

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
(THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO)
CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: An Allegation against **BARRY DENNIS GUNN, CPA, CA**, under **Rule 104.2(a)** of the Code of Professional Conduct.

TO: Mr. Barry D. Gunn, CPA, CA

AND TO: The Professional Conduct Committee

REASONS

(Decision and Order made October 18, 2016)

1. This tribunal of the Discipline Committee met on October 18, 2016 to hear an allegation of professional misconduct brought by the Professional Conduct Committee (PCC) against Barry Dennis Gunn, a Member.

2. Ms. Tamara Center appeared on behalf of the PCC. Mr. Gunn was not represented by counsel and did not attend. Ms. Lisa Braverman attended the hearing as counsel to the Discipline Committee.

Proceeding in Mr. Gunn's absence

3. Ms. Center filed the Document Brief Re: Affidavits of Service (Exhibit 1). Ms. Center referred to the Affidavit of Attempted Service of Mervyn Archdall. Mr. Mervyn Archdall, process server, had attempted unsuccessfully to serve three documents including the Allegation at Mr. Gunn's business address of record. Ms. Center noted that the documents were not left with an unidentified third party, due to confidentiality protocol. Mr. Archdall had sent a message to Mr. Gunn at an email address that he obtained independently but received no response. Ms. Center referred to the Affidavit of Katya Shtrachman, the Coordinator of Professional Standards, who had mailed three documents including the Allegation to Mr. Gunn's address of record on August 22, 2016. The mailed documents were not returned by Canada Post. Ms. Center referred to the Affidavit of Diane Williamson, the Adjudicative Tribunals Secretary, who stated that the Notice of Hearing had been mailed to Mr. Gunn at his employment address of record on September 21, 2016. The mail was not returned by Canada Post.

4. The tribunal determined that Mr. Gunn had received proper notice of the hearing and decided to proceed in his absence.

5. The decision of the tribunal was made known at the conclusion of the hearing on October 18, 2016, and the written Decision and Order was sent to the parties on October 20, 2016. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, include the allegation, the decision, the order, and the reasons of the tribunal for its decision and order.

Allegation

6. The following allegation was made against Mr. Gunn by the Professional Conduct Committee on August 5, 2016. At the hearing on October 18, 2016, the tribunal granted leave to make an amendment to the allegation to replace Rules of Professional Conduct with CPA Code of Professional Conduct:

THAT the said BARRY D. GUNN, in or about the period March 4, 2016 to June 21, 2016, failed to co-operate with the regulatory process of CPA Ontario contrary to Rule 104.2(a) of the CPA Code of Professional Conduct, in that he failed to promptly reply in writing to the following communications from CPA Ontario to which a written reply is specifically required, dated February 11 and March 18, 2016, from Ms. Theresa Tonelli, CPA, CA, Director of Standards Enforcement at CPA Ontario.

Plea

7. A plea of not guilty to the allegation was entered on Mr. Gunn's behalf.

Submissions of the PCC

8. Ms. Center submitted that this case involved a failure to co-operate with the regulatory process of CPA Ontario and that she was relying on affidavit evidence to support her case. The events leading up to the allegation are outlined in the Affidavit of Theresa M. Tonelli, CPA, CA, Director of Standards Enforcement, Professional Standards (Exhibit 2). On October 26, 2015, Ms. Tonelli had received a complaint from a former client of Mr. Gunn who had hired him in March 2013 to complete the corporate tax return for the client's company. The company was being audited by the Canada Revenue Agency (CRA) and the client had been unsuccessful in obtaining a response from Mr. Gunn to CRA's queries. Ms. Tonelli had written to Mr. Gunn on February 11, 2016, advising him about the complaint and requiring a written response by March 4, 2016.

9. The letter of February 11, 2016 was sent to Mr. Gunn by regular and registered mail and cautioned him that failure to respond by March 4, 2016 could result in allegations of professional misconduct being made against him. The registered letter was signed for by a third party on February 19, 2016, and the copy sent by regular mail was not returned by Canada Post.

10. In the absence of a response, Ms. Tonelli wrote to Mr. Gunn again on March 18, 2016, by registered and regular mail, requiring a written response by April 11, 2016 and reminding him that failure to respond would result in a referral to the PCC and could result in allegations of professional misconduct being made against him. The registered letter was signed for by Barry Gunn on March 23, 2016, and the copy sent by regular mail was not returned by Canada Post.

11. In the absence of a response, on April 22, 2016, Sheila James, a Coordinator in Professional Standards phoned and left a voicemail message for Mr. Gunn, requesting that he respond to the complaint. No response was received to the voicemail message.

12. On May 13, 2016, Ms. Tonelli wrote to Mr. Gunn, by regular and registered mail, advising that since no response had been received to her letters or the voicemail message, the matter would be referred to the PCC. The registered letter was signed for by a third party on May 17, 2016, and the copy sent by regular mail was not returned by Canada Post.

13. Ms. Tonelli stated that all correspondence was directed to Mr. Gunn's employment address of record with CPA Ontario. Mr. Gunn's residential address of record is the same as his employment address of record, and there is no email address for Mr. Gunn on record with CPA Ontario.

14. In her closing argument, Ms. Center submitted that the evidence is clear, cogent and convincing that Mr. Gunn failed to co-operate in accordance with the Code of Professional Conduct. Despite four attempts to contact him, Mr. Gunn had not provided any form of response to letters and a phone message. Mr. Gunn's conduct is contrary to Rule 104.2(a) of the CPA Code of Professional Conduct (formerly the Rules of Professional Conduct), and he should be found guilty of the allegation of professional misconduct.

The Decision

15. The tribunal found, on the uncontested evidence, that the allegation had been proven. After deliberating, the tribunal announced the following decision:

THAT the Allegation having been amended at the hearing, and having determined to proceed with the hearing in the absence of Mr. Gunn, being satisfied that he had proper notice of the hearing, and having entered on his behalf a plea of not guilty to the Allegation, and having seen and considered the evidence, the Discipline Committee finds Barry Dennis Gunn guilty of the Allegation, as amended, and guilty of professional misconduct.

Reasons for Decision

16. Having seen and considered the evidence provided on behalf of the PCC by Ms. Center, the tribunal concluded that the evidence was clear, cogent and convincing to prove the allegation on a balance of probabilities.

17. Mr. Gunn, despite opportunities to communicate with Ms. Tonelli, had failed to do so, thereby preventing the PCC from conducting an investigation into the complaint received from a former client of Mr. Gunn. The evidence demonstrated that Mr. Gunn failed to reply in writing to letters dated February 11 and March 18, 2016 from Ms. Tonelli, both of which required a written reply from Mr. Gunn, contrary to Rule 104.2(a) of the Code of Professional Conduct. The tribunal concluded that Mr. Gunn's conduct as set out in the allegation constituted professional misconduct.

Sanction

18. Ms. Center filed a Document Brief Sanctions (Exhibit 3), stating that there had been a history of complaints made against Mr. Gunn from 1993 to 2013 which resulted in admonishment or guidance from the PCC in four out of the seven complaints. Ms. Center submitted that Mr. Gunn has exhibited a pattern of non-response. Ms. Center noted that Mr. Gunn's conduct in the prior complaints involved failure to cooperate and failure to provide services to clients on a timely basis. Ms. Center indicated that Mr. Gunn had been advised in the past that further complaints could result in his record of complaints being made available to the PCC. Ms. Center submitted that Mr. Gunn's pattern of behaviour casts doubt on his willingness to be governed by CPA Ontario.

19. Ms. Center, on behalf of the PCC, submitted that an appropriate sanction in this matter would be: a written reprimand from the Chair of the tribunal; a fine in the amount of \$3,500; a response to Ms. Tonelli's February and March letters within 20 to 30 days; followed by suspension of membership and then revocation if he does not cooperate; and the usual order with respect to publicity. The PCC also sought an order for partial reimbursement of the costs of approximately two-thirds of the costs incurred.

20. The aggravating factors, Ms. Center stated, include the fact that despite three letters and a voicemail message left for Mr. Gunn, no response was received from Mr. Gunn to any of the communications. It was within Mr. Gunn's power to respond to the complaint, which was not a complex matter. Mr. Gunn has wasted the time and resources of the PCC and CPA Ontario. Mr. Gunn did not attend the hearing before the discipline tribunal. Mr. Gunn's actions, or lack thereof, have impeded the PCC from carrying out its mandate to inquire into the complaint. Mr. Gunn does have a history of complaints made against him and he was provided with admonishment or guidance on four prior complaints.

21. Ms. Center submitted that a mitigating factor is that Mr. Gunn has never appeared before the Discipline Committee in the past.

22. Ms. Center noted that the aggravating factors far outweigh the mitigating factor.

23. Ms. Center stated that a reprimand addresses the seriousness of the professional misconduct of Mr. Gunn and would act as a specific deterrent. The fine proposed is within the range of the amount ordered in similar cases, and would act as a specific and general deterrent to like-minded members. Publication acts as an effective general and specific deterrent.

24. Ms. Center stated that requiring a response to the February and March letters would give Mr. Gunn an opportunity to show his willingness to cooperate and addresses the issue of rehabilitation. His response would allow the PCC to fulfill its mandate to investigate the complaint.

25. Ms. Center filed a Costs Outline (Exhibit 4) showing the costs to be just over \$7,500, of which the PCC was seeking partial indemnity costs of \$5,000. Requesting approximately two-thirds, rather than one-half of the actual costs, is a recent practice. Ms. Center noted that the issues in this case were not complex but the issues were important as they address the governability of a member. The costs incurred are reasonable, both for legal costs and disbursements. Ms. Center stated that costs are considered an indemnification, not a penalty, where Mr. Gunn should bear the burden of paying a portion of the costs since the tribunal and the PCC are at this hearing because of Mr. Gunn's behaviour.

26. Ms. Center distributed a Case Brief containing similar cases under Rule 104.2(a). Ms. Center referred to the Case Brief containing the decisions regarding *Cooper*, *Zhu* and *Root*, pointing out that the precedents contained a common theme of failure to co-operate with the regulatory processes of CPA Ontario.

Order

27. After deliberating, the tribunal made the following order:

IT IS ORDERED in respect of the Allegation:

1. THAT Mr. Gunn be reprimanded in writing by the Chair of the hearing.
2. THAT Mr. Gunn be and he is hereby fined the sum of \$3,500, to be remitted to the Chartered Professional Accountants of Ontario ("CPA Ontario") within three (3) months from the date this Decision and Order is made.
3. THAT Mr. Gunn be and he is hereby required to cooperate with the Professional Conduct Committee by responding to the letters dated February 11, 2016 and March 18, 2016 from the Director of Standards Enforcement within twenty (20) days from the date this Decision and Order is made.
4. THAT notice of this Decision and Order, disclosing Mr. Gunn's name, be given in the form and manner determined by the Discipline Committee:
 - a) to all members of CPA Ontario,
 - b) to all provincial bodies,
 and shall be made available to the public.
5. THAT in the event Mr. Gunn fails to comply with the requirements of this Order, he shall be suspended from membership in CPA Ontario until such time as he

does comply, provided that he complies within twenty (20) days from the date of his suspension, in the event he does not comply within the twenty (20) day period, his membership in CPA Ontario shall thereupon be revoked, and notice of the revocation of his membership, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Gunn's practice or employment. All costs associated with this publication shall be borne by Mr. Gunn and shall be in addition to any other costs ordered by the Committee.

IT IS FURTHER ORDERED:

6. THAT Mr. Gunn be and he is hereby charged costs fixed at \$4,000, to be remitted to CPA Ontario within three (3) months from the date this Decision and Order is made.

Reasons for Sanctions

28. The tribunal found that Mr. Gunn's failure to co-operate was a serious breach, especially since it put CPA Ontario in the position of not being able to deal with or investigate a complaint from the public. The tribunal concluded that the proposed sanctions of a written reprimand, a fine, requirement to co-operate, and publication were appropriate and reasonable given the seriousness of the breach.

29. The tribunal also considered that there was a pattern of behaviour, given the number of times Mr. Gunn had dealt with the PCC. Mr. Gunn had seven prior complaints and he was admonished or given guidance in four of those seven complaints.

30. The sanctions that have been ordered address rehabilitation because they still give Mr. Gunn an opportunity to comply before suspending and if he still does not comply ultimately revoking his membership with CPA Ontario.

Costs

31. In recent cases, the tribunal has been awarding costs of approximately two-thirds of the total costs. In keeping with these precedents, the tribunal estimated that the total revised costs would be approximately \$6,000 (since the hearing concluded just before 2 p.m.) and thus awarded two-thirds of this amount equaling \$4,000. The tribunal concluded that costs of \$4,000 were appropriate and reasonable,

DATED AT TORONTO THIS 30TH DAY OF DECEMBER, 2016
BY ORDER OF THE DISCIPLINE COMMITTEE



A.C. MACKENZIE, CPA, CMA - DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

B.G. ALLENDORF, CPA, CA

P.A. BUSCH, CPA, CA

B. KUCHTA (PUBLIC REPRESENTATIVE)