



CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

TO: BRIAN D. MULLIGAN, CPA, CA

AND TO: The Discipline Committee of CPA Ontario

The Professional Conduct Committee of CPA Ontario hereby makes the following Allegation of professional misconduct against Brian D. Mulligan, CPA, CA, a member of CPA Ontario:

1. THAT the said Brian D. Mulligan, in or about the period September 23, 2015 through July 9, 2019, upon request by his client, C.D., to transfer to him, all of his property and the property of his company "C.A. Inc." which was in the member's possession, failed to do so promptly, contrary to Rule 303.2 of the Code of Professional Conduct.

Dated at Mississauga, Ontario, this 19th day of July, 2019

A handwritten signature in blue ink that reads "L. Davidson".

L. DAVIDSON, CPA, CGA, DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: An allegation against **BRIAN DAVID MULLIGAN, CPA, CA**, under **Rule 303.2** of the CPA Code of Professional Conduct, as amended.

TO: Mr. Brian David Mulligan

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE SEPTEMBER 26, 2019

DECISION

The Panel was satisfied that the Allegation was proven and constituted a breach of Rule 303.2 of the CPA Code of Professional Conduct. The Panel determined that, having breached this rule, Mr. Brian David Mulligan ("Mr. Mulligan") has committed professional misconduct.

ORDER

The Tribunal orders the following:

1. Mr. Mulligan be reprimanded in writing by the Chair of the hearing.
2. Mr. Mulligan shall pay a fine of \$5,000 to the Chartered Professional Accountants of Ontario ("CPA Ontario") by September 26, 2020.
3. Mr. Mulligan's membership in CPA Ontario and his Public Accounting Licence are suspended for a period of three (3) months from the date of this Order.
4. Mr. Mulligan is required to complete, by paying for and attending in their entirety within three (3) months from the date of this Order, the following professional development courses available through CPA Canada:
 - i. From overwhelmed to flourishing: Eight steps to thrive
 - ii. Get organized: Up your value proposition
5. Notice of this Decision and Order, disclosing Mr. Mulligan's name, is to be given in the form and manner determined by the Tribunal:
 - a) to all members of CPA Ontario;
 - b) to all provincial CPA bodies;
 - c) Public Accountants' Council

and shall be made available to the public.

6. Notice of the suspension of membership disclosing Mr. Mulligan's name is to be given by publication on the CPA Ontario website and in the *Ottawa Citizen*. Mr. Mulligan shall pay all costs associated with the publication and shall be in addition to any other costs ordered by the Panel.
7. In the event Mr. Mulligan fails to comply with any of 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 30 days from the date of his suspension. In the event he does not comply within 30 days of suspension, Mr. Mulligan's membership in CPA Ontario shall 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 in the geographical area of practice. All costs associated with this publication shall be borne by Mr. Mulligan, and shall be in addition to any other costs ordered by the tribunal.
8. Mr. Mulligan shall pay costs of \$16,860 to CPA Ontario by September 26, 2020.

DATED at Toronto this 26th day of September, 2019



Stephen Dineley, FCPA, FCA
Discipline Committee – Deputy Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: An allegation against **BRIAN DAVID MULLIGAN, CPA, CA**, under **Rule 303.2** of the CPA Code of Professional Conduct, as amended.

BETWEEN:

**Chartered Professional Accountants of Ontario
Professional Conduct Committee**

-and-

Mr. Brian David Mulligan

APPEARANCES:

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| For the Professional Conduct Committee: | Safina Lakhani, Counsel Alix Hersak, Counsel David Sanderson, Investigator |
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| For Mr. Mulligan: | Present, Self-Represented |
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| Heard: | September 26, 2019 |
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| Decision and Order effective: | September 26, 2019 |
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| Release of written reasons: | November 12, 2019 |
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REASONS FOR THE DECISION AND ORDER MADE SEPTEMBER 26, 2019

I. OVERVIEW

- [1] This hearing was held to determine whether the Allegation that Mr. Mulligan had failed to transfer a client's property, and the property of his company which was in the member's possession, promptly upon request, was established and amounted to professional misconduct.
- [2] Mr. Mulligan obtained his CPA designation in 1973. He has practiced as a sole practitioner in Ottawa, Ontario since 1986.
- [3] On September 14, 2015 one of Mr. Mulligan's former clients, identified as C.D., made a written complaint to the Chartered Professional Accountants of Ontario ("CPA Ontario")

Standards Enforcement branch (the “Original Complaint”), alleging that Mr. Mulligan had not completed tax returns for himself or his company, identified as C.A.I., from 2006 to 2012, and that Mr. Mulligan “refused to return the respective financial documents” of himself, his wife and C.A.I. when requested.

- [4] At the time the Original Complaint was received, an investigation into Mr. Mulligan’s standard of practice was ongoing. In the course of that investigation, concerns had been raised regarding Mr. Mulligan’s unresponsiveness to correspondence from the Director of Standards Enforcement.
- [5] On July 31, 2017, the Professional Conduct Committee (“PCC”) entered into a Settlement Agreement with Mr. Mulligan with respect to the investigation of his standards of practice, including the issue of non-responsiveness.
- [6] After further deliberation, the PCC informed the lawyer for C.D. and Mr. Mulligan of its decision to close the investigation file with guidance to the member by letter dated September 25, 2017, which among other things drew Mr. Mulligan’s attention to the requirements of Rules 201.1, 202.1 and 303.2 of the CPA Code of Professional Conduct (“Code”) and provided specific guidance and advice to Mr. Mulligan (the “2017 Guidance”) associated with those Rules and the circumstances of the Original Complaint. The 2017 Guidance to Mr. Mulligan included the following:
 - “ . . . your conduct in this matter may have violated the rules . . . the following guidance [is] to assist you in avoiding a similar situation in the future.
 - The committee draws your attention to . . . Rule 303.2, which requires a member to transfer promptly to the client all property of the client which is in the member’s possession . . .
 - The committee wishes you to clearly understand that all members of the profession must communicate with and respond to the needs of their clients. You should return their records upon request.”
- [7] On December 13, 2017, C.D. requested a review of the PCC’s decision to close the file with guidance by the Reviewer of Complaints.
- [8] By decision dated February 28, 2018, the Reviewer of Complaints directed that the matter be referred back to the PCC for review.
- [9] After further consideration following that referral, the PCC issued a further decision dated October 4, 2018 in which the PCC opted to maintain the guidance issued to the member in its letter dated September 26, 2018 (the “2018 Guidance”), and to again close its file. The 2018 Guidance again specifically drew to Mr. Mulligan’s attention, among other things, the requirements under Rule 303.2 to return client records to them promptly upon request.
- [10] Since Mr. Mulligan held a Public Accounting License, C.D. was able to, and did, apply to the Public Accountants Council (“PAC”) on December 5, 2018, to seek further review of his Original Complaint against Mr. Mulligan.
- [11] On March 26, 2019, the PAC recommended, pursuant to s. 22(1) of the *Public*

Accounting Act, 2004, that C.D.'s Original Complaint be further investigated by PCC.

- [12] The PCC then hired an investigator. After receiving the investigator's report dated June 26, 2019, the PCC met on July 9, 2019 to review the report and deliberate. At the time of that meeting, Mr. Mulligan still continued to retain C.D.'s records. The PCC directed that allegations of professional misconduct be prepared against Mr. Mulligan.
- [13] A written Allegation signed by the PCC on July 19, 2019 alleges that Mr. Mulligan, in or about the period September 23, 2015 through July 9, 2019, upon request by his client, C.D., to transfer to him, all of his property and the property of his company which was in the member's possession, failed to do so promptly contrary to Rule 303.2 of the Code of Professional Conduct.
- [14] At the hearing of the matter on September 26, 2019, the onus was on the PCC to show on a balance of probabilities that Mr. Mulligan's conduct breached the Code and constituted professional misconduct as alleged. Mr. Mulligan appeared without counsel, but he acknowledged that he understood he had the right to be represented by counsel.
- [15] Mr. Mulligan and the PCC jointly presented the Panel with an Agreed Statement of Facts containing the facts upon which the PCC relied to prove that Mr. Mulligan engaged in professional misconduct, together with a Document Brief containing documents admitted in the Agreed Statement of Facts. Mr. Mulligan agreed that the facts and documents therein may be taken as proven evidence.
- [16] At the hearing, Mr. Mulligan explained that he attempted to contact C.D. to return the files in June 2019, but after receiving no response, he asked the PCC investigator where to send the files. Mr. Mulligan and counsel for the PCC agreed that C.D.'s files were received from Mr. Mulligan at the PCC offices on September 19, 2019.
- [17] Mr. Mulligan called no other evidence on conduct. He also stated that he admits the written Allegation against him as signed by the PCC on July 19, 2019.

II. ISSUES

- [18] The Panel identified the following issues:
 - A. Did the evidence establish, on a balance of probabilities, the facts on which the particulars alleged by the PCC were based?
 - B. If the particulars alleged by the PCC were established on the evidence presented on a balance of probabilities, did the particulars constitute professional misconduct?

III. DECISION

- [19] The Panel found that the evidence presented by the PCC as set out in the Agreed Statement of Facts and the accompanying Document Brief established, on a balance of probabilities, the facts on which the written Allegation dated July 19, 2019 was based.

- [20] The Panel was satisfied that the conduct alleged and established by the evidence constituted a breach by Mr. Mulligan of Rule 303.2 of the CPA Code of Professional Conduct in failing, upon request by his client C.D. on and after September 23, 2015, to promptly return to C.D. all of his property and the property of his company, C.A.I.
- [21] Having admitted to breaching this provision, the Panel also considered the admissions made by Mr. Mulligan, as set out in the Agreed Statement of Facts and the accompanying Document Brief. The Panel found that Mr. Mulligan had committed professional misconduct.

IV. REASONS FOR THE DECISION

Findings regarding Conduct of Mr. Mulligan

- [22] The Panel found that the Original Complaint dated September 14, 2015 constituted a request within Rule 303.2 by Mr. Mulligan's client, C.D., that Mr. Mulligan return the financial documents provided to him by C.D. and C.A.I. Mr. Mulligan had those files in his possession, yet he failed to return them to C.D. Mr. Mulligan retained those files for just over 5 years, until he delivered them into the possession of CPA Ontario on September 19, 2019. In so doing, the Panel found that Mr. Mulligan failed to return them "promptly", as required by Rule 303.2.
- [23] In explanation of this conduct, Mr. Mulligan stated that he was concerned that his client C.D. would destroy the documents. However, the Panel accepted that, even if C.D. had given cause for a concern that the documents returned might be destroyed, Mr. Mulligan had the option to return the originals, as requested, while retaining copies of the documents. Therefore, the Panel found that the explanation offered did not excuse Mr. Mulligan's failure to comply with the requirements of Rule 303.2.

Finding of Professional Misconduct

- [24] The Panel found that Mr. Mulligan's conduct in not returning the requested files to C.D. continued for over 5 years. It continued despite Mr. Mulligan receiving guidance from the PCC, first on September 25, 2017 and then again on September 26, 2018, which the Panel considered should have caused Mr. Mulligan to return the requested files promptly, as required by Rule 303.2.
- [25] In these circumstances, the Panel concluded that the continued failure by Mr. Mulligan to comply with Rule 303.2 also constituted professional misconduct on his part.

V. SANCTION

Position of the PCC

- [26] On the issue of sanction, counsel for the PCC advised the Panel that she was making a joint submission with Mr. Mulligan on all aspects of the sanctions sought by the PCC, except for one. The sanctions on which counsel for the PCC submitted the Panel should

accept a joint submission from the parties were that:

- A. Mr. Mulligan be reprimanded in writing by the Chair of the hearing;
- B. Mr. Mulligan be required to pay a fine of \$5,000 to CPA Ontario by September 26, 2020;
- C. Mr. Mulligan be required within three (3) months to complete, pay for, and attend in their entirety two specified professional development courses available through CPA Canada;
- D. that Notice of the Decision and Order, including Mr. Mulligan's name, be given by the Panel in a form and manner it determines, to all members of CPA Ontario, to all provincial CPA bodies, to the PAC, and to the public, including by publication on the CPA Ontario website, and in the Ottawa Citizen;
- E. in the event Mr. Mulligan fails to comply with any of the requirements of this Order, that he be suspended from membership in CPA Ontario until such time as he does comply, provided that he complies within 30 days from the date of such suspension; and in the event he does not comply within 30 days of suspension, then Mr. Mulligan's membership in CPA Ontario be revoked, and notice of the revocation of his membership, disclosing his name, be given in the manner specified above, and in a newspaper in the geographical area of practice; and that all costs associated with this publication be borne by Mr. Mulligan, in addition to any other costs ordered by the Panel; and
- F. Mr. Mulligan be required to pay two thirds (2/3) of the costs of the investigation and hearing to CPA Ontario by September 26, 2020.

- [27] In addition to these joint submissions, counsel for the PCC asked the Panel to suspend Mr. Mulligan's membership in CPA Ontario, and also to suspend his Public Accounting License for a period of three (3) months. She noted that Mr. Mulligan did not agree to the addition of this element to the sanctions jointly requested, and that he wished to make submissions against it being imposed.
- [28] In support of her position on sanctions, counsel for the PCC relied upon the principle that a joint submission should only be rejected if it is unreasonable and contrary to the public interest as set out by the Supreme Court of Canada in *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204.
- [29] PCC Counsel also referred the Panel to recent decisions of the Discipline Committee of CPA Ontario which, in her submission, showed that the sanctions proposed by the PCC, both on a joint and on a contested basis, together, fell within the reasonable range imposed for similar, recent violations of Rule 303.2 in similar circumstances.
- [30] Counsel for the PCC submitted that these sanctions, including the contested suspensions, appropriately took account of the aggravating and mitigating factors present in this case, and were necessary to achieve the sanction principles set out in s. 15.2 of *Regulation 6.2*.

Position of Mr. Mulligan

- [31] Mr. Mulligan confirmed that he was in agreement with the joint submissions on sanction set out by counsel for the PCC.
- [32] Mr. Mulligan also confirmed that he opposed the imposition of any suspension, because in his view it would do nothing to benefit him or to enhance the reputation of CPA Ontario as an organization. He stated he would prefer to see something put in place of a suspension, such as a requirement to do professional work for not-for-profit clients. Mr. Mulligan stated that he already has a long history of doing this kind of work, for which he has received commendations from the United Way and the City of Ottawa.

Majority Decision on Sanction

- [33] A majority of the Panel determined that it was appropriate in the circumstances of this case to accept the joint submission of the parties, and to accept the proposal by counsel for the PCC to also suspend Mr. Mulligan's membership in CPA Ontario, and to suspend his Public Accounting License for a period of three (3) months.
- [34] The majority agreed with the submission of counsel for the PCC that the aggravating factors in this case, and particularly the five year delay in returning client property even after the issuance of repeated formal guidance by the PCC to do so, warrant the additional sanction of a suspension of Mr. Mulligan's membership and Public Accounting License. The majority does not accept Mr. Mulligan's submission that such suspension would serve no purpose, or that a requirement to do professional work for not-for-profits would be preferable. In the view of the majority, the additional sanction of a suspension is necessary in the circumstances, to provide specific deterrence to Mr. Mulligan to ensure he does not commit similar misconduct in the future. This is particularly so given Mr. Mulligan's prior discipline history, and his failure to comply with the 2017 Guidance and the 2018 Guidance provided by the PCC.
- [35] The majority acknowledged the reasons given by the dissenting member, as set out below, for proposing to strengthen the sanctions imposed in this case. However, on the evidence presented by the parties, there is no element of moral turpitude in this case, nor is there any evidence that the clients suffered any out of pocket cost as a result of the delayed return of the property. The majority are mindful of the guidance provided by the Supreme Court in *R. v. Anthony-Cook*, above. In the majority's view, reasonable and informed persons would not view the sanctions proposed by the PCC in this case to be so unreasonable and contrary to the public interest as to constitute a breakdown in the proper functioning of the justice system.
- [36] Review of the cases referred to by counsel for the PCC confirms that, while the breach of Rule 303.2 by Mr. Mulligan in this case is serious, the sanctions proposed are within the range imposed by Panels of the Discipline Committee in prior cases of a similar nature and seriousness. As such the majority sees no need to impose any additional sanction which was not sought in this case by the PCC.
- [37] The majority is mindful that Mr. Mulligan is self-represented, and that he has no doubt relied upon the sentence submissions presented by the PCC in making his decision to

admit to the Allegation against him. Had he known that any additional sanction might be added, it is unknown whether he would still have been prepared to enter into an Agreed Statement of Facts or admit his conduct.

- [38] In the circumstances, the decision of the majority is that it is appropriate both to accept the joint submission of the parties on all elements of the proposed sanction on which they are agreed, and also to accept in full the submission of counsel for the PCC proposing a 3-month suspension.

Dissent on Sanction

- [39] Panel Member Bryan Allendorf, CPA, CA, dissented from the decision of the majority with respect to sanction.
- [40] Mr. Allendorf considered that Mr. Mulligan's conduct appeared to be habitual in nature. There was a prior discipline history in which the allegations established included untimeliness of service provision to clients. The failure to return C.D.'s property had continued over a very extended period. Despite the 2017 Guidance and the 2018 Guidance, which provided Mr. Mulligan with clear and unequivocal guidance to comply with Rule 303.2 by returning the property in issue to C.D., he did not do so. Further, Mr. Mulligan's stated reasons for opposition to the sanction of a suspension, as sought by the PCC, suggested to Mr. Allendorf that either Mr. Mulligan did not appreciate the seriousness of his conduct, or he was not remorseful about it.
- [41] In these circumstances, Mr. Allendorf considered that an issue was raised as to whether Mr. Mulligan was deliberately ignoring Rule 303.2 and the guidance offered by the PCC, and whether he was ungovernable. That concern was increased by the history of non-response to the Director of Standards Enforcement at the early stages of the Original Complaint, as Mr. Mulligan's subsequent failure to respond to the 2017 Guidance and the 2018 Guidance continued even after the initial non-responsiveness allegations were addressed in the July 31, 2017 Settlement Agreement.
- [42] Mr. Allendorf considered that the suspension sanction sought by counsel for the PCC failed to address these concerns adequately. He felt that only revocation of Mr. Mulligan's membership in CPA Ontario and of his Public Accounting License was appropriate in all the circumstances.
- [43] As a result, Mr. Allendorf would have ordered revocation, instead of the 3-month suspension proposed by counsel for the PCC, and in addition to the other sanctions that comprised the parties' joint submission.

VI. COSTS

- [44] Costs are imposed as an indemnity, not as an additional fine or a form of penalty.
- [45] The PCC presented a Costs Outline at the hearing, which estimated the total hearing and investigation costs recoverable at \$25,290.00. Mr. Mulligan did not contest the contents of that Costs Outline. As noted above, the parties' joint submission included a provision that Mr. Mulligan would pay two-thirds of this amount.

[46] The Panel accepted this proposal, and ordered Mr. Mulligan to pay costs of \$16,860 to CPA Ontario by September 26, 2020.

Dated at Toronto this 12th day of November, 2019



Stephen Dineley, FCPA, FCA
Discipline Committee – Deputy Chair

Members of the Panel

Bryan Allendorf, CPA, CA

Mark Feldstein, CPA, CA

David Handley (Public Representative)

Gary Katz, CPA, CA

Independent Legal Counsel

M. Philip Tunley

St. Lawrence Barristers LLP