sabluc farm because she had been helping her husband by possibly doing searches on the farm and photo copying relating to the farm.
- She did not review with Ms. Di Giacomo the Farm Financial Assessment prepared by Mr. Bailey. She did not provide Ms. Di Giacomo with a copy of the Farm Financial Assessment. They had just talked.

The panel found that for the most part Mrs. Bailey was a credible witness. The evidence she had given was straight, clear and without any prompting.

Mr. Arthur Bailey

During his evidence, Mr. Bailey stated the following :

- He had been the general manager for the chick hatchery division of Maple Lodge Farms and he was well experienced in supply management in dairy and poultry farming.
- At Maple Lodge Farms, he had overseen an operation that hatched over 62 million chicks a year, employed about 180 people and had sales of close to \$40 million.
- After leaving Maple Lodge Farms, he focused his practice on consulting. He had become one of eight advisors who could participate in Farm Debt Mediation Service and he also became an advisor for the Canadian Farm Business Advisory Services.
- Under the two programs, he had done at least 80 Farm Debt Mediations and well over 100 Farm Financial Assessments.
- He was contacted by phone in 2005, and at that time, he had met mostly with Mr. Marriott. He said that he had spent a lot of time, in the house and barn at the farm.
- Mr. Marriott and Ms. Di Giacomo wanted to make several improvements to the farm (build a feed bunker, build a milking parlor) and he had provided them with a Farm Financial Assessment report in 2005. He testified that this report was to be given to several other banks for possible borrowing, because FCC had put the farm on hold, as far as lending new funds.
- In 2008, he had produced a business plan for Sabluc Dairy with a view to adding more quota and building a large free style barn. He had spent a great deal of time at the farm and going over their records.
- In the 2nd report, he had talked about training and had outlined weaknesses in the farm such as that there was no current financial information in that no bookkeeping was being done on the farm, no bench marking, no regular monitoring of key performance factors. He mentioned that bench marking standards for non financial factors had to be developed. He had prepared a detailed action plan and follow up.

- If there was any follow up done upon his recommendations, he said that he never saw it.
- He was not surprised that Mr. Derek Emond at FCC did not like his report because it did not look favourably on the farm, moving forward.
- At the complainant's request, he had sent a copy of his 2008 report to Dr. Armstrong, who had been retained by Ms. Di Giacomo to do a different report.
- Even before the death of the cattle in early 2009, the farm had gone from milking 140 cows down to 103. He said that the bottom line profit for the farm was \$36,000, which was not enough to support family living and to make loan repayments. There was also \$120,000 in credit card debt.
- Ms. Di Giacomo had called him to say that she was very upset with Dr. Armstrong about the divorce remark. She had thought that Dr. Armstrong was very unprofessional and wanted to know how to file a complaint.
- His next contact from Sabluc Dairy came in May 2009, after the court order, where the management of the farm rested with Ms. Di Giacomo. John Deere, one of the farm's secured creditors, had sent a Notice of Intent to Realize on Assets as they wanted to repossess one of the tractors. Ms. Di Giacomo wanted to know if he had any advice for her.
- He talked to Ms. Di Giacomo about Farm Debt Mediation.
- When anyone in Ontario wants to apply for Farm Debt Mediation, they contact one person and that person was the manager, Mr. Glen Inglis. In conversations with the farmer, Mr. Inglis would determine whether the applicant was eligible to participate. Mr. Inglis would discuss the two different options A and B, a) which involved mediation with all creditors and b) which involved mediation with secured creditors only. In this case, he was chosen by Mr. Inglis to be the farm financial consultant for this particular mediation and he accepted.
- He said that he was not working for the complainant, he worked for Farm Debt Mediation and he worked under the Rules and Regulations of the Federal Act. He said that he was prohibited from discussing any expectations, conditions or terms with any individual creditor. He said that the \$900,000 question was asked at the mediation meeting and FCC had said they would not release any portion of the proceeds and all of it had to go to paying down the debt.
- He said that he was paid by the federal government and his retainer with Farm Debt Mediation ended at the end of the meeting.
- At the time of the mediation, they were looking at a farm, which was insolvent and was not earning enough to pay their bills, they were milking less than half their quota and were milking approximately 60 cows. The farm revenues were down and they had \$265,000 of payables owing to 28 or 29 different trade clients.
- He said that he would have issued a recovery plan before the mediation meeting if he had any way to get the milking numbers up, back up to milking 103 cows. He also said that they were hanging their hats on an insurance claim for \$472,000 because even if they settled for \$300,000, he could have written a recovery plan for the Farm Debt

meeting because that money would not have had a lien on it. If Ms. Di Giacomo sold property, equipment or quota, most of the money would be taken by people who had liens on it.

- The Mediation meeting was casual and well received. A 90 day period of time was agreed to in order to see the effect of the three unresolved sources of cash.
- At the mediation meeting, he mentioned the OMAFRA Growing Forward program run by the Ontario Soil and Crop Improvement Association as a possible vehicle to get an advisor to develop a Plan for Ms. Di Giacomo because he knew she had no money. He said that if Ms. Di Giacomo applied to this program under Financial Difficulty and qualify, there is no fee.
- At the end of the mediation meeting, he said that if the application under Financial Difficulty in the Growing Forward program was accepted, he would do the work for Ms. Di Giacomo.
- By November 2009, nothing had been resolved with the insurance company and there were no new numbers to be put in. He advised her that she was no better off than she had been on August 4th, 2009.
- In December 2009, he told Ms. Di Giacomo that the program would end on January 15th, 2010, and that he had to finish the report but the report didn't help Ms. Di Giacomo. He told her that he had to file a report by January 15th in order to fulfill his contract with OSCIA and get paid.
- He was at Ms. Di Giacomo's farm on January 6th, 2010 and she was going to sign the claim forms so that he could get paid but she could not find the claim forms. He phoned the OSCIA office and they sent him the claim forms, which necessitated Ms. Di Giacomo's visit to his house on January 12th or 13th, 2010.
- Ms. Di Giacomo went to his home to sign these forms and he was home at the time. They sat down and talked. The report was sitting on his table and they had talked about it in great detail. He had produced a report which did not help her because there was no improvement in the cash flow.
- Ms. Di Giacomo had asked him to look at other scenarios including selling the heifer farm, and severing/selling one of the houses on the property. He had agreed to work pro bono to look at those two options.
- The \$900,000 error in the Farm Financial Assessment he submitted to OSCIA on January 15th, 2010, was embarrassing.
- He had continued to work on Ms. Di Giacomo's scenarios and had prepared a report to be presented to her on March 12th, 2010. The meeting did not take place on March 12th because he was fired on March 10th.
- He had received an email from Mr. Bordin for information about the Plan. In response to Mr. Bordin's questions, he had told Mr. Bordin that the plan did not work, the farm is not solvent and there was no way out at the moment. He had also discussed her short comings with Mr. Bordin.

Cross Examination by Ms. Jolley

Under cross examination, Mr. Bailey stated the following :

- He had told Ms. Di Giacomo about Farm Debt Mediation in May and June of 2009. He mentioned both options, options A and B.
- He told Ms. Di Giacomo that she should consider Farm Debt Mediation on the basis that somebody had filed a Notice of Intent.
- By July 29th, 2009, he knew a business Plan would be part of any agreement reached at the mediation. He had the option to prepare a recovery Plan in advance and present it at the mediation.
- He had never told Ms. Di Giacomo in writing that he was not doing a recovery/restructuring Plan.
- FCC and BNS were expecting a Plan by November 10th, 2009.
- When Mr. Van Boxtel had enquired about the Plan in October 2009, he did not email him back saying that he was not doing a Plan.
- He had never told Ms. Di Giacomo in writing that he was not going to be able to meet the deadline.
- When she emailed him on December 22nd, 2009, mentioning a restructuring Plan, he had replied that he was aiming to have 'something' for her on January 4th, 2010, and that he had spoken to Mr. Van Boxtel and he has been reasonable. He did not indicate in his response that he was not doing a restructuring Plan.
- He did not email a copy of his first report to Ms. Di Giacomo or send Ms. Di Giacomo a hard copy of his first report in the mail. He did not give Ms. Di Giacomo a copy of the second report.
- When he sends a Farm Financial Assessment into OSCIA, they do not do any analysis of the Assessment, they look to make sure that all the elements have been completed and they put the Assessment in a drawer, they do not file the Assessment with any third parties. The Assessment is for the farmer's use to use as he or she wants.
- The \$900,000 error in the Farm Financial Assessment affected almost all the financial ratios.

The panel found that Mr. Bailey's testimony sometimes lacked consistency. Most of his testimony related to the debt levels, liquidity problems and the viability problems that the farm had faced since 2008, which was not the subject matter of the allegations in the Notice of Hearing. It was only during the cross examination by Ms. Jolley that he finally admitted that there was a Plan expected of him by FCC and Bank of Nova Scotia, he had never told Ms. Di Giacomo in writing that he was not doing a recovery/restructuring Plan and he did not email Mr.

Van Boxtel of FCC saying he was not doing a Plan. He tried to explain that the Plan he was working on was of a different nature, a Farm Financial Assessment, not a recovery Plan or restructuring Plan, and was meant for the use of the farmer only. Regardless, this did not change his obligations and Mr. Bailey never provided Ms. Di Giacomo with a copy of the Plan.

FINDINGS OF FACTS FROM THE NOTICE OF HEARING

Based on the oral evidence heard and the documents entered as exhibits at this hearing, the panel of the Professional Conduct Tribunal makes the following findings of facts from the particulars in the Notice of Hearing:

1. In or about the summer of 2009 Mr. Bailey was retained by Ms. Di Giacomo to assist her at a Farm Debt Mediation.
2. As part of that mediation, which took place on or about August 4th, 2009, it was agreed that Mr. Bailey would prepare a farm restructuring Plan for Ms. Di Giacomo.
3. The Plan was to be presented to Ms. Di Giacomo's creditors by November 25th, 2009.
4. It was agreed that Mr. Bailey would provide Ms. Di Giacomo with a draft of the Plan by November 15th, 2009.
5. Mr. Bailey did not provide Ms. Di Giacomo with the Plan or a draft of the Plan by November 15th, 2009 or at any time in the balance of 2009.
6. The Ontario Ministry of Agriculture, Food and Rural Affairs ("OMAFRA") had a program in place where it paid qualified consultants, on behalf of farmers who found themselves in financial difficulty, to prepare Plans to assist the farming clients to work with their creditors to remedy their financial affairs.
7. Mr. Bailey was a qualified consultant for the purposes of OMAFRA.
8. Although Mr. Bailey had not yet provided Ms. Di Giacomo with the Plan or a draft of the Plan, in January 2010, he had asked her to attend at his office and sign documents to ensure that he would be paid by OMAFRA for preparing the Plan.
9. It was express or implied in having Ms. Di Giacomo sign the documents that Mr. Bailey would deliver a Plan to her, as had been earlier agreed.

10. As of March 2010 when Ms. Di Giacomo terminated Mr. Bailey's retainer, he still had not provided her with a Plan.
11. However, even though Mr. Bailey did not have Ms. Di Giacomo's authority to deliver the Plan to OMAFRA and had not shown a draft of any Plan to her, he delivered a Plan to OMAFRA by its deadline for funding of 15 January 2010 to ensure he would be paid by OMAFRA. Mr. Bailey did not advise Ms. Di Giacomo that he had filed any Plan with OMAFRA and never gave her a copy of what he had filed.
12. Mr. Bailey knew that Ms. Di Giacomo would not have given him her consent to file the Plan with OMAFRA as, during their discussions she was clear that she disagreed with his view of the economic viability of her farm.
13. Further, Mr. Bailey did not consider alternative courses of action that Ms. Di Giacomo had asked him to consider in any Plan as their consideration may not have allowed Mr. Bailey to file the Plan by the deadline for his payment.
14. Having submitted the Plan, Mr. Bailey was paid \$2,000.00 by OMAFRA.
15. Mr. Bailey knew the Plan that he did submit to OMAFRA was inaccurate as he was waiting for further information. The information Mr. Bailey needed for the Plan to be accurate was not available by the deadline by which he had to submit the Plan to OMAFRA to be paid. Mr. Bailey did not wait for the information as he was concerned that he would then not be paid for his work.
16. Mr. Bailey did not qualify the Plan to note that it was inaccurate as he was waiting for further information.
17. Mr. Bailey failed to recognize that it was not his decision to submit a Plan to OMAFRA or to Ontario Crop and Soil or any other third party without Ms. Di Giacomo's prior review and approval of the Plan and her consent to submit it.
18. The Code Principle of Trust and Duties requires members to act in the interest of their clients and to be prepared to sacrifice their self-interest to do so.
19. In submitting the Plan to OMAFRA so that he would be paid, without having provided his client with a draft, without considering his client's alternative proposals and without receiving her approval to submit the Plan, Mr. Bailey preferred his interests over the interests of his client.

21. Mr. Bailey was not retained to convince Ms. Di Giacomo to sell or otherwise "step down" from her farm. He was retained to provide her with a draft Plan, which he did not do as he felt it would be futile.
22. Mr. Bailey made negative comments about Ms. Di Giacomo to third parties, sharing with them his view that she did not have sufficient knowledge to manage the herd on the farm and maximize revenue and did not have sufficient attention to detail. It was not within the mandate given to Mr. Bailey by Ms. Di Giacomo to provide this negative commentary to any third party.
23. At the time he submitted the Plan, Mr. Bailey knew that Ms. Di Giacomo had sold \$900,000 worth of quota but he did not make an adjustment on the liability side of the Plan, as he was not certain against which of her debts the \$900,000 was being applied. Mr. Bailey knew that the Plan was inaccurate to the extent that it overstated the liabilities as a result. That information was available to Mr. Bailey 19 January 2010. He did not wait for that information, but instead submitted the plan on 15 January 2010 with the inaccuracy.
24. Further, Mr. Bailey did not make a note in the Plan that there would be a reduction in Ms. Di Giacomo's liabilities of \$900,000 although he was unable to identify which liability would be reduced as at the date of submission.
25. The Code Principle concerning Due Care requires a member to carry out his work with professional care and judgment.
26. The Code Principle concerning Deceptive Information requires that a member not be associated with information he knows, or ought to know to be false or misleading, whether by statement or omission.
27. In submitting a report that he knew to be inaccurate, without explanation or qualification, Mr. Bailey did not use the due care or professional judgment expected of him.
28. In filing the Report as he did, Mr. Bailey was also associated with information that he knew, or ought to have known was false or misleading, whether by statement or omission.

DECISION

The Discipline Committee has the onus of proving the allegations in the Notice of Hearing in accordance with the civil standard of proof. The standard of proof applied by the panel of the Professional Conduct Tribunal was a balance of probabilities based on clear, convincing and cogent evidence.

Having considered the evidence and the submissions and the onus and standard of proof, the panel of the Professional Conduct Tribunal finds that Mr. Arthur Bailey breached the following provisions of the Code of Ethical Principles and Rules of Conduct :

Code of Ethical Principles - Trust and Duties:

Members shall act in the interests of their clients, employers, and interested third parties, and shall be prepared to sacrifice their self-interest to do so. Members shall honour the trust bestowed on them by others, and shall not use their privileged position without their principal's knowledge and consent. Members shall strive to be independent of mind and in appearance.

Code of Ethical Principles - Due Care and Professional Judgment:

Members shall strive to continually upgrade and develop their technical knowledge and skills in the areas in which they practise as professionals. This technical expertise shall be employed with due professional care and judgment.

Code of Ethical Principles - Deceptive Information:

Members shall not be associated with any information that the member knows, or ought to know, to be false or misleading, whether by statement or omission.

The panel of the Professional Conduct Tribunal also finds Mr. Arthur Bailey guilty of professional misconduct.

REASONS FOR DECISION

1. Code of Ethical Principles - Trust and Duties:

- Code of Ethical Principle on Trust and Duties requires members to act in the interests of their clients and shall be prepared to sacrifice their self-interest to do so.
- Mr. Bailey not only failed to provide the Plan expected from him in a timely manner but also did not provide any written Plan at all to the client, Ms. Di Giacomo.
- Mr. Bailey failed to inform Ms. Di Giacomo that he filed a Plan with OMAFRA and did not give her a copy of the Plan that he had so filed. He had to file this Plan with OMAFRA by the deadline of January 15th, 2010, in order to get paid. He knew the Plan that he submitted to OMAFRA was inaccurate as he was waiting for further information.

- Mr. Bailey submitted the Plan to OMAFRA without his client's consent, knowing that the client would not give her consent.
- In submitting the Plan to OMAFRA so that he would be paid, without having provided his client with a draft, without considering his client's alternative proposals and without receiving her approval to submit the Plan, Mr. Bailey violated Code of Ethical Principle – Trust and Duties.

2. Code of Ethical Principles – Due Care and Professional Judgment:

- The Code of Ethical Principle on Due Care and Professional Judgment requires members' technical expertise to be employed with due professional care and judgment.
- Mr. Bailey did not wait for the information on the deployment of the \$900,000 which was not available at the time of the filing of his Plan with OMAFRA.
- In submitting a Plan that he knew to be inaccurate, without explanation or qualification, Mr. Bailey did not use the due care and professional judgment expected of him and therefore violated Code of Ethical Principle – Due Care and Professional Judgment.

3. Code of Ethical Principles - Deceptive Information:

- Code of Ethical Principle on Deceptive Information requires members not to be associated with any information that the member knows, or ought to know, to be false or misleading, whether by statement or omission.
- Mr. Bailey knew that the Plan he had submitted to OMAFRA was inaccurate in that it overstated the liabilities.
- Mr. Bailey did not make a note in the Plan that there would be a reduction in Ms. Di Giacomo's liabilities of \$900,000, even though he was unable to identify which liability would be reduced as of the date the Plan was submitted to OMAFRA.
- In filing the Plan as he did, Mr. Bailey was associated with information that he knew or ought to have known was false or misleading, whether by statement or omission, and therefore violated Code of Ethical Principle – Deceptive Information.

The panel of the Professional Conduct Tribunal found Mr. Bailey guilty of professional misconduct for breaching the above three provisions of the Code of Ethical Principles. The most important cornerstone of a professional practice is communication. Mr. Bailey clearly did not communicate with Ms. Di Giacomo in writing, to confirm her expectations and about his duties and responsibilities towards meeting those expectations. The Discipline Committee had amply demonstrated to the panel what Ms. Di Giacomo, the farm creditors and their lawyers, expected Mr. Bailey to do. They had expected Mr. Bailey to do a recovery or restructuring Plan for the farm. If he found that he was too busy or that it was impossible to do a plausible Plan, he then had the obligation and the responsibility to inform Ms. Di Giacomo that he was not doing the Plan. If he was not doing the Plan, he could have recommended someone to assist Ms. Di Giacomo in doing a Plan. This lack of professionalism tarnishes the image of the CGAO.

Mr. Bailey ultimately submitted a Plan to OMAFRA. In submitting the Plan to OMAFRA so that he would be paid, without having provided his client with a draft, without considering his client's alternative proposals and without receiving her approval to submit the Plan, and submitting the Plan to OMAFRA that he knew to be inaccurate, without explanation or qualification, Mr. Bailey engaged in professional misconduct.

PENALTY SUBMISSIONS

In terms of penalty, counsel for the Discipline Committee submitted that the panel should make the following penalty order:

1. A three month suspension.
2. A \$5,000 fine made up of a \$1,000 fine for each of the 3 breaches of the Code for a total fine of \$3,000 plus the divesture of the \$2,000 fee that Mr. Bailey received from OMAFRA.
3. Costs of the hearing, with fees of \$37,762.34 and disbursements of \$1,541.12.
4. Publication.

In contrast, counsel for the member made the following submissions on the penalty order:

1. A three month suspension is not appropriate, is too harsh, and it would be a death sentence in Niagara.

2. The divestiture of \$2,000 fee is ridiculous. Mr. Bailey did the work.
3. Most of the costs were excessive such as the second counsel's costs.
4. If Mr. Bailey had complete success, then no costs. If there is divided success, then costs should be apportioned.

PENALTY DECISION

The panel deliberated and considered the Discipline Committee's submissions in terms of penalty and the member's submissions in terms of penalty. Accordingly, the panel orders the following penalty:

1. Mr. Bailey is reprimanded by the CGAO as a result of his breaches of Code of Ethical Principles – Trust and Duties, Code of Ethical Principles – Due Care and Professional Judgment, Code of Ethical Principles – Deceptive Information, of the Code of Ethical Principles and Rules of Conduct.
2. Mr. Bailey is ordered to pay a \$1,000 fine for each of the 3 breaches of the Code for a total fine of \$3,000.
3. Mr. Bailey is ordered to pay \$10,000 in costs.
4. Publication in Statements.

REASONS FOR PENALTY DECISION

The reasons for the panel's decision to impose the above penalties are:

1. A member of the public had requested and had expected a member of the Certified General Accountants Association of Ontario to provide her with a recovery or restructuring Plan. By not acting in the interest of his client and submitting a Plan that he knew was inaccurate, he had breached the Code of Ethical Principles and Rules of Conduct and had tarnished the image of the CGAO. The reason for imposing the reprimand is meant to act as a specific deterrent to the member.

2. The reason for imposing the fine is meant to act as a general deterrent to the profession and a specific deterrent to the member. The panel has imposed a fine of \$1,000 for each of the three breaches of the Code of Ethical Principles and Rules of Conduct. The panel deliberated on the request of the Discipline Committee for divestiture of the \$2,000 fee that Mr. Bailey had received from OMAFRA and concluded that Mr. Bailey did some work to earn this fee and that Ms. Di Giacomo signed the papers to enable him to get paid by OMAFRA. Therefore, the panel decided against divestiture of the \$2,000 fee.
3. The actual costs of the hearing incurred by CGAO including legal fees and disbursements were \$39,303.46 based on the submissions made by Ms. Jolley. The panel had deliberated and concluded that Mr. Bailey pay only \$10,000 and not the total costs sought by CGAO, relying on the amount of costs ordered in the case of Mr. H, in tab 2 of the sentencing brief.
4. The reason for ordering publication in Statements is meant to act as a specific deterrent to Mr. Bailey and a general deterrent to other members of the CGAO. By publishing the name of the member and the nature of the breaches in Statements, the panel is sending a clear message to the profession, deterring them from engaging in similar acts. It was also meant to enhance and strengthen public awareness that the CGAO is a 'self regulating professional organization'.
5. The panel has decided not to order a suspension in this case as Mr. Bailey's conduct did not justify a suspension, as the violations in this case were largely due to lack of communication between Ms. Di Giacomo and Mr. Bailey. This was also consistent with the cases provided by Ms. Jolley where no suspension was ordered.

OTHER MATTER

No evidence was ever led by Mr. Krusell to support the serious allegations made against the Association and Ms. Jolley during the hearing.

Dated this _____ day of _____, 2012

I, Alexis Perera, sign this Decision and Reasons for Decision as Chair of the panel of the Professional Conduct Tribunal on behalf of the members of the panel that heard this matter.

Alexis Perera, CGA

NOTICE

This decision of the Professional Conduct Tribunal may be appealed to an Appeal Tribunal within thirty (30) days of the date of this decision.

The Notice of Appeal must be in writing, addressed to the vice-president responsible for regulatory affairs of the Association (Certified General Accountants of Ontario, 240 Eglinton Avenue East, Toronto, Ontario, M4P 1K8) and must contain the grounds for the appeal.

TAKE NOTE THAT, in an appeal, the Appellant bears the onus of obtaining and delivering copies of the transcript of the hearing before the Professional Conduct Tribunal for the Appeal Tribunal (4 copies) and for the Respondent (1 copy).

According to Article 9 of the Bylaws, a Notice of Appeal that fails to contain the grounds for the appeal, together with evidence that demonstrates that a transcript of the hearing giving rise to the appeal has been ordered, shall be void.