



FOUNDED 1879

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO  
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF  
ONTARIO  
FORM 9A

*THE CHARTERED ACCOUNTANTS ACT, 2010*

**TO:** JOHN W. MARTIN, CPA, CA

**AND TO:** The Discipline Committee of CPA Ontario

The Professional Conduct Committee hereby makes the following allegations of professional misconduct against JOHN W. MARTIN, CPA, CA, a Member of CPA Ontario:

1. THAT the said John W. Martin, in or about the period May 1, 2002 through March 31, 2003, while providing accounting services to "TM" and his company "TCMD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TM" and "TCMD," contrary to Rule 201.1 of the Rules of Professional Conduct.
2. THAT the said John W. Martin, in or about the period October 1, 2002 through January 31, 2007, while providing accounting services to "TW" and his company "JEW," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TW" and "JEW," contrary to Rule 201.1 of the Rules of Professional Conduct.
3. THAT the said John W. Martin, in or about the period December 1, 2002 through January 31, 2003, while providing accounting services to "BB" and his company "BRMC," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BB" and "BRMC," contrary to Rule 201.1 of the Rules of Professional Conduct.
4. THAT the said John W. Martin, in or about the period May 1, 2007 through May 31, 2009, while providing accounting services to "BC" and his companies "A-S A" and "242 Ontario Inc.," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BC," "A-SA" and "242 Ontario Inc.," contrary to Rule 201.1 of the Rules of Professional Conduct.

5. THAT the said John W. Martin, in or about the period June 1, 2009 through January 31, 2010, while providing accounting services to "GC" and his company "GCML," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "GC" and "GCML," contrary to Rule 201.1 of the Rules of Professional Conduct.
6. THAT the said John W. Martin, in or about the period August 1, 2009 through November 30, 2010, while providing accounting services to "CL" and his company "SBIC," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "CL" and "SBIC," contrary to Rule 201.1 of the Rules of Professional Conduct.
7. THAT the said John W. Martin, in or about the period August 1, 2009 through December 31, 2010, while providing accounting services to "ASML," and its shareholders "CM," "S&RB," "TM," and "D&KD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "ASML" and its shareholders "CM," "S&RB," "TM," and "D&KD," contrary to Rule 201.1 of the Rules of Professional Conduct.
8. THAT the said John W. Martin, in or about the period January 1, 2007 through May 31, 2007, failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by "AC" and his company "KC," contrary to Rule 201.1 of the Rules of Professional Conduct.

Dated at Erin, Ontario, this 24<sup>th</sup> day of February, 2014.



R. SIMON, CPA, CA, DEPUTY CHAIR  
PROFESSIONAL CONDUCT COMMITTEE

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 **JOHN WILLIAM MARTIN, CPA, CA**, under Rule 201.1 of the Rules of Professional Conduct, as amended.

**TO:** Mr. John W. Martin  
42 Robin Hood Road  
Etobicoke, ON M9A 2W8

**AND TO:** The Professional Conduct Committee

**ORDER MADE APRIL 16, 2015**

**ORDER**

**IT IS ORDERED:**

1. THAT Mr. Martin be reprimanded in writing by the Chair of the tribunal.
2. THAT Mr. Martin be and he is hereby fined the sum of \$25,000 to be remitted to CPA Ontario within three (3) months from the date this Order is made.
3. THAT Mr. Martin be and he is hereby suspended from the rights and privileges of membership of CPA Ontario for a period of six (6) months from the date this Order is made.
4. THAT notice of the Decision and Order, disclosing Mr. Martin's name, be given in the form and manner determined by the Discipline Committee:
  - (a) to all members of CPA Ontario; and
  - (b) to all provincial bodies;and shall be made available to the public.
5. THAT Mr. Martin surrender his CA and CPA certificates of membership in CPA Ontario to the Discipline Committee Secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Martin.
6. THAT in the event Mr. Martin 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 six (6) months from the date of his suspension. In the event he does not comply within the six-month 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. Martin's practice and/or residence. All costs associated with this further publication shall be borne by Mr. Martin and shall be in addition to any other costs ordered by the committee.

IT IS FURTHER ORDERED:

7. **THAT Mr. Martin be and he is hereby charged costs fixed at \$144,000 to be remitted to CPA Ontario within thirty-six (36) months from the date this Order is made.**

DATED AT TORONTO THIS 16th DAY OF APRIL, 2015  
BY ORDER OF THE DISCIPLINE COMMITTEE



DIANE WILLIAMSON  
SECRETARY - DISCIPLINE COMMITTEE

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 **JOHN WILLIAM MARTIN, CPA, CA**, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

**TO:** Mr. John W. Martin, CPA, CA

**AND TO:** The Professional Conduct Committee

**REASONS**

**(Decision made January 21, 2015 and Order made April 16, 2015)**

1. This tribunal of the Discipline Committee met on August 26, 2014 to hear allegations of professional misconduct brought by the Professional Conduct Committee against John William Martin, a Member. The hearing continued on August 27, September 4, October 29, 30 and 31, December 8 and 9, 2014, and January 20 and 21, 2015. After orally rendering its decision with respect to its findings as to professional misconduct, the tribunal heard submissions with respect to penalty on March 12, 2015.

2. Ms. Alexandra Hersak appeared on behalf of the Professional Conduct Committee (PCC). Mr. Martin attended represented by his counsel Mr. Michael Kerr and Ms. Christine O'Donohue. Mr. Glenn Stuart attended the hearing as counsel to the Discipline Committee.

3. At the start of the proceedings on December 8, 2014, the parties were advised that the public representative, Mr. Barry Solway, would be unable to participate that day due to health issues. Both parties agreed to proceed in his absence and if he were unable to continue to participate in the hearing, the existing tribunal members would complete the hearing. Mr. Solway was unable to further participate, and the hearing continued in accordance with Rule 17.01(3) of the *Rules of Practice and Procedure*.

4. Over the course of the hearing, witnesses called by the parties were subject to examination-in-chief, cross-examination and redirect from counsel and questions from the tribunal.

5. This case involved Mr. Martin creating a plan that the parties agreed would be described by the term "Tax Minimization Plan", or TMP, throughout the hearing.

6. The decision of the tribunal was made known on January 21, 2015, and the written Decision was sent to the parties on January 27, 2015. The order of the tribunal was made known on April 16, 2015, and the written Order was sent to the parties on April 16, 2015. 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.

## Preliminary Motion

7. Mr. Martin brought a motion for an order that the documents obtained by the complainants, former partners in Mr. Martin's firm, and provided to CPA Ontario be excluded from evidence at the hearing. The motion was supported by a motion record admitted as Exhibit 1. Counsel for Mr. Martin submitted that the documents had been obtained illegally and improperly by the former partners, breaching Mr. Martin's privacy rights and also that the documents had been provided to CPA Ontario in bad faith, contrary to the Minutes of Settlement among the firm's partners.

8. The PCC had a preliminary objection to the motion on the basis that, as it was delivered on August 22, 2014, the motion had not been filed in sufficient time. Notwithstanding the late filing of the motion, given that the parties were otherwise prepared to argue the motion, after hearing submissions from the parties, the tribunal concluded that there was no prejudice to any party if the tribunal heard the motion and permitted the motion to proceed.

9. After hearing submissions as to whether certain documents in the Documents Brief (Exhibit 2) filed by counsel for Mr. Martin should be referenced in this part of the proceedings, the tribunal decided that the exhibit could be admitted as evidence on the motion, excluding tabs 2, 6, 7 and 8.

10. Mr. Martin testified in support of the motion and advised that the complainants had been advised on March 5, 2010 of the dissatisfaction of the other partners and that they would be expelled from the partnership on April 30, 2010.

11. Mr. Martin testified that the expelled partners had accessed documents of the firm, including information on the firm's computer and provided the "blue book" information to CPA Ontario, although that document had been sealed and expunged from the litigation proceedings.

12. Mr. Martin stated that the complainants had knowledge of his TMP in 2009 before the falling out within the partnership.

13. Mr. Martin's counsel sought to exclude the evidence provided by the two complainants on two bases. First, he submitted that they had stolen the documents, that is, they had taken electronic documents from Mr. Martin's personal computer drives, contrary to the IT policy within the firm, and hard copies from Mr. Martin's personal filing cabinets without permission. Moreover, counsel submitted that the information had been obtained by means of an illegal search, contrary to the *Criminal* Code. Second, they had breached a confidentiality provision in the minutes of settlement that had been entered to resolve litigation between the complainants and the Evans Martin firm (Ex. 2, Tab 3). It was argued that the complainants breached the confidentiality provision by releasing the documents relating to Mr. Martin to CPA Ontario. Counsel argued that, both in law and as a matter of policy, the tribunal should respect the confidentiality of these documents and exclude them from evidence.

14. Counsel for Mr. Martin stated that no complaint had been received from clients, colleagues who had participated in the plan or other partners in the firm.

15. Counsel for the PCC submitted that CPA Ontario, as a regulatory body, has a duty to protect the public and the PCC will review a complaint received from any source, and may retain an investigator. Under Rule 211, Members have a duty to report to CPA Ontario any apparent

breach of the Rules of Professional Conduct. Counsel for the PCC stated that the end result would have been the same if the documents provided by the complainants had become available to the investigators. Counsel submitted that the tribunal can hear any evidence that is relevant and reliable concerning the arrangements made by Mr. Martin in establishing the TMP.

16. The PCC also submitted on a policy level that, if the motion were allowed on the grounds advanced on behalf of Mr. Martin, other members and firms would be able to shield information from PCC in a matter or matters under investigation.

17. The PCC also relied on the decision of the Supreme Court of Canada in *R. vs. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541, to underscore the legal difference between "Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute" (Para. 23) and criminal proceedings. Although acknowledging that the rationale of the decision was not directly applicable to this case, the PCC argued that this demonstrated the need to avoid the application of criminal law principles to these proceedings.

18. The parties reconvened on August 27, 2014, and, after the tribunal had deliberated on the motion, the Chair delivered the tribunal's decision. The tribunal concluded that it could not ignore the evidence that had come into its possession. The tribunal accepted that the *Statutory Powers Procedure Act* ("SPPA") allows CPA Ontario, and subsequently the tribunal, to accept any documents that are relevant and reliable and is not precluded from doing so simply by the fact that they may have been obtained by a process that could be considered illegal in a different setting. As a result, the motion was denied.

19. The PCC advised that they would be seeking costs for the motion itself, regardless of the outcome of the hearing on the merits.

### **Allegations**

20. The following allegations were made against Mr. Martin by the Professional Conduct Committee on February 24, 2014:

1. THAT the said John W. Martin, in or about the period May 1, 2002 through March 31, 2003, while providing accounting services to "TM" and his company "TCMD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TM" and "TCMD," contrary to Rule 201.1 of the Rules of Professional Conduct.
2. THAT the said John W. Martin, in or about the period October 1, 2002 through January 31, 2007, while providing accounting services to "TW" and his company "JEW," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "TW" and "JEW," contrary to Rule 201.1 of the Rules of Professional Conduct.
3. THAT the said John W. Martin, in or about the period December 1, 2002 through

January 31, 2003, while providing accounting services to "BB" and his company "BRMC," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BB" and "BRMC," contrary to Rule 201.1 of the Rules of Professional Conduct.

4. THAT the said John W. Martin, in or about the period May 1, 2007 through May 31, 2009, while providing accounting services to "BC" and his companies "A-S A" and "242 Ontario Inc.," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "BC," "A-SA" and "242 Ontario Inc.," contrary to Rule 201.1 of the Rules of Professional Conduct.
5. THAT the said John W. Martin, in or about the period June 1, 2009 through January 31, 2010, while providing accounting services to "GC" and his company "GCML," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "GC" and "GCML," contrary to Rule 201.1 of the Rules of Professional Conduct.
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7. THAT the said John W. Martin, in or about the period August 1, 2009 through December 31, 2010, while providing accounting services to "ASML," and its shareholders "CM," "S&RB," TM," and "D&KD," failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by his clients "ASML" and its shareholders "CM," "S&RB," TM," and "D&KD," contrary to Rule 201.1 of the Rules of Professional Conduct.
8. THAT the said John W. Martin, in or about the period January 1, 2007 through May 31, 2007, failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest in that he and his company participated in and profited from an arrangement to evade the payment of tax properly owing by "AC" and his company "KC," contrary to Rule 201.1 of the Rules of Professional Conduct.

#### **Plea**

21. Mr. Martin entered a plea of not guilty to the Allegations.

### **The Case presented by the PCC**

22. Counsel for the PCC made an opening statement stating that seven of the eight allegations relate to Mr. Martin participating in and profiting from an arrangement to evade the tax properly owing by his clients. The eighth allegation involved Mr. Martin's participation in the same arrangement with a now former partner.

23. Counsel for the PCC outlined the tax minimization plan that reduced the amount of tax payable for certain high net worth clients by using loss carry-forwards from Mr. Martin's own companies. Mr. Martin would issue an invoice which would be paid in full to Mr. Martin's company by the client company. Mr. Martin would then write a cheque from his personal bank account to the client company shareholder in the amount of 75 percent of the value of the invoice. Instead of paying tax at a 50 percent rate, the client's company moved a portion of income to Mr. Martin's company, the shareholder received 75 percent back personally, Mr. Martin retained 25 percent and the Government of Canada was left out of the equation.

24. Counsel for the PCC outlined that, in the course of the hearing, she would present evidence through the two investigators appointed by the PCC, Mr. Scott Porter and Ms. Peggy Bennett. Mr. Porter would present facts found in the investigation, and Ms. Bennett would provide opinion evidence with respect to the applicability of relevant tax provisions. The PCC would also be calling Mr. Allen Church, Mr. Martin's former partner in Evans Martin, to give evidence on his personal involvement in the TMP.

25. The PCC called Mr. Porter and filed a Document Brief (Exhibit 6), which Mr. Porter referred to in the course of his evidence. Mr. Porter stated that the original complaint had been received from two of Mr. Martin's former partners alleging that Mr. Martin had provided services to client companies that were high net worth with the ultimate purpose of reducing taxable income. It was alleged that Mr. Martin's company issued invoices, and the money paid was then absorbed in Mr. Martin's company through the use of tax loss carry-forwards. A portion of the invoiced amount was then returned to the company owner.

26. Mr. Porter stated that Mr. Martin responded to the complaint, through his then counsel, indicating the plan was to reduce high rate corporate income tax through the effective transfer of non-capital losses and the business losses arose in Mr. Martin's corporations where he was the sole shareholder. Mr. Martin's response stated that all partners with the firm were aware of the TMP, including the complainants. At a subsequent interview, Mr. Martin said he couldn't be sure if all partners were knowledgeable about the plan, but Mr. Church and the two complainants were aware of it.

27. Mr. Porter stated that he and Ms. Bennett interviewed Mr. Martin on three occasions. Mr. Martin was represented by legal counsel at all interviews. Mr. Porter and Ms. Bennett also interviewed the complainants, and two TMP participants, Mr. Chalmers and Mr. Church, who were CPAs.

28. Mr. Porter, by way of background, stated that Mr. Martin had formed his practice approximately 40 years ago and worked there until it was sold to another firm in 2011. Mr. Martin was not involved in audits, but primarily focused on business and consulting type work. Mr. Martin is currently involved as a part-time CFO for a number of companies.

29. Mr. Porter referred to a description of the TMP (Exhibit 7), which Mr. Martin had confirmed was the way the plan operated. The beneficiaries of the plan included the client corporation, the client corporation's shareholders, Mr. Martin's corporation and Mr. Martin himself. By example, Mr. Martin's company "Martinco" would issue a management fee invoice to the client for \$20,000 which the client paid. Martinco would retain the cash, report income of \$20,000 and pay no corporate tax due to the availability of loss carry-forwards. The client would deduct the \$20,000 and reduce corporate tax payable by \$10,000 (50% of \$20,000). Mr. Martin would write a personal cheque for \$15,000 to the shareholders or related parties of the client corporation and Martin/Martinco would retain \$5,000. As a result of the transaction, the client company's tax payable was reduced by \$10,000. Mr. Martin benefitted because no tax was payable on the \$20,000 fee due to the claimed loss carry forwards.

30. Mr. Martin had told Mr. Porter that the clients were generally high net worth, sophisticated investors with whom he had longstanding relationships, and the plan was not generally marketed. Mr. Martin said he had explained the plan fully to the clients, prior to executing the transaction.

31. With respect to the invoices issued to the clients for management fees, Mr. Martin told Mr. Porter that while he did not have timesheets for the services rendered, there was a basis for the services, although he agreed that he would not have invoiced for them if the client was not participating in the plan. Mr. Porter was told by Mr. Martin that payments were made from his personal funds since he could tell the Canada Revenue Agency ("CRA") that he was free to do what he wanted with after-tax dollars and by making the payment personally would create a separation from his corporate account, making it difficult for CRA to detect. None of the clients involved in the plan had been the subject of a net worth audit, and there had been no audit of the plan by CRA.

32. Mr. Martin had provided copies of invoices and, where available, cancelled cheques to Mr. Porter. Based on this information from Mr. Martin, the investigator compiled a chart that reflected a total of approximately 1.8 million dollars in TMP transactions from 2002 to 2010 (Exhibit 6, Tab 3).

33. The PCC called Mr. G. Allen Church, CPA, CA as a witness. Mr. Church stated he had been a former partner in the Evans Martin firm since 1990 until it merged with his current firm in 2012. His formal title while at the firm was tax partner. His practice combined tax and general practice, predominantly compilation type engagements.

34. Mr. Church participated in the TMP on two occasions. He had a general awareness that some clients were participating in the plan, and gradually became aware of the totality of the plan through the former partner complainants. At the time of his participation, Mr. Church felt the plan was aggressive but defensible but later became concerned with the amount of the plan's activity.

35. In 2011, Mr. Church reversed the transaction in which his corporation had participated by including in a subsequent year's income the \$40,000 previously claimed as a deduction. Mr. Church repaid the money to his company and paid the associated income tax and HST to the government.

### **Submissions on Exclusion of Evidence of the Investigator as an Expert Witness**

36. Counsel for the PCC called Ms. M.W. (Peggy) Bennett, CPA, CA and filed her *curriculum vitae* with the tribunal (Exhibit 16). The PCC was seeking to qualify Ms. Bennett as an expert for the purpose of providing opinion evidence in the application of income tax procedures and matters relating to professional services provided by Chartered Professional Accountants. Ms. Bennett would be asked to provide opinion evidence on the application of the *Income Tax Act* to the facts of this case.

37. Mr. Martin's counsel brought a motion challenging Ms. Bennett's role as an expert witness as she was one of the investigators. He argued that if Ms. Bennett presented evidence as an expert witness there would be an appearance of bias that should not exist for an expert.

38. Ms. Bennett gave evidence regarding her background and qualifications, and she was then cross examined by counsel for Mr. Martin. The particular area of expertise in which the PCC sought to qualify Ms. Bennett was the application of income tax procedure matters as they relate to the professional services provided by Chartered Professional Accountants (CPAs).

39. Counsel for Mr. Martin presented a memorandum of factum and law (Exhibit 8) in support of his submission, as well as a brief of authorities to support his memorandum (Exhibit 9), and a supplementary brief of authorities – Disqualification of Peggy Bennett as an Expert (Exhibit 12).

40. Counsel for the PCC presented a written argument on the dual investigator/expert role (Exhibit 10) as well as a brief of authorities on expert evidence (Exhibit 11) to support her argument.

41. Each side presented oral summaries of their arguments.

42. Mr. Martin's counsel took the position that Ms. Bennett was not qualified to give opinion evidence regarding tax matters, as there was nothing before the tribunal to suggest that she had dealt with cases of tax evasion. Counsel submitted that Ms. Bennett is a sole practitioner with no special skills relevant to the case and any evidence provided by her would be of no assistance to the tribunal.

43. Counsel for Mr. Martin submitted that if Ms. Bennett gave evidence in a dual role, it would present issues of procedural fairness and principles of natural justice. The Member's counsel argued that the roles of an investigator and an expert witness are quite different, one of the important differences being that the expert witness role is to provide assistance to the tribunal on technical matters beyond their knowledge. He also argued that it is a difficult job to fulfil both roles appropriately.

44. Counsel for the PCC submitted that Ms. Bennett had experience with a broad range of tax analysis and services to a wide variety of clients. Ms. Bennett has an understanding of the provisions of the *Income Tax Act* that enables her to provide specialist advice to individual and corporate clients that will keep them onside of the *Act*. It was submitted that Ms. Bennett's experience over a lengthy period of time gives her a level of expertise to provide opinion evidence to the tribunal. The PCC took the position that this hearing was to determine professional misconduct rather than tax evasion, and, therefore, Ms. Bennett's level of expertise in tax evasion was not an issue.

45. Having considered the oral and written submissions of both parties, the tribunal decided to accept Ms. Bennett as a qualified expert witness on income tax matters and services. The tribunal reached this conclusion for three reasons. First, s. 15 of the *SPPA* and Rule 18 of the Rules of Practice and Procedure both permit the tribunal to accept any evidence that is relevant and reliable. The tribunal accepts that the evidence of Ms. Bennett is relevant and reliable, subject to a determination as to the weight to be given to it. However, she has the experience necessary to justify her providing opinion evidence with respect to the application of income tax procedures and matters relating to professional services provided by CPAs. Second, the cases cited to the tribunal permit witnesses to fulfil a dual role as investigator and expert: *Yazdanfar v. College of Physicians and Surgeons of Ontario*, [2013] O.J. No. 4787, 2013 ONSC 6420 (Div. Ct.) at paras.59-60 and 75. The most relevant case cited on behalf of Mr. Martin, *Deemar v. College of Veterinarians of Ontario* (2008), 92 O.R. (3d) 97 (C.A.) involved a situation where a witness had demonstrated hostility to one of the parties, which was not the case here. Third, it was well-established in the practice before the Discipline Committee of CPA Ontario, and its predecessor, that this dual role had been accepted.

46. Ms. Bennett confirmed that she had been engaged to investigate this matter, along with Mr. Porter, and to provide opinion evidence with respect to the application of the *Income Tax Act*. In the course of her investigation, Ms. Bennett had attended various interviews, including three interviews with Mr. Martin. Ms. Bennett gave evidence concerning the details provided by Mr. Martin concerning his TMP. During the course of her evidence, Ms. Bennett made reference to a brief of tax reference material (Exhibit 18) which she had prepared.

47. In Ms. Bennett's opinion, it would not be good tax planning or reasonable for an experienced chartered accountant to suggest the TMP to his clients without having a solid explanation of why the plan would work from a technical income tax point of view, not just as something "under the radar". Ms. Bennett expressed the opinion that it would not be reasonable for a chartered accountant with 40 years' experience to believe that the plan complies with the provisions of the *Income Tax Act*.

#### **The Case presented on behalf of Mr. Martin**

48. Counsel for Mr. Martin made an opening statement, describing Mr. Martin as a "relationship accountant" who, over 40 years, had been heavily involved in the business affairs of his clients and had built his career on this approach to service. The TMP was to take advantage of losses in Mr. Martin's corporation by rendering invoices to people with whom he had a great deal of contact and to whom he had provided a great deal of advice.

49. Mr. Martin was called as a witness and provided background on his former practice, the subsequent merger, his retirement from the firm and present work as part-time CFO and consultant for five clients.

50. Mr. Martin stated that he had a good working knowledge of tax due to his many years in the profession advising small and medium businesses, including some high net worth individuals. If a matter required more technical input, he would consult with one of the tax partners in the firm.

51. Mr. Martin, in the course of his evidence, provided details of the corporations in which he had an interest. Mr. Martin identified which invoices contained in the summary of tax

minimization invoices contained in the Document Brief (Exhibit 6) were actually TMP transactions. Mr. Martin provided details of the services he provided to the various clients, the invoices rendered and the cheques paid back to the clients.

52. Mr. Martin, after providing details of his involvement with each individual client and their various companies, stated it was his position that, from among the transactions identified by PCC based on their interviews with him, only TM, in a second transaction, (Allegation No.1), BC (Allegation No. 4), GC (Allegation No. 5), CL (Allegation No. 6), and Allen Church (Allegation No. 8) and their companies took part in TMP transactions (Exhibit 19). The total amount involved in these transactions was \$450,000, rather than the \$1.8 million identified previously.

### **Submissions on Admissibility of Criminal Law Opinions**

53. Mr. Martin's counsel sought to call two expert witnesses, Mr. Cherniawsky and Mr. Greenspan to testify with respect to, among other matters, their opinions as to criminal law principles applicable to tax evasion and whether the conduct in issue in this hearing constituted the criminal offence of tax evasion. The PCC opposed the tendering of the opinions of these witnesses on these issues. Both counsel presented written and verbal arguments on this issue.

54. Counsel for the PCC made submissions (Exhibit 13) that the tribunal should not allow a section of the opinion evidence of the Alberta firm Felesky Flynn LLP on the basis that it is not relevant to the matters before the tribunal and would not be of assistance to the proceedings. The opinion included discussion of criminal offences of tax evasion and of counselling tax evasion, and whether Mr. Martin or his clients would be found guilty of such offences. The PCC also requested that the tribunal not allow Mr. Brian Greenspan to provide opinion evidence concerning criminal law principles with regard to tax evasion which would not be relevant to matters at issue before the tribunal. Counsel for the PCC submitted that evidence must meet the requirements of s. 15 of the *SPPA* and Rule 18 of CPA Ontario's *Rules of Practice and Procedure*. On that basis, the tribunal may exclude from evidence anything which is unduly repetitious.

55. Counsel for the PCC submitted that the allegations are that Mr. Martin failed to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest by participating in and profiting from an arrangement to evade the payment of tax properly owing by clients. This case is not about whether Mr. Martin is guilty of the criminal offences of tax evasion or of counselling tax evasion. There is no allegation that Mr. Martin has committed a criminal offence.

56. Counsel for Mr. Martin submitted that in order to disprove the allegations of tax evasion, the evidence of the experts in this complex area of law would assist the tribunal in understanding the elements of the offences (Exhibit 14). Counsel submitted that the PCC was attempting to prevent Mr. Martin from calling Mr. Greenspan, one of Canada's leading criminal lawyers, on the basis his evidence would be unduly repetitious, and to exclude key aspects of the Felesky Flynn report. This would contravene Mr. Martin's right to defend himself and thwart natural justice.

57. Having considered the written and oral submissions of both parties, after deliberation, the tribunal decided to allow Mr. Cherniawsky and Mr. Greenspan to testify. The tribunal decided to allow the opinions of both Mr. Cherniawsky and Mr. Greenspan on the criminal law issues to be heard on the basis of their conclusion that the evidence could provide the tribunal

with a better understanding of the facts in this case. Moreover, the tribunal concluded that the distinction between the positions taken by the parties with respect to the nature of the issue to be determined by the tribunal was a fundamental issue in the hearing and required the tribunal to have a full record setting out the evidentiary foundation related to both the Member's and the PCC's position.

58. Mr. Martin called Mr. Donald Cherniawsky, a lawyer and chartered accountant, a partner in the law firm of Felesky Flynn LLP in Edmonton and Calgary. Mr. Cherniawsky's background and credentials were set out in his *curriculum vitae* (Exhibit 20). Mr. Cherniawsky stated that his firm mainly deals with tax planning for owners and businesses and acts as tax counsel for small Alberta CPA firms, including assistance with tax disputes arising from Revenue Canada audits.

59. The tribunal, after reviewing Mr. Cherniawsky's qualifications and experience in income tax planning, including tax minimization plans, Revenue Canada audits and tax disputes and tax evasion issues, accepted Mr. Cherniawsky as an expert witness.

60. During the course of his examination, counsel for Mr. Martin referred Mr. Cherniawsky to his expert report (Exhibit 21), which contained his opinion on whether the conduct of Mr. Martin with respect to the TMP constitutes counselling a tax situation contrary to the *Income Tax Act*. Mr. Cherniawsky stated that his conclusion was that Mr. Martin was not counselling income tax evasion. The basis for his conclusion was that in order for the offence of counselling income tax evasion to be proven in court, the recipients of the statements from Mr. Martin would have had to have known that they were or likely would be committing income tax evasion.

61. Mr. Cherniawsky stated that Mr. Martin's corporations were trying to use up tax losses and Mr. Martin was using his own after-tax paid funds as a way of transferring money back to the individuals. There was no income tax evasion on the part of Mr. Martin or his loss corporations because there was no tax understatement. Mr. Cherniawsky stated that there is nothing illegal about aggressive tax planning and taxpayers are permitted to engage in a plan for the sole purpose of deferring, reducing or eliminating tax.

62. After the parties agreed that the Expert Report of Brian Greenspan would exclude the opinion on illegal search and seizure (Exhibit 22), Mr. Martin called Mr. Brian Greenspan to provide opinion evidence as to whether Mr. Martin's promotion of the TMP to his clients constituted the offence of counselling tax evasion. Mr. Greenspan's report included information on his law firm, his background and experience.

63. Mr. Greenspan stated that his views were based on the documents he reviewed, including the opinion provided by Felesky Flynn LLP, from a criminal law perspective. In his opinion, Mr. Martin's conduct did not involve criminal offences of tax evasion, counselling tax evasion, or counselling the offence of tax evasion not committed, given the absence of *mens rea* and the absence of any *actus reus*. Mr. Greenspan opined that it would be improbable that the Crown would proceed criminally against Mr. Martin as there would be no reasonable prospect of conviction.

64. In Mr. Greenspan's view, Mr. Martin believed that his TMP did not contravene any specific provisions of the *Income Tax Act* and that the transactions legitimately minimized tax. Mr. Martin had already paid tax on the funds that were the basis of the cheques he wrote to the participants, and in Mr. Martin's view, these cheques were gifts or donations. Mr. Martin believed these transactions were permissible and that the invoices issued for management fees

were reasonable for the actual time he spent assisting the client corporations.

65. In cross-examination by counsel for the PCC, both witnesses acknowledged that their opinion as to Mr. Martin's state of mind was based on representations to that effect made by Mr. Martin.

### **Final Submissions of the Parties**

66. Counsel for the PCC submitted that the tribunal must determine if the evidence that has been presented is clear, cogent and convincing, and, on the balance of probabilities, supports the allegations that the Member committed misconduct by failing to maintain the reputation of the profession, and its ability to serve the public interest. The PCC has alleged that Mr. Martin breached Rule 201.1 by participating in and profiting from an arrangement to evade the payment of taxes properly owing by his clients and their companies.

67. Counsel for the PCC stated that the mechanics of the plan are not in dispute and have been summarized by several witnesses, including Mr. Martin. The total amounts invoiced to the various clients, confirmed by the investigators and Mr. Martin during the course of the investigation, was 1.8 million dollars. During the investigation, an extensive matching process was undertaken where confirmed invoices were tied to Mr. Martin's books and records, and Mr. Martin determined which invoices related to plan transactions. This was an extensive investigation, with three interviews being conducted over a period of six months, and throughout the process Mr. Martin was represented by legal counsel.

68. Counsel for the PCC submitted that there are serious questions about Mr. Martin's credibility, as he was content to give one set of facts to CRA and another to the investigators with respect to the transactions. Counsel noted that, during Mr. Martin's testimony before the tribunal, he had stepped away from certain admissions he made to the investigators and had provided the tribunal with a different version of events concerning the process of identifying plan transactions and plan participants.

69. Counsel for the PCC submitted that Mr. Martin's actions are professional misconduct and that he should be found guilty of the allegations.

70. Counsel for Mr. Martin submitted that neither Mr. Martin nor his clients engaged in tax evasion, and Mr. Martin did not engage in counselling tax evasion. Counsel for Mr. Martin stated that based on the expert evidence of Mr. Greenspan and Mr. Cherniawsky that there was no tax evasion by the participants and therefore no counselling of tax evasion, Mr. Martin should be found not guilty on every allegation.

71. Counsel for Mr. Martin submitted that Mr. Martin, after 40 years in practice, has no prior disciplinary history, his clients have no issue with CRA and was a founding member in a highly-ranked firm. The TMP was developed by Mr. Martin when aggressive tax plans were popular. The plan was reviewed and approved by a conservative tax specialist who Mr. Martin knew and trusted. The invoices issued by Mr. Martin to each participant were reasonable for the services performed, and all invoices and payments were documented. Mr. Martin had used his own funds for payback to the clients as he believed that he could dispose of his own personal tax paid funds as he chose.

72. Counsel for Mr. Martin stated that the plan was limited to those people who had

approached Mr. Martin about tax relief, and that there was no reason to think Mr. Martin, or the other CPAs involved, would risk their licences or designations by engaging in any form of tax evasion.

### **Decision**

73. After deliberating, the tribunal announced the following decision on January 21, 2015:

THAT having seen, heard and considered the evidence, the Discipline Committee finds John William Martin guilty of Allegation Nos. 1 and 2, and not guilty of Allegation Nos. 3, 4, 5, 6, 7 and 8.

### **Reasons for Decision**

74. Before deliberating on the specific allegations and the surrounding evidence that had been provided at the hearing, the tribunal had to resolve two preliminary issues:

- (a) did the PCC have to prove professional misconduct based on the particulars provided by the PCC or did the PCC have to prove the criminal offence of counselling tax evasion; and
- (b) how should the terms actual knowledge, willful blindness, recklessness and negligence be defined for the purposes of this proceeding.

#### *Professional misconduct vs counselling tax evasion*

75. During the hearing, the PCC submitted that the tribunal was being called upon to determine whether the evidence that had been presented was clear, cogent and convincing, and on a balance of probabilities supports the allegations that the Member committed professional misconduct by failing to maintain the reputation of the profession and its ability to serve the public interest.

76. Counsel for Mr. Martin countered that, in order for the tribunal to find that Mr. Martin committed professional misconduct, the PCC must prove, on a balance of probabilities, with clear, cogent and convincing evidence that Mr. Martin committed the criminal offence of counselling tax evasion.

77. Counsel for the PCC referred to the decision in *Stevens and Law Society of Upper Canada*, (1979) O.J. No. 4546, in which the Divisional Court (Hartt, Reid and Cory, JJ.) stated the following proposition at paragraph 22:

The charges brought against a professional person by his governing body should not, in most cases, be approached as though they were counts in an indictment alleging that he committed an offence or offences contrary to the Criminal Code. The essence of the discipline hearing will be to determine whether or not there has been professional misconduct.

78. However, the tribunal recognized that a determination as to the application of this proposition turned, in part, in this case on the meaning of the word “evade” in the particulars of professional misconduct alleged against Mr. Martin. The PCC submitted that “To take the word “evade” from the particularization, and insist that absent proof of a criminal offence of tax

evasion, no misconduct can be proved is the overly technical approach, the Divisional Court says, is incorrect. The words and the particulars have meaning. They have meaning in the *Criminal Code*, certainly. They have meaning in the *Income Tax Act*, and they have plain language meaning, but it is about the conduct. It is about the misconduct.” (Jan 20, 2015 transcript pages 47-48)

79. Mr. Martin’s counsel countered that Ms. Bennett had testified that the issue as far as she was concerned was whether Section 239 of the *Income Tax Act* (referring to tax evasion) could be applied. Counsel submitted that this concession confirmed his position that a finding of the criminal conduct constituting tax evasion had to be proven if there was to be a finding of professional misconduct on these particulars. He went on to review the expert evidence of Mr. Greenspan and Mr. Cherniawsky that, in their opinions, even on a balance of probabilities, the only result the tribunal can reach is not guilty upon every charge because, in their view, there was no counselling of tax evasion by Mr. Martin (as defined as a criminal offence). Counsel further submitted that this appears to be the first time that the Discipline Committee has heard a tax evasion case in the absence of a certificate of conviction or a guilty plea. (January 20, 2015, transcript, page 53) This submission presumed that the characterization of the conduct advanced by Mr. Martin’s counsel was that a finding of professional misconduct was premised on a finding of criminal tax evasion.

80. After reviewing the arguments outlined above, the tribunal concluded that criminal tax evasion need not be proven to establish professional misconduct before the tribunal. The tribunal accepted the position put forward by the PCC, namely, that the issue before the tribunal was whether professional misconduct had been proven, not whether the criminal offence of counselling tax evasion had been proven. The tribunal accepted that, while another choice of language may have been preferable, the use of the term “evade” in the particulars does not equate with a requirement that tax evasion be proven as a precondition to a finding of professional misconduct. The term “evade” has a common usage, or dictionary definition, that does not necessarily refer to the criminal offence.

*Definition of actual knowledge, willful blindness, recklessness and negligence*

81. Throughout the course of submissions by the parties, and the evidence of the expert witnesses called on behalf of Mr. Martin, there were numerous references to the level of knowledge that needed to be established on the part of Mr. Martin to ground a finding of professional misconduct in the circumstances of this case. As part of the argument that the criminal offence of tax evasion had to be established, Mr. Martin’s counsel argued that the tribunal had to be satisfied that Mr. Martin had the necessary intention in relation to the offence, specifically that he either had actual knowledge of or was willfully blind to the elements of the offence. On the other hand, the PCC submitted that this level of knowledge or intention was not required, although counsel also submitted that Mr. Martin had been dishonest in structuring the TMP.

82. The PCC submitted that the tribunal needed to give primary consideration to Rule 201.1 of the Rules of Professional Conduct, which identified the alleged misconduct as a failure to “maintain the reputation of the profession and its ability to serve the public interest.” In her submissions, counsel for the PCC reviewed the decision in *Law Society of Upper Canada v. Kazman* case (2008) L.S.D.D. No. 46, 2008 ONLSAP (L.S. A.P.), emphasizing paragraphs 46 and 47:

. . . A licensee accused of professional misconduct may try to evade responsibility by claiming that he did not have actual knowledge of both elements and thus did not 'knowingly' engage in the risky behaviour and did not 'knowingly' intend the adverse consequences. If that does not work (i.e. he is facing a finding of willful blindness – the imputation of actual knowledge of both elements), he may try to argue that he is less culpable because he was 'merely reckless' (i.e., while he had actual knowledge of the risk (the first element), he did not have actual knowledge of the possible consequences of engaging in the risk (the second element)), hoping that a finding of recklessness will lead to a lower penalty than a finding of willful blindness. It will almost always be a vain hope.

In the administrative law sphere of the Law Society's regulation of its licensees, there will normally be little difference in culpability or sanction whether the licensee is willfully blind or reckless. While it may be possible to argue successfully that there is a difference in some cases, such arguments will fail in almost all cases. This is so because, even if a wrongdoer, who knowingly engaged in professional misconduct, can show that he did not know, by being reckless or cavalier, how or whether adverse consequences would result, the public interest is harmed whether or not he turned his mind to the possibility or exact form of the adverse consequences. The public relies on the licensees of the Law Society not to engage in professional misconduct in the first place, precisely to avoid the harm, or even the risk of harm, of such misconduct...

83. During the tribunal's deliberations, the tribunal asked that the hearing be reconvened on January 21, 2015 so that independent counsel to the tribunal could advise the tribunal with respect to the question of degrees of knowledge in terms of actual knowledge, willful blindness, recklessness and negligence. He advised the tribunal of the scope of those terms in the following way. He referred to the decision of the Law Society Appeal Panel in *Purewal vs. The Law Society of Upper Canada*, 2009 ONLSAP 10 (CanLii). That tribunal summarized the law regarding the definitions of those terms as follows at paragraph 31:

...Willful blindness and recklessness are two states of mind that are tantamount to knowledge. Put another way, they serve as proxies for proving actual knowledge but their meaning must be correctly understood...

Willful blindness means that a licensee actually suspects the dishonest activity, but deliberately refrains from making further inquiries for fear of confirming those suspicions. Recklessness means the licensee is aware of the risk that the activities in which he or she is participating or assisting are dishonest, but continues on despite the risk. It is obvious why these states of mind, properly understood, are tantamount to knowledge. Where they exist, the licensee either actually suspects fraud and deliberately refrains from confirming it or sees the danger that this is fraud, but takes the chance and proceeds anyway...

84. Independent counsel also advised the tribunal that the issue could arise in two ways. In light of the submissions made by the parties with respect to what needs to be established, if the tribunal accepts the position of the PCC that tax evasion as a criminal offence does not need to

be established, then the distinction between types of knowledge would arise on the consideration of penalty whereas if the tribunal accepts the position of the defence, then the issue would arise with respect to a finding of professional misconduct

85. Independent counsel further advised the tribunal that the other state of mind which is not tantamount to knowledge is negligence. That is the situation where the Member ought to have known certain information but did not subjectively know that. (January 21, 2015, transcript, pages 4-5)

86. Following the provision of this advice, counsel for both the PCC and Mr. Martin were asked for submissions. Counsel for the PCC had no further submissions on the point. Counsel to Mr. Martin first referred the tribunal to the Felesky Flynn report (exhibit 21) co-authored by Mr. Cherniawsky, who on page 34 states that "Willful blindness is, stated simply, deliberate ignorance that is tantamount to knowledge. It exists where an accused person suspected a fact to be true, realized that it was probably true, but refrained from obtaining confirmation because the accused person want to be able to deny knowledge. However, willful blindness is distinct from recklessness, which merely involves knowledge of a danger of risk or a marked departure from the ordinary standard of care, whereas wilful blindness is functionally equivalent to knowing that the risk in question has materialized."

87. In the view of this tribunal, it is not necessary to consider the various forms of knowledge in determining whether the actions of a Member constitute professional misconduct, where it has been alleged that the Member has failed to maintain the reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1. This Rule prohibits a broad range of conduct, reflecting the obligations imposed on Members as a result of the trust placed on Members by the public. The reputation of the profession is not only damaged by the deliberate conduct of a Member; it is also damaged where a Member fails to conduct himself in accordance with the rules and the level of conduct expected of all Members. The Member's state of mind can influence an appropriate penalty, but it does not impact our determination of whether Mr. Martin has engaged in professional misconduct.

#### *Consideration of the Evidence*

88. The tribunal reviewed the allegations that had been laid by the PCC against the Member and the evidence that had been presented at the hearing. Our conclusions are based on all of the evidence that we heard and the weight that we assigned to it. The tribunal recognized that there were conflicting versions of some events in the evidence, either between witnesses or between versions given by one witness. Although a resolution of all of these issues of credibility issues was not required for the purposes of these reasons, the tribunal has made findings of credibility on the evidence where necessary to its decision.

89. The tribunal considered the background to this matter that the allegations against Mr. Martin arose from a complaint letter sent by two former partners of his in 2011. This letter alleged that Mr. Martin was providing invoices to companies, but the ultimate purpose of the invoices was to reduce the taxable income of the companies with the intent of sheltering income in companies that he owned that had large non-capital losses. The amounts of such alleged invoices were substantial.

90. The TMP involved transactions with a few high net worth individuals who felt that they

were paying too much tax. It was essential that the taxpayer would be paying approximately 50% or thereabouts of tax on his corporate income for the plan to be beneficial. Mr. Martin owned corporations that had substantial non-capital losses and these losses would eventually expire unless they were used in some manner.

91. The framework of the TMP was not seriously contested during the hearing. Mr. Martin's plan was that one of his companies would invoice the taxpayer corporation for services. These services were usually provided, but the quantum of the invoice could be hard to justify. No time sheets or records had been kept to support the amount of the invoices. The taxpayer/client corporation would pay the invoices and deduct them in their statements, thereby receiving a deduction for tax purpose, saving tax at 50%. Mr. Martin's company would receive the income and record it – but would not pay any tax on this income due to the utilization of the non-capital losses available. The second part of the plan was that Mr. Martin would then write a personal cheque for 75% of the invoiced amount to the shareholder of the taxpayer corporation. Using this series of transactions, the tax savings were split 50-50 between the taxpayer corporation/shareholder and Mr. Martin/Mr. Martin's corporations.

92. The points of departure between the parties were the characterization of the TMP and the amount of transactions that were included in the TMP. Mr. Martin's rationalization for the cheque back to the shareholder was that he could do as he pleased with his own after tax funds. He also viewed the two transactions – the invoice to the corporation and the cheque back to the shareholder as being two separate transactions that were not related.

93. The tribunal did not accept Mr. Martin's characterization of the plan in these terms based on its consideration of all of the evidence. The tribunal was unable to reconcile this innocent characterization with Mr. Martin's acknowledgements at his interview with the investigators on June 11, 2013, and, in particular, his admission that the invoices were only issued as part of the TMP. At that time, Mr. Martin conceded the following:

**....This has to stand on its own, I understand that. I'll wear it. I got to wear it, I'll wear it. I'm a big boy. And there's nobody who did this but me. My clients may have asked me, my clients may have encouraged me, they participated, (AC) may have asked me, but I was the architect. I understand how it operated. And I was always (inaud) CRA, but sitting here with you, it is what it is. There is no defence.**

Q. So you're saying there's no defence as a CA but there is in front of CRA?

A. I'm saying that – no, I'm saying I had a position. if I had to take a position with CRA as to why this in my mind, okay?

Q. Okay. That was the position.

A. Yes. That's all I was saying. I never had to because it never got challenged"

Q. Then why – when we're just talking CRA, why delay payments and – and –

A. Because that was all part. (Inaud) CRA got one cheque one day to the next, okay?

Q. No, I understand. But part of what?

A. Part of my just – if I ever had to support it with the CRA, that was –

**Q. You said – last time you said the reason that you did it was – well, it's paraphrasing to sum up – was to make it difficult to audit**

**A. From CRA's perspective**

Q. Yeah. Yeah.

A. Well that's just the way – yes.

Q. Right here.

A. Yeah (Inaud)

**Q. Right. But you made it more difficult for them to figure it out.**

**A. Yes.**

Q. And that's what I'm saying. Why did you do that?

A. I guess to make it more defensible with CRA if I had to. But no different than trying to make an argument on the justification of the amount of the invoice and for what services rendered.

Q. So here, for us today, you're acknowledging then that those invoices were tax driven –

A. Yes

Q. – and they weren't reasonable?

A. I'm not saying they weren't – weren't reasonable in whose eyes?

Q. What do you mean?

A. Well my invoices to (JW) were reasonable, given the amount of work I did, given the fees that (EM) got paid, okay: 25 percent of his gross rent for what I did, and then certainly as we get into the difficult years. I don't know, Scott. How do you – how do you define "reasonable"?

**Q. Well, would you have issued the invoice if there wasn't going to be a tax saving?:**

**A. The answer is no. The answer is no. Let's call a spade a spade.**

**Q. Do you see where that is where the problem is?**

**A. I understand.**

(page 48-51, emphasis added.)

94. When Mr. Martin was cross-examined on portions of this extract, he frankly did not dispute that he had made those statements (transcript of October 31, 2014, pp. 125-130 and 135-137) or that the transactions were wholly tax-driven. He did contend, however, that these comments referred to a situation where he was asked about the two parts of the transaction separately, and if he was asked about the entire, two-part transaction, he would have been candid with CRA. Based on a plain reading of his responses, and the difficulty in reconciling his interview responses with the explanation offered at the hearing, the tribunal rejects Mr. Martin's testimony on this point.

95. It was also significant to the tribunal's assessment of Mr. Martin's characterization of the TMP whether he had a financial motivation for engaging in the TMP. In his evidence at the hearing, Mr. Martin denied that was his motivation (transcript of October 31, 2014, pp. 175-176). However, this evidence conflicted with his interview with the investigators on May 13, 2013, where he acknowledged this was part of the motivation:

Q. So in the instances that we've classified as tax, a standard question that I would normally ask is: Just looking back now, would you do this again, or how do you view this now with the benefit of hindsight?

A. (Inaud) here. Some of this (inaud) because I needed the tax savings, number of investments I was in, particularly when we got into trouble in 2007.

Q. So you were having some financial pressures?

A. Yes. Yes" ( pages 88 – 89)

96. While it is unclear the extent to which Mr. Martin's financial circumstances motivated his participation in the TMP, the tribunal did not accept his evidence that it was not a factor given the conflict with his earlier statement and concluded that the prospect of tax savings impacted his actions around the TMP.

97. There was also a significant discrepancy between Mr. Martin's statements to the investigators and his evidence at the hearing with respect to the value of the transactions that were included in the TMP. During the interviews with the investigators, which took place on May 13, 2013, June 11, 2013 and October 9, 2013, Mr. Martin and the investigators mutually agreed that the list of invoices subject to the TMP totalled \$1,801,000. This amount was less than the amount in the complainants' letter due to duplication and inclusion of *bona fide* invoices. But, it was clear in the evidence that this amount was agreed to by Mr. Martin at the time.

98. During Mr. Martin's testimony in chief, he provided an amended list of invoices involved in the TMP totalling \$450,000. The tribunal reviewed both Mr. Martin's evidence at the hearing as well as the excerpts of Mr. Martin's interviews with the investigators, which were introduced through the testimony of both of the investigators. In particular, the tribunal considered the discrepancy between the lists provided at the hearing and in the interviews the previous year in the analysis with respect to each client's transactions below, where that discrepancy was relevant to the tribunal's decision.

*Allegation No. 1: Evidence before the Tribunal*

99. The PCC alleged that two invoices, dated May 29, 2002 (\$40,000) and February 10, 2003 (\$80,000), were part of the TMP. During his interview of May 13, 2013, Mr. Martin was not sure if those invoices were part of the TMP (page 84). However, in a later email to the investigator, dated May 24, 2013, Mr. Martin, while discussing the chart of invoices that he acknowledged were part of the TMP, added " 8. The only additions to prior chart would be . . . (TCMD) .. for \$80k in 2003 and 40 k in 2002.." (page 405 of Exhibit 6)

100. During his evidence in chief on October 30, 2014 (p. 159), Mr. Martin unequivocally rejected that the May 2002 invoice was part of the TMP, on the basis that there was no cheque back to TM, the shareholder of the client corporation. By contrast, he acknowledged, as he had in the interview, that the second invoice of February 10, 2003 for \$80,000, was a part of the TMP (p. 160). In the context of that invoice, he described how the TMP was conceived:

- Q. I want to take you to the genesis for the tax minimization plan. What led to what is now known as the plan?
- A. The other issue [TM] had in 2002 was, because he had...when he sold the last portion of [a company], it had created a significant amount of income and, correspondingly, a significant amount of tax liability in [TM Limited]. And he was looking at...some he found on his own, some he was being presented with various tax deferral plans, various tax shelter plans, et cetera. He asked me to look at some of them, not all. He, more often than not, would deal with his accountants and tax advisor.

When I saw the situation he had, and I knew I had losses in my company, I sat and thought, "Is there a way that I can utilize my losses, and at the same time give [TM] a deduction?" And I came up with the concept that, because I had rendered services in 2002 and because I had at one point told [TM], "I should earn a success fee for the amount of money I got you for your...or assisted in getting you your last 25 percent disposition of [the company], I could charge you

anywhere from 3 to 5 percent," because that was the going rate that an M&A specialist would earn on a transaction like this.

So, I said, "(TM), I think I could comfortably and reasonably present you with an invoice for \$80,000, and you would get to deduct that. I will include it in my company income" And then, as per the plan, I determined that any tax paid money that I had in any of my investments, my accounts, and unrelated to Mr. Moore and this transaction, I had always the position that I was free to do whatever I wanted with that money in terms of donating it, gifting it, giving it away, because I had already paid tax on it. And as long as I personally wasn't trying to deduct that gift or donation or whatever payment I was making, I was free to do so.

And the conclusion I came to was that I could write (TM) a cheque for \$60,000 from your own money, and it was not any concern to anyone except myself. And that was the genesis of the plan."

Q. Did you speak with (TM) after you had formulated this plan?

A. I sat with (TM), explained it to him, much in the same manner I just explained it to you, and he said "it sounds okay, but I want to check it with my advisors," and he did so." (pp. 161-163, October 30, 2014)

101. It is not disputed on the evidence that the second invoice was part of the TMP. However, the tribunal finds, on a balance of probabilities, that the 2002 invoice was also part of the TMP. As counsel for Mr. Martin argued during closing submissions, it can be difficult for one to remember events of several years past. However, in the tribunal's view, it is more likely that Mr. Martin would have had a clearer recollection at the time of his interview in 2013, and at the time he subsequently sent the email to the investigators in May 2013. His responses at that time were not given under pressure; he had the benefit of counsel and he had an opportunity to consider the issue, review documentation and provide a considered response. In the absence of any corroboration to support his subsequent assertion that the invoice was not part of the TMP, this tribunal finds his original statement to investigators more reliable.

*Allegation No. 1 decision:*

102. Mr. Martin purported to rely on his client telling him that he contacted his own tax advisors regarding the planned transactions. Mr. Martin did not contact the client's tax advisor directly nor did he seek advice from his own tax advisor. In response to a question from a member of the tribunal, Mr. Martin confirmed that he did not discuss this plan with his tax people prior to outlining the plan with TM. At the same time, Mr. Martin testified that, although he had a good knowledge of tax, he was not a tax expert himself and testified that he looked to others for advice on technical issues; however, in regard to the transactions related to this allegation, he did not do so.

103. Based on the evidence, the tribunal finds that Mr. Martin engaged in professional misconduct when he proceeded with the TMP without discussing the validity of the plan directly with a tax advisor. Given the acknowledged limitations on his knowledge, Mr. Martin was obliged to inquire about the validity of the TMP before entering the arrangement, particularly with a client. The tribunal has concluded that even negligence, or an absence of due care, by an accountant in participating with a client in an arrangement of this nature is sufficient to ground a finding of professional misconduct on the basis that it constitutes a failure by Mr.

Martin, or any accountant, to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest.

*Allegation No. 2: evidence before the tribunal*

104. The transactions that are the subject of the second allegation involve Mr. Martin and a long-time client, TW. It became very clear that the relationship between Mr. Martin and TW was a special relationship, and that Mr. Martin had helped TW out a number of times with his expertise in several areas.

105. Allegation No. 2 involved transactions through the period from October 1, 2002 to January 31, 2007, involving his client TW. Mr. Martin's testimony in his interviews of 2013 differed with his testimony in chief on October 30-31, 2014 with respect to whether these transactions were part of the TMP.

When Mr. Martin testified in chief on October 31, 2014 (pp. 70-71), he denied that any of the transactions identified in the allegation and in the investigators' evidence for the period from 2002 to 2006 were part of the TMP on the basis that he did not rebate any invoice amounts to TW.

106. This contradicted the evidence provided by Mr. Martin during the course of the investigatory interviews, where he included the transactions before 2007 in the TMP. In his interview of May 13, 2013, Mr. Martin, when discussing TW, had the following exchange with the investigator, Mr. Porter:

Q. So with respect to [TW] there was some earlier –

A. Yes, very much so. You have the chart there.

Q. See, here's – just so you know –

A. And that's the way I did that. You know, I was asked, and it was obvious to me you had these other calculations. The calculations involved tax . . . But the relationship with [TW] changed in 2006.

Q. We need to, um . . .

A. And (TW) initially, yes, was part of that plan.

Q. We're probably going to need a revised chart of –

A. Okay. I mean, I can give you the answer this morning. If you want to make the changes, I can tell you which ones.

Q. Okay.

A. If you want to do that.

[Mr. Martin's counsel]: I think it's important two things happen. You can give him the answers, John, but we just want to make sure that we then provide a revised chart. If you don't mind?

Ms. Bennett: Yeah, okay. So on –

[Mr. Martin's counsel]: John, you agree with that?

Mr. Martin: No, you know what? I had better... You know what? What I had better do is take my time and go through this and not do this in two minutes this morning, okay?

Ms. Bennett: Whenever you can get back to us with that.

Mr. Martin: And that's not an attempt, but there's a lot of information up here and there's a lot – it's a lot of years. If you're going to ask me to go back, there may have been three or four instances that I had an involvement with a lot of these entities that didn't relate to tax at all, but there may have been one where I did, okay?" (page 30-32)

107. This excerpt was put to Mr. Martin in cross-examination (transcript of October 31, 2014, pp. 97-103), and he acknowledged that he was trying to be careful, but the answer was based on the information he had at the time. He confirmed in other instances in the May 2013 interview with investigators that the transactions up until 2006 were tax driven, although he characterized the payments back to TW as loans: transcript of October 21, 2014, pp. 57-58, 63-64 and 105.

108. The characterization of the payments back to TW as a "loan" mirrored his characterization with respect to his subsequent dealings with Mr. Church earlier in the May 2013 interview (p.43). In that context, it was significant to the tribunal that, while Mr. Martin used the term "loan", he did not expect it to be repaid. In later testimony, he testified that the term loan would be used if questioned by CRA, but it was really a gift. In his evidence at the hearing, Mr. Martin acknowledged that, although he had described the transfer of funds in some of these transactions as "loans", they were not loans: transcript of October 21, 2014, pp. 121-123.

109. At the same time, Mr. Martin conceded during his June 11, 2013 interview, with the investigators, among others, that he only generated the invoices for the purposes of the TMP and he arranged the transaction to be difficult for CRA to audit (pp. 49-51).

*Allegation No. 2 decision:*

110. For several reasons, the tribunal was unwilling to accept Mr. Martin's evidence at the hearing that all of the transactions prior to 2006 were not part of the TMP. As noted previously, in the absence of corroboration for the revised position taken at the hearing, Mr. Martin's evidence at the interviews was closer in time to the events and more reliable. The difference in Mr. Martin's testimony between the interviews in 2013 and the hearing on 2014 was explained – with respect to the transactions in 2005 and 2006 - by the additional information that was provided to counsel for the PCC by Mr. Martin's counsel in their letter of June 18, 2014. The documentation provides alternative explanations for payments that were made to TW by Mr. Martin in 2005 and 2006, as a result of changes in their relationship, as of 2004, but this documentation does not provide an explanation for the transactions in 2002-2003. Without corroboration, the tribunal sees no basis to prefer Mr. Martin's evidence at the hearing regarding these transactions to the representations he made in the investigation interviews. In addition, Mr. Martin's ambiguity in his description of the payments in this context and his willingness to present different versions to CRA gave the tribunal reason to question the accuracy of his evidence. His apparent willingness to be flexible in how he described these payments, depending on the circumstances, did not give confidence in the accuracy of his uncorroborated recollections at the hearing.

111. As a result, the tribunal concluded that the 2004-2006 transactions were not part of the TMP; however, on the basis of Mr. Martin's evidence in 2013, the tribunal concluded that the two transactions totaling \$171,000 in the period of 2002 to 2003 were part of the TMP.

112. As detailed in the tribunal's reasons with respect to Allegation No. 1, Mr. Martin did not obtain a professional tax opinion on the plan prior to engaging in the TMP for these transactions or have a reasonable basis at that time to believe that the transactions were defensible despite being suspect on their face. Given that the transactions, at best, presented a risk that they were in violation of the *Income Tax Act*, and inappropriate transactions for an accountant to involve himself in, the tribunal found Mr. Martin had committed professional misconduct with respect to

Allegation No. 2.

*Allegation No. 3 evidence before the tribunal:*

113. In his email on May 24, 2013, to the investigators (Exhibit 6, p. 405), Mr. Martin acknowledged that the 2002 invoice to BRMC for \$40,000, which is the subject of Allegation No. 3, was part of the TMP. During his in-chief testimony of October 31, 2014, Mr. Martin indicated that this same invoice to BRMC was not a TMP transaction, contrary to what he had advised the investigators in his interview, and offered an explanation for this discrepancy:

“Q. There is an invoice to (BRMC) dated December 15, 2002 at page 602, \$40,000

A. Correct

Q. And it says it is for consulting services in connection with reviewing various financing proposals and investment strategies related to privatization of (xxxx)

A. Correct

Q. Was there any issue in terms of your invoice when it was rendered to (BB)?

A. No

Q. Did he or his company pay that?

A. Yes

Q. During the investigation, it appears to me that you told the investigators you thought (BRMC) was likely a TMP transaction.

A. Correct

Q. Why did you say that?

A. I assumed because invoices in that period...all of this invoices that had been presented by the complainants, their representation was that they were tax minimization invoices. As I worked through the process with the investigator, we began to eliminate certain invoices where there were obvious duplicates and whatever. When during the investigation it became.. at the same time, we were matching cheques as we best could. When it became apparent that I would be unable to obtain cheques from my bank beyond 2007, nobody asked any questions, there didn't seem to be any need to push back and look at any of the transactions for 2006 and prior. I was having a very difficult time just working with the 2007 period because it was a lot of invoices, a lot of companies. So I didn't look at it any further and I didn't go any further other than to say there may have been, probably, but I think I at some point said I don't know.

Q. Go to the next page, then which is titled “Quicken Law File” and it says “May 2003”. The first entry refers to (BRMC). Can you explain what that is?

A. That is the deposit in my company's account of the cheque that he had given me for payment of his 2002 invoice.

Q. And then if you go to the next page, which says “JWM BMO Quicken”, what does BMO refer to?

A. That is Bank of Montreal, my personal account.

Q. All right. And if you go down four entries...

A. There is a cheque that I wrote to (BB) for \$40,000 at the same time that he paid the invoice for my consulting fees.

Q. Why were you writing a cheque to (BB) for \$40,000?

A. Because the agreement was that I would repay him the \$100,000 that he had invested in [xxxx] as part of the buyout.”

*Allegation No. 3 decision*

114. With regards to Allegation No. 3, the tribunal was satisfied on all of the evidence that it was a *bona fide* transaction and did not have the element of the 75% payment back to the shareholder. The tribunal accepted the evidence of Mr. Martin with regard to this payment due to the corroborating documentation referenced above. As a result, this allegation was not proven as there was no transaction that formed part of the TMP.

*Allegation No. 8: evidence before the tribunal*

115. Given its significance to the tribunal's analysis of the transactions that occurred after the transactions involving AC, it is important to consider this allegation out of sequence, but in chronological order. Both the PCC and Mr. Martin agreed that Mr. Church and his company, KC, participated in the plan. They both accept the evidence that there were two invoices that were part of the plan and that each invoice was for \$20,000, for a total of \$40,000.

116. The participant involved in the transactions that are the subject of this allegation is Allen Church. Mr. Church was the senior tax partner at EM. Under cross examination, Mr. Church acknowledged that his approach to tax is on the conservative side. By his participation in the plan, he gave tacit approval to the TMP. Under cross-examination, he maintained steadfastly that the TMP was not tax evasion or otherwise inappropriate.

117. The tribunal acknowledges that Mr. Church, upon reflection, ultimately reversed the transaction in which he participated in his corporate records; however, this did not occur for a few years, and by that time, the rest of the transactions that ended up being the subject of the allegations had taken place.

*Allegation No. 8 decision*

118. As with the later transactions reflected in Allegations 4 to 6, inclusive, it is not disputed that these transactions were part of the TMP. The tribunal's decision on this allegation turns on the involvement of Mr. Church and the reliance that Mr. Martin was entitled to place on the professional judgment of his tax partner. Mr. Church was an acknowledged expert in taxation, and by his participation in the plan, gave tacit approval to the TMP. Mr. Martin testified that he relied on this tacit approval of the TMP for his belief that the TMP was a legitimate tax reduction strategy. It is the tribunal's conclusion that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP.

119. As a result of the participation of Mr. Church, the tribunal found that this allegation had not been proven. A significant deciding factor in our deliberations was the fact that, although there was some dispute as to the extent of the consultation, Mr. Martin conferred with Mr. Church in relation to the TMP before Mr. Church participated. Mr. Church, it is not disputed, had a personal interest in his participation, as he was looking to reduce taxes, but he still participated in the TMP. This impacted the tribunal's assessment of all of the other transactions following this transaction in time.

*Allegation No. 4: evidence before the tribunal*

120. It was agreed by both the PCC and Mr. Martin that (BC)(ASA) and (242) had participated

in the TMP. The only unresolved question was how many invoices existed that had been part of the TMP. On the original schedule provided by the PCC (page 701 of Exhibit 6), based on their interviews with the Member, the total invoices were \$360,000. On the revised list provided by Mr. Martin during his evidence in chief given before the tribunal on October 30, 2014, the total was revised down to \$180,000 – consisting of three invoices. As far as the tribunal was concerned, as long as one invoice was part of the TMP, the Member could be found guilty of professional misconduct with respect to that specific allegation

*Allegation No. 4 decision*

121. The overriding factor with this series of invoices was their timing in relation to the transactions involving Mr. Church. These invoices were subsequent to the invoices provided to the company controlled by Mr. Church, which were the subject of Allegation No. 8. Mr. Church was an acknowledged expert in taxation, and by his participation in the plan, gave tacit approval to the TMP. Mr. Martin testified that he relied on this tacit approval of the TMP for his belief that the TMP was a legitimate tax reduction strategy. This was reflected in the following exchange on the transcript of Mr. Martin's evidence in chief (October 30, 2014, at pp. 182-183):

Q. Now, we have covered the [TM] transaction in 2003, and then [AC]'s transactions in 2007. Did [AC]'s participation have any effect on your view as to the efficacy of the tax minimization plan?

A. [AC] was our senior tax partner. I had known...[AC] came into the practice in 1990. I got to know him personally very well. He and I played squash on a regular basis. Our children are the same age. We spent a lot of time together. And [AC] impressed me as a conservative, a well prepared individual who was cautious, both his investments and the way he practised, his tax practice. And he was well respected, very well respected, sat on tax committees within the community, was often asked to present at tax foundations and so on. He was the face of our tax practice. And, certainly, it gave me a great deal of comfort to know that he had looked at this and made a decision that, yes, it was aggressive, but felt supportable, and that he was prepared to do a transaction.

Q. If [AC] had told you that, "Nice try, Mr. Martin, but this doesn't work," what would you have done?

A. I would not have done the transaction.

122. In the transactions prior to 2007, Mr. Martin had not made any direct inquiries with a tax expert or any authority who could assess the validity of the TMP. This changed after the transactions involving Mr. Church in 2007. It is the tribunal's conclusion that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP.

123. As a result, the tribunal found that this allegation had not been proven.

*Allegation No. 5: evidence before the tribunal*

124. Both the PCC and the defence agree that (GC) and (GCML) participated in the TMP. They both accept the evidence that there were two invoices that were part of the TMP and that each invoice was for \$15,000 for a total of \$30,000.

*Allegation No. 5 decision*

125. As with the transactions leading to Allegation No. 4, these transactions, while it is not disputed that they were part of the TMP, arose after the transactions involving AC. For the same reasons as stated in relation to Allegation No. 4, the tribunal's decision on this allegation turns on the timing of the invoices. Mr. Church was an acknowledged expert in taxation, and by his participation in the plan, gave tacit approval to the TMP. Mr. Martin testified that he relied on this tacit approval of the TMP for his belief that the TMP was a legitimate tax reduction strategy. It is the tribunal's conclusion that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP.

126. As a result, the tribunal found that this allegation had not been proven.

*Allegation No. 6: evidence before the tribunal*

127. Both the PCC and Mr. Martin agreed that (CL) and (SBIC) participated in the TMP. They both accept the evidence that there were three invoices that were part of the TMP and that each invoice was for \$40,000 for a total of \$120,000.

*Allegation No. 6 decision*

128. As with the transactions leading to Allegation No. 4, these transactions, while it is not disputed that they were part of the TMP, arose after the transactions involving AC. For the same reasons as stated in relation to Allegation No. 4, the tribunal's decision on this allegation turns on the timing of the invoices. Mr. Church was an acknowledged expert in taxation, and by his participation in the plan, gave tacit approval to the TMP. The Member testified that he relied on this tacit approval of the TMP for his belief that the TMP was a legitimate tax reduction strategy. It is the tribunal's conclusion that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP.

129. As a result, the tribunal found that this allegation had not been proven.

*Allegation No. 7: evidence before the tribunal*

130. PCC took the position, based on the evidence from the interviews with Mr. Martin, that the series of transactions identified in this allegation formed part of the TMP. Mr. Martin's counsel argued that the series of invoices did not fit the pattern of the TMP as Mr. Martin was a shareholder of the company. As with the previous transactions, Mr. Martin changed his position on this transaction between the investigation interviews and the hearing. At the interview, he conceded that two transactions formed part of the TMP. At the hearing, he gave evidence that these transactions were different because it had been agreed that the payments to the shareholders, paid through Mr. Martin, were to be reinvested in the company.

131. Notwithstanding the Member's contention that these transactions were structured differently, the essence of the transaction fit the TMP in that an invoice was sent from his company, it was paid, and he wrote cheques from his personal account as gifts to the other shareholders of the company. It was the conclusion of the tribunal that the transactions had the essential elements of the TMP; to borrow a colloquial phrase, "if it walks like a duck, and quacks

like a duck, then it's probably a duck".

*Allegation No. 7 decision*

132. As with the transactions leading to Allegation No. 4, these transactions, while it is concluded that they were part of the TMP, arose after the transactions involving Mr. Church. For the same reasons as stated in relation to Allegation No. 4, the tribunal's decision on this allegation turns on the timing of the invoices. Mr. Church was an acknowledged expert in taxation, and by his participation in the plan, gave tacit approval to the TMP. The Member testified that he relied on this tacit approval of the TMP for his belief that the TMP was a legitimate tax reduction strategy. It is the tribunal's conclusion that once Mr. Church had participated, Mr. Martin reasonably believed he could rely on Mr. Church's professional judgment as a tax expert to confirm the validity of the TMP.

133. As a result, the tribunal found that this allegation had not been proven.

**Submissions on Sanction**

134. After the tribunal rendered its decision on the findings of professional misconduct, the hearing resumed on March 12, 2015, for evidence and submissions on sanction to be heard. Both parties indicated that they did not intend to call further oral evidence in relation to sanction, but Mr. Martin's counsel advised that he wished to file a document brief. The PCC objected to certain of the contents and submitted that they should be redacted from the brief. Counsel for the PCC indicated there were three letters, two of which contained objectionable paragraphs and one that was objectionable in its entirety as they attacked the finding of guilty the tribunal had made. The letters were from clients of Mr. Martin who were involved in the subject transactions; PCC took the position that these letters should have been filed before the tribunal made its decision and that this was an attempt to tender unsworn evidence and raise issues concerning guilt or innocence that were not relevant to sanction.

135. Counsel for Mr. Martin submitted that the tribunal should look at the documents and exercise its discretion in deciding whether to accept the letters. Counsel disagreed that the portions of the letters in question pertain to the question of the finding of professional misconduct, rather than sanction.

136. After the tribunal's independent counsel provided advice that the tribunal would need to review the documents to address the fact-specific issue being raised, and thereupon being provided with the documents, the tribunal deliberated on the matter. The decision of the tribunal was to accept the Sanction Brief of Mr. Martin (Exhibit 24), excluding paragraphs 2 of the letters at Tabs 1 and 3, and the letter at Tab 5 in its entirety.

137. The parties did not call any additional evidence with respect to sanction but both parties made submissions.

138. Counsel for the PCC submitted that an appropriate sanction in this matter would be: a written reprimand from the chair of the tribunal, a fine in the amount of \$25,000, revocation of Mr. Martin's membership and full publicity, including publication in a newspaper. The PCC would also be seeking costs of \$144,000 which represents approximately 50% of the actual costs.

139. Counsel for the PCC commented on the letters contained in the Sanction Brief, stating that they mainly speak of Mr. Martin's character with no real awareness by the authors of the nature of the allegations and the decision of the tribunal.

140. Counsel for the PCC submitted that the sanctions proposed by the PCC would serve to protect the public and address Mr. Martin's failure to maintain the good reputation of the profession. The tax plan did have deceptive elements and Mr. Martin should have known better than to engage his clients in dishonest behavior. The public relies on members of the profession and places the highest level of confidence in them. At the same time, the quantum of the invoices and the tax avoided consequently caused the CRA to lose significant amounts of tax revenue.

141. Counsel for the PCC stated that Mr. Martin had not expressed remorse for involving clients in the plan. While Mr. Martin was entitled to plead not guilty to the allegations, counsel submitted that the evidence given at the hearing was different from the evidence he gave to the investigators.

142. The PCC took the position that the mitigating factors were that Mr. Martin has no disciplinary history, he cooperated with the investigators during three interviews and provided the documents requested. Mr. Martin did not personally evade the payment of taxes, and the plan was no longer being utilized.

143. Counsel for the PCC submitted that a reprimand was necessary for specific deterrence to make Mr. Martin aware of the seriousness of his actions and the negative impact on the public, including the possible risk to his clients of sanctions by the CRA. A fine acts as a specific and general deterrent, and \$25,000 is within the range for cases involving moral turpitude. Counsel was unaware of any impediment to Mr. Martin's ability to pay the fine, but the PCC would not be opposed to a reasonable amount of time for Mr. Martin to pay the fine and any costs assessed.

144. Counsel for the PCC submitted that revocation would be the appropriate penalty for Mr. Martin's dishonesty and lack of integrity and is the only way to ensure that the public is protected. Publicity is the key to general and specific deterrence. It is very rare for the tribunal to not order publicity as it conveys a message to the public, and counsel noted that there are no rare and unusual circumstances in this case. In the case of revocation, notice is published in a newspaper, usually the *Globe & Mail*, with the cost being borne by the Member.

145. The PCC filed a Costs Outline (Exhibit 25) showing that the actual costs were almost \$289,000, stating that the PCC usually asks for approximately half of the costs. In this case, that amount would be \$144,000.

146. Counsel for the PCC distributed a case brief containing the decisions in *Slavens*, *Marcus*, *Washburn* and *Stone*, cases involving false tax returns, failure to remit GST payments and a gifting plan to reduce taxes payable. In all these cases, the Members had pleaded guilty and there had been an agreed statement of facts, which resulted in less costs being incurred and assessed.

147. Counsel for Mr. Martin submitted that the tribunal has the discretion to determine if this Member poses a threat to the public and if it is a matter of moral turpitude. He emphasized that during the course of the hearing, no expert witness had said a client had committed tax evasion.

148. Counsel for Mr. Martin submitted that this was a standards matter, not a moral turpitude issue, which could be dealt with through education and remedial activity. Counsel stated that Mr. Martin has been severely prejudiced in his ability to defend himself since so many years have passed and some potential witnesses were unable to participate.

149. Counsel for Mr. Martin submitted that Mr. Martin, who has been a Member since 1972, was a founding partner in his firm and is well-regarded by his clients and a well-respected member of the community. There has been no disciplinary history in 40 years, the activity occurred approximately 10 years ago, and there is no prospect of re-offence by Mr. Martin. Mr. Martin is no longer in public practice and is now a part-time CFO for a few companies.

150. Counsel for Mr. Martin stated that the cases cited by the PCC are all straight out fraud, unlike this case. There was no tax evasion on the part of Mr. Martin.

151. Counsel for Mr. Martin noted that other firm members had participated in the tax plan, and the original complaint was made by former disgruntled members of the firm. The TMP was not a secret and was shared with other accountants. Over the course of the investigation, Mr. Martin had cooperated fully, provided vast amounts of information and there was no destruction or documents or a false paper trail.

152. Counsel for Mr. Martin observed that Mr. Martin was successful in having three-quarters of the allegations dismissed. Counsel submitted that a reprimand would be an appropriate sanction and suggested that the allegations as framed are prejudicial to Mr. Martin, and the first two allegations should be amended to not suggest a criminal offence under the *Income Tax Act*.

153. Counsel for Mr. Martin stated that Mr. Martin has incurred an enormous amount of costs for this hearing which should be netted off since he was the successful party on six of the eight allegations. Counsel submitted that a fine of \$25,000 was excessive and that Mr. Martin should be given three months to pay.

#### **Order**

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

##### **IT IS ORDERED:**

1. THAT Mr. Martin be reprimanded in writing by the Chair of the tribunal.
2. THAT Mr. Martin be and he is hereby fined the sum of \$25,000 to be remitted to CPA Ontario within three (3) months from the date this Order is made.
3. THAT Mr. Martin be and he is hereby suspended from the rights and privileges of membership of CPA Ontario for a period of six (6) months from the date this Order is made.
4. THAT notice of the Decision and Order, disclosing Mr. Martin's name, be given in the form and manner determined by the Discipline Committee:
  - (a) to all members of CPA Ontario; and
  - (b) to all provincial bodies;

and shall be made available to the public.

5. THAT Mr. Martin surrender his CA and CPA certificates of membership in CPA Ontario to the Discipline Committee Secretary within ten (10) days from the date this Order is made, to be held during the period of suspension and thereafter returned to Mr. Martin.
6. THAT in the event Mr. Martin 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 six (6) months from the date of his suspension. In the event he does not comply within the six-month 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. Martin's practice and/or residence. All costs associated with this further publication shall be borne by Mr. Martin and shall be in addition to any other costs ordered by the committee.

IT IS FURTHER ORDERED:

7. THAT Mr. Martin be and he is hereby charged costs fixed at \$144,000 to be remitted to CPA Ontario within thirty-six (36) months from the date this Order is made.

### **Reasons for Sanction**

155. Although the findings by the tribunal called into question Mr. Martin's integrity, and certainly reflected serious misconduct, the findings did not reflect misconduct of the level initially advanced by the PCC. First, a significant number of allegations were dismissed, and no professional misconduct was found in six of eight allegations. Second, with respect to those allegations where professional misconduct was established, the tribunal based its findings on a conclusion that Mr. Martin did not take the steps expected of an accountant in the circumstances. The tribunal declined to make a finding that Mr. Martin engaged in the misconduct with the knowledge that it was wrong. Rather, the tribunal found that he strayed from the standard of conduct expected, and in fact required, of a Member to ensure that a plan in which he was involving clients, or engaging in himself, was within the parameters of the law. Although the evidence indicated that Mr. Martin took steps that would conceal the plan from CRA, it is the conclusion of the tribunal that he initially took those steps with a mistaken belief that this was permissible, but he formed that view without taking the necessary care to ensure that the belief was reasonable. After Mr. Church participated in the plan, Mr. Martin reasonably (although incorrectly) believed that the plan as structured was defensible.

156. At the same time, although the tribunal did not accept portions of Mr. Martin's evidence, it accepted significant portions of his evidence where it was corroborated by other evidence. Moreover, the decision for the tribunal to make was generally which of two versions of events, both provided by Mr. Martin, it preferred as the basis for its findings. The tribunal did not fully reject the evidence of Mr. Martin; where necessary, it accepted one version over the other. While this does not vindicate Mr. Martin, it can be contrasted favourably to the situation where a tribunal disbelieves all, or most, of the evidence offered by a Member.

157. In addition, there were a number of mitigating factors in Mr. Martin's favour: he had no prior discipline history over a lengthy career; he cooperated with the investigators; he did not personally avoid taxes improperly; and, he has discontinued his use of the TMP.

158. In light of the foregoing considerations, the tribunal was satisfied that a suspension, rather than revocation, was sufficient as a general and specific deterrent on the factual findings made by the tribunal. On the other hand, the tribunal concluded that a suspension, rather than a reprimand alone, was required to express the tribunal's disapproval of this conduct to this Member, other Members of the profession and the public at large. The misconduct was serious, and a significant sanction was required to convey that adequately. In other words, the misconduct fell in the middle of the spectrum of misconduct that may be seen by the Discipline Committee, and the sanction is intended to reflect that.

159. A suspension was also required in light of some of the aggravating factors: Mr. Martin was aware that the structure of the TMP would frustrate review by CRA and took active steps to encourage that obfuscation; a significant amount of money was involved and taxes properly due were unpaid as a result of the TMP; he involved his clients in the scheme; and, he provided conflicting versions of events to the investigators and the tribunal.

160. The reprimand is also required to underscore to the Member the seriousness of the misconduct that was established and to further deter any recurrence of the misconduct. The fine sends a similar message to other Members of the profession who may be tempted to allow themselves to engage in similar misconduct.

### *Costs*

161. The tribunal carefully considered the issue of costs, in light of the lack of agreement between the parties on this issue. The tribunal was not prepared to accept the suggestion on behalf of Mr. Martin that no costs be awarded. While the general membership bears part of the costs of this discipline process, it was not the general membership's actions which lead to the hearing. The tribunal found that Mr. Martin committed professional misconduct, and, therefore, Mr. Martin must bear at least a portion of the cost.

162. The outline of costs presented by the PCC amounted to \$288,874.77. The PCC normally suggests, and did in this case, that 50% of the costs be paid by the Member to reflect the balance between the responsibility of the Member, whose actions triggered the discipline process, and the profession, whose duty it is to regulate itself. For the reasons that follow, the tribunal concluded that this balance applies here when all of the relevant factors are taken into account.

163. The tribunal has considered the fact that Mr. Martin has been found not to have committed professional misconduct on six of the eight charges. This, in itself, would typically result in a reduction of the costs awarded against the member; however, the other relevant considerations negate the usual impact of this factor.

164. The tribunal, when considering costs, was also mindful of the position set out by the PCC at the beginning of the hearing. After one day of hearing with respect to the first motion, the PCC put on record that it intended "to seek costs with respect to the motion, in any event of the costs [*sic*], which translated means regardless of the success or failure of the charges

ultimately, whether or not there is a finding of guilt in the overall discipline hearing, the Professional Conduct Committee will seek payment of its costs with respect to the motion itself.” (August 27, 2014 page 3 – 4 of transcript). The motions brought on Mr. Martin’s behalf were important. He was entitled to raise these issues, even though they were not successful. They were worthy of consideration by the tribunal and of benefit to the general membership. As a result, Mr. Martin should not have to bear an exceptional portion of the costs of these motions.

165. A reduction of costs would also be supported, in the view of the tribunal, by the fact that the PCC had two investigators attend all meetings with Mr. Martin and the hearing, except for the last day of the hearing. It is not reasonable to impose this cost on Mr. Martin when there must have been some economies available to reduce this component of the costs.

166. On the other hand, three significant considerations weighed against a reduction of the costs because they unreasonably prolonged the hearing:

- the lack of a pre-hearing conference,
- absence of a timely assessment of the time required for the hearing, and
- the member’s evidence changed substantially between his interviews with the investigators and his testimony at the hearing.

167. This hearing has been both lengthy and complex, and a timely assessment of the hearing by the Member and his counsel would have identified that. However, in the absence of such an assessment, it was not until one week before the hearing was scheduled to start that Mr. Martin’s counsel advised the PCC of their intentions regarding the hearing and the parties finally agreed that the duration of the hearing would take more than two days to complete and that there were six witnesses who would be giving testimony. With the in-chief testimony and cross-examination, the estimated four days for the six witnesses should have been seen as inadequate and should have been acknowledged as such in the parties’ correspondence prior to August 26, 2014.

168. In a similar vein, we understand that Rule 9.03(1) requires that a list of expert witnesses and a summary of their testimony be provided a minimum of 90 days prior to the hearing. We understand that this was not the case in this hearing due to a change of lawyers. Every Member is entitled to competent legal representation at the tribunal hearing and Mr. Martin’s counsel at hearing was not appointed until after the allegations were made on February 14, 2014. The fact that Rule 9.03(1) was not adhered to, in isolation, was not a factor for the tribunal in assessing costs. However, because the Member’s lawyer did not adhere to Rule 9.03(1), this led to the last minute notification to the Secretary (August 18, 2014) that the hearing would now take four days. This was a significant understatement as the hearing took 11 days over close to seven months.

#### *Member’s Attitude*

169. Mr. Martin attended three interviews with the investigation team (Mr. Porter and Ms. Bennett) on May 13, 2013; June 11, 2013 and October 9, 2013. At each interview, Mr. Martin was represented by legal counsel, although not the counsel who represented him at the hearing. He later testified at the hearing that he did not appear to understand the gravity of the situation. Mr. Martin’s lawyer at hearing described Mr. Martin as taking a rather “cavalier” and “shooting from the hip” approach to the interviews (January 20, 2015 – pages 105, 110 and 126 of the transcript). Counsel for the PCC stated “the characterization of Mr. Martin’s statements to the investigators as “cavalier”, and “shooting from the hip”, well, that is not how a Member

approaches a Professional Conduct Committee investigation.” (January 20, 2015 – page 153 of the transcript) The tribunal agreed with the lawyer for the PCC. To the extent that this attitude ultimately prolonged the hearing, Mr. Martin must bear both the cost consequence and a sanction that expresses disapproval of this attitude.

170. The tribunal was presented with two sets of conflicting evidence – the Member’s interviews of 2013 and his evidence before the tribunal on October 30, 31 and December 8, 2014. The tribunal had to review all of the testimony and, in several instances, determine which version was the more compelling evidence.

171. The significance of the sanction, and the quantum of the costs awarded are, in part, to reinforce to the Member that every effort should be made to be completely honest and forthright when meeting with the Professional Conduct Committee and its investigators.

#### *Pre-hearing conference*

172. Rule 11 of the Rules of Practice and Procedure for the Discipline Committee requires that a pre-hearing conference take place when a hearing is scheduled to take three days or more. This rule was not adhered to here because there was no indication from Mr. Martin that the hearing would be of this length. It is the tribunal’s view that had earlier notification of the time required for the hearing been possible a pre-hearing conference could have been scheduled. This conference might have resolved some of the contentious issues put before the tribunal, and thus reduced the hearing time.

#### *Review of additional information*

173. We understand that additional information was provided subsequent to the PCC laying allegations against the Member. The PCC laid the allegations against Mr. Martin on February 24, 2014. Subsequent to that date, Mr. Martin changed lawyers for a final time and CPA Ontario was made aware of this change on March 14, 2014.

174. Mr. Martin’s new lawyers filed additional information with the lawyer for the PCC on June 18, 2014, July 21, 2014 and August 15, 2014.

175. In cross-examination, Mr. Scott Porter, the investigator on this matter for the PCC, on August 27, 2014 (page 161 of the transcript) stated that he was aware of the additional letter filed on June 18, 2014, but that, as it had been filed subsequent to his investigation being completed, he did not use it to make his conclusions.


176. Ms. Peggy Bennett confirmed in her cross-examination on October 30, 2014 that the information was received too late for her to review it. Section 29 of Regulation 7.1 precludes the PCC from re-assessing new information in a matter that has been referred to the Discipline Committee.

177. The tribunal realizes that this information had been received after the matter had been referred to the Discipline Committee but recommends that CPA Ontario consider for the future a mechanism whereby information received subsequent to the allegations being laid, but prior to the Discipline Committee hearing, be able to be considered. We agree that information cannot be forwarded days before the hearing and expected to be considered. We also realize that submitting additional information may also be used as a delaying tactic. The inability to review

this additional information, due to the possibly unavoidable timing of its delivery, was not taken into consideration when determining the costs.

178. Taking the above factors into consideration, the tribunal set the costs payable by Mr. Martin to CPA Ontario at \$144,000.

DATED AT TORONTO THIS 6<sup>TH</sup> DAY OF OCTOBER, 2015  
BY ORDER OF THE DISCIPLINE COMMITTEE



J.A. CULLEMORE, FCPA, FCA – CHAIR  
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

G.G. IRELAND, CPA, CA  
G. KROFCHICK, CPA, CA