

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **GARRY WILLIAM ROUND, CPA, CA**, under **Rules 104.1 and 104.2(c)** of the Rules of Professional Conduct, as amended.

TO: Mr. Garry W. Round, CPA, CA
17 Elderberry Court
Guelph, ON N1L 1K3

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE MARCH 23, 2017

1. The motion for an order compelling the Professional Conduct Committee to make further disclosure, as specified in the Notice of Motion and Part V of the Member's Factum, is dismissed.
2. The Professional Conduct Committee is directed to make written submissions with respect to costs within 10 days of the date of this Decision and Order, not to exceed five pages, excluding the costs outline.
3. The Member may make responding submissions with respect to costs within 10 days of receipt of the submissions of the Professional Conduct Committee, also not to exceed five pages, excluding a costs outline, if any. The Professional Conduct Committee may make reply submissions within 5 days thereafter, not to exceed two pages.

DATED at Toronto, this 20th day of April 2017.



DIANE WILLIAMSON
ADJUDICATIVE TRIBUNALS SECRETARY

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
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TO: Garry William Round, CPA, CA

AND TO: The Professional Conduct Committee

REASONS FOR DECISION MADE ON THE MOTION HEARING HEARD ON MARCH 23, 2017

1. This tribunal of the Discipline Committee of the Chartered Professional Accountants of Ontario ("CPA Ontario") convened on March 23, 2017 to hear a motion for disclosure brought on behalf of Garry Round, CPA, CA ("Mr. Round").

2. Mr. Matthew Latella, accompanied by Mr. Ahmed Shafey, appeared as counsel for Mr. Round (the Moving Party), who was not in attendance. Ms. Alexandra Hersak, accompanied by Ms. Melissa Gentili, appeared as counsel for the Professional Conduct Committee ("PCC") (the Responding Party). Mr. Glenn Stuart attended as counsel to the Discipline Committee.

3. The tribunal had been provided with documents from both parties in advance of the hearing, which were marked as Exhibits on the motion: Factum of the Moving Party, Garry Round (Exhibit 1), Motion Record (Exhibit 2), Book of Authorities of the Moving Party (Exhibit 3), Factum of the Responding Party (Exhibit 4), Brief of Authorities of the Responding Party (Exhibit 5). The Will Say Statement of John W. Murray, BA, LLB, LLM, Vice-President of Standards Enforcement, Professional Standards, of CPA Ontario, was entered as Exhibit 6 during the hearing. These documents were referred to by both parties during the course of the motion hearing.

4. After deliberating on the Motion, the tribunal decided to dismiss the Motion and requested the parties to make written submissions on costs of the Motion. The decision and order of the tribunal was communicated to the parties on April 20, 2017.

The allegations

5. On May 7, 2015, the PCC gave notice to Mr. Round that the PCC was alleging that Mr. Round had engaged in professional misconduct on the basis of two particulars. The first allegation was that Mr. Round failed to cooperate with the regulatory processes of CPA Ontario, contrary to Rule 104.1 of the Rules of Professional Conduct, by failing to provide information requested by the Vice-President of Standards Enforcement from October 17, 2014 to March 24, 2015. The second allegation was that Mr. Round failed to attend before the PCC after having been personally served with a notice to attend, contrary to Rule 104.2(c) of the Rules of Professional Conduct.

The Motion before the tribunal

6. In Mr. Round's Notice of Motion, dated March 8, 2017, Mr. Round sought:

An Order compelling CPA Ontario to disclose and produce to Round:

- a) the identity of the CPA Ontario staff member (the “**Unnamed Staff Member**”) who CPA Ontario has advised happened upon the website of Ryan ULC (“Ryan”) while purportedly investigating an “unrelated matter”;
- b) full particulars of the nature of the “unrelated matter” which the Unnamed Staff Member was purportedly reviewing when s/he happened upon Ryan’s website;
- c) full particulars regarding the circumstances by which the review of the purportedly unrelated matter led the Unnamed Staff Member to focus on Ryan;
- d) full particulars of the circumstances surrounding how the CPA Ontario could have purportedly noted for the first time via the Unnamed Staff Member’s browsing of Ryan’s website the fact that Ryan employed CPA Ontario members allegedly providing accounting services to the public; notwithstanding Ryan’s longstanding presence in the Ontario market and CPA Ontario’s past familiarity with Ryan’s business and personnel;
- e) the identity of any other representatives of the CPA Ontario in any way involved in the investigation of Ryan and/or Round, whether by way of the activities of the Unnamed Staff Member or otherwise, including, but in no way restricted to any CPA Ontario staff members who worked, corresponded with or directed the Unnamed Staff Member in his/her investigation;
- f) any other information or documents that provide context for or reveal the impetus for CPA Ontario pursuing its investigation against Round and/or Ryan, including any general directives to CPA Ontario staff members to investigate similarly-situated firms. regardless of whether Ryan was identified by name; and
- g) any and all internal correspondence or documentation of every nature and kind that in any way pertains to the CPA Ontario’s investigation or prosecution of Round, save for such material as may be truly subject to privilege, such material to be set out in a sufficiently detailed list as to allow Round to ascertain the basis for any such assertion of privilege.” (Exhibit 2, Tab 1)

7. There are several alleged grounds for Mr. Round’s Motion set out in the Notice of Motion (Exhibit 2, Tab 1, beginning at page 3) and further detailed in the Factum of the Moving Party (Exhibit 1, paragraphs 18 to 26). The Moving Party sought the stated relief primarily on the basis that the PCC’s or CPA Ontario’s alleged lack of disclosure of information to Mr. Round was unfair to Mr. Round and prevented him from making full answer and defence to the allegations against him. In particular, the Moving Party contended that the disclosure of the identified information was required so that Mr. Round could fully address the following three arguments he intended to raise:

- a) The actual object of the investigation by CPA Ontario was Ryan, not Mr. Round, but CPA Ontario was pursuing Mr. Round as president of Ryan because CPA Ontario’s own rules had not allowed Ryan to be able to register with CPA Ontario due to its legal structure. However, the documents sought from Mr. Round, and which it was alleged he failed to produce, were really documents belonging to Ryan. To this extent, CPA Ontario lacked jurisdiction to make the demand.
- b) CPA Ontario was advancing the allegations against Mr. Round in order to reduce competition in the market, which demonstrated the improper impact of the business

structure rules of CPA Ontario which abuse CPA Ontario's dominant position and contravene the *Competition Act*. To advance this position, it was submitted that Mr. Round needed to know the details of the inquiries by the Unnamed Staff Member.

- c) The information sought would disclose what factors or events led CPA Ontario to vary its approach to Ryan's business, which had been carried on for a number of years without intervention by CPA Ontario. Mr. Round intended to argue that the investigation was an abuse of process.

The position of the PCC

8. The PCC opposed the motion for reasons detailed in the Factum of the PCC, which set out the facts it considered relevant. The PCC emphasized that Mr. Round brought this Motion for disclosure in the context of allegations of failure to cooperate with the regulatory process of CPA Ontario. The PCC submitted that the sole issue to be determined by the Discipline Committee was whether Mr. Round was entitled to the disclosure requests in the Notice of Motion in the context of those Allegations. The jurisdiction of the PCC to carry out its investigation of Mr. Round was not at issue in this Motion as it would be the subject of a motion scheduled to be heard on May 17, 2017. Moreover, the PCC submitted that the disclosure was not necessary for the argument of the jurisdiction motion.

9. The PCC observed that Mr. Round made repeated reference to an alleged investigation by the Federal Competition Bureau into CPA Ontario's corporate structure rules set out in the *Chartered Accountants Act, 2010* ("CA Act") and the Bylaws, Regulations and Rules of Professional Conduct ("Rules"). The PCC submitted that there was no evidence of such an investigation, nor was there any evidence supporting the assertion that the Federal Competition Bureau had directed CPA Ontario to change its Rules if it could not demonstrate that the Rules served to protect the public interest. The position of PCC was that whether or not there was an investigation by the Competition Bureau was irrelevant to this Motion. The PCC also noted that Mr. Round also made the allegation, which was unsupported by any evidence in their submission, that CPA Ontario's Rules were "*anti-competitive*". The PCC took the position that the insinuation that the PCC had been improperly motivated to investigate the professional conduct of Mr. Round because Ryan's powerful accounting firm competitors are represented on CPA Ontario's Governing Council was also unsupported and irrelevant to this Motion. The PCC submitted that CPA Ontario has a legislated mandate to enforce the Rules. The PCC submitted that full details of the information in its possession relevant to the Allegations against Mr. Round had been provided to Mr. Round by either Mr. Murray or PCC.

The relevant background and facts

10. The evidence before the tribunal on the Motion was contained in either the Motion Record, dated March 23, 2017 (Exhibit 2), or, on the agreement of the parties, the will say statement of John W. Murray (Exhibit 6). The Motion Record contained copies of correspondence between Mr. Round's counsel and various representatives of CPA Ontario during the period June 12, 2014 to June 5, 2015, which are discussed in more detail below, the Notice of Application for Judicial Review brought to the Divisional Court by Mr. Round on May 28, 2015, and the Reasons for Judgment of the Divisional Court, dated December 9, 2015, and a listing CPA Ontario's 2016/2017 Governing Council obtained from its website. In addition, the Motion Record also included a copy of a complaint letter, with appendices, sent by Mr. Latella to the Commissioner of Competition at the Competition Bureau, dated October 4, 2016, regarding "Complaint by Ryan ULC against CPAO in relation to its Abuse of Dominant Position".

11. On June 12, 2014, Ms. Theresa M. Tonelli, Director of Standards Enforcement of CPA Ontario wrote a letter to Mr. Round, in his capacity as President of Ryan (Exhibit 2, Tab A). The first sentence of the letter stated "It has come to the attention of the Professional Conduct Committee (the "Committee") that Ryan, ULC, may be offering accounting services to the public while not being registered as a Firm with CPA Ontario." The letter went on to state that CPA Ontario, as a self-regulating professional body, had a duty to review all matters coming to its attention that may indicate a violation of its Rules, Regulations or Bylaws and directed Mr. Round's attention to Regulation 7-1, section 9, which set out the responsibilities of the PCC in such reviews. Ms. Tonelli referred Mr. Round to specific Rules of Professional Conduct (Rules 101 (Bylaws 1.1.31 and 4.17.2, Regulation 4-6) and 409), and invited Mr. Round to "provide any comments and information that you would like to be considered by the PCC in its review of this matter." The letter stated that the PCC wished to commence its review and stated that a written reply was required on or before July 3, 2014. The letter advised Mr. Round that an extension would be permitted in limited circumstances and a failure to reply may result in an allegation or allegations of professional misconduct. Enclosed with the letter was a summary of the disciplinary process entitled "Standards Enforcement and Disciplinary Procedures", as well as copies of some of the Ryan website pages. Ms. Tonelli invited Mr. Round to contact her should he have any questions. The letter also advised Mr. Round that any information provided by the PCC in the course of its review was to be held in confidence, and not used or disseminated for any other purpose.

12. Receipt of this letter was acknowledged on June 27, 2014, by Mr. Round's former counsel, and the due date of Mr. Round's response was extended to August 25, 2017. Ms. Tonelli provided Mr. Round's counsel with links to further information on the CPA Ontario website.

13. Mr. Latella emailed a letter, dated August 25, 2014, to Ms. Tonelli in response to her letter of June 12, 2017 (Exhibit 2, Tab E). Mr. Latella identified himself as counsel to Ryan. In his letter, Mr. Latella stated that Ryan would like to cooperate with the PCC "to the full extent required" and it "wishes to ensure that it [Ryan] and Mr. Round are afforded complete fairness and due process", and asked for confirmation that the review was directed to Mr. Round personally and not to Ryan. Mr. Latella wrote that, regarding Regulation 7-1, section 9 of the Institute of Chartered Accountants of Ontario ("ICAO") Regulations, Ms. Tonelli's letter did not refer to any complaint having been received by the PCC, nor did it provide particulars of the information received supporting the complaint and did not identify the complainant. Mr. Latella asked for full particulars of any complaint received, by what means it was received (e.g. in writing, etc.), all information and documents received regarding the complaint, and the identity of the person providing the information, or if that person is different than the one providing the information, that person's identity. The letter referred to the duty of CPA Ontario to review all information coming to its attention that may indicate a violation of CPA Ontario's Rules of Professional Conduct and asked that particulars of any information received in that regard be provided. The letter also stated that Ryan had been operating in Ontario for many years and wished to understand fully the impetus for the CPA Ontario's letter, and whether something had changed since Ryan ULC entered the Ontario market either regarding the mandate of CPA Ontario or its predecessor bodies, or with respect to Ryan's business. Mr. Latella asked that CPA Ontario address these matters in its response.

14. Mr. John W. Murray, Vice-President of Standards Enforcement, Professional Standards, of CPA Ontario, emailed a letter, dated September 24, 2014, to Mr. Latella in response (Exhibit 2, Tab F). The letter set out answers to Mr. Latella's specific questions in his August 25, 2014 letter. He advised Mr. Latella that the *CA Act*, its Bylaws and Rules require all CPA Ontario members to comply with its Bylaws, Regulations and Rules. In response to Mr. Latella's

enquiry, the letter stated that CPA Ontario wished to review and understand the type of services offered to the public by all CPA members employed by Ryan, including Mr. Round. Ryan's website identified Mr. Round as the President of the Canadian Operations of Ryan, located in Mississauga, Ontario. Mr. Murray noted that Regulation 7-1 stated that the PCC or anyone acting on its behalf may take notice of any information that comes to its attention and consider that information as a complaint. The PCC may request further information or documents from a complainant or any other person. Mr. Murray advised that regarding "this enquiry, in reviewing an unrelated matter, Standards Enforcement staff noted that Ryan's Website indicated that Ryan was employing CPA Ontario Members and offering a number of tax related services that could fall under Bylaw 1.1.31's definition of 'provision of accounting services to the public,' As such, Bylaw 4.17.2 would require that Ryan be registered as a firm with CPA Ontario." Copies of Ryan's website pages reviewed by staff as at June 3, 2014 were included with the letter. Mr. Murray pointed out that Bylaw 1.1.31 had recently changed. He advised Mr. Latella that it is the responsibility of every CPA member to ensure they are aware of, and are in compliance with, all the Bylaws, Regulations and Rules of CPA Ontario.

15. Mr. Murray's September 24, 2014 letter asked for the following specific information:

A full and complete response is required from your client to assist the Committee [PCC] in assessing whether or not Ryan has complied with the Rules. With this in mind, please provide:

- a detailed description of all services provided by Ryan's staff who are CPA Ontario Members (for each type of service, please include (i) the nature of the clients to whom the services are provided and (ii) an indication of the approximate percentage of Ryan's overall business that each service comprises); and
- the names of all CPA Ontario Members involved in these activities.

The letter concluded by requesting the information by October 17, 2014 in accordance with Rule 104 of the Rules of Professional Conduct and noted that failure to provide the information might result in the PCC pursuing allegations of professional misconduct.

16. On October 17, 2014, Mr. Latella emailed a letter to Mr. Murray (Exhibit 2, Tab G), in reply to the September 24, 2014 letter, stating that "Our client wishes to reiterate that it would like to cooperate with the Professional Conduct Committee's ("PCC") process to the full extent required, while ensuring that complete fairness and due process are observed." Mr. Latella took issue with Mr. Murray's explanation of Regulation 7-1 and stated that if there was a complainant he wished to know the specific identity of any complainant and the specific date when that complainant is alleged to have made the complaint to the PCC. The letter asked for confirmation that the enquiry was not directed to Ryan, and wanted the names of any and all "target(s)" of the enquiry. Mr. Latella requested "full particulars" as to how the information came to the attention of staff members who were involved in an unrelated matter and how they came to view Ryan's website. The letter concluded with a request that CPA Ontario furnish all documentation in its possession relating to the matters raised.

17. Between October 17, 2014 and February 13, 2015, there were five further exchanges of correspondence between Mr. Murray and Mr. Latella, with Mr. Murray reiterating his answers to questions previously raised by Mr. Latella.

18. In his letter of January 29, 2015 to Mr. Latella (Exhibit 2, Tab J), Mr. Murray answered questions raised in Mr. Latella's letter of January 28, 2015. Mr. Murray's letter confirmed that there was no third party complainant, that staff had brought the matter to the attention of the PCC and that the PCC was considering it to be a complaint under Regulation 7-3, subsection 3. The letter stated that particulars of the issues under investigation were previously communicated to Mr. Latella and documentation consisted of copies of the Ryan website. The letter stated that the genesis of the investigation was not relevant to the Member, the PCC's refusal to provide further details was not unfair and Mr. Round did not need to know the details of an unrelated investigation to provide a detailed response to the PCC's enquiries. Mr. Murray stated in his letter that the PCC had no jurisdiction over Ryan; however, it did have jurisdiction over any member who was employed by Ryan and could require co-operation of that member in order to pursue its investigation. The letter referred to CPA Ontario's powers of investigation in sections 46-50 of the *CA Act*. Finally, the letter states that Rule 104 of the Rules of Professional Conduct requires members to co-operate with the regulatory process of CPA Ontario.

19. On March 4, 2015, Mr. Paul Farley, Senior Counsel to the PCC, served on Mr. Round a *Notice to a Member to Attend before the Professional Conduct Committee* ("Notice") at its meeting on March 24, 2015 (Exhibit 2, Tab M). The letter advised Mr. Round that failure to attend may result in an Allegation of Misconduct against him under the Rules of Professional Conduct.

20. On March 20, 2015, Mr. Latella wrote to Mr. Farley acknowledging receipt of his March 4, 2015 letter, and the Notice before the PCC (Exhibit 2, Tab N). Mr. Latella advised that "we are not available to attend" the PCC meeting on March 24, 2015". He also informed Mr. Farley that he had been instructed to proceed with an application for Judicial Review of CPA Ontario's decision to issue the Notice. He stated "As you have already acknowledged, this matter is not the result of a complaint by a member of the public and, accordingly, there is neither any urgency to the situation, nor any prejudice occasioned by postponing any such meeting."

21. On March 23, 2015, Mr. Murray emailed a letter to Mr. Latella to advise him that Mr. Round had been served with the Notice to attend the March 24, 2015 meeting of the PCC and that his attendance was to "provide information and answer questions in furtherance of the committee's investigation." (Exhibit 2, Tab O) Neither Mr. Latella nor Mr. Round attended the PCC meeting on March 24, 2015.

22. In his letter dated May 1, 2015, to Mr. Latella (Exhibit 2, Tab S), Mr. Farley summarized the disclosure material given to Mr. Round, summarized the status of disagreements between the PCC and Mr. Round and stated the PCC's position on outstanding issues. He stated that the PCC was not prepared to continue the correspondence regarding issues that had previously been addressed.

23. The Allegations of Misconduct against Mr. Round were served on his counsel on May 7, 2015.

24. On October 26, 2015 the Divisional Court heard a Judicial Review Application brought by Mr. Round against CPA Ontario, first, to quash the decision by CPA Ontario to embark on an inquiry regarding information which came to its attention that indicated a possible breach of CPA Ontario's Rules of Professional Conduct by Mr. Round and, second, to challenge CPA Ontario's jurisdiction to issue allegations of misconduct against Mr. Round for failing to cooperate with the regulatory process of CPA Ontario. Mr. Round submitted that CPA Ontario exceeded its jurisdiction by initiating investigative proceedings against him and because of that, its actions were *ultra vires*. Mr. Round also contended that CPA Ontario's refusal to identify the precise source and context of the complaint against Mr. Round was a denial of his right to natural justice

and procedural fairness. CPA Ontario sought the dismissal of the Application on the basis that (i) the Application for Judicial Review was premature, (ii) the CPA Ontario's investigation was within its jurisdiction, and (iii) the investigative procedure disclosed no procedural unfairness or breach of natural justice.

25. It was not disputed before the Divisional Court that Mr. Round was a CPA, CA, and his professional activities were governed by CPA Ontario pursuant to the *CA Act*, and the Bylaws, Regulations and Rules of Conduct established by that *Act*. The facts set out above in these reasons were also before the Divisional Court. The material before the Court indicated that Mr. Round sought full particulars from PCC, including the identity of the "complainant" who made the complaint that initiated the Committee's review. The parties had been unable to agree on how much information could, would, or should be provided to Mr. Round, particularly the name of the CPA Ontario staff member who came across the information. The Court dismissed Mr. Round's Application. In summary, the Court found that the issues of jurisdiction should first be raised before CPA Ontario. The Court found no breach of natural justice or procedural unfairness respecting the investigative procedure or the decision by CPA Ontario to proceed against Mr. Round for failing to cooperate with its investigation. The Court found that Mr. Round had been provided, by multiple letters exchanged by the parties over a long period of time, with information regarding the "matters being investigated" pursuant to section 15 of Regulation 7-1 which states:

The subject(s) of the investigation and their firm(s), if applicable, shall be notified in writing of the investigation and of the matter(s) being investigated, whether or not they were the subject of the complaint, and shall be notified of any expansion or alteration of the matters investigated. Such notice shall include a reminder of their professional responsibility to cooperate and of the possibility that some client documents in their possession might be subject to legal privilege, and shall further caution the subject(s) of the investigation that the failure to produce a document that is not privileged might breach their professional responsibilities.

26. The Court concluded its Reasons for Judgment (Exhibit 2, Tab Y) by stating in paragraph [18], "It is not for Mr. Round to challenge the *bona fides* of the investigation at this stage. His duty is to cooperate."

Analysis and Discussion

27. The issues for the tribunal to determine in this Motion were (a) whether Mr. Round was entitled to disclosure of the information requested by his counsel, and, in particular, the identity of the Standards Enforcement staff member who identified Ryan's website, and (b) if Mr. Round was entitled to disclosure of this information, at what stage in the discipline process must disclosure of relevant information be provided to him.

28. The Motion seeks an Order compelling the PCC to disclose "full particulars of the nature of the 'unrelated matter'" that the unnamed staff member was reviewing when that staff member came across Ryan's website. In his letter to Mr. Latella dated January 7, 2015, Mr. Murray answered this inquiry, stating that he had answered this request in his September 24, 2014, and also stated "Standards Enforcement matters are confidential, and therefore further details of the 'unrelated matter' will not be provided . The September 24, 2014 letter states in paragraph numbered 2: "With respect to this enquiry, in reviewing an unrelated matter, Standards Enforcement staff noted that Ryan's website indicated that Ryan was employing CPA Ontario Members and offering a number of tax related services that could fall under By-law 1.1.31's definition of 'provision of accounting services to the public.' As such, By-law 4.17.2 would

require that Ryan be registered as a Firm with CPA Ontario. For your reference, I have again attached copies of Ryan's website pages as at June 3, 2014 as reviewed by staff." (Exhibit 2, Tab F). The tribunal concluded that this information provided Mr. Round with the specific concern of the preliminary enquiry by the PCC.

29. The tribunal agreed with Mr. Murray's position that the "unrelated matter" should remain confidential in order to maintain the confidentiality of the subject matter of the "unrelated matter" and the integrity of the work of the Standards Enforcement group. The tribunal also relied on Section 58 of the *CA Act 2010*, which requires that persons engaged in the administration of the *CA Act* and bylaws maintain secrecy respecting of information and knowledge coming to their attention.

30. Section 58 (1) of the *CA Act 2010* states as follows:

Every person engaged in the administration of this Act and the by-laws shall preserve secrecy respecting information or material that comes to his or her knowledge or possession in the course of his or her duties under this Act or the *Public Accounting Act, 2004*, and shall not disclose any such information or material to any person except,

- (a) to his or her counsel;
- (b) with the consent of the person to whom the information or material relates;
- (c) to the extent that the information or material is available to the public;
- (d) as may be required in connection with the administration of this Act and the by-laws or with any proceeding under this Act; or
- (e) as may otherwise be required by law, 2010, c. 6, Sched. C. s. 58(1).

31. The tribunal recognized that the scope of this provision may need to give way to the obligation of CPA Ontario to make full disclosure of *relevant* information. However, the nature of the inquiry that the staff member was pursuing when he or she identified the Ryan website does not impact any of the issues before this tribunal. The tribunal concluded that that specific evidence is not relevant to the issues before the tribunal. The evidence is that the staff member was investigating another matter and went to Ryan's website. Copies of Ryan's website indicating the employment of CPA Ontario members and provision of tax related services that could fall under Bylaw 1.1.31's definition of the provision of accounting services to the public were printed and later provided to Mr. Round. The PCC took notice of this information and, under Regulation 7-1 decided to pursue an enquiry into the question of whether Mr. Round, and other members of CPA Ontario who were employees of Ryan, were offering accounting services the public (Exhibit 2, Tab F).

32. The information already disclosed to Mr. Round provides the factual basis on which the Moving Party can pursue his arguments regarding the basis for the investigation, while recognizing the protections of section 58 of the *CA Act*. The tribunal was not satisfied that further information about the other matter was required for that argument.

33. The initial enquiry letter of the PCC, dated July 12, 2014, to Mr. Round, set out the issue that was the subject of the investigation. It stated that it had come to the PCC's attention that "Ryan ULC may be offering accounting services to the public while not being registered as a

Firm with CPA Ontario". The letter set out PCC's authority to request this information and stated that it "invited" Mr. Round to provide comments and information he wished to be considered by the PCC in its review of this matter. Additional information was requested in Mr. Murray's letter of September 24, 2014, and reiterated in his letters of January 7, 2015, and January 29, 2015 (Exhibit 2). If there is a hearing on the merits of the allegations of professional misconduct currently pending against Mr. Round, the central issue will be whether the failure to provide this information, given the issues Mr. Round raised through his counsel, was professional misconduct. The information relevant to that question has already been disclosed.

34. The tribunal was similarly not satisfied that the identity of the unnamed staff member was necessary for or relevant to either Mr. Round's jurisdiction motion or his defence of the allegations. The issue, or one of the issues, on the jurisdiction motion is whether there must be a complainant in order for the PCC to have authority to investigate. It was conceded by the PCC that there was no external complaint; a staff member had found the information that led to the investigation. The tribunal determined that the identity of the staff member was not material to either the preliminary motion regarding the tribunal's jurisdiction or the defence of the main allegations against Mr. Round. The identity of the specific staff person was not relevant to a determination of the jurisdiction issue. In these circumstances, the tribunal was satisfied that the identity of the Standards Enforcement staff member should remain confidential in order to protect the staff member's privacy.

35. The parties set out a number of cases for the tribunal to consider. In *R. v. Stinchcombe*, [1991] 3 SCR 326, the Supreme Court of Canada set broad standards for disclosing information to defendants in criminal matters. These broad standards were not in issue between the parties; their application to the facts of the present case was. In *Howe v. Institute of Chartered Accountants of Ontario*, (1994), 19 OR (3d) 483, (C.A.), the issue was whether an expert's report should have been disclosed to the member's counsel in an ICAO discipline case. The Ontario Court of Appeal held that the decision of the chair of the Discipline Committee to withhold the report on the basis of privilege was reasonable. There was no denial of natural justice to the member. In his dissenting opinion, Laskin, J.A., determined that in failing to provide the investigator's report to Howe, ICAO breached its duty of fairness and the court should grant judicial review and provide Howe a right to appeal from an adverse finding. The tribunal determined that the Investigator's report was a key piece of information in the PCC's case against Howe, and that the investigator would be using the report in his testimony before the Discipline Committee. While the tribunal understands that the analysis in the dissenting opinion reflects the prevailing law in 2017, the decision is distinguishable to the extent that the tribunal was not satisfied, as a question of fact, that the information sought by the Moving Party was relevant to the issues in the hearing.

36. In the *Howe* case, the predominant issue was whether or not the investigator's report should have been disclosed to Howe's counsel given that the investigator was assured by the PCC that the report would be kept confidential. The PCC used the report as a basis for preparing allegations against Howe. It, along with the investigator's testimony, comprised the essence of the PCC's case against Howe. The name of the investigator was known by both parties for this reason. In the instant matter, the tribunal concluded that the identification of the Standards Enforcement staff member who came across the website was not a relevant factor in considering an allegation of failing to cooperate. It was the information gathered from Ryan's website that formed the basis for the PCC's investigation, not the staff member's involvement or identity.

37. The cases that involve more similar facts to the present case are of more assistance to the tribunal and support the tribunal's conclusion. In *D'Mello v. Law Society of Upper Canada*, 2015 ONCA 584, the Ontario Superior Court of Justice – Divisional Court found that Mr. D'Mello, a member of the Law Society who was charged with failing to co-operate with the Law Society of Upper Canada's investigation of a mortgage issue, did not have any right to an electronic copy of a complaint letter since the letter was not relevant to the failure to co-operate proceedings. In that case, Mr. D'Mello did not submit certain documents requested by the LSUC's investigator and disputed that the Law Society had properly responded to his request for information, notably the complaint letter. The failure to comply led to the allegation of failing to co-operate with the Law Society. The tribunal concluded that this case demonstrated that the required submission of documents to the Law Society was not connected to the request for the Law Society to provide the complaint letter. This was comparable to the request made by Mr. Round not being relevant to his defence in the present case.

38. In *Presta v. Institute of Chartered Accountants of Ontario*, 2010 ONSC 1877, the Ontario Superior Court of Justice – Divisional Court determined that the Institute of Chartered Accountants of Ontario was bound by its bylaws to make disclosure when a charge was made, but it was not required to make disclosure before a charge is laid. The tribunal concluded that disclosure of all relevant information in the present case had been made available to Mr. Round prior to the allegation being made. This did not mean that this information might not be relevant to substantive allegations, as opposed to a failure to cooperate, but those are not the allegations before this tribunal.

39. In *Wise v. Law Society of Upper Canada*, [2010] O.J. No. 2158, the Ontario Superior Court of Justice – Divisional Court found that there was an obligation on a member of the Law Society of Upper Canada to provide information, but the Law Society must not act in an arbitrary or fundamentally unfair manner. The tribunal concluded that Mr. Round was treated fairly by CPA Ontario regarding the disclosure of information to him, and there was no evidence that suggested otherwise.

Conclusion

40. In its deliberations, the tribunal carefully considered the evidence and submissions made by both counsel. In the tribunal's view, the issues in a hearing of the allegations advanced against Mr. Round focused on the issue of CPA Ontario's request for information from Mr. Round and Mr. Round's response to that request. The tribunal needed to consider whether the disclosure of information to him that was sought in the motion was relevant to a hearing of that allegation.

41. Section 8 of the *Statutory Powers Procedure Act*, R.S.O 1990,c.S.22, provides that "Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto." This provision reflects the disclosure obligation that has been imposed on the PCC through the case law noted above. Rule 9.02(1) of CPA Ontario's Rules of Practice and Procedure requires CPA Ontario to make disclosure not later than 10 days prior to the date of the hearing on the merits of the procedure. In the instant matter, the tribunal concluded that this obligation had been met, and the obligation did not require the disclosure of the information sought.

42. Regarding the Motion particulars 1.b. to 1.g., the tribunal concluded that, while it was clear that Mr. Round did not accept that the information had been provided, Mr. Murray had provided information in response to the requests by Mr. Latella, except for the identity of the

staff member, in correspondence dated September 24, 2014 and January 29, 2015. Regarding particular 1.a., Mr. Murray explained in his January 29, 2015 letter that the reason for not releasing the staff member's identity was that it was not relevant to the issues under review and withholding it was not unfair to Mr. Round. The tribunal concluded that the identity of the staff member was not relevant to the issue of how the information regarding Ryan came to the attention of the PCC.

43. For the reasons stated above, the tribunal dismissed the motion for an order compelling the Professional Conduct Committee to make further disclosure, as specified in the Notice of Motion and Part V of the Moving Party's Factum.

DATED AT TORONTO THIS *18TH* DAY OF JULY, 2017
BY ORDER OF THE DISCIPLINE COMMITTEE



A. D. NICHOLS, FCPA, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

J.C. BLACKWELL, CPA, CA

J. EMUAN, CPA, CMA

J.H. FRIDAY, FCPA, FCA

B. SOLWAY (Public Representative)

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **GARRY WILLIAM ROUND, CPA, CA**, under **Rules 104.1 and 104.2(c)** of the Rules of Professional Conduct, as amended.

TO: Mr. Garry W. Round, CPA, CA
17 Elderberry Court
Guelph, ON N1L 1K3

AND TO: The Professional Conduct Committee

ORDER MADE AUGUST 22, 2017

After carefully reviewing the written submissions on behalf of both the Professional Conduct Committee and Garry William Round with respect to costs of the motion which was heard on March 23, 2017, the Discipline tribunal orders:

THAT costs payable to CPA Ontario fixed in the amount of \$10,000 be paid by Mr. Round no later than thirty (30) days from the date this Order is made.

DATED at Toronto, this 23rd day of August 2017.



DIANE WILLIAMSON
ADJUDICATIVE TRIBUNALS SECRETARY

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against GARRY WILLIAM ROUND, CPA, CA, a Member of CPA Ontario, under Rules 104.1 and 104.2(c) of the Rules of Professional Conduct, as amended.

TO: Mr. Garry William Round, CPA, CA

AND TO: The Professional Conduct Committee

**REASONS FOR AN ORDER OF COSTS ON THE MOTION HEARING HELD ON
MARCH 23, 2017**

(Order made August 22, 2017)

1. This tribunal of the Discipline Committee of the Chartered Professional Accountants of Ontario met by teleconference call on August 22, 2017 to deliberate on the written submissions of the Professional Conduct Committee (PCC) and Mr. Garry William Round regarding costs of a motion for disclosure heard by the tribunal on March 23, 2017. The motion for an order compelling the PCC to make further disclosure, as specified in the Notice of Motion, was dismissed. The order of the tribunal on the motion was communicated to the parties on April 20, 2017.
2. Mr. Matthew Latella and Mr. Ahmed Shafey represented Mr. Round, and Ms. Alexandra Hersak and Ms. Melissa Gentili represented the PCC at the motion hearing.
3. As part of its order dismissing the motion, the PCC was directed to make submissions on costs of the hearing, Mr. Round was invited to respond to the PCC's submissions, and the PCC was invited to respond to Mr. Round's submissions. These written submissions (Exhibits 12, 13, 14 and 15) formed the basis of the tribunal's deliberations and its decision and reasons with respect to the costs of this motion.

The PCC's submissions on costs

4. The PCC submitted a Costs Outline (Exhibit 13) which detailed a total of \$14,955 in costs being incurred in relation to the motion. The costs claimed for PCC counsel were based on nominal hourly rates, depending on the year of their call to the bar, as drawn from the Costs Grid used under the *Rules of Civil Procedure*. The PCC submitted that these hourly rates were "extremely low compared to rates charged by counsel in private practice."
5. The PCC submitted that the tribunal should consider six factors in determining costs of legal proceedings. These are the factors identified under Rule 57.01(1) of the *Rules of Civil Procedure*. These factors deal with the amount claimed and recovered, the complexity of the proceeding, the importance of the issues, a party's conduct that unnecessarily lengthened or shortened the hearing, whether any step taken in the proceeding was improper, vexatious, unnecessary or taken through negligence, neglect or excessive caution, and a party's denial or refusal to admit anything that should have been admitted.

6. The PCC submitted that costs should be payable by the unsuccessful party and asked that the tribunal order Mr. Round to pay two-thirds of the PCC's costs of the motion in the amount of \$10,000 to be paid within 30 days. The PCC submitted that the costs being sought and time to pay were more than reasonable in the circumstances.

Mr. Round's submissions on costs

7. Mr. Round submitted that his position on costs was "[t]hat it would be most prudent and appropriate for the Discipline Committee to defer any order that Mr. Round pay any amount as costs for the disclosure motion, unless and until such time as it is determined that the PCC's position is ultimately upheld."

8. Mr. Round's submission stated that "in cases such as this, where there may yet be a judicial review and/or Competition Bureau proceedings that could challenge even a *final* tribunal decision, the case for deferring any requirement on the member to pay costs of an interlocutory motion to the PCC is even stronger. Once paid, Mr. Round's recourse to recover such payment, should his position ultimately be vindicated, will be limited. The Discipline Committee should seek to avoid such unjust scenarios."

9. Mr. Round submitted that Rule 19.01(2) of CPA Ontario's *Rules of Practice and Procedure* states that the tribunal presiding over an interlocutory proceeding "may" defer the determination of costs to a tribunal presiding over the hearing on the merits. Mr. Round submitted that a determination on the entitlement of costs should be deferred in accordance with CPA Ontario's *Rule of Practice and Procedure* 19.01(2).

10. Mr. Round submitted that the PCC did not explain why they relied on the *Rules of Civil Procedure* applicable in proceedings before the Ontario Superior Court. In Mr. Round's submission, civil proceedings usually involve claims for damages, and each party is subject to an equal risk of costs or other civil relief. Given that CPA Ontario's conduct proceedings are very different, it was submitted that the *Rules of Civil Procedure* should not be applicable to CPA Ontario proceedings.

11. Mr. Round cited criminal proceedings as an analogy to the merits of a disclosure motion and submitted that in the *Henderson* case, it is stated that the accused could face "a *professional death penalty*." Mr. Round submitted that it is rare for a criminal accused to be ordered to pay costs on the grounds that the nature of the criminal justice system is such that the state should not be indemnified for costs of the proceeding.

Reply cost submissions of the PCC

12. The PCC submitted that it should be entitled to costs of the motion no matter what the outcome of the whole proceeding may be. Any order for costs by the Discipline or Appeal Committee could be varied or overturned at some future time by, for example, judicial review.

13. The PCC submitted that the *Rules of Civil Procedure* could be looked to for guidance by analogy where the CPA Ontario *Rules of Practice and Procedure* were silent on an issue.

14. The PCC pointed out that Mr. Round did not challenge the quantum or time period for payment of the costs sought.

Order

15. The tribunal made the following order on August 22, 2017, which was sent to the parties on August 23, 2017:

After carefully reviewing the written submissions on behalf of both the Professional Conduct Committee and Garry William Round with respect to costs of the motion which was heard on March 23, 2017, the Discipline tribunal orders:

THAT costs payable to CPA Ontario fixed in the amount of \$10,000 be paid by Mr. Round no later than thirty (30) days from the date this Order is made.

The Tribunal's analysis and conclusion

16. Rule 19 of the *Rules of Practice and Procedure of CPA Ontario* provides the tribunal with the authority to order costs against Mr. Round since he was not successful in his motion. Costs are not a penalty; they are meant to indemnify a successful party for costs incurred. In these proceedings, the tribunal has a broad discretion to determine whether costs are payable, the amount of the costs and the time in which they must be paid.

17. The tribunal carefully considered the submissions of both counsel and the factual record for the disclosure motion in determining how to exercise its discretion with respect to costs.

18. There were three principal issues raised by the parties with respect to costs. The first issue for the tribunal to consider, which was raised by Mr. Round, was whether it was appropriate to be awarding costs, in the manner contemplated in a civil proceeding in court, in these proceedings. The second issue, also raised by Mr. Round, was whether an order of costs should be deferred. If the tribunal did not accept Mr. Round's position on those points, the third issue was the quantum of the costs to be paid.

19. The tribunal concluded that it clearly had the jurisdiction to award costs under Rule 19. It is well established that a CPA Ontario proceeding is neither a criminal nor a quasi-criminal proceeding, so the position on costs in those proceedings had no bearing on the issue before the tribunal. On the other hand, the tribunal was satisfied that, even though there were differences between a civil proceeding and a CPA Ontario proceeding, and the *Rules of Civil Procedure* were not applicable to this proceeding, the principles in the *Rules of Civil Procedure* could assist the tribunal, by analogy, in the absence of a specific provision in CPA Ontario's own *Rules of Practice and Procedure*. Some factors set out in the *Rules of Civil Procedure* clearly do not apply in the context of these proceedings, such as "the amount claimed and recovered". That does not prevent the tribunal from considering the factors that do apply.

20. Mr. Round's submission that an order for costs should be deferred was based on the premise that the proceedings, when decided on the merits and after any appeals, could result in conclusions that were different from those the tribunal reached on this motion. Specifically, the result could favour Mr. Round, and he therefore would not be responsible to pay those costs. However, in the tribunal's view, this argument could be made in the case of any interlocutory order that does not terminate the proceedings. Any decision of the tribunal could be overturned on appeal or review, and any interlocutory decision could be reconsidered, if appropriate, at a hearing on the merits. In any such case, an order for costs would be reversed and reimbursed.

The tribunal does not accept that repayment by the PCC of a costs order would be a problem or is a reason to defer an order for costs. The tribunal also does not accept that the generally applicable argument advanced by Mr. Round can justify, without other exceptional circumstances, the deferral of a costs order. To decide otherwise would be to unnecessarily limit the discretion provided by Rule 19.01(2).

21. In the tribunal's view, the fact that a decision could be reversed does not mean that costs were not incurred by the PCC to respond to the interlocutory motion. An order for costs is intended to indemnify the successful party for its costs of a step in a proceeding. Even if a decision is reversed, those costs have been incurred. The tribunal concluded that the question of whether a costs order should be reversed can be determined by the tribunal reversing the decision on the merits. It does not require the deferral of an order as to costs. The tribunal concluded that it was appropriate in all of the circumstances to order costs on the completion of this discrete interlocutory proceeding.

22. Given the tribunal's conclusion that it was appropriate to not defer an order for costs, the tribunal had to determine the appropriate amount of costs to be paid. Mr. Round did not challenge either the amount of costs sought or the period allowed for payment of costs.

23. The PCC sought costs that were incurred by the PCC in preparing for and attending the motion hearing and set out in detail before the tribunal. The PCC noted that the hourly rates for counsel were nominal hourly rates and less than typical rates for the private bar. The use of possibly unfavourable hourly rates in the calculation of costs could be considered a partial contribution by PCC to the costs of this hearing, and the tribunal took this into consideration in determining the reasonableness of the costs sought.

24. The PCC requested approximately two-thirds of the total costs of \$14,955. The tribunal recognized that the disciplinary process is part of the activities of the disciplinary authority of CPA Ontario over its members and the membership as a whole should bear some of the costs. In other words, CPA Ontario should bear some of the costs of the hearing. In the tribunal's view, the partial indemnity hourly rates and the two-third share reflected an appropriate allocation of costs between the parties.

25. For these reasons, the tribunal ordered costs to be paid by Mr. Round in the amount of \$10,000 to be remitted to CPA Ontario within 30 days of the date of the Order.

DATED AT TORONTO THIS 7th DAY OF DECEMBER, 2017

BY ORDER OF THE DISCIPLINE COMMITTEE



A. D. NICHOLS, FCPA, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL

J.C. BLACKWELL, CPA, CA

J. EMUAN, CPA, CMA

J. H. FRIDAY, FCPA, FCA, CMA

B. SOLWAY (Public Representative)