

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **FRANK MERLE**, a suspended member, under **Rules 104.1** and **104.2(c)** of the CPA Code of Professional Conduct

TO: Mr. Frank Merle

AND TO: The Professional Conduct Committee

REASONS
(Decision and Order made July 19, 2017)

1. This tribunal of the Discipline Committee met on July 19, 2017 to hear allegations of professional misconduct brought by the Professional Conduct Committee (PCC) against Frank Merle, a suspended member.

2. Ms. Melissa Gentili appeared on behalf of the PCC. Mr. Merle was not represented by counsel and did not attend. Mr. Glenn Stuart attended the hearing as counsel to the Discipline Committee.

Proceeding in Mr. Merle's absence

3. Ms. Gentili filed the Affidavit of Service of Mervyn Archdall, process server (Exhibit 1), who stated that he had served the letter from PCC Counsel, the allegations and the outline of procedure at hearings by leaving the documents with Frank Merle on March 27, 2017. Mr. Merle had identified himself to Mr. Archdall.

4. Ms. Gentili filed the Affidavit of Kristen Couch, the Adjudicative Tribunals Assistant Secretary (Exhibit 2) who stated that a letter requesting hearing date availability had been mailed and emailed to Mr. Merle on May 1, 2017; a delivery confirmation of the email was received on May 1, 2017. The letter sent by regular mail was not returned by Canada Post. A covering letter and the Notice of Hearing had been mailed and emailed to Mr. Merle on May 24, 2017; a delivery confirmation of the email was received on May 24, 2017. The letter sent by regular mail was not returned by Canada Post. Both letters were mailed and emailed to Mr. Merle's mailing and email address of record with CPA Ontario.

5. Ms. Gentili filed an email dated July 19, 2017 from Christian A. Merle (Exhibit 3), sent at 5:19 a.m. on July 19. Christian Merle is Mr. Frank Merle's son. The email stated that Mr. Frank Merle was away on a trip and would not be attending the hearing. Ms. Gentili stated that although it was unknown if Christian Merle represented his father, the email did provide corroboration that the hearing date was known to Frank Merle.

6. The tribunal determined, in light of the affidavits and the email, that Mr. Merle had received proper notice of the hearing and decided to proceed in his absence.

7. A preliminary matter was dealt with arising from the passage of the *Chartered Professional Accountants of Ontario Act, 2017* ("CPA Act") on May 17, 2017. At the time the allegations were brought, Mr. Merle was subject to rules under both the *Certified General Accountants Act, 2010* ("CGA Act") and the *Chartered Accountants Act, 2010* ("CA Act"), a

result of the unification of the three accounting designations in Ontario in 2014. As such, the PCC was required to apply the Rules under both Acts to the allegations which resulted in two parallel sets of allegations. With the passage of the CPA Act on May 17, 2017, the CGA Act and the CA Act were repealed. Therefore, at the time of the hearing, the second set of allegations relating to the rules of CGA Ontario were redundant. It was the position of the PCC, with which the tribunal agreed, that it would be inappropriate to proceed with allegations under both sets of Rules. As such, Allegation Nos. 2 and 4 were withdrawn by the PCC.

8. The decision of the tribunal was made known at the conclusion of the hearing on July 19, 2017, and the written Decision and Order was sent to the parties on July 24, 2017. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, include the allegations, the decision, the order, and the reasons of the tribunal for its decision and order.

Allegation

9. The following allegations, as amended at the hearing, were made against Mr. Merle by the Professional Conduct Committee on March 23, 2017:

1. THAT the said Frank J. Merle, in or about the period September 19, 2016 to January 17, 2017 failed to co-operate with the regulatory process of CPA Ontario contrary to Rule 104.1 of the CPA Code of Professional Conduct, in that:
 - a. he failed to provide documents or other information when requested to do so by the Professional Conduct Committee through its investigator and staff of CPA Ontario; and
 - b. he failed to attend an interview as requested by the investigator appointed by the Professional Conduct Committee.
2. *WITHDRAWN*
3. THAT having been personally served with a Notice to a Member to Attend Before the Professional Conduct Committees of CPA Ontario and CGA Ontario pursuant to Regulation 7-1 s.18, the said Frank J. Merle, on or about January 17, 2017, failed to co-operate with the regulatory process of CPA Ontario contrary to Rule 104.2(c) of the CPA Code of Professional Conduct, in that he did not attend as required by the terms of the Notice.
4. *WITHDRAWN*

The Case for the PCC

10. Ms. Gentili submitted that Mr. Merle, a suspended CPA, CGA member, failed to cooperate with the regulatory process of CPA Ontario. A complaint had been received by Standards Enforcement from a former client that Mr. Merle had not filed the client's tax returns for 2013 and 2014. Mr. Merle responded to the initial complaint, but the PCC appointed an investigator to obtain additional information. Mr. Merle was so advised. Despite being made aware of the powers and authority of the PCC, Mr. Merle failed to provide some requested documents or attend formal meetings with the investigator or the PCC.

11. Ms. Leigh Beijer, the investigator appointed by the PCC, was sworn in as a witness. Ms. Gentili filed a Document Brief (Exhibit 4) containing communications regarding the complaint and the attempts by Ms. Beijer to obtain further information from Mr. Merle. A communications log (Exhibit 5) had been prepared by Ms. Beijer listing her attempts to communicate with Mr. Merle.

12. Ms. Beijer stated that she had been appointed to do a further investigation arising out of the client's complaint, including meeting with Mr. Merle and obtaining relevant documentation. Her appointment was authorized under the Act and Regulations of CPA Ontario. Ms. Beijer confirmed that Mr. Merle has been under suspension by the Registrar since December 16, 2015 for failure to remit membership dues and file the CPD requirement form, and is prohibited from practising as a CPA, CA while under suspension.

13. Ms. Beijer discussed by phone and emailed Mr. Merle on October 3, 2016 requesting documents, by October 10, 2016, pertaining to the working paper file, tax returns, CRA records and correspondence with the complainant client, a listing of other tax clients for the years 2013 to 2015 and a listing of accounting services provided to the public and related revenue since December 16, 2015. A follow-up email was sent on October 6, and Mr. Merle responded on October 10, 2016. In that email, he addressed his communications with the complainant and his attempts to resolve that matter, but his response did not address the matter in its entirety. Ms. Beijer stated that Mr. Merle had not provided the information requested regarding other client files. In his response to Ms. Beijer, Mr. Merle indicated this request from Ms. Beijer was a breach of confidentiality and a "witch hunt" concerning other clients.

14. Ms. Beijer again communicated with Mr. Merle, addressing his concerns, setting out what documents were required and noting that relevant background information on his career would be collected during an interview to be set after Ms. Beijer had an opportunity to review the requested information. In the absence of a response, Ms. Beijer wrote again to Mr. Merle and followed up by telephone message, reminding him of the requirement to cooperate with the regulatory process of CPA Ontario.

15. Mr. Merle responded on October 26, 2016. His response did provide some of the requested information regarding the complainant. Ms. Beijer wrote on October 28, 2016, requesting the client and accounting services listing from Mr. Merle. Ms. Beijer also provided details of the interview process, as outlined in Ms. Gentili's letter of September 19, 2016 to Mr. Merle, and suggested meeting dates between November 9 and 18, 2016.

16. Mr. Merle's email response of November 2, 2016 indicated he could not understand why information regarding his other clients was pertinent to the complaint. Ms. Beijer stated that the matter was referred to Ms. Gentili, who responded to Mr. Merle advising him that the PCC investigates and reviews complaints but does not make findings against members. The powers given to an investigator under the Act give the authority to require a member to provide information and documentation the investigator feels is relevant. The client lists requested for the 2013 to 2015 period would provide insight into the nature of Mr. Merle's practice during the time of the complaint. Ms. Beijer stated that the letter also reminded Mr. Merle of the requirement to cooperate with a PCC investigation and that failure to do so could result in allegations being made against him.

17. Ms. Beijer made further attempts by phone and email to obtain the client listing and accounting services listing from Mr. Merle and to set up an interview with him. Mr. Merle subsequently provided a numerical listing of his tax clients for 2013 to 2015, but not details of the accounting services provided. In response, Ms. Beijer emailed and phoned Mr. Merle to request working papers for five random clients selected from the listing to be provided to Ms. Beijer by November 16, 2016, and also requested his preference of location for the interview scheduled for November 18, 2016. Ms. Beijer advised that the interview could be at Mr. Merle's office location or the CPA Ontario offices but not at a public location or at his residence.

18. Ms. Beijer referred to Mr. Merle's response of November 13, 2016, which indicated that

providing personal information of his clients would jeopardize their privacy rights. Mr. Merle stated that the threatening and harassing requests were outside the purview of the PCC and CPA Ontario. Mr. Merle stated he would not attend an intimidating interview on Ms. Beijer's grounds and felt that any questions concerning the original complaint had been answered. Mr. Merle indicated that his treatment was like an inquisition and that he was outraged as a member of long standing, especially since the complaint was not concerning fraud or a grievously serious matter. Mr. Merle stated that he was not using the CGA, CPA designation and there was nothing in the public domain that designated him as such.

19. A letter from Ms. Gentili dated November 18, 2016, emailed and couriered to Mr. Merle, set out Section 49 of the *CA Act* and the *CGA Act*, which specified that an investigator may require the production of documents believed to be relevant to the investigation including a client file. Rule 208 of the Code of Professional Conduct sets out that a member's duty of confidentiality to a client does not excuse the member from complying with requests from CPA Ontario in the exercise of its duties. Further, the PCC is subject to the confidentiality provisions of the *CA Act* and the *CGA Act* in preserving the secrecy of information or material. Ms. Gentili's letter also addressed Mr. Merle's contention that he had never been apprised of the PCC's investigation process, referring him to the letter of October 30, 2015 from Theresa Tonelli, the Director of Standards Enforcement. Enclosed with Ms. Tonelli's letter was a summary of the disciplinary process entitled "Standards Enforcement and Disciplinary Procedures". Ms. Beijer noted that an additional copy of the process document had been enclosed with her email of October 13, 2016 to Mr. Merle.

20. Ms. Beijer referred to an email dated November 29, 2016 from Mr. Merle which provided working paper files on three of the five clients selected from the numbered listing previously provided. The requested list of accounting services and two client files were not provided. In the email, Mr. Merle stated that he was "in no way comfortable with a recorded interview (interrogation)" and did not believe anything further could be learned from an interview.

21. On December 7, 2016, Ms. Gentili responded to questions raised in Mr. Merle's November 29, 2016 email including the role of the PCC, the relevance of providing files to the investigator, the relevance of an interview and the investigator's role as a fact-finder who only reported any findings to the PCC.

22. Ms. Beijer stated that she followed up by telephone with Mr. Merle in mid-December. Mr. Merle offered to meet with her at a Tim Hortons; Ms. Beijer advised Mr. Merle this would not be a suitable venue for an interview.

23. Ms. Gentili filed an Affidavit of Service of Mervyn Archdall (Exhibit 6 and Tab 22 of Exhibit 4), which indicated Mr. Archdall had personally served Frank Merle with a Notice to a Member to Attend before the PCC on January 17, 2017. The letter and notice required Mr. Merle's attendance. Mr. Merle's response to Ms. Gentili indicated he would not attend the PCC meeting.

24. Ms. Beijer submitted that overall, in her dealings with him, Mr. Merle was unprofessional and quite angry.

25. In her closing argument, Ms. Gentili submitted that the evidence was clear, cogent and convincing that Mr. Merle failed to cooperate in accordance with Rules 104.1 and 104.2(c). Despite numerous attempts to contact him for further information arising from the complaint, Mr. Merle had failed to: provide all the files requested; provide information on the type of accounting services provided since his suspension; attend an interview with the investigator and appear before the PCC. The files and information requested of Mr. Merle would have given a better

understanding of the type of services he was providing.

26. Mr. Merle's failure to meet with the investigator and attend before the PCC prevented the PCC from fulfilling its mandate. Ms. Gentili submitted that Mr. Merle had refused to be interviewed by the investigator despite being given options, noting that he only offered to meet with her at a Tim Hortons, which would not be acceptable. The interview process is critical for the investigator to obtain information from the member that can be accurately reported to the PCC for consideration. Mr. Merle was advised that the interview would be recorded and that he would be given a copy of the transcription, but he would not agree to meet with Ms. Beijer. Mr. Merle had refused to attend the PCC meeting, despite being served with a notice to attend under Regulation 7-1, s. 18. The PCC has a duty to review all complaints and investigate any matters that may arise in the course of its review. After full consideration, the PCC can close a matter, give guidance to the member or lay allegations.

27. As a result of Mr. Merle's lack of cooperation, the investigator could not complete her report and the PCC could not carry out its mandate. Ms. Gentili submitted that Mr. Merle's conduct was contrary to Rules 104.1 and 104.2(c) of the CPA Code of Professional Conduct and he should be found guilty of the allegations of professional misconduct.

The Decision

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

DECISION

The Professional Conduct Committee having withdrawn Allegation Nos. 2 and 4

The Discipline Committee, having determined to proceed with the hearing in the absence of Frank Merle (Mr. Merle), being satisfied that he had proper notice of the hearing, and having seen, heard and considered the evidence, finds:

THAT Allegation Nos. 1 and 3 have been established;

THAT Rules 104.1 and 104.2(c) have been breached; and

THAT Mr. Merle has thereby committed professional misconduct.

Reasons for Decision

29. Having seen, heard and considered the evidence provided on behalf of the PCC by Ms. Gentili, the tribunal concluded that the evidence was clear, cogent and convincing to prove the allegations on a balance of probabilities.

30. Mr. Merle had been provided with several opportunities to provide the requested documents to the investigator, Ms. Beijer. He was provided with explanations and documents in response to questions regarding the process followed by CPA Ontario when investigating a complaint. He was given ample opportunity to comply with the various requests and requirements of the PCC, the investigator, Standards Enforcement and Counsel to the PCC. He chose not to comply with the direction given by CPA Ontario and was therefore found guilty of the two allegations of professional misconduct.

Sanction

31. Ms. Gentili 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; the usual order with

respect to publicity and an order that Mr. Merle cooperate by providing the outstanding information within 20 days and meeting with the investigator within 60 days, followed by suspension of membership for an additional 20 days and then revocation including newspaper publicity if he did not cooperate. The PCC also sought an order for approximately two-thirds of the costs incurred.

32. Ms. Gentili submitted that a mitigating factor was that Mr. Merle had never been before a discipline tribunal of CGA Ontario or CPA Ontario. Mr. Merle did respond to the initial complaint and did provide some of the requested information.

33. The aggravating factors, Ms. Gentili stated, included the fact that since October 2016, a period of over nine months, Mr. Merle had not fully complied with the requests for information from the investigator. The request was not overwhelming, and the information should not be difficult to assemble. Mr. Merle's refusal to provide documents and meet with the investigator had prevented the PCC from making a fully informed decision on the matter and had impeded the PCC from carrying out its mandate. Mr. Merle's conduct had wasted the time and incurred costs of staff, the tribunal, the process server and the PCC, and the matter had still not concluded. Mr. Merle refused to attend the hearing and did not appear to appreciate his responsibility to cooperate with his regulator. Ms. Gentili submitted that the aggravating factors far outweighed the mitigating factors of this case.

34. Ms. Gentili submitted that the sanctions requested would address general and specific deterrence, as well as rehabilitation. It is important to ascertain if Mr. Merle is still willing to be governed by his regulator.

35. Ms. Gentili stated that a reprimand acts as a specific deterrent and is intended to highlight the importance of cooperation with the PCC processes. The \$3,500 fine proposed would act as a specific and general deterrent to like-minded members.

36. Ms. Gentili stated that another opportunity to cooperate would show if Mr. Merle was respectful of the process and was still governable. This would allow the PCC to consider all the facts and decide on the outcome.

37. Publication is the main key as an effective general and specific deterrent and lets the public know that CPA Ontario is vigilant in regulating the conduct of its members. Ms. Gentili submitted that only rare and unusual circumstances would warrant a member's name not being publicized, and there was no evidence that such circumstances existed in this case. Ms. Gentili stated that publication in the usual manner on the CPA website, D & A publication and notification to the other CPA provincial bodies was warranted, along with newspaper publication if Mr. Merle does not comply with the terms of the Order.

38. Ms. Gentili filed a Costs Outline (Exhibit 7) showing the costs incurred by PCC to be just under \$14,000, of which the PCC was seeking partial indemnity costs of \$9,000, approximately two-thirds. This proportion attributed to Mr. Merle was the usual proportion sought by the PCC. The outline provides a breakdown of the costs incurred, including investigation and counsel costs.

39. Ms. Gentili distributed a case brief containing the decisions in *Presta*, *Croucher*, *Zhu* and *Titus*, matters involving failure to cooperate with the regulatory processes.

Order

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

IT IS ORDERED in respect of the Allegations:

1. THAT Mr. Merle be reprimanded in writing by the Chair of the hearing.
2. THAT Mr. Merle be and he is hereby fined the sum of \$3,000, to be remitted to the Chartered Professional Accountants of Ontario ("CPA Ontario") within twelve (12) months from the date this Decision and Order is made.
3. THAT Mr. Merle be and he is hereby required to cooperate with the Professional Conduct Committee by providing to the investigator within forty-five (45) days from the date this Decision and Order is made:
 - a) the complete working paper files for 2013 to 2015 for Client #40 and #76, as described in the email dated November 11, 2016 from the investigator to Mr. Merle;
 - b) a listing of all accounting services provided to the public since December 16, 2015 to present and the related revenue earned from those services.
4. THAT Mr. Merle be and he is hereby required to cooperate with the Professional Conduct Committee by attending an interview at a location deemed appropriate by the investigator within sixty (60) days from the date this Decision and Order is made.
5. THAT notice of this Decision and Order, disclosing Mr. Merle'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.
6. THAT in the event Mr. Merle 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. Merle's practice, residence or employment. All costs associated with this publication shall be borne by Mr. Merle and shall be in addition to any other costs ordered by the Committee.

IT IS FURTHER ORDERED:

7. THAT Mr. Merle be and he is hereby charged costs fixed at \$9,000, to be remitted to CPA Ontario within twelve (12) months from the date this Decision and Order is made.

Reasons for Sanctions

41. It is expected by the public and by the members of CPA Ontario that members comply with the CPA Code of Professional Conduct. Failure to do so will result in sanctions commensurate with the conduct of the member for the purpose of confirming to the public that

CPA Ontario takes these matters seriously. The sanctions are levied as both a specific deterrent to the member and as a general deterrent for the membership at large.

42. A written reprimand is a specific deterrent to emphasize to the member the importance of adherence to the CPA Code of Professional Conduct.

43. The tribunal determined that a fine of \$3,000 was appropriate. Mr. Merle did make some overtures to comply in part with some of the requests made of him; however, his conduct was not appropriate and fell short of that expected of a member of CPA Ontario. The tribunal reduced the amount of the fine from that requested by PCC as they felt that the \$3,000 amount was in line with other precedents and reflected some consideration for Mr. Merle's partial attempts at compliance. Twelve (12) months to pay the fine was considered fair and reasonable by the tribunal.


44. As set out in the sanctions, Mr. Merle was also given another opportunity to comply with requests made of him by the investigator, Ms. Beijer. He had been provided with adequate time to comply. Should he fail to again comply with the sanction that requires the production of documents and the attendance at an interview with the investigator within the prescribed times, his membership in CPA Ontario will be suspended and ultimately revoked if the failure to comply continues. This was both a specific deterrent to the member and a general deterrent to the membership. This tribunal was of the view that this sanction served the interests of the public.

45. Publication to other members, and on the website and to other provincial CPA bodies, serves as a general deterrent for members and provides the public with the necessary information regarding this particular matter.

Costs

46. Mr. Merle was charged costs of \$9,000 and was given up to twelve (12) months to pay, the same time period as for the payment of the fine. The costs represented approximately two-thirds of the actual costs incurred. The costs incurred increased as a result of Mr. Merle's failure to cooperate with the requests made of him by the investigator and by his failure to cooperate with the requirement to attend a meeting before the PCC. Mr. Merle caused the costs to increase as a direct result of his non-compliance.

DATED AT TORONTO THIS *22ND* DAY OF SEPTEMBER, 2017
BY ORDER OF THE DISCIPLINE COMMITTEE


S.M. DOUGLAS, FCPA, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

R.F.Y. FUNG, CPA, CMA
P-J. VAILLANCOURT, CPA, CGA
R. CARRINGTON (PUBLIC REPRESENTATIVE)