CV 06318

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**MARGARET H. TANAKA**

Applicant

- and -

**THE CERTIFIED GENERAL ACCOUNTANTS' ASSOCIATION OF THE NORTHWEST TERRITORIES**

Respondent

## REASONS FOR JUDGMENT

1 The applicant is a certified general accountant and a member of the respondent Association. In these proceedings she seeks to quash a direction to establish a committee of inquiry into certain complaints about her professional competence.

2 The applicant is the resident member of her firm's accounting practice in Hay River. In early 1993, her firm was awarded a contract to conduct fiscal year-end audits, for the years 1993, 1994 and 1995, for the Baker Lake Housing Association. In December, 1995, a complaint was forwarded to the Association concerning the adequacy of the audit procedures for the fiscal years 1993 and 1994. The complainant was the Northwest Territories Housing Corporation acting on behalf of the Baker Lake Housing Association. The details of the complaint are unimportant for the purpose of this proceeding.

3 Pursuant to the Association's governing statute, complaints are initially

investigated by the chairperson of the Association's discipline committee or, if the chairperson is not available to perform that duty, by the vice-chairperson. In this case, the complaint was forwarded to Mr. Kenneth Wowk, the vice-chairperson.

4 Mr. Wowk, upon receiving the complaint, immediately requested further information from the complainant. This was provided by letter dated January 30, 1996. Up to this point, Mr. Wowk did not contact the applicant, as the member complained of, nor give notice to her that he was conducting an investigation. The complainant, however, had sent a letter to the applicant on the same day that the letter of complaint was sent to the Association. The letter to the applicant identified the complainant's concerns and the fact that a review by the Association "will be" requested.

5 On February 1, 1996, Mr. Wowk wrote to the applicant informing her about the complaint and enclosing a copy of the letter of complaint. Mr. Wowk's correspondence also gave notice to the applicant of alleged violations of certain specific rules of professional conduct and that a committee of inquiry had been established to investigate the allegations. The letter also (i) informed the applicant that the committee was to be composed of four members, including Mr. Wowk; (ii) demanded the production of information by no later than February 23, 1996; and, (iii) directed the applicant to attend before the committee for a hearing on March 16, 1996.

6 In response, the applicant brought these proceedings. In the meantime, as well, particulars of the allegations made against the applicant were provided to her. In addition, Mr. Wowk decided to remove himself as a member of the committee of inquiry.

Finally, by agreement of counsel, the hearing date was rescheduled for mid-May.

7 Several issues were raised on behalf of the applicant at the hearing before me. It is, of course, trite to point out that the specific requirements of the statute authorizing disciplinary action must be examined to assess the scope of the powers enjoyed by the Association and an investigator in the position of Mr. Wowk in this case. I will therefore start there and then discuss the specific points argued by the applicant, which, for convenience, I will put under the following headings:

(a) an error of law on the face of the record and exceeding jurisdiction by including matters in the proposed inquiry that were not the subject of the complaint;

(b) an apprehension of bias, both "personal" in respect of Mr. Wowk and "institutional" in respect of the Association; and,

(c) a failure to provide procedural fairness to the applicant during the investigation.

**Legislation**:

8 The Association is established as a self-governing professional body pursuant to the *Certified General Accountants' Association Act*, R.S.N.W.T. 1988, c. C-1. The executive body for the Association is the Board of Governors. The Board has the power

to make by-laws respecting, among other things, rules of professional conduct and the discipline of members. With respect to discipline, the Board is required, by s.16(1) of the Act, to establish a committee on ethics and professional conduct (the "discipline committee"). By section 14, a written complaint about a member may be lodged with the Association's Secretary. The procedural requirements for dealing with a complaint are then set out in sections 17 through 20 of the Act:

> **17**. (1) On receiving a complaint under subsection 14(1), the Secretary shall without delay transmit it to the chairperson of the discipline committee.
>
> (2) The chairperson of the discipline committee shall without delay investigate every matter that comes to his or her attention regarding the conduct of a member or student and shall either
>
> (a) direct that no further action be taken if he or she is of the opinion that the matter does not constitute or involve conduct unbecoming a certified general accountant or student, as the case may be, or
>
> (b) direct that an inquiry into the matter be conducted and for that purpose
>
> (i) cause notice to be given to the member or student, with reasonable particulars of the matter to be investigated, and
>
> (ii) establish a committee of inquiry and appoint its members from among the members of the discipline committee,
>
> and shall without delay advise the Board, the complainant, if any, and any other person having a legitimate interest in the matter of the direction.
>
> (3) Where the chairperson of the discipline committee is unable or not available to perform any of the duties assigned to the chairperson by this section, the vice-chairperson of the discipline committee may perform those duties in the chairperson's stead.
>
> **18**. Where, following a complaint, a direction is made under paragraph 17(2)(a), the complainant may appeal against the direction to the Supreme Court, which may dismiss the appeal or direct that an inquiry into the matter be conducted and that a committee of inquiry be established.

> **19**. (1) A committee of inquiry shall be composed of not less than three members.
>
> (2) A committee of inquiry shall investigate the facts relevant to the matter of the conduct of the member or student concerned.
>
> (3) A committee of inquiry may investigate any other matter concerning the conduct of a member or student that arises in the course of the investigation and that, in its opinion might constitute or involve conduct unbecoming a certified general accountant or student but in that event the committee shall
>
> (a) declare its intention to investigate and report on the new matter; and
>
> (b) permit the member or student sufficient opportunity to prepare his or her answer to the new matter.
>
> **20**. Notwithstanding anything in this Act, a committee of inquiry or the chairperson or vice-chairperson of the discipline committee may make an order limiting the rights and privileges of a member or suspend the member pending the investigation by the committee of inquiry or its conclusion or pending the outcome of criminal proceedings being taken against the member by way of indictment, but in no case shall the limitation or suspension exceed a period of 90 days.

9 As will be noticed, the Act does not set out specific provisions as to how the initial investigation under s.17(2) is to be conducted. It does, however, authorize the investigator to decide whether a complaint will be in essence dismissed or directed to a hearing by a committee of inquiry. If the latter course is taken, the investigator is also the one who appoints the members of the committee.

10 The Act goes on to stipulate that the committee of inquiry has wide scope to set its own procedures, but that the rules of natural justice will apply. The member being investigated is a compellable witness in proceedings before the committee. The committee has powers to compel the attendance of witnesses and the production of documents and lack of co-operation by the member affected is itself a disciplinary

infraction. The committee has the power to make findings and to impose penalties. Those penalties can range from a mere warning to being struck off as a member of the Association. The only recourse from the committee's findings is a right of appeal to the Supreme Court.

11 The Association has passed by-laws which are, unfortunately, singularly lacking in directions on how investigations are to be conducted. In some cases, the by-laws also contravene the express provisions of the Act. The relevant by-laws are those numbered 11 and 40:

> **11. Complaints Against Members**
>
> a) It shall be the right of any member, or any person deemed to be aggrieved, to present a complaint regarding the alleged professional misconduct or conduct unbecoming a Certified General Accountant or for a violation of the rules or by-laws of the Association by a member of the Association or by a registered student.
>
> b) It shall be the duty of the Secretary to receive all complaints against any member or registered student of the Association, from whatever source. All complaints should be in writing and signed by the complainant.
>
> c) The Secretary shall refer the matter to the Committee on Ethics and Professional Conduct.
>
> d) The Board shall upon receipt of the report of the Commitetee on Ethics and Professional Conduct declare its judgment, and if the member or registered student against whom the complaint has been lodged is found guilty of the offence, the Board may impose a fine, suspend or expel such member or registered student. Such action shall require the written concurrence of not less than two-thirds of the Board members.
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> e) Any member or registered student fined, suspended or expelled by the Board for misconduct shall have the right of

appeal to the Association at the next Annual General Meeting or a Special General Meeting, provided that written notice of such appeal is filed by the affected member or registered student with the Secretary within thirty days of the date of mailing notice of the suspension or expulsion; and such appeal shall set out the pertinent facts and explain the grounds for the appeal.

f) The Board shall give notice of all suspensions and expulsions under this by-law to every member, to the public and to any other association or body which, in the opinion of the Board, should be so informed.

**40. Committee on Ethics and Professional Conduct**

a) The Committee on Ethics and Professional Conduct shall exist pursuant to Section 16.(1) of the Act and shall also act as the Committee of Inquiry as referred to under Section 19 of the Act unless otherwise determined by the Board.

b) The Committee on Ethics and Professional Conduct shall recommend rules for the regulation of the professional conduct of members and registered students. Such rules will not be effective until approved by the board.

c) The Committee on Ethics and Professional Conduct shall, in respect of any matter referred to it, whether as set out in section 14 of the Act, or otherwise, make full investigation pursuant to section 17 of the Act, and file with the Secretary a written report of its findings and recommendations within a reasonable time frame and such report shall be signed by at least a majority of the members of the Committee, and the Secretary shall immediately notify the President of receipt of such report, and shall present it to the next meeting of the Board.

12 The references in by-laws 11(d) and (e) to the Board making a judgment or imposing a sentence, and the right of appeal to the Association in a general meeting, are obviously contradictory to the Act and of no consequence. The reference in by-law 40(a) to the committee on ethics also acting as the committee of inquiry is also not in compliance with the Act. The Act contemplates the establishment of a committee of

inquiry on a case-by-case basis, not a standing one. Further, it is the chairperson or vice-chairperson who conducts the initial inquiry who appoints the members of the committee of inquiry from among the members of the committee on ethics. A committee of inquiry established in any other manner would not be properly constituted under the statute.

13 These problems with the by-laws are not relevant to the issues before me. What is relevant, however, is the apparent lack of direction, statutory or otherwise, for the conduct of the initial investigation. But, as noted by applicant's counsel, there is nothing akin to a privative clause in the legislation so as to oust this court's jurisdiction to intervene to correct errors of law or violations of the rules of natural justice.

**Error of Law and Excess of Jurisdiction**:

14 The applicant submits that the notice of hearing sent by Mr. Wowk reveals an error of law on its face. This is based on two references in the notice of February 1st. The first is in the very first reference line found in the letter:

> Dear Ms Tan(a)ka
>
> RE: Baker Lake Housing Association Audits - March 31, 1991 to March 31, 1995 inclusive

The second is the request for more information including financial statements for the fiscal years of 1991 through 1995.

15 The applicant's submission is that, since the original letter of complaint related allegations dealing only with the audits conducted for the fiscal years of 1993 and

1994, and since the applicant's retainer by the client post-dated the preparation of the 1991 and 1992 audits, the notice of hearing bears an error of law on its face because it purports to direct a hearing into the full five-year term specified in the reference line. The applicant argues that there was no evidence, indeed there could not be, relating to the two years prior to her taking on the contract. Reliance is placed on the following comment from Evans, DeSmith's Judicial Review of Administrative Action (1980, 4th ed.), at page 407: "If the order purports to incorporate all the relevant evidence, error of law will be apparent if there is no evidence in support of a recorded finding of primary fact or in support of any material fact ...".

16 In my opinion, the references to the five-year period of 1991 and 1995 inclusive are obvious errors. I think they stem from a reference to a "five-year period" in the original letter of complaint. But, that letter specified that the complaint related to the audit work performed for the years 1993 and 1994. The letter of complaint was included with Mr. Wowk's notice. Furthermore, the allegations to be investigated by the committee of inquiry were particularized and provided to the applicant in March. If there was an error in the notice, it was subsequently cured by these particulars. The essential question is whether the applicant knows the charges against her. That she does.

17 There is, however, a further jurisdictional argument. The applicant submits that Mr. Wowk exceeded his jurisdiction by going beyond the specific subject-matter of the original complaint in his investigation. The applicant points out that, while the original complaint referred to alleged deficiencies in audit procedures for 1993 and 1994,

the notice included allegations of breaches of non-audit related rules of conduct. The notice, and the particulars subsequently provided, made reference to alleged breaches of rule 701 (dealing with management of a member's office) and rule 715 (dealing with annual registration).

18 The Act requires, by s.17(2), that the chairperson, or vice-chairperson as was the case here, investigate "every matter that comes to his or her attention ...". But a "matter" would not, under the scheme established by the Act, come to the chairperson's attention unless it was contained in a "complaint" received by the Secretary who then must transmit it to the chairperson. The applicant's submission is that, for any matter to be investigated, it must be part of the complaint and the chairperson has no power to embark on an investigation into matters beyond the scope of the complaint. Reference can be made to *Barsoum* v. *Pape et al.*, [1988] N.W.T.R. 368 (S.C.), where a ruling on a similar basis was made with respect to disciplinary investigations of pharmacists.

19 The applicant also referred to s.19(3) of the Act as a point of comparison. That subsection empowers the committee of inquiry to investigate "any matter that arises in the course of the investigation". If the investigator had the same powers, the applicant argues, then s.17(2) would also use the phrase "<u>any</u> matter" as opposed to "<u>every</u> matter". The reference in that subsection is to a specific matter not to "any" matter. Hence the investigator is limited to the matters contained in the complaint.

20 In my opinion, the aim of the Act is to direct the initial investigation to those matters contained in a complaint. As in the *Barsoum* case, there is no authority

granted to the chairperson to embark on a wide-ranging inquiry into matters that are not the subject of a *bona fide* complaint. The question of whether in any case an investigation has gone beyond the scope of the complaint depends, however, on the particular facts of the case.

21 In this case, the alleged breaches included in the particulars are ones that go to a member's general obligations. They are incidental to the specific complaints. They relate to a member's status generally and are the type of information items that would arise generally during the course of an investigation into a complaint of almost any kind. They are not issues that are distinctly different matters; they are issues of a general sort of which all members have a general duty to be aware. For that reason, I do not agree that Mr. Wowk has exceeded his jurisdiction with respect to the scope and subject-matter of his investigation.

**Bias**:

22 The applicant submits that the decision of Mr. Wowk to convene an inquiry should be quashed on the basis of bias | bias that is both individual on the part of Mr. Wowk and institutional on the part of the Association. If, of course, there is proof of actual bias, that will call into question the entire investigation. Even if there is no such proof, the issue must still be addressed if there is a reasonable apprehension of bias. The test is, as noted in numerous authorities, whether a reasonably informed but objective observer could reasonably perceive bias on the part of the decision-maker.

23 The allegation of actual bias is raised in two paragraphs of the applicant's affidavit filed in support of this application:

> 19. Mr. Wowk as an official of the Association's Discipline Committee was involved in an earlier investigation of my practice. This investigation arose as a result of a complaint by Mr. John Mapes in 1992, subsequent to the purchase of the Hay River practice by Evancic Perrault Robertson. The complaint involved internal office procedures with respect to applying payments received on behalf of clients against their overall accounts for services rendered.
>
> 20. This complaint was eventually dropped but Mr. Wowk was directly and intimately involved in the matter. As a result of that incident, I believe that Mr. Wowk has a negative opinion of me since at the conclusion of that proceeding he told me that he "would be happiest if I never saw you or heard of you again". Mr. Wowk is proposing to Chair the Committee of Inquiry scheduled for March 16, 1996.

24 In response to this allegation, the respondent filed the affidavit of the Association's executive director. In it, she asserts that Mr. Wowk was not involved in any way in the investigation or committee of inquiry deliberations into the complaint of 1992 referred to in the above extracts. The executive director also contradicts the applicant when she swore that the "complaint was eventually dropped". The 1992 complaint resulted in a finding against the applicant and the imposition of certain directions. Mr. Wowk became involved afterward to facilitate compliance with those directions.

25 Neither the applicant nor the executive director was cross-examined on their affidavits. All I can go by therefore is the bald assertions made in their affidavits together with any supporting material. I have concluded that there is no basis for the allegation of actual bias against Mr. Wowk. It simply is not supported on the evidence.

26 I must, nevertheless, still go on to consider whether there is a reasonable apprehension of bias. On this point, the applicant submits that there is an institutional bias in that (a) Mr. Wowk conducted the investigation and appointed the committee of inquiry members; (b) Mr. Wowk is a senior member of what was termed a small and cohesive professional group, therefore his opinions carry great influence; and, (c) the particulars prepared as a result of Mr. Wowk's investigation reveal a degree of prejudgment of the merits which will also influence the committee. The short answer to these points is that these factors are either provided for by the statute or inherent in the nature of self-governing bodies.

27 In this case, one potential problem was removed by Mr. Wowk's reversal of his decision to also sit as a member of the committee of inquiry. The chairperson, or vice-chairperson, who does the investigation also has the power to appoint the members of the committee of inquiry if he directs that the complaint go to a committee. Nothing in the statute authorizes that investigator to also be a member of the committee. Admittedly, nothing expressly prohibits it. But, under the common law, Mr. Wowk would be disqualified from being both investigator and adjudicator. Only if there is express statutory authority for him to act in both roles could he also sit as a member of the committee of inquiry. This point was made by the Supreme Court of Canada in *Ringrose* v. *College of Physicians and Surgeons of Alberta* (1976), 67 D.L.R. (3d) 559.

28 It is now proposed that Mr. Wowk act as an assistant to counsel retained

by the Association to lead evidence before the committee of inquiry. It seems to me that this too would raise a potential problem with bias in the context of these circumstances. Mr. Wowk investigated the complaint, directed what matters will go before a committee, and selected the committee members. All of this is allowed by the statute. But, to also have Mr. Wowk participate at the hearing as someone akin to the "prosecutor's assistant", could influence the members who must adjudicate on the merits of the allegations which were investigated by Mr. Wowk and which were deemed by Mr. Wowk to be at least worthy of going before a committee. The fact that he also chose the members thus serves to limit Mr. Wowk's role in the future. As stated by Heald J.A., in reference to a situation involving the Canadian Human Rights Commission and its method of adjudicating complaints, in *MacBain* v. *Canadian Human Rights Commission et al.* (1985), 22 D.L.R. (4th) 119 (Fed. C.A.), at page 128:

> In my view, the apprehension of bias also exists in this case because there is a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal). That connection easily gives rise, in my view, to a suspicion of influence or dependency. After considering a case and deciding that the complaint has been substantiated, the "prosecutor" picks the Tribunal which will hear the case. It is my opinion that even if the statute only required the Commission to decide whether there was sufficient evidence to warrant the appointment of a Tribunal, reasonable apprehension of bias would still exist.

29 In this case, Mr. Wowk acted in the capacities of, at first, an "investigator", then second, as a "prosecutor" by deciding that matters should go before a committee of inquiry, and then third, as the person who appoints the decision-makers. As also noted in *MacBain*, there is no meaningful distinction between being your own judge and

selecting the judges in your cause. That is not to say that Mr. Wowk has come to a decision on the merits of the complaint. All he has decided is that it should go forward to a committee. But that is the exercise of a decision-making power, albeit with limited results, but one nevertheless that has consequences. It is no different than a prosecutor deciding to lay a charge. The notable difference, however, is that ordinarily the prosecutor does not also appoint the judge. For that reason, I think it would be inappropriate for Mr. Wowk, or anyone in his position in the future, to take part in the committee of inquiry proceedings. He has investigated; he has appointed; now his role is over. The results of his investigation can be turned over to counsel retained to present the case before the committee and, if that counsel needs assistance, he or she should retain their own expert. Mr. Wowk's role is now at an end.

30 With respect to prejudgment, I have considered the allegations and how they are phrased in the particulars provided to the applicant. In my opinion, they are no different than what one would find in an indictment. They are labelled as alleged infractions. I do not think the committee would be swayed by the wording to conclude that somehow these allegations are to be treated as proven or even provable. This is not a case, such as *Barsoum* referred to earlier, where the same board who is to hear the complaints drew up the complaints. The particular allegations were drawn up here by the investigator. No argument can be made as to prejudgment by the actual committee members (now that the investigator is no longer a member of the committee).

31 Were these complaints of bias the only grounds advanced by the applicant,

I would allow the committee to proceed, but with directions limiting Mr. Wowk's role as discussed above. The applicant, however, raises a natural justice issue as well.

**Lack of Procedural Fairness**:

32 The applicant submits that Mr. Wowk's direction should be quashed due to a lack of procedural fairness, specifically, the fact that Mr. Wowk failed to inform the applicant of his investigation and failed to obtain her response to the complaint. The applicant argues that, even though Mr. Wowk was carrying out an initial investigation, there was at least a limited duty to get her side of the story before any decision was made because of the significant detrimental impact on her professional reputation caused even just by merely deciding to hold a committee hearing. I agree with these submissions.

33 There is no doubt that, as a general common law principle, there is a duty of procedural fairness on every public official making an administrative decision which affects the rights, privileges or interests of an individual. Such a duty can operate in the absence of any statutory obligation: *Cardinal* v. *Kent Institution*, [1985] 2 S.C.R. 643; *Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653. This duty applies to the disciplinary processes of self-governing professions. As has often been noted, a high standard of justice is required when the right to continue one's profession or employment is at stake: *Kane* v. *University of British Columbia*, [1980] 1 S.C.R. 1105.

34 The Act expressly imposes a duty on the committee of inquiry to follow the principles of natural justice. It is silent, however, as are the by-laws, as to the obligations of the investigator. Counsel for both the applicant and the respondent acknowledge two points in relation to this issue. First, the traditional view of the duty of fairness in the investigation stage is that the rules of natural justice do not apply where the investigator

is empowered to simply collect information and make a report with no power to impose a liability. This is reinforced in those situations where, as here, the governing statute specifically protects the member's natural justice rights before the body that has the power to make decisions and impose penalties: see, for example, *Re Youngberg & Alberta Teachers' Association* (1977), 82 D.L.R. (3d) 376 (Alta. C.A.); *Hawrish* v. *Cundall* (1989), 39 Admin. L.R. 255 (Sask. Q.B.); and *Jackman* v. *Newfoundland Dental Board* (1989), 39 Admin. L.R. 154 (Nfld. S.C.). Second, this traditional view is changing somewhat. As noted by the Saskatchewan Court of Appeal in *Stephen* v. *College of Physicians & Surgeons* (1989), 61 D.L.R. (4th) 496, at page 503:

> The college took the position that council was performing a mere investigative function which could not affect the rights of a party since there would be a future opportunity for a hearing before any disciplinary sanctions could be imposed. Thus, it was not subject to judicial review. It relied on *Samuels, supra*, [(1966), 57 W.W.R. 385 (Sask. Q.B.)] and *Re Jow and College of Physicians & Surgeons of Saskatchewan* (1978), 91 D.L.R. (3d) 245, both judgments of the Queen's Bench where the court refused to interfere with proceedings before a preliminary inquiry committee, because it had no power to make any final determination of the rights of the parties. Thus, it was not performing any judicial or *quasi*-judicial function and not amenable to supervision by the courts. It also relied on cases such as *Guay* v. *Lafleur* (1964), 47 D.L.R. (2d) 226, [1965] S.C.R. 12, [1964] C.T.C. 350 (S.C.C.), and *St. John* v. *Fraser*, [1935] 3 D.L.R. 465, 64 C.C.C. 90, [1935] S.C.R. 441 (S.C.C.). However, there has been a substantial movement in recent years toward extension of judicial review to investigatory bodies and the above cases may no longer be good law.

35 In his text, The Regulation of Professions in Canada (1994), James T. Casey examined this issue (at pages 7-7 to 7-9):

> It is misleading to simply state that either there is or is not a duty of fairness in the investigatory stage, since the wide divergence of the

> type of powers being utilized by investigating bodies may lead to different results ...
>
> Caution is advisable against drawing too broad conclusions from individual cases since each case must be examined within the context of the particular powers of the investigator. However, a close examination of the case law reveals that many of the cases are not as contradictory as they may first appear. As noted in *Hammond* v. *Assoc. of British Columbia Professional Foresters*, the decisions which have held that there is no duty to act fairly in the investigative function are reconcilable with the more modern decisions. The cases cited for the proposition that there is no duty of fairness in the investigative stage tend to be those in which there has been no element of decision-making. On the other hand, those which have found there to be a duty of fairness have tended to be those where a conclusion or a finding as to the rights of the individual would ensue. (citations omitted)

36 Pursuant to the legislation in this case, the chairperson, or vice-chairperson as the case may be, conducting the initial investigation is not making a decision as to improper conduct or imposing a penalty. But the investigator is doing more than merely making a recommendation. The investigator is exercising a certain degree of decision-making since it is up to the investigator to either direct that no further action be taken or direct that an inquiry be conducted. The threshold for coming to either decision may be quite low, perhaps not even a *prima facie* case, but something more than mere suspicion. I fail to see how the investigator could come to a reasoned decision even at this initial stage without the investigation including at least the response of the person being investigated.

37 There is no evidence to suggest that Mr. Wowk's investigation was conducted capriciously or arbitrarily. But, similarly, there is no evidence to determine what was done by way of investigation. I suggest that any such concerns would be easily alleviated, having regard to what I conceive as the limited duty of procedural fairness on

the investigator, by giving notice of the investigation to the member affected and by seeking the member's response to the complaint. This would not mandate a preliminary hearing or convert the investigator into some type of preliminary adjudicator. It simply means that the investigator would have at least a statement of the member's position. Such a statement could only help the investigator come to a reasoned decision on whether to dismiss the complaint or refer it for an inquiry. It could also avoid errors by the investigator such as, in this case, the reference to the two fiscal years predating the applicant's retainer by the complainant.

38 Another indicator that the investigator in this case has a broader role than merely collecting information, and has a decision-making power, is s.20 of the Act which empowers the investigator, or the committee of inquiry, to make interim orders suspending or limiting the rights and privileges of a member. This, together with the fact that the investigator must be either the chairperson or vice-chairperson of the discipline committee from whose membership the committee is appointed, suggest to me that the statute envisages a fair amount of authority residing within that person's mandate.

39 Finally, I have not ignored the applicant's submissions to the effect that even the mere referral of a complaint to a committee of inquiry has a negative impact on the applicant. There is a detrimental effect on her professional reputation among her colleagues and potential clients as well as the costs to be incurred in defending a professional misconduct charge. This reinforces, in my view, a requirement for at least elemental fairness at the investigation stage.

40 For these reasons, I have concluded that there is a duty on the part of the

investigator to, at a minimum, notify the member of the complaint and solicit a response from the member. That is as far as the investigator needs to go. That was not done in this case, hence Mr. Wowk's direction for an inquiry is quashed.

**Conclusions**:

41 I have considered the appropriate remedy in this case. It seems to me that there is no basis for prohibiting the Association from ever conducting a hearing. The way in which the initial investigation was conducted was flawed, but that does not taint some future inquiry. The appropriate remedy, in my view, is to direct a fresh investigation by someone other than Mr. Wowk.

42 The Act requires that the investigation be conducted by either the chairperson or vice-chairperson of the discipline committee. In this case, the chairperson declared a conflict and obviously Mr. Wowk, as the vice-chairperson, should not conduct the new investigation or take further part in any future proceedings relating to this matter. I see nothing in the Act, however, preventing the Board from appointing either a new or an acting chairperson of the discipline committee to conduct the investigation. That person can rely on all of the information supplied to Mr. Wowk by the complainant plus whatever response is received from the applicant. That person can also, if he or she decides to refer the complaint for an inquiry, appoint the members of the committee.

43 I want to make it clear that I do not fault Mr. Wowk in any of this. He carried out his investigation in a timely manner in circumstances for which there is no

guidance from either the statute or the by-laws. He can hardly be criticized if even judicial authorities disagree on the extent of procedural fairness required in this type of case.

44 There were no submissions on the question of costs. Having regard to the fact that this case concerned the internal operations of a self-governing profession, that I have not halted the disciplinary process but merely sent the matter back for a fresh investigation, and that s.27 of the Act empowers a committee to award costs for or against a member, I would be inclined to defer the question of costs to the committee of inquiry should that be the result of the fresh investigation I have ordered. If, on the other hand, it turns out that there is no eventual inquiry, then the parties may make submissions to me on costs. In any event, if counsel are unable to agree on this issue, they may speak to me in chambers.

John Z. Vertes
J.S.C.

Yellowknife, Northwest Territories
April 2, 1996

Counsel for the Applicant: John Donihee

Counsel for the Respondent: Gerard K. Phillips